

SHOULD SIMON BE IN GAOL?

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Ethics Essay

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Background

My cousin, Simon (not his real name), whom I hardly know, was recently imprisoned in Yatala, a maximum security prison, for a minimum of eight months. He plead guilty to stealing money from his company to finance debts accrued through his addiction to gambling. He is married to Jane, who to this point has stayed by him. Financially, they are ruined.

He was offered a transfer to a lower security prison, but was advised not to go by other prisoners, because drugs and violence are more prevalent there, and he would be several hours drive away from his friends and relatives, making it difficult to maintain his relationships with them (Even at the moment he is only allowed two, forty minute visits* per week).

Upon his arrest, Simon admitted his gambling problem, and under his own initiative joined Gambler's anonymous, and saw a psychologist regularly. He felt that both of these were a significant benefit to him, convincing him of his problem, and providing strategies and support to overcome it. He believes that in order to totally overcome his addiction he needs to continue with GA, and his psychologist, but is unable to do so now that he is in prison, where there are no such services.

The question for discussion is,
Was Imprisoning Simon the most Ethically Appropriate Response to his
Conviction?

*10-11s more a matter of law or ethics or both? Consider
— they related in this case?*

Gilligan warns that we must consider not only the issue of justice and fair treatment, but also how various relationships are affected by Simon's imprisonment¹. Traditionally, the only care or relationship questions asked with respect to imprisonment dealt with the care of society, not the care of the criminal or their family². More recent Christian reflection on the prison system and the ethics of imprisonment focuses strongly on issues of relationship based on the biblical themes of punishment as reconciliation. The major focus of this paper will be the evaluation of traditional imprisonment ideologies with respect to whether they adequately reflect a concern not only for justice, but for Simon and his relationships with others.

Until recently, I would have justified using Simon as a case study on the basis that, although I had access to facts about him, I didn't really know him personally, and therefore could remain objective and dispassionate. I now agree with Gilligan that such an attitude is a dangerous one, because disassociation can actually impede moral decision making. Rather than treat Simon like a stranger, I should be trying to treat strangers like family³.

*interesting
transformation
in attitude!*

¹ As summarised in Gilligan, C., "Moral Orientation and Moral Development" in Kittay, E. F., & Meyers, D. T., *Women and Moral Theory* (Rowman & Littlefield 1987)

² For example Calvin, *Institutes*, IV.XX.9-10.

³ An issue this raises, that I cannot deal with here, is whether the present justice system can cope with the relationship perspective in its legal and ethical decision making, and in particular in its decisions about responding to law breakers. It appears from casual observation that some judges do so, but that the legislation itself is not constructed to ensure that this happens.

*yes - it is
an disassociation can
(voluntary?)*

I will take it as given that Simon did the wrong thing (though consequentialists and contextualists could perhaps argue otherwise), primarily because he himself believes this. I therefore begin with the assumption that society is justified in responding to his theft.

Whether that response should be imprisonment depends on *why* Simon is imprisoned⁴. What will imprisonment do to/for Simon and society? There are three predominant views⁵; retributive (Simon must 'pay' for what he did), deterrent (we will scare him out re-offending) and rehabilitative (we will cure him of the desire to re-offend). To this I would add protective (keeping him and especially us safe until he's better).

Judgments about the models will only be useful if we first consider the context in which they are to be applied, in this case Australia in the 1990s, where society believes in certain individual rights. Further, this paper is written from a Christian perspective with a particular understanding of who we are, and what makes for a healthy society.

Having briefly outlined these rights, and my view of humanity and healthy society, I will take what I believe to be the most compelling argument for Simon's imprisonment from each of the four ideologies mentioned above⁶, and examine whether they

⁴ Admittedly I am assuming that there is no compelling deontological necessity to imprison law breakers, but I have not read of anybody else suggesting that there is.

⁵ Williams, R., "Penance in the Penitentiary", *Theology* vol. 95, 1992, p. 91; Forrester, D. B., "Punishment and Prisons in a Morally Fragmented Society", *Studies in Christian Ethics* vol. 6, 1993, p. 18; Uniting Church Assembly Social Responsibility & Justice Committee (UCASRJC), *Prison: The Last Resort*, p. 16; Law Reform Commission 1987 Discussion Paper # 29, cited in UCASRJC p. 17.

⁶ Thus avoiding the "straw man approach", which is one of several common pitfalls warned against in J. P. Wogaman, *Making Moral Decisions* pp. 47-61.

excellent
saves

provide sufficient grounds for violating Simon's *prima facie* rights and relationships, and how effective they will be in restoring Simon to a healthy relationship with society, while minimising the harm done in the process.

