Punishment
The Supposed Justifications Revisited

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Introduction

This book is philosophical, which is to say that its ambition is logic about a subject – logic in the most general sense. So it consists in an attempt to achieve a clarity that is rightly called analysis, and then consistency and validity, and then a completeness. It is true that disciplines and lines of life other than philosophy have some aim of this kind, which does not exclude commitment, but they cannot be so single-minded in it. Physical science has other aims to which it attends, obviously, and so do the humanities, say history. Something the same is true, even, of the works of jurisprudents and lawyers on the subject of the justification of punishment. They rightly give attention to a lot more than what at bottom is a question of logic in morality and thus in moral philosophy. So too do sociologists, criminologists, penologists and other social theorists have other concerns.

With punishment, then, there is a division of labour and has to be, a division according to the possession of different tools, ways of proceeding and the like. This is not at all peculiar. It is to be found with respect to other subjects, say the nature of consciousness, free will, time, reality in general, and terrorism. To think any of these can be treated wholly within science, for example, is inevitably to bungle them. Proofs surround us.

The somewhat grand intention of the original book of which this is a revision was to consider everything clear and at all persuasive by way of arguments or justifications for the practice of punishment, and also to pay attention to the main obscurities. That is still your author's intention. But it cannot now be carried forward by introducing a reader to just about all of what accredited philosophers and the like have put into print on those arguments. As your search engine on the web will demonstrate to you, there is now too much print. There is only a sample of it here. A relief to both of us, maybe.

You will gather that answers to the question of why we punish, the explanation, where that is not the question of what reasons

we can give for punishing, but rather a question about causes, are not our concern. Nor is the *meaning* of punishment, which thing you may not have known it has, and which presumably is not either its explanation or its justification. The book is not sociology, social theory, social psychology or the like. It is not the sociology of punishment, where that is a descriptive account of the practice and also of its causes and effects in and on society and its history as well as its other relations to other social things.[1] Still, the book's realism and plain sense, if that is what they are, about retribution in punishment and the retribution theory of its justification, does contain part of an answer to the question of explanation. Is that not reassuring? Is our reason for something not likely to be the answer, now and then, to the question of why it exists?

The first chapter is a quick introduction to the problem of justification of punishment, in fact punishment by the state, and the matter of its definition. The second and third chapters together, and then the fourth and then the fifth, deal with traditional 'theories' of punishment – in fact three families of theories or arguments, sometimes with members whose membership is uncertain. Theories of the three sorts are not considered, however, because any of them is now much advanced on its own as a sufficient justification of punishment. Rather, the aim is to get clear about each of them by giving it separate consideration. This is a necessary prelude to considering almost all contemporary theories of punishment, which mix together the traditional ones in various ways.

The sixth chapter is about different assumptions of all theories of the three families and their combinations. It is thus about freedoms, holding people morally responsible for actions, and determinism, essentially the questions of the freedom and responsibility of offenders and the truth of determinism.[2] The seventh chapter is concerned with the contemporary doctrines mentioned – mixes, combinations and compromises. The eighth is conclusions. It certainly includes a different theory of punishment, and more than that.

It would be alarming for an author if a book written 35 years ago and revised 20 years ago seemed just as right now as it did then. It would not be reassuring to a reader either. Fortunately for its peace, and as you will have gathered, my mind has changed about things. If this additionally revised and enlarged edition is no recantation, but remains on the side of its predecessors and does not go over to any other side, it does take up a different position in the one it stays on. You could say there is more edge to its moral conviction. Is this

partly because the world has changed? That, as is plain, punishment has become more punitive and there is more of it?[3] Or because the world has not changed? Because, that is, the political moralities of conservatism and liberalism do not change their spots, but keep their societies serving their interests, and because this has sunk in on the author?

As well as in moral conviction, the book is also very different in other contents and in organization. Certainly there was reason to change the title. Two chapters of the last edition, the first and last, about backward-looking theories of punishment, have become two different ones, the first and second. The sixth chapter, on determinism, freedoms, and ways of holding people morally responsible, entirely replaces the old one. It reflects my own progress, if that is what it has been, in thinking about these subjects on their own, the separate problem that is nearly as much a problem in the philosophy of mind as in moral philosophy.[4] The seventh chapter, on compromise theories, and the eighth, giving conclusions, are entirely new replacements of their predecessors. Throughout the book some mistakes have been put right. Some propositions are worked out more fully.

