PUNISHMENT: DEFINITION AND JUSTIFICATION

By Thomas McPherson

The two questions that philosophical discussion of punishment has centred around are: What is punishment? and What is the justification of punishment? These may look to be easily separable; and in fact they generally are separated—the former commonly being regarded as relatively minor and as a necessary preliminary to the latter. This appearance of separateness is, I think, illusory. The idea has been that one can, and indeed ought to, first discover what the word ‘punishment’ means, and then subsequently, as an independent operation, develop some “theory” about the justification of the kind of action that is called punishment. It seems to me doubtful whether this is a good, or even perhaps a possible, way to proceed. I shall return to this point later.

Let us first look at what seems to have become for recent discussion the received definition of punishment: the Flew-Benn-Hart definition.¹ I shall quote it in the form given it by Hart, for the (possibly unfair) reason that Hart’s wording offers more scope for criticism than the others.

The ‘standard or central case of “punishment”’ is defined in terms of five elements.

(i) It must involve pain or other consequences normally considered unpleasant.

(ii) It must be for an offence against legal rules.

(iii) It must be of an actual or supposed offender for his offence.

(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 offence is committed.

This definition obviously fits the retributive view much more easily than it does the deterrent or the reformatory views. It is sometimes said that what the retributive view really does is to give the definition of punishment whereas the other standard theories give its justification. This is certainly a neat and simple distinction. But it is too neat and simple. Why should a definition of punishment look only to the past and present (as does the received definition) and not to the future? One would have supposed that by now the notions of reform or deterrence

might occur naturally to anyone as defining characteristics of punishment. Benn, writing as a utilitarian, says of one aspect of retributivism (viz., the notion that guilt in law is a necessary condition for punishment) that it is ‘completely persuasive; and this is . . . because it is a definition and not a justification. Consequently, it need not conflict with a utilitarian view’ (p. 334). But why should not utilitarian elements come into the definition of punishment, and retributivist elements into the justification of punishment?

It may be that Benn and the others are trying to give a dog a good name. Perhaps the operation they are engaged in is a sort of philosophical de-fusing, or neutralization, or kicking upstairs. To define ‘punishment’ in a way that clearly owes much more to retributivism than it does to utilitarianism is, in a way, to honour retributivism. What could be grander than to be, to the exclusion of your rivals, set out in front as the expression of the meaning of an important concept? But, the honour having been paid, the promotion carried out, retributivism can then be ignored without its feeling offended when the more important matter of the justification of punishment is dealt with. ‘How can you say we don’t appreciate you? Haven’t we made you Honorary Perpetual President?’

The received definition, in Hart’s version, is unsatisfactory in other respects, too.

1) There is an ambiguity in ‘involve’ and ‘considered’ in the sentence, ‘It must involve pain or other consequences normally considered unpleasant’. This may refer either to the intentions of the punisher or to the experience of the punished. Some people prefer being in prison to being outside. The rich do not feel small fines. Does this mean that imprisonment or fines in these cases are not punishment? (Though presumably ‘normally’ is put in to avoid this kind of difficulty.)

2) Hart says, ‘It must be for an offence against legal rules’. And again: ‘It must be imposed and administered by an authority constituted by a legal system . . . ’. This implies that, for example, offences against moral as opposed to legal rules, or against parental injunctions, cannot be punished or can be punished only in a secondary sense of ‘punishment’. Hart himself does indeed describe the latter of these cases as ‘sub-standard or secondary’.

3) Hart says, ‘It must be intentionally administered by human beings other than the offender’. No unintentional punishment, then; no punishment by fate; no divine punishment; no self-punishment. But this is to discourage at the outset the raising of what may be substantial issues. It is to relegate to the realm of the ‘sub-standard’ what are surely quite common uses of ‘punishment’, examination of which might throw light on the general concept of punishment, if there is one.
Why is the philosopher interested in punishment? Partly, no doubt, because the clarification of concepts is a philosophical pursuit, and punishment is one of the concepts that philosophers have traditionally been concerned with. But partly also for more practical reasons. An interest in social or legal reform has sometimes prompted philosophical speculation about punishment—in particular, speculation about the “justification” of punishment. To ask for the justification of something is to suggest that the thing needs justification (though there is a sense in which punishment is also self-justifying, as we shall see); for instance, that there is some doubt about what it is for, or about whether it is the best way of achieving whatever it is that it is supposed to be for. There are implied practical interests behind, and practical consequences of, this kind of inquiry. Should we alter our ways of doing things? Should we stop doing certain things? What is it that we are trying to do anyway? Or is it that we are not “trying to do” anything?

