

is only compensation that is deserved by need, and then only when the need is blameless.

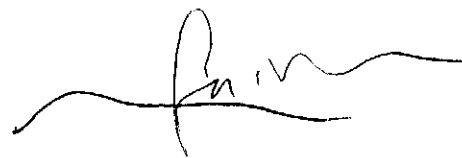
If I am right and economic income cannot plausibly be construed as prizes or rewards, and can be spoken of as "deserved" only insofar as it is compensation, then a startling result follows. To say that income ideally ought to be distributed only according to desert is to say that, in respect to all social benefits, all men should ideally be equal. Some, of course, should receive more money than others to compensate them for greater burdens or greater needs, but ideally the compensatory sum should be just sufficient to bring the overall balance of their benefits up to the level of their fellows'.

What follows, though, from this brief discussion of economic benefits is not that wealth ought to be distributed equally with adjustments made only for needs and burdens, but rather that there are important considerations relevant to this question which have *nothing to do with desert*. Unequal incomes tend to promote industry and ambition and also to encourage socially valuable activities and the development of socially important skills and techniques. The incentive of financial gain might very well make possible the creation of so much wealth that even the smaller shares would be greater than the equally shared portions of the smaller equalitarian pie. Desert is essentially a nonutilitarian concept, one which can and often does come into head-on conflict with utility; and there is no *a priori* reason for giving it automatic priority over all other values. Desert is one very important kind of ethical consideration, but it is not the only one.

Fernberg, Doing and Deserving

(1970)

(ed.? author?)



The Expressive Function of Punishment

It might well appear to a moral philosopher absorbed in the classical literature of his discipline, or to a moralist sensitive to injustice and suffering, that recent philosophical discussions of the problem of punishment have somehow missed the point of his interest. Recent influential articles¹ have quite sensibly distinguished between questions of definition and justification, between justifying general rules and particular decisions, between moral and legal guilt. So much is all to the good. When these articles go on to *define* "punishment," however, it seems to many that they leave out of their ken altogether the very element that makes punishment theoretically puzzling and morally disquieting. Punishment is defined in effect as the infliction of hard treatment by an authority on a person for his prior failing in some respect (usually an infraction of a rule or command).² There may be a very general sense of the word "punishment" which is well expressed by this definition; but even if that is so, we

¹ See esp. the following: A.G.N. Flew, "The Justification of Punishment," *Philosophy*, 29 (1954), 291-307; S. I. Benn, "An Approach to the Problems of Punishment," *Philosophy*, 33 (1958), 325-341; and H.L.A. Hart, "Prolegomenon to the Principles of Punishment," *Proceedings of the Aristotelian Society*, 60 (1959/60), 1-26.

² Hart and Benn both borrow Flew's definition. In Hart's phrase (*op.cit.*, 4), punishment "(i) . . . must involve pain or other consequences normally considered unpleasant. (ii) It must be for an offense against legal rules. (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."

can distinguish a narrower, more emphatic sense that slips through its meshes. Imprisonment at hard labor for committing a felony is a clear case of punishment in the emphatic sense. But I think we would be less willing to apply that term to parking tickets, offside penalties, sackings, flunkings, and disqualifications. Examples of the latter sort I propose to call *penalties* (merely), so that I may inquire further what distinguishes punishment, in the strict and narrow sense that interests the moralist, from other kinds of penalties.³

One method of answering this question is to focus one's attention on the class of nonpunitive penalties in an effort to discover some clearly identifiable characteristic common to them all, and absent from all punishments, on which the distinction between the two might be grounded. The hypotheses yielded by this approach, however, are not likely to survive close scrutiny. One might conclude, for example, that mere penalties are less severe than punishments, but although this is generally true, it is not necessarily and universally so. Again, we might be tempted to interpret penalties as mere "pricetags" attached to certain types of behav-

³ The distinction between punishments and penalties was first called to my attention by Dr. Anita Fritz of the University of Connecticut. Similar distinctions in different terminologies have been made by many. Sir Frederick Pollock and Frederic Maitland speak of "true afflictive punishments" as opposed to outlawry, private vengeance, fine, and emendation. *The History of English Law Before the Time of Edward I*, 2nd edn. (Cambridge: At the University Press, 1968), II, 451ff. The phrase "afflictive punishment" was invented by Bentham: "These [corporal] punishments are almost always attended with a portion of ignominy, and this does not always increase with the organic pain, but principally depends upon the condition [social class] of the offender." *The Rationale of Punishment* (London: Heward, 1830), 83. Sir James Stephen says of legal punishment that it "should always connote . . . moral infamy." *A History of the Criminal Law of England*, 3 vols. (London: Macmillan & Co., 1883), II, 171. Lasswell and Donnelly distinguish "condemnation sanctions" and "other deprivations." "The Continuing Debate over Responsibility: An Introduction to Isolating the Condemnation Sanction," *Yale Law Journal*, 68 (1959). The traditional common law distinction is between "infamous" and "non-infamous" crimes and punishments. Conviction of an "infamous crime" rendered a person liable to such postpunitive civil disabilities as incompetence to be a witness.