Another way of saying much of this is that the book remains true to a realism and plain sense, as it does indeed seem to me, about almost all talk of retribution, desert, proportionality and the like in punishment. That is a realism that has never endeared the book to a better class of readers, including some too self-respecting lawyers. But, to go back to differences, the book is now truer to the proposition that the subject of punishment is not to be treated without an actual consideration of the subject of *crime*, which is to say what a society or part of it deals with by means of punishment. That is also to say that the subject of punishment is not considered without actually considering and judging, if too briefly, what a society or some part of it takes to be rightly defended – indeed takes to be a decent society.

The book is also different in being aware of some late twentieth- and early twenty-first-century thinking and also of some empirical facts and other things that have become plainer, notably facts having to do with rehabilitative and deterrent hopes for punishment and also the subject of determinism and an interpretation of quantum theory. No really new doctrine of the justification of punishment has come into being since the book was first published.[5] But certainly there has been enlargement, modification and some admission of error with respect to the old doctrines, and also that wonderful intellectual progress that is terminological.

1
Problem and Definition

THE NEED TO JUSTIFY PUNISHMENT

The problem of punishment arises in the first place because the practice includes what traditionally has been called suffering. Whatever can be said for the practice, the need for it, it is an intentional infliction of suffering. Apologists used to say that it is an automatic reflex of society, like that of a living body to injury. This sort of thing was at best darkening metaphor, and any serious suggestion that punishment is wholly an ungoverned reaction would be absurd. It does not become less absurd when some of the sociology of punishment, in its uncertain moments, edges towards it.

Is it true that by comparison with penalties visited on offenders in the past, many of our present penalties are humane? Is it then inappropriate to describe contemporary penalties as giving rise to *suffering*? It was said by a philosophical defender of the practice in the middle of the twentieth century that

> most punishments nowadays are not inflictions of suffering, either physical or mental. They are the deprivation of a good. . . . Imprisonment and fine are deprivations of liberty and property. The death sentence is deprivation of life; and in this extreme case every attempt is made to exclude suffering. . . . We have taken the . . . important step of substituting the removal of something desired for the infliction of positive suffering.[1]

The distinction between deprivations and inflictions of suffering or pain was less than reassuring when it was made. Now, at the beginning of the twenty-first century, it seems to me not a good idea, either, for a good philosopher to sum up penalties as *what are generally regarded as unpleasant consequences* or as *burdensome sanctions*.[2] Our prisons are grim and usually hellish places. Some say it is right that they be so. Our reflections on punishment would be

improved by our knowing not only what men, women, boys and girls have done in order to get put into them, about which we read a great deal, but also knowing more of what drives them to suicide in them, say male-on-male rape.[3] We could learn something, too, of the fact that our prisoners with mental health disorders, a very large majority of all prisoners, have their disorders worsened by imprisonment.[4] It is unlikely to be disputed that penalties now imposed on offenders, whether or not they are to be described as causing suffering, or being more than burdensome, do raise a question of moral justification.

The question of justification would be raised correctly, however, even by a practice that did no more than deprive someone of their usual freedoms, or usual resources, in some protective, considerate and even kindly fashion. For us to be deprived of our voluntariness, that personal and bodily freedom, not to mention social, civil and political freedoms, is certainly our being deprived of a great good. Being locked up, however sensitively, is to experience an evil, have a bad life, whether or not for good reason.

To that needs to be added the fact that some men are imprisoned for a couple of decades, or have their lives taken from them barbarously in what prides itself as civilization, and turn out beyond doubt to have been innocent rather than guilty. Others suffer excessive punishments. Others bargain their way out of what would have been justice with respect to their guilt. It cannot be a requirement of a social institution that it is perfect. That it kills men without reason cannot be left out of consideration either.

