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ONLINE EXCLUSIVE: How to Punish Collective Agents: Non-Compliance with Moral Duties by States (Response to Toni Erskine)

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This article is a response to Toni Erskine's article from the fall 2010 issue of Ethics & International Affairs*, "Kicking Bodies and Damning Souls: The Danger of Harming 'Innocent' Individuals While Punishing 'Delinquent' States."*

It is often argued that collective entities such as states or corporations can have moral obligations. States for example are considered to have moral duties to combat world poverty or to shoulder burdens of climate change. Assuming that states have obligations to confront such problems, their corresponding moral duties are collective duties, as they do not attach to any individual, but to the collective as such. I will, however, not defend this view—which a number of authors have convincingly argued for—here, but simply assume that such collective moral duties exist.[1] I understand having a moral duty as meaning that one is morally required to act in a certain way. In that sense the allocation of duties is prospective in character. In failing to comply with the moral imperative that the duty entails, one becomes liable to retrospective moral blame and, potentially, to punishment.

Assuming that states can hold moral duties, it can easily be seen that states—just like any other moral agent—can sometimes fail to discharge those moral duties. In the context of climate change examples of states that do not meet their emission reduction targets abound. If individual moral agents do wrong they usually deserve and are liable to some kind of punishment. But how can states be punished for failing to comply with moral duties without therewith also punishing their citizens who are not necessarily deserving of any punishment?

This is the main question raised by Toni Erskine in her 2010 article "Kicking Bodies and Damning Souls."[2] As she rightly points out, "when a relevant act or omission that has led to moral failure is best described at the corporate level, the institution as a whole can be blamed." This, she specifies, applies only to institutional agents who are not so constrained in their actions that they cannot act upon the moral duty, for example "weak" or "constrained" institutions.[3] An institution is delinquent (with regard to particular moral duties) if it is neither weak nor constrained, but fails to discharge its duty nonetheless.

Erskine indicates how punishing collective entities such as states is morally problematic in a number of ways. She understands punishment as "the deliberate infliction of some burden (in the form of suffering or deprivation) on an offender in response to an offence."[4] Erskine addresses three concerns with punishing institutions: (i) guilt by association, (ii) overspill, and (iii) misdirected harm.

Guilt by association: This first of Erskine's concerns refers to situations in which all members of a group are blamed and/or punished for the wrongdoings of some members on the basis of an assumption of group liability. This concern, however, is not relevant here, because we are looking precisely into situations where the wrongdoing cannot be reduced to individual members' actions, but applies to the organization or institution as a whole and non-distributively and non-reductively.

Overspill: Another of Erskine's concerns is with unintended side-effects of punishing. She argues that even if we found a way to punish an institution at the corporate level, this may have unintended negative side-effects for individuals inside and outside the institution. Yet this, I argue, is no concern for institutional punishment alone, but for punishment in general. If imposing a prison sentence on a father of four, these four children and their mother will (usually) suffer indirectly from the punishment. Given that this is not a concern that is unique to institutional or corporate punishment, I will not pursue this problem any further.

Misdirected harm: This concern reflects the problem how institutions can be punished as institutions without punishing their individual human constituents. After all, Erskine writes, institutions have "no soul to be damned and no body to be kicked."[5] This is a serious moral and practical problem, because it seems that whatever burden one inflicts on a collective agent will have to be borne by its constituents. Given that the first two concerns fail to be of exclusive relevance to institutional punishment, it is the problem of misdirected harm that I will focus on below, suggesting ways of (effectively) punishing an agent where there is no body or soul to be tormented and without misdirecting the resulting harm to individuals. I propose two solutions.

