

Critical Analysis of Theories of Punishment in Improving Road Safety

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Abstract

Over the past 100 years, the number of laws governing road transport has grown, giving judges and lawyers a steady stream of work. There doesn't seem to be any chance that the law will stay the same, since new offences and suggestions are made to improve road safety and keep people from getting hurt on the roads. But, as can be seen with speeding tickets, this good goal is often not understood by those to whom it applies. Education and better engineering of both roads and cars are also ways to reduce the damage caused by vehicles. The question is how far we can expect the law to go to achieve these goals and how to make crimes that are most likely to work. Why is it that the criminal law, and not some other part of the law, should try to stop bad driving behaviour on the road? Criminal law is different from civil law in that people who break criminal law are often made fun of in public. People who break civil law, on the other hand, may get fines, but they are generally not shamed in public for not following the law. A crime is not only against the person who was hurt, but also against the State as a whole. The State is in charge of taking people who break the law to court and punishing them for doing so. To figure out who should be punished, the State must decide ahead of time what kind of action should be made illegal and punished.

Keyword: Road Safety, Criminal Law, Behaviour, Punishment

Introduction

The first step is to look at what society is trying to do by making bad driving a crime, what some of the goals of punishment are in criminal law in general, and which of those goals are tried to be met by punishing bad drivers in particular. As we'll see, getting even is part of being fair. But it's not clear how much bad drivers should be punished based on how much damage they cause, or if they should only be punished if they cause damage. Cars are dealt with in two different ways by the government. The law seems to have a very different role in punishing bad drivers than it does in punishing bad drivers who kill. At this time, a driver is a criminal if they hurt someone. Most people agree that driving carelessly and killing someone is a crime, but this isn't true for smaller crimes like careless driving, which is usually seen as a crime even when no harm is done. People's feelings about this crime might have something to teach us about how to be better drivers. Before figuring out how the criminal law could be used to change how drivers act, it's important to figure out why drivers act the way they do. By looking at psychology, we can learn a lot about how the rules can be used to change the way drivers act.

If the point of criminal law is to punish bad behaviour, then it could be claimed that after a criminal conviction, the State doesn't need to do anything else to the convict, since labelling the driver as a wrongdoer may be enough to show society's disapproval. So, Hart says that sentencing needs a reason above and beyond this.¹ Most of the time, there are two kinds of reasons for punishment: practical, also called "reductionism," and "retributive." No one agrees on how much weight, if any, should be given to each type of justification, and there are many different points of view in the discussion. Hart says that there is one general reason why punishment is right, and that is that it leads to good results. However, revenge also plays a role in figuring out how much punishment is right in any given case.² Others, like Moore, say that the only reason punishment is right is because the person who did the wrong thing deserves it and that there is no need to find any other benefits of punishment.³

¹ H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 1-27 (Oxford University Press, 2nd edn., 2008).

² *Ibid*

³ Michael Moore, *Placing Blame: A Theory of the Criminal Law* 104–152 (Oxford University Press, London, 1st edn., 2010).

Utilitarian justifications

Williams says that the practical reason for punishing carelessness (like careless driving and dangerous driving) is that we hope to improve people's behaviour (in this case, their driving) by doing so.⁴This was acknowledged at a Law Society meeting in 1964, where it was said that "the vast majority of traffic offences were temporary lapses by ordinary men and women" and that the goal wasn't so much punishment as making them safer drivers.⁵Utilitarian justifications can be seen as the only ones applicable to crimes of strict liability such as speeding.

There are many ways to use punishment to make people behave better. First, all drivers may be less likely to drive badly if they know they could get in trouble (general prevention). Second, a driver could be discouraged from breaking the law again after being found guilty of a crime and facing the effects (this is called "specific or individual deterrence"). Some people have said that deterrence doesn't work when it comes to driving offences because if the immediate threat of physical harm to the driver or damage to the driver's property doesn't stop the driver from taking a risk, no other consequences that could happen in the end will either. Schulhofer says, "With regard to reckless or negligent behaviour, the motivation to stop is probably very strong in any case; the actor, if he is aware of the danger at all, will still want to avoid tort liability for injury to others, not to mention the possibility of injury to himself."⁶ Williams says that even though this is true, traffic violations can add to the pressure on bad drivers to change their ways or, in the worst case, to stop driving.⁷ In an earlier work, he made a more convincing case that punishment can make a person more careful about what he does because of the dangers he knows about. In the same way, punishment can make a person more foresighted by making him stop and think before committing to a course of action.

