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*Published in:*

Ethics, Society and Politics: Themes from the Philosophy of Peter Winch

*DOI:*

[10.1007/978-3-030-40742-1\\_4](https://doi.org/10.1007/978-3-030-40742-1_4)

Published: 01/01/2020

*Document Version*

Accepted author manuscript

*Document License*

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[Link to publication](#)

*Please cite the original version:*

Hertzberg, L. (2020). “What Justifies the Justifications?” Winch on Punishment and Justice. In M. Campbell, & L. Reid (Eds.), *Ethics, Society and Politics: Themes from the Philosophy of Peter Winch* (pp. 41-55). (Nordic Wittgenstein Studies). Springer. [https://doi.org/10.1007/978-3-030-40742-1\\_4](https://doi.org/10.1007/978-3-030-40742-1_4)

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“What Justifies the Justifications?” Peter Winch on Punishment and Justice  
Lars Hertzberg

1. Peter Winch first broached the problem of punishment and justice in his essay “Ethical Reward and Punishment” from 1970. He returned to the theme, from a different angle, in “He’s to Blame!”, published in 1989, and, in a closely related discussion in an unfinished book manuscript from 19??, edited by Michael Campbell with the working title *The Green Book: Peter Winch’s Notes on Political Philosophy*.

Commented [Office1]: could you fill in the year?

The earlier essay begins with a quotation from Wittgenstein’s *Tractatus Logico-Philosophicus* (6.422):

When an ethical law of the form, “Thou shalt...” is laid down, one’s first thought is, “And what if I do not do it?” It is clear, however, that ethics has nothing to do with punishment and reward in the usual sense of the terms. So our question about the *consequences* of an action must be unimportant. – At least those consequences should not be events. For there must be something right about the question we posed. There must indeed be some kind of ethical reward and punishment, but they must reside in the action itself.

(And it is also clear that the reward must be something pleasant and the punishment something unpleasant.)

Winch’s essay is an attempt to explicate Wittgenstein’s distinction between the usual and the ethical sense of reward and punishment. For Winch, ethical reward and punishment are a matter of how an agent perceives her action. He suggests that, when an agent thinks of the way she is treated as reward or punishment for something she has done, provided she feels the reward or punishment was something she deserved, then her thoughts are “a way of thinking about the act itself” (Winch 1972, 221). The pleasantness or unpleasantness of how she is treated, if taken to be deserved, are internal to her action as she sees it. What underlies Wittgenstein’s remark that ethical reward and punishment “must reside in the action itself”, Winch argues, is that

what matters, ethically, to an agent contemplating his own past actions is, quite simply, what he has done; if his judgment is affected by anything which is merely contingently connected with the character of what he has done (e.g. by the fact that he has been found out), then he is ceasing to think of his action in an ethical way (Winch 1972, 213).

Winch observes that such an attitude may not be limited to things that are done to me by others because of my past action. Someone may also come to accept “a natural disaster which afflicts him as a punishment for some wrong which he has committed in the past” (Winch 1972, 224). Indeed, one could imagine many kinds of fortunate or tragic events – becoming fatally ill, losing a spouse or a child, having a catastrophic car accident, etc – being seen in this way, without entertaining any superstitious idea of an actual causal connection between one’s action and the later events. Or again, being treated unfairly by others might be accepted by the agent as punishment for some past action which had gone unnoticed.

What I find surprising – to such a degree that I am unsure whether I have understood Winch’s intentions correctly – is that he explicitly wishes to delimit the ethical perspective on reward and punishment to a person’s thinking about *her own* actions. Concerning the third person perspective, Winch points out that people may be induced to conform to various demands by the fear of punishment or by the hope for reward – in the sense of external events – and that this in itself does not mean that they will be acting morally. He here invokes Kant’s distinction between acting “in accordance with” and acting “for the sake of” a principle. (Winch 1972, 212.) This seems unobjectionable. He then goes on to say that “inducements are the only considerations which are likely to appear in third person talk”, i.e. in our talk about another person’s actions: though we may attribute merit or guilt to a person we are talking about, “[t]he question is ... whether the words ‘guilt’ and ‘merit’ can, from a *purely* third-person point of view, amount to any more than deviance from or conformity to a given standard of what is ‘required’ or ‘to be praised’.” (Ibid.) It seems clear from the context that he means for the answer to this question to be negative. What Winch appears to be saying is that when we speak of someone other than ourselves, the concept of desert signifies a neutral consideration – it refers to a person’s disposition to act in ways that do or do not conform to commonly accepted standards of behaviour.

