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PUNISHMENT AS DETERRENCE: REPLY TO SPRAGUE

By Anthony Ellis

In my 'A Deterrence Theory of Punishment', I argued that a deterrence system of punishment can avoid the charge that it illegitimately uses offenders if its punishments are carried out 'quasi-automatically': threats are issued by a legislature for deterrent purposes, but those who carry out the punishments have no authority to take deterrent considerations into account. Sprague has objected that under such a system, those who carry out punishments will be unable to justify their actions. I reply that if it is justifiable to set up the system in this way in the first place, then this justification will transmit to all actions carried out under it; and that it is justifiable to set up an institution of punishment in this way.

I must thank Michael Sprague for his comments;[1] they enable me to clarify things a little. I argued that the institution of punishment should be thought of mainly as a system of deterrent threats justified by the needs of group self-defence, and that it needs nothing more than the normally accepted principles of self-defence for its justification. As Sprague says, I further argued that when the threats are acted on, they are so in what I call a 'semi-automatic' way. This is because of the separation of powers that characterizes most modern democracies (certainly those of the US and UK). Legislators issue the threat, but they are not, with rare exceptions, involved in carrying it out. This is left to other arms of the government: putting it somewhat crudely, the police apprehend suspects, the courts try them, the correctional system punishes them. As far as the legislators are concerned, then, the punishment of offenders 'goes forward fairly automatically': once the threat is issued, they need do nothing, and for the most part can do nothing, to ensure that it is carried out. And one important consequence of this, I argued, is that no offender who is punished can object that he is being punished in order to deter others, and so unacceptably used. The threat was issued with the intention of deterring potential offenders, certainly, but the actual offender is not punished because his punishment will help to deter others; indeed, everyone involved may think it highly unlikely that it will do so. The offender is punished solely because he has ignored a threat addressed to all, a threat embedded in a system so constructed that any given offence would attract punishment whether or not this would contribute to deterrence.

[1] M. Sprague, 'Who May Carry Out Protective Deterrence?', *The Philosophical Quarterly*, 54 (2004), pp. 445–7; see also my 'A Deterrence Theory of Punishment', *The Philosophical Quarterly*, 53 (2003), pp. 337–51.

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Of course, further conditions may need to be satisfied before the charge that the offender is being unacceptably used can be rebutted. We may, for instance, have other aims in mind than deterrence, and these may involve using the offender. Again, some would say that certain sorts of punishment, whatever the intention behind them, do not treat an offender as an end in himself, and so, effectively, use him. But these issues are not to the point here. The issue raised by Sprague is quite different. As he points out, if punishment goes forward 'fairly automatically' as far as the legislators are concerned, it certainly does not do so as far as those who actually administer the punishment are concerned. They have to make the decision to do whatever their role in the institution requires of them. We may add, though Sprague does not, that though the system does 'go forward fairly automatically' as far as other agents in the system are concerned – the police and judiciary – this does not help to justify what they are doing in the way it does with the legislators. Legislators issue a threat and, normally, have nothing to do with how, if at all, it is carried out in particular cases; that is the sense in which, for them, its operation is automatic. This is true also of, say, the police. When the police apprehend a suspect, and here of course I am simplifying, his trial and punishment go forward fairly automatically from their point of view: *as police*, they have no further role to play in his punishment. But unlike the legislature, they must have available to them a justification not required of the legislature, a justification for treating *this particular offender* in the way they do. But it will do no harm if I concentrate, as Sprague does, simply on those who actually administer the punishment. The question, then, is whether they can offer a justification for the actions they may perform which does not appeal to deterrent effects; if not, then my proposal clearly fails, for if they can appeal only to deterrent considerations to justify the punishment of each offender, then each offender is after all punished because his punishment will contribute to deterrence. And the legislature is, after all, implicated in this, since it is the legislature that is responsible for the system in which this happens.

A simple model will make both the problem and the solution clearer. Imagine, then, that I wish to deter people from trespassing on my domain. To do this, I issue a threat of retaliation against such trespassers. I then employ a number of people to enforce this: some to apprehend suspected violators, others to ascertain whether they really are violators, and others to carry out the retaliation if indeed they are violators. None of these agents is given authority to base their actions on deterrent considerations. Now when a violator is retaliated against, he cannot say that I have punished him because doing so will deter others, for my justification for his being retaliated against need include nothing about the deterrent effects of retaliating against him. All I need to do is to explain the workings, and justification, of the system, and to point out that he has ignored the threat embedded in it.

This seems fine if the system is a straightforwardly automatic one of the sort envisaged by Quinn in his famous article.[2] But it is not, because no one will be retaliated against unless those I employ make decisions to do what they are employed to do. And if a violator challenges them to justify their action against him,

[2] W. Quinn, 'The Right to Threaten and the Right to Punish', *Philosophy and Public Affairs*, 14 (1985), pp. 327–73.

