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THE MEANING OF "PUNISHMENT"

The two principal questions concerning punishment are, "What gives us the moral right to punish anyone?" and "What do we hope to accomplish when we punish someone?." A third question, which so far seems to be of interest only to philosophers and not to persons directly concerned with the administration of punishment is, "What is the proper analysis of the concept of punishment?" This question is much neglected, unfortunately, by some penal reformers who *assume* that to favor punishment in lieu of rehabilitation implies favoring retribution or implies the desiring of revenge. In this essay I wish to deal only with the third question.

For the most part we are reasonably clear as to what a punishment is. We know that someone put into prison is being punished. When a child does something wrong, the spanking it receives is its punishment. As a first approximation it is natural to say "punishment" means "infliction of suffering upon wrongdoers." There are difficulties with this quick approximation. First, while we may hope that punishment will be limited only to wrongdoers, we realize it is possible to punish by mistake persons who are not wrongdoers. Second, the manner in which suffering may be imposed may affect our opinion as to whether the suffering is, or should be called, punishment. Let us concentrate for awhile on the first objection.

The point of that objection is that since it is not self-contradictory to say "he was punished for something he did not do," the proposed definition is too narrow. What we ought to say is that if the person being made to suffer is genuinely believed to be the guilty party then the suffering we inflict upon him is his punishment. Indeed, the most we can say about people in penitentiaries is that we *think* they are guilty of crimes. It is right to say they are being punished although we realize that probably some of them are not guilty of the crimes for which they have been convicted. I do not mean that any time we make persons suffer whom we genuinely believe to be guilty of crimes that that counts as punishment. Consider lynching. My inclination is to say that lynching is not punishment even in the face of such usages as "Let's get the bastard and give him the punishment he deserves," uttered by someone

in a mob. I do not know what can be said against this except that there are all sorts of deviant and metaphorical usages with respect to any concept. (Sportswriters wrote of the severe punishment Sonny Liston gave to Floyd Patterson. Babe Ruth could really punish a baseball.) No doubt a family resemblance exists which one might painstakingly trace out between all the usages. But a theory concerning punishment in relation to criminal behavior is not likely to benefit from such an undertaking.

Let us return to lynching. My reason for saying that lynching is not punishment is that it is not conducted in an impersonal fashion. Punishment is calm and deliberate and therefore requires administration by a disinterested party. A cornered beast which, from fright, kills its attacker is not punishing it. Even under the *lex talionis* theory, which some people take to be the sanctioning of revenge, the wild retaliation of one party on another does not qualify as punishment. The *lex talionis* theory considers retaliation to be punishment when it is fitting, and this implies a *considered* aim in the inflicted suffering (e.g., an eye for an eye). Lynching is angry response to a real or imagined hurt. Striking back in fear or in anger may be a natural response but it is not punishment.

There are certain difficulties in explicating the concept of punishment which arise in a totally different way. Suppose a man is put into jail for a crime. Supposed he is whipped, stretched and beaten. Suppose none of this pains him. Suppose, further, that nothing we could do to him would bother him. Has he been punished? Is he punishable? These suppositions result from consideration of another objection which goes as follows: A says imprisonment, per se, is a punishment. B replies that he can imagine someone wanting to go to prison so that, for that person, prison is not a punishment. Now by extending his argument, B might go on to say that being beaten, stretched, and whipped are not punishments if the person receiving them wants them. The force of B's objection, "He wanted to go to jail, so he really wasn't punished," is that whatever else punishment may be it must at least involve consequences that the one who receives them regards as unpleasant. Thus, if a person wants to go to jail, it becomes self-contradictory to say that going to jail is his punishment. However, I believe this line of reasoning is a mistake. For if that were self-contradictory think how much more obviously would "he wants to be punished" be self-contradictory. Yet we sometimes say just this about some people. We cannot define the activity of punishment in terms of its subjective effects on each and every person who is punished. If we try to, we run the risk of a new "oddball" appearing each time we think we have settled the question of what punishment is. The question is, therefore, not what the person

being punished wants but what we want. Again, the question is, "Do we give the prisoner any choice in the matter?" If a person goes into prison of his own choice and can leave when he wants to, he is not being punished. That he wants to stay there becomes irrelevant if we are determined to keep him there. With respect to the claim that the consequences of punishment should be unpleasant, Mabbott has pointed out that even when a person is being deprived of his life the idea is not to make him suffer.¹ The thought of his coming punishment will cause a person some suffering but the punishment will cause him very little. (Unless, of course, it is of a crude form like blood-letting.) In fact, as forms of capital punishment have evolved, one aim has been to make them as painless as possible. We may note that those who regard capital punishment as the primitive rite of barbaric revenge do not make mention of the above point.

We should think of punishment in terms of such objective deprivations as loss of life, limb, property, and liberty rather than in terms of physical suffering. If we run through the normal channels of punishment then we may say a person has been punished irrespective of the subjective effects they have had on him.

The second objection to the first, approximate definition (p. 1) was that the manner of the suffering affects our opinion as to whether that suffering is punishment. Someone might say that for punishment *to be* punishment it must be just — the suffering or deprivation must fit the crime. There are special problems connected with the idea of "fitting the crime" which a retributivist would have to face. Here, only some general points need to be considered. We sometimes use the expression "cruel and unnecessarily harsh punishment." We do not regard this as self-contradictory. Hence we recognize that punishments do not always fit the crimes for which they are imposed. It is possible that some persons who say "punishment to be punishment must be just" are recommending that the label "punishment" be dropped in certain circumstances in which it is now considered acceptable. More likely the objection is a rhetorical way of registering moral disapproval of certain punishments (unjust ones). To disapprove of unjust punishments, however, is to recognize the propriety of the phrase "unjust punishments."

