

## CRIMINALISATION: IDEOLOGY AND SOCIAL POLICY

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### 1

My own particular area of academic interest is in the study of the relationship between philosophical theory and the description, analysis, and implementation of social policy. In *this* discussion I shall draw upon points made in the philosophy of language by Ludwig Wittgenstein and by one of his philosophical “heirs”.<sup>1</sup> My exposition of these points will lead to an account of how they reveal one sense at least in which any social policy is ideological, simply by virtue of being an activity or set of activities identifiable within a language. (Readers familiar with Wittgenstein’s analysis of following a rule and its application to the relation between language and reality should move straight to Section 3 of my discussion.) In addition, I shall briefly draw conclusions for our view of the place of Philosophy in the study of Social Policy, and for our view of the abilities needed by those who implement social policy. I want to stress the connections between these issues in the philosophy of language, with their consequences for our conception of a human society, and our thinking about the education of all who participate in social life, but in particular of those responsible for the continuity and development of a form of life.

### 2

We may start out from the distinction drawn by Plato between popular and philosophic virtue (*Phaedo*, 67B-69B, trans. Hackforth, 1955). I follow Phillips and Mounce (1969, p. 68) in taking Plato to be saying that moral understanding cannot consist in knowing what

<sup>1</sup> The relevant influential approaches and passages, to be identified later occur in Wittgenstein, 1953 and 1958. The “philosophical heir” given prime time in this discussion is Peter Winch, and I shall draw upon Winch, 1958, 1967, and 1972 in particular.

people call “good”. The general lesson for *us* being that recognition of a particular activity as of the type it is: courageous, temperate, or whatever, cannot consist simply in knowing what on any particular occasion people call it. This is simply because on any particular occasion, or indeed on many particular occasions,<sup>2</sup> what people call by the name of a type of activity (“caring”, “punishing”, “criminal”, “political”, and so on), may be incorrectly so-called (deliberately or accidentally).

Of what, then, does recognition of a particular activity as of the type it is consist? More accessibly: how can we come to understand what it is that has been done, is being done, or will be done?

We can of course do these things if we are able to tell when it is *true to say* that an activity of a certain type has occurred, is occurring, etc. And we can tell *this* only if we can recognize a correct use of the expression used to refer to or describe that activity. This way of putting matters draws out the relationship between recognition of action and linguistic competence: our ability to recognise a particular activity as the type it is presupposes the ability to distinguish between correct and incorrect uses of the expression used to refer to or describe that activity.

How do we acquire the presupposed ability? Here we may usefully turn to Winch:

Let us consider what is involved in making a mistake (which includes, of course, a consideration of what is involved in doing something correctly). A mistake is a contravention of what is *established* as correct; as such, it must be *recognizable* as such a contravention. That is, if I make a mistake in, say, my use of a word, other people must be able to point it out to me. If this is not so, I can do what I like and there is no external check on what I do; that is, nothing is established. Establishing a standard is not an activity which it makes sense to ascribe to any individual in complete isolation from other individuals. For it is contact with other individuals which alone makes possible the external check on one's actions which is possible the external check on one's actions which is inseparable from an established standard (1958, p. 32).

The presupposed ability is acquired only if certain *social* conditions exist, those variously described as our sharing in “a form of life” with others, sharing “membership of a linguistic community”, sharing

<sup>2</sup> Note the stress on *particular* occasions, however many. Knowing what in *general* they call by a name is different, if we are thereby able to discern a standard use and distinguish a correct from incorrect use of the name in relation to the established standard: then we shall be in a position to recognize the type of activity in question, except in the rather special circumstances in which an error has become established, cf. Graham, 1981.

“the conditions of a common life,<sup>3</sup> conditions such that a standard may be established by which to distinguish correct from incorrect use of an expression, and there by what is being done from what is not.

An established standard may be thought of as “a rule”. To use an expression correctly of an activity, to speak and act on the established standard, is then to follow the rule governing the use of whatever expression is in question.