ior that are generally undesirable, so that only those with especially strong motivation will be willing to pay the price.⁴ In this way deliberate efforts on the part of some Western states to keep roads from urban centers to wilderness areas few in number and poor in quality would be viewed as essentially no different from various parking fines and football penalties. In each case a certain kind of conduct is discouraged without being absolutely prohibited: anyone who desires strongly enough to get to the wilderness (or park overtime, or interfere with a pass) may do so provided he is willing to pay the penalty (price). On this view, penalties are in effect licensing fees, different from other purchased permits in that the price is often paid afterward rather than in advance. Since a similar interpretation of punishments seems implausible, it might be alleged that this is the basis of the distinction between penalties and punishments. However, even though a great number of penalties can no doubt plausibly be treated as retroactive licensing fees, it is hardly possible to view all of them as such. It is certainly not true, for example, of most demonstrations, firings, and flunkings that they are "prices" paid for some already consumed benefit; and even parking fines are sanctions for rules "meant to be taken seriously as . . . standard[s] of behavior"⁵ and thus are more than mere public parking fees.

Rather than look for a characteristic common and peculiar to the penalties on which to ground the distinction between penalties and punishments, we would be better advised, I think, to turn our attention to the examples of punishments. Both penalties and punishments are authoritative

⁴ That even punishments proper are to be interpreted as taxes on certain kinds of conduct is a view often associated with O. W. Holmes, Jr. For an excellent discussion of Holmes's fluctuations of this question, see Mark De Wolfe Howe, *Justice Holmes, The Proving Years* (Cambridge: Harvard University Press, 1963), 74-80. See also Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), Ch. 2, Part 7, and H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 39, for illuminating comparisons and contrasts of punishment and taxation.

⁵ H.L.A. Hart, *loc. cit.*

deprivations for failures; but, apart from these common features, penalties have a miscellaneous character, whereas punishments have an important additional characteristic in common. That characteristic, or specific difference, I shall argue, is a certain expressive function: punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those "in whose name" the punishment is inflicted. Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties.

The reprobative symbolism of punishment and its character as "hard treatment," though never separate in reality, must be carefully distinguished for purposes of analysis. Reprobation is itself painful, whether or not it is accompanied by further "hard treatment," and hard treatment, such as fine or imprisonment, because of its conventional symbolism, can itself be reprobatory. Still, we can conceive of ritualistic condemnation unaccompanied by any further hard treatment, and of inflictions and deprivations which, because of different symbolic conventions, have no reprobative force. It will be my thesis in this essay that (1) both the "hard treatment" aspect of punishment and its reprobative function must be part of the *definition* of legal punishment, and that (2) each of these aspects raises its own kind of question about the *justification* of legal punishment as a general practice. I shall argue that some of the jobs punishment does, and some of the conceptual problems it raises, cannot be intelligibly described unless (1) is true, and that the incoherence of a familiar form of the retributive theory results from failure to appreciate the force of (2).

I

That the expression of the community's condemnation is an essential ingredient in legal punishment is widely acknowledged by legal writers. Henry M. Hart, for example, gives eloquent emphasis to the point:

What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies . . . its imposition. As Professor Gardner wrote not long ago, in a distinct but cognate connection:

"The essence of punishment for moral delinquency lies in the criminal conviction itself. One may lose more money on the stock market than in a court-room; a prisoner of war camp may well provide a harsher environment than a state prison; death on the field of battle has the same physical characteristics as death by sentence of law. It is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment."

If this is what a "criminal" penalty is, then we can say readily enough what a "crime" is. . . . It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community. . . . Indeed the condemnation plus the added [unpleasant physical] consequences may well be considered, compendiously, as constituting the punishment.⁶

Professor Hart's compendious definition needs qualification in one respect. The moral condemnation and the "unpleasant consequences" that he rightly identifies as essential elements of punishment are not as distinct and separate as he suggests. It does not always happen that the convicted prisoner is first solemnly condemned and then subjected to unpleasant physical treatment. It would be more accurate in many cases to say that the unpleasant treatment itself expresses the condemnation, and that this expressive aspect of his incarceration is precisely the element by reason of which it is properly characterized as punishment and not mere penalty. The administrator who regretfully suspends the license of a conscientious but accident-prone driver can inflict a deprivation without any scolding, express or implied; but the reckless motorist who is sent to prison for six

⁶ Henry M. Hart, "The Aims of the Criminal Law," *Law and Contemporary Problems*, 23 (1958), II, A, 4.

months is thereby inevitably subject to shame and ignominy—the very walls of his cell condemn him, and his record becomes a stigma.

To say that the very physical treatment itself expresses condemnation is to say simply that certain forms of hard treatment have become the conventional symbols of public reprobation. This is neither more nor less paradoxical than to say that certain words have become conventional vehicles in our language for the expression of certain attitudes, or that champagne is the alcoholic beverage traditionally used in celebration of great events, or that black is the color of mourning. Moreover, particular kinds of punishment are often used to express quite specific attitudes (loosely speaking, this is part of their “meaning”); note the differences, for example, between beheading a nobleman and hanging a yeoman, burning a heretic and hanging a traitor, hanging an enemy soldier and executing him by firing squad.