The moral problem of punishment also arises, with respect to any system of punishment, as a consequence of a different fact. Others than those punished, some ordinary law-abiding members of society, are coerced by it. Their freedom is at least curtailed. One need not, in order to regard this as a consideration of importance, believe the laws of a society to be bad ones. There has been an inclination on the part of some philosophers to believe that to be forced to behave rightly is not to have one's freedom curtailed, but that involves a special and loaded conception of freedom.[5]

Does the moral problem also arise because the general quality of life in a society, the quality of its public and private institutions and relationships, is influenced by the existence of a central practice of an authoritarian and repressive nature? Are child-rearing, education, work and religion different than they could be? Is sex? Love? It is possible to think so. It is also possible to be trapped in the encompassing

habit of a society, never think about it much, or raise such questions, and suppose nothing other than the society as it stands is reasonable.

Is the problem of the justification of punishment also raised by another consideration or two? Well, we have enough to be going on with.

In the past, single reasons have often been given for the rightness of punishment. One sort of reason is to the effect that what has happened in the past is in itself a reason for or a justification of punishment. The best-known instances of this backward-looking thinking or feeling, which may be characterized with deceptive simplicity, are to the effect that punishment is *deserved* by offenders for what they willingly did. Punishment is *retribution*. Other instances of looking to the past rather than to consequences of punishment have to do with past free *consenting* by individuals and other past states of affairs.

Another idea is historically associated with utilitarianism, whether or not this is an unfortunate fact, utilitarianism being the doctrine whose fundamental principle, the principle of utility, is that what makes an action, practice or institution right *is* only a judgement as to certain good consequences. What makes the action or whatever right, for utilitarianism, is more particularly the fact that it will probably give rise to a greater total of satisfaction or a lesser total of dissatisfaction than any other action or whatever. What we have often been told about punishment is that punishment serves this good end by the means of deterring people from offending. *Deterrence* consists in men being made fearful of breaking the law or made to keep it out of a self-concerned judgement of the possibility of punishment. When they actually consider offending, that is, they do not go ahead.

But the idea of deterrence is better made part of a family of claims, that punishment is justified because it *prevents* offences, thereby serving the end of utilitarianism or some different end, not necessarily by means of deterrence. For one thing, the punishment of imprisonment makes most offences impossible. It *incapacitates*. Prisoners do not decide not to break the law, but are made incapable of breaking it in ordinary ways by their being in prison. Death works better.

A third sort of reason for punishment is that it secures that fewer offences will be committed in the future but not through deterrence, understood as we just have, or incapacitation. Instead, men become law-abiding through what used to be called higher motives.

It was once the case, but is no longer, that all views of this third kind could be positively described as recommending the moral regeneration of individuals as an end in itself and also a means to the prevention of crime. We used to speak of *reform* and we now speak, sometimes, of *rehabilitation* or socialization. Well, some of us do. Other theorists raise a question about themselves of whether they should be included in this third category. They speak of punishment as *communication*. One is Robert Nozick, the defender and celebrator of private property rights at whatever cost to those without them. Also to be found here, without doubt, are the theories that propose that we should give up punishment, or give it up to some large extent, and engage instead in the treatment of offenders for their disorders.

Claims in these three families, as remarked already, have been known as 'theories' of the justification of punishment. This is so, perhaps, partly because it has been assumed that punishment or some closely related practice is an indubitable social necessity whose justification is beyond doubt. There is no question but that it is justified. Given this seeming fact, what is to be done is to provide a hypothesis in explanation, as one provides an explanatory theory about a fact of the physical or non-human world. Let us keep the usage for its usefulness, not for this implication. Assumption, conventionality, orthodoxy and piety about punishment are not useful, indeed not decent, in inquiring into it.

More recently, philosophers and others have contended that no attempted justification having to do with the past, or with prevention, or with rehabilitation or the like, taken by itself, is sufficient to justify punishment. Two or more are needed together. Sometimes a number of reasons are mentioned but one is accorded a very secondary importance. We are told that some retribution theory is correct, since punishment is justified because it is deserved in some sense for a past offence, and then we are reminded that punishment also has the recommendation that somehow it reduces offences. It may be that these are no more than the standard compromises just mentioned, variously disguised in an attempt to keep an old flag flying, or an old feeling respectable, or certain sentencing policy as tough or harsh as it is.

