Rethinking the concept of Punishment
An essay about the problems of punishment and a proposal to its solution

En omprövning av konceptet straff – en uppsats om straffets problematik och ett förslag till en lösning.

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The degree of civilization in a society can be judged by entering its prisons

- Fjodor Dostojevskij
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Introduction

I find Jean Hamptons introduction to one of her articles very well written and explanatory,

There are few social practices more time-honored or more widely accepted throughout the world than the practice of punishing wrongdoers. Yet if one were to listen to philosophers discussing this practice, one would think punishment impossible to justify and difficult even to understand.¹

Punishment is a part of any society. It is actually a big part, just like health care and education. It is also an older part than both of them, as far history can tell. It is not a popular subject to speak about in contrast to other societal ventures just mentioned, because of that it is often forgotten what its part and relevance it has in a society. There are many reasons why we should and should not have punishment, different intellectual disciplines (e.g. political science) have different reasons for punishing and wildly different discussions than philosophers. The major philosophical problem that is discussed with punishment is that it is pretty much impossible to morally justify, and I agree. What is necessary to point out is that there is no shortage of philosophers that disagree. The most common way to solve the problem of punishment is by finding a way to morally justify it by adjusting or attempting to clarify what a philosophical doctrine actually claims. But to me those solutions are often, if not always, ad hoc and I will explain why in this essay. What I am setting up to do is solving the problem of punishment by not attacking the justification, but the concept of punishment. In the world, we have older records that proves we been using punishment longer, than we have had ethical discussions (ethical discussions is probably older, but not as well documented).² I am unfortunately convinced that we cannot remove punishment in its entirety in any foreseeable future (in an unforeseeable future I would claim it is). There is also an appeal to necessity of punishment I simply cannot deny, as I cannot find a convincible argument against it. I also believe that to punish we do not need to inflict intentional harm, which also will be explained.

I also need to be clear with that this essay, when talking about punishment, will address punishment that is a revoke of physical freedom (jail, prison or court ordered house arrest),

² The oldest known law and punishment is the code of Ur-Nammu, it is dated 2100 – 2050 BC, making it over 4000 years old.
unless anything other is mentioned. Also, there are some aspects that will not be addressed; these are the deprivation of freedom of people considered, beyond any reasonable doubt, a clear and present danger to individuals and/or society at large. Such as a known serial pyromaniac who almost certainly will start a fire that surely endanger lives. I will also only discuss legal punishment by a legit judicial system, government, not parents punishing their children, schools punishing there students or anything as such. Finally only correct punishment, in accordance with to a just and reasonable judicial system, upon the guilty will be discussed, the problem of incorrectly punishing the innocent is for another day.

I will attempt to show that there is a moral problem, and why it is a problem, with punishment. If successful with that, it will also show why the problem of punishment is unsolvable, at least if we keep trying to justify it as is. Basically, my thesis is, too solve the problem of punishment we must first rethink the concept of punishment. The idea is to find a redefinition of what punishment is (and how it is implemented) to make it morally permissible. I will do that by introducing what I call *Beneishment*, being the idea of instead to focus on harm, as punishment does, shift the focus to potentials benefits.

**What is punishment?**

Provided that reality exists, without a sufficient definition of what punishment is, there is no point talking about it, it is essential to clarify. If the reader disagrees on how I define punishment, there is another discussion that is needed to be had before counting reading.

In its most simplified way punishment is to inflict harm to an individual due to unwanted- or anti-social behavior. A punishment is by definition a *negative experience*, say if someone is punished by being feed and entertained - that simply is not a punishment. So a lot of things are punishments such as detention, getting strip of a rank, a pay cut, a curfew, revoked privileges et cetera. But as mentioned I will focus on autonomy revoking punishment. The clearest requirement is that punishment needs to not just inflict harm, but to inflict *intentional harm* as David Boonin expresses it.³ What that means is that a judicial system cannot punish someone and hope that it is a negative experience; the harm must be known and specified. Say, to give a gamer a four week long house arrest and hope he has a bad time is not a

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successful punishment. But to give a gamer the same punishment, without an internet connection is a whole other story. Another requirement for a punishment is that it needs to be legit; the definition of a legit punishment that I am referring to is that it is just and reasonable. What is not just and reasonable is something like a two million dollar fine for double parking, due to its disproportionality. There might also be punishment that is just but not reasonable or reasonable but not just, none of these will be discussed.

Harm

In an article by Dan Demetriou he is criticizing Boonin by stating that there are punishments without a necessary intentional harm, Demetriou claims that there is indeed punishment without any form of harm at all, he writes:

Jackass: Sally, age 12, is an American girl growing up in a healthy, loving American household. She knows she is supposed to take the garbage out on Fridays. After multiple failures to perform her chore, her mother forbids her from watching her favorite show, MTV’s Jackass, for a month. (Her mother knows this is Sally’s favorite show, but this consideration was not sufficient for her choosing this punishment she would not have forbidden Sally from watching PBS’s NOVA or any other edifying program, should one of those have been Sally’s favorite.)