If we are to take Winch at his words here, what this would mean is that we would never feel joy on behalf of another person for some reward which we felt had been justly bestowed on her for some admirable deeds; say, for deeds courageously carried out in defiance of public opinion or official sanctions. Nor, on the other hand, would we feel indignant on behalf of someone who had been unjustly sentenced for an act he did not commit, or for violating some statute we found unjust. The agents might feel joy or indignation, but for an observer there would only be room for considering whether the sanctions had or had not been applied in accordance with existing standards, and whether or not they were likely to influence the agent’s behaviour in the future.

Winch goes on to say:

“Retribution” [as a concept tied up with desert in an ethical sense] has to be understood in connection with the way in which an agent is related to his own acts, with what those acts are for him. We can see what role the concept of punishment may play in this dimension only by considering ways in which the agent may use it in coming to terms with himself and his actions (Winch 1972, 213).

Perhaps this passage provides a clue to Winch’s reasoning about the third person case. His point seems to be that for desert and retribution to carry ethical significance, they have, in some way, to encompass the agent’s potential perspective on her own action; for instance, even if the agent, in some sense, does not recognize the wrongness of what she has done, does not recognize, for instance, in what way her action wronged or harmed those who were affected by it, we judge it to be just to punish her only provided such a recognition is in her reach. Perhaps we will say, “She *ought* to have realized what she did was wrong”. Where justice is concerned, it might be argued, the third person perspective always has the first person perspective at its core. This seems to me a defensible position. It is in line with this that we hold that those deemed criminally insane ought not to be punished. Similarly, a system of punishment which completely disregards the perspective of agents strikes us as inhuman, as in the case of a criminal organization trying to impose its will on a community through the deterrent use of punishment.

I am suggesting that these considerations might explain Winch’s claim that retribution, as an ethical notion, can only be understood “in connection with the way in which the agent is related to his own acts, with what those acts are for him”. Nevertheless, I would argue that his claim that in the third person case, we can only think of punishment in terms of an inducement to conform to standards of behaviour, and of guilt as a failure to conform, is misleading.

2. Let me tie Wittgenstein’s distinction between reward and punishment “in the usual sense of the terms” on the one hand, and ethical reward and punishment on the other hand, to two different aspects of the institution of legal punishment as it exists in many modern societies. On the one hand, sanctions are a way of regulating behaviour, their importance deriving from the values served by bringing about or forestalling certain ways of acting: rules of traffic for road safety, taxation for securing certain public functions deemed to be essential, etc. In short, these regulations are justified by an appeal to the common good. From this point of view, the measure of success within this system of sanctions is efficacy. On the other hand, systems of reward and punishment will also be judged for their justice. A central requirement of the whole legal system is that the legal statutes and the procedures adopted in implementing them should safeguard the just treatment of those falling

under their purview: people should only be punished for actions they have actually committed, and their punishment should be proportionate to their crimes and should take account of the circumstances in which the act was committed. In fact, there is overlap between the two aspects, since part of what the regulation of behaviour aims at is to deter the inhabitants of a state from unjustly violating the safety and rights of their fellow inhabitants. As Winch puts it:

... what I wanted to say all along was not that the rationale of the penal law is the preservation of public order, so much as the preservation of justice. The preservation, or attainment, of a *just social order*. (Winch 2016, 38.)

Of course most legal systems will fail to live up to these requirements to a lower or higher degree – for one thing, economic, political and social forms of corruption are more or less prevalent in most human societies; and for another thing, even in a system administered by people of good will, errors of implementation will be inevitable in a system run by human beings. Still, in many societies appeals to the common good and to justice are held to be *relevant* to the appraisal of the legal system and its workings. The ideal aimed at in such societies is commonly (not wholly accurately) referred to as the rule of law in contradistinction to the rule of men.

A legal system can of course be imagined in which the regulation of behaviour overrides considerations of justice. In an extreme case, sanctions are in practice a pure exercise of power for ends set by those in control (even though the system may be made out as serving some higher values). In such cases, questions of culpability are only taken into consideration to the extent that this serves the purposes of the system. We might call such a system despotic. History abounds with examples of such systems; in today's world, the paradigmatic case is the North Korean regime. However, in most of the societies we are familiar with this is not the way systems of justice work. On the contrary, even where behaviour is regulated for the sake of social utility we are inclined to think that it should take place in observance of certain standards of justice.