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can they offer any acceptable justification for what they do that does not appeal to its deterrent effects?

Sprague (p. 447) thinks that they cannot:

> Ultimately, assuming the premise that lawmakers are justified in making deterrent threats only if the punishment of offenders will proceed automatically (when those threats fail) entails, by *modus tollens*, the conclusion that lawmakers are not justified in making deterrent threats – because the further premise, that punishment does in fact proceed automatically, is false.

But this is, I think, incorrect. What is correct is that assuming the satisfaction of the further conditions I mentioned earlier, which are not in question at the moment, the lawmakers are justified in making deterrent threats given that no one is punished in order to deter others and thereby unacceptably used. And, as I said in my original article, so long as the system proceeds automatically *as far as they are concerned*, the lawmakers can correctly say that they are not using anyone. But it does not follow from this, and it is not required, that it must proceed automatically as far as everyone else is concerned. All that is required is that each of the remaining agents must be able to give an adequate justification for what he does without appealing to the deterrent value of punishing any particular offender. And each can do that. Certainly, as Sprague remarks, the corrections officer cannot merely appeal to the fact that he has entered into a contract to do what he is doing, for such a consideration never by itself serves to justify an action. He can, however, appeal to the nature of the system in which he is playing a part. This is a system of self-defence in which costs and benefits (construed broadly, as explained in the original article) are in an acceptable balance, and in which considerations of deterrence are precluded from entering into the question of whether, or how much, any particular individual is to be punished. Given, again, satisfaction of the other conditions mentioned earlier, such a system is a legitimate one, and its legitimacy transfers to all actions performed in accordance with it. Thus each agent, including those who administer the punishment, may justify his actions by saying that he is performing an essential role in a legitimate system.

But this may seem too quick. All of those who actually operate the system are involved in what may seem like pointless violence: each is committed to bringing it about that certain offenders are punished even if it is clear that their being so will have no beneficial consequence. How can that be justified? Again they cannot merely appeal to the fact that they have a contract to do this. If that were all they could say, the riposte would simply be that it was not acceptable in the first place to enter into a contract which committed them to pointless violence, and an illegitimate contract confers no legitimacy on actions carried out under it. And it may now seem that they cannot appeal to the fact that the system is a legitimate one, for it may seem that a system which commits people to pointless violence cannot be legitimate.

It is certainly true that the system commits those who operate it to carrying out particular acts of violence which may be foreseen to have none of the beneficial effects upon whose realization the justification of the system depends. But it is not

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clear that this must make it illegitimate. Everything will depend upon whether there is an acceptable reason for setting up the system in this way; and this possibility cannot be ruled out *a priori*. Certainly, it is sometimes acceptable to set up a system with justifiable aims in which agents are prohibited from taking into account those very aims in their particular deliberations within the system – even when, as they think, they can see that their actions will subvert those aims – because we sometimes judge that the aims we have in mind will be better achieved overall by denying this authority. One might perhaps object that this does not wholly generalize, and in particular that it does not generalize to cases in which agents are required to harm particular individuals when they can see that no benefit will flow from this. But Sprague, at least, does not seem to take this view, and nor do I. Apart from any other consideration, it would condemn our own criminal justice system, in which, for instance, prison warders are not given authority to remit punishment because, in their opinion, punishing a particular offender will achieve none of the benefits supposedly to be gained from the correctional system, and may indeed subvert them.

And there is good reason for setting up the system in this way – indeed, more than one reason. For one thing, it is part and parcel of the separation of powers: roughly, who should be punished, and how much, is a matter for the judiciary; punishing them in accordance with the decision taken at that level is then the business of the executive. Of course, as I said in the original article, certain arms of the executive are in fact given limited discretion here. The President, and State Governors, in the US, for instance, have the power of executive clemency, and the Home Secretary in the UK has some residual, though widely resented, sentencing power. But these are very limited exceptions to the general practice. And there is good reason for the general practice. Whatever else might be said, it ought to be generally agreed, though indeed it is not, that sentencing power should not be in the hands of those who are subject to direct political pressure, or those who are directly answerable to them. Not only that, but we *disperse* the immense power wielded by the criminal justice system amongst different governmental organs in order to diminish the power that the government may have over individual citizens. That is simply a particular application of the general principle of the separation of powers. And even if we were not convinced about the virtues of a separated government in general, we would surely insist upon it in the case of the criminal justice system. Concentrating that power in one arm of the government would create scope for corruption and oppression that we would not countenance.

In addition, allowing the executive to base sentencing on considerations about deterrence would immediately open it to the charge that, in some cases at least, offenders were being punished in order to deter others. We do allow this, of course, in our own criminal justice systems, but it was the working assumption of the original article that this is unacceptable.

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