



Punishment, Jesters and Judges: a Response to Nathan Hanna

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Abstract

Nathan Hanna has recently argued against a position I defend in a 2013 paper in this journal and in my 2016 book on punishment, namely that we can punish someone without intending to harm them. In this discussion note I explain why two alleged counterexamples to my view put forward by Hanna are not in fact counterexamples to any view I hold, produce an example which shows that, if we accept a number of Hanna's own assumptions, punishment does not require an intention to harm, and discuss whether a definition and counter-example approach is the best way to proceed in the philosophy of punishment. I conclude with a brief exegetical discussion of H.L.A Hart's Prolegomenon to the Principles of Punishment.

Keywords Punishment · Harm · H.L.A.Hart · Conceptual analysis · Folk theories

1 Introduction

Nathan Hanna has recently addressed a claim central to my 2013 article 'Must Punishment Be Intended to Cause Suffering' and to the second chapter of my 2016 book *An Expressive Theory of Punishment*: namely, that punishment need not involve an intention to cause suffering. Hanna defends what he calls the 'Aim To Harm Requirement' (AHR), which he formulates as follows.

AHR: 'an agent punishes a subject only if the agent intends to harm the subject'
(Hanna 2017 p969)

Why does AHR matter? One reason Hanna notes is that it has recently become fashionable to argue that punishment is impermissible on the grounds that punishment always involves an intention to harm, and that it is impermissible to act with such an aim.¹ If AHR is false, this argument fails. It may be true that our existing institutions of punishment cannot be justified;

¹Hanna 2008, Boonin 2009

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but abolitionist conclusions cannot be justified so easily. (This isn't the only reason why one might care about AHR: one might also find it appealing insofar as it explains why forms of treatment such as quarantine and pre-trial arrest aren't forms of punishment. But as I argue elsewhere, we don't need to appeal to AHR to explain this.²).

Hanna misstates my position in various ways. For example, he suggests that I argue for the correctness of my view on the grounds that abolitionism is false, thus begging the question against abolitionism. (Hanna 2017 p972).³ He also represents me as appealing to the authority of H.L.A. Hart in defense of my view. (Hanna 2017 p969–70). Neither attribution is correct. I mention Hart once, and in passing; and if my view turned out to be incompatible with the letter of Hart's position, my response would be 'so much the worse for Hart'. And, while I think that abolitionism is probably false and that opponents of abolitionism should reject AHR my rejection of AHR does not presuppose that abolitionism is false. (Indeed I'll argue in this note that advocates of abolitionism should reject AHR too.)

Space precludes listing, let alone rebutting, every point at which Hanna misrepresents me.⁴ Instead, I'll try to show in this note that Hanna's latest attempts to defend AHR fail. I'll start by setting out my own view, drawing attention to one significant, but perhaps understandable, misstatement of Hanna's. I'll then discuss two alleged counter-examples that Hanna presents to my view, and show that they both fail in their own terms. I'll also argue that, given assumptions that Hanna is willing to make a scenario closely related to one that Hanna presents counts against AHR.⁵ I'll then discuss how significant it would be if these counter-examples were successful. My view is that it wouldn't matter much, and that anyone attracted to abolitionism should agree. I'll conclude with a brief discussion of Hart, which may be of interest to enthusiasts and Hart scholars.

2 My View

Like Hart, I am interested in giving an account of the phenomenon of legal punishment in political communities with modern legal systems.⁶ The most prominent examples of such communities – though not the only ones – are states. Paradigmatic examples of the phenomena to be accounted for include practices of incarceration in the US, Europe and elsewhere; but other penal practices occur and need to be adequately accounted for too. A significant feature of these paradigmatic instances of punishment is that those who punish are not individual judges, juries and prison officers, but the state or political community.⁷ I take states and political communities more generally to be best understood as collective agents.⁸

² Wringe 2013 pp869–71

³ My claim is that a plausible account of the nature of punishment is available to those who reject abolitionism.

⁴ But see in particular Section 2 and note 12 below.

⁵ As will become clear, I'm not willing to make the assumptions in question, so I don't take the case to establish that AHR is false, but only that Hanna should not accept it. In Section 6, I give reasons for doubting that discussions of the kind of puzzle case considered here are the right way to go when trying to characterize punishment. I thank a referee for *Ethical Theory and Moral Practice* for encouraging me to clarify this point.