And he continues:

The Jackass case seems especially difficult to see as an instance of intending harm. Although clearly Sally dislikes missing her favorite show, only on an implausibly broad conception of harm is Sally harmed by being banned from viewing a banality such as Jackass, especially at her age.

I do not disagree per se, but I think that Demetriou missed Boonin’s point about harm, therefore it is necessary to discuss the difference between harm and harmful. When Boonin is talking about harm he is in not talking about physiological or psychical harm, even though they both might accrued while being punished, that is in no way the objective of the

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intentional harm. By intentional harm, as Boonin (and I) uses it, it means a conscious and deliberate infliction of a negative experience. Meaning everything from a prison sentence to a slap on the wrist or forbidding a child to watch its favorites TV-show. To have something compulsively removed against ones will, is a negative experience, and by that a harm. Boonin uses an example between a fee and a fine. A fine is nothing but a financial burden, a speeding ticket, while a fee pays for something, a service like broadband to one’s home. The intention of a fine is to harm, inflicting a negative experience to a perpetrator, whereas a fees meant to pay for services and in no way or form harm the person paying for it. If intentional harm is not a requirement for punishment; and if a fine is a form of punishment, then how is a fee not a punishment? What I am trying to say is that it is a requirement for punishment to be something bad, but that does not mean it needs to inflict pain, or not be good in the end. Think about the gamer, no internet gives him more time to study or workout, but it is still a punishment. Maybe this is not the best example, but hopefully it clears up the difference of harming someone and the intentional harm of punishment.

**What is the purpose of punishment**

The main and most obvious point of punishment is to reduce crime, by inflicting negative experiences towards the person who committed the crime. For example by imprisoning someone, the punishment removes the criminals from the general population and shows that the crime is not acceptable. There are four common and widely accepted theories of the purpose of punishment; these are retribution, deterrence, rehabilitation and isolation. I shall present them briefly, but hopefully adequately, one by one. Note that none is mutually excludes another theory, they often entangle with each other. Normally one of these is used as the main purpose of punishment, if one or more get combined that is just seen as a bonus, generally speaking. Someone who supports isolation as the main purpose of punishment would probably not complain over any deterrence effects that follow from it.

**Retribution**

The most accepted, and historically oldest justification to punishment, is retribution. When someone does something wrong, unlawful or publicly dangerous, the state or society has the right to retribute that action. By performing certain criminal acts the offender has given up her

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freedom by that action. The punishment does not need to have any more justification then that the wrongdoer deserves to be punished. The idea is that when the citizens know of (often harsh) consequences of an action they will avoid that action in self-preservation. The main critique it receives is that it is a glorified version of revenge.\footnote{Bedau, Hugo Adam and Kelly, Erin, "Punishment", The Stanford Encyclopedia of Philosophy (Spring 2010 Edition), Edward N. Zalta (ed.), http://plato.stanford.edu/archives/spr2010/entries/punishment/ (accessed June 4, 2015).}

For example within the doctrine of retribution we have the concept of \textit{lex talionis}, this grotesque tradition is more commonly known as “an eye for an eye”, revenge as clear as it gets. Now I do not believe anyone whom actually thought about wrong and right can subscribe to something like \textit{lex talionis}. To me it is revenge and revenge is not an acceptable moral doctrine. But luckily I do not need to expand on the subject because I will only discuss just and reasonable punishment which \textit{lex talionis} is neither. Though some might think that raping a rapist is just; few to none would claim it to be reasonable. Therefore no one that claims rape is an immoral act, could subscribe to the theory of \textit{lex talionis}.

The modern interpretation of \textit{lex talionis} is that the punishment should fit the crime, and too many that seems reasonable. To me that still just sound like vengeance, since I interpret it as you get what you deserve, no matter what the circumstances and that the punishment in itself is more important than the peoples involved. Vengeance should not be a part of any just and reasonable judicial system, I think a punishment should be just and reasonable, and as you will see, most essential beneficial.

\textbf{Deterrence}

To be able to uphold the law, there need to be consequences if you do not. There are two kinds of deterrents, the public- and the so-called direct deterrence. The public is deterred from committing crimes and anti-social behavior to avoid getting punished, the idea is that prison works as a scarecrow to discourage the public from committing crimes. And the punished that sees the inside of a prison gets deterred from ever returning to the prisons. She has experienced direct deterrents. The main critique deterrence get is that it simply does not work.\footnote{Lee, D.S., McCracy, J., “The Deterrence Effect of Prison: Dynamic Theory and Evidence” The National Bureau of Economic Research, July 2009. http://eml.berkeley.edu/~jmccrary/lee_and_mccrary2009.pdf (accessed June 4, 2015).} If you are committing a crime of passion (jealousy murder), you do not stop and think
about how it will feel to be imprisoned, if you plan a crime (jewel heist) you might stop and think about imprisonment, but you do not plan to get caught. Deterrence assumes a rational choice where the offender thinks that the benefit of the crime is outweighed by its punishment. Another aspect of deterrence is the risk of getting caught, like an alarm or an area where a patrol car is frequent, in this aspect deterrence works well but what that does is just deterring from a single crime, not criminal behavior.

