

Phil 108, April 24, 2008
Quinn: The right to punish from the right to threaten

The basic question:

Why doesn't punishment violate (or even infringe) the rights of the person punished? After all, taking someone's property, confining him against his will, etc. normally does violate her rights (or infringe them, in which case we owe compensation or apology).

The same question arises in the case of self-defense, but it seems easier to answer: we defend ourselves to protect our rights. The problem is that when we punish someone for some violation of our rights, the *punishment* does not protect us from *that* violation.

Objection to deterrence: It is not generally true that "ordinary rights to liberty and life fail to apply *because* their application would stand in the way of some socially profitable use of people."

Objection to forfeiture: Forfeiture is the idea that rights to life, liberty, and property are conditional, so that if one attempts to violate the rights of others, one "forfeits" them. But we don't think that people or society can violate the criminal's rights in ways *independent* of punishing him (e.g., locking up a burglar to prevent him from expressing his political views). So "the idea of forfeiture... comes to no more than the idea that the criminal's rights do not in fact stand in the way of his being punished."

Objection to retribution: It is mysterious why it is just to inflict suffering for wrongdoing. And the main appeal of the view—that punishment should be justified by the crime, not by further advantages—can be captured by a new alternative.

Quinn's approach:

The traditional approach: The right to threaten punishment is justified by the right to punish.

Quinn's approach: The right to punish is justified by the right to threaten punishment.

To create a threat: (i) to create a risk that something bad will happen to someone if he does something and (ii) to inform him of (i) in circumstances in which this information may deter him from doing it.

Self-protection: We have a right to create threats because we have a right to protect ourselves from violations of our rights.

- Like deterrence theory, punishment is justified by the aim of deterrence. But each act of punishment is not justified *because it* deters.
- Like retribution, the justification of punishment is backward-looking, for a particular crime. But the justification does not appeal to desert.

Our right to protect ourselves from violations of our rights allow us to take several kinds of measures:

- (i) self-defense,
- (ii) barriers (e.g., locks, fences),
- (iii) automatic costs "*precede* or *accompany* the violation of some right,"
- (iv) confinement, as a last resort.

Creating threats is an instance of (iii): "[S]uppose... our defender cannot arrange the spikes so that they offer a threat of injury to someone entering his territory but can arrange them so that they clearly offer threat of injury to an enemy leaving his territory after an attack." If he would have a right to do the former, doesn't he have a right to do the latter?

“M-punishment”

With a system of mechanical punishments or m-punishments, our only choice is whether to create the threat. There is no further choice, after we have created the threat, whether to follow through. The machines take care of that for us.

Each instance of m-punishment is justified *not* because *that punishment* deters *future* crime. Instead, it is justified as the *unavoidable by-product* of the prior threat, which was justified because *that threat* deterred crime *until now*.

Proportionality in m-punishment is explained by proportionality in self-protection.

- For example, we are not allowed to kill someone trying to pick our pocket.
- Still, the cost we threaten may be more serious than the violation of the right that the threat protects.

The functional equivalence of punishment and m-punishment

“Every intuitively justified practice of punishment has as its counterpart a practice of m-punishment justified by the rights of self-protection, and vice versa,” where they are “counterparts” if they “threaten penalties of just the same severity for the same crimes.”

Since m-punishments may be more severe than the violations that they punish, one might worry that the system of m-punishment is at odds with our intuitions about proportionality.

- *Reply*: Intuitively, we allow that punishment may be more severe than the violations they punish.

There are cases in which a violation of rights has occurred, but punishment seems unjustified. It is also unjustified to m-punish in these cases?

- *Innocent third parties*: M-punishment would also be ruled out. “[N]o matter what the gain in protection, it is manifestly unjust to threaten to inflict an evil on someone when it is not up to him to do that which will prevent it.”
- *Incapacity to respond to reasons* (e.g., compulsion, mental illness, non-culpable ignorance): “It would be unjust to create dangers for them that they cannot escape or cannot have a reasonable chance of escaping.”

Does the right to threaten punishment justify the right to punish?

Quinn aims to argue from:

(1) the right to threaten *m*-punishment

to

(2) the right to *threaten* punishment

to

(3) the right to *punish*

The hard step is the one from (2) to (3). Can this be explained *without presupposing* the right to punish? Notice that this is the crucial difference between m-punishment and punishment. In the case of m-punishment, there is no question of the right to *inflict* m-punishment, because it is the machines that do that, not us. We only need to show that there is a right to *threaten* m-punishment. But in the case of punishment, *we* inflict the punishment. With what right?

Quinn’s explanation of the step from (2) to (3) is rather subtle and involved. So we won’t try to follow all the twists and turns. Perhaps the most important feature of his explanation is that it focuses on the *objections of the recipient* of the punishment. From the *recipient’s* perspective, there seems little difference between our creating the threat and our trying to carry it out. In both cases, some potential cost

is attached to some conduct of his. So if he doesn't have an objection to the former, then why should he have an objection to the latter?

Question: Is the *recipient's* objection to our being *allowed* to threaten or to punish the only objection that matters to whether we have a right to threaten or to punish?

- One might think that whether we have a right to do something depends on a balancing of the *recipient's* objection to our being *allowed* to do it to him and *our* objection to our being *prohibited* from doing it to him.
- And perhaps even if *his* objection to our being allowed to punish him is *no stronger* than his objection to our being allowed to threaten him, *our* objection to being prohibited from punishing him is *weaker* than our objection to our objection to being prohibited from threatening punishment. If we don't threaten, then our rights are put at risk. But what do we lose if we don't follow through on our threat? (Of course, we lose the ability to *deter others* by punishing him, but the *right* to punish him is not supposed to depend on that.)

Quinn considers a related objection: that his theory faces a problem similar to the "toxin puzzle."

- In the puzzle, one has reason to intend to drink the toxin, but no reason, when the time comes, to drink it. Once one realizes this, one cannot rationally intend to drink it.
- Why isn't it the same with punishment? We have reason to intend to punish, but no reason, when the time comes, to punish. So we cannot rationally intend to punish, which threatening to punish involves.
- Quinn concedes that our reason, when the time comes, to punish cannot be to deter the crime that we are punishing.
- Still, we can have *other* reasons to punish: to mete out retribution, to deter others, to express our condemnation, or simply to fulfill our contractual obligations.
- Crucially, these reasons do *not justify our right* to punish. But they are reasons that we can expect to have, and so they can enable us to intend in advance to punish.