

King on Punishment: A Comment*

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One thing I learned from Professor King's paper is that he and I are far less in agreement on punishment theory than I had anticipated. It is perhaps fortunate for King that I do not hold with an expectations theory of contract because then I might argue that he deserves to be punished for dashing my expectations. And since, on his very own theory, there is no nonarbitrary way to set any limits on punishment, then Professor King might have to agree that it would be justifiable for me to have him executed.

Professor King claims at least to have established the moral case for punishment *per se*, even though he denies the possibility of arriving at any standards for the degree or type of punishment in any particular case. I don't think he has established anything of the sort. I am frankly puzzled about *how* he has allegedly demonstrated the moral case for punishment, though perhaps his larger work will make this clearer. But several elements appear to be involved. One is his assumption that establishing the case for rights *ipso facto* and along with it establishes the basis for punishment. I do not see how this is true. One can demonstrate that people should not aggress against the person or property of another, without at the same time establishing the case for punishment. It would be possible, with Robert LeFevre, to advocate simply the subjection of the aggressor to the moral condemnation of most of society. I do not at all agree with LeFevre's anti-punishment position, but the point is that it is not absurd on its face to believe in rights without believing in punishment for their violation. More must be done to establish the basis for punishment.

Secondly, Professor King places very heavy emphasis on the necessity of *convincing people of the existence and the importance of rights*. By implication, he seems to hold that rights do not exist *unless* almost everyone is convinced of their existence. But surely Professor King is fatally confusing the task of science (the discovery and identification of objective laws) with the task of rhetoric (putting those laws in the most persuasive manner). The two are completely distinct. The laws of nature are objective and real, regardless of how many people may or may not be convinced of them. It

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might, after all, be more difficult to convince many people of the truth of Einstein's theory of relativity than of the existence of natural rights to person and property. Let us then establish the rights first, and then worry afterward about how to put the case for them in the most persuasive manner.

Indeed, it seems to me that Professor King does not believe in natural rights at all, but instead wishes to convince everyone of rights on a strictly utilitarian ground: what he repeatedly calls the "overriding" need for avoiding what he apparently considers the omnipresent threat of a Hobbesian war of all against all. Hence, his almost desperate emphasis on the importance of universal or near-universal agreement to the existence of rights. But the avoidance of the allegedly looming war of all against all does not seem to me overriding at all. Certainly, its overriding importance is scarcely self-evident. It is revealing that King is willing to embrace almost any social system provided that his dreaded war of all against all is avoided. He considers it a happy alternative, for example, if everyone were to agree to obey him in all things; then, he says, "we could easily have peace together." Perhaps so. But, to some of us, the alleged war of all against all would be preferable to living under the totalitarian command of Professor King, to say nothing of the edicts of far less likable dictators.

As a veteran New Yorker, I can assure Professor King, living in sheltered California, that the war of all against all is really not so bad, and that it is possible to survive and even flourish under it. More seriously, I believe that King errs and unduly blackens the state of nature by adopting the Hobbesian rather than the Lockean version. The giveaway is that King holds that desires or wants are, as he says, "given", and that given these desires, many of which are apparently murderous, he feels impelled to search desperately for universal agreement on ways to avoid unleashing these aggressive passions. But suppose, as I would maintain, that most people hold an implicit natural rights position anyway, even in a state of nature. In that case, there would really be no war of all against all in a state of nature, but only a war of a few against a peaceful many, which is a very different picture of the world than given us by Professor King.

I conclude that Professor King has failed to establish a basis for punishment. But that is not the end of his troubles. For King envisions a world where everyone, not just the victim, would have the right to punish every aggressor, and where, furthermore, no limit would be placed on the degree of such punishment. So if Jones steals an apple from Smith's pushcart, and Smith, guided by obscure and nonrational personal values, only wishes to extract two apples from Jones as punishment, then presumably Robinson, in high dudgeon at Smith's namby-pamby attitude, would have the perfect moral right, according to Professor King, to execute Jones for his apple theft.

