

Judicial Corporal Punishment

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A Surprising Contentiousness

Judicial corporal punishment (JCP) consists in the deliberate exercise of physical force on the bodies of criminal offenders using techniques such as fustigation, flagellation and electric shocks in a way calculated to inflict physical pain. JCP is administered pursuant to offenders' having been sentenced to it by a court following a determination that they are guilty of an offence. Historically widely employed around the globe, including throughout the British empire, the use of JCP is nowadays confined to fewer than 30 countries, including Singapore.

JCP is widely deplored as brutal and inhumane. One of the dominant narratives of modern penal history is of a transition from the use of physically violent sanctions emblematic of premodern repression to the more humane deprivation of offenders' liberty. Yet this narrative is disputed by some, including Michel Foucault, who denies that the transition from JCP to imprisonment brought about by Enlightenment reformism can be explained by a heightening of moral concern for the wellbeing or dignity of prisoners. The shift is instead accounted for, in Foucault's view, by a determination to punish more effectively and to exercise greater control over society through new regulatory and normative techniques of disciplinary power. Foucault conceives of this transition as the replacement of one system of domination with another (Foucault 1977).

There has in recent decades been a resurgence of interest in a moral reconsideration of forms of JCP that cause no lasting physical injury (see, e.g., Scarre 2003; Newman 2010;

Moskos 2011; Murtagh 2012; Brennan 2017; Moen 2020). Those pressing for a reassessment of JCP are typically motivated, in part, by the thought that it may be more humane than subjecting criminals to the conditions of imprisonment existing in many countries, especially the United States, whose prisons are widely depicted as a nightmare of overcrowding, predation, rape, violence, degradation, poor diet and inadequate ventilation (see, e.g., Ferguson 2014). Opponents of JCP can retort that the awfulness of the conditions of incarceration in the United States and certain other countries supplies an argument not for JCP but for the reform of existing prison conditions to allow inmates to live in safer, less crowded and less humiliating circumstances. But to this, supporters of JCP typically rejoin that it is morally preferable to imprisonment even under humane conditions. They claim a number of advantages for it over imprisonment. Before considering the benefits and advantages extolled by JCP's supporters, the retributivist justification for JCP stands in need of assessment.

The Retributivist Justification

Assuming what some philosophers deny (Boonin 2008; Zimmerman 2011), namely that the legal punishment of criminal offenders is justified, can resort to JCP ever be morally legitimate? Retributivism, according to which punishment of criminal offenders is justified by their desert, does not rule out the use of JCP. Yet retributivism cannot be invoked in support of JCP either. Because retributivism is only limitedly determinate, it does not single out any type of punishment as a uniquely fitting response to any particular crime and can be completely satisfied by other types of punishment.

The doctrine of *lex talionis*, adhered to by some retributivists, appears to provide the most promising basis for claiming that retributivism calls exclusively for the imposition of JCP for

certain crimes such as assault. On its most plausible construction, the *lex talionis* requires that like be returned for like. In other words, it demands that a punishment should qualitatively match the crime for which it is imposed. However, as Jeffrey Reiman and Jeremy Waldron demonstrate, the *lex talionis*, plausibly interpreted, is itself only limitedly determinate and does not ever render JCP a morally obligatory response to any crime including assault (Reiman 1985; Waldron 1992).

It could be argued that retributivists ought (all else equal) to prefer types of punishments, such as JCP, that can be completed quickly. On this argument, the more protracted the punishment, the greater the chance of an offender on whom it has been imposed not receiving the entirety of his or her deserved punishment as a result of the offender's death, escape or for some other reason (Tomlin 2014). But against this time-related advantage of JCP over more prolonged types of punishment must be weighed the drawback that JCP is more likely to punish in full people whose innocence is discovered only after the administration of punishment has begun. While an innocent person who has been subjected to JCP can be compensated for undeservedly exacted punishment, JCP is less likely to be remissible because when the innocence of an offender whose JCP has commenced is discovered there is "little chance of their being any [punishment] yet to come" (Bentham 1830: 52).