But none-the-less, most of us do not want to go to prison. So that should be some proof of the deterrence value of prisons. Ellis, in his book The Philosophy of Punishment, claims “...deterrence is the only way in which a penal system can have any significant effect on the level of crime.”9 Now, there is no empirical evidence supporting him, on the contrary the empirical evidence proves him wrong. As we can read in the book Evidence-based crime prevention; “Similarly as found by Andrews, Zinger et al. deterrence treatment were associated with negative effects (e.g. an increase in recidivism).”10 Basically in the so-called real world, politicians and criminologist have given up on the deterrence theory because both of its inefficacy and that there are better choices available. 11

Rehabilitation (and/or Reform)

This is the oldest (that I know of) philosophical justification of punishment, going back to Plato and Aristotle. It states that the only possible justification of punishment is if the person being punished gain something from the punishment, as for an example education. As Plato puts it “We ought not to repay injustice with injustice or do harm to any man, no matter what we may have suffered from him”.12 So instead the offender is given something that will get her, hopefully, a stake in society or reason not to be an offender. In modern times this is still the basics for the idea of rehabilitation, but during the 1960 the focus shifted to a more health focused aspect, starting to use psychologist and group therapy to help the individuals turn there life’s away from crime.

One of the main problems is the social stigma by calling a punishment for rehabilitation in the public ear that sounds like crimes is a sickness. This is an actually founded problem, where

9 Ellis, Anthony, Philosophy of Punishment, Imprint Academic, United Kingdom, 2012, p. 11
12 Plato, Crito, X, 49.
inmates have refused going through rehabilitation programs clamming that they are not sick.\textsuperscript{13} Secondly how do you rehabilitate someone that partly is not sick or recovering, and partly does not want to be rehabilitated? Thirdly if someone has a ten year sentence, but if she finishes a rehabilitations program in five years, do you release or keep her incarcerated? Fourthly how do you know that the rehabilitation is successful at all, and the inmate is just not only acting like it is. That could mean that charismatic prisoners would serve a lesser sentence. Fifthly and finally, as Hampton points out, what are the limits to the rehabilitation programs? Therapy? Drugs? Electrical shocking? Of course this is to take something to its utter most points; I only attempt to be clear.\textsuperscript{14} To instead call rehabilitation – reform is not solving anything either. Maybe it is just me, but reform sounds a lot like reeducation camps and the same question goes as with rehabilitation. I would instead want to call it reintegration, since that is the actual idea behind rehabilitation, to reintegrate individuals to society.

\textbf{Isolation (or Incapacitation and societal protection)}

If an individual cannot follow the laws, or rules of the land, she is to be isolated from the rest of the society. As the parenthesis in the title states, it is partly to punish, and partly to protect the rest of the society from a potential recidivist or escapee. By isolating someone you incapacitate them from committing any further crimes. So the basic justifications are that if you cannot play by the rules, you are not allowed on the field, and to stop a person from committing more crime.

Now the question that arises is how much do we isolate, and to what end? If we just lock away unwanted members of society will that solve anything or just postpone the problem. Are we going to let the inmates be totally isolated, no contact with the outside world at all, or some? These are questions left unanswered if not combining the isolation theory with something else, such as the alternative solutions I will present below.

Another problem with isolation is that what stops us from isolating potential criminals? Today we already know about high risk members of society. Let’s say, that there is a sport event that have a barbaric culture of violence like football or ice hockey. The police are aware of a known hooligan with a history of violence. What stops the police to arrest him before hand on

\begin{itemize}
  \item \textsuperscript{13} Sarnecki, Jerzy, \textit{Introduktion till kriminologi.} uppl 2:3., Studentlitteratur, Lund, 2009 p 450
  \item \textsuperscript{14} Hampton, Jean. “The moral education theory of punishment”, \textit{Philosophy and Public Affairs} 13 (3), 1984 p. 222
\end{itemize}
suspicion of planning to riot, to avoid an incident? This might just be a case of slippery slope, but still, something worth considering.

No matter which one, or anythinkable purpose there can be, I say that all should have one thing in common; reintegration to society. To me, that should be the sole purpose of the penal system, as I will show below. The judicial system punishes if necessary, the penal system executes the punishment and helps the persons to reintegrate to society.

Alternative solutions

There are some alternative solutions to the problem of punishment, that attempt to justify punishment by making the purpose of punishment a positive experience, instead of a negative one. They still inflict intentional harm, such as retribution but at the end the inmate is supposed to gain something from the punishment. I will only present two of them, the two largest and mostly discussed. They will also play a large role in my argument when I build my solution to the problem of punishment. These are Moral Education Theory and Restorative Justice.

The Moral Education Theory of Punishment

The theory is credited to Jean Hampton, from her article with the very same name.\(^\text{15}\) It is understandably closely related to the rehabilitation theory, the main difference being that the moral education is just as any education, it will not necessarily shorten anyone’s sentence. It focuses only on education as a purpose of punishment and not any form of treatments such as medical or therapy. Hampton’s idea is that if a perpetrator of a crime learns what was done is morally wrong then he will not repeat the offence. So instead of rehabilitate or reform someone, the theory simply educates someone. Of course this suffers from some problems the rehabilitation theory does. How do we know that the inmate has learned anything at all, or is just faking it? The point Hampton does is that the state is not using pain coercively, but instead education, she also states it is not a guarantee but it is at least something better.\(^\text{16}\) So to be clear; the idea is if someone successfully understand and agree that what was done is morally impermissible, then she will not undergo that act again.

