

Chapter 8

Punishment

Introduction

People have rights to themselves. Criminals are people. Therefore criminals have rights to themselves. To punish a person by physical pain, imprisonment or death is to deny that person's right to himself. Therefore it is not just to punish criminals in these ways.

This may sound like a recipe for a society that will be overwhelmed by criminal behavior. That this need not happen is a consequence of two things. First, fines are not inconsistent with the rights of persons to themselves, and second, no one has a right to be trusted. Each person's right to himself includes the right to not trust whom he chooses to not trust.

While we do not have a right to imprison criminals or inflict physical pain on them, we do have a right to fine them, to require them to post bonds, and to decline to associate with them. We can justly say to a criminal, "We don't trust you. We don't want to bear the risk of the harm that might result from associating with you. We have rights to ourselves. We choose to exercise those rights by forming a society that does not include you. You must find someplace else to live." That is, a society has a right to exile those persons with whom its citizens find it costly to associate.

This is not to say that a good society will have no qualms about deciding not to trust people and exiling people. A good society will make every effort that they can to trust people and to find ways of including them even if they do not trust them. But justice gives them the choice of where to draw the line about whom to trust and whom to include, guided by conscience and by their understanding of the capacity of their fellow citizens for embracing moral imperatives. Still, in this framework a society can justly exile a citizen or tell a citizen that he will be exiled if he does not accept his society's restrictions on his liberty.

A person faced with such a judgment has several choices. He can join some other society if he can find one that will have him. He can band together with friends, family and associates who find one another compatible and secede, or he can secede as a society of one and live as a hermit. Finally, he can negotiate with his society for restrictions on his liberty that he finds to be acceptable if he is allowed to remain a member of the society.

Thus the role that imprisonment, the infliction of physical pain, and execution currently play in responding to criminal conduct would be played in a just society

by the combination of fines, bonds, emigration, group secession, individual secession, and restrictions on their liberty that individuals accept voluntarily.

Fines

It might seem that fines would infringe on the rights of persons to themselves. To levy a fine on a person is to compel that person to transfer to the court resources that had previously been agreed to belong to the person, possibly the product of his labor. How is it that this is not a denial of the person's right to himself?

The answer is that if a person has an adequate exit option (an opportunity to emigrate and an opportunity to secede if desired, both opportunities accompanied by rights to equal shares of natural opportunities), then by living in a society the person can be taken to have agreed to its laws and therefore to have no just complaint when the legal procedures of the society impose a fine on him. When the laws of a society allow fines to be levied, any wealth that a person has accumulated can properly be regarded as belonging to the person only on the condition that he not be fined. People could justly form a society in which any violation of any rule of the society would result in the forfeiture of all of the violator's wealth. It is rather implausible that very many people, if any, would want to live in such a society, but it would not be unjust to form the society. Thus fines of any magnitude, when levied in accordance with the laws of a society, are just.

Bonds

A person may not have enough wealth to pay a fine that the laws and legal procedures of his society impose on him. If a person who seems untrustworthy does not have enough wealth to pay a fine that might be imposed on him, his fellow citizens may think about exiling him, to protect themselves. As an alternative, they may say to him, "Because we are uncomfortable with the idea of trusting you when you do not have the wealth to pay the fines that our legal system might impose on you for things we think you might do, and because we want to refrain from exiling you if there is a reasonable alternative, we would like to ask you to find someone with the necessary wealth who will post a bond for you. If a fine that you cannot pay is levied on you, we will take it from your bond."

The bond provides a possibility for a person who lacks substantial wealth and is not generally trusted to remain in a society without exposing his fellow citizens to the risk of misbehavior that can be compensated by fines. If anyone with adequate wealth is willing to trust a generally untrusted person for a price that that person can afford, then he can remain in the society. However, with respect to misbehavior that cannot be compensated by fines, bonds are inadequate.