How does “contact with other individuals” establish and maintain standards of the kind in question, rules for the use of expressions? As Winch says in the quoted passage, other individuals provide “an external check”: they correct each others’ use of expressions; they teach and they learn. They may for example engage in what is called “ostensive definition” for those expressions amenable to it, that is, point out the object or activity referred to by the correct use of some expression whenever the object or activity is again pointed out, each shaking his head at utterances of the expression whenever something else is pointed out, until the learner “catches on”. However, definitions of any kind can never fully explain the existence of established standards or correct use, for any use of an expression learned must be *applied in the future*. Determined as we may be simply to use the expression as taught, as laid down in the definition, our use of it in the future (of past, present, or future actions) must be *accepted* as following the established standard.

Again, as Winch says, “..it is only in a situation in which it makes sense to suppose that somebody else could in principle discover the rule which I am following that I can intelligibly be said to follow a rule at all” (1958, p. 30).

Only in such circumstances is there any *prospect* of my use of an expression being accepted as following the established standard, as being in keeping with the rules for the correct use of the expression. And if you discover the rule I am following, acceptance that I am following the established standard of use and not some deviation from it is not guaranteed: what is also necessary is what has been called “agreement in reaction” or “agreement in form of life”. It must “come naturally” to you to accept that *this is* (or *is not*) the same use.<sup>4</sup> Individual members of the same species reared and trained by other individuals are of course likely to find agreement in reactions, but this outcome is not bound to occur.

<sup>3</sup> cf. Benson, 1976; Wittgenstein, 1953, secs. 240-1; Winch, 1958, p. 52 ff.

<sup>4</sup> cf. Winch, 1972.

Let us now turn to consider cases in which agreement in using words, and so agreement about what is being done is absent, whether because established rules for the correct use of an expression are not being followed by at least one party, or because of a more thorough lack of agreement in reaction. The first kind of case I want to mention is identified by thinking about the implications of the point just quoted from Winch. It is, roughly, that if you are in principle unable to “catch on” to a rule I am following in uttering a certain expression, then I cannot intelligibly be said to follow a rule at all: I cannot intelligibly be said to be *saying* anything, because I cannot intelligibly be said to be doing anything, though my behaviour may entertain, or make you fearful, and so on.<sup>5</sup> Similarly, where a learner is being taught an established standard and at some appropriate point does not go on in the right way, does not “catch on” to what is required, we may judge the rule and the activity to be beyond his grasp. We would treat him as “mentally defective” in some way. “If a child does not respond to the suggestive feature, it is separated from the others and treated as a lunatic” (Wittgenstein, *Brown Book*, sec. 30). More sensitively we may say that at least in respect of that part of our form of life, related in the appropriate way to the established standard in question, and in so far as that standard is beyond his reach, such an unsuccessful learner is not an active, though he may be a passive, member of our form of life.

The second kind of case I want to mention is the more important for our present general purposes. It is the kind of case in which somebody else could in principle discover the rule which I am following, and in which in practice somebody else does discover the rule, but in which there is some dispute about whether or not *the established rule* is being followed.<sup>6</sup> It is worth noting that such a dispute may arise in connection with *any* expression since any established rules learned must be applied in future. Reflection upon what is to count as following the established rule in a changed social environment may lead different individuals to different opinions, and so into dispute, about what may be correctly said, and so what is being done.

In a rapidly changing social environment such problems will arise frequently, not just because traditional customary modes of behaviour have broken down,

<sup>5</sup> cf. Strawson, 1968, and his discussion there of “objective” and “reactive” attitudes.

<sup>6</sup> Grounds for such a dispute may be of many different kinds: an expression may be ambiguous; an expression may be used almost but not quite correctly, so that we can talk of its meaning being “debased”, cf. Winch, 1958, p. 123; and so on.

but because of the novelty of the situations in which those modes of behaviour have to be carried on. Of course, the resulting strain may *lead* to a breakdown in the traditions. (Winch, 1958, p. 64.)

