PHL271 Handout 8: Punishment and Desert

§1 Punishment and the Law

Our primary concern so far has been the nature and limits of the law. Yet today we have a new topic: the connection between law—especially the criminal law—and punishment.

The central questions about legal punishment are *justificatory*:

1. *System Justification*: What justifies the creation and maintenance of a system of punishment?

2. *Target Justification*: What justifies the selection of who can be punished?

3. *Sentencing Justification*: Which factors justify the particular sentences the system assigns to individuals?

We've already seen theories that provide (perhaps merely partial) answers to 1.

> Hart, for example, could treat punishment as simply one means (among others) that a legal system might use to ensure obedience to the rules that constitute the legal system.
>
>> A minimal role for punishment: maintaining adherence to those rules that help constitute a legal system.
>>
>>> *Question*: what sort of justification, if any, could this minimal role provide for a system of punishment? Given the separation between law and morals within Hart's legal positivism, it isn't obvious that this minimal role will always (if ever) provide *moral* justification for a system of punishment. Yet if we can't secure moral justification for our system of punishment, by what right do we punish?
>
> Hobbes also accords punishment—or something quite like it—a central place in his framework. His account of our exit of the state of nature requires that we forfeit our natural liberty to the sovereign (and so our ability to enforce contracts and agreements). Yet this kind of forfeiture requires the background of a system of punishment (or so Hobbes assumes): laws owe their force in part to the fact that they're backed by the authority vested in the sovereign, an authority backed by *force* and limited only by the role of the sovereign as the means to protect citizens from re-entry into the state of nature.
>
>> Note: the limits on the sovereign's authority might provide partial answers to 2 and 3. Who gets punished, and how they are punished, will depend upon what furthers the sovereign's ultimate aim of protecting society from re-entry into the state of nature.
>>
>>> Yet Hobbes runs into the same problem as Hart: why should the *practical necessity* of protecting people from the state of nature count as

1

a *moral justification* of punishment? One option would be to opt for a kind of *consequentialism*: a view on which the (morally) right action is that which produces the best overall consequences. Given the background of consequentialism, Hobbes could say that some system of punishment is morally justified in virtue of being superior to the alternative of a state of nature.

> *Worry*: consequentialism might, given the right circumstances, justify punishing the innocent in the name of the greater good.

Much can be said in response to questions 1–3. Our aim will be to get a sense of the complexity of the problems posed by punishment. Indeed, we'll see that it isn't obvious that we can justify anything akin to the system of punishment we have in place.

> Today we'll focus on some general moral questions about punishment. Next class we will get our hands dirty by reading a recent Ontario Court of Justice decision (*R. v. McGill*) that engages directly with the complicated moral and legal status of punishment.

§2 Problems of Justification

Let's canvas some obvious options for answering question 1. This list isn't necessarily exhaustive, and the options aren't exclusive.

> For each of these views, ask yourself how their answer to question 1 constrains potential answers to questions 2 and 3.

§2.1 Desert and Retributivism

An answer that seems obvious to many is that punishment should track *desert*: if someone violates the law—especially the criminal law—they've wronged an individual or society (or both), and so *deserve* some kind of punishment.

> A theory of punishment that makes essential justificatory appeal to desert is often classified as 'retributivist'. In pithy form: retributivists say we (morally) ought to punish the guilty because they deserve it.

Desert-based theories of punishment have a long and storied history. Most such theories include several general constraints on the relationship between punishment and desert:

1. *Proportionality*: a deserved punishment must be proportional to the wrong done by breaking the law (The phrase 'an eye for an eye' should rings some bells).

2. *Fairness*: to the extent that offenders inflict the same wrong, they deserve the same punishment.

3. *Asymmetry*: while the guilty deserve punishment, the innocent <u>even more strongly</u> deserve freedom from punishment.

There are hard questions, which we'll get to in §3, about how we should understand these constraints, and thus what sorts of answers they generate to questions 2 and 3. Yet even if we put questions about these constraints to one side, there remain general challenges to retributivist theories of punishment.

No Moral Desert: the concept of moral desert should play no role in a mature moral theory.

Desert Without Punishment: Even if moral desert has a role to play in our general moral theory, it does not support the imposition of punishment; instead wrongdoers deserve some other kind of consequence (e.g. moral criticism).

Desert Without The Law: Even if moral desert has a role to play in our general moral theory, and even if it supports the imposition of punishment, the state should not impose this punishment through the instrument of the law (either because the state has no standing in matters of moral desert, or because the law is the wrong instrument for imposing punishment).