⁶ But see Wringe 2016 chapters 4–8 for attempts to extend the account beyond what we might think of as 'paradigmatic' instances of punishment.

⁷ See, in particular, Wringe 2016. My view is consistent with the truism that the state cannot perform any actions, including actions that constitute the punishment of offenders, except through the actions of individuals. It does not follow that the actions by individuals in virtue of which the state punishes offenders involves the punishment of offenders by individuals

⁸ For states as collective agents see Wringe 2016 chapter 3 and Stilz 2011

I hold that the following conditions are necessary and sufficient for a form of treatment to constitute punishment:

- 1) It should involve harsh treatment
- 2) Inflicted by an appropriate authority
- 3) On an offender
- 4) In response to some specifiable wrongdoing
- 5) With an appropriate expressive purpose.

Condition 1) is the main locus of my disagreement with Hanna. I understand harsh treatment as ‘treatment which would normally be found burdensome by a typical individual of the kind on whom it is being imposed’ (Wringe 2013 p867). This condition can be satisfied without the agent who is punishing the offender intending the agent to suffer. Since none of conditions 2–5 require an intention to make an offender suffer, I hold that AHR is false.

Condition 5) requires some commentary. Hanna represents me as holding that the expressive purpose mentioned in condition 5 must that of denouncing wrongdoing. (Hanna 2017 p973) This involves a slight, but significant misrepresentation of my position. In the 2013 article which Hanna cites, and in the chapter of my 2016 book which is based on it, I note that my characterization of the expressive view is broad enough to capture views put forward by a number of expressivists who differ on the details of what punishment expresses and who it expresses it to.⁹ More recently I have argued for the superiority of a view of punishment on which the expressive punishment is that of moral denunciation of wrongdoing. (Wringe 2017) However, I do not hold that this particular expressive purpose is one that is constitutive of punishment as such. The considerations that make this particular view of the purposes of punishment superior to other versions of expressivism are ones that are relevant to the *justification* of punishment rather than its definition.

Can we say anything general about the kinds of expressive purpose that are essential to punishment? Not much, I suspect. Clearly, not any expressive purpose will do: harsh treatment inflicted for the sole purpose of demonstrating the power of the state, or its capriciousness, or its alleged benevolence and limited in its application to offenders for reasons of convenience unconnected with considerations of desert might not be appropriately seen as forms of punishment. There must at least be reasons for taking the harsh treatment to express something *about the wrongdoing* (or perhaps something closely related, such as the character or motivation of the individual who performed it.)¹⁰ And given the role that punishment typically plays in societies that we can recognize as analogous to ours, expressive purposes which involve no element of condemnation of the offender’s offense may be difficult to conceive of.

Nevertheless, there is no reason why this condemnation need be specifically moral condemnation.¹¹ Admittedly, *justifiable* punishment will necessarily involve justifiable forms of expression. So it may well be that the only situations in which expressively intended harsh treatment can be justified are ones in which what is expressed is moral condemnation of an offender’s offending action. But as Hanna notes, definition is one thing, justification another.

⁹ Including those of Duff 2001, Bennett 2008, Hampton 1992, and Metz 2007, all of whom disagree with me about the correctness of the denunciatory aspect of expressivism.

¹⁰ For details of how acts of hard treatment can express something about a crime see Wringe 2016 chapter 3.

¹¹ It might, for example, involve the expression of forms of contempt for offenders which we would find it hard to recognize as moral contempt – that is to say as the expression of an emotion which had as its proper object moral wrongdoing.

(Hanna 2017 p975). To summarize: on my view, punishment must – constitutively – have an expressive purpose; justified punishment must – morally – have a denunciatory purpose.¹²

3 Hanna's Counter-Examples (I). Bombed

Hanna presents two supposed counter-examples to my view. In one (**Judgment**), a judge who must sentence an individual, Thief but wishes to avoid harming them imposes a sentence on an offender which he or she knows will not be harmful to the offender, but which he or she knows will be widely regarded as harmful, so as to avoid widespread public anger. As a more concrete specification of the kind of case he has in mind, Hanna suggests one in which a judge imposes on a thief a kind of community service that the thief would be inclined to do anyway (even though this is not widely known). In the other (**Bombed**), a capricious monarch throws a comic into prison for failing to amuse him, but without having any intention of suggesting that there is something morally wrong with failing to amuse him.