Advantages and Disadvantages

The case for JCP must therefore depend, for retributivists as for others, on whether its advantages compared to available alternative punishments outweigh its disadvantages, and on whether there are powerful objections to its use, such as its violating offenders' rights. JCP's defenders claim for it several advantages over imprisonment (see, e.g., Scarre 2003; Newman 2010; Moskos 2011; Murtagh 2012; Moen 2020): that it is financially much less expensive

than imprisonment; that because it is administered swiftly it does not cause harm to offenders' family members and dependents by depriving them of a source of financial and emotional support to nearly the same extent as imprisonment; that it avoids prolonged restrictions on offenders' liberty and privacy that are prerequisites for work, relationships and family life and, in so far, for the furtherance of many of their ulterior interests; that it avoids the interaction of offenders, a feature of imprisonment that may serve to reinforce their criminal propensities and thereby to increase the probability of their criminally offending in the future; that it reduces the risk, ever-present in many present-day prisons, that offenders will be predated upon, assaulted, raped or mistreated by guards and other offenders; and that JCP is likely to have greater deterrent efficacy than incarceration. Other advantages over imprisonment that JCP is said by its defenders to possess are that it is inherently less invasive, that it has greater denunciatory efficacy, and that it is more 'equable' inasmuch as the pain it inflicts can be precisely measured to eliminate variation in the suffering experienced by different offenders in response to the same amount of punishment.

Some of the advantages claimed for JCP over imprisonment by its supporters are plainly significant, including its depriving offenders' dependents of a source of emotional and financial support to a lesser degree, its being much less financially costly and its not restricting offenders' liberty and privacy to the same extent. Others are harder to demonstrate or less substantial. The claim that JCP will have greater effectiveness as a deterrent than imprisonment is questionable. JCP could have appreciable deterrent efficacy if its administration was publicly exhibited (Bentham 1830: 184). But most modern supporters of JCP think it should be carried out in private to avoid unacceptably humiliating the offender. It is possible that JCP's deterrent efficacy could outstrip that of other punishments in virtue of its exerting a greater influence over the imagination of the offender (Scarre 2003: 302). But against this speculation can be set the conjecture that use of JCP could have a brutalizing

effect on members of the public, coarsening their moral sentiments and weakening their aversion to violence with the effect of increasing the crime rate. There is insufficient empirical evidence to show that JCP has greater efficacy either as a specific or general deterrent than other types of punishment. And it is far from clear that the reintroduction of JCP on an experimental basis to ascertain its deterrent efficacy would be justified (Lenta 2018: 197).

Graeme Newman argues that JCP has an advantage over imprisonment insofar as, because it involves the infliction of physical pain and has no reformatory ambitions, it is more likely than imprisonment to reassure the public that punishment has been credibly administered (Newman 2010: 50, 93-94). This is questionable, however. Although imprisonment need not visit physical pain upon offenders, the deprivation of liberty over a (relatively) prolonged period is widely understood to be a credible punishment. Even prison conditions at their mildest will set back offenders' basic interests in liberty and privacy significantly, reducing the quality of their lives to a level significantly below those not behind bars.

Also open to question is the contention that JCP is more 'equable' than imprisonment in virtue of the amount of pain it inflicts being amenable to precise calculation, eliminating variation that exists in the case of imprisonment in the subjective experience of suffering by different offenders – the suffering of incarcerates in response to the same term of imprisonment varying depending on their psychological sensitivity, adaptability to prison conditions and whether they have relationships with friends and family that will be disrupted. One way to reply to this argument is to insist that what ought to be proportional to the seriousness of the crime is the severity of the punishment, understood objectively as the setting back of offenders' interests, not the severity of the suffering subjectively experienced. But even if it be conceded that variation in offenders' suffering ought to be eliminated or at least minimized, it is doubtful whether JCP achieves this. For one thing, the psychological

suffering induced by corporal punishment may vary depending on the differing characteristics of offenders (Bentham 1830: 83). As well, it may be that different people experience painful physical stimuli differently. Pain responses have been found to be influenced by psychosocial context and cultural background, as well as by anxiety and depression.

Finally, the claim that imprisonment is more invasive than JCP is open to question. Kevin Murtagh argues that imprisonment, because it inflicts psychological suffering relating to the disruption of valued relations and activities, is more invasive than JCP, which causes only physical suffering. Psychological suffering is more invasive than physical suffering, he contends, because the “beliefs, desires and attachments” with which psychological suffering is bound up are more central to and “constitutive of our identity as persons” than our bodies are (Murtagh 2012: 51-53). Murtagh appeals to Hugo Adam Bedau’s Minimal Invasion Principle, according to which a punishment will be justified only if it is the least invasive means of achieving a worthy public purpose (Bedau 2002). A number of replies are available. Imprisonment need not involve a deep invasion of an offender’s psyche in the way that brainwashing and certain forms of coercive therapy would. Additionally, JCP that inflicts severe physical pain, as JCP typically does, is deeply psychologically invasive because the intense pain it inflicts (temporarily) undermines offenders’ rational self-governance, preventing them from rational reflection for the duration of the punishment. And by undermining offenders’ dignity and self-possession, JCP attacks offenders’ dignity, which is plausibly viewed as being at the core of their identity. Furthermore, JCP often elicits feelings of humiliation and loss of self-esteem as a result of offenders’ inability to retain their self-control under the importunity of severe physical pain, and this too must count as psychological suffering.