Thus, ethical concerns seem to be relevant to punishment even when it is a contingent consequence of the crime – even when it does not, in the *Tractatus* sense, “reside in the action itself”. However, Wittgenstein, in the *Tractatus*, is denying this, and Winch, in his early essay, seems to agree. On their view, the connection between legal punishment and ethics is only external. In his later work on punishment, however, Winch reverses his position.

3. Rush Rhees commented on Winch's thoughts in an essay borrowing its title from that of Winch: "Ethical Reward and Punishment". This appeared posthumously in the collection *Value and Understanding: Essays for Peter Winch*, edited by Raimond Gaita. Rhees has doubts about Winch's interpretation of the *Tractatus* remark about "a kind of ethical punishment in which the punishment lies in the act itself" (although he hastens to add that "[a]s always with questions of interpretation, it is at least as likely that he is on the right lines and I am wrong") (Rhees 1990, 179). In fact, Rhees's essay is somewhat sketchy and his criticism of Winch is elusive. He does not offer an alternative reading of the *Tractatus* passage, rather he says that the *Tractatus* sentences about punishment are difficult (by which he means, I believe, that he thinks they present unsolvable problems). Winch, he claims, makes the mistake of trying to read the *Tractatus* passage as it stands, without considering Wittgenstein's own later critique of his early work. If I read Rhees correctly, he is arguing that it is pointless to try to explain Wittgenstein's remarks about value and ethics in the *Tractatus* – as well as in the "Lecture on Ethics" – given that Wittgenstein himself later on rejected them as groundless, an assessment with which Rhees agrees. My own inclination is to think that Rhees is not wrong on this matter, even though Winch should be given credit for the intellectual boldness of his attempt.

Rhees points to difficulties with Wittgenstein's idea that "ethics cannot be expressed", as he puts it in *Tractatus* 6.421, the remark immediately preceding the one about ethical reward and punishment (Rhees 1990, 180 f). The reason ethics cannot be expressed is that, according to the *Tractatus*, language, in essence, consists of nothing but factual propositions and of truth-functions of factual propositions. In speaking ethically, however, we are not asserting facts, hence to try to put something ethical into words is to fail to say anything. However, Rhees questions the idea that language has an essence, and he points out that Wittgenstein rejected this whole way of looking at language in the *Philosophical Investigations*.<sup>1</sup> According to Rhees and the later Wittgenstein, it cannot be settled *a priori* which things can be said and which things cannot. When this idea is given up, however, there is no longer any good reason for thinking that ethical matters cannot be spoken about.

It is not immediately obvious what the connection is between the idea that ethics cannot be expressed and the remark about ethical reward and punishment. I take it that they are connected *via* the opening sentence of 6.422:

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<sup>1</sup> Wittgenstein's self-criticism is summed up in § 65:

Instead of pointing out something common to all that we call language, I'm saying that these phenomena have no one thing in common in virtue of which we use the same word for all – but there are many different kinds of *affinity* between them. And on account of this affinity, or these affinities, we call them all "languages".

(I am here quoting from the revised translation by Hacker and Schulte, rather than the Anscombe translation used by Rhees. This should make no difference to the content of the remark.)

When an ethical law of the form, "Thou shalt..." is laid down, one's first thought is, "And what if I do not do it?"

A hypothetical command of the form, "Do so and so in order to avoid such and such a consequence!" – e.g. "Observe the speed limit to avoid getting a speeding ticket!" – can (let's assume) be reduced to a factual assertion: "If NN does x, y will happen." Accordingly, such a command would make unproblematic sense on the *Tractatus* conception. However, the idea that acting ethically means striving to achieve some result which is external to ethics (say, for the sake of being rewarded or avoiding punishment) is obviously misguided. An ethical command is not hypothetical, hence not factual, hence it cannot be put into meaningful words.

Actually, when confronted with a command such as "Thou shalt not bear false witness against thy neighbour", I doubt whether one's first thought is "And what if I do?". Wittgenstein's point seems to be, rather, that for someone who has taken the *Tractatus* view of language to heart, that *ought* to be one's first reaction. I would suggest, on the other hand, that if we understand what is commanded we see its rightness.

Further on, Rhees writes:

There are certain ethical judgments for which I have no answer to the question "Why?" "As far as I am concerned, it stops there." ...

I do not think these are judgments I could *discover* by any method, unless it might be self-examination. (Rhees 1990, 185.)