Excellent
you are
wonderful
ethical
you are
great
off
"P..."

Although the aims of the retributive and deterrent models are generally not thought to be relational, I believe that they can be, and I will present them in that light.

Simon's prima facie rights, (the justice perspective)

Simon was born with certain *prima facie* rights or privileges. We should not seek to harm him, or to discriminate unfairly against him⁷. We should respect his autonomy, do good to him where possible, and be truthful and trustworthy with him. In return, Simon has these obligations to us, as individuals and as a community. These privileges are *prima facie*, not absolute, but if we wish to curtail some of Simon's privileges in good conscience, we must be able to justify ourselves.

Simon has, he admits, not upheld his part of the bargain. He has done harm to his company, his family, and indirectly to all of us. He did not treat his company fairly, because he unjustly took money from it. To a small extent, he violated the freedom of the company by limiting its spending. To a larger extent he violated his family's freedom to spend their money as they desired. He

and their knowledge of their true financial situation

⁷ Of course, this discussion could be generalised, but I chose to use "Simon" and "We/Us" to emphasise that we are personally involved with the decisions 'society' makes, and that prisoners are real people with names, families etc. I hope that this will guard against the discussion becoming de personalised and 'justice' dominated.

1/2/20

harmed his company by stealing from them. He did not honour truth in his relationships, most significantly with respect to his family and company.

The question is, does that justify our curtailing of Simon's rights, and to what extent? Why should his rights be curtailed, and how do we address the problem that we cannot withhold his rights without to an extent withholding those of his family and friends, who are innocent? How can we ensure that whatever harm is inflicted generates a maximum amount of good for both Simon and ourselves, and to whom do we give priority?

(again, you use the principles helpfully to structure the questions.)

A Christian sketch of Simon and society in relationship⁸

Simon is loved by God and in relationship with God. He is one of us, he relates to a greater or lesser extent to us all (indeed to everyone in the world)

Everyone of us acts both immorally and morally. We all harm others, ourselves, and perhaps even God at times. We are all criminals who didn't get caught, or whose sins we have subjectively decided aren't worth responding to in court. Conversely, Simon is one of us, who did get caught, and whose sin was though big enough to punish through the criminal justice system. Apart from biblical testimony and church experience, various psychological experiments suggest that the difference between ourselves and Simon is contextual more than ontological⁹.

⁸ More detailed theological justification for this sketch is found in Forrester, pp. 24-29; Williams pp. 88-90; Edgar, K., "Quaker Peace and Prison Violence", *Theology* vol. 95, 1992, pp. 107-108.

⁹ Gleitman, H. *Psychology* 2nd edn (Norton & Co. 1986) pp. 398-404, summarises some of these.

was perhaps deserving more explicit attention. The basis of this rather important claim.

Simon badly damaged his relationship to some of us, and indirectly we all suffer slightly through his contribution to our common pool of immoral actions. Our response to his particular crime must be to act where possible to restore or strengthen those relationships. This does not *a priori* exclude inflicting pain or punishment through imprisonment. It does mean that what action we do take must hold the goal of improved relationships at the forefront. We do it humbly, helping a fellow traveller, not as righteous revenge takers, or patronising benefactors. Simon remains one of 'us', not one of 'them', for under God there is no 'them'. ✓

is justice
by
consequence?
(retributive)

Our question is whether imprisonment is the best way of restoring the relationships that Simon's theft has damaged. How well does each ideology fulfil our Christian desire to restore relationships while doing the least amount of harm?

Retribution (Simon must 'pay' for what he did so that people don't resent him)

Proposition

Simon did something wrong, and should pay for it. He was in covenant with society not to break the law, but he did. He therefore forfeits his *prima facie* privileges. Since it was his autonomy that allowed him to break the rules, his 'payment' will be to forgo it temporarily. This can be done most effectively by confinement in prison, where he will be obliged to follow orders, and given no say in his daily activities. ✓

Although he is not in a position to repay his debt financially, the company and society can get satisfaction from knowing that Simon suffered appropriately for his action. In Australian society, people who get off lightly, or are seen to be being given special treatment, are resented, making it difficult for them to relate to others. Punishing Simon is essential for him to be accepted back into Australian society.

Discussion

While the papers show that many would like to see retribution visited on Bond and Skase, it is doubtful that many or any will gain satisfaction from Simon's imprisonment¹⁰. His company is left without its money, and Jane is probably left more resentful than ever, since she is now left alone.

