Assessing the Criminal

Restitution, Retribution, and the Legal Process

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Contents

Chapter 1

Assessing the Criminal: Restitution, Retribution, and the Legal Process*

Randy E. Barnett
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COMPETING GOALS AND THE QUEST FOR CRIMINAL JUSTICE

Perhaps the single most important characteristic of the contemporary criminal justice system in the U.S. is the profound sense of malaise, if not crisis, that pervades the entire field. Thomas Kuhn, in his path-breaking work on *The Structure of Scientific Revolutions*, has noted that a growing awareness of the breakdown of the capacity for problem solving within an existing paradigm has typically preceded a major transition to a new paradigm. It is precisely this type of breakdown that has generated so much concern both among professionals within the criminal justice system and among concerned citizens who are exposed to the consequences of this breakdown.

In an important sense, however, this analogy is not entirely appropriate, since it is not clear that there is an existing paradigm of criminal justice, at least in the sense of an explicitly and systematically articulated framework for dealing with the problem of criminal behavior. Certainly at the intellectual level the most remarkable feature of the criminal justice system is the almost complete lack of consensus regarding the most appropriate policies for responding to criminal behavior.

Furthermore, at the institutional level the situation becomes even more confused. As James Q. Wilson notes in the preface of this col-

*We would like to express our appreciation to the Liberty Fund for the financial support that enabled us to devote the time necessary to prepare this study.

lection, it may be misleading even to describe the criminal justice system as a "system." Partly this is a result of the fact that the administration of criminal justice in the United States is largely undertaken at the local or state level and thus considerable variations in procedures and institutions may be encountered from one jurisdiction to the next. Probably more important, however, is the fact that our institutions reflect the confusion of our intellectual efforts to confront the problem of criminal justice. Moreover, since institutions change only slowly over time, they tend to represent a complex amalgam of existing policies and residues of earlier policies, some of which may have long since been discarded at the intellectual level.

In examining the prevailing conceptual approaches to the problem of criminal justice, it is possible, despite the conflicting goals that differentiate these approaches, to identify two characteristics that they all share. The first is the assumption that there is a fundamental distinction to be made between tort law and criminal law. While the reasons for this distinction sometimes vary, the effective result is to define criminal behavior primarily in terms of the relationship between the criminal and society or, more specifically, between the criminal and various governmental institutions that presumably reflect the interests of society. While the individual victim of criminal behavior may be seen as triggering this relationship, there is considerable ambiguity regarding the role of the victim after the criminal act has occurred and has been reported to the appropriate government authorities. In fact, the broad category of so-called "victimless crimes" raises the question as to whether current concepts of crime even require the existence of a victim.

A second characteristic shared by prevailing intellectual approaches to the problem of criminal justice is that they seek to define the relationship between the criminal and society in terms of future-oriented goals. While the precise content of these goals may vary considerably, they all seek, in the words of John Hospers, "to make the future better." From this perspective, society's response to crime is measured by its effectiveness in reducing the incidence of criminal behavior. Since there is a scarcity of resources, it becomes necessary to choose among conflicting goals and to establish some schedule of priorities in which some goals acquire precedence over others. It is generally thought that the selection process should be governed by some form of utilitarian calculus that weighs the costs and benefits associated with each goal.

It is at this point that the various approaches begin to diverge and the resulting confusion becomes apparent. For, while there may be general agreement over the need for some type of utilitarian selection process, no single process has yet been able to achieve widespread acceptance, and some observers have begun to suggest that this failure may be the result of certain fundamental flaws in the underlying utilitarian assumptions. Thus, the formulation of criminal justice policies has been hampered by an inability to choose among numerous conflicting goals, and this has resulted in policies marked by contradictory goals and shifting, ad hoc institutional compromises.

The malaise within the criminal justice system stems not so much from the existence of contradictory goals but from the apparent inability of the criminal justice system to meet *any* of the goals that have been proposed. It is illuminating, if somewhat depressing, to review some of this evidence.

The three most widely accepted goals within the criminal justice system are: (1) *deterrence*—maximizing the perceived costs to potential criminals and thereby reducing their willingness to engage in criminal behavior; (2) *rehabilitation*—developing treatment programs for those who have already committed criminal acts in an effort to ensure that these individuals will not repeat their acts in the future; and (3) *incapacitation*—isolating in prisons those who have committed criminal acts so that they will be prevented, at least for specified periods of time, from engaging in further criminal conduct.