If I have understood his drift, he is suggesting that what led Wittgenstein to the conclusion that the ethical is inexpressible is the fact that ethical judgments are often without ground (in particular they have no extra-ethical ground). From the point of view of the *Tractatus* these things were indistinguishable: only that which can be grounded in empirical observation can be meaningfully uttered; however, there is no reason one should think so. Since Wittgenstein's remark about reward and punishment is tied to a conception of language he himself later came to recognize as misconceived, Winch's attempt to find sense in the remark, according to Rhees, is a wild-goose chase.

4. Winch's more recent essay, "He's to Blame!" takes off from an altogether different angle. The so-called *Green Book* carries the discussion begun in that essay further. Winch's essay was published in a volume honouring Rush Rhees, but when it appeared Rhees had died. There is no evidence that Rhees had read Winch's essay, nor, it seems, had Winch read Rhees's essay "Ethical Reward and Punishment" at

the time he published "He's to Blame!" However, as we shall see, there are parallels between Winch's more recent essay and some of Rhees's thoughts in the second half of his essay.

Winch's central concern in these later texts is with getting clear about the question of the justification of punishment – the question which is regarded as central in most philosophical discussions of the concept.

I wish here to take note in passing of a conceptual peculiarity connected with the debate about the justification of punishment. The word "justification" is typically bound up with rights, but it may be asked whether the central question in connection with punishment is one of a right to punish rather than an obligation to punish (as it might be thought, towards those victimized by the crime), and if the latter, whether "justification" is a good term to use. (Kant certainly thought there was an obligation to punish, though one that was independent of any consideration of the victims.) I am not aware of any discussion in the literature of the relation between punishment as a right and as an obligation. This issue may have important bearings on how the debate is to be conceived. I must admit that this paper wavers on the distinction.

Now, rather than proposing a theory of justification from among those on offer (deterrence, rehabilitation, incapacitation, retribution, etc) or adding a new one of his own, Winch argues that the difficulty lies in understanding the issue itself aright. Adopting a remark of Wittgenstein's, he says that in raising the question, we fail to "put the question marks *deep* enough down" (Wittgenstein 1998, quoted on Winch 1989, 151). In other words, we tend to forge forward looking for an answer without stopping to reflect what question we are actually asking.

As Winch points out, when the question of the justification of the practice of punishment is raised, we should recognize, first of all, that the practice we are referring to is in itself partly *constituted* by the fact that certain justificatory questions are relevant to it. The practice consists of cases in which persons are sentenced to undergoing such and such punishments *for* such and such crimes. It belongs to the nature of the practice that we may raise questions like: was the accused really guilty, was the evidence sufficient, was he sentenced by a competent court, was the sentence fair, etc, etc. (Winch 1989, 152.) As Winch puts it:

one sort of case is regarded as unjustified *in contrast with* others. Our familiarity with the terms in which these contrasts are drawn is itself a very important feature of our understanding of what punishment is. The concept of someone's being punished *for* an offence is not itself called into question in these examples [of the justice of a verdict being questioned]; indeed, the examples would evaporate if it were (Winch 1989, 153; first italics mine).

Here it should be pointed out in passing that in the family of uses of the word “punishment”, there are some in which the connection with such a justificatory discourse is much thinner or non-existent, as in the forms of despotic punishment described above. Winch’s observations are limited to the type of legal practice which we might be prepared to call “a system of justice” (which does not imply, as was said, that the system as such may not suffer from failures of justice, great or small); in other words, they are limited to systems which aspire, or at least make a show of aspiring, to justice in the creation and application of laws. It is, of course, for the most part to such systems that the traditional discussion of the justification of punishment limits itself.

As Winch puts it:

It may well be the case (it would be hard to deny that it is the case) that our penal institutions and the way they are administered in many ways fall short of what we should think ideal. Perhaps sometimes we may think they fall so far short as to be “more honoured in the breach than in the observance”. To think this, however, is not necessarily to think the whole concept of punishment discredited: for it may be the case that what our institutions fall short of is precisely what the concept of punishment itself, properly understood, requires. (Winch 2016, 142 f.)

Now, the fact that such systems of justice contain forms of justificatory discourse in themselves will not of course be enough to satisfy the traditional punishment theorist - let us call him “the justificationist”. The question he will want to ask, as Winch formulates it, is: “What is the justification of these justifications?” (Winch 2016, 144), in other words, why should there *be* such a system of punishment - including its justificatory discourse - in the first place?

