

140: Matters of life and death – 9 – Punishment (1)

1 The Idea of "Just Punishment"

Arguably our idea of *justice* in punishment has at least five distinct strands –

- (a) *only the guilty* should be punished; only those who have actually *broken* the rules should be punished for their breach;
- (b) only those with *guilty minds* should be punished, who broke the rules *intentionally*, or in a way that they should have foreseen; contrast the idea of strict liability;
- (c) *all the guilty* should be punished, in the absence of mitigating factors;
- (d) punishment should be *proportional* to the severity of the crime;
- (e) punishment should be pronounced and kept to, *not left indefinite*.

Any attempted justification of punishment needs to be able to explain these five strands, especially the factors (a) to (c).

Note: what is at issue here is the moral justification for a certain sort of *institution*, *not* the justification for particular cases of punishment like the case of the Sheriff or the case of the Atlanta murders.

2 Forwards-looking Justifications

There are three forwards-looking justifications of systems of punishment standardly offered by Utilitarians –

- (i) **Reform** – punishment as an attempt to alter the character of the criminal. Then our practice is wildly ineffective! And it would be better to have a system of *treatment* for offenders.
And how to explain (a) above? Why wait till people have committed a crime? Why not screen people for criminal tendencies, and treat them in advance?
And how to explain (c) above, if a criminal act does not stem from a criminal character?
And how to explain (d) and (e)? Why not treat until successful?
- (ii) **Protection** – of the public against the criminal. Again our actual system is very ineffective. And again it would be more effective to have a system of screening, followed by indefinite detention and treatment. That is, we cannot explain strands (a), (c), (d), or (e) in our idea of just punishment.
- (iii) **Deterrence** – of *other* potential criminals. Can claim that this will not work if we deny (a)? But what if we can arrange to *frame* someone, surely this will deter just as effectively? But there is a general case against institutionalized framing, namely that it may be found out, with consequent loss of public confidence in the law. So perhaps this strand in Utilitarianism *can* explain strand (a).

But now we lose the justification for (b), since a system of strict liability would deter much more effectively! (An important ingredient in deterrence is the rate of conviction; without having to prove a guilty mind, this would go up dramatically!)

Also we lose any justification for (c), since for some crimes – e.g. of passion – deterrence is unlikely to work anyway, and since there should be no objection to punishing a *percentage* of criminals if the deterrent effect could be achieved as well.

3 A Backwards-looking Justification

Should we claim, instead, that the only justification of punishment is *retribution*? This can account successfully for all five features in the idea of just punishment, since on this account the sole and sufficient reason for punishment is guilt.

But what *sort* of justification is this?

- (1) **Objective** – reasserting the "moral balance of the universe"? But this is an unacceptable form of intuitionism.
- (2) **Subjective** – punishment should be seen as institutionalized *revenge*? But surely to seek revenge is wrong! Revenge is an understandable emotion, but involves *pointless* infliction of suffering.
- (3) **Contractualist** – see session 10.

4 An Expressive Justification

Should punishment be seen as *expressive* of the moral judgment and condemnation of society? This, too, can successfully account for the main strands in the idea of just punishment. For we condemn all and only those who are guilty and have guilty minds (in the absence of mitigating factors), and our condemnation will be proportional to the evil they have done.

But this expressive function is logically quite distinct from the infliction of suffering! How can a *judgment* on a person's character *justify* the infliction of suffering on them? This suggests that we should really have two distinct practices, not one.

5 Justification *within* a system versus justification *of* a system

A number of possible justifications of punishment seem inadequate by themselves. Perhaps we should try a combination? E.g. giving a forward-looking justification of a backwards-looking institution? *Within* the institution justifications have to look back to guilt, but the justification of the system as a whole is in terms of utility? E.g. perhaps the reason why *all* the guilty should be punished is that *equal treatment before the law* is an important motive for people's respect for the law, and so for their compliance?

But why should there only be punishment for a guilty mind? Why not a system of strict liability?

A.Kenny (*Freewill and Responsibility* ch.4) claims that since deterrence works by adding an extra element to practical reasoning, punishment *can only deter* actions that are done intentionally.

But this simply confuses "This punishment *might have* deterred this wrong-doer" (which is false if the wrong-doing was unintentional) with "This punishment might deter others". Those others who are considering crimes will be *more* deterred if there is punishment with strict liability.

6 A right to be punished? (H.Morris 'Persons and Punishment' in Wasserstrom ed. & the *Monist* 1968.)

A strange right that no one would want to claim! But the contrast is with a system of *treatment*, which would infringe the right to be treated *as a person*. Systems of punishment treat us as rational beings, who are responsible for our own choices; and we have a right to be so treated.

Since laws and attached punishments are publicly known, our justification of punishment to the criminal can be "You brought it on yourself". But then so, too, can terrorists and bank-robbers say this when they "punish" those who disobey them. What makes punishment under the law different? (More on this in #10.)