

October 24, 2023: Michael S. Moore

- Retributivism: punishment is justified by the guiltiness of the perpetrator
- Negative retributivism: only the guilty may be punished
 - Not what Moore means by retributivism, although he accepts this view
- Positive retributivism: all the guilty must be punished - justice requires the punishment of the guilty
 - Deserve to suffer in proportion to the culpability of their wrongdoing (principle of proportionality)
- Consequentialist/utilitarianism: punishment must be justified by the positive consequences of it (deterrence, incapacitating dangerous members of society, satisfying victims)
- Censure retributivism
 - Punishment is the vehicle through which society can express its condemnation of the criminal's behavior
- Gregg v. Georgia
 - 8th amendment: excessive bail shall not be required, nor excessive fines imposed, or cruel and unusual punishment inflicted
 - 14th amendment: no state shall deprive any person of their life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws
 - Prior to this case: the administration of the death penalty was too arbitrary/not concrete enough so it was unconstitutional
 - In this case: death penalty restrictions from 14th amendment had been satisfied by new guidelines, and death penalty now not cruel and unusual so therefore it is constitutional under 8th amendment as well.
 - "Capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function is unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs"
 - Looks like censure retributivism
 - "The decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death"
 - Looks more like absolute/positive retributivism
- Moore's argument: the retributive principle helps us to account for more particular moral judgements that we believe to be true
 - Emotions are trustworthy guides to moral insight
 - A brutal criminal who is completely rehabilitated before being punished still deserves punishment for his crime

- Anti-retributivists misplace their compassion for the victim to the offender expressing unwillingness to face repulsion at what was done

October 26, 2023: Murphy's Marxism and Retribution

- Retributivists: rationale for punishment is backward-looking
 - Wrongdoing merits punishment
 - Wrongdoer should suffer in proportion to his wrongdoing
- Murphy's question: what gives us the moral right to inflict punishment
 - Does not take Moore's morality justification for retribution
 - Murphy's answer: criminals could be said to will their own punishment as a fair price to pay for their lawbreaking
 - Goes back to Hagel and Kant
- How can we say the state is authorized to coerce us and that we also have the ultimate right of freedom?
 - Need a political theory that makes the states decision to punish our own decision
 - Coercion is justified when it could have been rationally willed even by the person who breaks the law
 - If in an antecedent position, we collectively would rationally will criminal law in order to protect accepted social contracts, then we will to coercion of the state
 - Known as contractionalism
- Murphy: positive retributivist
 - For the law to remain just, it must guarantee that those who disobey it do not gain an unfair advantage over those who do obey it
 - Unfair advantage in the sense they do not bear the same burden of self-restraint as other citizens
 - Punishment balances out this unfair advantage so therefore criminal cannot complain about their punishment
 - "Fair play argument" - punishment restores balance between benefit and burdens of the system for each person
 - Criminal benefits from other citizens obeying the law so he tacitly accepts his punishment
 - Problem with balancing metaphor: we must be able to understand the deprivation of liberty that incarceration involves as sufficiently akin to the unfreedom of self-restraint to support the metaphor of restoring balance
 - Problem of 1:1 proportion - balancing burden of self restraint with punishment of doing crime does not seem to be plausible
 - Are criminal wrongdoers really taking unfair advantage?
- Murphy and Marx

- Moral relationship with other people only feasible under conditions that equate social equality and mutual benefit
 - In the absence of reciprocity, crime will increase
- Kant's criminal theory has to presuppose people who commit crimes are part of reciprocal society or else theory of benefits does not apply
- Marxist theory of crime
 - Capitalistic society is characterized by these causes of crime
 - Inequality with significant property and deprivation
 - Ethos of competition, greed, and selfishness
 - Deep alienation of people from their fellow citizens
 - Under these circumstances, the unjustly disadvantaged do not receive the sufficient benefits to require their obedience to the law so therefore a retributivist theory of punishment is largely inapplicable in modern society

October 31, 2023: James Whitman: "A Plea Against Retributivism"

- Retributive philosophies of punishment
 - Culpable wrongdoers deserve punishment
 - Punishment should be proportional to: 1. The severity of the offense and 2. The culpability of the wrongdoer
 - 2 requirements of voluntary agency are very low threshold
 - Actus reus: voluntary
 - Mens rea: culpability
- Why do certain communities defined by income level, education access, race, etc have different levels of crime
- US system is a system of conditional accountability
 - So much discretion given to police, prosecutors, judges, etc. so the practice of inequality is inevitable
- Retributivism is a blaming theory which desensitizes us to the person being punished
 - Blaming in criminal justice normalizes punishment which is partly the reason behind the staggering numbers behind the US criminal system
- "To the extent retributivist philosophers are heard at all, they are heard in ways that amount to pouring gasoline on the fires of American punishment" (94)
 - When people hear "blame" or "condemnation" they are automatically predisposed toward vengeance
- 2 retributivist claims
 - We must found punishment on blame because only blame takes the offender seriously as an autonomous moral actor
 - Whitman contests this point by saying not everyone is fully autonomous - that certain social factors limit full autonomy
 - We must reject a rehabilitative approach because it is patronizing

