

Phil 108, April 15, 2008
Punishment: Morris's "Retributivism"

Morris argues that:

1. We have a right to be punished.
2. This right derives from a right to be treated as a person.
3. The right to be treated as a person is natural, inalienable, and absolute.
4. Denying the right to be treated as a person involves denying all moral rights and duties.

Morris admits that the idea of a right to be punished sounds odd. Who would ever wish to claim it? More fundamentally, it seems that someone has a right only if her having that right serves some interest of hers. What interest is served by a right to be punished? To explain what this interest might be, he contrasts a system of punishment with a system of therapy.

The system of punishment:

We assume a set of "primary rules," which is roughly the core of criminal law.

- General compliance with these rules benefits us all: it allows each of us to go about his or her affairs without interference.
- But realizing this common good imposes burdens on us all: each of us is called on to comply with the rules, restraining him or herself from interfering with others.
- Justice requires that these benefits and burdens be distributed equally.

Three justifications for punishment:

First, those who comply need some assurance that others will do so as well. Otherwise, their motivation to comply will weaken. People are less willing to do their fair share in a system if they believe others will not do their fair share.

Second, since justice requires an equal distribution of benefits and burdens, there is reason to have some mechanism that prevents unequal distributions.

These first two justifications appear to be appeals to deterrence. Punishment encourages people to comply with the rules, and this in turn provides assurance and prevents unequal distributions.

Third, when someone violates the rules, the distribution is no longer equal. The violator—by taking some liberty—has not borne the burden that others have. By placing a further burden on the violator—by depriving him of some liberty that others enjoy—punishment restores the equal distribution that justice requires.

This justification:

- Explains why non-violators should not be punished: Non-violators have borne the same burdens as others, so punishing them would make the distribution *unequal*.
- Explains proportionality: Violators should be deprived of no more and no less than the liberty that they have unfairly taken.

Notice that this justification does *not* appeal to *desert*, as we understood it last time: the idea that it is good in itself that people who have done bad things suffer. The appeal is instead only to the idea that the burdens of compliance should be *distributed equally*.

Some questions about this justification:

- Does justice require "leveling down"? If someone enjoys some benefit that others do not, does justice require that he be deprived of that benefit, even if others will not thereby enjoy it?

- What if the liberty that the violator has taken is not a liberty that others want to take? Is it unjust for someone to enjoy a benefit that others would not enjoy? There are many criminal activities that none of us have any interest in engaging in.

Here one might say that the point is *not* that the violator has borne less of a burden than others (since it's not a burden to them). It's instead that he has deprived his *victim* of some liberty. This also upsets the distribution. But then the way to restore equality is to *increase* the *victim's* liberty. It is not clear how punishing the violator does this.

- Why should only voluntary violations be punished, as Morris claims? Even if I take some liberty *involuntarily*, haven't I still enjoyed something that others have been deprived of?

The therapy system:

Violations of the rules are treated as symptoms of disease. The violator is treated until he no longer has the disease.

Morris claims that:

- Therapy focuses on the future, not the past.
- Therapy treats all actions as mere happenings. (Why must it treat *non-violators'* actions as mere happenings?)
- Therapy seeks to benefit the violator. (Why to benefit him? Why not to benefit others, by protecting him from his violations?)
- The therapy system cannot explain proportionality. (Why not a balancing of the burdens to him of therapy with the benefits to himself or others from it?)
- The therapy system has no reason be concerned about treating people who don't have the disease. (Why not, if therapy is burdensome to them?)

The sense in which we have a right to be punished, Morris argues, is that we have an interest that the punishment system, but not the therapy system, serves. This interest is our right to be treated as persons.

We are treated as persons when? only when?:

- our choices determine how others treat us,
- our choices are taken seriously and not treated as symptoms of disease,
- our actions are treated as different from mere happenings. Otherwise, we never achieve or earn anything.

Unless we have the right to be treated as persons, Morris claims, we have no rights, and others have no rights against us. (Does this follow?)

Questions:

- What does treating our actions *as* actions require? That others *praise* and *blame* us for them?
- Is the therapy system *incompatible* with treating us as persons? Is our system of responding to criminal violations the only social practice that can reflect our treatment of others as persons?
- Does *Morris's* punishment system entail that we *are* treated as persons? Contrast it with a system based on desert.
- Might Morris's justification support some third alternative: neither punishment, nor therapy? He considers only a *forgiveness* system (which does not deter and presupposes punishment) and a *shame* system (which has no mechanism for correcting inequalities and offers us no way to rid ourselves of shame).