Hanna claims that **Bombed** shows that moral denunciatory purpose is not essential to punishment. I agree. Nevertheless, **Bombed** is not a counterexample to any view I hold. As I noted in Section 2, expressivists need not (and I do not) hold that there's a conceptual requirement that the expressive purpose of punishment be moral denunciation. They might instead hold that the conceptual requirement is that punishment have an expressive purpose, and that punishment is only justified when it has the right kind of expressive purpose. Since it's implausible that **Bombed** involves justified punishment, it needn't involve moral denunciation. There are other expressive purposes that may be in play: perhaps the monarch's purpose is to communicate to Comic or the populace at large that monarchs are not to be displeased, or something similar.

Here are two further important points about **Bombed**. First, whether the monarch believes that failing to be funny is morally wrong does not settle the question of whether there is morally denunciatory intent: one can, after all, denounce someone insincerely. Whether one has a morally denunciatory intent depends on what one intends the uptake of one's actions to be. Hanna's story leaves undetermined the question of whether the monarch may intend the population at large, or the comic, to come to believe there's something morally wrong with failing to amuse the king.¹³ Furthermore, we cannot simply stipulate that the king has no such intentions: since punishment involves a system of symbols with widely understood meanings, the reasonableness of this stipulation depends on devising a scenario where it's plausible that the intended uptake is not denunciatory.

Secondly, Hanna takes the intentions of the monarch to be the only ones that are relevant to determining whether their action involves a denunciatory purpose. I'm not sure he's entitled to assume this. Hanna stipulates that in **Bombed** we should take the monarch to be an absolute legal authority. Insisting on this ensures that **Bombed** presents us with a clear case where Condition 2, (the 'appropriate authority' condition) is satisfied. But we may be stipulating a great deal when we do so. If we say the king's word is *law*

¹² Hanna complains (Hanna 2017 p974) that I don't explain *how* punishment denounces wrongdoing. I discuss this at some length in chapter 3 of Wringe 2016.

¹³ On my view, the intended audience of justified punishment is the population at large rather than the offender. See Wringe 2017 for further details.

then we are presupposing the existence of a system of law. It's plausible that when we are stipulating quite a lot in the background: the existence of a set of secondary rules, collective plans and so on.¹⁴ So even if the king's word is law, it does not follow that the king's intentions are the only intentions that are relevant to determining whether there is any kind of morally denunciatory intent present. For all Hanna has argued there may be collective intentions embodied in these social institutions.

Still, here's the bottom line: even if we concede a great deal to Hanna here, **Bombed** is not a counter-example to any view I hold.

4 Hanna's Counterexamples (II): Judge

Hanna claims that in **Judgment**, i) Thief is not harmed; ii) Thief is not punished. He also holds that iii) AHR explains why Thief is not punished. I take it to follow from this that iv) Hanna holds that in a situation otherwise identical to **Judgment**, but where Judge intends to harm Thief - let's call this **Judgment*** - Thief would have been punished. I also infer that he holds that v) in **Judgment***, the agent punishing Thief would be Judge. If that wasn't so, then the judge's lack of the relevant intentions in **Judgment** wouldn't be relevant to establishing AHR.

Significantly, v) is not common ground between me and Hanna. In Section 2, I noted that in the normal case, it is states, conceived of as collective agents, rather than judges that punish. It is thus the intentions of the collective agent, which are, in the first instance, relevant to establishing whether Thief is punished.¹⁵ In particular the question of whether Thief is punished doesn't turn on the intentions of the judge but on the collective intentions embodied in the legal system. (On my view, the relevant intentions are, of course, expressive intentions, rather than intentions to harm. Hanna says nothing in the main body of his text about the expressive condition for punishment: he mentions it in footnote 7, but in a way that presupposes, incorrectly that the relevant intentions are those of the judge.)