But what would this be if not the war of all against all? King virtually admits this when he states wistfully that, after his case for punishment *per*

se is established, we must then sit back and "await the workings out of particular societies in light of the personal values of the participants in order to fill in such crucial details as penalties and procedures." And so, in high irony, Professor King, fleeing as from the very plague from the spectre of a Hobbesian war of all against all, grounding his entire theory in that fear, yet would plunge us precisely into such a world.

King struggles against this insight, claiming that even competing courts would work out a fairly narrow range of punishments. Yet he himself, in attacking the proportional punishment theory, points out that criminals and victims would have different ideas on the degree of punishment, so that a war of all against all would ensue. But if this is the case when everyone is at least *trying* to adhere to a proportional punishment standard, then how much more intense and pervasive would such a war be in a Kingian world where everyone feels justified in any wholly arbitrary notion of punishment! In fact, I do indeed think that a free society would arrive at a narrow range of punishments, but not simply because, as King puts it, "very few people could enjoy the prospect of having children executed for stealing apples." I submit, and this of course cuts to the heart of our difference in moral theory, that there is a *reason* why most people would not, as he puts it, "enjoy" killing children for petty crimes: i.e., that most people believe that such punishment is wrong, and wrong *because* it far exceeds any plausible criterion for the proportionality of punishment.

Furthermore, a Kingian world would be in even more trouble. For it is indeed true that, though unfettered by any criterion of proportionality, most people would not enjoy killing children for stealing apples. But *some* people might; and, for King, it is perfectly permissible for *one* very hard-nosed person, incensed by the crime of apple-stealing, to step in and exercise his right to execute the errant child, even though most people would shrink at such a task. And so King would truly bring us a war of all against all.

Indeed, it is odd that Professor King, who places such great stress on public acceptance of rights, is not more impressed with the fact, as he admits, that "proportionality has certainly been an ideal of our culture." For, if King is willing to accept rights because he thinks people can be persuaded to believe in them, why shouldn't he, on the same grounds, be even *more* ready to accept proportionality of punishment which most people *already* believe in? If common acceptance can establish rights, why not also proportionality of punishment?

I contend that Professor King is a utilitarian rather than a natural rights theorist also because he basically adopts a deterrence rather than a retributivist view of punishment: that is, a deterrent from the launching of that dreaded war of all against all ever threatening to bubble up from beneath the surface. King retorts that he would be strongly opposed to punishing the innocent for the sake of such deterrence. Fine. But within this side-

constraint of punishing only the guilty, there is no reason why King should not adopt a consistent deterrence scale of punishment. I would here argue that people have moral compunctions against committing murder which they do not have against stealing apples, that hence murder is a far less likely crime than apple stealing, and that therefore on deterrence grounds the punishment for murder should be *far lighter* than for petty theft, since less punishment is needed for its deterrence. And so a Kingian world would logically be one where apple stealers are executed whereas murderers are let off with a few days in the public stocks. It seems to me that *this* sort of world, of totally arbitrary or even reverse-proportional punishment, is far more counter-intuitive than a sin he charges me with: namely, failing to punish bombers whose victims were pacifists and who therefore pressed no charges against them.

In attempting to defend his no-holds-barred view of punishment, Professor King asserts that "when one has violated the principle of right, one forfeits rights and cannot claim that they protect one from punishment." Presumably he means that one forfeits *all* rights, and hence the moral permissibility of executing juvenile apple-stealers. But why all rights? If one discards deterrence of the imminent Hobbesian war as the main groundwork for punishment theory, then it would become more plausible to say that the criminal forfeits not *all* rights, but only the rights that he himself has violated.

