

Teaching Fiction?: *The Wire* as a Pedagogical Tool in the Examination of Punishment Theory

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HBO's highly acclaimed television drama *The Wire* has been hailed by some as one of the most accurate depictions of life in an American city.¹ With its in-depth examination of the drug enterprise, police, city government and other institutions and social maladies that produce crime, *The Wire* rejects the formulaic features of a classic crime drama and has no clear heroes or villains. Its complex character portrayals and plot lines provide a fascinating media textbook for students to explore the basic maxims of punishment theory.

A typical criminal law class begins by defining punishment as the intentional infliction of pain, suffering or deprivation of property imposed by the state on a person convicted of a crime. Students learn that punishment is an "evil" that typically violates basic human rights and requires some persuasive justification.² Students then spend a significant portion of the semester exploring the moral correctness of punishment (retribution) and the positive outcomes of deterrence, incapacitation and rehabilitation that punishment may produce (utilitarianism). *The Wire's* graphic depiction of life in Baltimore allows students to examine the validity of these justifications for punishment.

Retribution, Motives and Just Deserts

The Wire urges students to interrogate a core premise of retribution—that punishment is intrinsically and morally good for society.³ By perceiving punishment as inherently good, retributivists forget that punishment is

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1. Ruth Penfold-Mounce, David Beer & Roger Burrows, *The Wire as Social Science-Fiction?*, 45 SOC. 152, 155 (2011).
2. Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 850 (2002); David Dolinko, *Three Mistakes of Retribution*, 39 UCLA L. REV. 1623, 1626 (1992).
3. Christopher, *supra* note 2, at 864; see Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87, 116, 118 (2010).

an unfortunate necessity that is incompatible with other equally important moral goods of equality and respect, especially given the persistent pattern of punishment that disproportionately targets poor African Americans.⁴

While retributivists tend to agree that the underlying justification for punishment is the offender's "moral desert," theorists differ on how to determine whether an offender is morally deserving of punishment. Choice theorists ascribe criminal responsibility to the responsible moral agent who has the capacity to make a rational choice and a fair opportunity to choose a law-abiding course.⁵ Character theorists premise criminal blameworthiness on the actor's bad character.⁶ The complex narratives that unfold throughout *The Wire* challenge the retributivist notion of an independent criminal who makes a meaningfully autonomous choice. Viewers likely understand that young characters like Wallace and Michael Lee have little option but to sell drugs to take care of themselves and other children. Even the most violent characters in the series at times appear more human against the backdrop of their life circumstances. *The Wire* capitalizes on our emotional connection with these characters to shift our outrage from the crime and the criminal to the circumstances that produced them.

The Wire also challenges the notion that contemporary retributive punishments are meted out by neutral state arbiters who set aside their own interests for the greater good of society. Virtually every political decision in *The Wire*, including decisions about who to punish and why, are designed to preserve power and ensure the personal and institutional success of those with voice and capital. Political candidates make their careers by running on tough-on-crime platforms regardless of whether those platforms are fair and effective. Police and prosecutors follow investigative leads that score quick political points and avoid media backlash. And high-ranking state officials routinely arrest low- and mid-level drug traffickers rather than high-ranking drug lords who have financial ties to the politicians. *The Wire*, with its implicit critique of the war on drugs, exposes the reality of the state's criminal justice policies that fail to satisfy the basic requirement of Kantian retributivism which strenuously oppose the subservience of one group to the purposes of another.⁷

Undermining Utilitarianism

Even the traditional catalogue of "morally acceptable" utilitarian benefits of deterrence, incapacitation and rehabilitation break down when state-imposed punishments fail to achieve their stated objectives of reducing crime

4. See Flanders, *supra* note 3, at 117-18; see also James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 100-01 (2003).
5. Michael S. Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POL'Y 29, 31-35 (1990); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 823 (2003).
6. Scott & Steinberg, *supra* note 5, at 823-24.
7. Immanuel Kant, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* 194-204 (W. Hastie trans., Clark 1887) (1796).

and drug use among *The Wire*'s Baltimore residents. Deterrence assumes either that the public will be deterred from crime by observing others punished or that specific offenders will be dissuaded from further crime by reflecting on the consequences of their prior behavior. Documenting what Jeffrey Fagan and Tracey Meares call a "paradox of punishment," *The Wire* dramatizes what we know empirically—that contemporary crime control policies have not been effective as either a specific or general deterrent to crime.⁸ Deterrence is weakened as incarceration becomes normal within a community and the costs of punishment are relatively small compared to the high rewards of crime. Deterrence is further undermined when punishment loses its legitimacy and social groups no longer credit the state's claims of fairness and proportionality in punishment.⁹

Incapacitation, which aims simply to reduce crime by confining offenders, is equally useless as a crime control strategy.¹⁰ In *The Wire*, incarcerated drug dealers like Avon Barksdale use violence and intimidation to maintain power in and outside of prison. With Barksdale in prison, Barksdale's lieutenant remains on the street to take orders and adapt the organization's business model to account for new police surveillance techniques. Incapacitation does little to stop the crime and drugs that are deeply entrenched in West Baltimore.

Finally, rehabilitation has little place in a society committed to preserving the personal and institutional interests of those in power. Politicians reject rehabilitation as both ineffective and too lenient on crime, while private capitalists reject rehabilitation as irrelevant or contrary to the economic interests of the powerful elite.¹¹ With the exception of Reginald "Bubbles" Cousins and Dennis "Cutty" Wise, rehabilitation is impossible for the vast majority of characters in *The Wire*—not because there is something inherently wrong with treatment but because the state has never invested the resources it needs to address the social disorganization of impoverished communities that undermine most rehabilitative strategies.

Conclusion

The Wire's success as a platform for the social and legal critique of punishment theory turns on its close examination of the intersecting influences of capitalism, politics, racial inequality, class and bureaucratic policing. *The Wire* challenges society's long-held assumptions about the black and white underclass and engages students in an examination of the moral and practical failings of contemporary American punishments.

8. Jeffrey Fagan & Tracey Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 229 (2008).

9. *Id.* at 216-17.

10. Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343 (1983).

11. See David Simon on a panel discussion with *The Root*, August 10, 2012; see also Ed Burns et al., *The Wire's War on Drugs*, TIME (Mar. 5, 2008), available at <http://content.time.com/time/magazine/article/0,9171,1720240,00.html>.