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\(^{15}\) Hampton, Jean. The moral education theory of punishment. Philosophy and Public Affairs 13 (3), 1984

\(^{16}\) Ibid., p 214
Restorative Justice

The idea behind Restorative justice is to restore the damage done by a crime. If it is vandalism you might repair what you have broken. If it is robbery or assault you might meet and talk to your victim and try to make amends. Apart from the other purposes of punishment restorative justice focuses mainly on the victim’s needs. Instead of seeing to that the offender gets what she is supposed to get like in the retribution theory, the ambition is to restore the victim’s original position, meaning if having lost something to get that back or if being frighten to walk alone, getting that courage back. That might sound like something that would not work, but this is one of the most effective methods to stop someone from reoffending. It is because when perpetrator and victim meet, the victim sees that her aggressor is just a human, often sad and broken. While the perpetrator sees her victim as a fellow human being. Of course, it does not work all of the time, but when it works it is proven to be a very effective method, especially in violent crimes like robbery or rape. Though the essential key to its success is the voluntarily to meet from both parties. In their article The Effectiveness of Restorative Justice Practices: A Meta-Analysis Latimer et al. writes in their conclusion:

The current meta-analysis [of restorative justice] provides the most comprehensive empirical synthesis of the restorative justice literature to date. Despite some method limitations, the results provide notable support for the effectiveness of these programs in increasing offender/victim satisfaction and restitution compliance, and decreasing offender recidivism

In Sweden we have had a lot of success with reducing recidivism in juvenile offenders (21 year old and younger) by using mediation (not meditation). The mediation programs are so far our best crime prevention program and it seems to grow in all parts of the world, even the US.

The Problem of Punishment

Strictly philosophically speaking, it is primarily the justification of punishment that does not work in any acceptable way, which is what is referred to when speaking about ‘the problem of punishment’. Though even if we could justify punishment the empirical evidence tell us that it does not work in any other aspect then hiding the wrongdoers away (as I will show in the part recidivism below). As mentioned earlier the definition of punishment I call for is Boonins intentional harm. There is no moral theory which could allow intentional harm, I cannot find any case any moral doctrine could allow harming someone intentionally. One classical argument is to use a side constraint in a moral doctrine, say a utilitarian could argue that punishing one could benefit ten; therefore it is morally permissible to inflict harm. But my understanding of utilitarianism is that its very foundation is to maximize utility and to use argument as above would be ad hoc and undermine the foundations the theory stands upon. The question that is under scrutiny in this subject among philosophers is can it ever be morally justified to sentence someone to a punishment?

For a state to treat their citizens morally different, they need to morally justify that. If not, than I would argue that that state is without any moral, and I wonder if that is a sustainable state. It would seem that a state without any moral is a totalitarian or anarchistic state and few would stand behind such a state. One way to justify this is by saying that the state is morally responsible for it citizens safety. As some say that if a state prohibits an action, it is therefore morally justified to punish, but to me that is just a political justification, and is not sufficient as a moral justification. Another way to do that is saying that the state’s law is morally relevant, saying that is saying that the law is a moral doctrine, which many would find troublesome (it would make jaywalking morally wrong). An altogether other approach to morally justify punishment is by putting the burden upon the citizens themselves. C.S. Nino argues for what is known as the Consensus Theory, the idea is that we the citizens agree that we have a moral responsibility to not be punished. Nino writes “[…] we rely on the moral autonomy of the individual, making his liability to punishment depend on his free and

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conscious undertaking of it”.\textsuperscript{21} So if we act anti-socially we remove our right to not be punished and the state just does what we agreed to.

**Is there even a problem?**

Also important to mention is that within the discussion of about the philosophy of punishment there are a lot of philosophers simply denying that there is a problem at all, or that is very easy to justify.\textsuperscript{22} And unfortunately I believe that many peoples, philosophers and non-philosophers alike, subscribes to that idea, therefore it should not go unmentioned. One of the most used and strongest arguments is that is morally wrong to commit crimes, and if you do wrong punishment is the natural way to go, and by that the one being punished learns her lesson. Otherwise all you need to do is add a premise to any moral doctrine, by stating that punishment is a special case, or a side constraint in a moral doctrine, and that the law is morally relevant. For example, Herbert Morris, a pro-punishment philosopher writes:

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[…]first, that we have a right to punishment; second, that this right derives from a fundamental human right to be treated as a person; third, that this fundamental right is a natural, inalienable, and absolute right; and, fourth, that the denial of this right implies the denial of all moral rights and duties.\textsuperscript{23}
\end{quote}