From a Christian perspective, since Simon admits his guilt, and is repentant, it is unacceptable for us to get revenge. The responsibility now lies with society to forgive him. However, given that we are less than perfect, many of us may desire to see Simon 'pay'.

If so, it may be just to expect Simon to lose some of his autonomy (since he abused the privilege, and 'took' some from his company). The harm Simon inflicted was removal of assets, so we could expect him to pay for his crime financially. Since his theft inconvenienced, rather than devastated, the company, his

¹⁰ The argument that he must be imprisoned to show that white collar criminals don't get treated more lightly than blue collar ones assumes that it is appropriate to imprison blue collar criminals in the first place. I don't have time to debate that here, but believe that close examination of their cases on an individual basis would often lead me to conclude otherwise.

repayments should at worst be inconvenient. Simon also betrayed relationships, but these cannot be restored through punishment, it can only be restored by the decision of the company, his family, and wider society, to forgive.

If Simon is in prison, he cannot earn money, and therefore cannot repay his debt. To obtain the most effective retribution, to limit his autonomy while maximising the speed of his repayments, we could sentence him to home detention for all but work related activities. The added bonus is that this will allow him to re establish the trust relationship with his family. We would thus minimise the suffering his family endures, which we are obliged to do since they have done nothing to invalidate their prima facie privileges.

✓ excellent argument

Deterrent (we must ensure that this doesn't happen again).

Proposition (#1)

Society should not imprison Simon for revenge. However, if Simon doesn't suffer to some extent, there will be no fear of punishment to stop him re-offending, or others copying him, which would lead to even more wounded people and shattered relationships. We cannot exempt Simon from imprisonment without setting a precedent.

of course
How does
deter
deterrent
- like
repaying
calculated
etc

Discussion (#1)

The temptation to steal is common to most of us, and as children the fear of discovery and punishment was the biggest deterrent¹¹. The deterrence policy takes the Aristotilean line, that once we rationally understand the negative consequences of an

¹¹ Freud's theory of development, cited in Stein, E. V., *Guilt Theory and Therapy*, p. 37.

action, we will avoid it. Edward's "Nature of Virtue" argument, if reversed to present "The Nature of Immorality", convincingly refutes this position.

Handwritten notes: "I think I can observe - need to fast out to ..."

✓ As a child, my understanding of right and wrong, and my fear of punishment was never sufficient to stop me disobeying my parents. I still stole biscuits, stayed out too late etc, then lived in fear of discovery. As an adult I did something that I knew was morally indefensible, with likely deadly consequences for myself and my co-conspirator. At these moments of decision it was not reason, but desire and passion, even addiction, that drove me.

Simon, too, was motivated to steal by passion and addiction, and by fear of his family discovering his lies. There is no evidence that the rest of us are any less likely to break the law if Simon is imprisoned¹². Indeed, for Simon, imprisonment demonstrably increases the likelihood of a person re offending¹³!

Handwritten notes: "Is this a ... of a ...?"

Handwritten notes: "yes -> ... turn into a ... crime!"

Proposition (#2)

Deterrence fails because the sentences are too lenient, and prison conditions too comfortable. Simon should be imprisoned for longer, and his autonomy more sharply curtailed, until the point is reached where the deterrence is big enough. That is the view of Kennet and others¹⁴.

¹² UCASRJC p. 16. Forrester p. 18.

¹³ NSW Bureau of Crime Statistics & Research, cited in UCASRJC p. 17.

¹⁴ UCASRJC p. 2, quoting various news articles, "Kennet We will toughen terms in jail (no reference)", "Our gaols are too soft (Western Mail 20.12.86)", "...sentences need to be tougher... (Sunday Telegraph 3.3.86)".

Discussion (#2)

Prisons are already in disgraceful condition, and the suffering that occurs in them is well documented¹⁵. Since convictions for theft continue in countries where amputation is the stipulated punishment, it is difficult to imagine much that could deter people who are desperate or sick, enough.

It seems that imprisonment as deterrence, even when unjustly harsh, is ineffective. It is therefore an invalid motivation for imprisonment, even before we get to relationship issues.

Rehabilitation (hurting to heal)

Proposition

Doctors must often act with maleficence in order to be beneficent. We do not *want* to harm Simon, but he should be incarcerated so that we can ensure that he undergoes a process of rehabilitation, and emerges cured of his addiction and therefore with no need to re-offend. There is no desire to punish, and his conditions will be as humane and pleasant as possible, but we must limit his autonomy to ensure his healing. Given his condition, he cannot be trusted, nor should he be expected, to seek out rehabilitation on his own.