Judgment only present a counter-example to my view if ii) is correct and if my view entails that Thief is in fact punished in **Judgment**. Let's suppose my view does entail this. It's not clear that Hanna's entitled to claim ii). Many who accept ii) will do so because they accept i). Arguably, they should not if, like Hanna, they accept a counterfactual conception of harm, on which someone is harmed if they are made less well-off than they would otherwise be.¹⁶ Whether or not Thief enjoys their community service, their liberty is restricted.¹⁷ Since it's not implausible to think of liberty as an element of well-being, we can hold that he is worse off than he would have been if he had not come into contact with the judicial system or if he had been acquitted. On

¹⁴ For secondary rules: Hart 1959; for collective plans Shapiro 2011; for other possibilities see Fuller 1964, Raz 1980. As a referee for this journal notes, on Fuller's account, considerations of coherence will affect the content of the law in ways that go beyond the king's intentions.

¹⁵ Wringer 2016 chapter 3. This is why Hanna's example of a judge who imposes a legally mandatory sentence accidentally, or while not intending to do anything harsh isn't, as he supposes, (Hanna 2017 p973) a counter-example to my view.

¹⁶ Hanna 2016, Hanna 2017.

¹⁷ It doesn't follow from the fact that Thief enjoys his community service that he isn't harmed. As Hanna 2017 notes, it isn't a plausible constraint on an account of harm that an agent who is harmed takes themselves to be harmed.

Hanna's preferred account of harm it follows that Thief is in fact harmed. This undermines the plausibility of ii).¹⁸

Whether or not i) is true, this discussion suggests that an example like **Judgment** cannot establish AHR.¹⁹ For it seems as though judgments as to whether Thief is punished in this scenario depends on whether Thief is in fact harmed, rather than on Judge's intentions. In other words, Hanna should consider a case in which an offender is harmed, but where there's no intention to harm, such as the following:

Incompetent Judge: Judge is required to sentence two thieves. He intends to harm neither of them. He's fairly sure that Thief 1, who is homeless and starving, will benefit from a spell in jail, but that he'll find a spell of community service demeaning. He's equally sure that Thief 2 will enjoy her community service, but lose her job if imprisoned. So he plans to sentence Thief 1 to prison and Thief 2 to community service. Unfortunately, Judge has the facts about Thief 1 and Thief 2 mixed up. Thief 1 goes to prison and loses his job, while Thief 2 is sentenced to community service, which she hates.

If AHR is correct, then (leaving aside considerations about whether it is judges or states that punish) neither Thief 1 nor Thief 2 is punished, since Judge does not intend to harm either of them. This seems implausible. Let's suppose that - for reasons independent of Judge's actions - Thief 1 is in a position to claim that he has not had a fair trial and objects to his treatment. It seems as though he ought to be entitled to the same remedies as someone who has had an unfair trial and been punished. And the best explanation for this is that he has indeed been punished.²⁰ So, given Hanna's assumptions, AHR must be wrong.

5 Punishment without a Collective Intention to Harm?

Incompetent Judge suggests that given his other assumptions (about harm, and about who the agent of punishment is), Hanna should not accept AHR. Someone who agrees with me in rejecting those assumptions might not take **Incompetent Judge** to establish the falsity of AHR. For they might think that it is not the judge but the state who is punishing the thieves here, and that the state - as a collective agent - has an intention to harm in this case. Against this background, **Incompetent Judge** does not establish the falsity of AHR.

Are there examples that could do so? As we shall see in Section 6, I think there are reasons for doubting that appeal to thought experiments is the best way to adjudicate disputes over the

¹⁸ Of course, it doesn't follow simply from the fact that Thief's liberty is restricted (or from the fact that he is thereby harmed) that he is punished. Being arrested and subjected to pre-trial detention is a restriction of one's liberty, and on the account of harm we are considering here also a harm; but we might well think it is not a punishment. On my view this is because pre-trial detention doesn't satisfy some of the other defining characteristics of punishment. (For more detail on precisely this kind of case see Wringer 2013). Nevertheless, I take it that the only plausible grounds for denying that Thief is punished in **Judgment** is the (mistaken) view that he is not harmed. I thank a referee for this journal for prompting me to add this clarification.

¹⁹ On my view the fact that Thief is harmed doesn't explain why he is, in fact, punished. However, I think the deprivation of liberty that Thief suffers is enough to make his treatment harsh (in my terms), in most plausible societies.