What he claims is that only those who by their own free will follows and obeys the laws are protected against being punished. I do not find that to be a crazy stand point, I can understand the urge to punish, but emotions and punishment should not be entangled. Another version of bypassing the problem issue, one of the harshest ones is the theory of Just (or Simple) Desert, in its most simplified version stats that if you commit a crime, you deserve to be punished.\textsuperscript{24} It has its points (few and far apart), but it is just too black and white in the, oh so, colorful subject of punishment. Therefor I will not expand on this theory. With that said I think that just the information accessible today have an overwhelming arguments against these views of punishment. Anyhow, I do not think that any of these ways to justify punishment works; I say that they are ad hoc or just avoiding the problem by rhetoric’s. This dismissal is based on my

\begin{quote}
\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{22} To mention a few influential names: Igor Primoratz, Michael S Moore, Herbert Fingarette and Gibbs.
\item \textsuperscript{23} Morris, Herbert., “Persons and Punishment”, *The Monist* 52 (4) p 476, 1968
\end{itemize}
\end{footnotesize}
\end{quote}
opinion that there is a complex problem, and dismissing that there is a problem is an entirely different polemic that what I intend to discuss in this essay.

**Recidivism**

One of the most essential problem form the societal perspective of punishment is reoffenders, I will there for turn to some numbers as they do a lot of clarifying explanations. In the subject of criminology it is often said that roughly five per cent of any population stands for ninety per cent of all criminal activity.\(^{25}\) There is also a clear, undeniable, correlation between harsher punishment and recidivism; all countries suffer from this statistics.\(^ {26}\) In Sweden roughly speaking, those who are sentence to three months or less in prison have a recidivism rate at 32 %, while for people sentenced to between seven and twelve months the recidivism rates are at 72 %.\(^ {27}\)

Also once someone has more than one adjunction the number for risk of recidivism raises. First time with prison sentences 21 % relapse, after the second and third sentence 69 % relapse, after the forth or more sentences the percentages of recidivism is 84 %.\(^ {28}\) Making the total average of recidivism in Scandinavia roughly 40 %, such percentages are considered low compared to U.Ks 74 % between 2005 and 2009.\(^ {29}\) But the more prison sentences one has the more the likelihood of recidivism increase.\(^ {30}\) For example in an article by *ScienceNordic* we can read: “The statistics in other countries [than U.S.A.] show a similar picture: more than half of the prisoners released in Finland in 1993-2001 were back behind bars within five years”.\(^ {31}\) Jesper Ryberg states one reason why very clearly in the same article: \(^ {32}\)

\(^{25}\) There is no empirical evidence to support this, the hidden statistics is impossible to estimate, but this is a very common opinion express by multiple distinctive sociologist and criminologist, for example David Farrington.


\(^{28}\) Ibid., p 434


\(^{32}\) Jesper Ryberg is Professor of Ethics and Philosophy of Law at the Department of Philosophy at Roskilde University, Denmark.
When criminals are released after serving their sentence, the opportunities available to them in the world they re-enter are far more restricted than before they went to jail. [...] Their record makes it more difficult for them to get a job, and rebuilding their lives and paying off debts such as legal fees without a job is more difficult.\textsuperscript{33}

Now, the first numbers I showed indicate that harsher punishment also increases the risk of recidivism, and it is no surprise that repeat offender gets a harsher punishment then a first time offender. As the notorious “third strike” law in the U.S., which drastically increases the scale of possible sentencing; “The law imposed a life sentence for almost any crime, no matter how minor, if the defendant had two prior convictions…”\textsuperscript{34} Unless you actually get a life sentence, we get of that is a twice increased risk of recidivism. So one of the main problems with in society is reoffenders, or career criminals, and most of these peoples normally do not want to live a life as a criminal. Against the common belief, the career criminal, at least in the U.S.A., have lower annual income than most people living on minimal salary.\textsuperscript{35} But it is a salary, and if once punished in desperation of money some turn to organized crime, like street gangs such as Bloods, Crips or Hells Angels. In such environments where, if not already achieved, a prison sentences is necessary for credibility among their peers.

I shortly want to mention a rather new concept that sociologist’s calls “prisonization”, I quote:

Prisonization is the fact or process of becoming prisonized. Prisonization is the process of being socialized into the culture and social life of prison society to the extent that adjusting to the outside society becomes difficult. Prisonization or prison socialization, has been recognized as a process with goals that are antithetical to the reintegration of ex-offenders.\textsuperscript{36}

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This can be seen on ex-prisoners from high security prisons in the US having a hard time with simple tasks like cooking, taking care of their own personal hygiene and even opening doors by themselves.\textsuperscript{37} Such findings suggest that the concept of punishment we use today, and the social stigma attached to it, breeds crime. That alone should make people react against the current idea of punishment.

Many (for example the Swedish right wing) will argue that if we punish “nicer”, criminals will not mind prisons, and that some dangerous persons will be set free “too early”.\textsuperscript{38} But as mentioned in the introduction, I do not discuss those who are a clear and present danger to society. Also I do not claim that the penal system stops doing risk assessments. What I am saying is that my belief is the opposite, that punishing harshly is what makes criminals stay criminal. I also believe that there is evidence that supports that statement, just looking at the harsh punishment in the US.

