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PART I

The Descartes Lectures 2018

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CHAPTER I

Defining Social Punishment

Linda Radzik

I INTRODUCTION

The term ‘social punishment’ is intended to distinguish our topic from legal punishment. As a first pass, we can think of social punishment simply as nonlegal (and nondivine) punishment. Examples of nonlegal punishments that readily pop to mind include parents grounding children, teachers giving students detention, or employers demoting employees. Each of these is an example of what I call *formal* social punishment. Parents, teachers, and employers act within fairly well-defined, hierarchically structured, institutional roles. In that way, the social punishments of parents and teachers resemble the legal punishments of judges and juries.

The sort of punishment that most interests me here is instead *informal social punishment*, or what Leo Zaibert calls “pre-institutional punishment.”¹ It is what John Stuart Mill, in *On Liberty*, describes as the “moral coercion of public opinion.”² These sorts of penalties are imposed by “public opinion” or “society” or one’s “fellow-creatures,” rather than by any sort of formal authority figure acting in an official capacity.³ Mill’s examples of informal social punishments include “depreciatory remark[s],” “disparaging speeches,” sarcasm, and “vituperation,” as well as shunning behaviors.⁴

Mill is one of the few philosophers who have addressed informal social punishment at any length.⁵ He takes these sanctions quite seriously. In *On Liberty*, he writes,

¹ Leo Zaibert, *Punishment and Retribution* (New York: Routledge, 2006), 21–23.

² John Stuart Mill, *On Liberty*, in *Collected Works of John Stuart Mill*, vol. 18, ed. J. M. Robson (Toronto: University of Toronto Press, 1977), I.9. Citations of Mill’s works specify chapter and paragraph number.

³ *Ibid.*, e.g., I.9 and I.11.

⁴ *Ibid.*, III.14, II.44, and III.6.

⁵ Other examples include Zaibert, *Punishment and Retribution*; Ferdinand David Schoeman, *Privacy and Social Freedom* (New York: Cambridge University Press, 1992); and William

Society can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practises a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself.⁶

Readers who are familiar with Mill's biography cannot help but imagine that these words draw on his own, and his beloved Harriet Taylor's, painful experiences as the objects of gossip and scandal. Mill speculated that for historical and political reasons his society might have been particularly prone to using public opinion as a form of punishment.⁷ But I wonder whether even Victorian England can compare with the call-out culture of Twitter in terms of sheer, soul-crushing power.

On the very day I delivered the first of these Descartes Lectures, my morning paper included a vivid example. A recent, online trend in the United States involves posting videos of people in the throes of drug overdoses.⁸ Sometimes these videos are recorded and shared by police officers, with the apparent motive of drawing attention to the severity of the opioid epidemic in the United States and the need for some sort of action. Other videos appear to be posted by bystanders for the purposes of publicly shaming drug abusers. The videos frequently go viral, especially those in which parents have collapsed in front of their young children. Such videos typically generate both outrage and mockery, although some viewers instead reach out with encouragement or offers of aid. For some overdose victims, "the public shaming was a new way to hit bottom" in the sense that it created a moment of crisis that led them to seek treatment.⁹ But for others, having one of the worst moments of their lives permanently archived on the Internet, available for viewing by family and coworkers as well as strangers, is an obstacle to recovery.

It is worth nothing that, while Mill is keenly aware of the dangers of ordinary people policing one another's behaviors, he does not categorically reject informal social punishment. Indeed, Mill writes in *On Liberty*, "If any one does an act hurtful to others, there is a prima facie case for

A. Edmundson, "Civility as Political Constraint," *Res Publica* 8, no. 3 (2002): 217–29. Also notable is historian Michael Cook's *Commanding Right and Forbidding Wrong in Islamic Thought* (New York: Cambridge University Press, 2000).

⁶ Mill, *On Liberty*, I.5.

⁷ *Ibid.*, I.8.

⁸ Katharine Q. Seelye, Julie Turkewitz, Jacky Healy, and Alan Blinder, "How Do You Recover after Millions Have Watched You Overdose?" *New York Times*, online edition, Dec. 11, 2018.

⁹ *Ibid.*

punishing him, by law, or, where legal penalties are not safely applicable, by general disapprobation.”¹⁰ He expresses this thought even more strongly in *Utilitarianism*, saying that “we should be gratified” whenever injustices that fall outside the reach of the law are punished through social sanctions.¹¹ So, while Mill provides a clear case against socially punishing those who harm only themselves (e.g., by overdosing), he appears to support the social punishment of those who harm others (e.g., by neglecting and traumatizing their children).

