

Opinion

Volume 2 Issue 3 - March 2017
DOI: 10.19080/JFSCI.2017.02.555588

J Forensic Sci & Criminal Inves

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A Flawed Theory of Justice



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Submission: March 07, 2017, 2017; Published: March 22, 2017

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Opinion

Proportional punishment—"Let the punishment fit the crime"—is arguably the foundational theory of criminal justice. It is a flawed theory and responsible for massive dysfunction in the "criminal justice" system. Enlightened officials struggle to circumvent these dysfunctions and to put modern insights into practice, but the archaic theory raises its head at every turn to make their task more difficult. Primary responsibility for the tenacity of the old ways lies with legislators. No amount of intellectual gymnastics and jiggering of definitions of can disguise the fact that revenge is the core principle of criminal justice policy. "Retribution" is its code word and becomes "justice" when the "right amount" of revenge/retribution has been inflicted. The first flaw in this thinking is that the "right amount" is in the eye of the beholder. "An eye for an eye" was once considered "just", or perhaps a death for a death, or hanging for shoplifting. Of these perhaps only a death for a death would now be considered "just", but who knows how long that will remain true? Deterrence of crime is offered as a rationalization for "retribution" and is not entirely devoid of justification. It would be hard to argue that a policy of no punishment would deter as well as a policy of some punishment. This serves to obscure the fact that present day punishments, designed as they have always been, for "justice", considers deterrence only as an afterthought. Effectiveness is rarely investigated or evaluated.

Another flaw in the theory is the expectation that a one-size-fits-all punishment for a particular offense will be equally effective for all. Punishments tailor made for the individual offender could be far more effective. "Justice" as currently conceived takes no account of rehabilitation and frequently interferes with it, to the detriment of crime prevention and thus to society. It has been said (accurately) that we build prisons and jails to contain people we are afraid of and fill them with people we are mad at. This results in a massive misallocation of resources to ineffective practices. Rational policy would restrict use of prisons to contain dangerous offenders and enforce compliance with alternative sentences by others. The quest for justice leads to a policy of excusing offenders with various forms of mental impairments. This leads to inconsistent definitions of the "right amount" of various forms of impairment. Sentences tailor made to individual offenders would eliminate the need to define some sharp boundary between "enough" and "not enough" of a particular form of impairment. If sentences were designed for deterrence and rehabilitation, punishment could either included or not included depending on its expected effectiveness.



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DOI: 10.19080/JFSCI.2017.02.555588

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