

JUSTICE AND PUNISHMENT

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I HAVE OFTEN FELT that punishment is at the crux of political philosophy. For it is through punishment that discipline may be enforced, through discipline which power may be exercised, and the just (or unjust) acquisition and exercise of power is the fundamental subject of political philosophy. Punishment is, of course, inextricably tied up with criminal justice. And criminal justice is imperfect—as John Rawls notes, “even though the law is carefully followed, and the proceedings fairly and properly conducted, [criminal justice] may reach the wrong outcome” (86). Thus it is often very difficult to determine when punishment is just, or when it goes so far as to cease to even be punishment. In light of this indeterminacy, I wish to critique and modify a definition of punishment, and turn it into a normative definition. By a ‘normative definition’ I mean a definition designed to distinguish not only punishment from non-punishment but also just punishments from unjust punishments. In his article, *Prolegomenon to the Principles of Punishment*, H. L. A. Hart gives a very revealing positive definition of punishment. To my mind, it needs but a few corrections and qualifications. And to that end I shall present it and comment on it, and in doing so, I shall develop a normative definition.

In the *Prolegomenon*, Hart defines punishment in the following manner:

I shall define the standard or central case of ‘punishment’ in terms of five elements:

- (i) It must involve pain or other consequences normally considered unpleasant.
- (ii) It must be for an offense against legal rule.
- (iii) It must be of an actual or supposed offender for his offense.
- (iv) It must be intentionally administered by human beings other than the offender.
- (v) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

In calling this the standard or central case of punishment I shall relegate to the position of sub-standard or secondary cases the following among many other possibilities:

- (a) Punishments for breaches of legal rules imposed or administered otherwise than by officials (decentralized sanctions).
- (b) Punishments for breaches of non-legal rules or orders (punishments in a family or school).
- (c) Vicarious or collective punishment of some member of a social group for actions done by others without the former's authorization, encouragement, control, or permission.
- (d) Punishment of persons (otherwise than under (c) who are neither in fact nor supposed to be offenders (357).

Personally, I would suggest that sub-standard case (b) is actually the standard case, or at least more fundamental than the case Hart gives as standard. However, because this is a minor concern compared with the insight that the definition provides, I shall refer to the various cases by the names which Hart gives them.¹ Let us examine it one piece at a time.

(i) *It must involve pain or other consequences normally considered unpleasant.* This is perhaps the least controversial part of the definition. It seems intuitively obvious that whatever meaning one ascribes to punishment, punishment should be undesirable and hence, unpleasant. And it does become obvious once we examine why laws are made. As Hart puts it, "Why are certain kinds of action forbidden by law and so made crimes or offenses? The answer is: To announce to society that these actions are not to be done and to secure that fewer of them are done" (358). How is one to secure that fewer of the forbidden actions are done? The answer is: To make sure unpleasant consequences are attached to those actions.

Presumably these actions are done because there is some perceived gain (although not necessarily a material gain). Will *X* refrain from performing an action from which he thinks he will gain something because *Y* tells him not to do it? No, unless *Y* backs up his words with a realistic threat of unpleasant consequences, or *X* and *Y* share an intimate sort of relationship (but very few people apart from Socrates hold such a relationship with the state). If the consequences are not unpleasant, there will be no incentive for *Y* to refrain from performing the action since his expected gain will not have been reduced, and may have even been increased, if the consequences are pleasant.

Even when Nietzsche claims "to give at least an idea of how uncertain, how supplemental, how accidental, 'the meaning' of punishment is" (1269) when setting down the many and varied ends to which he has observed punishment being used, Nietzsche describes in every case a punishment which is in some way painful or unpleasant. To me it seems that pain is an inseparable part of the idea of punishment: I cannot conceive of a punishment which is not intended to be painful or unpleasant.

Even in the case of the masochist who takes pleasure in punishment, it is still painful—were it not painful she would have no interest in it.