Winch quotes Protagoras from the Platonic dialogue carrying his name (Winch 1989, 153):

Punishment is not inflicted by any rational man for the sake of the crime that has been committed -- after all one cannot undo what is past -- but for the sake of the future, to prevent either the same man, or, by the spectacle of his punishment, someone else, from doing wrong again. (324b)

Plato’s Protagoras here gives expression to an inclination which has held a powerful sway over much of the justificationist debate over the ages. The only acceptable justification for maintaining a system of punishment, it may seem, is the future

consequences of punishment, either through its deterrent effect, as a means of rehabilitation, or for the sake of incapacitation, or all of these together. If future consequences are discounted, it will appear, punishment will be reduced to a mere act of revenge. The idea that some past event could in itself be a reason for performing such and such an action sounds like a superstition.

Now Winch is not denying the importance of the future-oriented aspects of punishment. As one might put it: once the authorities have rightfully incarcerated an individual, they have an obligation to make the best of the situation as far as compatible with the principle that the punishment should be a negative event (this concern could be held to be one difference between punishment and revenge). However, Winch is questioning the idea that the only thing that can justify any action at all are future consequences. For one thing, he points to an ambiguity in the notion that the past cannot be undone. He considers the saying, "It's no use crying over spilt milk". We are tempted to cry when the effects of having spilt the milk are irreparable, as when we have ruined a precious tablecloth in spilling the milk, or if we cannot afford another glass of it. In other cases there is no need to cry since we can simply pour another glass from the container. So in the first case the past cannot be undone in terms of its consequences, in the latter case the consequences can be undone; what cannot be "undone" is simply the fact that something was the case. Winch points out that those who speak of punishing someone *for* a crime are hardly under the illusion that past actions can be undone in the latter sense; whereas it is a contingent question whether or in what way the past can be undone in the former sense – that seems to be a possibility in cases in which compensation or restitution may be in place, whereas in other cases this would not be a possibility. (Winch 1989, 154) So the saying that the past cannot be undone will not work by itself as an argument for the purely forward-looking conception of punishment; some additional argument is required to show that punishment cannot "undo the past" in any relevant sense. Or better put: some other argument is required if we are to be forced to the conclusion that a past event cannot by itself be a reasonable ground for action regardless of future consequences.

Punishing someone for a crime is punishing him for something done in the past. We might also say: in punishing him we implement the judgment that he *deserves* to be punished. And the concept of desert points to the past without regard to future consequences.

5. Let me interject a few remarks about revenge. The wish for revenge is the most notorious backward-looking motive. There is a common inclination to think, like Protagoras, that only forward-looking motives can be rational – in other words, that

the wish to act on a backward-looking motive always embodies an error.<sup>2</sup> And so, when penal practices in general, or some particular practices, are criticized, the criticism often takes the form of arguing that the practices in question are really a form of (are no better than) “simple revenge”, and this, it is claimed, is irrational and barbaric. At the same time, there is another backward-looking motive that is hardly ever criticized: that is, gratitude. We would not shake our heads at Jack, say, for doing Jill a favour in gratitude for something that Jill had done for him (or even, let’s say, for something Jill’s father or her cousin had done for him) – independently of whether the return of favour might reasonably be expected to inspire further benefits in the future. On the contrary, it is refusing the favour that would be likely to earn him contempt – in spite of the fact that Jill’s favour to him “was something in the past”.

Whence, then, the widespread suspicion of revenge? It is true that revenge is often out of proportion, or aimed at the wrong individuals (say, taking revenge on an entire ethnic group for actions done by an individual member of the group) – but to say so is in itself to admit that at least in some cases the proportion and the target of revenge are *not* wrong. Questions of proportionality aside, assessing acts of revenge in terms of rationality seems out of place, but so does assessing acts of gratitude in terms of rationality. We might call such motives non-rational. On the other hand, there seems to be no problem about discussing revenge, or gratitude, in terms of *intelligibility*. In Heinrich von Kleist’s story *Michael Kohlhaas*, the protagonist’s unbending search for retribution is fully comprehensible, he even earns our respect. Perhaps what we condemn is not revenge itself as a general motive, but the particular motive *for* revenge, since this will, as often as not, be petty, self-seeking, or self-centred, the avenger being blinded by his subjectivity.

In discussing revenge we tend to focus on dramatic acts of retaliation. But vindictiveness may also creep into people’s everyday dealings with one another, as when Joe, the CEO of a company, fails to appoint Susan to a job even though she is the best qualified applicant, on the grounds that Susan had criticized Joe on some earlier occasion, or maybe because she had resisted his advances. In such a case, Joe may be at pains to hide his motives from others and maybe even from himself, unlike the case of punishment where one normally makes a point of making manifest what the culprit is being punished *for*. Thus revenge may be insidious in a way that punishment is not.