I have very mixed feelings about punishment myself. I am deeply skeptical about the justification and effectiveness of criminal punishment in legal contexts. I rarely used punishment as a parent. But in this book, I argue that informal social punishment is permissible in some contexts. My goal is not to encourage informal social punishment but to bring attention to the fact that it goes on around us all the time and to develop tools for thinking critically about it.

In this first chapter, I take up the task of defining informal social punishment more clearly. Formulating a definition helps us distinguish social punishment from a range of other possible responses to wrongdoers, including blaming, morally criticizing, persuading, and minding one’s own business.¹² Chapter 2 addresses the problem of justifying informal social punishment. Taking traditional debates about criminal punishment as my model, I ask what the general justifying aim of social punishment might be. Is it to dole out just deserts? To deter wrongdoing? To express or communicate some sort of message? I argue that none of the usual answers is quite right and develop an alternative. I have titled Chapter 3 “Practicing Social Punishment.” Even when we grant that informal social punishment is justifiable in principle, justifying particular acts of punishment presents further difficulties.

Each of the three chapters highlights a different set of social practices that, I argue, are frequently used as informal social punishments. In this chapter, my main examples involve rebuking or pointedly socially avoiding wrongdoers. Chapter 2 features a consumer boycott of an unjust business. The third chapter focuses on the phenomenon of naming and shaming on social media, including the use of public shaming by the #MeToo campaign against sexual abuse and harassment and the #LivingWhileBlack

¹⁰ Mill, *On Liberty*, I.11.

¹¹ John Stuart Mill, *Utilitarianism*, in *Collected Works of John Stuart Mill*, vol. X, ed. J. M. Robson (Toronto: University of Toronto Press, 1969), V.13.

¹² Unless otherwise indicated, I use the terms ‘wrongdoer’ and ‘wrongdoing’ to imply culpability.

campaign, which responds to the harassment and oversurveillance of African Americans in everyday life.

2 WHY BOTHER WITH DEFINITIONS?

Let's turn, then, to the task of defining informal social punishment more precisely. You might well wonder whether this is really necessary. Philosophers in the analytic tradition have been known to fetishize definitions. Analyzing a commonly used word like 'punishment' into necessary and sufficient conditions and then using those conditions to sort hugely complex sets of phenomena will inevitably feel artificial at times. We should expect there to be marginal cases and reasonable disagreement. Still, a good definition helps us coordinate our attention on a topic. It gives us insights into that topic and helps us understand why controversial cases are controversial. We should pay attention to what the definition leaves out and consider whether it encourages us to make value-laden assumptions that should instead be interrogated. But if we keep these guidelines in mind, definitions are helpful things.

The philosophical literature on punishment includes quite a bit of debate about how punishment should be defined. It is remarkable just how fully focused this literature is on legal punishment.¹³ To give just one example, David Boonin's 2008 book *The Problem of Punishment* is, despite the title, solely concerned with legal punishment.¹⁴ He simply ignores the possibility of nonlegal punishment. I am picking on Boonin a bit here, but he is hardly alone. Other authors mention that there are nonlegal kinds of punishment and *then* ignore them, often dismissing them as "sub-standard" or "secondary" cases.¹⁵ Some, however, explicitly argue that there is no such thing as nonlegal punishment. They dismiss talk of divine punishment or parental punishment as either misuses of the term or mere metaphors.¹⁶ They certainly would not countenance the category of informal social punishment. Arguments for denying the possibility of nonlegal or informal punishments emerge in what follows. But I would

¹³ For a thorough review of the literature on this point, see Zaibert, *Punishment and Retribution*, ch. 1.

¹⁴ David Boonin, *The Problem of Punishment* (New York: Cambridge University Press, 2008). Leo Zaibert makes this criticism of Boonin in "Punishment, Restitution, and the Marvelous Method of Directing the Intention." *Criminal Justice Ethics* 29, no. 1 (2010): 41–53, at 42.

¹⁵ H. L. A. Hart, "Prolegomenon to the Principles of Punishment," in *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed. (New York: Oxford University Press, 2008), 1–27; and Antony Flew, "The Justification of Punishment," *Philosophy* 29, no. 111 (1954): 291–307.

¹⁶ Stanley I. Benn, "Punishment," in *The Encyclopedia of Philosophy*, vol. 7, ed. Paul Williams (New York: Macmillan, 1967), 29–36.

like to register a few initial objections to the view that ‘punishment’ simple *means* legal punishment.

First, the practice of using words like ‘punishment’ in various languages for the actions of God and parents as well as kings and magistrates goes way back. Second, as Zaibert points out, many writers in the literature on criminal punishment (including Boonin) reason from premises about nonlegal forms of punishment to conclusions about legal punishment.¹⁷ Third, ordinary, contemporary usage is on my side. People use the language of punishment to talk about nonlegal and informal types of penalties.