This practical or social interest is better served if the concept of punishment is not defined in the limiting kind of way that I have been discussing. We do talk of parents punishing their children, and we do talk of self-punishment. To say or imply at the outset that these uses are at best secondary or sub-standard is, even when a disclaimer is made, to depreciate any contribution that they may be able to make to the clarification of the concept of punishment. Benn says (p. 333) that we do not feel bound to punish people for breaches of moral rules, e.g., lying. He says this because he is using the received definition of punishment. If, however, we were to take the punishing of children as a primary and not a secondary sense of punishment then what he says is plainly false: lying is precisely what many people do feel bound to punish in children, whereas breaches of law—of many laws, anyway—by children are precisely what many people would feel we ought not to punish. Self-punishment involves a strong moral element; divine punishment suggests supreme power and perfect justice; punishment by fate suggests inevitability; unintentional punishment suggests arbitrariness. These are all real elements in people’s confused notions of punishment. The received definition succeeds in tidying up such confusions all too well.

Another limiting aspect of philosophical discussion of punishment is a tendency to treat the standard “theories” about punishment as exhausting between them the possibilities of justification. This seems to me mistaken. The theories are themselves amalgams of separate elements. Their traditional association together can prevent these elements from being looked at sufficiently seriously each in its own right. We need to distinguish reform from education and from conditioning, deterrence from prevention, retribution from revenge and from hostility. Sometimes this is done; sometimes not. Retributivism suffers badly in
this respect. The habit of talking as if there were something properly
to be called ‘The Retributive Theory of Punishment’ is widespread.
We find people “re-interpreting” retributivism. We find them asking
whether this or that is an essential part of a retributive theory. Must
such a theory include the notion of an exact matching of punishment to
crime? Is it the case that retributivism requires its holders to maintain
that there is a positive duty to punish, and does this mean that it does
not allow for forgiveness? But these questions only arise because
writers approach the subject with ready-made theoretical classifications.
To worry whether, if one is attracted by some aspects of retributivism,
one is thereby committed to accepting the whole of The Retributive
Theory, is to have a worry of one’s own manufacture. We ought to
spend less time on the “theories” and more on the separate points made
in each of them—and, it may be, points not made in any of them.

I now return to the point with which I started, that of the relation
between the definition of punishment and the justification of punish-
ment. K. G. Armstrong writes of the logical priority of ‘the problem
of defining the word “punishment”’. ‘Clearly,’ he says, ‘the logical
order is first to decide what punishment is, then to decide whether
this thing is morally justifiable or not’.1 He is, as it happens, here
discussing a particular view (of Ewing’s); but I have no doubt that
he would generalize the point. And this, I think, is something on
which writers on punishment are for the most part nowadays agreed.
On the face of it, this view may look unexceptionable. It is obvious,
someone might say, that a definition of punishment is needed before
one can start to consider the question of the justification of punish-
ment. How can one sensibly discuss justifications unless one knows
what it is that one is trying to justify? But is this so?

I have already said that even to raise the question of justification
seems to imply that there is some doubt about whether punishment can
be justified. But what sort of thing is this doubt? Such a doubt may
well come and go according to what we understand by punishment.
Coming to see that punishment is justified may be a matter of re-defining
‘punishment’. Someone might explain his worry whether punishment is
justifiable by saying: ‘I am wondering whether it is justifiable to inflict
unpleasantness on a person just because he is guilty of a crime’. And he
might then answer himself by saying (for instance): ‘But, of course, the
infliction of this unpleasantness should have the effect of deterring
others from committing the same crime and so is likely to conduce to
the general happiness; this is what justifies us in inflicting punishment’.
Might this not amount to a decision that his original worry was caused
by a failure fully to understand what punishment means? Punishment is
not just the infliction of unpleasantness on a guilty person. Punishment

is the infliction of unpleasantness on a guilty person in the interests of the general happiness. Or so he may conclude. (Otherwise, it would be something like Hobbes's 'acts of hostility'.) Here the justification of punishment and the definition of punishment are hard to keep apart. 'What is punishment?' and 'Why do we punish?' are questions that may, of course, be separated, but there is not necessarily a logical priority of the first over the second. The clarification of the concept of punishment may have to be achieved by considering both together. (The objection might be raised that if reference to some purpose to be served by it is included in the very definition of punishment it would become impossible even to ask the question whether punishment might have some other purpose or none at all. This in itself does not seem to me a serious objection, provided the purpose is stated in sufficiently broad terms. In any case, in so far as this is an objection, similar objections, as we have seen, apply to the received definition.)