It is much easier to show that punishment has a symbolic significance than to state exactly what it is that punishment expresses. At its best, in civilized and democratic countries, punishment surely expresses the community's strong *disapproval* of what the criminal did. Indeed, it can be said that punishment expresses the *judgment* (as distinct from any emotion) of the community that what the criminal did was wrong. I think it is fair to say of our community, however, that punishment generally expresses more than judgments of disapproval; it is also a symbolic way of getting back at the criminal, of expressing a kind of vindictive resentment. To any reader who has in fact spent time in a prison, I venture to say, even Professor Gardner's strong terms—“hatred, fear, or contempt for the convict”—will not seem too strong an account of what imprisonment is universally taken to express. Not only does the criminal feel the naked hostility of his guards and the outside world—that would be fierce enough—but that hostility is self-righteous as well. His punishment bears the aspect of legitimized vengefulness. Hence there is much truth in J. F. Stephen's celebrated remark that “The criminal law stands to the passion

of revenge in much the same relation as marriage to the sexual appetite.”⁷

If we reserve the less dramatic term “resentment” for the various vengeful attitudes and the term “reprobation” for the stern judgment of disapproval, then perhaps we can characterize *condemnation* (or denunciation) as a kind of fusing of resentment and reprobation. That these two elements are generally to be found in legal punishment was well understood by the authors of the *Report of the Royal Commission on Capital Punishment*:

Discussion of the principle of *retribution* is apt to be confused because the word is not always used in the same sense. Sometimes it is intended to mean vengeance, sometimes reprobation. In the first sense the idea is that of satisfaction by the State of a wronged individual's desire to be avenged; in the second it is that of the State's *marking its disapproval* of the breaking of its laws by a punishment proportionate to the gravity of the offense.⁸

II

The relation of the expressive function of punishment to its various central purposes is not always easy to trace. Symbolic public condemnation added to deprivation may help or hinder deterrence, reform, and rehabilitation—the evidence is not clear. On the other hand, there are other functions of punishment, often lost sight of in the preoccupation with deterrence and reform, that presuppose the expressive function and would be difficult or impossible without it.

Authoritative disavowal. Consider the standard international practice of demanding that a nation whose agent has unlawfully violated the complaining nation's rights should punish the offending agent. For example, suppose that an airplane of nation *A* fires on an airplane of nation *B* while

⁷ *General View of the Criminal Law of England* (London: Macmillan & Co., 1863), 99.

⁸ (London, 1953), 17-18. *My italics.*

the latter is flying over international waters. Very likely high authorities in nation *B* will send a note of protest to their counterparts in nation *A* demanding, among other things, that the transgressive pilot be punished. Punishing the pilot is an emphatic, dramatic, and well-understood way of *condemning* and thereby *disavowing* his act. It tells the world that the pilot had no right to do what he did, that he was on his own in doing it, that his government does not condone that sort of thing. It testifies thereby to government *A*'s recognition of the violated rights of government *B* in the affected area and, therefore, to the wrongfulness of the pilot's act. Failure to punish the pilot tells the world that government *A* does not consider him to have been personally at fault. That in turn is to claim responsibility for the act, which in effect labels that act as an "instrument of deliberate national policy" and hence an act of war. In that case either formal hostilities or humiliating loss of face by one side or the other almost certainly will follow. None of this scenario makes any sense without the clearly understood reprobative symbolism of punishment. In quite parallel ways punishment enables employers to disavow the acts of their employees (though not civil liability for those acts), and fathers the destructive acts of their sons.

Symbolic nonacquiescence: "Speaking in the name of the people." The symbolic function of punishment also explains why even those sophisticated persons who abjure resentment of criminals and look with small favor generally on the penal law are likely to demand that certain kinds of conduct be punished when or if the law lets them go by. In the state of Texas, so-called paramour killings were regarded by the law as not merely mitigated, but completely justifiable.⁹ Many humanitarians, I believe, will feel quite

⁹ The Texas Penal Code (Art. 1220) until recently stated: "Homicide is justifiable when committed by the husband upon one taken in the act of adultery with the wife, provided the killing takes place before the parties to the act have separated. Such circumstances cannot justify a homicide when it appears that there has been on the part of the husband, any connivance in or assent to the adulterous connection." New Mexico and Utah have similar statutes. For some striking descrip-

spontaneously that a great injustice is done when such killings are left unpunished. The sense of violated justice, moreover, might be distinct and unaccompanied by any frustrated *Schadenfreude* toward the killer, lust for blood or vengeance, or metaphysical concern lest the universe stay "out of joint." The demand for punishment in cases of this sort may instead represent the feeling that paramour killings deserve to be *condemned*, that the law in condoning, even approving of them, speaks for all citizens in expressing a wholly inappropriate attitude toward them. For in effect the law expresses the judgment of the "people of Texas," in whose name it speaks, that the vindictive satisfaction in the mind of a cuckolded husband is a thing of greater value than the very life of his wife's lover. The demand that paramour killings be punished may simply be the demand that this lopsided value judgment be withdrawn and that the state *go on record* against paramour killings and the law *testify to the recognition* that such killings are wrongful. Punishment no doubt would also help deter killers. This too is a desideratum and a closely related one, but it is not to be identified with reprobation; for deterrence might be achieved by a dozen other techniques, from simple penalties and forfeitures to exhortation and propaganda; but effective public denunciation and, through it, symbolic nonacquiescence in the crime seem virtually to require punishment.

This symbolic function of punishment was given great emphasis by Kant, who, characteristically, proceeded to exaggerate its importance. Even if a desert island community were to disband, Kant argued, its members should first execute the last murderer left in its jails, "for otherwise they might all be regarded as participators in the [unpunished] murder. . . ."¹⁰ This Kantian idea that in failing to punish wicked acts society endorses them and thus be-

tions of perfectly legal paramour killings in Texas, see John Bainbridge, *The Super-Americans* (Garden City: Doubleday, 1961), 238ff.

