

Revisiting the Censure Theory of Punishment

Phillip Montague

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Abstract This paper is a rejoinder to Thaddeus Metz’s article “Censure Theory Still Best Accounts for Punishment of the Guilty: Reply to Montague.” In his article, Metz attempts to answer objections to censure theory that I had raised previously. I argue in my rejoinder that Metz’s defense of censure theory remains seriously problematic despite what he says in his reply.

Keywords Censure theory of punishment · Intuition · Societal-defense

This paper is the fourth in a sequence that begins with Thaddeus Metz’s “Censure Theory and Intuitions About Punishment.”¹ I raise some objections to Metz’s position in “Recent Approaches to Justifying Punishment,”² and Metz replies to my objections in “Censure Theory Still Best Accounts for Punishment of the Guilty: Reply to Montague.”³ I propose here to respond to Metz’s reply. In some of my remarks, I attempt to clarify points raised in my previous paper that, I now realize, were stated less clearly than they should have been. My primary purpose, however, is to show that Metz’s defense of censure theory remains problematic despite what he says in his reply.

According to Metz,

Censure theory, of the sort that I defend, is the backward-looking view that the state is justified in punishing because only by proportionately punishing those guilty of injustice can it discharge a duty to express disapproval of them in proportion to their guilt. (115)

As he does in his original paper, Metz defends censure theory in his reply on the limited basis of claims he makes about the theory’s relation to “The Intuition”—the proposition

that there is always some defeasible moral reason for the state to proportionately punish the guilty. (115)

¹Metz (2000)

²Montague (2002)

³Metz (2009)

P. Montague (✉)

Department of Philosophy, Western Washington University, Bellingham, WA 98225, USA
e-mail: phillip.montague@wwu.edu

According to Metz, censure theory entails The Intuition while rival theories do not; or censure theory more adequately, or more plausibly, or more strongly explains The Intuition than rival theories. I left The Intuition unchallenged in my original paper, and will do the same here.

There is, however, an important distinction that must be drawn within Metz's characterization of how censure theory is related to The Intuition. That is, the proposition that p entails q differs significantly from the proposition that p plausibly (strongly, adequately) explains q . For whether p entails q is entirely independent of whether p is true or even supportable, while p cannot plausibly (or adequately, or strongly) explain q unless p is at least supportable. Hence, p could entail q without plausibly explaining q . And, for at least some types of propositions, p can plausibly explain q without entailing q .

Given these features of entailment and explanation, it is unclear why Metz places so much emphasis on his claim that censure theory entails The Intuition while certain rival theories do not. For even if he is right about censure theory, it might not plausibly explain The Intuition;⁴ and some rival theory that does not entail The Intuition might nevertheless plausibly explain it. A theory that plausibly explained The Intuition would surely be preferable to a theory that merely entailed it.

Although the issues just raised need to be addressed by Metz, his claims about entailment are problematic in more serious respects.

As Metz formulates censure theory and The Intuition, the former doesn't actually entail the latter. With some minor adjustments, however, the entailment can be made to obtain. These adjustments are accomplished by reformulating censure theory as the conjunction of these two propositions:

(C1) All states have a *pro tanto* obligation to express disapproval of those guilty of injustice in proportion to their guilt.

(C2) A state can discharge this obligation only by proportionally punishing all those guilty of injustice.

And The Intuition is presumably equivalent to:

(I) All states have a *pro tanto* obligation to proportionally punish all those guilty of injustice.

Using these formulations (and with the addition of a relatively uncontroversial premise), censure theory does indeed entail The Intuition.

But now consider the following propositions, whose conjunction we will interpret (provisionally) as a rule utilitarian theory of punishment:

(R1) All states have a *pro tanto* obligation to create institutions that maximize overall intrinsic value for their citizens.

(R2) A state can discharge this obligation only by creating institutions that proportionally punish all those guilty of injustice.

⁴ This is precisely the claim that Metz makes about "desert theory"—i.e., that it entails The Intuition without plausibly explaining it. Metz's criticism of desert theory will be discussed below.

The conjunction of (R1) and (R2) (together with the uncontroversial premise refereed to above) also entails (I). Hence, rule utilitarianism (as formulated above) also entails The Intuition. Similarly, the societal-defense theory of punishment could be interpreted (again, provisionally) as the conjunction of these two propositions:

(S1) All states have a *pro tanto* obligation to establish institutions that distribute harm justly.

(S2) A state can discharge this obligation only by creating institutions that proportionally punish all those guilty of injustice.

And since the conjunction of (S1) and (S2) (and the uncontroversial premise) also entails (I), societal-defense (as provisionally formulated) also entails The Intuition.