²⁰ Why is the best explanation not just that Thief has had an unfair trial? Because someone who had had an unfair trial and been acquitted - or been sentenced and then benefitted from a stay of release - needn't be entitled to the same remedies.

correct characterization of punishment. However, those who think it is may wish to consider the following:

Stoic State: The rulers of Politeia are Stoic sages. They think - perhaps misguidedly – that the only way in which we can be harmed is by becoming less virtuous; and they believe (again, misguidedly) that imprisonment and similar penalties cannot make offenders less virtuous, and can prompt moral reform. They therefore institute a system of incarcerative penalties for persistent offenders, which they expect offenders – not being Stoic sages - to find burdensome. In doing so, they hope to make these offenders more virtuous not less. In short, they hope to benefit offenders, not harm them.

The rulers of Politeia are almost certainly misguided, both about the nature of harm and about the likely effects of incarceration. But there seems little reason to deny that offenders whom they subject to imprisonment are punished. In short, **Stoic State** suggests that we can have punishment where there is no collective intention to harm.²¹

6 Methodological Concerns

I've shown that Hanna's putative counter-examples to my view fail. I now want to make a wider methodological point. Hanna's counter-examples appeal to what we might call a folk conception of punishment. If they had succeeded, they would - at best - have shown that conditions 1–5 did not perfectly correspond to our folk intuitions about punishment.

However, it's not obvious to me that philosophical theorizing about punishment should be concerned with giving an analysis of a folk conception of punishment. In Section 2 I said that I was interested in giving an account of the phenomenon of punishment in political communities with modern legal systems. The question of how such a conception might relate to our folk conception of punishment is not straightforward.

One possibility is, of course, that the relationship is one of identity. Another, is that 'punishment' is a theoretical kind term of intellectual enterprises such as criminology and penology. On this view, we might expect a theoretical conception of punishment to be revisionary of some of our intuitions about punishment, just as a theoretical account of water might lead us to revise some of our folk judgments about what counts as water. If so, then even if Hanna's counter-examples established what he thinks they establish, it's not clear how worried an expressivist should be.²²

Considerations about abolitionism provide a further reason for countenancing a revisionary approach to our folk conception of punishment. Suppose that Hanna is right and that AHR is a component of our folk conception of punishment. There could, nonetheless be institutions very like our own that inflicted kinds of treatment which satisfied my conditions 1–5, but did not involve an intention to cause suffering. Call such treatment 'wunishment' and such institutions

²¹ For reasons that I shall discuss in the next section I do not think it can conclusively establish this. Nevertheless, I thank a referee for this journal for prompting me to address the issue considered in this section.

²² The same point applies with equal force to the idea that Incompetent Judge and Stoic State establish the falsity of AHR. I don't take them to show this: I include them to show that someone who is committed to Hanna's methodology should draw conclusions which are opposed to the ones he draws. I take the falsity of AHR to be demonstrated by the fact that when we impose harsh treatment on an offender but fail to harm them we don't take ourselves to have failed to punish them (and our punitive practices bear this out) See Wringer 2013 pp. 863, 867–8.

‘wunitive’. Wunitive institutions might be – as Hanna suggests – better in some respects than our existing institutions: they might avoid deliberate cruelty, and bring about less suffering. But it seems at least as plausible that many of the morally unattractive features of our existing punitive institutions would be features of wunitive institutions too. In particular, it is hard to see why they could not be as stigmatizing, degrading and dehumanizing as the worst existing American prisons are.

On Hanna’s view of punishment, a proposal to replace institutions that are punitive with ones that are (on their view) merely wunitive ought to satisfy the abolitionist’s demands. But this would be abolitionism on the cheap. It ought not to satisfy those whose adoption of abolitionism is motivated by an awareness of the awfulness of these features of American prisons. Someone who thinks the abolitionist should not be satisfied so easily here has two options. One is to concede that AHR is no part of our existing conception of punishment. That option is not open to Hanna. An eirenic alternative would be to concede that our folk conception of punishment fails to track the most morally significant kind here. But the sorts of counterexample Hanna puts forward would tell us little about this non-folk kind.