Against JCP's advantages compared to imprisonment must be weighed certain disadvantages. Because JCP is swiftly administered compared to imprisonment it is much less incapacitative. As well, JCP offers offenders less encouragement to repent and reform. Because its infliction is swiftly over, and because the intense physical pain it inflicts undermines offenders' ability rationally to reflect, it does not afford offenders an extended opportunity to reflect on the censure communicated to them through its infliction, undistracted by the demands and diversions of daily life, while the punishment is being administered (Bentham 1830: 115). Furthermore, it is harder, if not impossible, to communicate a condemnatory message about the denial of victims' dignity by offenders through their wrongdoing, when the punishment that is the medium through which that message is conveyed is itself unacceptably degrading (about which more in a moment).

Additionally, to the extent that JCP has advantages over imprisonment, those advantages may be less significant when it is contrasted with other types of punishment. Community service and community custody curtail offenders' liberty and privacy to a lesser degree, result in offenders' dependents suffering less collateral harm, and are far less expensive, than imprisonment. And types of punishment other than imprisonment may have certain advantages over JCP that imprisonment does not have, such as, in the case of community service, being highly amenable to being tailored to reflect qualitatively the crime for which it is imposed, enabling it to communicate censure more effectively.

Offenders' Rights Against Degrading, Cruel and Torturous Punishment

Even if the balance of JCP's advantages and disadvantages compared to alternative punishments, including imprisonment, is such as to favour its use, a powerful rights-based objection can be raised against JCP. On this objection, JCP is unacceptably degrading, cruel

and torturous and offenders have a right not to be subjected to unacceptably degrading, cruel or torturous punishment. One reason to consider JCP unacceptably degrading is that by overwhelming the reflective, deliberative agency of offenders through the visiting of severe pain upon their bodies, and reducing them to terrified, screaming animals, it undermines their “autonomous human personhood” (Murphy 1979: 233). Another reason is that JCP frequently humiliates offenders, causing them to experience “a painful sense of loss of dignity”, as a result of the loss of self-possession and self-control that JCP occasions (Margalit 1996: 115-116, 147). Shame may be occasioned by the inability of offenders to refrain from publicizing, and thereby exposing to the view of others, their responses to the intense pain JCP inflicts (see Velleman 2001).

Some of JCP’s defenders deny that it is unacceptably degrading or that it is more degrading than imprisonment. Kevin Murtagh contends that “temporarily shutting down rational functioning” need not be unacceptably degrading. A punishment that involves cryogenically freezing offenders so that they exist for a time in suspended animation, after which they are thawed out and restored to normal functioning without any adverse effects, would not, he asserts, be unacceptably degrading despite these offenders’ rationality having been temporarily shut down. He argues as well that it is not perforce unacceptably degrading to ‘animalize’ people by causing their sensuous animal nature to overwhelm their capacity for rational self-governance. We see this, he says, when we consider that a person who brings his sexual partner to orgasm does not ipso facto unacceptably degrade the latter. As well, he contends, the psychological suffering experienced by prison inmates will equally have the effect of undermining offenders’ capacity for autonomous reflection and functioning, yet we do not consider this an objection to imprisonment. He contends further that imprisonment curtails offenders’ autonomy to a greater extent than JCP by subjecting them to the dominion and control of prison guards and by forcing them to comply with restrictive prison rules

(Murtagh 2012: 150-159). Newman denies that JCP is degrading on the basis of a study which found that offenders viewed JCP as an opportunity to demonstrate their manliness (Newman 2010: 120).