In evaluating the deterrent impact of current criminal justice policies, a brief examination of the FBI's crime statistics for 1975 provides a revealing introduction to the extent of the crime problem in the U.S. today. For example, an average of twenty-one serious crimes are reported every minute in the U.S., while one violent crime is reported every thirty-one seconds. Not only is the problem serious, but there is evidence that it is getting worse, suggesting that, whatever deterrent effect the criminal justice system does have, its effectiveness in deterring crime may be decreasing over time. According to these statistics, the crime rate increased by almost 9 percent in 1974–1975 alone and, over the period 1960–1975, the crime rate has increased by almost 180 percent.

As Roger Meiners indicates in Chapter 14, recent surveys of criminal victimization rates by the Law Enforcement Assistance Administration (LEAA) suggest that much of this increase in reported crimes may actually be a result of more effective reporting of criminal behavior rather than the result of actual increases in criminal activity. While this is somewhat reassuring, the LEAA surveys also indicate that the rate of *actual* victimization is considerably higher than the reported crime statistics of *reported* crime suggest. Growing concern over the reliability and interpretation of crime statistics has further complicated the utilitarian approach to the criminal justice problem

by underscoring the fact that any evaluation of goals on the basis of statistical evidence alone can never be conclusive.

Attaining the goals of rehabilitation, incapacitation, and perhaps to a lesser extent, deterrence critically depends on the ability of the criminal justice system to accurately identify and successfully prosecute the criminal. Unfortunately, there are strong reasons to question its abilities in performing these functions. The FBI's statistics for 1975 reveal that only 21 percent of all serious crimes were "cleared"[1] in that year. Moreover, only 80 percent of the adults arrested for serious crimes were prosecuted in the courts, and of these, only 66 percent were found guilty as charged. While allowing for the fact that a single offender may have committed a number of serious crimes, such statistics indicate that roughly 11 percent of all reported crimes result in the conviction of an offender for the specific crime committed. When the vast number of unreported crimes are considered, these figures become an even greater cause for concern.

With regard to the goal of incapacitation, James Q. Wilson has observed that fewer people, as a proportion of the total population, are in prison today than were in prison in 1955, despite the fact that the crime rate has more than doubled in the same time period. Thus, the existence of more criminals and fewer prisoners suggests that even the relatively limited goal of incapacitation has been increasingly difficult to achieve.

While recidivism is notoriously difficult to measure statistically, the limited available evidence casts considerable doubt on the rehabilitative effect of imprisonment. One important study of California correctional programs concluded that variations in recidivism rates could not be explained in terms of the correctional programs to which the criminal had been assigned, but rather that these variations were largely attributable to initial differences among the offenders processed. In other words, none of the correctional programs examined had any measurable effect on the likelihood that a particular offender would commit another criminal act in the future.

Actual estimates of recidivism rates, which vary depending on the nature of the crime and the particular methodological assumptions employed, range from a low of approximately 35 percent to 80–90 percent. One study of FBI data on offenders who were released in

1. "Clearance" is defined as the identification of an offender and the accumulation of sufficient evidence to charge the offender and to bring the offender into custody. The threshold standard is one of "probable cause" to believe the offender is guilty. This figure does not, therefore, reveal the percentage of cases which were "provable," i.e., where the evidence of guilt is beyond a reasonable doubt.

1972 indicated that, depending on the particular category of crime involved, between 64 and 81 percent had been rearrested by 1975.

In view of the doubtful effectiveness of existing policies, the magnitude of their monetary costs becomes particularly disturbing. In 1973, public expenditures at all levels of government on correctional programs alone totaled $2.74 billion, while expenditures on the criminal justice system as a whole reached nearly $13 billion in the same period.

Thus, even if one were to accept the utilitarian assumptions underlying most contemporary discussions of the criminal justice system, it seems clear that serious problems have emerged, and the ability of the system to confront these problems effectively appears increasingly open to question. Measured then by their own standards and their own goals, the prevailing approaches to criminal justice are found wanting.