- Whitman says this patronization could be contained
- Uses example of European criminal system
- Whitman's underlying Nietzschean psychological theory:
 - Punishment is the degrading infliction of status inferiority on one party by another party who is always tempted to express contempt and disgust and to degrade the punished (101)
 -

November 2, 2023: Cesare Bonesana di Beccaria

- The aims of ethics, according to utilitarianism, is to maximize aggregate social utility
 - Social utility: greatest happiness of the greatest number
- Beccaria combines: 1. A deterrence theory of punishment with 2. A social contract theory of liberty and rights
 - He captures the deontological approach characteristic of retributive views without committing to the dubious notion that punishment achieves justice
 - Social utility cannot disregard human rights
- Crime does not necessitate punishment
- Punishment and law should have a rational basis
 - Ideas of virtue and vice change in proportion to the passions and errors by which the different lawgivers were successively influenced
 - It should be rational for legal subjects to comply with the law
- Rejects death penalty and torture
- Deterrence is a promising approach to punishment, thinks Beccaria, because people are both rationally self-interested and motivated by pleasure and pain
 - Pleasure and pain are the only springs of action in beings endowed with sensibility
 - This view combines an appeal to prudential reasoning with psychological hedonism
- We are more likely to correct our behavior if we think the undesired consequence is more likely to happen rather than if the consequence is worse
- Deterrence vs. retribution
 - Deterrence does not rely on any moral desert
 - For Beccaria, no value placed on punishment per se. There is no commitment to the good of the deserved punishment
- Beccaria's principle of proportionality
 - We should be suspicious of retributive attempts to scale punishments to assessments of bad character
 - "The degree of sin depends on the malignity of the heart, which is impenetrable to finite being"
- Applying the deterrence idea

- The means made use of by the legislature to prevent crimes should be more powerful in proportion as they are destructive of the public safety and happiness and as the inducements to commit them are stronger
 - Two factors: 1. Harmfulness of crime 2. Inducements to commit it
 - Punishment as weighted calculation of disutility (of crime + punishment) x likelihood of crime
- Problem: should a highly rational thief be punished less than an impulsive thief?
 - Seems unfair
- No defendant should be punished more than what it would take to deter the representative citizen who is tempted to commit a crime. Otherwise we upset the principle of equality
 - Some people cannot be deterred
 - There are some class of action that people are so inclined to do, that it is not worth criminalizing (jaywalking, adultery)

November 14, 2023: Actus Reus Omissions

- Murphy: two situations in which human action misfires: actions done accidentally or in distress; case in which action misfires more basically - reflex, etc (in this we say humans do not act at all)
- Why is the act requirement important?
 - No one is punishable solely for his thoughts - need an act requirement in criminal law
 - Would a diary entry of nefarious intent be sufficient to show criminal intent?
 - Lack of sufficient evidence
 - Lack of clarity
 - Interference with liberty
 - Overreach (we'd all be in prison), abuse of police power
 - Scope of criminal law would be too broad
 - Possibility of changing one's mind
- Omissions: how can omissions be a basis for a criminal conviction if a culpable act is required?
 - The failure to act/omission of an act is equivalent to an act if in the situation of the act being required
 - Jones vs. U.S.
 - Defendant Jones convicted for involuntary manslaughter of baby Anthony, who starved to death while in her home. Jones was a family friend of the mother (Shirley Green)
 - Involuntary manslaughter is a reckless killing. Jones must have recklessly caused Anthony's death

- Jones court outlines 4 situations in which failure to act may constitute breach of a legal duty
 - Where statute imposes a duty to care for another
 - Where one stands in a certain status relationship to another
 - Where one has assumed a contractual duty to care for another
 - Where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid
- Pope v. State 1979
 - Joyce Pope found guilty of child abuse and misprison of felony for the death of a child whose mother she had invited to stay in her home
 - Md. Ct of Appeals concludes that Pope had no legal duty to the child
 - No reasonable jury could conclude that Pope had a duty to intervene
- Barber v. Superior Court 1983
 - Mr. Herbert was in a coma after suffering a heart attack from life support. After consulting with the family, doctors disconnected him from life support. State brought murder and conspiracy charges against the doctors. Trial court dismissed charges. The superior court reinstated the charges. Doctors appeal.
 - District Court's position
 - No criminal liability for failure to act when there is no duty to act
 - No duty of doctor to continue to provide "ineffective" treatment