\textbf{Two wrongs do not make a right}

A lot of the arguments that support theories of punishment go like this: “…the very essence of an offence is its using one’s victim as a tool, and that we therefore have no obligations not use the offender himself in this way”.\textsuperscript{39} That is if you offend, commits a crime, you surrender you rights to be treated as any other members of society. But as far as I know, the essence of any moral theory is that it has to be constant and coherent. To treat some person’s differently cannot be allowed, in a consistent moral theory (unless you are a fundamental religious- or racist person whom makes a difference between human- and human value). To justify harm by harm is merely a circular argument and will not solve anything.

\textbf{The victim}

What it is essential for any theory of punishment, and cannot go unmentioned is the victim of the crime. But I will not expand on the subject of victimology. The victim is often the center of a crime and so often forgotten in judicial process and aftermath that there is a name for it;

\textsuperscript{39} Ellis, Anthony, \textit{Philosophy of Punishment}, Imprint Academic, United Kingdom, 2012, p.162 Note that the quote is taken out of its context and do not reflect Ellis standpoint.
secondary victimization. What it means is that the person identified as the victim is not met with necessary patience and attention and is just bounced around, creating stress and uncertainty, in effect making the victim a victim of the legal system. Such as a victim of a crime may be called to testify against someone she believes is dangerous, and after the testimony the judicial system offer no support to the victim. This is not always the case, but as mentioned, happens often enough to be get a name by scholars.

The question that has to be asked in this essay is what is the purpose of punishment too the victim, or even if there is a purpose for the victim? I think this is a very complicated and hard question, I honestly do not know. Many would argue, especially retributivists that the punishment is largely for the victim, to make the victim feel safe and avenged. Surly that could be a part of punishment, but I would say that punishment, as it is today, has nothing to do with the victim, it comes after the victim and the punishment has no purpose to resolve anything for her. Sadly enough the victim is just that a victim, nothing less or more. For better or worse that eliminates the vengeance aspect from the victim herself in the judicial process of sentences the perpetrator. Now, is this right? That is a question for another essay.

**Appeal to Necessity**

Humans are social animals, we want to live close, and we want to interact with others humans, it is undeniable (sure, there are some hermits and survivalist that disagree, but cities in themselves are pretty clear and solid counter argument). The fact that we also need other humans to thrive, like teachers, doctors, farmers and so on are a strong reason to want to live in a society. This has led us to living in very large populations, cities with hundreds of thousands and millions of humans. To be safe, to have some form of order (which seems highly desirable) we created laws to follow. The idea is to have just and reasonable laws, that if everyone follow we will have a safe and orderly society. But humans are also opportunistic and have a sense of self-preservation. What I mean with that is that some humans will se opportunities, and take them if they seem beneficial to themselves, not considering others.

41 Ellis, Anthony, *Philosophy of Punishment*, Imprint Academic, United Kingdom, 2012, p. 40
42 As of now, that will probably be the subject of my next essay, so stay tuned!
Some will in desperation steal believing it is there only way to survive. So I am convinced that there will be crime and criminals. This leads to that even if punishment is unjustifiable; it is a necessity of any human community.\textsuperscript{43} So the appeal to necessity claims that punishment is necessary in a society, a necessary evil so to speak. Even if we cannot morally justify punishment it is \textit{needed}, once again this points towards a state’s responsibility to keep its citizens safe.\textsuperscript{44} I cannot find a good (or more correctly solid) argument against this, do not get me wrong, I tried, and wish I would have succeeded, and then I would have joined the prison abolition movement.\textsuperscript{45} But I did not find any that convinced me, so I believe there is some form of need of punishment, at least in a large society, to maintain a safe and social environment. Still I cannot morally justify punishment, the way it looks today, I do not think that appeal to necessity is morally convincing, just politically.

But what I believe is possible is to reduce the appeal to necessity, if punishment actually worked as all judicial- and penal system \textit{wished} it to work, we would not have the crime rates we have today, mostly we would only have first time offenders. I will now try to show how this can be done.

\textbf{What is the solution?}

There is a claim that the problem of punishment is unsolvable. So, therefor I will not attempt to solve the problem by addressing the justification of punishment, instead I will attempt to rethink the concept of punishment. As I explained earlier the definition of punishment is to inflict intentional harm to a wrongdoer. What I want to do is to tweak the existing justification theories of moral education, rehabilitation and restorative justice to the conceptual idea of punishment. Instead of having the necessary requirement of intentional harm we will change it to the necessary requirement of intentional \textit{benefit}. Now, the obvious criticism of this is: if a punishment requires that the punished is benefited, is it still a punishment? My answer to that is no. No it is not, and I do not claim it to be. I claim it to be a re-conceptualization of punishment, because the only way to solve the problem of punishment is to surrender the old

\footnotesize{\begin{itemize}
\item \textsuperscript{43} It will be very interesting to see how the missions to mars will solve punishment, since there will only be essential personnel and I have a hard time believing all will obey every rule for the two yearlong space trip.
\item \textsuperscript{44} Boonin, David., \textit{The problem of punishment}, Cambridge University Press, Cambridge, 2008, P. 214
\item \textsuperscript{45} Yes, it is a real thing, see the articel "Let’s abolish Prison, Not Reform It": \url{http://goodmenproject.com/ethics-values/lets-abolish-prison-not-reform-it/}
\end{itemize}}
ideas and reinvent punishment. If I succeed with this, then that will also solve the problem of punishment from the moral aspect, since there will not be any intentional harm. I call this Beneishment, mostly because I enjoy portmanteaus, but also because you are not a real philosopher until you coined your own phrase or word.