(ii) *It must be for an offense against legal rules.* In any case, it must be for an offense against some rule, legal or otherwise. What is notable about this point is that punishment must be a response to a crime or a breaking-of-the-rules. This is, in part, what is so terrifying about Hobbes's vision of the leviathan. The leviathan needs no excuse—no rule need be broken for the leviathan to inflict punishment, even death. The utilitarian state also suffers from this problem. It might well serve the end of utility that the government should frame an innocent man for a crime and punish him horribly as an example.

And note that this part of the definition is not contrary to sub-standard cases (c) and (d), for those cases deal only with the fact that the man to receive punishment did not actually break the rules. In fact, in case (c), the punishment is specifically for a breaking-of-the-rules, but a breaking-of-the-rules by someone other than the punished man. It is also notable that this is not the position taken up by such as J. D. Mabbott, for this still allows for sub-standard case (c) to be considered punishment, in direct contradiction to Mabbott's position.

But here is the point at which the justice of the laws becomes important. Despite Mr. Mabbott's contention that the justice of laws is irrelevant when assessing the justice of punishments (50), there is still a very real sense in which the justice of the laws is important to the justice of punishment. Imagine a nation with contradictory laws—for example, a nation where one law required each citizen, male or female, to serve in the military for at least one year, but another law prevented women from entering the military. Would it be just to punish the women who did not (could not) enter the military? Of course not—offense against the law could not have been prevented. And as that contradiction between the laws is exactly what is unjust about them, it is the injustice of the laws which makes the punishment unjust.

Yet the injustice of a law does not of itself confer injustice to punishment for breaking that law, but it is rather only a certain kind of injustice of laws which confers injustice to corresponding punishments. The punishment is unjust if the laws broken cannot reasonably be expected to be obeyed. For example, I firmly believe that laws restricting the possession of narcotic substances are unjust. However, given that such laws exist I do not think it unjust to punish someone for possessing such a substance, because it is quite possible to not possess a narcotic substance. But laws which are contradictory or which make necessary actions (e.g. eating) illegal or which make states of being (e.g. being Jewish) illegal cannot reasonably be expected to be obeyed.² Punishment for disobeying such laws is unjust. The judge whose job it is to

punish those who break the laws acts unjustly in assigning punishment to the breakers of such laws.

Moreover, there needs to be consistency in the execution of the laws, not just in the laws themselves. For example, I met a lawyer who while facing a paternity suit from his secretary was sued for divorce by his wife on the grounds that he was naturally and incurably impotent. He lost both cases. Regardless of what this situation seems to say about his skill as a lawyer, it is unjust as he logically could not both have been impotent and have impregnated his secretary.

(iii) *It must be of an actual or supposed offender for his offense.* Again it is emphasized that the punishment must be *for an offense*, but this time with the stipulation that the offense belongs to the man to be punished. This is the stance taken by Mabbott: “The only justification for punishing any man is that he has broken a law” (48). That is, it is not enough that *someone* has broken the law—it must be the man to be punished. This condition imposes certain restrictions on the distribution of punishment and on the procedures by which guilt is determined.

In particular, those procedures must be at least relatively reliable. If they are not, then we cannot say with any assurance that the offense belongs to the actual or supposed offender. Robert Nozick notes this when he says that “no one has the right to use a relatively unreliable procedure in order to decide whether to punish another. Using such a system, he is in no position to know that the other deserves punishment; hence he has no right to punish him” (106). We must be careful to interpret “deserves punishment” as “has committed an offense” in this context, but otherwise the quotation is in full accordance with my position. To be sure, we also require a relatively reliable procedure to decide when an offense has been committed, for we must establish the existence of the offense before we can ascribe the offense to any alleged offender. And I fail to see how the procedure for determining guilt can be at all reliable if the procedure for recognizing an offense is unreliable.