REDISCOVERING RIGHTS AS A FOUNDATION FOR JUSTICE

The growing dissatisfaction with this performance has given rise to an increasing receptivity to new perspectives and has made people more willing to question the fundamental assumptions that have guided policy formation for so long. In particular, there has been renewed interest in two theories of criminal justice that have a rather long tradition but have generally been in disfavor among more "social science"–oriented policymakers. These two theories—retribution and restitution—by requiring a reconsideration of the question of individual rights and of the extent to which policy formulation must be constrained by a prior conception of rights, demand a fundamentally different conception of criminal justice. As a consequence, there has been considerable resistance to this revival by defenders of contemporary utilitarian orthodoxy.

This development in the theory of criminal justice has been reinforced by recent developments in contemporary political and legal philosophy for, in these fields, the question of individual rights has once again become a hotly debated issue. This new concern is not with *legal* rights, but with the existence and content of individual *moral* rights that are independent of the state and the will of the majority.

John Rawls, in his monumental study of *A Theory of Justice*, has done more perhaps than any other philosopher in precipitating this debate. His theory challenged the dominant positivist and utilitarian traditions in philosophy and eloquently developed an alternative

framework within which philosophical discussion might proceed. Most significantly, this new framework prepared the way for a new examination of the concept of justice from the perspective of individual rights. Robert Nozick, Professor Rawls' colleague in the philosophy department at Harvard University, expanded upon the concept of individual rights in his book *Anarchy, State and Utopia* and explored some of its implications for moral and political philosophy.

Nozick begins by asserting that "individuals have rights, and there are things no person or group may do to them (without violating their rights)."[2] In describing his conception of rights, Nozick makes an intriguing distinction between moral goals that are to be judged by utilitarian considerations and rights that no goal may override and that are therefore termed "moral side-constraints." "A specific side-constraint upon action toward others expresses the fact that others may not be used in the specific way the side constraint excludes. Side constraints express the inviolability of others in the way they specify."[3]

Although Nozick specifically declined to lay out a theory of rights, this task was undertaken shortly afterward by Ronald Dworkin, professor of jurisprudence at Oxford University. His book, *Taking Rights Seriously*, outlines a theory of rights that is both far-reaching and a sharp break with the positivist theory that has dominated political and legal philosophy for so long. Dworkin draws an almost identical distinction between rights and moral goals. "I shall say that an individual has a *right* to a particular political act, within a political theory, if the failure to provide that act, when he calls for it, would be unjustified within that theory even if the goals of the theory would, on balance, be disserviced by the act."[4] And: "Rights based theories are . . . concerned with the independence rather than the conformity of individual action. They presuppose and protect the value of individual action and choice."[5] The assumption of a rights-based theory is "that individual rights must be served even at some cost to the general welfare."[6] His final formulation of the concept of rights is strikingly similar to Nozick's: " . . . if someone has a right

2. Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), p. ix.

3. Ibid., p. 32.

4. Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), p. 169.

5. Ibid., p. 173.

6. Ibid.

to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so."[7]

Discussions of criminal justice frequently refer to "rights," but in this context the word has traditionally been accorded a different meaning. What are usually at issue are "constitutional rights," rights granted the individual by the state, and even these rights are usually procedural in nature, e.g., the right to counsel or the right to a speedy trial, etc. These discussions have another marked characteristic: they are almost exclusively concerned with the constitutional rights of criminal defendants and the so-called rights of society. Contemporary attitudes leave little room for the possibility that other participants in the criminal justice process may have rights as well.

What makes the approaches of Nozick and of Dworkin so important is that they force us to contemplate the rights of *all* persons in all contexts including, *a fortiori*, the rights of all participants in the criminal justice system, and to do so outside the narrow context of constitutional construction and reasoning. A framework of individual rights enables us to analyze each problem from a new perspective. Such a methodology offers us an opportunity to confront the inadequacies of existing institutions by critically challenging each assumption underlying the establishment of these institutions. This approach offers a promise of new solutions that could scarcely even be conceived within the existing paradigm.