Unknowable Desert: What grounds do we have for supposing that the state, legislators, or judges are reliable with respect to facts about moral desert (i.e. facts about who deserves what)?

§2.2 Deterrence

Another option would be to appeal to the alleged *deterrent* role of punishment: a system of punishment serves to deter people from breaking the law.

There are two sides to deterrence. Punishment might serve to deter not only *actual* law-breakers but also *potential* law-breakers.

These different sides to deterrence have different normative implications.

If our primary aim were to deter individual law-breakers from committing further crimes—from *recidivism*—then we might end up with quite counter-intuitive answers to our second and third justificatory questions. For instance, the punishments required for individual deterrence might be neither proportional nor fair; the punishments might also be private rather than public.

If our primary aim were to deter potential law-breakers, we would run afoul of a central Kantian moral principle: we ought never treat people as 'means rather than ends'. Human beings are not meant to serve as mere instruments of the state or of the law; to treat them as such would be an affront to their status as autonomous agents.

Potential reply: in at least some cases, someone who violates the law justifies our downgrading their moral status, and so justifies our treatment of them as mere means to a larger end. (Compare: the removal of voting rights from ex-convicts in parts of the United States).

Worry: while this move might seem plausible for select crimes, surely many of the crimes we currently punish are not serious enough to justify downgrading the moral status of those who commit them.

General Empirical Worry: there exists empirical evidence supporting the view that punishment (especially imprisonment) isn't an effective deterrent.

Note: Hobbes certainly seems a natural fit for a deterrence-based justification of punishment. Must Hart also endorse this kind of justification for punishment? What about Mill and Dworkin?

§2.3 Moral Education

Jumping off from the Kantian complaint about a deterrence-based justification for punishment, some think that the primary justification for punishment is the *moral education* of wrongdoers.

The General Idea: on the assumption that wrongdoing results from a failure to appreciate the moral landscape and one's place in it, the role of punishment is to train wrongdoers to develop the proper appreciation.

This conception of punishment treats wrongdoers as autonomous agents capable of evaluating reasons, duties, and so on.

Something like this approach (supposedly) underwrites aspects of the penal systems in many 'developed' countries.

Challenges for this view:
1. The Mentally Ill (e.g. those who *cannot* understand the consequence of their actions)
2. Deeply Evil Criminals (e.g. Paul Bernardo)

§2.4 Restorative Justice

A fourth (and increasingly prominent) answer to the first justificatory question is that a system of punishment is justified insofar as it furthers the ideals of restorative justice.

Central to the concept of restorative justice is the idea that offenders should seek to *repair* the wrong they've done. Hence the primary objective of punishment is the restoring and/or minimizing of the harm done to communities and individuals.

> For example, someone who vandalizes a piece of property might be required to either repair the damage done, or replace what was damaged.

The obvious challenge for proponents of this kind of approach—taken as a wholesale justification of a system of punishment rather than a partial justification for marginal aspects of the system—is the problem of how to further the ideals of restorative justice in cases where extreme harm has been done (e.g. murder, rape, assault, etc.).

§3 Principles of Sentencing

Let's end with a brief survey of some of the challenges that afflict the dominant retributivist model of punishment when we extend the model to questions 2 and 3.

§3.1 Desert

Quite apart from the general moral status of the concept of desert, and the relevance of this concept to the criminal law, there are internal problems with the concept that anyone appealing to moral desert must face.

> *A Desert Metric?*: what should we use as the measure of desert?

>> Also, many wrongs can seem *incommensurate* to any possible punishment, and so it seems inapt to describe a punishment as 'fitting' a crime (e.g. the case of rape).

> *Geometry of Desert*: why is it worse to punish the innocent than to let the guilty go free? This is just one of many questions about the structure of moral desert (Cf. Kagan 2015). A system of punishment will encode certain answers to these questions; but why think these answers are any good?

§3.2 Fairness

What does it mean to treat 'like cases alike' when we're talking about punishment?

> What counts as a 'like case'?

>> We seem to recognise that a wrongdoer's intention can change the status of her action (e.g. negligent homicide vs. pre-meditated homicide). But which distinctions within the class of intentions capture a morally relevant difference between cases? And what else, apart from intentions, should factor in our classification of an action that violates the law?

5

What counts as 'like treatment'?

> *Example*: suppose we want to impose a fine as a punishment for breaking some minor law. Should we set a specific dollar amount (say $100) as the fine? Or should we set the fine as a percentage of an offender's *gross* monthly income? Or should we set it as a percentage of an offender's *disposable* monthly income?

These questions will become very relevant, and very hard, when we look at R. v. McGill next class.