Differences in the social context of the use of any expression, on any two occasions, may be thought to warrant the claim that on one occasion the expression is incorrectly used, and so lead us to argue that the activity in the two cases is not the same. This feature of all communication is worth particular attention when we are concerned with activities which are fundamental to human society: activities which manifest, create, and maintain social relationships in which we understand such phenomena as birth, sex, and death and develop conceptions of childhood, adulthood,<sup>7</sup> and political relations: relationships which are (by definition, I would say) the object of social policy. Disputes about the identity of an activity arising from the fact that the activity is inevitably carried on in a changed social environment should be of special interest to students of social policy because much social policy seems to be aimed at changing the social environment in which people must act. However, such disputes can arise in connection with social policies of any kind: promoting or inhibiting social change, since both kinds are nevertheless implemented in changed circumstances. Thus, for example, for conservative social policy inhibiting change, disputes will focus on the questions of identity: is this going on in the same way? If it is, then it will have conservative support; if not, it will not, but will have the support of those who want us to change what we do in a certain way. Arguments for social *reform* are particularly interesting in this context, since reformers must argue in some cases that what *appears* to be an activity of a different kind is fundamentally the same, and worthy of *continued* support (while conservatives argue that the activity is fundamentally different: “they go too far”, and radicals, perhaps, argue that the activity shares too many features with previous opposed activity to yet deserve *their* support).

### 3

I said earlier that definitions can never fully explain the continued existence of established standards of correct use because any expression learned *must be applied in future*, any action signified must be identifiable after the definition has been given. I now want to point out that for the same reason a number of analogous devices cannot

<sup>7</sup> Cf. Hampshire, 1978.

of themselves make disputes of the second kind under consideration irrational, though they may be accepted by current disputants and end *their* dispute. However clear we make our *intention* about what the established rule should be<sup>8</sup> however clearly it is stipulated, however large a majority of those with political power or of the language-users regard it as the established rule, even if *all* of those in either group so regard it, the rule must be applied in the future and in a changed social environment: and so the logical possibility remains open for any individual to argue that the change is such that the established rule is not being followed. In a passage I quoted earlier, Winch points out that establishing a standard is not an activity which it makes sense to ascribe to any individual in complete isolation from other individuals. In the same way, where the individual is not in complete isolation, his judgment that an established standard is not being followed will be regarded as plausible only by those from whom he is not completely isolated in reactions; that is, with whom he has in part or can hope to achieve in full “agreement in reactions” to changes he points to as crucial (whom he can hope to “convert”). His arguments may be more or less politically effective. At their least effective his dispute will be regarded as of the sort we first considered. That is, *he* will be regarded as unable to “catch on” to the actual established standard, and thought of as “mentally defective”. And as his reactions are increasingly shared, and others begin to discover and agree that they are following a different rule, he would move up to membership of a pressure group of some kind, challenging conventional descriptions of certain activities.

I said in my introduction that my exposition of these points from the philosophy of language would lead to an account of how they reveal one sense at least in which any social policy is ideological, simply by virtue of being an activity or set of activities identifiable within a language. The sense in question may be approached in the following way. The points I have drawn from the philosophy of language entail that no activity can be identified or implemented independently of successful completion of the tasks of “catching on to” and “going on in the same way” in accordance with an established standard which determines what it is to act in the way in question. That is, no activity can be identified or implemented independently of membership of a community of language-users, sharing a *conception* of what it is to act in the way in question (and what it is not to act in that way).

The sense in which any social policy is ideological may be approach-

<sup>8</sup> Cf. Winch, 1972, p. 65, on Humpty-Dumptyism.

ed in another way. Disputes of the second kind we considered, where it is argued on one side that the established rule is not being followed, do of course arise within a community of language-users. Such disputes cannot be resolved “by appeal to the facts”. This is simply because the disputes are precisely about how to describe what is going on,<sup>9</sup> about what is there to be noted. This form of words may be misleading. I do not mean to suggest that it makes any sense to talk about “what is going on”, or reality in general, independently of some conception. Again, as Winch puts it,

Our idea of what belongs to the realm of reality is given for us in the language that we use. The concepts we have settle for us the form of the experience we have of the world... the world *is* for us what is presented through those concepts may not change; but when they do, that means that our concept of the world has changed too. (1958, p. 15.)