For a person who might break the law to stop doing something, he or she must be able to recognise that action as one that the law tries to stop. Drivers must know what kind of driving is illegal and realise that their own driving may fall into that category. Drivers should know the speed limit on a certain stretch of road and be aware of any changes to the limit so they

⁴ Glanville Williams, *Textbook of Criminal Law* (Stevens & Sons Ltd, London, 2nd edn., 1983).

⁵ Roger Hood, *Sentencing the Motor Offender* (Heinemann Educational, London, 1st edn., 1972).

⁶ Stephen J. Schulhofer, "Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law" *University of Pennsylvania Law Review* 1521 (1974).

⁷ *Supranote 4*

don't speed and get in trouble. Speedometers in cars make it easy to do this. Drivers should also know that they can't drive if they've been drinking, and if they do drink before getting behind the wheel, they should know how much they can have according to the current blood alcohol concentration (BAC) level. Drivers also know that they shouldn't drive carelessly or in a dangerous way. One thing that might make it hard to achieve the goal of deterrence when it comes to careless and dangerous driving is that potential criminals might not always connect their own actions with those that are against the law. This issue will be looked at again in the future.

You could say that all of the possible punishments for driving crimes have some effect on keeping people from doing it again. In fact, Ashworth points out that in some cases, the punishment is not just the term but also the process of going to court.⁸ Pearce's study backs this up. He found that most people who were charged with careless or dangerous driving went to court feeling "nervous, embarrassed, and ashamed." In cases of speeding where fixed penalty letters are used, the offender won't have to go through a public process to get punished, so this kind of punishment by process won't happen. The same is true for careless driving cases where the driver doesn't show up to court but pleads guilty by letter. Depending on how much money a driver has, having to pay a fine may or may not stop them from being careless or speeding. However, the threat of losing one's licence through immediate disqualification or points that add up under the 'totting-up' system may be a more effective deterrent. Walker, for example, says that drivers are more worried about getting kicked off the road than about getting fined.⁹ However, Mirrlees-Black says that disqualification will only work as a barrier if people who might break the rules know what will happen to them. She found that many first-time criminals she talked to didn't know that their crime could get them kicked out of school. This makes it harder for the law to stop people from breaking the law in general. Most of the criminals who were interviewed, though, said that their ban would make them less likely to commit crimes in the future. This means that disqualification seems to work as a personal deterrent. Harland and Lester also found that disqualification was the punishment that offenders talked about the most when they were asked. Half of the people who broke the law said they thought being banned would stop them, and a quarter said they thought a fine would stop them.

⁸Andrew Ashworth, *Sentencing and Criminal Justice* 67 (Butterworths, 3rd edn., 2000).

⁹Nigel Walker, *Why Punish?* 18 (Oxford University Press, 1991).

If you speed or drive carelessly, you won't go to jail. However, if you get caught drinking and driving or driving dangerously, you could go to jail. This is also usually what happens if you cause someone's death by driving dangerously or carelessly while drunk or high. However, the maximum sentence for causing death by dangerous driving is much higher than the maximum sentence for dangerous driving, and if someone dies because of careless driving, they can now get a prison sentence for causing death by careless driving even though they didn't do anything wrong in the first place. This can't be explained as a way to keep people from doing bad things. As was said above, if the chance of killing oneself or others doesn't stop a dangerous driver, it's unlikely that possible criminal penalties will. One tries to stop people from taking risks. But the fact that getting caught could lead to criminal punishments adds another factor to the equation of taking risks and the usefulness of deterrence. This needs to be explained more.

If there were no legal consequences for bad driving, drivers would only have to decide if they were willing to risk hurting themselves or others. One might think that this risk is enough to keep people from driving badly. As Aberg said, it's hard to understand why people need rules about road safety to change their behaviour. If drivers were acting rationally, they would stop doing things that make them more likely to cause an accident when they learn that doing those things makes them more likely to cause an accident.¹⁰ Groeger says that a driver's own safety, which is one of Driver's goals, doesn't have much of an effect. Instead, a driver's goals are to get to his or her objective, avoid obstacles, minimise delay and driving time, enjoy driving, feel in control, etc. It is the concrete expression and realisation of these goals, not abstract principles like safety, that really affects behaviour.¹¹ If drivers can be convinced that one of the goals is to avoid getting in trouble for driving offences, the law might stop bad driving. In a place where bad driving is a crime that can get you in trouble, Driver will probably look at both the risk of hurting someone and the risk that Driver will get in trouble for bad driving. Aberg thinks that the purpose of traffic rules is to give drivers new risks that are more likely to happen than the normal safety risks of driving.¹² For a rule to work, people must think that the chance of getting caught breaking it is high enough to make them follow it.

