

ON RETRIBUTIVE JUSTICE

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Hsiao has recently developed what he considers a 'simple and straightforward' argument for the moral permissibility of corporal punishment. In this article we argue that Hsiao's argument is seriously flawed for at least two reasons. Specifically, we argue that (i) a key premise of Hsiao's argument is question-begging, and (ii) Hsiao's argument depends upon a pair of false underlying assumptions, namely, the assumption that children are moral agents, and the assumption that all forms of wrongdoing demand retribution.

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Hsiao (2020) presents what he considers a 'simple and straightforward' argument for the moral permissibility of corporal punishment. According to Hsiao, corporal punishment involves inflicting physical pain in response to an act of wrongdoing. But since this is so, corporal punishment satisfies the retributive purpose of punishment. This is because, according to retributive punishment, '[j]ustice is being done in that the wrongdoer receives a deserved harm as a way of balancing the scales of morality'. But if corporal punishment satisfies the retributive purpose of punishment, and spanking children *just is* a form of corporal punishment, it follows, says Hsiao, that spanking children is morally permissible and that 'a child who is spanked gets what he deserves'. Formally, Hsiao's argument goes as follows:

1. Corporal punishment (CP) is the intentional infliction of physical pain in response to an act of wrongdoing.

2. If CP is the intentional infliction of physical pain in response to an act of wrongdoing, then CP satisfies the retributive purpose of punishment, and thus is morally justified.
3. Therefore, CP satisfies the retributive purpose of punishment and is morally justified. (from 1 and 2)
4. If CP satisfies the retributive purpose of punishment and is morally justified, then spanking satisfies the retributive purpose of punishment and is morally justified.
5. Spanking satisfies the retributive purpose of punishment and thus is morally justified. (from 3 and 4)

We argue that Hsiao’s argument is seriously flawed for at least two reasons. Specifically, we argue (i) that Hsiao’s premise 2 is question-begging, and (ii) Hsiao’s argument depends upon a pair of false underlying assumptions, namely, the assumption that children are moral agents, and the assumption that all forms of wrongdoing demand retribution.

First Worry

Recall Hsiao’s premise (2):

2. If CP is the intentional inflicting of physical pain in response to an act of wrongdoing, then CP satisfies the retributive purpose of punishment and thus is morally justified.

According to Hsiao’s (2), the intentional infliction of physical harm in response to an act of wrongdoing directly implies that corporal punishment is a proper or reasonable form of retributive punishment. That is, on Hsiao’s (2), physical punishment automatically constitutes a morally justified form of retributive punishment. And this is because, says

Hsiao, the goal of administering corporal punishment is not to correct the wrongdoer or even deter future misbehaviour. Rather, administering corporal punishment is purely a matter of retributive justice in that the wrongdoer receives a *deserved physical harm* as a way of balancing the scales of morality.

But premise (2) is plainly question-begging, for we can ask: *why* exactly should the intentional infliction of physical harm automatically constitute a morally justified form of retributive punishment? The fundamental issue, as we see it, is *precisely* whether the infliction of physical harm constitutes a proper, reasonable, or morally justified form of retributive punishment. So far as we can determine, however, Hsiao provides no argument for this claim.

We can develop this point a bit more fully. Retributive justice is standardly taken to be the idea that those who commit a wrongful act deserve to suffer a punishment that is proportionate to that wrongful act, where a punishment (i) imposes some sort hardship on the person being punished, (ii) the hardship is imposed in response to a wrongful act, and (iii) the hardship is imposed as a way of sending a message of condemnation for the wrongful act (Walen 2021). So, suppose that Jones intentionally vandalizes a building or steals a car. According to the demands of retributive punishment, Jones deserves *some* sort of punishment for her wrongdoing, one that is proportionate to her wrongful act, imposes a hardship on Jones, and serves as a message of condemnation for her wrongful act. We share the intuition that Jones deserves some form of punishment; Jones deserves to be punished for her wrongdoing. According to Hsiao's (2), however, the intentional infliction of *physical* harm – say, a series of painful whippings, lashings, or even caning (which Hsiao apparently endorses) – would automatically constitute a proper or reasonable form of punishment in response to Jones' wrongdoing, and thus would be morally justified. But again, why must this be so? Perhaps what Jones deserves in response to her wrongdoing is not *physical* punishment but

something else. Perhaps, and not implausibly, Jones deserves as punishment to be forced to perform a certain number of hours of community service in addition to receiving a fine. Perhaps (and again, not implausibly) Jones deserves as punishment short-term incarceration in conjunction with some form of asset forfeiture. Surely, and contrary to Hsiao, there is a wide range of punishments that can plausibly be given in response to Jones' wrongdoing, none of which, importantly, involve the intentional infliction of physical harm.¹

The worry here, then, is this: Hsiao asserts that premise (2) is true and that the intentional infliction of physical harm upon a wrongdoer automatically constitutes a proper form of retributive punishment, and thus is morally justified. But Hsiao fails to provide an argument for (2). Since this is so, Hsiao has begged the question in favour of corporal punishment and, therefore, Hsiao's argument for the moral permissibility of corporal punishment fails.

Second Worry

The second worry is this: retribution for wrongdoing is justified only if the wrongdoers are moral agents. For only then can the wrongdoers be held morally responsible for the wrongs they have committed. Hsiao seems to assume that children are moral agents. But we might ask: should *children* be viewed as moral agents?