¹⁰ *The Philosophy of Law*, tr. W. Hastie (Edinburgh: T. & T. Clark, 1887), 198.

comes *particeps criminis* does seem to reflect, however dimly, something embedded in common sense. A similar notion underlies whatever is intelligible in the widespread notion that all citizens share the responsibility for political atrocities. Insofar as there is a coherent argument behind the extravagant distributions of guilt made by existentialists and other literary figures, it can be reconstructed in some such way as this: to whatever extent a political act is done "in one's name," to that extent one is responsible for it; a citizen can avoid responsibility in advance by explicitly disowning the government as his spokesman, or after the fact through open protest, resistance, and so on; otherwise, by "acquiescing" in what is done in one's name, one incurs the responsibility for it. The root notion here is a kind of "power of attorney" a government has for its citizens.

Vindication of the law. Sometimes the state goes on record through its statutes, in a way that might well please a conscientious citizen in whose name it speaks, but then owing to official evasion and unreliable enforcement gives rise to doubts that the law really means what it says. It is murder in Mississippi, as elsewhere, for a white man intentionally to kill a Negro; but if grand juries refuse to issue indictments or if trial juries refuse to convict, and this fact is clearly recognized by most citizens, then it is in a purely formal and empty sense indeed that killings of Negroes by whites are illegal in Mississippi. Yet the law stays on the books, to give ever less convincing lip service to a noble moral judgment. A statute honored mainly in the breach begins to lose its character as law, unless, as we say, it is *vindicated* (emphatically reaffirmed); and clearly the way to do this (indeed the only way) is to punish those who violate it.

Similarly, *punitive damages*, so called, are sometimes awarded the plaintiff in a civil action, as a supplement to compensation for his injuries. What more dramatic way of vindicating his violated right can be imagined than to have a court thus forcibly condemn its violation through the symbolic machinery of punishment?

Absolution of others. When something scandalous has occurred and it is clear that the wrongdoer must be one of a small number of suspects, then the state, by punishing one of these parties, thereby relieves the others of suspicion and informally absolves them of blame. Moreover, quite often the absolution of an accuser hangs as much in the balance at a criminal trial as the inculcation of the accused. A good example of this point can be found in James Gould Cozens's novel *By Love Possessed*. A young girl, after an evening of illicit sexual activity with her boy friend, is found out by her bullying mother, who then insists that she clear her name by bringing criminal charges against the boy. He used physical force, the girl charges; she freely consented, he replies. If the jury finds him guilty of rape, it will by the same token absolve her from (moral) guilt; and her reputation as well as his rides on the outcome. Could not the state do this job without punishment? Perhaps, but when it speaks by punishing, its message is loud and sure of getting across.

III

A philosophical theory of punishment that, through inadequate definition, leaves out the condemnatory function not only will disappoint the moralist and the traditional moral philosopher; it will seem offensively irrelevant as well to the constitutional lawyer, whose vital concern with punishment is both conceptual, and therefore genuinely philosophical, as well as practically urgent. The distinction between punishment and mere penalties is a familiar one in the criminal law, where theorists have long engaged in what Jerome Hall calls "dubious dogmatics distinguishing 'civil penalties' from punitive sanctions, and 'public wrongs' from crimes."¹¹ Our courts now regard it as true (by definition) that all criminal statutes are punitive (merely labeling an act a crime does not make it one unless sanctions are

¹¹ *General Principles of Criminal Law*, 2nd edn. (Indianapolis: The Bobbs-Merrill Co., 1960), 328.

specified); but to the converse question whether all statutes specifying sanctions are *criminal* statutes, the courts are reluctant to give an affirmative reply. There are now a great number of statutes that permit "unpleasant consequences" to be inflicted on persons and yet surely cannot be regarded as criminal statutes—tax bills, for example, are aimed at regulating, not forbidding, certain types of activity. How to classify borderline cases as either "regulative" or "punitive" is not merely an idle conceptual riddle; it very quickly draws the courts into questions of great constitutional import. There are elaborate constitutional safeguards for persons faced with the prospect of punishment; but these do not, or need not, apply when the threatened hard treatment merely "regulates an activity."

The 1960 Supreme Court case of *Flemming v. Nestor*¹² is a dramatic (and shocking) example of how a man's fate can depend on whether a government-inflicted deprivation is interpreted as a "regulative" or "punitive" sanction. Nestor had immigrated to the United States from Bulgaria in 1913 and became eligible in 1955 for old-age benefits under the Social Security Act. In 1956, however, he was deported in accordance with the Immigration and Nationality Act for having been a member of the Communist Party from 1933 to 1939. This was a harsh fate for a man who had been in America for forty-three years and who was no longer a Communist; but at least he would have his social security benefits to support him in his exiled old age—or so he thought. Section 202 of the amended Social Security Act, however, "provides for the termination of old-age, survivor, and disability insurance benefits payable to . . . an alien individual who, after September 1, 1954 (the date of enactment of the section) is deported under the Immigration and Nationality Act on any one of certain specified grounds, including past membership in the Communist Party."¹³ Accordingly, Nestor was informed that his benefits would cease.