Decrying legal punishment by likening it to revenge is empty rhetoric. Punishment is administered by those to whom the task has been assigned, in the

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<sup>2</sup> We should note that even forward-looking motives do not necessarily presuppose an instrumental connection between one’s acts and the future envisaged, as in the case of someone who volunteers to visit with old people in the hope that someone will visit him when he himself is old and lonely. We might not call such a motive rational, but neither is it irrational.

name of all citizens, and we are all ultimately responsible for holding them to the standards of justice. We have a stake, we might say, both in the culprit's not escaping punishment and in the punishment being just. Revenge, on the other hand, is taken by those injured or insulted, or by some of them on behalf of the others. The rest of us are bystanders, though we, or our authorities, may be responsible for seeing to it that revenge does not get out of hand. It is because revenge tends to be driven by subjectivity that it tends to be misdirected or disproportionate, thereby often giving rise to a spiral of destruction. Where the legal administration of punishment is concerned, on the other hand, there are statutes intended to make sure that the authorities involved in the process – including members of juries – do not have a personal stake in the matter. In some cases, it is true, this condition is notoriously difficult to fulfil. (There are, of course, intermediate forms, systems of vendetta, where forms of revenge are more or less institutionalized, and on the other hand criminal trials or parole hearings in which the victims of crime or their families are given a role almost as party to the proceedings. The criminal justice system in the United States, it is sometimes claimed, in some of its aspects verges on state-sponsored revenge. But this does not refute the point that there are paradigmatic cases in which punishment and revenge are clearly distinct.)

6. Suppose we ask: what reasons might there be for introducing something corresponding to our penal system in a society in which there is no concept of desert, and where accordingly such a system does not exist? (It does not matter for this thought experiment that it is questionable whether such a society can even be imagined.) Of course, if the concept of desert existed, there would be no need for inventing reasons for punishment.

Let us imagine that there is a proposal that people who have committed assault should be locked up. We must assume, of course, that the word "assault" is given a neutral definition, e.g. as behaviour causing long-lasting pain, bleeding, fractures, etc (maybe with a clause listing exemptions such as surgery). The justification would be that one wants to discourage people from behaving in such ways. However, this by itself would not be an instance of justifying a penal system. What we are describing here might as well suit a group of vigilantes deciding to put a stop to the violence rampant in their neighbourhood. What would be absent in such a case are questions like: who has the authority to do the locking up? through what procedures is the decision to incarcerate someone to be reached? what would the term of incarceration be? etc. Furthermore, if the sole purpose of introducing this practice is to achieve some specific change in behaviour, there is no reason why the reprisal should be limited to the perpetrator of an assault. It might be thought more

effective, for instance, to lock up his friends or colleagues or the members of his family in addition to him or in place of him.

In the kind of society with which we are familiar, the use of force is the prerogative of the state, and its exercise is – in principle – carefully circumscribed by penal laws and by rules of procedure. The exercise of legal force is subject to the law of the land, no less than the behaviour of ordinary citizens. Just as central is the requirement that the infliction of punishment should be limited by considerations of desert. In short, the instrumental purposes of the law should always be tempered by the requirements of justice.

In discussing the practice of punishment as a practice with pretensions to justice, we must take into consideration the justificatory discourse that is internal to it, *otherwise we will not be talking about this practice but about something else*. Our discussion concerns the coupling of crimes and punishments. Taking into consideration the justificatory discourse does not, of course, mean accepting each and every justificatory argument that is on offer – that would be impossible anyway, since those arguments will often conflict with one another. Rather it means being ready to argue within the framework of that discourse, one of the core features of which is the concept of desert. And the word “desert” is internally linked to the word “crime”. Rhees: “We cannot speak of a crime – we should not call it a *crime* – unless we could say: ‘Whoever did that should be punished.’” (Rhees 1990, 189.) Well, we might allow for exceptions in special cases, as when the perpetrator is criminally insane, is under overwhelming pressure, etc, but the default response to what we consider a crime is that the perpetrator deserves to be punished.

Rhees seems to suggest, in a later context, that we respond with horror or indignation to a crime. But this is not necessarily true for many ordinary criminal acts, such as traffic violations or faking an ID card to gain entrance to a pub. The legal tradition makes an important distinction between what is called *mala per se* and *mala quia prohibita* – that is, between actions that are bad in themselves and actions which are bad because they are prohibited. Of course, the line between these is not a sharp one.