7 Coda: Harshness and Hart

In Section 1, I noted that the passing reference to Hart 1959 in my 2013 wasn’t intended as an appeal to authority. However, since some philosophers might regard Hart’s view as authoritative it may be worth discussing whether Hanna is right that my view is inconsistent with Hart’s. (Hanna 2017 p970).

Hanna notes that Hart doesn’t use the phrase ‘harsh treatment’ when characterizing his view. (Hanna 2017 p970). In what I take to be his most careful characterization of his view, he says that punishment must ‘involve pain or other consequences *normally considered unpleasant*’.²³ (my italics) Obviously, ‘consequences that are normally considered unpleasant’ need not be considered unpleasant either by the individual on whom they are inflicted (or by the person inflicting them.) If I immerse you in urine, say, I have inflicted on you something which is, in most places ‘normally considered unpleasant’. Still, perhaps you personally do not consider this unpleasant. And maybe I don’t consider it unpleasant either. I might even regard it as beneficial to one’s health. So I can inflict on you ‘consequences normally considered unpleasant’ – and *a fortiori* ‘pain or consequences normally considered unpleasant’ – without intending to harm you.

It doesn’t yet follow that Hart’s formulation is compatible with punishment’s actually being harmless. But clearly, something which is normally considered unpleasant could also not be harmful. Suppose that you are, unbeknownst to anyone, suffering from a fatal skin condition which can be cured by immersion in urine. Had you not been involuntarily immersed in urine, you would have had no reason to seek to immerse yourself voluntarily. As it happens, you are cured of a condition which would otherwise have killed you. Plausibly, you are better off than you would have been if you hadn’t been immersed in urine. On Hanna’s preferred account of harm – and, colorably on many others – it seems that you are not harmed.

Hanna mentions three things which might suggest otherwise. First, Hart represents himself as drawing on the work of Flew and Benn (Hart 1959 p4), both of whom do require that punishment be in some way bad for the person punished: Flew says, for example, that

²³ Hart 1959 p4

punishment must be ‘an evil, an unpleasantness to the victim’ (Flew 1954 p293); and Benn cites this phrase directly (Benn 1958 p325). It’s striking that Hart varies the formulation that Flew gives in such a way as to introduce the phrase ‘normally considered harmful’. It’s not unreasonable to think that Hart might have adopted the ‘normally considered harmful’ rather than Flew’s ‘an evil to the victim’ precisely to avoid committing himself to the idea that punishment must be bad for the punished individual.²⁴

Secondly, in discussing the possibility that Reform is the primary aim of punishment Hart says:

‘The objection to assigning to Reform this place in punishment *is not merely that punishment entails suffering* and Reform does not; but that Reform is essentially a remedial step for which ex hypothesi there is an opportunity only at the point where the criminal law has failed in its primary task of securing society from the evil which breach of the law involves’. (Hart 1959 p6 – my italics)

Hart also remarks, during his discussion of ‘definitional stops’, that those who are skeptical of punishment are often particularly concerned with its possession of the following feature: ‘measures painful to individuals are to be taken against them only when they have committed an offence.’²⁵

Hart certainly says in the first passage that punishment ‘entails’ suffering. However ‘entailment’ need not mean ‘logical entailment’. I might object to moving office midsemester on the grounds that this will entail a lot of disruption. I won’t consider myself answered if someone points out that it is *logically possible* for me to move without there being any disruption: my point depends on the fact that moves *typically* and *predictably* involve disruption.

More importantly, the objection that Hart that is endorsing, and the point that he is making in his discussion of definitional stops both still stand, if we think that punishment typically and predictably involves suffering. Since Hart’s most careful statement of his view seems to be framed in such a way as to avoid committing himself to the view that punishment logically entails suffering, it seems reasonable to interpret him along these lines here too.²⁶

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²⁴ Does this mean that Hart misrepresents himself as agreeing with Benn and Peters? He says that he is ‘drawing on’ the work of Flew and Benn. (Hart 1959 p4). But ‘drawing on’ needn’t involve complete agreement.

²⁵ Hart’s concern here is with the idea that committing an offence is a necessary condition for inflicting harm (with which he thinks some utilitarians will disagree); not with the idea that it is a sufficient condition. If he were concerned with this latter idea, there might be a stronger case for Hanna’s view.

²⁶ I am grateful to India Golding and two referees for this journal for a number of useful comments.

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