¹² *Flemming v. Nestor*, 80 S. Ct. 1367 (1960).

¹³ *Ibid.*, 1370.

Nestor then brought suit in a district court for a reversal of the administrative decision. The court found in his favor and held Section 202 of the Social Security Act unconstitutional, on the grounds that "termination of [Nestor's] benefits amounts to punishing him without a judicial trial, that [it] constitutes the imposition of punishment by legislative act rendering §202 a bill of attainder; and that the punishment exacted is imposed for past conduct not unlawful when engaged in, thereby violating the constitutional prohibition on *ex post facto* laws."¹⁴ The Secretary of Health, Education, and Welfare, Mr. Flemming, then appealed this decision to the Supreme Court.

It was essential to the argument of the district court that the termination of old-age benefits under Section 202 was in fact punishment, for if it were properly classified as non-punitive deprivation, then none of the cited constitutional guarantees was relevant. The Constitution, for example, does not forbid all retroactive laws, but only those providing punishment. (Retroactive tax laws may also be harsh and unfair, but they are not unconstitutional.) The question before the Supreme Court, then, was whether the hardship imposed by Section 202 was punishment. Did this not bring the Court face to face with the properly philosophical question "What is punishment?" and is it not clear that, under the usual definition that fails to distinguish punishment from mere penalties, this particular judicial problem could not even arise?

The fate of the appellee Nestor can be recounted briefly. The five-man majority of the Court held that he had not been punished—this despite Mr. Justice Brennan's eloquent characterization of him in a dissenting opinion as "an aging man deprived of the means with which to live after being separated from his family and exiled to live among strangers in a land he quit forty-seven years ago."¹⁵ Mr. Justice Harlan, writing for the majority, argued that the termination of benefits, like the deportation itself, was the exercise

¹⁴ *Ibid.*, 1374 (interspersed citations omitted).

¹⁵ *Ibid.*, 1385.

of the plenary power of Congress incident to the regulation of an activity.

Similarly, the setting by a State of qualifications for the practice of medicine, and their modification from time to time, is an incident of the State's power to protect the health and safety of its citizens, and its decision to bar from practice persons who commit or have committed a felony is taken as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment of ex-felons.¹⁶

Mr. Justice Brennan, on the other hand, contended that it is impossible to think of any purpose the provision in question could possibly serve except to "strike" at "aliens deported for conduct displeasing to the lawmakers."¹⁷

Surely, Justice Brennan seems right in finding in the sanction the expression of Congressional reprobation and, therefore, "punitive intent"; but the sanction itself (in Justice Harlan's words, "the mere denial of a noncontractual governmental benefit"¹⁸) was not a conventional vehicle for the expression of censure, being wholly outside the apparatus of the criminal law. It therefore lacked the reprobative symbolism essential to punishment generally and was thus, in its hybrid character, able to generate confusion and judicial disagreement. It was as if Congress had "condemned" a certain class of persons privately in stage whispers, rather than by pinning the infamous label of criminal on them and letting that symbol do the condemning in an open and public way. Congress without question "intended" to punish a certain class of aliens and did indeed select sanctions of appropriate severity for that purpose; but the deprivation they chose was not of an appropriate kind to perform the function of public condemnation. A father who "punishes" his son for a displeasing act the father had not thought to forbid in advance, by sneaking up on him from behind and then throwing him bodily across the room against the wall, would be in much the same position as the legislators of the amended Social Security Act, especially

¹⁶ *Ibid.*, 1375-76.

¹⁷ *Ibid.*, 1387.

¹⁸ *Ibid.*, 1376.

if he then denied to the son that his physical assault on him had had any "punitive intent," asserting that it was a mere exercise of his paternal prerogative to rearrange the household furnishings and other objects in his own living room. To act in such a fashion would be to tarnish the paternal authority and infect all later genuine punishments with hollow hypocrisy. The same effect is produced when legislators go outside the criminal law to do the criminal law's job.

In 1961 the New York State legislature passed the so-called Subversive Drivers Act requiring "suspension and revocation of the driver's license of anyone who has been convicted, under the Smith Act, of advocating the overthrow of the Federal government." *The Reporter* magazine¹⁹ quoted the sponsor of the bill as admitting that it was aimed primarily at one person, Communist Benjamin Davis, who had only recently won a court fight to regain his driver's license after his five-year term in prison. *The Reporter* estimated that at most a "few dozen" people would be kept from driving by the new legislation. Was this punishment? Not at all, said the bill's sponsor, Assemblyman Paul Taylor. The legislature was simply exercising its right to regulate automobile traffic in the interest of public safety:

Driving licenses, Assemblyman Taylor explained . . . are not a "right" but a "valuable privilege." The Smith Act Communists, after all, were convicted of advocating the overthrow of the government by force, violence, or assassination. ("They always leave out the assassination," he remarked. "I like to put it in.") Anyone who was convicted under such an act had to be "a person pretty well dedicated to a certain point of view," the assemblyman continued, and anyone with that particular point of view "can't be concerned about the rights of others." Being concerned about the rights of others, he concluded, "is a prerequisite of being a good driver."²⁰

¹⁹ *The Reporter* (May 11, 1961), 14.