To perceive the significance of this new approach, it is necessary to examine more carefully the traditional formulation of the rights of the parties in the criminal justice system. We should begin by identifying the individuals considered to be parties to the criminal action. Crime has, since the Norman conquest, been viewed as an offense committed against the king and later the state. The person against whom the crime was actually committed—the "victim"—was (and still is) considered to be only a witness to the crime. Given this vision, it is not difficult to predict how rights in such a system will be allocated. Since the function of the criminal justice system was, until recently, primarily to inflict suffering on "bad" criminals for their evil acts in the name of society, it was necessary to balance the rights of society against the rights of the accused. In this regard, procedural safeguards can be seen as performing a vital role; they serve to assuage the consciences of the community when it is confronted with the sight of criminals suffering "for their sins."

In Chapter 10, "Crime and Tort: Old Wine in Old Bottles," Richard Epstein shows that the traditional distinction between the criminal

7. Ibid., p. 269.

and civil legal processes can only be explained (and he believes justified) by the moralistic posture of the criminal law, which gives rise to the need to judge the mental state of the accused and to punish accordingly. This, in turn, contributes to the need for procedural safeguards against wrongful punishments. The brutalities that such a system can produce and the lack of any resemblance to rationality in proportioning punishments has led some, like Walter Kaufmann in Chapter 9 to reject punishment and justice altogether.

Another consequence of a theory of justice that focuses on the moral attributes of those accused of crimes is the need to probe the psyche to determine the extent of "badness" present. This often leads to the paradoxical result that those persons who commit the most heinous crimes may escape punishment entirely. Such a result arises when the criminal act is so inhumane as to raise a question about the offender's "sanity."

In this context, sanity is defined by the psychiatric establishment with reference to "some gross deviation from normal human behavior" and thus a savage, shocking crime may in itself be interpreted as strong evidence of psychiatric abnormality. As a result, psychiatric examinations are routinely ordered in any particularly severe crime (provided no monetary motive is present). The offender who is found "insane" is "not responsible for his acts," a conclusion that can only be understood in the context of moral responsibility. Since this approach is exclusively concerned with judging the moral attributes of offenders (as opposed to judging the morality of their acts), when an offender is incapable of "understanding right and wrong," he is not to be punished even if he perfectly well understands how to use a car, gun, knife, or axe.

What then happens to those acquitted by reason of insanity? Consistent with the assumptions underlying this approach to criminal conduct, an effort is made to instill in the offender a sense of moral responsibility. In Chapter 3, Dr. Thomas Szasz examines the uses and inevitable abuses of so-called "psychiatric diversion" programs that may result in imprisonment for much longer periods than the statutory penalty for the crime or, alternatively, in the quick release of criminals who, regardless of the severity of their offense, have been deemed "rehabilitated." As a result, Szasz condemns the entire category of criminal defenses involving insanity, incompetence, and reduced capacity.

Far from being isolated examples of the misapplication of current philosophies of punishment, the lack of proportionality between punishment and criminal conduct is a natural result of "intent theories of punishment" which require the court to investigate and

pass judgment upon the mental processes of those accused of criminal conduct. By shifting our attention from the criminal's mental state to the nature of the criminal's acts, and the consequences of these acts, we can begin to extricate ourselves from these theoretical and practical difficulties. Once we shift our inquiry to the nature of the criminal act as opposed to the criminal's mental state, we are immediately confronted with the other party to crime—the victim. Only by examining the relationship between the criminal and the victim that is created by a criminal act are we able to judge the moral status of the act.

In an unpublished manuscript, Murray N. Rothbard has illustrated this point with the example of a person who is observed to be forcibly taking a watch from another person. He correctly points out that this observation alone is not sufficient to allow the attachment of criminal liability, for the man taking the watch might be stealing it, or he might be trying to retrieve the watch from a thief. It is not the intent of the parties that determines the outcome; it is the respective rights of the parties, in this case to the watch in dispute. Only when this is determined—when the rights question is resolved—can we attach liability.

It should be apparent, then, that the contemporary exclusion of the victim described in Chapter 13 is no institutional accident. The intent theories of punishment simply provide no place for a victim except as a witness to the manifestation of evil intent. Although the traditional theoretical approach as formulated, for example, by John Hospers in Chapter 8, "Retribution: The Ethics of Punishment," with its focus on the criminal's moral "desert," contains no comfortable "slot" for the victim, Randy Barnett, in Chapter 16, "Restitution: A New Paradigm of Criminal Justice," cites historical evidence that this has not always been the case. In fact, until the rise of European nation states and the consolidation of the institution of the monarchy, the victim of aggression had occupied the central focus in traditional legal systems in Europe. Under these earlier systems, which prevailed for centuries, aggression by one individual against another had been dealt with by requiring the aggressor to make payment of money or personal services to the victim or the victim's kin to compensate for any losses.

