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JERUSALEM SEMINAR IN MORAL AND POLITICAL PHILOSOPHY

SUFFERING PUNISHMENT

1. INTRO

- ▶ **Legal punishment** is a state-run system for the intentional infliction of suffering on citizens.
- ▶ How can we justify "**hard treatment**" (imprisonment, compulsory community service, fines and the like)?
- ▶ Two camps: **consequentialists** (forward-looking) and **retributivists** (backward-looking).

1. INTRO (CONT.)

- ▶ **Pure-consequentialists:** if and to the extent that practices of hard treatment achieve certain ends, they are justified.
- ▶ **Strong-retributivists:** a system of hard treatment is justified (at least partly) by the value or good of inflicting suffering on those who deserve it.
- ▶ **Moderate-consequentialists:** hard treatment is only justified by its consequences if certain liability conditions are met.
- ▶ **Moderate-retributivists:** hard treatment is required to morally address past wrongs.

1. INTRO (CONT.)

- ▶ Common assumption to most (all?) views:
 - ▶ The suffering inflicted by a given system of hard treatment is independent of the justification offered for it.
- ▶ I argue:
 - ▶ Different justifications of the same hard treatment justify different kinds suffering.
 - ▶ How we justify hard treatment determines whether hard treatment gives offenders new reasons to suffer, reasons that they did not already have.

PLAN

- ▶ **Sec. 2:** Disagreement between moderates.
- ▶ **Sec. 3:** The added-suffering view of meaningful infliction of suffering.
- ▶ **Sec. 4:** The transformative view of meaningful infliction of suffering.
- ▶ **Sec. 5:** Hard treatment according to the transformative view.
- ▶ **Sec. 6:** Back to the disagreement about hard treatment.

2. DISAGREEMENT BETWEEN MODERATES

- ▶ Moderate-consequentialists and moderate-retributivists *agree*:
 - ▶ Condemnation is non-instrumentally justified as part of punishment.
- ▶ Moderate-consequentialists and moderate-retributivists *disagree*:
 - ▶ Hard treatment is justified as condemnation.

2. DISAGREEMENT BETWEEN MODERATES (CONT.)

- ▶ Moderate-consequentialists: hard treatment is not condemnatory.
- ▶ Exhibit 1:
 - ▶ Of course the guilty person's criminal act merits condemnation –that is, it merits strong public disapproval. Such a response is not only apt and permissible—in some contexts it would be a moral failure on our part if we didn't condemn such serious wrongdoing. But this is different from saying that the person who commits such wrongs deserves prison, and so ... the position I'm defending is not a form of retributivism. (Shelby 2016, 242).

2. DISAGREEMENT BETWEEN MODERATES (CONT.)

- ▶ Moderate-consequentialists, exhibit 2:
 - ▶ The hard treatment aspect of punishment requires justification that appeals both to beneficial consequences and to fair opportunity to avoid, but the cost of the condemnatory aspect of legal punishment ... does not require justification of either kind. The cost simply of being (properly) condemned can be justified simply on the ground that this **condemnation is deserved**. (Scanlon 2013, 105)

2. DISAGREEMENT BETWEEN MODERATES (CONT.)

- ▶ Moderate-retributivists: hard treatment as condemnation.
- ▶ Hard treatment is required for apologetic reparation (Duff 2019), for the state's expression of censure and condemnation (Brady 2020), or for meaningful dissociation (Dahan Katz 2020).

2. DISAGREEMENT BETWEEN MODERATES (CONT.)

- ▶ A first-order moral disagreement about whether hard treatment is an appropriate response to wrongdoing.
- ▶ Moral Judgment depends on how we understand the experience of suffering hard treatment.
- ▶ Coming up:
 - ▶ Moderate-consequentialists justify infliction of meaningless hard treatment.
 - ▶ Moderate-retributivists justify infliction of meaningful hard treatment.

3. THE ADDED-SUFFERING VIEW (OF MEANINGFUL INFLICTION OF SUFFERING)

- ▶ Consider being slapped in the face.
 - ▶ **Cases A:** the slap is intended to save you from a mosquito; or to keep you from fainting; or the slap is an uncontrollable twitch.
 - ▶ **Cases B:** the slap is intended to humiliate or demean you; or the slap is accusatory.
- ▶ **Lesson:** A slap can be *justified and meaningless* or *justified and meaningful*.