Emigration

When the citizens in a society are unable to trust one of their number and money will not compensate for the potential harm that concerns them, they may justly exile that person. The most straightforward response to exile is emigration. If your fellow citizens won't tolerate you, then find people who will. Emigration is problematic when the reason that your fellow citizen won't tolerate you is a reason that makes sense to everyone. If you are an incorrigible thief it will not be surprising if no society is willing to accept you. On the other hand, if the behavior that makes you unacceptable to your fellow citizens is something, such as moderate consumption of alcohol, that is perfectly acceptable in one or more other societies, then your emigration to an accepting society may be exactly what is needed to restore general harmony. Thus emigration is not punishment but rather an accommodation to the understandable and permissible variety of views as to what a good society is. It may be considered punishment by persons who regard their society's intolerance of them as unreasonable and see emigration as very costly. However, because separation into compatible groups is a consequence of the rights people have to themselves, requiring people to affiliate with those who find them acceptable cannot properly be described as punishment.

Group Secession

Group secession is a natural outcome in two types of circumstances: 1) when a criminal has a propensity that makes him generally unacceptable but he has friends and family who find him acceptable and want to join him in exile and 2) when a new view of the nature of a good society is incompatible with all existing geoliberal societies, but it nevertheless has a number of adherents who favor it strongly enough that they are willing to take the trouble to form a new society, to give expression to their view of a good society.

If the number of persons seceding is too small to operate as efficiently as the group from whom they are seceding, then they will have a right to compensation for the loss of efficiency. The logic is as follows. Historically, land per capita has declined as population has increased. This was just, as long as the combination of technological improvements, increased economies of scale and capital accumulated for compensation by earlier generations ensured that the total value of the natural opportunities plus compensation did not fall for anyone despite the reduction in land per capita. Those who secede operate with smaller numbers that do not permit them to make use of all of the economies of scale that keep incomes in the larger group up. Therefore economies of scale do not compensate the seceders for reduced land per capita in the way that they do compensate the larger group. Since seceders have a right to opportunities at least as valuable as those of previous generations and they are not benefiting from all of the economies of scale that

benefit the larger group, they have a greater claim on the capital from previous generations that is supposed to prevent the overall value of opportunities from falling.

Rather than grant the seceders all of their compensation in cash or land, the larger society may find it worthwhile to give them some things that are valuable to the seceders and easy for the larger group to provide—water service and cell phone service, for example. With appropriate compensation in cash, land and services for their reduced ability to benefit from economies of scale, group secession is not punishment. As with emigration, it is simply accommodation to incompatibilities. Seceding may be costly because of the loss of connection to the larger group, but this does not make it punishment.

One may wonder why it is just for a group of persons who wish to secede to impose on the larger group from whom they wish to secede the obligation to provide the seceders with compensation for the economies of scale that will be unavailable to them. Is it not the fault of those who wish to secede that they are losing those economies of scale? The reason that it is just for the seceders to impose this cost can be explained as follows. When earlier generations grew the population, reducing natural opportunities per capita and compensating with technology, greater economies of scale, and capital transmitted to the next generation, they were taking a risk that the members of future generations would not find one another compatible enough to take advantage of the economies of scale that they thought they would be providing. Those of the current generation who are not fully compensated for the reduction in land per capita by technology and economies of scale have an extra claim on the capital transmitted by previous generations to offset the reduction in natural opportunities per capita. Thus the seceders have a right to compensation for their inability to take advantage of economies of scale.

Individual Secession

Because of the potential loneliness of the life of a hermit, secession as a society of one seems even more like punishment than group secession or emigration. But still it is not. Because those who wish to exile a person have rights to themselves, they may justly decline to associate with a person in any way, and thereby exile him.