In order to clarify what is involved in each of the three original sorts of claims, and the later unions, I shall begin by looking at claims separately, quite a few of them. Each one will be regarded as historically it was regarded, and in several cases may still be, as

sufficient by itself to establish the rightness of punishment. This procedure, as indicated earlier, will have the advantage of demonstrating why it has been thought, whether or not correctly, that no single claim is sufficient. More important, as I have said, it may bring into clarity each element of the ensuing compromises, show whether they can be necessary if not sufficient conditions of justification.

THE DEFINITION OF PUNISHMENT

There is one other preliminary matter. We need a definition of punishment. This is not a matter of choosing the one true description of punishment, as is sometimes supposed. What we need, rather, is to come to a conception of it that serves the purpose of inquiry and does not impede it, perhaps by going against ordinary usage, perhaps by begging a question in advance.

Punishment is not treatment, although some patients, like offenders, are subjected to deprivation or distress. Anything we describe as punishment *must* involve some such thing. At any rate it intends to cause deprivation or distress, which, indeed, is reasonably described as its aim. This remains true, although the aim is not the final end, when punishment is imposed to prevent or reduce offences by deterring or rehabilitating, and thought to be justified by this. Treatment, obviously, has no such aim but rather seeks to avoid distress whenever possible. It mostly does.

Punishment, secondly, is not revenge, although certain of its supposed justifications would go some way to justifying revenge as well, and some of those who punish share motivations and needs with those who take revenge. Punishment is not revenge because a man who has been injured by another and then revenges himself upon him is not *authorized* to act as he does. That is, he is not empowered by generally accepted rules, as a judge is empowered by the law, to fix and enforce penalties. If there are societies with practices that are governed and limited by generally accepted rules, where the injured man or his family exacts the penalty, these approach to being practices of punishment.[6]

Punishment, thirdly, is obviously not something done to a man chosen at random and without regard to his previous conduct. Punishment, or so we habitually think, is imposed on an *offender*, someone who has broken the law of a society – or maybe has just been found to have done so. An offending act for which

someone is somehow responsible is a logically necessary condition of punishment – punishment for any reason.

Punishment may then seem, given these rudimentary differentiations, to be

> an authority's infliction of a penalty, something involving deprivation or distress, on an offender, someone who has freely and responsibly broken a law or rule, for that offence.

Is this tentative definition, a customary one, true of all practices that we are ordinarily willing to call practices of punishment? Is it true of punishment by the state, punishment by our judges, prosecutors, jailers and the like? Certainly it is ordinarily a good idea for a definition to be in some accordance with ordinary usage. If the tentative definition does not cover everything it might, this is so partly for the reason that, as we have noted, not all punishments take place within a society's ordinary legal and penal systems.

It may be said, against the definition, that punishments are not always the work of an *authority* – persons or groups of persons empowered to act by rules that have a general acceptance. 'War criminals' are said to be punished despite doubts as to whether the tribunals of the winning side count as authorities. Victor's justice, it may be said, is not justice. It may also be denied for a particular reason that punishment is always preceded by an *offence*, assuming an offence to be an action that went against a specific rule previously stipulated. A father is unlikely to have announced, before his son does some astonishing and unpredictable thing, that no one was to do *that*. Perhaps he may be taken as having announced something so general as that his son wasn't to behave in outrageous ways. Might there be similar cases which we would call cases of punishment and where the point was to teach a quite new rule?

If there are such cases as these latter ones, where there is some hope of arguing that there have not been offences, are these also cases where the person punished is not an *offender* – that is, someone who has freely and with responsibility broken a rule? So it seems. But there is also another matter having to do with offenders, more pressing. Anyone who sets out to define punishment faces a decision about defining ordinary offenders, those dealt with by our judges, prosecutors and jailers.

It is at least natural to say that someone who in fact has not broken the law – e.g. did not do the killing – is not the offender, not

an offender. If you say this, then not all punishment is of offenders, as the tentative definition supposes. This will be so since mistakes are made by judges and juries, and hence some punishment is of non-offenders, innocent people. If, on the other hand, you define an offender as somebody who has been found guilty of breaking the law, whether or not he or she did so, you have a similar upshot. All or nearly all punishment is of offenders as defined, but since judges and juries make mistakes, not every offender is an offender in the other and more ordinary sense – somebody who in fact has broken the law by cheating or harming the customers, embezzling the funds, stealing the car, or committing the murder.