The force of these objections to considering JCP to be unacceptably degrading has been challenged (Lenta 2018: 199-205). It is not just the shutting down of offenders' capacities for reflection, deliberation and speech that make JCP unacceptably degrading, it has been argued, but also that JCP results in their autonomous personhood being overwhelmed by their heteronymous, sentient nature such that they are reduced to the level of terrified animals. Cryogenic freezing, because it renders its recipients' unconscious, does not have this effect. Nor does it have the effect of shaming offenders by publicizing responses to intense physical pain that they would prefer to keep private. Furthermore, the analogy with bringing someone to orgasm does not show that JCP is not unacceptably degrading since, while it could temporarily undermine a person's rational self-governance, and so degrade the person experiencing it in a descriptive sense, it will not be unacceptably degrading because, being consensual, it does not amount to mistreatment. A person who is brought to orgasm without their consent will be unacceptably degraded, but the JCP discussed to this point is imposed non-consensually. Murtagh's claim that prisons too will induce psychological suffering severe enough to undermine their rational functioning has been countered on the ground that while conditions of confinement, if sufficiently dire, may induce severe psychological suffering, prison conditions need not be nearly that bad. And if they are not, inmates can obtain psychological relief by diverting their thoughts to happier objects of contemplation, something that is impossible for offenders experiencing the intense pain of JCP, which dominates their consciousness to the exclusion of all else. As for the claim that imprisonment is more degrading than JCP because it subjects offenders to the dominion and restrictions of prison officials and prison rules, it can be replied that the prison regime is not necessarily

inconsistent with being treated respectfully, as Margalit's example of military conscripts who are subject to the dominion of their superiors, and the rules of the military, without being degraded, shows (Margalit 1996: 266-270). Finally, Newman's evidence that (some) prisoners take pride in demonstrating their manliness in being able to brazen out the infliction JCP does not entail that it is not degrading. Determining whether a punishment is unacceptably degrading involves an objective assessment, and not a subjective one, and depends on the character of the punishment and its effects on those subjected to it and not on whether offenders feel degraded by it (Duff 2005).

Whether JCP is inherently cruel depends on the definition of cruelty that is operative. A cruel punishment can be defined as one that inflicts pain or suffering that is both severe and unjustified (Lenta 2018: 112). JCP, in the forms its defenders support, causes severe physical pain. It often elicits intense anxiety prior to its administration, which may function to magnify the experienced intensity of that pain. And if JCP is deemed unjustified, either on the ground that its advantages compared to other types of punishment are outweighed by its disadvantages or on the basis that it is unacceptably degrading, the conclusion that it is cruel seems inescapable. Certain of JCP's defenders deny that it is inherently cruel on the ground that the severity of the physical pain that it inflicts need not be disproportionate to the seriousness of the offences for which it is imposed; and if it is not, JCP will not be unjust (Scarre 2003: 307-308; Murtagh 2012: 86-91). But to this it may be retorted that being disproportionately severe is not the only way in which punishments may be unjust. If JCP is unacceptably degrading or if its advantages are outweighed by its disadvantages, there may be reason enough to consider it unjustified.

There may also be reasons to consider JCP that involves the infliction of severe physical pain to be torturous. Torture almost always involves the intentional infliction of severe pain or suffering. And punishment is one of the purposes for which torture is imposed (Lenta

2018: 120-121). Predictably, however, defenders of JCP have objected to its classification as torture on a number of grounds: that torture, unlike JCP, is “a highly utilitarian process” (Newman 2010: 154-155); that torture has the aim of using pain to “break the victim’s will” whereas JCP does not have this aim (Davis 2007: 33; Waldron 2010: 206); and that recipients of JCP, unlike torture victims, are informed in advance of the amount of punishment they will receive and the manner of its infliction, so that an offender anticipating JCP “knows that he will not be put at the mercy of a seemingly omnipotent individual” (Murtagh 2012: 32) and will therefore not experience anxiety or terror that is a concomitant of torture. Efforts to distinguish between JCP torture on these and related grounds are contentious, however (for a rebuttal, see Lenta 2017; Lenta 2018: 120-128).

Conclusion

It might appear that if offenders have a right not to be subjected to cruel, degrading or torturous punishment, and if JCP is either cruel, unacceptably degrading or torturous, then JCP is morally illegitimate and ought to be foresworn. There may be circumstances in which the administration of JCP is necessary to avert a catastrophe, in which case its use could be morally optimal or even obligatory. Yet such circumstances are fanciful and unlikely to arise; and unless they do, offenders’ right not to be subjected to cruel, degrading or torturous punishment must be considered to protect them against any such punishment.

Perhaps, though, JCP that is inflicted on a consensual basis could be morally legitimate. Offenders could waive their rights by consenting to the imposition to a fixed course of JCP in preference to another type of punishment, such as a term of imprisonment, of equal severity (Moskos 2011: 111; Scarre 2003: 314). This is indeed a possibility, assuming that safeguards are in place to ensure the genuineness of offenders’ consent and that the right not to be

unacceptably degraded by the state is not inalienable. But even if certain offenders validly waive these rights, their doing so will only mean that JCP does not wrong them. For the use of JCP on a consensual basis to be justified it may still have to be demonstrated that on a weighing up of its advantages and disadvantages, JCP is preferable to other types of sanction, including imprisonment.

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