The expression "cruel and unnecessarily harsh punishment" is explained, I think, by the fact that what the party imposing the suffering thinks constitutes a just punishment may be radically at odds with what an observer thinks is just. It would be queer if the one imposing the punishment considered it cruel and unjust. But if the observer believes

¹ J. D. Mabbott, "Professor Flew on Punishment," *Philosophy*, 1955, p. 7.

that the party is not concerning himself with the matter of justice then he will withhold the appellation "punishment" altogether, rather than merely regard what he sees as a cruel and unjust punishment. Thus "cruel and unjust punishment" is not self-contradictory even though it is true that punishment to be punishment involves a consideration of justice. The expression is used by those passing judgment on those doing the punishing. It presupposes that those doing the punishing are trying to do what is right and, in the opinion of the observer, are failing to do so. If a man believes there is no God, he may oppose punishments imposed for alleged offenses against God. He may even cry, "That is not punishment!", but we may reasonably take this to be an exclamation of disapproval at the punishment. On the other hand, if he thinks those inflicting the suffering are insincere, are themselves really atheists secretly furthering private interests then the cry is meant literally.

In quarrelling over whether punishment should be for legal, moral, or religious offenses, philosophers have inquired into the nature of a criminal offense as a general concept. For example, Mill said that for anything to be a punishable offense there must be some injury to someone other than the offender. Mill was attacked by several of his contemporaries.² Many of them felt that if the commission of any act was generally regarded as extremely repulsive or was so unnatural as to be an affront to God then that constituted sufficient ground for it to be a punishable offense. Homosexuality is the classic example. It has been condemned by some persons who have insisted it is not necessary to ascertain whether it involves one person's harming another. The subject of what a punishable offense should be is important and needs to be examined in connection with the aims and justification of punishment. But it usually has been included in discussions of definition for persuasive purposes: "Real punishment is for . . ."; "Punishment can only be for . . ."; "Nothing is punishment which does not aim at . . ."; etc. All these are typical instances of persuasive definitions. Their intent is not so much to inform us of correct usages as they are to push pet normative theories about the aims of punishment.

All this time I have viewed punishment as something aimed at wrongdoers. Is this essential? Can we not punish persons who are not suspected of any crimes if our intention is to produce good? The definitional question is easier to answer than the moral question. It is conceivable that sometimes more good will come of imposing suffering on some innocent

² For a spirited defense of Mill against his critics see H.L. A. Hart, *Law, Liberty and Morality* (Oxford: Clarendon Press, 1962).

persons than if we did not impose that suffering. And it may be argued that our obligation is always to produce the maximum amount of goodness we can. But obviously not all good things are acts of punishment. Some people are made to suffer because they are thought to deserve it; perhaps others should also be made to suffer. But we need a word to preserve this difference — and we have it. Thus we do not prejudge any moral issue by insisting that punishment must be for a wrong. Now some utilitarians have made too much of this definitional point. Critics of utilitarianism have said that since utilitarianism is a theory consistent with punishing the innocent it must be rejected as morally objectionable. The peculiar reply to this criticism is that utilitarianism is a theory of punishment, not a theory of suffering and, since by definition punishment refers to imposing suffering upon the guilty, the objection is a non sequitur.³ Hart has called this way of putting down a challenge the "definitional stop."⁴ Those who use the definitional stop misconceive the nature of the challenge put to them. The point the anti-utilitarian is making is that if your interest in making anyone suffer is solely to produce certain desirable consequences then, logically, you must approve of making the innocent suffer if it has those consequences. We are not merely interested in what punishment is but even more in the question of who we should make suffer and under what circumstances. As Hart says, "No account of punishment can afford to dismiss the question with a definition."⁵

The conclusion, then, is necessarily a modest one. I have discussed a few cases which make explication troublesome. The importance of explicating the concept is greater than for most concepts because it is so emotion-laden. Its definition may be used to sway moral opinions. I have not entirely succeeded in adopting a neutral tone. For example, I said that lynching is not a punishment. But my purpose was not to agitate against lynching (which is hardly necessary, anyhow), for I could have accomplished that by insisting that it is always unjust punishment. Rather, for the previously discussed reasons, I claimed it was not punishment at all. A single definition of "punishment" is bound to be too narrow unless one focuses on a very particular aspect of punishment. For like any concept, there is at best a family resemblance uniting the threads; but tracing these threads would not help us to solve the

³ S. I. Benn, "An Approach to the Problems of Punishment," *Philosophy* (1958), p. 332.

⁴ H. L. A. Hart, "Prolegomenon to the Principles of Punishment," *Aristotelian Society Proceedings* (1959-60), p. 5.

⁵ *Ibid.*

problem of establishing a normative theory of punishment in its most central use. Concerning that central use, I said that "punishment" is a word best restricted to the suffering imposed on suspected wrongdoers. This cannot be construed, as it sometimes is, as an argument affecting the question whether to extend suffering to the innocent if social utility warrants it.

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