¹⁰Lars Åberg, "Drinking and Driving: Intentions, Attitudes, and Social Norms of Swedish Male Drivers." 25 Accident Analysis & Prevention 289-96 (1993).

¹¹ John A. Groeger, Understanding Driving Applying Cognitive Psychology to a Complex Everyday Task 189 (Psychology Press., London, 1st edn., 2000).

¹²*Supra* Note 10

For careless and dangerous driving, the risk of getting caught and the risk of hurting yourself or other people on the road must be looked at individually. This is because getting caught doesn't depend on causing a crash. But the driver might not know how likely it is that either of these things will happen. For the crime of causing death by dangerous driving, which can get you up to 14 years in jail, the driver must first figure out how likely it is that they will kill someone. If driver doesn't think about the chance of killing someone, driver won't think about the chance of being punished for doing so, either. Schulhofer says it this way:

It would seem that the deterrent effect of a penalty imposed only for causing harm would tend to diminish as the risk of harm (in terms of circumstances of which the actor should be aware) diminishes and as the extent to which the actor actually adverts to this risk diminishes This tendency to diminish as the degree of risk and the degree of the actor's advertence to the risk diminishes will presumably be reinforced by the natural tendency of many people to discount such contingencies.¹³

There are a number of psychological reasons why drivers don't take the risk of getting into an accident seriously. We'll talk about some of those reasons later in this chapter, but here are two that are worth mentioning quickly. The "subjective risk" of an accident is lower because people don't see themselves as part of the same group as "accident victims" and because most drivers think they are better than normal.¹⁴

To sum up, drivers can only be stopped from driving dangerously or carelessly. They can't be stopped from killing someone, because they have no control over what happens when they do something. As far as individual deterrence goes, most drivers who are convicted of causing death by dangerous driving or causing death by careless driving won't take risks while driving again, not because of the punishment they get, but because they have killed another person. Pearce et al. made this point in their research for the government, and it's backed up by research on how to stop dangerous driving (which is often a part of joyriding) in Australia,

¹³Supra Note 6

¹⁴RistoNaatenen and HeikkiSummala, Road User Behavior and Traffic Accidents 69 (North-Holland Publishing Co, 1st edn., 1976).

which shows that young people see the possibility of killing a bystander or a friend as a bigger reason not to go joyriding than the chance of going to jail.¹⁵

Back to how punishment can stop people from breaking the law, another way punishment tries to change behaviour is by making people unable to act. The problem with this utilitarian reason for punishment is that the effects only last as long as the term. Incapacitation can only try to change an offender's behaviour temporarily, while prevention and rehabilitation try to change it for good. One way to stop bad drivers is to take away their license. However, it's not always a good punishment because some drivers keep driving even after they've been banned. Offenders can also be made unable to do wrong by going to jail. It would be hard to say, though, that bad drivers should be locked up just because they can't drive. Bentham is credited with coming up with the economy principle, which says that since punishment is bad in and of itself, it should only be used when it is necessary and shouldn't be more than is needed to get the job done. If you believe in the saving principle, it's hard to see why drivers who drove dangerously or carelessly should go to jail. On the other hand, the offender could be made unable to drive without going against the frugality principle by being banned from driving for a long time and possibly being forced to give up his or her car. A third utilitarian justification for punishment is rehabilitation. This is often rejected as a valid justification on the basis that efforts to rehabilitate criminals have failed. However, in relation to bad drivers the prospects for successfully improving a driver's behaviour are greater.

Retributivist justifications

Now that we've talked about how the utilitarian goals of punishment can apply to traffic violations, we can talk about retaliation as a reason for punishment. It's possible that the meaning of "revenge" has changed over time. Schulhofer says that retribution is different from anger and retaliation. Retribution can be thought of as a theory of justice based on moral blameworthiness, which says that criminals should be punished in a way that is proportional to what they did wrong. The hard part is figuring out what a criminal's moral blameworthiness should depend on. More specifically, people disagree about whether a driver is morally responsible for the results of his or her acts or whether a driver is only morally responsible for his or her state of mind. Schulhofer says that a negligent offender's

¹⁵Emma McDonagh, Richard Wortley, et.al., "Perceptions of Physical, Psychological, Social and Legal Deterrents to Joyriding" 4 Crime Prevention and Community Safety 11-25 (2002).

blame must come from taking a risk that was against the law, and that the outcome of his risk-taking shouldn't change his sentence. There is no explanation as to why a discount should be given in cases where the harm is only risked and not caused. It is clear that killing someone by drink-driving is more harmful than merely creating a risk of killing by drink-driving. Apart from anything else, in the former case an individual becomes the victim of the driving, whereas in the latter case only a general class of other road users whose lives have been put at risk are directly affected. But this does not explain why a driver who kills deserves more punishment than one who does not, given that whether or not a driver kills depends on chance.