A hermit has a right to even more land than the per capita rights of the seceders, since his capacity to benefit from technological advances is even smaller. A hermit has a right to as much land as is needed to give him opportunities as valuable as he would have had, as a hermit, in the generation of his elders. To the extent that even as a hermit he receives benefits from technological advances, his claim on land is smaller than what it would have been in the time of his elders. To avoid the need to allocate additional land to the exiled person, the society that

exiles him will find it worthwhile to provide him with a variety of goods that are cheaper to provide than the land that they would be obliged to provide if they did not provide the goods. Thus while an exiled person would have a right to a completely independent existence on a substantial amount of land with no benefits from modern technology, most exiled persons would choose to live in proximity to civilization on less land, with enough compensation to pay for running water, sewers, electricity, a telephone, an internet connection, and basic food, clothing and shelter.

It may seem strange that a person who is unwilling to behave in a manner that is acceptable to his fellow citizens should be able to require his fellow citizens to provide more land for him than anyone else has. But it is like the treatment of aboriginal peoples. Every person has a right to himself and a right to a combination of land, cash, and technology that provides opportunities as valuable as he would have had with the per capita land, compensation and technology of earlier generations. If a person receives no value from modern technology, then the combination of land value and cash to which he has a right is greater than for other persons.

Negotiated Limitations on a Person's Liberty

Exile is generally costly to the person who is exiled and, in view of the rights of the exiled person, to those who exile him. Therefore there is generally a possibility of a mutually advantageous agreement between a person for whom exile is being considered and the society that is considering exiling him. The society may say to the person who might be exiled, "We would not need to exile you if you would agree to restrictions on your liberty that would prevent you from offending us in the ways that concern us. How would you feel about living under supervision?" Supervision could take a variety of forms, depending on what was needed to provide reasonable assurance that the person's behavior would be acceptable in the future. Some forms of supervision would resemble prisons. But there would be important differences. A person living under supervision would always be able to leave if he was able to find another society that would accept him and was acceptable to him. A person living under supervision would be able to choose a different supervision facility, as long as it accepted him and offered the required assurance that his supervision would be adequate. Finally, a good society would recognize that since supervision is not punishment, they ought to accept any proposed increase in the liberty of the supervised person that did not compromise the assurance that he would behave acceptably.

Since it might reasonably be presumed that people would generally prefer living under supervision to exile, the judicial system in a geoliberal society might generally prescribe supervision for offenders whose future conduct seemed likely to be unacceptable and non-compensable, with the offender free to respond with an

announcement that he preferred secession or emigration. Either party might propose a bond for those circumstances in which a fine beyond the means of the offender would provide an adequate guarantee of good conduct.

The Treatment of Offenders in a Just and Good Society

In a society that is not only just but also good, disagreeable conduct will be treated more with compassion than justice. Justice is not the proper goal of human interaction but rather the goal that we settle for when there is not enough love and patience to resolve human conflict. Justice is based on equal rights, where compassionate interaction is based on persons using the resources that are agreed to be their own to achieve the greatest possible good.

While it is perfectly just for society to seek to protection from the harm that can be caused by criminals, it is not the best to which they might aspire. A good society will try first to ignore, accommodate or forgive violations of its rules. A good society will entertain the possibility that its expectations are unreasonable and that it should be more tolerant. Limiting the liberty of citizens or exiling them will be regarded as last resorts, for situations when the greatest patience that they can muster has been exhausted.

As deeply ingrained as the human taste for punishment is, people ought to aspire to give it up. If humans were as loving as they might be they would regard offending behavior as an occasion first to reexamine their standards and second to educate offenders. If their patience was exceeded, they would at least grant that acceptance of equal rights for all precludes punishment.

When the equal rights of all to the gifts of nature are recognized, any protection from offenders that is needed can be secured by requiring offenders to make their claims on nature in some place apart from that of those whom they offend, or else to accept restrictions on their liberty that provide reasonable guarantees that they will be unable to offend.

Such an approach to offenses would fulfill two of the three purposes of current forms of punishment: deterring people from harming others and reforming offenders. A good society would renounce the third, requiring offenders to “pay” for their offenses with their bodies.