There is a tendency on the part of law-makers, lawyers and indeed newspapers to choose the definition by which an offender is someone found guilty. In my newspaper, anyway, somebody found guilty of murdering his wife is reported to have murdered his wife. Later on, when it turns out he didn't do it, the paper may have to call him the supposed murderer, the alleged offender, as indeed it does. Is it better, given the ordinary implications of the word, to take the more ordinary definition of an offender, as somebody who has in fact broken the law and not just been found to have done so?

That is not to say that finding someone to be an offender is not essential to punishment, as distinct from essential to somebody's being an offender. Should this not go into a definition of punishment? With respect to the finding, by the way, whether or not of a real offender, this has to be done by the judge and jury in good faith, and by way of certain procedures. A judge cannot find someone to have broken the law, in this sense of 'find', if he is convinced that he hasn't done so but pretends that he has. Nor can he find him to have broken the law if he does not investigate the matter in certain ways, look into the question of responsibility by certain methods. He must go through a certain process, follow the law on trials.[7]

Putting aside ordinary trials, it may also be suggested on the basis of quite different examples that punishment is not always of an offender, maybe even of somebody found to be an offender. There can be doubts in the case of war-crime trials so-called. We also speak of collective punishments of groups, such as classes in schools and villages in wars, some only of whose members have offended.

More importantly, to revert to ordinary punishment, American, English and other law is such that a supermarket that sells dangerous food, without anyone's intending to do so and without anyone's having been careless, may none the less be held legally responsible

and be penalized. That it was not responsible in an ordinary sense, morally responsible, does not matter.[8] So may a motorist who without being negligent runs into a pedestrian under certain circumstances. A bartender who sells whisky to a man who is drunk already, without knowing the man's state or being careless about finding out, may be in the same position. It is also against the law under certain circumstances to take a girl to bed who is under 16, and remains so if the man made an honest mistake in thinking she was older. That he did not intend to break the law and took some care is not a defence. These are offences of *strict liability*. They are not a peripheral part of the law and may be more pervasive in the future.

There is also *vicarious liability*. The owners of a supermarket may be legally responsible under certain circumstances if an employee puts dangerous food on the shelves. The company that owns the truck with poor brakes, rather than the driver who didn't check them, can be legally responsible for negligence. So too may an insurance company be responsible when its salesman leads a customer into a disastrous policy improperly. Or so we are told. Employers generally may be legally responsible for certain acts of their employees. It may be said that none of these could be regarded as offenders in the ordinary sense.

What difficulties do these various cases raise for our tentative definition of punishment? Do they show we have not captured the ordinary notion of punishment? They are put forward as instances of punishment, instances of what we would be inclined to regard as punishment, and also as instances where some feature required in the given definition is missing. On further reflection, most people may be inclined to say of these cases either that they do possess the feature in question and are punishments, as ordinarily conceived, or that they lack it and should not be regarded as punishments. That is, the cases in question do not show a conflict between our definition and ordinary usage.

What is done to 'war criminals' may be taken to be punishment by those who *do* accept that the tribunals count as authorities. Those who do not accept this will give some other name or description to the practice, or to particular instances of it. So perhaps with the father-and-son case and the question of whether there was an offence – if it is accepted that there was *no* antecedent rule of a relevant character it will go against the grain to call the case one of punishment. One can deal in some related way, perhaps, with

collective punishments. Strict and vicarious liability are much the same. Some people may, after reflection, be ready to name as punishment what is done in such cases, perhaps out of a kind of determined orthodoxy. Others will not be willing to regard what is done as punishment. They will give it another name. As for a court's *finding* someone to have offended, that surely *will* have to go into a final definition.