This is, of course, only one of the things that might be meant by a justification of punishment. To ask whether punishment can be justified may be to ask whether it has any purpose, or whether it is a good way, or the best way, of achieving such-and-such a purpose. It may, however, be to ask something quite different: not why (with what aim) we do what we do, but rather whether it is right to do what we do. But here, too, it is difficult to separate justification from definition. Those who think it important to make such a separation are perhaps under the influence of the desire to keep questions of fact apart from questions of value. But this is something that cannot always be easily done. 'Punishment' is a word heavily loaded with value. A totally value-neutral account would not be a fully adequate account of what is involved in punishment. To call something 'punishment' is already to have taken up an attitude towards it—either pro or con. The utilitarian, being interested in consequences, sees the pain or unpleasantness of punishment as justified by what it leads to, and so at first sight it might seem that the natural thing for him to do would be to define punishment so as to include reference to its intended aims. Paradoxically, the received definition, which defines punishment in largely retributional terms, is held by many who are utilitarians of one kind or another. Or perhaps this is not paradoxical after all. As a matter of logic, anything that is included in the definition of punishment cannot be used in its justification: a utilitarian definition of punishment hence precludes a utilitarian justification of punishment. So, if one considers justification more important than definition, and if one is inclined towards a justification in utilitarian terms, one naturally must begin from a definition couched in the only other terms easily available—those of retributivism. But what this means is that far from the questions of the definition of punishment and the justification of punishment being separate, as is often
claimed, in this case the former is determined by the latter. The received definition of punishment, because it defines punishment in retributive terms, rules out the possibility of a retributivist justification of punishment and leaves the way open for a utilitarian one. It is not surprising that Benn should say that "what pass for retributivist justifications of punishment in general, can be shown to be either denials of the need to justify it, or mere reiterations of the principle to be justified, or disguised utilitarianism" (p. 327). By his (retributivist) definition of punishment a retributivist justification of punishment is precluded. I see no compelling reason why a retributivist should not define punishment in a utilitarian way and then give a retributivist justification of it.

I have referred to the fact that the word 'punishment' is not value-neutral. To those who say that punishment ought to be abolished and replaced by treatment, 'punishment' is a dirty word. But to most people its connotations are favourable, and along with this goes the further fact that there is a sense in which punishment is self-justifying. If you see someone behind bars and ask why he is there, the answer, 'He is being punished', itself gives a kind of justification of his treatment. Part of what we mean by 'punishment' is 'justifiable infliction of unpleasantness'. It is not surprising that it is peculiarly difficult to distinguish definition from justification in the case of punishment.

Perhaps we ought to say that what needs to be justified is not punishment (if it is indeed the case that to call something 'punishment' is usually already to have decided that it is justified), but, more neutrally, unpleasantness or pain inflicted upon people by themselves or by other people or by "fate", etc. The justifications can take many forms. Utilitarians will look for justification to the aim such things are supposed to serve. But utilitarians can differ among themselves in the aim or aims they mention. People who are not utilitarians will consider reference to aims irrelevant. A man need not undergo penance with some aim in view. A puritanical community may (as in Hawthorne's The Scarlet Letter) ostracize someone, and if asked for a justification of their behaviour consider it adequate to say, 'She is an adulteress'.

There is no good reason to suppose that there is such a thing as the justification of punishment-in-general. (Perhaps there is no such thing as punishment-in-general anyway.) Concentration on its aims, in particular, suggests what is certainly a limited, and is very probably a mistaken, view of punishment: as if punishment were something designed to fulfil a certain purpose. Men have designed punishments, but nobody designed punishment. People have been punishing each other for a very long time. Punishment can turn up in any human relationship. Lovers punish each other; parents punish their children; the State punishes criminals. Punishment takes physical forms and it takes 'mental' forms. What might in practice be given as its 'justifications' are
various: 'She was unfaithful to me'; 'He disobeyed me'; 'They broke the law'. It will be said that aims also have a place. Of course, aims do also have a place. What I am saying is that aims should be put in their place.

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COMPLAINTS ABOUT 'ENTITLED TO COMPLAIN'

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Daniel Lyons' paper 'Entitled to Complain' (Analysis, 26.4, March 1966, pp. 119–22) is principally an attempt to uncover the characteristic which distinguishes moral right-holders from third-party beneficiaries of moral duties. Third-party beneficiaries are those who are not a party to the contract, but for whose benefit the contract was expressly made. That is, a third-party beneficiary is one who is named in the contract as the beneficiary of a duty which was created by the contract. Lyons' thesis is that 'we locate moral right-holders, as distinct from mere beneficiaries of moral duties, by asking who is entitled to complain and feel aggrieved' (p. 121). My complaint is that 'entitled to complain and feel aggrieved' is not an adequate criterion for distinguishing between moral right-holders and third-party beneficiaries of moral duties. Consequently, I shall proffer what I think is an adequate criterion for distinguishing between them.

My objection is that the third-party beneficiary of a moral duty is entitled to complain and feel aggrieved if the relevant duty is not fulfilled. This can be seen from the following case: A has made a "gentlemen's agreement" with his good friend B which stipulates that if A should die before B, or vice versa, then the survivor would be morally obliged to educate the other's children. Thus, if A died first, he would have a moral right to B's providing an education for his children. B would have a moral duty to provide an education for A's children, the children being the third-party beneficiaries of A's moral right. Now, if B fails to perform his moral duty, the third-party beneficiaries of the moral right, i.e., the children, are morally entitled to complain and feel aggrieved. They are morally entitled to complain and feel aggrieved because, in virtue of their father's agreement, they are morally entitled to an education provided for by B.