Solution I: Institutional Reform as Punishment

How can an institution be punished without inflicting harm on individuals? Certain forms of punishment for corporations aiming at the collective agent itself and not at its constituents are not uncommon and comprise measures such as public shaming or compensatory payments. One might think, though, that often these measures either do not go far enough or constitute cases of misdirected harm already.[6] Consequently, I here make a further suggestion for such punishment, which is inspired by the objectives of legal punishment. Depending on the circumstances, legal punishment may entail the goal to rehabilitate the offender (hence the term "correctional facilities" used in the United States). In the case of individual offenders, pursuit of this goal may comprise professional training while in prison or community work, as well as psychological counselling or access to religious services. The success of these efforts depends on numerous factors and is never guaranteed. When it comes to the punishment of institutional agents, the objective of correcting what is "wrong" with the offender may be much easier to achieve, given the explicit and formal structure of such institutions. If the failure to comply with a moral duty results from flaws in the organizational structure or established decision-making and control procedures, then eradicating these malfunctions and adjusting the structures will (hopefully) abolish or at least diminish the risk of future failure to comply with moral duties. Institutional reform thus appears to be a kind of "punishment" for collective agents that does not misdirect harm toward individuals. One prominent culprit required to reform itself as a result of its failures to meet moral duties would be the UN Security Council. Many have argued that the UN in general, or the Security Council in particular, are morally blameworthy for not taking sufficient measures against crimes against humanity in a number of cases, the most prominent being the Rwandan genocide. However, just how such punishment in the form of institutional reform could be enforced is another matter.

Enforcing institutional reforms and restructuring can be a form of institutional punishment that avoids misdirecting harm toward individuals. One could argue against calling these enforced reforms "punishment"; however they resemble "ordinary" legal punishment in that they are impositions on the collective will and in that they limit the institutional agent's sovereignty.

Solution II: Punishing Individuals

Apart from the failure of institutions to act upon a moral duty that is non-distributive, there are also failures that are—at least partially—reducible to individual omissions or inactions. Some punishment of individuals for non-compliance with a moral duty by a collective may be morally justified. This is a possibility that Erskine explicitly mentions but does not pursue. Punishment of (an) individual(s) for a failure of the collective to comply with a moral duty is justified if that failure is attributable to actions, accountable

inactions, or omissions on part of a particular individual or several members of the collective. Note that the following discussion is about *moral liability* to punishment, not about actual legal punishment. Whether or not legal punishment should always be strongly informed by moral considerations is a different question that will not be answered here. Whether or not an individual who is part of a collective is *morally* liable to punishment depends on the magnitude of her wrongdoing, which is directly related to the magnitude of the contributory moral duty she failed to comply with. In the following, let me explain the concept of contributory duties and how their magnitude differs among individual and group members of the collective.

Moral duties held by a collective—for example a state—entail duties for individual members of that collective, both occupants of institutional roles (such as politicians) and persons with no institutional role. I call these entailed duties "contributory duties." Professional duties entail contributory moral duties, but the latter may extend beyond the former. Furthermore, individuals with no institutional role may well hold contributory duties with regard to a collective duty of their state. I suggest three criteria for determining the magnitude of an individual agent's or sub-group's contributory duty to a collective duty: *capacity, moral correlation, and commitments of oneself and other agents*.

Capacity: The first criterion that influences how much an agent within a collective must contribute to the collective duty is the agent's capacity. The capacity can depend on how much power or influence over the outcome the agent has. But it also depends simply on the agent's abilities. The more power or influence an individual agent has or the more he is capable of discharging a duty due to his particular abilities, the larger his contributory duty. This criterion clearly establishes stronger contributory duties for those members of a collective who hold an institutional role.

Moral correlation: The second criterion that influences the magnitude of individual contributory duties is what I call the "moral correlation" of the agent to the problem that the collective duty aims to address. "Moral correlation" covers both moral (retrospective) negative or positive responsibility for the problem and the issue of to what degree one might have benefitted from the problem.[7]

Accordingly, individuals (or sub-collectives) that have responsibility for the occurrence of the problem have to contribute more to solving the overall problem than others, other things being equal.

Commitments of oneself and other agents: How much an agent or sub-group has to contribute depends on how much the other agents contribute and how much the agent has publicly committed herself to contribute. If I have made it clear to other members of the collective that I will take on a particular contributory task in the context of discharging a collective duty, I have a stronger obligation to do so than if I had not announced this, because I make others believe that they need not undertake this contributory task. It is also now more likely not to be undertaken at all, should I not do it.[8]

Two of these determinants of the magnitude of contributory duties—*capacity* and *commitment*—indicate that those who are in a position of power within a state, usually politicians, above all the government, but also other influential figures of public life, have the strongest duties to contribute to discharging the moral duty of the state. Hence individuals who fail to discharge their contributory duties in an obvious way—for example politicians who ignore the problem of climate change or even deny it—are morally liable to punishment as individuals. But the second criterion—*moral correlation*—suggests that persons with limited power and with no explicit (professional) commitment, who are in some way responsible or benefit from the problem the duty addresses, have contributory duties as well. This leads us back to the problem of misdirected harm.