Fortunately, we need not set out to discover majority opinions. What we want is a definition of punishment convenient for our purposes. It must certainly be more or less in line with the ordinary understanding of the term, but over cases where there is no agreement, or where any existing agreement is not obvious, we may make our own decisions in order to facilitate our inquiry. As in the case of a definition of terrorism, say, despite the efforts of governments, nothing of a substantial nature follows from this with respect to the main question being considered. The matter of definitions, descriptions and names is not simple, but there is some point in saying that there are not false definitions, only definitions that complicate things or get in the way, maybe disastrously.

It will be convenient to take up a definition of punishment that allows us to use the term of cases of strict and vicarious liability, whatever may be true of ordinary usage. We need not worry about war tribunals, fathers and sons, and collective reprisals. We will henceforth be concerned only with ordinary punishment by a society, or rather by the power in it that is the state, of its citizens or those who live in the society. The definition we have, where punishment is an authority's infliction of a penalty on an offender for an offence, does not cover cases of strict and vicarious liability. What is to be done?

To linger a bit with strict liability, which will have some importance later, suppose we take it to be established beyond any doubt that a store's action in selling dangerous food in no way resulted from a relevant intention of anyone or even from negligence. In a certain sense it would be mistaken to say anybody broke a rule. This is the sense that carries the implication that the person who broke the rule was at fault or responsible – somehow morally responsible. It is the ordinary sense of the words, and precisely the sense of the words, that has entered into the tentative definition of an offender. Hence, it would be mistaken to regard the woman as an offender. There is something else to be noticed, however, of which we shall make use.

There is a different sense in which the store *did* break a rule. After all, you can break a rule unintentionally, unknowingly. You can do something without being morally responsible for doing so – that is, without there being any possibility of your being held morally responsible for doing so or being credited with responsibility for doing so. The store, then, may be understood to have broken a rule although not to have done so with intention or negligence, not with moral responsibility. Vicarious liability, however, is another matter. One could not without absurdity exhibit the owners of the trucking company or unfortunate employers generally as individuals who have broken rules in any way – if, that is, it is *really* true that they fully intended to have no trucks with poor brakes, were not at all careless, and so on. Maybe that is rare, but it is what we are talking about.

The tentative definition with which we began has another quite different disability. It specifies that punishment is *for an offence* and so may be taken to state or imply that the moral justification of punishing a man is that he deserves it for what he has done. If we were to use this definition, it might appear that we had so defined punishment that the principal question before us, 'What, if anything, justifies it morally?', was already answered by the definition, anyway in part. The answer might appear to be built in. Anyone who disputes it, or anyone else for that matter, might protest that the outcome of the inquiry could hardly be in doubt. That is not quite true – definitions do not determine the outcomes of inquiries – but is there anything to be said for the inclusion of the words 'for an offence'?

They are significant in two ways. They specify a necessary feature of what we normally count as punishment, not included in our tentative definition but subsequently mentioned, to the effect that a man must be found to have committed an offence. This, however, is already implied by the very mention of an *offender*. Secondly, as I have said, the words suggest an attitude to a man's having committed an offence. The words 'for an offence' suggest that the penalty is justified because he *deserves* it for the offence, or something of the sort.

This attitude is not itself a necessary feature of what we shall take to be punishment. We shall not regard something as other than punishment if the judge, who seems to be the relevant person, is a forward-looking fellow who does not hold the view that the penalty he imposes is morally justified because it is deserved. We shall not

think that he is not engaged in punishment at all if he takes the view that the existence of an offence is important merely as an indication or proof that the man in front of him is one who is likely to offend in the future if he is not deterred or incapacitated.

It will be as well to make explicit something implicit in these thoughts. It is not the case, although it is sometimes supposed that it is, that a punishment follows on not merely an illegal but necessarily a *wrongful* act.[9] It would follow from making this stipulation that putting a man in jail for 30 years, or executing him, as a result of legislation, due process of law and so on, would not be a punishment if he had not behaved wrongly as distinct from illegally. The punishment would not be an unjust or vicious punishment, say, but rather not a punishment at all. That would be the view of those who thought the law against which he offended was wrong, maybe monstrous, and he was not wrong but right to break it.