I have pulled just a few examples from my favorite advice columnist, Carolyn Hax of the *Washington Post*. (Yes, I have a favorite advice columnist. Advice columns are filled with discourse about everyday sorts of wrongdoing.)

- One letter writer says that her self-absorbed in-laws have never shown any interest in her as a person. She is hurt and angry and finds herself wanting to keep them from seeing the new grandchild. Hax suggests some possible reasons for her in-laws’ behavior and then writes, “Now think of these possibilities and ask yourself, is any of these violations of character or behavior serious enough to warrant the punishment of losing their grandkids?”¹⁸
- Another woman confesses that she lied about seeing her brother’s girlfriend cheating on him with another man. The lie was motivated by jealousy at how well the young couple are doing financially and professionally while the letter writer is still struggling. But she got caught in the lie and now her brother avoids being alone with her. Hax responds, “[I]f you seriously think your worst or only punishment . . . is that it’s awkward right now and your main concern is wanting the awkward phase to pass faster . . ., then you have some more work to do with your conscience.”¹⁹ (I think Hax is implying here that the writer deserves both her brother’s emotional withdrawal and the self-punishment of guilt and remorse.²⁰)

¹⁷ Zaibert, “Punishment, Restitution, and the Marvelous Method of Directing the Intention,” 43.

¹⁸ Carolyn Hax, “‘Strangers on a Train’ Except with Carpooling Instead of Murder,” *Washington Post*, online edition, May 25, 2018.

¹⁹ Carolyn Hax, “Boom Chicka Pop to That,” *Washington Post*, online edition, Oct. 26, 2017.

²⁰ Self-punishment is another morally rich phenomenon that tends to be overlooked when we define punishment to mean only “legal punishment.”

- A third letter writer recounts having cheerily asked a co-worker, Polly, how her holiday was. In return, “[Polly] glared at [him] and stomped away.” A year later Polly is still emotionally distant. It turns out that Polly had suffered a traumatic miscarriage over the holiday and posted about it at length on Facebook. Hax responds, “You have zero obligation to be aware of what people post on social media. . . . So if Polly has distanced herself as a way to punish you for your *faux pas*, then Polly is in the wrong.”²¹

Is punishment merely a metaphor in Hax’s vocabulary? It does not seem to be. Her use of the word seems perfectly straightforward. It would be much odder were she to write, “Gee, I just don’t see the connection between your in-laws hurting your feelings and you wanting to block them from cuddling their grandchild” or “What could Polly be up to? She’s not a court of law!” It is also worth mentioning that other academic literatures, including psychology and economics, discuss informal, social forms of punishment without pausing over the use of the word ‘punishment.’²²

In the end, though, the best answer I can give to someone who objects that there is no such thing as informal social punishment is that the proof of the pudding is in the tasting. In these chapters, I take the theoretical apparatus that was developed by philosophers to think through the moral complexities of state punishment and apply it to the ethics of responding to wrongdoing among social peers. If this exercise is profitable – if it helps us engage in deeper, wiser forms of moral reflection – then that is the best defense I can give for claiming that I am not misusing the word ‘punishment.’

Just one more caveat before we get down to the task of formulating a definition: it is difficult to separate the task of defining punishment from the task of justifying punishment. We certainly do not want all punishments to turn out as permissible by definition. But I think we are going to find that ‘punishment’ is a thick term – it has both descriptive and normative elements. So, a certain amount of reasonable disagreement about what should be included in the definition and what should instead be considered a question of justification is probably inevitable.

²¹ Carolyn Hax, “Nicknaming Awesomeness,” *Washington Post*, online edition, Sept. 8, 2017.

²² See, for example, Francesco Guala, “Reciprocity: Weak or Strong? What Punishment Experiments Do (and Do Not) Demonstrate,” *Behavioral and Brain Sciences* 35 (2012): 1–15; Fiery Cushman, “Punishment in Humans: From Intuitions to Institutions,” *Philosophy Compass* 10, no. 2 (2015): 117–33; and Klaus Jaffe, “Evolution of Shame as an Adaptation to Social Punishment and Its Contribution to Social Cohesiveness,” *Complexity* 14, no. 2 (2008): 46–52.