Traditionally, moral agency is assigned only to those who can be held responsible for their actions. But, according to a long-standing – indeed, dominant – philosophical tradition, children are not morally responsible for their actions, and therefore should *not* be viewed as moral agents. The basic rationale for this goes as follows.

Philosophers typically acknowledge two individually necessary and jointly sufficient conditions for an agent to be morally responsible for an action: a *control condition* and an *epistemic condition*. The control condition has to do

with whether the agent possessed an adequate degree of freedom in performing an action, whereas the epistemic condition is concerned with whether the agent's epistemic state was such that she can properly be held accountable for an action and its consequences.

Let's focus on the epistemic condition. There are four plausible epistemic conditions required for moral responsibility (Rudy-Hiller 2021). Firstly, the epistemic condition requires of an agent that she is *aware of the circumstances* in which she acts, that is, she must be aware of what she is doing. Secondly, the condition requires of an agent that she is *aware of the action's moral significance*, that is, the agent must have a belief about the action's being wrong or a belief about the presence of an action's wrong-making properties. Third, the condition requires an *awareness of consequences*. That is, the agent must have a belief that a harmful consequence of some sort would or might occur as a result of her action. The idea here is that the requirement of awareness of consequences is usually understood in terms of *reasonable foreseeability* by the agent. Fourth and finally, the condition requires an *awareness of alternatives*. According to this last condition, an agent can't be held blameworthy for a wrong action unless she believes that there is at least one alternative (and morally permissible) course of action available to her.

Clearly, moral responsibility, as we've just outlined here, requires of an agent that she possess a wide range of highly developed intellectual capacities and reflective abilities. It is for this reason that moral responsibility is standardly assigned only to those agents who actually possess the relevant capacities and abilities, namely *normal adult humans*. But now, if moral responsibility should be assigned only to those who possess the relevant intellectual capacities and abilities, then, clearly, children (roughly below the age of sixteen) and adults with mental disabilities and certain cognitive impairments should not be considered moral agents. The reason for this is straightforward: children and adults with mental disabilities simply *fail* to

possess the kinds of intellectual capacities and reflective abilities that are necessary for moral agency. Specifically, children and adults with mental disabilities and certain cognitive impairments should not be considered moral agents since it's implausible to suppose that they can satisfy the four epistemic conditions necessary for moral responsibility outlined above.

The upshot here is this. Since children, especially young children, can fail to satisfy the four epistemic conditions necessary for moral responsibility, it's not appropriate to hold children morally responsible for their actions. But, if children should not be held morally responsible for their actions, then, contrary to Hsiao, children should not be viewed as moral agents. But if that's so, then Hsiao's argument fails as his argument for the moral permissibility of corporal punishment depends upon the assumption that children are moral agents.

Third Worry

This brings us to our final worry. Hsiao makes it clear in his argument for the moral permissibility of corporal punishment that all forms of wrongdoing demand retribution or punishment. As Hsiao himself puts it:

punishment is chiefly a matter of justice: it is about giving a wrongdoer what he has *come to deserve*. Retribution seeks to balance the scales of morality by inflicting deserved harm upon a wrongdoer.

But, contrary to what Hsiao asserts, it's false that all forms of wrongdoing deserve retributive punishment. As noted in the previous section, children do not deserve retribution for their wrongdoing, since they are not moral agents. And, as we argue below, moral agency is not a sufficient condition for retributive punishment. For not even all *adult* wrongdoing calls for retribution.

This becomes clear when one thinks about the various kinds of wrongdoing. The kind of wrongdoing that most clearly merits retribution consists of cases where the wrongdoing was *intentional* or *deliberate*. But many cases of wrongdoing are not intentional and consequently do not deserve punishment. Suppose, for example, that Jones attempts to help another a friend but, due to ignorance or some non-culpable error, Jones ends up harming her. Surely in such a case Jones does not deserve *punishment*, let alone physical punishment, as Hsiao recommends. The correct 'punishment' here would seem to require of Jones that she somehow correct the harm that she caused or confer a benefit on her friend. Or consider the following: according to various plausible moral theories (for example, Kantian deontological theories) we have duties to self – duties to develop our capacities and natural dispositions. On such views, ingesting harmful drugs would therefore be considered morally wrong. However, retributive punishment – indeed, any punishment at all – seems unjustified in these sorts of circumstances.

The basic point here, then, is this: moral agency is not a sufficient condition for retributive punishment. Hence, contrary to Hsiao's assumption, not *all* wrongdoing deserves retribution. But since this assumption undergirds Hsiao's argument, it follows that Hsiao's argument fails.

Conclusion

Since premise 2 of Hsiao's argument is question-begging, and since Hsiao's argument depends upon at least two false underlying assumptions, namely, the assumption that children are moral agents along with the assumption that all wrongdoing deserves retribution, we conclude that Hsiao's argument for the moral permissibility of corporal punishment fails.

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Note

¹ Another way of putting the objection here is this. Hsiao claims (i) that wrongdoers deserve retribution and (ii) that retribution is a matter of inflicting harm on the wrongdoer. Hsiao then notes that (iii) corporal punishment involves the infliction of *physical harm* on the wrongdoer. From (iii), however, Hsiao goes on to infer that (iv) corporal punishment therefore automatically satisfies the retributive purpose of punishment, and thus is morally justified. But, again, Hsiao doesn't provide any sort of justification for the inference from (iii) to (iv), that is, he doesn't provide an *argument* for the claim that the intentional infliction of *physical harm* automatically satisfies the retributive purpose of punishment. He merely asserts it.

References

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