There is no need to follow this line, tempting though it may be, and no advantage in doing so. It may well be that the justification of punishment depends on an act's having been wrong, but that is nothing to the point. Making punishment necessarily of a wrongful act, maybe an act said to be regarded as wrong by a society, is certainly not needed, in particular, in connection with distinguishing punishment under the criminal law from the awarding of damages against someone in civil law and so on. We might contemplate saying that punishments follow on illegal acts that 'officially' are wrong, and struggle to make that clear. But that is different and hardly in need of explicit mention.

Another point needs making about the tentative definition of punishment. It registers the fact, remarked on at the start, that punishment unlike treatment actually aims at deprivation or distress – for whatever purpose. The definition does this in saying that in punishment an authority inflicts deprivation or distress. Some have said that this by definition makes punishment 'retributive'. Does that mean that punishment by such a definition is justified at least in part by a proposition, some proposition or other, to the effect that offenders deserve it?

It does not. That punishment aims at distress or whatever, for whatever reason, is certainly not a proposition that punishment is deserved, or that it is right because deserved. Those who deny or dismiss exactly these propositions about desert also accept that punishment is aimed at distress, and may depend on this in connection with other propositions. They may justify punishment by

an argument that has nothing to do with desert, probably to the effect that the distress is useful, something that reduces offences.

A historical remark is in place here. Over the last 30 years or so, in the United States and Britain, there has been an increasing emphasis on retribution in punishment, whatever retribution comes to.[10] This has been owed to or at any rate connected with a conservative trend in politics.[11] This is not at all our main business, which is the worth or logic of retributive and other theories of punishment rather than their connection with politics and social change. It is worth noting, however, that writing desert into a definition of punishment in the ways noticed prepares the way for a substantial conclusion in favour of desert in punishment.

The writing in, whether or not deliberately, influences the innocent or unwary. It does not serve our higher purposes to do this. This is a proper inquiry, or so I hope, not a vindication or a defence of the liberal society or the like. Nor would it serve our purpose to write in some influencing in the direction of any other theory, say a prevention theory that leaves out desert entirely. It would be easy and indeed natural enough to do so, but not a good idea from the point of view of inquiry.[12]

Given these considerations about 'for an offence' and the aim of distress, and the considerations about strict liability and vicarious liability, and the previous considerations, let us change our minds. Let us leave behind the tentative definition and define punishment as

> an authority's infliction of a penalty, something intended to cause distress or deprivation, on an offender or someone else found to have committed an offence, an action of the kind prohibited by the law

and understand that to be found to have offended is to be found to have

> actually broken a rule out of intention or negligence, somehow freely and responsibly, or broken certain rules without that, or have occupied such a position as employer with respect to a rule breaker in either of the preceding senses.

Our definition, so interpreted, is reasonably satisfactory for our purposes. Perhaps it does not fit everything that is ordinarily called punishment, whether by parents, teachers or irregular tribunals.

It does fit the subject in hand. That is a dominant practice of control, or *the* dominant practice of control, within our societies. The offences, of which more will be said in due course (p. 214), include crimes involving the property of others, such as theft and damage, crimes of violence to persons, such as murder and assault, crimes consisting of certain acts considered to be immoral, and certain crimes against the state and some of its institutions, including treason and the subversion of justice. The penalties are those fixed by law. In the main, the law sets down maximum penalties for offences. The choice in a particular case, fine or imprisonment or worse, is made by the judge or judges.

If the given definition is suitable for our purposes, it is also true that it departs somewhat from definitions provided by philosophers who have considered the question of punishment in the past. This is so for several reasons, one of them that many philosophers have attempted to capture the most common or ordinary notion. Many people do have the feeling, maybe have been got to have the feeling, that at least part of the justification of punishment is that it is deserved, and this attitude finds expression in their use of the term. Some such implication is thus present in many definitions, as it was in our earlier definition. Also, of course, given this genesis of definitions in ordinary life, and a want of awareness there of the existence of strict and vicarious liability, the definitions have excluded a part of their intended subject matter. This has issued, if not in clear mistakes, at least in an overlooking of things of relevance.

If the definition we have brings in a thing or two not made explicit in other fairly recent ones, and leaves out things they put in, it is not greatly different from them.[13] It might have included, say, a specification of the nature of the authority involved. What has been said seems to me sufficient for the arguments we will be considering.