Without the idea that a person may deserve to be punished, i.e. that he may justly be made to suffer solely because of some past action, nothing analogous to our system of criminal law could exist. But could not this idea be introduced in a society? Perhaps it will be decided that it is useful to treat a person as responsible in a given set of circumstances, since doing so would be beneficial for society. Such a proposal, however, makes no sense. To judge either that it would be useful to treat a person as responsible, in an individual case, or generally to treat persons as responsible in a given range of circumstances, is not the same as judging them to *be* responsible. Of course the authorities may on some occasion be tempted to make an outward show of holding someone responsible for a crime – say, in order to stave off

a lynch mob or to appease a political group by scapegoating some individual - but whatever we may think of the wisdom of such a procedure in a given case, it is and remains a *pretence*. We cannot decide by stipulation that someone deserves to answer for some given action. The judgment that a person deserves to be punished can be based only on the considerations pertinent to judging of a person's responsibility, not on any external grounds.

The use of the word "desert" embodies a justificatory claim, but there can be no justification for the thought that actions may deserve punishment as such. As Rhees puts it:

There cannot be a *reason* for punishing – a justification of punishing at all, of punishing as such. There may, of course, be a justification of means or methods of punishing.

... When Kant says that punishment must be inflicted on a criminal only because he has committed a crime, we cannot ask how *that* justifies it. We should have no idea what we were seeking. (Rhees 1990, 190.)

In sum: if it is asked, "Should one punish people who deserve to be punished?" the answer is "Yes, that's what we mean by 'deserve'"; and if it is asked, "Does a person who commits a crime deserve to be punished?" the answer is "Yes, that's what we mean by 'crime'."

There seems to be a paradox in the idea of what taking an enlightened view of punishment would amount to. When the matter is discussed on a general level, there is, I believe, a widespread view that the only thing that can justify punishment are forward-looking considerations. However, in an individual case, I believe most people would be appalled at the idea of punishment being administered independently of desert.

7. Winch's essay concludes with a discussion of an essay by John Mackie called "Retributivism: A Test Case for Ethical Objectivity" (published in 1986). While rejecting most justificationist accounts of punishment, Mackie maintains that (in Winch's words) "the widespread idea that ... the infliction of pain is appropriate when someone has done something wrong" should be taken seriously (Winch 1989, 160). So far, Winch agrees with Mackie. However, according to Winch, Mackie in the end fails to meet this ambition.

To spell out his disagreement with Mackie, Winch sets out the following elements of the problem of punishment:

(1) There exists a practice involving the infliction of pain or unpleasantness on those who commit certain acts of wrongful behaviour. (2) This practice also involves certain ways of speaking and thinking, focused on the concept of "punishment", according to which given the right circumstances, such an infliction of pain etc. is "called for", "justified", "fitting" etc. (3) There exist ideas about the justification of this practice. (Winch 1989, 161.)

The central issue concerns elements (1) and (2) and the relation between them. Mackie evidently assumes that (2) is prior to (1): as we might put it, "in the beginning was the thought". The thoughts in question are "sentiments", i.e. ways we feel about actions. These are, as it were, superimposed on what is actually the case. They, in turn, give rise to ways of responding to human wrongdoing.

Winch wishes to turn this perspective around. In order to do so, he draws a parallel between the discussion of punishment and Wittgenstein's discussion of the way our thinking about causality might be thought of as arising from human primitive reactions (Wittgenstein 1993). An example of such a reaction might be this: someone hits me painfully on the nose, and I immediately react by hitting him back or shouting at him, etc. (I here deliberately choose a case in which the reaction to a cause takes the form of retaliation, but of course there are many other forms of primitive reactions to causes: e.g. hearing a loud bang and turning to look in the direction it came from, stopping to remove a pebble from one's shoe, protecting oneself from a stream of water suddenly pouring down from the roof, etc.) Now the role of such reactions may be misconstrued in two ways. One mistake would be to regard them as *justifications* of our causal judgments, as if one's reaction to something as a cause were actually evidence that a causal connection was at hand. In fact, of course, our reactions are frequently too hasty. But neither are we to think of them as mere "sentiments", responses that are to be kept separate from what is objectively the case – along the lines on which Mackie construes our retaliatory reactions. Rather their significance lies in providing a life environment in which there is a place for talk about causes, inquiry into causes, speculation about causes, etc. – talk in which correct as well as erroneous causal judgments will be made. It is within this talk that questions about what is "objectively the case" concerning causal beliefs finds its sense.