What I build my concept on is the moral education theory, restorative justice and isolation. I do not intend the isolation part to be intentional harmful (but it will most likely always be harmful to be isolated), I intend it to be a form of supervision, and that it may be some social protection. Simply put, I am putting the doctrine of double effect in effect.46 By foreseeing the consequences of isolation, but not using it to intentionally harm the inmates. Boonin quotes Stanly Benn who writes that “the ‘unpleasantness’ of punishment is not merely an incidental byproduct or side effect of it, but rather is ‘essential’ to punishment”.47 My idea is that, on the contrary the unpleasantness should just be a side effect of punishment. I still intend that the punished should have as much autonomous freedom as possible, such as doing their own cooking, having their own key, as it is on Norway’s Prison Island; Bastøy Prison (more on that below). Another possible solution to this is night prisons, you are free during the day (for example 07:00 – 19:00), but must sleep at a prison, this concept is already tested and successful in Sweden when reintegrating inmates to society after a long sentence.48 What I changes is that the entire sentence is shaped like this, not just the end of it. That way you can go to school, university and most workplaces. If you have a spouse and kids it would mean time with them, instead of becoming estranged. But you would not be able to drink, party, and spend time with friends or doing mischievousness. Of course there would be a lot of restrictions on this form of punishment. It would probably be best suited for individuals that are a first time offender and/or have a family. But I will argue that unless there is specific reasons, the only acceptable form of a prison is minimum-security, like Bastøy prison in Norway (self-sustain, farming, where inmates roam free during the day).49 If you respect and treat inmates well, that will at least increase the likeliness that they will feel better about

46 Thanks to both Alexander Kirchhoff and Marcus Dageryd whom pointed this out too me.
themselves, and respect you back. But treat another human with hate and disrespect, that will likely only create a more ill fitted person.

**What does ‘intentional benefit’ or Beneishment even mean?**

Well, just as intentional harm, the intentional part is essential because we cannot punish and hope there to be a beneficial aspect of it, we must know (or at least attempt) and specify that there will be a benefit. The idea is actually pretty simple and as I said builds a lot on Hampton’s moral education theory. How this is different from moral education is mainly by not having any moral education (unless a punished wants to take a course in moral philosophy). Instead they would focus on broadening the inmate’s horizon, to let her see her options outside the prison. The benefit can come in many different shapes and forms. I also do not say that the benefit must be towards the punished. I do not think that all criminals will be interested in education, bettering there health (both physical and psychological), doing work needed by the society or such. But let us not forget about the victims, remember restorative justice, if we somehow can apply benefit to them, such as making the punished meet and talk to the victim, hopefully apologize.

Another idea is to work off your sentences in a beneficial manner for example let’s say you get a ten years sentence, but if you do stuff like getting a degree in high school, university or vocational training you are rewarded with a time taken off your sentence. This would of course need to be specified in the original sentence. Even other things could be rewarded such as volunteering (like a soup kitchen or have lectures to “at risk youths”) the list can be made very long. That would be an incentive for an inmate to better herself, shorten his sentence which would lower the cost for the state, and make the inmate more hirable when leaving prison. This is would effectively avoid prisonization. With this potential employers also could look at a punishment and instead see a commitment. Not looking why you were punished, but look at what you did while being punished.

Now, there will problem be a lot of cases when the punished just refuse everything presented at them. But, as far as I know what most inmates complain about is boredom.50 So, I believe by giving them a purpose and an activity the vast majority will be onboard. There are some

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compulsory chores to undertake in almost every prison, but I believe (without any tangible data, but with common sense) that if the inmates have the freedom of choice it is plausible that these activates will benefit them more, and they will be executed better.

What I also want to point out is that the benefit in my idea does not limit to the inmate. If somehow society can benefit from one or more inmates that would be highly encouraged, like helping out with manual labor, paper work, or babysitting. Some female prisons already have daycares for their own children, like Ringsjön Prison in Sweden. Now this would take some effort and trust, but all I am saying is if possible as many as possible should benefit from the penal system. That should be one of the goals to strive after, just think if a prison successfully educated orderlies which could ease doctors’ and nurses’ workload. The inmate’s gets purpose, responsibility, trust, education and our health care system works better. This might seem unrealistic or improbable, still would be something good if successful. Not to forget, the US sometimes punishes smaller offence by giving the option of either jail time, or military service. If your offence is of nonviolent nature, why not sentence you to learn welding, pluming or what the society has demand for at that time.

Now, unless you think that a person who has committed a crime, deserves to get punished and that’s the end of it. To focus on benefits, to both individuals and society would not be possible to be immoral, at least not to me. Sure it is to turn punishment, more or less, upside down and will seem prima facie as punishment is something to aim for and that would make peoples want to get punished. That is not what my goal is; the idea is that the outside is still a better place with more options. Prison will still be a place away from everyone you love, everything you enjoy and you will not have the options of staying up late or to take long walk.