Disputes of the kind in question presuppose that the parties to the dispute can agree to *some* description of “what is going on” though they dispute some *further* description of it (otherwise it would make no sense to say they are in dispute, since the object of the dispute could not be identified). For example, for us to dispute whether or not a particular killing is correctly called “muerder” we must agree that the action is correctly called “a killing”. To resolve such disputes which are ideological in this sense we must engage in philosophical conceptual investigation, even though the results of such investigations can never make further dispute irrational, since changed circumstances may justify further dispute. And in undertaking such necessary investigations we (as philosophers) are *not* employed as an under-labourer clearing the ground a little, and removing some of the linguistic rubbish that lies in the way of knowledge of the world (cf. Winch 1958, p. 3). “In discussing language philosophically we are in fact discussing *what counts as belonging to the world*” (Winch, 1958, p. 15).

Of course, many disputes in the realm of social policy *can* be resolved by appeal to the facts. My point is to stress that some cannot be, and along the way to suggest that disputes of the one kind might be confused with disputes of the other. Let me turn to two illustrations of disputes which are ideological in the sense I have tried to isolate.

<sup>9</sup> Cf. Phillips and Mounce, 1969, ch. 6.

4

My illustrations both concern social policies implemented in the United Kingdom which require the identification of *criminal* activity. The first is based in discussions of juvenile justice, the second in discussions of terrorism.

In addressing both sets of discussion we begin with the question: What rule or rules govern the use of the expression “criminal activity”? or, expressed in the alternative “mode”: What for us is a crime? The discussion of juvenile justice upon which I shall draw is taken from Children and Young Persons (Scotland), known as “the Kilbrandon Report” (Cmnd. 2306, 1964), and disputed in *In whose best interests?* by Laurie Taylor, Ron Lacey, and Denis Bracken (Cobden Trust, 1979), and elsewhere.<sup>10</sup>

The answer to our initial question that I shall accept for the purposes of my discussion of the first illustration<sup>11</sup> is that for us a crime is an offence in our criminal law for which the offender is responsible.<sup>12</sup> The committee chaired by Lord Kilbrandon accepts this view of the correct use of “criminal activity” but may be understood to be arguing that certain features of the acts of children should be given more attention. These features in cases where the acts in question are presently *called* criminal but, it is suggested, if we recognize their presence, we must accept that the acts in question are called “criminal” in error. In paragraph 13 it is suggested that “delinquency” is sometimes “simply a *symptom* of personal or environmental difficulties” (emphasis added). In paragraph 14 it is suggested that “persistent truancy”, which is also an offence, “is in many cases a manifestation of emotional disturbance often attributable to factors in the home and family background”. Of course it is difficult for us to recognize the presence of such features without knowledge of the children and families concerned, but, we are assured, the features have been spotted in “the consensus of experienced opinion” (para. 15).<sup>13</sup>

Given that for us a crime is an act for which the offender is responsible, the presence of these features justifies the claim that the behaviour of these children now (in 1964) called “criminal” is not correctly so-called. Behaviour which is symptomatic of difficulties

<sup>10</sup> Cf. Morris, et. al., 1980.

<sup>11</sup> Of course, dispute of the ideological kind in question can begin at the level of definition. My first illustration is not of that kind, but my second illustration may be.

<sup>12</sup> A number of senses of “responsibility” may be distinguished, of course: cf. Downie, 1971. I use it in the sense of having deliberately caused the offence.

<sup>13</sup> Dispute of the ideological kind in question may enter here, too. Cf. Williamson, 1978.



of some sort, or a manifestation of emotional disturbance is the outcome of suffering, not purpose.

We are further encouraged to accept that the behaviour in question is incorrectly called “criminal” when the committee points out that “the common law, while assuming the criminal responsibility of juveniles, accepts that youth may be a mitigating factor. This appears to be a mitigating factor. This appears to be a recognition of the varying moral and intellectual capacity of children” (para. 55(1)): we have always suspected that the behaviour in question was not properly classified as “criminal”. And again we are reminded of the costs of our mistake: causes of the behaviour are left untouched (para. 54(1)-(4)).

Thus the Kilbrandon Committee may be understood to argue that our social policies in relation to juvenile offenders should be changed. We have failed to “catch on” to what the children in question are doing and so also failed to recognize what we are not doing for them: we have not recognized that we are not doing all we can to prevent further offences, because we have not recognized the needs underlying the offences. According to the Committee, the behaviour of these children does not accord with our conception of criminal activity. We should see it for what it is, and if our aim remains the prevention of further offences, we cannot go on in the same (incorrectly described) way as before but must change our policies to fit the facts.