Let us call this Wittgenstein's picture of how causal thought might be grounded in human behaviour. Now Winch's suggestion is that a similar picture might be drawn concerning the roots of our talk of punishment and desert. The disanalogies should be obvious (a point which Winch does not bring up). For instance, there may be ways of investigating causal connections which are independent of our reactions to causes, as when we trace the course of an epidemic

or study the benefits of a new fertilizer for wheat crops. In this way, our immediate responses may be shown to have been misguided. When it comes to matters of responsibility and desert, on the other hand, there are no facts independent of our inclinations to react in various ways to human actions by which the “veracity” of our reactions might be checked. This, however, is not to say that facts may not have an indirect corrective effect on our responses; thus if we found that a person’s outrageous behaviour had its ground in neurological or psychological malfunctioning, our retaliatory reactions might be held back.

At any rate, through familiarizing myself with a case, through discussions with others, etc, I may come to change my verdict concerning a person’s culpability. However, it does not make sense to suppose that we might somehow come to discover that the whole practice of holding people responsible for their actions is erroneous, that it involves a factual mistake; that there is nothing in reality “corresponding to” it. (Thus, the suggestion that all of human behaviour might have its ground in neurological malfunctioning is incoherent.)

At this point, Winch makes a somewhat surprising claim. He says, almost as an afterthought, that

[w]e cannot therefore rule out *a priori* the possibility of a wholesale condemnation of punishment, not merely as a set of practices but even as a way of thinking. And hence, I think, we cannot rule out *a priori* the possibility of asking questions about their justification. (Winch 1989, 163.)

This is surprising to me since it seems to run counter to the whole tenor of Winch’s essay, at least as I have understood it. I take him to have been arguing that, unless, in raising questions of justification, we stay within the family of concepts constituting our thinking about crime, desert and punishment, then the focus of our questions vanishes – it is no longer clear *what* it is we wish to justify or to bring into question. And now it appears as if Winch wishes to bring back the possibility of a wholesale rejection of the thinking surrounding punishment. How are we to understand this reversal?<sup>3</sup>

I am unsure how this question is to be resolved. Let me, however, propose a conceivable way out. On my reading of Winch, what was shown to be confused was the question whether the idea of punishment as such is either just or unjust. It makes no sense to ask, concerning verdicts within the system, *in so far as they are just*, whether they may nevertheless be unjust. In short, the practice of punishment as such cannot be called out on the issue of justice.

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<sup>3</sup> We may note that there is no similar concession in the *Green Book*, which in many respects appears to be an elaboration of the thoughts in “He’s to Blame!”

This, however, does not exclude another possibility: someone might turn her back on any kind of penal system and any notion of desert. She wants no part of it, she will never use any of the concepts that belong to the family of concepts surrounding penal practices. She is not arguing that the way of thinking is confused or erroneous in some sense, she simply considers it alien and inhuman. Maybe she is a soulmate of Leo Tolstoy, with his radical reading of *Luke vi: 37*: "Judge not, and ye shall not be judged: condemn not, and ye shall not be condemned: forgive, and ye shall be forgiven". I would suggest the attitude sketched out here is easier to embrace if one restricts one's attention to a certain range of crime – the kind that is liable to call for our compassion rather than indignation. (The reading I propose might be taken to be suggested by the first of the sentences quoted above, but harder to square with the second sentence.)<sup>4</sup>

This reading of the passage seems to be borne out by what follows: "... it is important to be aware of how much one is taking on if one tries to do this." Winch points out that "our punitive reactions are continuous with other, very fundamental, moral responses" and that "our penal *concepts* are intimately and subtly interwoven with our other moral concepts". In other words, it is a hard question how much of our moral thinking can remain intact if any idea of desert is weeded out. We may ask: could there be a notion of responsibility without a notion of desert; and furthermore, can the concept of agency be understood without any connection with responsibility? These are huge questions, too large to be entered into here. In any case, I believe this reading of Winch's concluding thoughts is roughly on the mark, and I believe he succeeds in showing that a desert-based practice of punishment is deeply entrenched in the human form of life.<sup>5</sup>

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<sup>4</sup> Another way of reading the remark about the possibility of raising questions about the justification of punishment was suggested to me by David Cockburn in discussion. On his proposal, we could imagine the case of someone who accepted the idea of desert but who favoured other ways of meting out retribution, and to whom we were trying to show the superiority of a penal system.

<sup>5</sup> I wish to thank Michael Campbell, David Cockburn and Merete Mazzarella for helpful comments on previous drafts of this essay.

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