3. THE ADDED-SUFFERING VIEW (CONT.)

- ▶ A meaningful slap is *about* something.
- ▶ A meaningful slap is a meaningless slap with content 'added on' to it.
- ▶ Meaningful suffering has content, e.g., humiliation, resentment, shame, grief, etc. Meaningless suffering lacks content, e.g., burning sensation, stomach ache, exhaustion.
- ▶ The added-suffering view: The meaning of the slap adds insult to the mere injury the slap inflicts.

3. THE ADDED-SUFFERING VIEW (CONT.)

- ▶ Emotional suffering vs. physical suffering
- ▶ A meaningful slap merits or gives reason for emotions; it makes emotional suffering fitting.
- ▶ Meaningful suffering is rationally evaluable ('reasons-response' or 'judgment-sensitive'); meaningless suffering is a-rational.
- ▶ A meaningful slap can merit meaningful suffering, i.e., rationally evaluable emotional suffering, due to its content.

3. THE ADDED-SUFFERING VIEW (CONT.)

- ▶ Three complications:
 - ▶ First, a meaningless slap can also give reason for meaningful suffering. However, a meaningful slap merits meaningful suffering *due to its meaning*.
 - ▶ Second, a meaningful slap can merit meaningful suffering even if it is not intended to do so.
 - ▶ Third, whether a meaningful slap merits meaningful suffering depends on *what* it means.

3. THE ADDED-SUFFERING VIEW (CONT.)

- ▶ Added-suffering view applied to hard treatment:
 - ▶ Meaningless hard treatment causes a-rational suffering but also merits rationally evaluable, meaningful suffering. E.g., lack of freedom merits sadness.
 - ▶ However, meaningless hard treatment does not merit meaningful suffering due to what it means; it merits meaningful suffering due to what it does.
 - ▶ Question: Is there a justification of hard treatment on which the *meaning of hard treatment* merits meaningful suffering?

3. THE ADDED-SUFFERING VIEW (CONT.)

- ▶ Added-suffering view applied to hard treatment (cont.):
 - ▶ Answer: yes.
 - ▶ Moderate-retributivists claim hard treatment is condemnatory. It is therefore meaningful.
 - ▶ Hard treatment merits meaningful suffering twice: once due to the burdens and deprivations it imposes and once due to the condemnatory meaning of those burdens and deprivations.

3. THE ADDED-SUFFERING VIEW (CONT.)

- ▶ Added-suffering view applied to hard treatment (cont.):
 - ▶ Moderate-consequentialists: hard treatment is justified by its consequences, not by its meaning. So there is no reason to suffer due to the meaning of hard treatment.
 - ▶ Moderate-retributivists justify more suffering than moderate-consequentialists, not because retributivists justify harsher treatment, but because of the way they justify the same hard treatment.

3. THE ADDED-SUFFERING VIEW (CONT.)

- ▶ “As soon as men had begun to appreciate one another and the idea of consideration had taken shape in their mind, everyone claimed a right to it, and one could no longer deprive anyone of it with impunity. From here arose the first duties of civility even among Savages, and from it any intentional wrong became an affront because, together with the harm resulting from the injury, the offended party saw in it contempt for his person, often more unbearable than the harm itself.”
(Rousseau 1997, 166)

3. THE ADDED-SUFFERING VIEW (CONT.)

- ▶ "...one kind of skeptic, granting that penalties are needed if legal rules are to be enforced, and also that society would be impossible without general and predictable obedience to such rules, might nevertheless question the need to add condemnation to the penalizing of violators. Hard treatment of violators, he might grant, is an unhappy necessity, but reprobation of the offender is offensively self-righteous and cruel; adding gratuitous insult to necessary injury can serve no useful purpose." (Feinberg 1970, 115)

4. THE TRANSFORMATIVE VIEW (OF MEANINGFUL INFLICTION OF SUFFERING)

- ▶ Added-suffering view: when meaning merits suffering meaningful suffering is added to meaningless suffering.
- ▶ This section argues: **Not always.**
- ▶ Sometimes, meaning does not add meaningful to meaningless suffering but turns meaningless suffering meaningful.