As Barnett's account demonstrates, the current view that contemporary forms of state monopoly justice arose to protect individuals from the uncontrollable violence of blood feuds is a serious distortion of history. Blood feuds had in fact largely been replaced by institutional forms of restitution long before the rise of feudal monarchies and the forcible imposition of a new system for dealing with

criminal behavior. Such commonly accepted myths determine in many respects our prevailing responses to the criminal justice problem. Only by challenging them will we be able to explore the dimensions of a new paradigm based on a systematic examination of the rights of each individual involved in the criminal act. We should be forewarned that any new paradigm may raise more questions than it answers, but what really matters is the promise of solutions.

We may begin to explore the dimensions of this new paradigm by considering the rights of the victim. Perhaps the most important insight of this new paradigm is that a crime exists because the rights of an individual, rights that each of us possess, have been violated in some way. Once this is acknowledged, the victim must be considered a party to the criminal prosecution.

In contrast with a positivist conception of crime, this conception defines crime in terms of the actions of one or more individuals that violate, or threaten to violate, the rights of one or more other individuals. One implication of this is that a criminal action necessarily involves a minimum of two individuals: an aggressor and a victim. It will be readily seen that this formulation diverges fundamentally from the positivist approach, which defines crime as any action that has been prohibited by statute. Our view of criminal conduct, on the other hand, would encompass any action that violates individual rights regardless of whether that action has been statutorily prohibited. Similarly, our conception would regard "victimless" crimes as a contradiction in terms: there can be no crimes without victims.

Any discussion of criminal justice presupposes a definition of what constitutes criminal behavior. Ronald Hamowy's paper (Chapter 2) represents an important contribution to our understanding of the process by which many sexual activities that do not violate the rights of other individuals came to be declared illegal. Contrary to popular conception, many of these activities had not been legally prohibited prior to the first few decades of the twentieth century, and the expansion of American criminal law into these areas was not precipitated by a revival of religious zeal. Rather, the nineteenth century may generally be characterized as a period of relatively limited statutory intrusions into private sexual activity. The dramatic growth in statutory law in this field was actively promoted by the medical and psychiatric professions which had come to view certain forms of sexual behavior as immoral conduct to be suppressed through criminal law. The medical and psychiatric theories that served to justify such a significant inflation of statutory law have long since been discredited, but their legacy lives on in the statute books. Until the entire concept of victimless crimes has been abandoned, it will continue to obscure the true nature of crime, thereby frustrating efforts to confront the problem of criminal justice.

Our definition of crime focuses on the violation of rights and, in particular, the fundamental right of all individuals to be free in their person and property from the initiated use of force by others. If this right is violated, an imbalance is created between the offending party and the victim. We are accustomed to speaking of a criminal paying his "debt to society," but we would suggest that this is a remnant of our feudal past. Within the framework presented here, it is more appropriate to speak of paying one's "debt to the victim." Only when the imbalance created by the criminal act has been rectified can it be said that justice has been done. Although such a concept of crime has only recently become academically respectable, it has never been beyond the common sense of the nonphilosopher. Nor is this attitude foreign to traditional American concepts of justice. In Chapter 13, William F. McDonald points out that the American system of justice abandoned this view in favor of the societal view of crime only gradually and reluctantly.

While the new paradigm focuses on the right of a victim to demand rectification of the imbalance created by the criminal act, the precise nature of this rectification continues to be a controversial issue. In Chapter 11, "Punishment and Proportionality," Murray N. Rothbard stresses the important insight that the rights of the victim to seek rectification are necessarily limited by the nature and consequences of the offense against which rectification is sought. In other words, the concept of rectification implies a rigorous standard of proportionality relating the sanction imposed upon the offender to the nature of the offense.