The bulk of Professor King's paper is a critique of the view, held by myself among others, that punishment should be proportional to the crime and that it should be levied at the behest of the victim and not of other members of society. Having disposed of King's positive theory of punishment, let us now examine his specific charges against our alternative view. In attacking the idea that the victim should decide on whether to press charges and on how much punishment to inflict up to proportionality, King cites two cases. One is the victim who is intimidated by the threats of the aggressor into dropping charges. But he fails to realize that this happens now all the time. Surely we are all familiar, from movies and television, with the witness who is frightened off by threats from the criminal. Such threats are illegal now, and would to the same degree be illegal in a libertarian society. But my point is that the intimidation problem would be no worse in the free society than it is now. As for the Mad Bomber's destruction of the homes of pacifists, yes it is true that, in my view, third parties would not be able to punish the bomber until he tries to burn down their own houses. But as King himself says of his own defense of unlimited punishment for petty crimes, "this is a hard saying", perhaps less hard than his own. But there are also other things that third parties could do: they could boycott the bomber, they could watch his every move on the street, etc. And there is something else which King overlooks. Namely, that in a libertarian society, *all* land areas, including streets, would be owned by private parties and not by the State. So that the street-owners of this puta-

tive neighborhood, though not empowered to punish the Mad Bomber, would undoubtedly exercise their private-property right to eject him from their streets and therefore from their neighborhood.

There is yet another point that King overlooks. If Jones aggresses against Smith, and Smith, as a pacifist, refuses to prosecute, may we not even say that no crime or aggression has been committed? If Jones, for example, steals \$10,000 from Smith, and Smith then says, "I forgive you, my son, go in peace," then may we not say that Smith, though admittedly in an odd kind of way, has simply given Jones the \$10,000 voluntarily, surely a perfectly licit action in a free society? Even in the case of the bombings, we could say that Smith has voluntarily collaborated in the blowing up of his own home. But if so, then no crime against Smith has been committed, and even Professor King would have to admit that his troubled third parties would have no legitimate reason for rushing in to inflict punishment. In fact, as we have seen, King himself believes that rights and punishment are inextricable. Standing King on his head, may we not say that if the victim chooses not to inflict punishment, then no rights have been violated?

Professor King then proceeds to point out in some detail that proportionality of punishment is often difficult to achieve in practice. Granted. But that is no reason to toss out the principle. Most legal principles, after all, are difficult to apply in practice; that is why there are courts and arbitrators. All we can say is that we or the courts will have to do the best we can. Better that than making arbitrary decisions without a rudder, or allowing every hopped-up fanatic to inflict maximum punishment on all transgressors.

Professor King believes that defining the extent of a theft as a percentage of the victim's assets makes as much sense as defining it in accordance with the amount of money stolen. I don't agree. If we believe that each person possesses the same rights, then a poor person's right to the ownership of \$1,000 must be exactly the same as the rich person's right to \$1,000, no more and no less. And therefore the criminal owes no more restitution to the poor man than to the rich. It is also true, as Professor King charges, that a theft committed by a rich man would bring him a relatively less onerous penalty than the same theft committed by a poor man. But that of course is true today of any fine levied upon wrongdoers. All that King has demonstrated is that it is tougher, in any society, to be poor than to be rich — a "hard saying" indeed, but one that we at least have all come to terms with.

Professor King also states that the criminal's losing his rights to the extent of his crime is no less arbitrary than his losing rights by some multiple of that amount. Again, I don't agree. It seems to me both fitting and commonsensical to say that a criminal loses his rights to the extent that he violates the rights of others. At least this fitness is an argument, whether one agrees or not, and hence superior to the notion that criminals should lose five times the extent of their violation, a view that enjoys the support of no argument whatsoever.

Professor King concludes his paper by stating that too many people are

guilt-ridden and hence unwilling to protect persons and property by levying punishment on transgressors. He laments the difficulty of persuading these people of the case for punishment and hence of imposing a sufficient deterrence for crime. I submit, however, that, as he himself should be ready to admit, it would be far easier to convince people to adopt a theory of proportional punishment than to enter a world in which anyone may permissibly execute a youngster who has stolen an apple. And since Professor King places overriding emphasis on the need for general agreement, he should for that reason alone abandon his own theory and join me in adopting the doctrine of proportional punishment.