²⁰ *Loc.cit.*

This example shows how transparent can be the effort to mask punitive intent. The Smith Act ex-convicts were treated with such severity and in such circumstances that no nonpunitive legislative purpose could *plausibly* be maintained; yet that *kind* of treatment (quite apart from its severity) lacks the reprobative symbolism essential to clear public denunciation. After all, aged, crippled, and blind persons are also deprived of their licenses, so it is not *necessarily* the case that reprobation attaches to that kind of sanction. And so victims of a cruel law understandably claim that they have been punished, and retroactively at that. Yet, strictly speaking, they have not been *punished*; they have been treated much worse.

IV

The distinction between punishments and mere penalties, and the essentially reprobative function of the former, can also help clarify the controversy among writers on the criminal law about the propriety of so-called strict liability offenses—offenses for the conviction of which there need be no proof of “fault” or “culpability” on the part of the accused. If it can be shown that he committed an act proscribed by statute, then he is guilty irrespective of whether he had any justification or excuse for what he did. Perhaps the most familiar examples come from the traffic laws: leaving a car parked beyond the permitted time in a restricted zone is automatically to violate the law, and penalties will be imposed however good the excuse. Many strict liability statutes do not even require an overt act; these proscribe not certain conduct, but certain *results*. Some make mere unconscious possession of contraband, firearms, or narcotics a crime, others the sale of misbranded articles or impure foods. The liability for so-called public welfare offenses may seem especially severe:

... with rare exceptions, it became definitely established that *mens rea* is not essential in the public welfare offenses, indeed

that even a very high degree of care is irrelevant. Thus a seller of cattle feed was convicted of violating a statute forbidding misrepresentation of the percentage of oil in the product, despite the fact that he had employed a reputable chemist to make the analysis and had even understated the chemist's findings.²¹

The rationale of strict liability in public welfare statutes is that violation of the public interest is more likely to be prevented by unconditional liability than by liability that can be defeated by some kind of excuse; that, even though liability without “fault” is severe, it is one of the known risks incurred by businessmen; and that, besides, the sanctions are *only fines*, hence not really “punitive” in character. On the other hand, strict liability to *imprisonment* (or “punishment proper”) “has been held by many to be incompatible with the basic requirements of our Anglo-American, and indeed, any civilized jurisprudence.”²² What accounts for this difference in attitude? In both kinds of case, defendants may have sanctions inflicted upon them even though they are acknowledged to be without fault; and the difference cannot be merely that imprisonment is always and necessarily a greater harm than a fine, for this is not always so. Rather, the reason why strict liability to imprisonment (punishment) is so much more repugnant to our sense of justice than is strict liability to fine (penalty) is simply that imprisonment in modern times has taken on the symbolism of public reprobation. In the words of Justice Brandeis, “It is . . . imprisonment in a penitentiary, which now renders a crime infamous.”²³ We are familiar with the practice of penalizing persons for “offenses” they could not help. It happens every day in football games, business firms, traffic courts, and the like. But there is something very odd and offensive in *punishing* people for admittedly

²¹ Hall, *op.cit.*, 329.

²² Richard A. Wasserstrom, “Strict Liability in the Criminal Law,” *Stanford Law Review*, 12 (1960), 730.

²³ *United States v. Moreland*, 258 U.S. 433, 447-448 (1922). Quoted in Hall, *op.cit.*, 327.

faultless conduct; for not only is it arbitrary and cruel to condemn someone for something he did (admittedly) without fault, it is also self-defeating and irrational.

Although their abundant proliferation²⁴ is a relatively recent phenomenon, statutory offenses with nonpunitive sanctions have long been familiar to legal commentators, and long a source of uneasiness to them. This discomfort is "indicated by the persistent search for an appropriate label, such as 'public torts,' 'public welfare offenses,' 'prohibitory laws,' 'prohibited acts,' 'regulatory offenses,' 'police regulations,' 'administrative misdemeanors,' 'quasi-crimes,' or 'civil offenses.'"²⁵ These represent alternatives to the unacceptable categorization of traffic infractions, inadvertent violations of commercial regulations, and the like, as crimes, their perpetrators as criminals, and their penalties as punishments. The drafters of the new Model Penal Code have defined a class of infractions of penal law forming no part of the substantive criminal law. These they call "violations," and their sanctions "civil penalties."

Section 1.04. Classes of Crimes: Violations

(1) An offense defined by this code or by any other statute of this State, for which a sentence of [death or of] imprisonment is authorized, constitutes a crime. Crimes are classified as felonies, misdemeanors, or petty misdemeanors.

[(2), (3), (4) define felonies, misdemeanors, and petty misdemeanors.]

(5) An offense defined by this Code or by any other statute

²⁴ "A depth study of Wisconsin statutes in 1956 revealed that of 1113 statutes creating criminal offenses [punishable by fine, imprisonment, or both] which were in force in 1953, no less than 660 used language in the definitions of the offenses which omitted all reference to a mental element, and which therefore, under the canons of construction which have come to govern these matters, left it open to the courts to impose strict liability if they saw fit." Colin Howard, "Not Proven," *Adelaide Law Review*, 1 (1962), 274. The study cited is: Remington, Robinson, and Zick, "Liability Without Fault Criminal Statutes," *Wisconsin Law Review* (1956), 625, 636.