The controversy, however, arises over the precise nature of the sanctions that may be employed for a particular crime. Rothbard would argue that, if the criminal act had involved the infliction of pain, the victim would be entitled to inflict a proportional degree of pain on the offender. However, the victim would have discretion to decide to impose a lesser sanction or even no sanction at all.

An alternative approach would be to limit the range of sanctions available to the victim by declaring that the deliberate infliction of pain or suffering upon an offender will not be permitted as an end in itself and that only if the pain or suffering results from an attempt to enforce some other form of sanction will it be permitted. Under this alternative approach, only sanctions that were designed to provide constructive reparation to the victim, either in the form of money or services, would be permitted. Since this debate has just begun, the contours of these alternative approaches can only be

tentatively and somewhat sketchily outlined. What is important, however, is the very existence of the debate.

As already suggested, this new paradigm of criminal justice would allocate to the victim a central decisionmaking role in determining the nature of the sanction to be imposed upon the convicted offender. Within the limits established by the principle of proportionality, the victim may specify the form of sanction to be imposed, or he may delegate this responsibility to another (perhaps the court) or he may partially or completely forgive the criminal. This discretion may be exercised by the victim for any reason whatsoever. In this respect, a rights approach to crime does not foreclose the pursuit of various goals within the criminal justice system; it merely stipulates the party (the victim) that will have the discretion, always within the limits imposed by the nature of the original criminal act, to choose among a wide variety of possible goals.

It should be noted that, while a restitutive theory recognizes important rights in the victim and seeks to redress the long-standing neglect of the victim in the criminal justice system, this does not imply an endorsement of *any* measure that purports to assist victims. Roger Meiners (Chapter 14) demonstrates convincingly the profound economic and practical problems that would be encountered in the implementation of any of the programs for government-financed victim compensation that have been presented in Congress in recent years. The restitutive theory would also reject such programs on moral grounds since, rather than providing for compensation of the victim by convicted offenders, these programs would place an additional tax burden on the rest of the population to compensate the victim for his misfortune. In effect, such programs are not very different from conventional welfare programs, and they would entail a violation of the rights of innocent third parties in order to achieve the goal of compensating victims.

In a significant sense, a restitutionary theory of justice shifts the focus of decisionmaking to the victim, but at the same time, it reserves certain important rights to the criminal, rights that are more specific and meaningful than the rights of the criminal that are recognized by the present system. Currently, as long as the sanction is determined according to law, in adherence to the procedural due process rights of the accused, and as long as the sanction is not so extreme as to be considered "cruel and unusual" (a very narrowly defined standard), the criminal does not have a right to any limiting standards of proportionality.

Partly in response to this situation, there has, in recent years, been a growing movement on behalf of so-called "prisoner's rights." In

fact, this movement does not reflect a proper understanding of the meaning of "rights," at least in the sense in which the word has been used here. Rather, in an effort to shield individuals from the extreme vagaries of a penal system generally acknowledged to be irrational and unjust, this movement argues that the "interests" of the criminal must be balanced with a variety of other factors in an effort to achieve a "fair" system.

In contrast to this balancing approach, the restitutionary theory of justice suggests that the criminal has certain rights that need not be "balanced" at all. In his famous pronouncement, Hegel asserted that "punishment is regarded as containing the criminal's right and hence by being punished he is honored as a rational being." While the restitutionary approach shares little with Hegelian philosophy, this statement, cut loose from its underlying theory, is suggestive of an important insight.

The criminal does have a right to punishment or, rather, a right to limited punishment measured by the extent of his transgression. This right stems from the underlying assumption that all persons have rights and that the criminal has only abrogated his to the extent that he has violated the rights of others. Therefore, "the criminal's right as a rational being" is the right to be protected from a sanction that goes beyond the nature and consequences of his acts. In short, the criminal's rights pick up at the exact point that the victim's rights leave off. Furthermore, since we are advocating a relatively specific approach to sanction formation, the criminal has as much right to insist upon adherence to that approach as does the victim. Moreover, as a party to the action (with considerable knowledge about the crime committed), he has a right to participate in the determination of the sentence. This is in sharp contrast to the current arguments in mitigation, which are usually heard at the discretion of the court and which usually serve merely as a device to provoke sympathy for the accused.