To be sure, rule utilitarians are unlikely to regard (R2) as an appropriate component of their theory; and (S2) is not—and should not be—included in the societal-defense theory of punishment. But what about (C2)? It is evidently no more appropriately part of a philosophical theory of punishment than are (R2) and (S2). I suppose that Metz might dispute this last claim on the ground that, while (R2) and (S2) are contingent and cannot be parts of philosophical theories for that reason, (C2) is necessary. Proposition (C2) seems clearly to be contingent, however, and attempting to establish that it is not would almost certainly require introducing some highly tendentious stipulative definitions.

In denying that either rule utilitarianism or societal-defense entails The Intuition, Metz implicitly interprets these theories without propositions (R2) and (S2) respectively. Under these interpretations of the theories, Metz is correct: neither theory entails The Intuition. But, in continuing to include (C2) within censure theory, Metz unfairly loads his argument against the two rival theories. If he relies on (C2) in claiming that censure theory entails The Intuition, then he must include (R2) and (S2) in his consideration of whether rule utilitarianism or societal-defense entails The Intuition—and this regardless of how proponents of these theories would view the latter propositions.

It seems to me that censure theory should be formulated without (C2). Metz could then attempt to show that censure theory is superior to rule utilitarianism and societal-defense by arguing for (C2) and against (R2) and (S2) (although it is hard to see what kind of arguments might be offered in support of any of these propositions). If Metz did this, however, then his comparison of censure theory with rule utilitarianism and societal-defense would depend on substantive rather than merely logical considerations. That is, Metz would have shifted ground from claims about entailments to claims about the plausibility of the premises of those entailments.

This shift is actually present in Metz's discussion of the position he refers to as "desert theory." As Metz characterizes this theory, it "is the view that state punishment is justified because those who have been unjust deserve it." (118) Metz goes on to say that "Although... this theory can entail The Intuition, I maintain that it fails to provide a *prima facie* plausible explanation of it." (118) Metz argues in support of this latter claim, and he also replies to my objection that, although he criticizes desert theory, he fails to argue in support of his own account.

Metz's argument that desert theory "fails to provide a *prima facie* plausible explanation" of The Intuition is contained in this passage:

extremely firm desert-based intuitions provide little, if any, reason to believe this version of desert theory, making it a poor desert-based explanation of The Intuition.

What makes the above instance of desert theory unattractive from a desert-based perspective is that intuitions about desert do not track the above principle's specification about when and how much punishment is apt. Hundreds of millions of movie-watchers each year think to themselves "He got what he deserved" upon a villain being harmed either by his own hand (e.g., the gun blowing up in his face), by punishment from a non-statal agent such as the hero or the victim, or even by natural causes (e.g., crushed by a boulder). Hollywood probably would not exist were these kinds of retributive judgments not deeply and widely held. If suffering or deprivation that comes prior to state punishment can give an offender what he deserves, then there is no reason to favour the above principle, which requires state punishment as alone deserved, regardless of what harm the offender has received from an extra-judicial source. (119)

Here Metz appears to be claiming that evildoers can receive their just deserts without being punished, which evidently implies that states aren't obligated to punish all those guilty of injustice. If this is indeed what Metz is claiming, then he is implicitly retracting his earlier acknowledgment that desert theory entails The Intuition. More importantly, however, Metz's claims are largely both empirical and speculative. They also ignore some features of the concept of desert that are necessarily reflected in any theory that proposes to justify punishment by appealing to the deserts of those on whom it is imposed.

Metz seems on the one hand to be suggesting that evildoers receive their just deserts as long as bad things happen to them. On the other hand, however, he seems to have cases of "poetic justice" in mind, where the bad things that happen to evildoers are appropriately related to their evildoings ("the gun blowing up in his face"). It would not be surprising if Metz were indeed thinking along these latter lines, since desert is a three-place rather than a two-place relation. That is, people don't simply deserve something bad (or good); rather, they deserve it for having acted in certain ways. Because of this connection between deserts and past actions, the things that people deserve are rather specific—not simply "something bad" or "something good"—but punishment, reward, blame, praise, criticism, credit, and so on.

As was noted above, these features of desert will necessarily be reflected in theories of punishment that base the state's obligations to punish on the deserts of evildoers. Now suppose that person x deserves punishment p for doing y . The fact that something bad happens to x prior to receiving p in no way implies that x received her just deserts. Granted, one might gain some sense of satisfaction (and even say "serves him right") on learning, say, that a brutal murderer died of cancer, but this possibility is unlikely to dissuade a desert theorist from insisting that states have a *pro tanto* obligation to impose deserved punishments on all evildoers.

Metz deliberately refrains from saying anything about the concept of desert in his critique of desert theory. Perhaps for this reason, he makes no mention of the features of desert and desert theory emphasized above. Of course, Metz might wish to argue for a different conception of desert and a different interpretation of desert theory—perhaps one that bolsters his argument against the theory. As

matters now stand, however, his argument against desert theory is not at all persuasive.

I now turn to Metz's reply to my contention that—if he objects to desert theory on substantive (rather than logical) grounds—then he must be prepared to defend his own theory, rather than resting content with the claim that it entails The Intuition.