**Society’s responsibility**

With the current mentality towards ex-criminals (that they are antagonists in a society) it is likely that some will frown upon thinking that law-abiding citizens have any responsibilities towards criminals. But the responsibility society bears, in this context, is the one of doing what they can to reduce crime. One easy and cheap way is to try to not see ex-criminals as the antagonists of the community, but individuals worthy for second chances. Another easy way

is to give companies that hire ex-criminals some form of subsidy. I am not trying to “guilt trip” members of society, just emphasize that they also play an important role for the success of re-conceptualize punishment.

One possible objection to such a proposal is that this is not an equitable form of punishment. That this will make peoples commit crime just to get to these “prisons” and that the victims will not find reconciliation or peace. However, firstly, isolation is pretty bad no matter what, and what I ask is; do you want to punish to make the victim feel avenged or to make the entire society to a safer place? I understand that is a very different question if asked to a recent victim or a university student in a safe environment. But the point is that if we punish to make the entire society a safer place, by beneishment, there will be fewer victims. If I am right, and if what I suggest works, it would significantly reduce recidivism, and that is actually one of the biggest problems, for all penal system. It is clear, that country’s as Norway and Canada that have a big focus on helping criminals, more than punish them have a much lower rate of recidivism than country’s that focus on harder punishment like U.S.A. and England. Let’s talk a bit about Norway’s Prison Island. Victor Lund Shammas presents the idea of the Islands and shows its effect fullness in both punishing and reintegrating inmates to society.52

On the island the inmates feel worse, claiming it is more troublesome than to serve a sentence in a high security prison.53 They have the bittersweet taste of freedom; they have everyday problems, the time moves slower. So they feel worse, and are better suited to return to a society, even a retributivist should be able to agree to this form of punishment. This also comes with an economical benefit, when the inmates cook, clean, and produces items by themselves there are a lesser need of staff, turning it to the lowest costing prison in Norway per bed.54 Plus some stuff the inmates produce they sell, making an income to the island. And Norway does not stop there; they also have Halden, a high security prison, considered the world’s most human prison.55 Basically the country with the lowest recidivism rates in the world (20 %) has the two most humane prisons in the world. This to me has still not solved

53 Ibid., p. 115
54 Ibid., p. 107-8
55 Gentleman, Amelia “Inside Halden, the most humane prison in the world”, the Guardian, 2012, This is just one of many similar articels. http://www.theguardian.com/society/2012/may/18/halden-most-humane-prison-in-world (accessed May 20, 2015).
the problem of punishment. What I am trying to say, are that already there is better ways to execute punishment, if we can stop seeing punishment as a necessary intentional negative experience. As Ellis puts it:

> However, like many peoples, I am skeptical about whether the theory I propose can justify the scale of the penal institutions with which we are familiar in the US and UK, and in particular the severity of punishment that many offences incur (especially in the US). But I doubt whether any sensible theory of punishment could justify that.\(^{56}\)

This could be avoided if the members of society did not see measures like Norway’s prison island as a vacation. What I am trying to accomplish by presenting this is, too quote Foucault, “to punish less, perhaps; but certainly to punish better”.\(^ {57}\) By punishing better, I am convinced that fewer sentences will follow and by that, less criminal activity, a safer and richer society.

### Conclusion

In this essay, I set out to outline the problem of punishment from a philosophical perspective, and I understand that many will disagree but I believe that I at least showed that there is a problem with punishment. By showing that justifying punishment cannot be done by any normally comprehended moral doctrines. Moreover I attempted to show that there is a solution to solve the problem of punishment, by rethinking the very concept. I showed that there already exists better ways to punish then what we are accustomed to, creating a better society for all. I also claim by using *beneishment* that would even work better.

How then does beneishment differ from punishment, and how does it solve the problem of punishment? Well, most obviously the focus is shifted from harm to benefit. So when a criminal gets sentenced the job of the judge is to find out what would benefit the criminal the most, and how she can safely return as fast as possible to society. If instead of seeing a convicted felon as something “evil” (in lack of a better word), we see the felon as an human in

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\(^{56}\) Ellis, Anthony, *Philosophy of Punishment*, Imprint Academic, United Kingdom, 2012, p. 11-2

need of some help, that is to become better then she is right now. If it is true that beneishment is moral education, restorative justice, self-improvement and development. Then it cannot possibly be something immoral, in any moral doctrine, and if that is true there is no problem of punishment. With that I claim that most moral doctrines would allow Beneishment as a theory of punishment within them. I am sure that consequentialists will point out things they do not agree on, and deontologist will do the same and others doctrine will too. But none the less, this theory should fit with everyone, with the exception of retributivists whom follow the just desert theory or such. The point being that my ambition is that whatever moral doctrine you subscribe to, you could (if you want to) also subscribe to beneishment.

Obviously punishment (even as beneishment) will never in itself solve the main problem, the problem of crime. Most criminologists are focused on why peoples commit crime, if there was an answer to that, well then we could stop crime before it happens and punishment in this context will be obsolete. And that would be a stake in society, meaning having something to lose. But until that day, I say it is essential to keep discussing and improving all forms of punishment.

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