²⁵ Rollin M. Perkins, *Criminal Law* (Brooklyn: The Foundation Press, 1957), 701-702.

of this State constitutes a violation if it is so designated in this Code or in the law defining the offense or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction or if it is defined by a statute other than this Code which now provides that the offense shall not constitute a crime. A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.²⁶

Since violations, unlike crimes, carry no social stigma, it is often argued that there is no serious injustice if, in the interest of quick and effective law enforcement, violators are held unconditionally liable. This line of argument is persuasive when we consider only parking and minor traffic violations, illegal sales of various kinds, and violations of health and safety codes, where the penalties serve as warnings and the fines are light. But the argument loses all cogency when the "civil penalties" are severe—heavy fines, forfeitures of property, removal from office, suspension of a license, withholding of an important "benefit," and the like. The condemnation of the faultless may be the most flagrant injustice, but the good-natured, noncondemnatory infliction of severe hardship on the innocent is little better. It is useful to distinguish violations and civil penalties from crimes and punishments; yet it does not follow that the safeguards of culpability requirements and due process which justice demands for the latter are always irrelevant encumbrances to the former. Two things are morally wrong: (1) to condemn a faultless man while inflicting pain or deprivation on him however slight (unjust punishment); and (2) to inflict unnecessary and severe suffering on a faultless man even in the absence of condemnation (unjust civil penalty). To exact a two-dollar fine from a hapless violator for overtime parking, however, even though he could not possibly have avoided it, is to do neither of these things.

²⁶ American Law Institute, *Model Penal Code, Proposed Official Draft* (Philadelphia, 1962).

V

Public condemnation, whether avowed through the stigmatizing symbolism of punishment or unavowed but clearly discernible (mere "punitive intent"), can greatly magnify the suffering caused by its attendant mode of hard treatment. Samuel Butler keenly appreciated the difference between reprobative hard treatment (punishment) and the same treatment without reprobation:

... we should hate a single flogging given in the way of mere punishment more than the amputation of a limb, if it were kindly and courteously performed from a wish to help us out of our difficulty, and with the full consciousness on the part of the doctor that it was only by an accident of constitution that he was not in the like plight himself. So the Erewhonians take a flogging once a week, and a diet of bread and water for two or three months together, whenever their straightener recommends it.²⁷

Even floggings and imposed fastings do not constitute punishments, then, where social conventions are such that they do not express public censure (what Butler called "scouting"); and as therapeutic treatments simply, rather than punishments, they are easier to take.

Yet floggings and fastings do hurt, and far more than is justified by their Erewhonian (therapeutic) objectives. The same is true of our own state mental hospitals where criminal psychopaths are often sent for "rehabilitation": solitary confinement may not hurt *quite* so much when called "the quiet room," or the forced support of heavy fire extinguishers when called "hydrotherapy";²⁸ but their infliction on patients can be so cruel (whether or not their quasi-medical names mask punitive intent) as to demand justification.

²⁷ *Erewhon*, new and rev. edn. (London: Grant Richards, 1901), Ch. 10.

²⁸ These two examples are cited by Francis A. Allen in "Criminal Justice, Legal Values and the Rehabilitative Ideal," *Journal of Criminal Law, Criminology and Police Science*, 50 (1959), 229.

Hard treatment and symbolic condemnation, then, are not only both necessary to an adequate definition of "punishment"; each also poses a special problem for the justification of punishment. The reprobative symbolism of punishment is subject to attack not only as an independent source of suffering but as the vehicle of undeserved responsive attitudes and unfair judgments of blame. One kind of skeptic, granting that penalties are needed if legal rules are to be enforced, and also that society would be impossible without general and predictable obedience to such rules, might nevertheless question the need to add condemnation to the penalizing of violators. Hard treatment of violators, he might grant, is an unhappy necessity, but reprobation of the offender is offensively self-righteous and cruel; adding gratuitous insult to necessary injury can serve no useful purpose. A partial answer to this kind of skeptic has already been given. The condemnatory aspect of punishment does serve a socially useful purpose: it is precisely the element in punishment that makes possible the performance of such symbolic functions as disavowal, nonacquiescence, vindication, and absolution.

Another kind of skeptic might readily concede that the reprobative symbolism of punishment is necessary to, and justified by, these various derivative functions. Indeed, he may even add deterrence to the list, for condemnation is likely to make it clear, where it would not otherwise be so, that a penalty is not a mere price tag. Granting that point, however, this kind of skeptic would have us consider whether the ends that justify public condemnation of criminal conduct might not be achieved equally well by means of less painful symbolic machinery. There was a time, after all, when the gallows and the rack were the leading clear symbols of shame and ignominy. Now we condemn felons to penal servitude as the way of rendering their crimes infamous. Could not the job be done still more economically? Isn't there a way to stigmatize without inflicting any further (pointless) pain to the body, to family, to creative capacity?

One can imagine an elaborate public ritual, exploiting the

most trustworthy devices of religion and mystery, music and drama, to express in the most solemn way the community's condemnation of a criminal for his dastardly deed. Such a ritual might condemn so very emphatically that there could be no doubt of its genuineness, thus rendering symbolically superfluous any further hard physical treatment. Such a device would preserve the condemnatory function of punishment while dispensing with its usual physical media—incarceration and corporal mistreatment. Perhaps this is only idle fantasy; or perhaps there is more to it. The question is surely open. The only point I wish to make here is one about the nature of the question. The problem of justifying punishment, when it takes this form, may really be that of justifying our particular symbols of infamy.