Also, I find the phrasing of (iii) slightly curious. The phrase *actual or supposed* is inadequate. If we suppose someone to be an offender, then he is a supposed offender (regardless of whether he is an actual offender or not), but if he is an actual but not supposed offender then we have no business punishing him as we have not decided that he is guilty of any offense. Thus, the inclusion of the term *actual* is detrimental to the precision of the definition. It would more precise to phrase it: *it must be of a supposed offender for what is supposedly his offense*. The phrasing is more cumbersome, to be sure, but it is more accurate and more effectively emphasizes the relevant distinctions.

Another point of interest is that this part of the definition, in combination with part (ii), has a very subtle implication of profound impor-

tance. The implication is that the punishment is for *doing* the offense, not for *being* an offender. When a murderer is tried and punished, he is tried and punished for committing a murder not for being a murderer. One can observe that in many states in America it is illegal to have sexual intercourse of any kind with a member of the same sex, but in no state is it illegal to be a homosexual.

What is so grossly unjust about Alex's punishment in *A Clockwork Orange*, for example, is that Alex is being punished for being a criminal, not for committing crimes. He is punished when violent desires arise in his mind, not when he acts them out. Were we to punish for being an offender, there would be no end to punishment; a man who commits only one murder remains a murderer for the rest of his life and thus could be brought to trial and convicted over and over again for being a murderer. I suppose it could be argued that after a certain time, a person has changed enough to effectively be a different person and therefore to cease to be the offender he once was. Nonetheless, even punishing a person for so long as he is an offender is unjust. This is precisely what the *Clockwork Orange* punishment does—Alex is punished until he changes into a new person (who no longer has the inclination for rape and violence)—and most people still recoil from it as a horrible injustice.

Of course, this does not imply that what a person is is not relevant in a trial for an offense done by that person. A harsher penalty might justly be applied to a murderer who has murdered again (i.e. for an offender who has *already* murdered) and a lighter penalty might be given to an insane man. In short, what someone is might justly condition or prevent punishment, yet someone should not be punished for what he is but only for what he has done.

An issue which I will not address is the issue of attempted crimes. There are really (at least) two questions here. The first question is that if there is no explicit law against attempting to break a law, then is the attempt (without the success) a crime? The second is: is it just to give lesser penalties to those who attempt but do not succeed in breaking the law? Both of these questions are valid and worthy of note, but well beyond the scope of this paper.

(iv) *It must be intentionally administered by human beings other than the offender.* I find the inclusion of the term *human beings* somewhat dubious. Presumably, if aliens exist then they may punish as well—as may lions, tigers, and bears within their respective communities. But the important part of this rule is the intentionality involved by entities other than the offender (that it is administered by human beings is purely accidental). This intentionality separates punishment from desert—the death of a murderer resulting from a rock rolling, but not pushed, down a hill is desert but not punishment because the element of intentionality is absent.

Yet it seems to me that more is necessary. The punishment must not only be intentional, but must *intentionally be punishment*. When a bear kills a murderer who happens to be making his escape through the woods, the bear kills him intentionally but not with the intention of punishing him; thus it too is desert but not punishment.³ One might think that the inclusion of the term *human beings* in Hart's phrasing would account for this, but we need only replace the bear in my last example with a maniacal killer who knew nothing of the murderer's crime to have a counterexample.

(v) *It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.* This is by far the trickiest part of the definition. Every action breaks some possible rule, but that in itself does not give anyone the right to punish someone for performing an action—it is not even enough if that action breaks some existing rule. There must be some definite relationship between the punisher and the rule which was broken, part of which is that the punisher (or whoever sanctions the punishment) must be aware of the existing rule (and, in fact, the existence of the rule) which was broken and of the action which broke it. However, this is still not enough. What is needed is just what Hart says: that the punisher be in some way an authority constituted by a legal system against which the offense is committed. Notice that this is not contrary to Locke's notion that in the state of nature everyone has the right to punish; for Locke *everyone* is a legally constituted authority of the *law of nature*--"What any may do in prosecution of that law, every one must needs have a right to do" (740). After thinking about Locke's position, one must call into question what it means to be an *authority constituted by a legal system against which the offense is committed*. Is it enough to define one's own legal system, decide that baking a cake is an offense punishable by death, and then kill the cook? Of course not, despite the fact that one could easily make oneself an authority of one's own legal system. More is still necessary, but not on the side of the punisher. There must be some relationship between the offender and the relevant legal system. That is, there must be some way in which the offender is bound by the laws of the relevant legal system, by which I mean there must be some property of the offender which gives an authority constituted by the legal system the right to punish him. And the manner in which the offender is bound to the laws may have great effects on what form the punishment might take.

