

Phil 108, April 22, 2008
Feinberg: The Expressive Function of Punishment

Punishment distinguished by its expressive function:

Common definition of 'punishment': "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)."

Feinberg suggests that this is better understood not as a definition of 'punishment,' but instead as a definition of the broad class of '*penalties*' to which punishments belong. Parking tickets, firings, "regretfully suspending the license of a conscientious but accident-prone driver," are penalties, but they are not quite the same as punishments.

What distinguishes punishments from "mere penalties"?

- That punishments are harsher? Not always.
- That penalties are mere "prices" paid after receiving some benefit? But not all penalties (e.g., firings) can be viewed as payment for a benefit.

Feinberg's answer: The punishments have a symbolic or expressive significance that other penalties lack: "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."

Several functions of punishment that depend on its expressive function:

- *Authoritative disavowal*: By punishing the rogue fighter pilot, his government expresses that it does not condone his action. The call for punishment (e.g., by the aggrieved government) may be in order to ensure that he did not act with the blessing of his government.
- *Symbolic nonacquiescence*: By not punishing paramour killings, the State of Texas condones them. Since this authority "speaks in the name" of Texans, it involves them too in condoning paramour killings. The call for punishment may be a refusal to acquiesce in being involved in this way.
- *Vindicating the law*: If lynchings are never punished, then the law against them is dead letter. Punishment "emphatically reaffirms" the law.
- *Absolution of others*: Punishment of one person for a crime relieves others of suspicion and blame.

Distinguishing symbolic condemnation from hard treatment:

Many kinds of hard treatment, such as imprisonment, have the "conventional" symbolic significance of condemnation

However, hard treatment is neither necessary (at least in principle) nor sufficient (as mere penalties show) for such symbolic significance.

Once we distinguish symbolic condemnation from hard treatment, then each seems newly vulnerable to objection.

Against symbolic condemnation: “We need penalties for deterrence. But condemnation serves no useful social purpose.”

Against hard treatment: “It is clear why we should condemn crimes. But why must this condemnation involve any further pain or hardship? Why should the condemnation come through the ‘usual physical media—incarceration and corporal treatment’? ‘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 criminal for his dastardly deed.’”

Distinguishing the expressive function from retributivism:

Retributivism—the view that “the ultimate justifying purpose of punishment is to match off moral gravity and pain”—is easily confused with the idea that punishment has an expressive function.

- For both retribution and expression, punishment is backward-looking and appropriate in response to an action that is “truly worthy of reprobation.”
- However, retribution aims to *apportion suffering to moral desert*, whereas expression aims only to *communicate society’s condemnation*.
- “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.”
- Retribution is focused on the how *morally evil* the *particular criminal* is, whereas expression is concerned with the *social objection* to the *general kind of behavior* that has been outlawed.
- As a result, expression may not need as strict a doctrine of *proportionality* and may have an easier time explaining the doctrine it needs. “[T]he 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.”

Questions: Which attitudes does, or ought, punishment express? What follows for punishment?

- *Disapproval*, which seems impersonal, like mere grading?
- *Resentment* (or indignation=vicarious resentment), which is felt by (or behalf of) the specific person, or group, who was wronged?
- *Vengeance*, which involves a desire to harm the violator? (“The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite.”)