

Phil 108, April 17, 2008
Punishment: Hart's Synthesis

Hart's main aim is to suggest that there is *more than one question* about the justification of punishment. Elements of both retribution and deterrence may be correct as answers to *different questions*.

The definition of crime:

Prior to the question why, when, and how people may be punished for crimes is the question what the crimes are and why. Certain kinds of action are made crimes, in order "to announce to society that these actions are not to be done and to secure that fewer of them are done."

- A punishment cannot be understood simply as a *cost* imposed by law on a certain behavior. Taxes on earned income are costs imposed on earning income, but they are not punishments. We need the prior idea of a crime.
- "It would be paradoxical to look upon the law as designed not to prevent murder at all... but simply to extract the penalty from the murderer."

General Justifying Aim:

This is the reason for having a system of punishment at all. Retribution, he thinks, is implausible as a General Justifying Aim. But it not implausible as a *constraint* on the *pursuit* of the General Justifying Aim, which Hart takes to be closer to utility or deterrence.

Retribution in distribution:

In its role as constraint, retribution is a claim about the *distribution* of punishment. It is "the simple insistence that only those who have broken the law—and voluntarily broken it—may be punished."

Hart denies that "retribution in distribution" flows from the General Justifying Aim, whether this is taken to be Utility or Retribution.

Utilitarians argue for retribution in distribution on the grounds that a system that publicly empowered authorities to frame the innocent would have bad consequences overall. *Objections:* (i) Framing might be beneficial in particular cases. (ii) There have been effective legal systems of vicarious punishment.

Surprisingly, Hart thinks that even *Retribution as General Justifying Aim* doesn't explain retribution in distribution. This is because retribution in distribution has value even in a system that criminalizes morally good actions. "Even where the laws themselves are hideously immoral as in Nazi Germany, e.g., forbidding activities (helping the sick or destitute of some racial group) which might be thought morally obligatory, the absence of the principle restricting punishment to the offender would be a further *special iniquity*." The value of retribution in distribution in *these* systems cannot be that it gives bad people, and only bad people, the suffering that they deserve.

Excuses and Mitigation:

Justification: conduct that the law does not condemn, since the conduct does not detract from the aims of the law (e.g., justifiable homicide, such as killing in self-defense).

Excuse: the law condemns what the person did, but given his psychological state, it would be unfair to punish him for it (e.g., excusable homicide: accidental, non-negligent killing).

Mitigation: punishment is justified, but the special difficulty that the person faced in avoiding the crime lessens the severity of the punishment that he should receive.

Like the prohibitions on framing and vicarious punishment, excuses and mitigation do not flow from the General Justifying Aim, but instead are constraints on it. (Granted, the severity of punishment is partly determined by the General Justifying Aim, but this is distinct from mitigation.)

The utilitarian attempt to explain the excuses fails. Here Hart makes Jen's point from last time: "Plainly it is possible that the actual *infliction* of punishment on [the mad, the infant child or those who break the law unintentionally or under duress], though (as Bentham says) the *threat* of punishment could not have operated on them, may secure a higher measure of conformity to law on the part of normal persons than is secured by the admission of excusing conditions." Why? Because the availability of excuses may undermine deterrence. If prospective criminals know that they may be able to avoid punishment by pretending to be crazy, they may be emboldened to commit crimes. Indeed, this kind of social calculation is not merely hypothetical. Many legal systems recognize "strict liability"—punishment for unintentional, non-negligent acts—because proof of intent or negligence is too difficult to determine.

Further constraints on pursuing the General Justifying Aim:

- *Treating like cases alike*
- *Lesser offences should not be punished more severely* (proportionality).

Again, this does not flow from the General Aim:

- Against Utility as General Aim, a severe penalty for minor offenses may be such an effective deterrent that it maximizes utility.
- Against Retribution as General Aim, there is no way of determining what punishment *really* fits the crime.

Hart's suggestion: "[W]here the legal gradation of crimes expressed in the relative severity of penalties diverges sharply from this rough[, commonsense] scale, there is a risk of either confusing common morality or flouting it and bringing the law into contempt."

Explaining the constraints on pursuing the General Justifying Aim:

"Justice simply consists of principles to be observed in adjusting the competing claims of human beings which (i) treat all alike as persons by attaching special significance to human voluntary action and (ii) forbid the use of one human being for the benefit of others except in return for his voluntary actions against them."

"An itch to go further": Part of the "fair terms" on which the General Aim may be pursued:

- Retribution in distribution secures "that the suffering involved in punishment is a return for the harm done to others."
- Each individual has a "*fair* opportunity to choose between keeping the law required for society's protection or paying the penalty." The punishment is "a price justly extracted because the criminal had a fair opportunity beforehand to avoid liability to pay."

Supports individual freedom:

- First, people have the choice whether to obey and avoid the penalty, or to violate and take the penalty.
- Second, people can better predict when they will be free from social interference. E.g., people can predict better what they will do intentionally, than what they will do unintentionally.

Reform:

- "To take Reform as the dominant objective would... thus subordinate the prevention of first offenses to the prevention of recidivism."
- "Reform can only have a place within a system of punishment as an exploitation of the opportunities presented by the conviction or compulsory detention of offenders."