3 THE STANDARD DEFINITION OF PUNISHMENT

What is often called the standard definition of punishment in the literature is the Flew–Benn–Hart definition.²³ These three authors – Antony Flew, S. I. Benn, and H. L. A. Hart – present roughly the same definition, with minor differences in phrasing, in separate articles. All three versions of the definition include clauses referring to the actions of “officials” or violations of “legal rules,” which ensure that only legal forms of punishment count as punishments under their definitions. Flew and Hart mention the possibility of nonlegal punishments before putting them aside, while Benn dismisses the possibility of nonlegal punishments altogether. Boonin also defends a version of the Flew–Benn–Hart definition in his book. As I have already mentioned, Boonin does not take up the question of whether there are nonlegal forms of punishment. For my purposes, though, what is interesting about Boonin’s version of the Flew–Benn–Hart definition is that it does not include any clauses that explicitly limit punishment to legal contexts. His discussion is only about legal punishment, but the definition itself is much more inclusive. Or so I will argue.

Boonin defines punishment as *authorized, intentional, reprobative, retributive harming*.²⁴ Since I plan to use the word ‘retributive’ to refer to a different concept in Chapter 2, I substitute the word ‘reactive’ to refer to the concept he has in mind. With this change in place, punishment is defined as *authorized, intentional, reprobative, reactive harming*. We can clarify this definition by seeing how these five criteria are fulfilled in a paradigmatic case of legal punishment – a sentence of imprisonment set by a criminal court.

First, punishing is a case of *harming*. Being confined to prison is clearly harmful. The harm condition in the definition of punishment is expressed in various ways in the literature: what is imposed is characterized as suffering, evil, or pain but also as unpleasantness²⁵ or hard treatment.²⁶ Herbert Fingarette suggests that what really characterizes punishment is the humbling of the person’s will by imposing something on her she would

²³ Flew, “The Justification of Punishment”; Benn, “Punishment”; and Hart “Prolegomenon.” In this paragraph, I draw on Zaibert’s discussion of the Flew–Benn–Hart definition in *Punishment and Retribution*, ch 1.

²⁴ Boonin, *The Problem of Punishment*, 1–36.

²⁵ Flew, “The Justification of Punishment,” 293; Benn, “Punishment,” 29; and Hart, “Prolegomenon,” 4.

²⁶ Joel Feinberg, “The Expressive Function of Punishment,” in *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton: Princeton University Press, 1970), 95–118, at 95.

prefer not to experience.²⁷ To me, all of these sound like forms of harm, so I favor that term.

Second, to say that a punishment is *reactive* is to say both that it is a reaction to the perceived transgression of a rule and that it is applied to the person who is believed to have committed the transgression.²⁸ Again, this is well illustrated with the example of imprisonment. Confinement of a person acknowledged to be innocent is kidnapping, not punishment.

The third criterion in Boonin's definition of punishment specifies that the harming is *reprobative*. That is, the infliction of harm is meant to express disapproval of the one being punished. Imprisonment is clearly expressive in this way. Furthermore, this criterion helps explain why fines are punishments rather than just fees for engaging in particular behaviors.

Fourth, punishment is *intentional* harming. Imprisonment is a harm that is intentionally imposed on the prisoner. In contrast, a criminal who is accidentally trapped when the sheriff closes off a cave with a steel grate is not thereby punished.²⁹ The sheriff did not mean to harm the criminal by installing the grate. Intention requires both that the punisher *knows* that he is imposing a harm and that he is imposing that harm for the *purpose* of punishment, that is, in order to cause harm as a response to the transgression.³⁰ If the sheriff knowingly traps the criminal in the cave but does so in order to prevent him from testifying about the sheriff taking bribes, the confinement would once again fail to qualify as punishment under the standard definition.

Finally, to count as a punishment the harming act must be *authorized*. It must fall within the legitimate jurisdiction of the agent imposing the sanction. The authorization criterion captures the intuition that, for example, mob aggression against a criminal is properly viewed as assault rather than punishment. Even if the criminal has been convicted of the crime through a legitimate and fair process, the mob are not the ones authorized to impose a penalty. The authorization condition helps explain why labeling something as a punishment gives it at least an air of legitimacy. Particular acts of punishment may be unjustified. Whole

²⁷ Herbert Fingarette, "Punishment and Suffering," *Proceedings and Addresses of the American Philosophical Association* 50, no. 6 (1977): 499–525.

²⁸ Similarly, rewards are "reactive" in that they are responses to praiseworthy actions.

²⁹ The example is drawn from Mark Twain, *The Adventures of Tom Sawyer* (Mineola, NY: Dover Publications, 1994).

³⁰ Wider readings of the purpose of punishment – what Hart would call the general justifying aim of punishment – should not be included in the definition of punishment (Hart, "Prolegomenon"). To do so would prematurely close off debate about whether and why punishing is justified.