Whatever the form of skeptical challenge to the institution of punishment, however, there is one traditional answer to it that seems to me to be incoherent. I refer to that version of the retributive theory which mentions neither condemnation nor vengeance but insists instead that the ultimate justifying purpose of punishment is to match off moral gravity and pain, to give each offender exactly that amount of pain the evil of his offense calls for, on the alleged principle of justice that the wicked should suffer pain in exact proportion to their turpitude.

I shall only mention in passing the familiar and potent objections to this view.²⁹ The innocent presumably deserve *not* to suffer, just as the guilty are supposed to deserve to suffer; yet it is impossible to hurt an evil man without imposing suffering on those who love or depend on him. Deciding the right amount of suffering to inflict in a given case would require an assessment of the character of the offender as manifested throughout his whole life and also his

²⁹ For more convincing statements of these arguments, see *iter alia*: W. D. Ross, *The Right and the Good* (Oxford: Clarendon Press, 1930), 56-65; J. D. Mabbott, "Punishment," *Mind*, 49 (1939); A. C. Ewing, *The Morality of Punishment* (London: Kegan Paul, Trench, Trubner & Co., 1929), Ch. 1; and F. Dostoevski, *The House of the Dead*, tr. H. Sutherland Edwards (New York: E. P. Dutton, 1912).

total lifelong balance of pleasure and pain—an obvious impossibility. Moreover, justice would probably demand the abandonment of general rules in the interests of individuation of punishment since there will inevitably be inequalities of moral guilt in the commission of the same crime and inequalities of suffering from the same punishment. If not dispensed with, however, general rules must list all crimes in the order of their moral gravity, all punishments in the order of their severity, and the matchings between the two scales. But the moral gravity scale would have to list as well motives and purposes, not simply types of overt acts, for a given crime can be committed in any kind of "mental state," and its "moral gravity" in a given case surely must depend in part on its accompanying motive. Condign punishment, then, would have to match suffering to motive (desire, belief, or whatever), not to dangerousness or to amount of harm done. Hence some petty larcenies would be punished more severely than some murders. It is not likely that we should wish to give power to judges and juries to make such difficult moral judgments. Worse yet, the judgments required are not merely "difficult"; they are in principle impossible to make. It may seem "self-evident" to some moralists that the passionate impulsive killer, for example, deserves less suffering for his wickedness than the scheming deliberate killer; but if the question of comparative *dangerousness* is left out of mind, reasonable men not only can but will disagree in their appraisals of comparative blameworthiness, and there appears to be no rational way of resolving the issue.³⁰ Certainly, there is no rational way of demonstrating that one criminal deserves exactly twice or three-eighths or twelve-ninths as much suffering as another; yet, according to at least some forms of this theory, the amounts of suffering inflicted for any two crimes should stand in exact proportion to the "amounts" of wickedness in the criminals.

³⁰ Cf. Jerome Michael and Herbert Wechsler, *Criminal Law and Its Administration* (Chicago: The Foundation Press, 1940), "Note on Deliberation and Character," 170-172.

For all that, however, the pain-fitting-wickedness version of the retributive theory does erect its edifice of moral superstition on a foundation in moral common sense, for justice *does* require that in some (other) sense "the punishment fit the crime." What justice demands is that the *condemnatory aspect* of the punishment suit the crime, that the crime be of a kind that is truly worthy of reprobation. Further, the degree of disapproval expressed by the punishment should "fit" the crime only in the unproblematic sense that the more serious crimes should receive stronger disapproval than the less serious ones, the seriousness of the crime being determined by the amount of harm it generally causes and the degree to which people are disposed to commit it. That is quite another thing than requiring that the "hard treatment" component, considered apart from its symbolic function, should "fit" the moral quality of a specific criminal act, assessed quite independently of its relation to social harm. Given our conventions, of course, condemnation is expressed by hard treatment, and the degree of harshness of the latter expresses the degree of reprobation of the former. Still, this should not blind us to the fact that it is social disapproval and its appropriate expression that should fit the crime, and not hard treatment (pain) as such. Pain should match guilt only insofar as its infliction is the symbolic vehicle of public condemnation.



Action and Responsibility

What is the difference between a full-fledged human action and a mere bodily movement? Discussion of this ancient question, long at an impasse, was revitalized a decade and a half ago by H.L.A. Hart in a classic article on the subject¹ in which he argued that the primary function of action sentences is to ascribe responsibility and that even in nonlegal discourse such sentences are "defeasible" in the manner of certain legal claims and judgments. It is now widely agreed, I think, that Professor Hart's analysis, although it contains insights of permanent importance, still falls considerably short of the claims its author originally made for it. Yet, characteristically, there appears to be very little agreement over which features of the analysis are "insights" and which "mistakes." I shall, accordingly, attempt to isolate and give some nourishment to what I take to be the kernel of truth in Hart's analysis, while avoiding, as best I can, his errors. I shall begin with that class of action sentences for which Hart's analysis has the greatest *prima facie* plausibility—those attributing to their subjects various kinds of substandard performance.

I²

If I throw down my cards at the end of a hand of poker and, with anger in my voice, say to another player

¹ H.L.A. Hart, "The Ascription of Responsibility and Rights," *Proceedings of the Aristotelian Society*, 49 (1948/49), 171-194.

² I am grateful to George Pitcher for pointing out some serious errors in an earlier version of this section. I fear there may still be much in it that he disagrees with.