November 16, 2023: Mens Rea (guilty mind)

- Theft: a person is guilty of theft if he unlawfully takes or exercises unlawful control over movable property of another with purpose to deprive him thereof
- Mens rea
 - Purpose, knowledge, recklessness, negligence
- Regina v. Cunningham (1957)
 - Section 23 of the Offenses Against the Persons Act of 1861: "whoever shall unlawfully and maliciously .. cause to be .. taken by another person any .. noxious thing, so as to endanger the life of such person .. shall be guilty of a felony"

November 28, 2023: Causation

- Causation
 - Actual or but for causation: "But for the defendants act the injury would not have occurred"
 - Proximate causation: a close or sufficiently direct relation between the act and result

- The result was a foreseeable result of the action with no superseding cause (fluke accident, unusual natural occurrence, or the actions of another person)
- The result was within the scope of the risk created by the defendant's conduct

December 5, 2023: Insanity

- Duress relies on an objective criterion of the reasonable person
- Insanity is an evaluation of the defendant's significantly limited mental capacities
 - End of the spectrum of mental illness
 - Leaves questions about all of the defendant's between the ordinary person and the people on the far end of the mental illness spectrum/insanity
- Balance between unable/unwilling
 - Unable implies insanity
- Insanity as law defines it is much narrower than mental illness including paranoia, autism, down syndrome, etc
- Insanity is in regards to a specific mental state at a specific moment
- 3 situations in criminal law where mental illness has a bearing
 - As a defense against criminal charges
 - As a basis of incompetence to stand trial
 - Whether the defendant can be executed
- Less than 1% of the less than 5% that go to trial use the insanity defense
 - 1/120 of the 1% are found not guilty by insanity defense
- P. 971 quote from reading
- Defendants found not guilty by reason of insanity are not released, and are sometimes put in mandatory mental health asylums. In other cases, the defendant is reviewed for commitment and are committed if they are judged a danger to themselves or others
 - Risky to raise insanity defense as defendant - rarely works and there are big implications of success
- 12 states have added guilty but mentally ill statutes to their code
 - 3 options
 - Guilty
 - Not guilty by reasons of insanity
 - Guilty but mentally ill
 - Same sentence if found guilty, but entitled to psychiatric treatment while in prison
- M'Naghten case (House of Lords 1843)
 - Daniel M'Naghten found not guilty for reasons of insanity for murder he committed under paranoid delusion.
 - People not happy with this ruling - judges called to defend their reasoning

- Chief Justice Tindal
 - Presumption of sanity/responsibility when someone goes to trial
 - Presumption of sanity is rebuttable by clear showing that defense, at the time of the criminal act, was laboring under such a defect of reason from a disease of the mind as
 - Not to know the nature and quality of this act, OR
 - Not to know what he was doing was wrong
- M'Naghten thinks the prime minister is going to kill him. Goes to London and kills the secretary of the prime minister thinking he is the prime minister so that he does not get killed. Does not alert the authorities.
- Blake vs United States (1969)
 - Blake is schizophrenic convicted of bank robbery
 - Appealed case based on the premise the definition of insanity the jury used was prejudiced and outdated
 - Davis standard (1897)
 - "The term 'insanity' as used in this defense means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong and know that the act is wrong, yet his will by which I mean the governing power of his mind has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control"
 - Will is so destroyed that even though he knows the act is wrong
 - Moral responsibility as involving a bare minimum of
 - Cognitive understanding of a. The nature of the act and b. That it is wrong, AND
 - Volitional control
- MPC (model penal code) Section 4.01
 - A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either:
 - To appreciate the criminality of his conduct, OR
 - To conform his conduct to the requirements of law
- Hinkley - 1982 attempted to assassinate President Regan
 - Found not guilty by reason of insanity - met by huge backlash and courts started narrowing the scope of insanity
- Lyons case
 - Pleads insanity based upon his addiction to drugs
 - Same court as Blake court - uses justifications laid out in previous ruling

- Trial court says impairments caused by addiction cannot constitute insanity
- Appeals court:
 - Drug addiction does not show how and why he does not conform his actions to the law
 - Only shows why he does not have full control over his actions
- “We now hold that a person is not responsible for criminal conduct on the grounds of insanity only if at the time of that conduct, as a result of a mental disease or defect, he is unable to appreciate the wrongfulness of that conduct” (955 from reading)
- 3 rationales for insanity as a defense
 - Legally insane person cannot/will not (generally speaking) be deterred by the law
 - The law is and should be addressed to its subjects as people who are, generally speaking, rationally capable of guiding their choices by it. This excludes the legally insane, whose rational agency is, generally speaking severely impaired
 - Criminal guilt should be restricted to the morally blameworthy. The insane are not morally blameworthy for their criminal actions