To turn now to my second illustration, recalling that for us a crime is an offence in our criminal law for which the offender is responsible. Let me now add to this (partial) account of the established standard of what a crime is, the point that a standard use of the expression “criminal activity” carries an implication about motivation, namely that the activity is engaged in for personal and private advantage. This addition eases exposure of those aspects of my second illustration which are ideological in the relevant sense. Hunger-strikers in the Maze Prison in Belfast have offered many different arguments in presenting their case for, as they put it, “political status” or, as the Government would have it, “special category status”. Here I shall be concerned only with that argument referring to motivation. The argument in question, in the terms employed in my discussion, may be understood to be that in so far as the offences in our criminal law for which the hunger-strikers are responsible were not engaged in for private advantage (but in pursuit of a political ideal), the activities in question are called “criminal” in error. Of course, the activities remain criminal in the sense of being offences in criminal law, just as the behaviour of children discussed earlier remained criminal until the

law was changed. That is not the point; the point being made in each case is that the law is based on a mis—classification: a mistake about the correct use of an expression; a mistake about reality.

Naturally, this account of what these men did is denied by the Government, usually by making the following points. First, it is suggested that the activities in question are after all criminal because they are serious offences<sup>14</sup> or, second, because “Northern Ireland is a free country, where all have the right of political action, publication and peaceful demonstration. Those who use violence to force political change are not ‘freedom fighters’ but criminals, often guilty of murder”.<sup>15</sup>

It may be that these points reflect a confused attempt to make a moral point: that the activities in question are very wicked, the more so since any political objective they may have might be sought without resort to such means. However, in relation to the debate about whether the activities in question are or are not criminal, the points are weak.

Though the identification of some activities of a certain kind presupposes a particular moral point of view, e.g., an abortion as a murder, it seems quite implausible to take *either* the view that *no* legal activity which is wicked and to which a less wicked (or not wicked) alternative is available can be correctly called “political”, *or* the view that *all* illegal activities which are wicked and to which (and so on) can correctly be called “criminal” (and are thus necessarily to be seen as motivated by private advantage). It seems to me quite clear that activities correctly called “political” and those correctly called “criminal” may be in some cases justified and in others unjustified, whether legal or not. As a *moral* point, what the Government has to say is more attractive if it is true that alternative means to the hunger-strikers’ objectives are available. I don’t want to pursue this illustration further. The point is that it illustrates an ideological dispute of the kind we have been considering and one which has policy implications. The hunger-strikers claim that the Government has failed to “catch on” to what they are doing or have done; they have incorrectly been taken to be engaged in criminal activity when in fact engaged in political activity: the behaviour of these men, it is claimed, does not accord with our conception of criminal activity. Further, the Government has correspondingly failed to “catch on” to what *it* is doing and has done. If the Government’s aim remains the prevention of further activities of the kind *it disputes* then it cannot go on in

<sup>14</sup> Cf. *H-blocks, The facts*, Northern Ireland Office, October 1980, p. 6.

<sup>15</sup> Quoted in a letter to *Times*, 5 December 1980, by Canon John Austin Baker.

the same way (incorrectly described) as before but must change its policies to fit the facts. Policies designed to deter criminals (by appealing to their self-interest) may not deter political activists much, and in addition may create opportunities for them to be heroes and even martyrs. *Given* the hunger-strikers' account of the facts, what are the policy implications? Most discussion has focused upon clothing, association, visits, and so on: detailed changes in the regime in prisons. It seems to me that both sides to the dispute are (for whatever reasons) ignoring a more relevant<sup>16</sup> policy implication: that alternative political activists with the ideals in question. Where such opportunities do exist and are not used, the activities currently pursued would still be political, but few would see them as heroic, except in confusion.

My conclusions relating to the place of Philosophy in the study of Social Policy and my conclusions relating to the abilities needed by those who implement social policy may be stated more briefly.

Certain features of our utterances stand in the way of our grasping the rules governing the use of expressions identifying actions: ambiguity, vagueness, and so on. Further, certain features of series of our utterances stand in the way of our constructing a *rational* series: inconsistency, self-contradiction, and invalidity in general. Such features of series thus stand in the way of *any* attempts to *argue*. For our purposes, the implication I wish to stress is that where utterances identify actions, such features of series stand in the way of us planning in a rational series of acts.