Some people have called the crime of causing death by dangerous driving "illogical" since it was made a crime in the middle of the 20th century. The fact that luck is so important to the crime is what makes it not make sense. Willett said about driving violations that don't end in death, "It's often a matter of chance whether the damage is big or not." It is usually the skill of other drivers or the quick thinking of the cops that keeps things from getting worse.¹⁶ As medical care and technology get better, luck has to play a bigger role, since many accidents that could have killed people in the past no longer do so if the person gets the care they need. It's not clear that the chance of death means a dangerous or careless driver should get more punishment than one who causes major injuries but doesn't kill someone because of something out of his or her control.

If we want to punish people the way they deserve to be punished, shouldn't they only be punished for things they can control? This gets us back to the question of what modern desert theorists see as the benefit of punishment. One benefit of a desert-based view of justice is that it puts the focus on how punishment helps people communicate.¹⁷ Even though desert theorists don't agree with practical reasons for punishment, they also know that if punishment didn't help stop crime, there would be no need for it because society would find other ways to show disapproval.¹⁸

It's possible that this is the main reason why people get in trouble for driving badly. When the law punishes a driver who has taken risks, whether on purpose or by accident, it is not just

¹⁶T.C. Willett, *Drivers After Sentence* 71 (Heinemann Educational, 1st edn., 1973).

¹⁷Von Hirsch Andrew., "The "Desert" Model for Sentencing: Its Influence, Prospects, and Alternatives" 74 *Social Research* 413-34 (2007).

¹⁸*Ibid*

trying to stop the driver or others from breaking the law again by threatening them with jail time, losing their license, or paying fines. It is also showing disapproval. When the law criticises something, it does so in order to change how people act in the future. Duff says that the goal is not just to change views and behaviour, but also to get drivers to change their behaviour in the future by getting them to realise that the behaviour that is illegal is wrong. In this way, the law also tells other people that this kind of behaviour is wrong. There are still some things that make it hard to reach these goals, like the fact that few people agree that speeding is "wrong."

Criminologists have found that drivers who break traffic rules do so because they don't believe the rules are true or that breaking them is a "real" crime or wrong thing to do. They like to feel in charge and don't want to follow a code of conduct that they think was made for the "average" driver, who isn't as good as they are. Instead, they follow their own code of conduct. As long as the road conditions and speed they are driving at don't make the job harder than what they are comfortable with, they have no reason to follow the rules. These drivers, whose violations may lead to accidents, need help to change the way they think about driving in order to change the way they drive. This is different from drivers who accidentally take risks by breaking traffic rules but need remedial training to stop driving badly. Based on these results, it seems like the criminal law should treat these two types of drivers differently.

If we agree that sentencing should try to both stop people from breaking the law and make people feel like they got what they deserved, then we can see that the current law fails at its job in many ways. The first problem is that the government isn't doing its main job, which is to teach people by putting them in jail, because traffic violations aren't seen as "real" crimes. To use von Hirsch's idea of the preventive function of the criminal sanction, which is that it gives a prudential reason in addition to the moral reason not to do the forbidden thing, it can be seen that drivers already have the prudential reason not to drive badly as long as they think they might be caught, but they don't see the moral reason because they don't agree with the message that bad driving is wrong.

Conclusion

In terms of retribution and the desert theory, bad drivers won't be seen as "deserving" penalties if driving offences aren't considered "real" crimes. The only time this isn't true is

when a driver kills someone with their car. In contrast to how bad drivers are usually seen, people who kill people with their cars are thought to deserve a harsher sentence. People have said that punishments based on revenge should focus on the driver's responsibility for taking risks rather than on the chance of harm. If drivers are to be seen as deserving of punishment, views about driving offences need to change to show how morally wrong it is to put others in danger on the road, whether or not the danger actually happens.

Concerning the question of deterrence, the problem is that the way things are set up now, deterrence is only likely to work after an accident has already caused damage, which is too late. If drivers think it's likely that their dangerous driving will be caught and they'll be charged, the present penalties for dangerous driving may be enough to stop them. But there are two things that make this kind of prevention hard to do. First of all, if a bad driver doesn't cause death or major injury, it's unlikely that they will be caught. Second, people who are in charge of bringing cases to court don't always agree on what kind of driving is dangerous and careless. The implication is that the standard of a "competent and careful driver" is not easy to find, either by the police, lawyers, and judges, or by the driving public. How can people who might break the law be stopped from doing so if they don't know what the crime is?