While there are myriad ways in which someone can be bound to a set of laws or rules, there are only two fundamental classes. The first consists of those characterized by voluntary agreement of all parties involved, and the second are those which are not (i.e. those characterized by forced consent of at least some party). Of course, these classes

can be compounded. Take, for example, a private university. By attending classes at the university students voluntarily bind themselves to obey its rules (while on the campus at least). However, the university itself, and hence its rules, are bound involuntarily under the laws of the country in which it is. And when considering the manner of binding, we must always consider the rules which bind the rules.⁴

Now, given a fundamental situation of the first class, say a social contract made in Hobbes's state of nature, there is not much to be said about requirements for the form of punishment. There are none. If someone objects to the forms of punishment outlined in the social contract, he need not give his consent. Thus anyone who gives (uncoerced) consent gives implicit approval of the forms of punishment. Yet this is not a very relevant situation. In reality all of the fundamental situations are of the second class, and someone who chooses not to voluntarily agree to a social arrangement often finds that social arrangement forced upon him.

Therefore, I shall move on to the standard case: a person born (or in some other way forced) into a pre-existing society. There are many arguments for why people are obligated to obey the laws of the state in which they live. I find most of them far from satisfactory. To be blunt, I think they miss the point to a large extent. The question needs to be phrased in terms of why the state has the right to punish someone who breaks one of its laws and, if the state does have this right, in what ways the state may punish him. It seems to me that in any case, the state has freedom in choice of the method of punishment only inasmuch as the method of determining guilt is reliable. Do not misinterpret me to mean that there should be some sort of calculus of punishment, but rather an approximate distinction. For example, unless the method of determining guilt has 100% accuracy, the death penalty is unjust (and I realize that no method has 100% accuracy). But more generally, any institution, say a public high school, which does not have a serious method of determining guilt should not inflict serious penalties.

So finally I offer my normative definition, a revision of Hart's definition, of punishment:

- (i) It must involve pain or other consequences normally considered unpleasant.
- (ii) It must be for an offense against legal rules which can reasonably be expected to be obeyed.
- (iii) It must be of a supposed offender for what is supposedly his offense.
- (iv) The procedures by which the offense is recognized and ascribed to the offender must be relatively reliable.

- (v) It must be intentionally administered as punishment by individuals other than the offender.
- (vi) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.
- (vii) The supposed offender must be appropriately bound to the legal system against which the offense was committed.

I have on more than one occasion wondered whether I could break this definition into two parts: one saying what it is to be punishment and the other saying what it is for a punishment to be just. But I finally realized that that cannot be done. For punishment is in the spectrum of violence. And one of the definitive issues which separates punishment from most other types of violence is that punishment is at least ostensibly just. This is not to say that there is no such thing as unjust punishment or that all of the conditions of this definition must be met for something to be called punishment, but there comes a point at which the injustice is so blatant or so few of the conditions are met that it ceases to be punishment and simply becomes violence.

NOTES

1. I will, however, decline to examine the various parts of the definition, as they do not bear on my purposes here.
2. There are, I am sure, many more examples of laws or types of laws which cannot reasonably be expected to be obeyed, but that is a topic for another paper.
3. It is notable that being thrown to the lions is still punishment because the offender is intentionally thrown to the lions as punishment and lions are known to act in a predictable way when they are hungry and presented with meat.
4. A somewhat odd case which I will not examine is military justice.

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