What is wrong with the punishment of "ordinary" citizens as a result of punishing a state—the problem that Erskine worries about? Individual citizens with no particular power to influence compliance with duties of global concern may also have some, though very limited, contributory duties. Returning to the example of climate change: Even if

specific mitigation-related burdens are allocated on a state basis, this does not mean that states alone hold these duties while individual citizens do not. If we look at duties in the context of climate change, for example national mitigation schemes and the national carbon budgets[9] , these entail duties for individual citizens as well. The state can justifiably impose mitigation-related costs on its citizens only because it is the state as a collective (including its citizens with their financial capacities) to which the duty to mitigate attaches.[10] Hence, punishing a non-compliant state in a way that imposes financial burdens upon its citizens is not necessarily morally questionable and is not always a case of misdirected harm. It can under certain circumstances be justified —provided that the financial burden the punishment imposes is adequate in relation to the original burden entailed by the moral duty. In contrast, economic sanctions against a state usually inflict burdens almost exclusively on the undeserving civilian population and are thus often examples of clearly misdirected harm. When punishing an institution, care must be taken not to misdirect harm to non-deserving individuals and to limit overspill effects.

However, those individuals who are most liable to some form of individual punishment are those who have the strongest contributory duties—usually those in a position of power within a state. This is in fact reflected by institutions such as the International Criminal Court, where individuals can be held legally accountable for actions they are, positively or negatively, responsible for, but which were committed by collectives. With regard to corporations, this position is reflected in the criminal liability of managers for some harms caused by (the products of) their corporation.

If states or similar institutional agents can have moral duties, they should be liable to some form of punishment directed at the institutional level—such as enforced institutional reform. Such institutional punishment will more often than not be accompanied by individual punishment, that is, assuming that more often than not individuals will carry some responsibility for institutional failure. Institutional punishment will necessarily differ from punishment inflicted on humans in that institutions cannot regret their actions or atone or feel ashamed for what they have done. But such punishment can serve the purpose of correcting the "culprit," and it ideally decreases the likelihood of future offences. It may furthermore re-establish justice in a society, in the sense of making institutions more just and apt to fulfil their moral tasks.

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NOTES

1 These authors include Toni Erskine, *Ethics & International Affairs* 15, No. 2 (2001), pp. 67-89; David Miller, "Holding Nations Responsible," *Ethics* 114, No. 2 (January 1, 2004), pp. 240-68; and William Wringe, "Global Obligations and the Agency Objection," *Ratio* 23, No. 2 (2010), pp. 217-31.
2 Toni Erskine, "Kicking Bodies and Damning Souls: The Danger of Harming 'Innocent' Individuals While Punishing 'Delinquent' States," *Ethics & International Affairs* 24, No. 3 (2010), pp. 261-85.
3 According to Erskine, "weak institutions" are those which "possess capacities for deliberation and action that allow it to qualify as a moral agent even when it faces internal impediments that render these capacities limited or unreliable in a way that prevents the group from discharging some duties." "Constrained institutions" are those that face external limits to discharging particular duties, for example by financial demands (Erskine, "Kicking Bodies," p. 268f).
4 Ibid., p. 270.
5 Ibid., p. 273.
6 In some countries commercial corporations are fully liable for damages to the environment, and the resulting compensatory payments can mean financial ruin for the firm. This, however, imposes burdens on the employees of the company (who lose their jobs) and is thus a case of misdirected harm.
7 Positive responsibility for harm here means to have contributed to harm by an action,

while negative responsibility for harm means to have failed to prevent harm when one could and should have prevented it.
8 This is particularly the case for persons with institutional duties covering collective moral duties or contributory duties. A very similar idea is expressed in Robert Goodin's notion of special duties. See Robert E. Goodin, "What Is So Special about Our Fellow Countrymen?" *Ethics* 98 (1988), pp. 663-686.
9 See WBGU (German Advisory Council on Climate Change), "Solving the climate dilemma: The budget approach" (2009), at http://www.wbgu.de/wbgu_sn2009_en.pdf.
10 I will remain agnostic here on the question whether this allocation is based on historical responsibilities for green-house gas emissions, on benefitting from the moral wrong these emissions entail, or simply on duties to assist in the face of a moral emergency.

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