In general, then, in so far as such features of utterances as ambiguity go undetected, they prevent us from discriminating one kind of action from another; in so far as such features of series of utterances as inconsistency go undetected, they prevent us from recognising acts of different kinds as in conflict: both sets of features undetected stand in the way of rational social policy in practice and rational critical analysis. In so far as academic Philosophy has traditionally included the identification in theory and the detection in practice of such features,<sup>17</sup> it seems clear that at least *that* part of academic Philosophy, known as "informal logic", must in some form be included in the study of Social Policy. However, it also seems clear to me that other parts of academic Philosophy must be included. Briefly, and taking my illustrations *only* from moral and political philosophy, certain

<sup>16</sup> N.C.C.L. have taken the view that *all* prisoners have these rights and that the Government should recognize them. Cf. *Rights*, vol. 5, no. 2, 2 November 1980. This seems to me to be true, but to support the suggestion that the *distinctive* policy-implications of the hunger-strikers' account of the facts are not those usually mentioned, such as clothing.

<sup>17</sup> Cf. Flew 1975 and 1979.

kinds of action are particularly difficult to identify and have been subject to continued philosophical discussion, most often recently in the form of debates about the rules governing the correct use of the expressions concerned. For example, we have particular difficulty in specifying how to identify (and so in identifying) activities that are examples of “altruism”, “positive discrimination”, “punishment”, or “being to blame”.<sup>18</sup> Further, the form of conflict between certain kinds of action is particularly difficult to delineate, so that the rationality of the inclusion of acts of both kinds in a single social policy, or a set, is problematic. At least some of these have been the subject of philosophic discussion: for example, the rationality of attempts to promote both justice and utility.<sup>19</sup>

I think that such philosophic discussions have considerable value, but I don't want to deny their limitations. One limitation is implied by the line of thought drawn upon earlier in my discussion: whatever we learn from philosophical discussion, the expressions identifying social actions *must be applied in the future*. Like definition, philosophical discussion may help us identify guidelines for the use of an expression, but it cannot finally determine what will be accepted as the correct use of the expression, actions of that kind, in the future. This will also depend upon the reactions of the language-users in a changed social environment. Further, philosophical discussion of expressions which have a place in a form of life may determine what it makes sense to say within that form of life and what therefore *may* be true, but it cannot determine what on any particular occasion is true, and in Social Policy this too is of some concern.

Finally, let me say something about the *abilities* needed by those who *implement* social policy. No doubt there are many, but my discussion implies at least that they must possess an enhanced capacity for a certain kind of *reflection*. Let me explain.

To be active in a particular way, *any* human being must be able to “catch on” to the rules governing the use of an expression identifying that activity. To be active in that way in the future, any human being must be able to determine what is to count as “going on in the same way” in a changed social environment. These abilities manifest what I have referred to as “a capacity for a certain kind of reflection”.<sup>20</sup> I say that those who implement social policy should have an *enhanced* capacity of this kind because of the power with which they are

<sup>18</sup> Cf. Gallie, 1964, ch. 8; Quinton, 1967.

<sup>19</sup> Cf. Frankena, 1963, ch. 3; Dworkin, 1978, ch. 12.

<sup>20</sup> Cf. Winch, 1958, p. 64 ff.

endowed in their role. The capacity is displayed in all human social activity but those who implement social policy often bear the responsibility to distribute scarce and much needed resources according to *their* ability to “catch on” and “go on in the same way”: they must identify what the claimant has done and is doing (whatever he *says*), and they must identify what it is to do what they judge is to be done (rule-book or no). This kind of reflection is required of any creature with a *conception* of what it is doing,<sup>21</sup> and is engaged in any policy review, identification of precedent, anomaly or analogy, and in any exercise of discretion (in any of three of its senses, at least.<sup>22</sup>

<sup>21</sup> Cf. Winch, 1958, p. 65.

<sup>22</sup> Cf. Dworkin, 1978, p. 31 ff; Titmuss, 1971 is usefully juxtaposed. The computers allegedly ending the need for discretion may also be opposed as fundamentally limited in use since they lack a conception of what is to be done.

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