4. THE TRANSFORMATIVE VIEW (OF MEANINGFUL INFLICTION OF SUFFERING)

- ▶ Two cases of being meaningfully slapped:
 - ▶ **Case 1:** The slap is intended to humiliate you and merits insult and resentment.
 - ▶ **Insult is added to injury:** The unjustified slap gives you reason for meaningful suffering (e.g., insult and resentment) that you did not have before.

4. THE TRANSFORMATIVE VIEW (CONT.)

- ▶ Two cases of being meaningfully slapped in the face:
 - ▶ Case 2: the slap is a justified condemnation of some wrongdoing on your part. E.g., the person who slaps you is a friend whose trust you betrayed.
 - ▶ The slap does not give you new reasons for suffering and the pain it inflicts is meaningful.

4. THE TRANSFORMATIVE VIEW (CONT.)

- ▶ More on Case 2.
 - ▶ What the slap means—what it says to you—is that you have independent reasons for guilt and remorse.
 - ▶ In recognizing the slap as a justified reaction to your offense and in feeling guilt and remorse, you experience the pain inflicted by the slap as itself fitting to your betrayal.
 - ▶ The transformative view: meaningless suffering (the pain) is made meaningful.

4. THE TRANSFORMATIVE VIEW (CONT.)

- ▶ How does meaning transform physical suffering?
 - ▶ Suffering from *x* partly consists in a desire that *x* not be occurring (Brady 2018) or in an aversion or attitudinal displeasure toward *x* (Kauppinen 2019).
 - ▶ Distinction between **source** and **form** of suffering.
 - ▶ Meaningless **pain** vs. **grief**.
 - ▶ The **physical pain** inflicted by the slap is the **form** of your suffering; its **source** is your **betrayal**.

4. THE TRANSFORMATIVE VIEW (CONT.)

- ▶ The form/source of suffering
- ▶ Objection to the transformative view
 - ▶ Pain is a-rational. So it cannot be fitting to wrongdoing.
 - ▶ Compare: heart racing during fear; headaches and loss of appetite during grief.
 - ▶ Response: physical sensations are *not essentially* rationally evaluable, but they sometimes are.

5. HARD TREATMENT ACCORDING TO THE TRANSFORMATIVE VIEW

- ▶ Moderate-consequentialists maintain that hard treatment is justified by its effects; moderate-retributivists maintain that hard treatment is justified as condemnation.
- ▶ Only moderate-retributivists justify hard treatment by appealing to its content and meaning.
- ▶ Added-suffering view: moderate-retributivists justify more suffering than moderate-consequentialists do.
- ▶ Transformative view: moderate-retributivists justify less suffering than moderate-consequentialists do.

5. HARD TREATMENT ACCORDING TO THE TRANSFORMATIVE VIEW (CONT.)

- ▶ If hard treatment is justified only by its consequences, then it is a source of meaningless and meaningful suffering.
- ▶ But if hard treatment is justified as condemnation, then it consists in burdens, impositions, and deprivations, that are fitting to the offenders' wrongs.
- ▶ Suffering hard treatment is like suffering guilt and remorse.
- ▶ The source and reason of suffering are the wrongs.

5. HARD TREATMENT ACCORDING TO THE TRANSFORMATIVE VIEW (CONT.)

- ▶ Why the added-suffering view of meaningful hard treatment is wrong:
 - ▶ Condemnatory treatment *does not add* reasons for suffering; it *accentuates* existing reasons.
 - ▶ Hard treatment is a *form* of suffering whose *source* is the offender's past wrong. Hard treatment does not give offenders new reasons for suffering.

6. BACK TO THE DISAGREEMENT ABOUT HARD TREATMENT

- ▶ **Ideally**, we should seek a system of penal punishment that is not intended to give offenders more reasons for suffering, but to inflict on them suffering they already have reason to experience.
- ▶ **Objections**: too harsh; relieves the state of responsibility.
- ▶ **Concessive response**: existing forms of hard treatment are unlikely to be justified as meaningful.
- ▶ **And yet there is a temptation to view existing forms of hard treatment as meaningful because the alternative – that suffering is inflicted for its social benefits – seems even worse.**