Here is how Metz responds to this criticism:

In reply, note the difference between providing a positive and systematic justification for a theory's essential claims, on the one hand, and noting that a particular theory is poorly motivated in light of claims held by those who would be most inclined to believe it, on the other. I do avoid the former, assertoric project in my article, saving it for other occasions, but I do not refrain from the latter, dialectical argument, which strikes me as a reasonable approach, at least given the space constraints of a journal article. (119)

According to Metz, although desert theory “is poorly motivated in light of claims held by those who would be most inclined to believe it,” a “parallel” objection to censure theory would be ineffective, because the parallel claims about censure-based intuitions are false.

Since Metz acknowledges that desert theory entails The Intuition, his claim that desert theory fails plausibly to explain The Intuition implicitly denies the plausibility of desert theory itself. I have suggested that Metz's argument in support of this denial is unpersuasive; it is in any case less persuasive than other arguments against desert theory that are available. Metz is of course free to question the theory's plausibility on whatever grounds he wishes. Once he opens the door to questions about the plausibility of desert theory, however, proponents of rival theories are equally free to select the substantive questions they wish to raise about censure theory. Rival theorists—and desert theorists in particular—certainly aren't restricted to proceeding along lines parallel to Metz's. Presumably, then, Metz's discussion of desert theory should contain a defense of censure theory against the strongest objections to the theory that a desert theorist might raise.

In the paper to which Metz is replying, my critique of Metz's account focused primarily on his claim that censure theory accommodates The Intuition better than rival theories of punishment. Some remarks by Metz in his reply suggest another line of inquiry regarding his account.

According to Metz,

Most censure theorists believe that the duty to express disapproval of the guilty rests upon further non-consequentialist rationales such as a need to treat offenders as responsible for their behaviour, victims as important or injustice as something to disavow. Such treatment, so the theory goes, is constituted by proportionately expressing disapproval of the guilty, which, in turn, is constituted by proportionately punishing them. (115)

These remarks are surprising from one perspective, but not at all surprising from another. They are unsurprising because, even if states do have a duty to “express disapproval of the guilty,” this duty appears on its face to be derivative rather than fundamental. But in acknowledging that the duty might be derivative, Metz invites claims like this one: states have a duty to express disapproval of the guilty because

those guilty of wrongdoing deserve such treatment, and states have a duty to insure that the guilty receive their just deserts. This claim implies, of course, that censure theory rests on desert theory.

The preceding remarks are obviously speculative, but seem to me to raise questions that ought to be addressed by Metz in constructing a deeper defense of his theory. The chief task he faces as he does so, however, was pointed out in my original paper and acknowledged by Metz in his reply. This task faces anyone attempting to explain the permissibility of punishment, namely, that of identifying considerations that are capable of defeating the strong moral presumption against inflicting harm on others. For Metz, this would involve arguing for a position that seems on its face highly implausible: that the (putative) *pro tanto* duty of states to express disapproval of evildoers is stringent enough to defeat the moral presumption against harming them. He would also need to argue that censure theory's defeasibility condition provides a better explanation of the permissibility of doing harm through punishment than do those of other theories—in particular, theories that emphasize preventing innocent people from being harmed by evildoers.

Metz concludes his paper by summarizing his reasons for denying that societal-defense entails The Intuition, and for concluding that it is therefore inferior to censure theory. The problem with societal-defense, according to Metz,

is that, while it is true that to maintain an institution of punishment as societal-defence the members of that institution must *often* punish the guilty (proportionately), it is not true that to maintain this institution its members must *always* punish the guilty (proportionately). It could well be the case that a given practice of punishment would have exactly the same consequences in terms of protection of the innocent if the guilty were (proportionately) punished 95% of the time instead of 100%.... In short, Montague cannot provide a principled reason for the state to (proportionately) punish all the guilty, and can appeal only to the contingent results of a given instance of such punishment or collection of such instances. Since the results of state punishment vary from context to context, the logic of the theory fails to entail that there is always some moral cost when the guilty avoid (fitting) penalties from the state. (122)

I dealt with these points above, however. I acknowledged that societal-defense doesn't entail that states are always obligated to punish the guilty unless conjoined with a certain contingent proposition [i.e., (S2)]. But I also pointed out that Metz's formulation of censure theory includes a proposition that is itself almost certainly contingent [i.e., (C2)], and without which censure theory doesn't entail that states are always obligated to punish the guilty. Hence, with respect to whether they entail The Intuition, societal-defense and censure theory are very much in the same boat.⁵

⁵ I take it that the following statement is a slip on Metz's part: "I continue to submit that... [societal-defense] does much worse than censure theory at entailing that, and explaining why, there is always some moral reason for the state to proportionately punish those guilty of having broken a just law." (120) Nowhere does he argue that censure theory *explains* The Intuition better than societal-defense does.

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