

PUNISHMENT

I. The Definition of Punishment

A. H.L.A. definition of 'punishment', which is now widely accepted hold that:

A system is a system of punishment if, and only if:

- (i) it involves the intentional infliction of pain or some other consequence normally considered unpleasant;
- (ii) this is inflicted on an individual presumed to be an offender against a system of rules *for* his or her presumed offense; and,
- (iii) this is deliberately imposed by an agent authorized by the system of rules against which the presumed offense is committed who is acting within his or her official capacity.

B. Feinberg's Addition: Joel Feinberg points out that this definition fails to distinguish punishment from mere penalties such as overdue notices, late fees and such. Punishment, in the strict sense, includes an *expressive* element. We might capture Feinberg's suggestion by adding this clause to Hart's definition:

- (iv) it expresses vindictive resentment.

II. Punishment stands in need of justification for the simple reason that it, by definition, involves the intentional infliction of pain or some other consequence normally considered unpleasant. Furthermore, these undesirable consequences are typically inflicted against the wishes of the person punished.

III. Philosophical Problems in the Justification of Punishment

A. *General Justification*: Is any system of punishment morally justified? If so, upon what basis? (This involves considering alternative responses to crime—e.g., therapeutic rehabilitation.)

B. *The Distribution of Punishment*:

1. Whom should we punish? Why? (This is sometimes called the question of 'title'.)
2. How much should we punish and in what ways? Why? (This is sometimes called the question of 'severity'.)

IV. Basic Approches to the Justification of Punishment

A. *Utilitarian*: Utilitarian justifications are forward-looking (consequentialistic) in nature. A system of punishment is justified by its consequences. The good consequences of punishment are usually said to be:

1. *Deterrence*

- a. *Special*: The tendency of the punishment to deter the person punished from future criminal acts.
- b. *General*: The tendency of the punishment of one person to deter others from committing criminal acts.

2. *Incapacitation*: Preventing the person from having the opportunity or ability to commit criminal acts (sometimes only of a certain sort).
 3. *Rehabilitation (Reform)*: Altering the character of the person punished so that he or she no longer desires to commit the sort of act for which he or she was punished.
- B. *Retributive*: Retributive theories justify punishment by reference to *desert*. They differ according to their standard of desert and the role they give desert in justifying punishment.
1. The standard of desert
 - a. *Harm Standard*: People deserve punishment in proportion to the harm that their actions have caused.
 - b. *Moral Iniquity Standard*: People deserve punishment in proportion to their iniquity (wickedness).
 - c. *Balance of Justice Standard*: People deserve punishment in proportion to the degree to which they have upset the balance of justice. This is typically understood as the degree to which they have brought about an unfair distribution of benefits and burdens in society.
 2. The role of desert
 - a. *Negative Retributivism*: Desert is a necessary condition for the justification of punishment but showing that people deserve punishment provides *no* positive reason for punishing them. (In effect, showing that people deserve to be punished shows that they do not have a right not to be punished. It does not give us a reason to punish them. For this, we must appeal to other, perhaps utilitarian, considerations.)
 - b. *Positive Retributivism*: Desert is both a necessary condition for the justification of punishment and a positive reason for punishing. (An exceptionally strong version of positive retributivism would hold that desert is both a necessary *and a sufficient* condition for punishment. With the possible exception of Kant, no sane person holds such a view.)

V. Alternatives to Punishment

- A. Psychotherapeutic Rehabilitation (including: psychotherapy, psychosurgery, behavior modification through operant conditioning, and more)
1. Justification:
 - a. Proponents frequently deny the possibility of free will and the sort of responsibility apparently required by retributive theories. Furthermore, they argue, this alternative is preferable, on utilitarian grounds, to a system of punishment. (I.e., they claim that psychotherapeutic rehabilitation is more efficient at achieving the goal of reducing crime than punishment is.)
- B. Restitution: The restitution model seeks not to impose a punishment on the criminal but to compel the criminal to “pay for his/her crime” literally by compensating victims for the harm caused.