Handwritten notes in left margin: "...of Simon's condition... really..."

Discussion

From a Christian perspective, this is the most compelling case for Simon's imprisonment. His confession and repentance, and our forgiveness of him does not preclude his imprisonment because in this model he is not being punished. He is being forcefully 'hospitalised', to ensure his cure. The patriarchal assumptions are obvious, but the motivation is commendable. ✓

¹⁵ Beach, W., *Christian Ethics in the Protestant Tradition*, p. 120; Williams p. 92; Edgar p. 106-108; Forrester p. 16; UCASRJJC pp. 21-28.

Handwritten notes on right margin: "For not only past actions but also all future behaviour. Addiction -> responsibility -> autonomy"

Handwritten notes at bottom right: "what do you really think about this?"

Unfortunately, even with the best possible intentions, rehabilitation is problematic in a prison environment. The terrible conditions in prisons, as cited above, are arguably not conducive to the healing process. Further, the scarcity of resources means that the environment, and professional assistance needed is lacking¹⁶. Also, it is by definition forced or at least strongly coerced rehabilitation, whereas most counsellors agree that for people to change they must decide to do so for themselves. Finally, since a 'rehabilitated' prisoner is likely to get out sooner, the wrong motivation for change exists, and the motivation ceases once the prisoner is released.

too early to compare

✓ 1998 - the accountability of the person is compromised by the temptation to deceive for self-serving reasons.

✓ 2. demonstration mechanism? repentance

Simon was already voluntarily participating in Gambler's Anonymous, and seeing a psychologist, and the rehabilitative effects of these were clearly evident to himself and his family. Now that he is in prison neither of these are possible, and he is removed from all significant support networks that might encourage him as he tries to rehabilitate himself. Since his every move is dictated to him by others, his sense of accountability and personal power to control his own actions is probably being eroded, which is damaging to somebody attempting to gain self control.

✓ 1998

✓ 998

As Forrester pointed out¹⁷, the theories may sound impressive, but in practice Simon's imprisonment is impeding his rehabilitation. If Simon's rehabilitation is the only concern, then his imprisonment is not only unjustified, but counter productive.

✓ excellent position
1. a similar argument can be made for psychiatric "diagnosis" and hospitalization - helps producing the phenomenon - predicted
2. cause of predicted

¹⁶ Ignatieff, M., "Imprisonment and the need for Justice", *Theology* vol. 95, 1992, p. 98.

¹⁷ Forrester, p. 20.

Protection (Keeping Simon & Society Safe)

Proposition

Simon is a thief with a gambling addiction. Although not physically dangerous, he must be separated from society until we can be sure that he will not steal from us, which would harm even more people, including Simon, and further damage his relationship to us.

perhaps too strong?

Discussion

Simon has demonstrated repentance, and a desire to overcome his addiction, thereby removing the danger of him stealing again. Keeping him imprisoned for eight months in dehumanising conditions, and without therapy will, if anything, increase his danger to us upon release. Simon was a chartered accountant, but his accreditation has been removed. It would be extremely unlikely that he could reinstate himself in a position of trust sufficient to steal from an employer again, unless they freely choose to put themselves at risk.

We are obliged to take genuine confession and repentance seriously. If we were to lock up everybody we considered to be a potential danger to society, there would be many more arrested before Simon.

Keeping Simon on home detention, and monitoring his work placements until he recovers is more likely to protect us, and provides the chance for damaged relationships to be healed at the same time. ✓

(plus cost society much (PS))

Conclusion

None of the models considered offer sufficient justification for imprisoning Simon, indeed it is demonstrable that imprisonment would actually undermine our purpose in doing so.

Simon should at worst have been subjected to limited home detention. Since he desired rehabilitation through GA and psychologists, this should have been encouraged and even financed if necessary. To some level it was probably appropriate for Simon to have made financial restitution to the company he stole from, in keeping with his means.

When Simon's case is reviewed in October, he ought to be released under home detention for the remainder of his sentence, and he should be encouraged and aided to continue his rehabilitation. In regards financial restitution, it must be remembered that since the court has, in its wisdom, decided that imprisonment was a reasonable form of retribution, his time served must be taken into account in any repayments demanded.

Distinction

Jason: Excellent paper. Clear, concise, insightful, and well-documented. You have a genuine gift for clearly getting to the heart of complex issues and making persuasive arguments. Combined with your genuine passion/awareness of the care & relationship dimensions of clinical life, these relational skills will be of great benefit to the Christian community and society. Keep striving for excellence in health, education and service.

References

← Bead?

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✓