It would be misleading to characterize the present system as excessively harsh or excessively permissive since, by restitutionary standards, it may sometimes be one or the other. The point is precisely that, as a consequence of the reliance on faulty conceptions of justice, the present system will almost certainly be one or the other. Some criminals may be punished too harshly, while others are punished too leniently. Advocates of "law and order" will tend to focus on one aspect, while civil libertarians will be more concerned with the other. As may be expected in such a long-standing dispute, the two sides are focusing on two dimensions of the same problem, and yet neither side has been able to identify the underlying problem.

The convicted offender, then, has a right to a just sanction, which is ultimately based on the nature and consequences of his acts and which, within this limit, may be specified by the victim. This does not, however, tell us about the rights of the *accused*. The right to impose sanctions on the criminal can only be derived from the fact that he did indeed trespass on the rights of others. What about those who are accused of a crime but who either did not commit the crime or against whom the evidence is weak?

The assumption underlying the rights approach is, to repeat, that all individuals have certain rights that can only be alienated by their own free choice. The accused who is in fact innocent has, therefore, all the rights of the nonaccused, for he has done nothing to alienate those rights. *Any* forceful imposition is, therefore, an unjustifiable violation of that individual's rights. It is not sufficient to define certain procedural requirements and then to permit an infringement upon an individual's substantive rights as long as those procedural requirements are satisfied. Even if undertaken in good faith, the prosecution of an innocent person that results in the infringement of that person's substantive rights in any way is itself a crime. The authority responsible for such a prosecution would be liable, provided, of course, that the falsity of the prosecution can be established. The standards of proof necessary to implement this approach are discussed below.

Of course, the inherent uncertainties of human knowledge must be acknowledged. The rights we posit are ontologically grounded, that is, grounded and derived from the facts of human existence and the facts of specific actions. In order to identify the rights of each individual in a particular situation, it is first necessary to ascertain the factual context and it is inevitable that humans will occasionally err in pursuing this factual inquiry. The possibility of such error must be recognized, and procedures must be devised that will remedy any injustice caused by such errors.

The American adversary system has often been criticized as an inadequate process for "truth seeking." However, even more broadly, it might be suggested that any system that structures judicial decision-making on the basis of presumptions and procedural devices rather than on the basis of an explicit and overriding concern for the facts of the specific case must, to some extent, compromise its "truth seeking" function. It is a tribute to our common sense rejection of the positivist imperative that the current system seeks the truth to the extent that it does. As a consequence of its affirmation of the primacy of the truth-seeking function, the restitutionary theory of justice provides philosophical support for our deeply ingrained intuitive beliefs.

Since this chapter is primarily concerned with outlining a substantive theory of criminal justice, the many problems of crafting a legal process consistent with that theory must unfortunately remain largely beyond its scope. However, Lloyd Weinreb, a professor at Harvard Law School, has recently published a study entitled *Denial of Justice* that moves beyond a critique of the adversary system and presents a proposal for an alternative system.[8] While Weinreb's proposal ignores the role of the victim, his suggestions are not incompatible with the theory of criminal justice developed in this study and they provide significant insights regarding the viability of one potential alternative process.

One additional aspect of a restitutionary rights approach is perhaps the most difficult to accept as a result of our somewhat schizophrenic attitude toward crime. On the one hand we recognize that crime is perpetrated against specific, identifiable victims, but at the same time a certain holist conception of society leads us to believe that, in some sense, society is the real victim. By focusing on crime in terms of individual rights, the preceding analysis has at least implicitly been highly critical of the latter conception of crime. However, it is still necessary to consider what rights, if any, third parties would possess once a crime has been committed. This question must be strictly distinguished from the important, but far different, question of what *interests* third parties might have when a crime is committed. Members of the community are interested in crime in a number of ways: there may be fear that similar acts will be committed against them in the future; there may be economic consequences to the community of criminal activity; and the rest of the community may share a common moral outrage at the criminal act itself.

Do these and other potential interests give third parties *rights* in the same sense that victims and accused or convicted offenders have rights? Under the restitutionary theory outlined above, a criminal act does not vest any rights in third parties. A specific action is defined as criminal within the context of this theory only if it violates the right of one or more identifiable individuals to person and property. These individuals are the victims of the criminal act, and only the victims, by virtue of the past infringement of their rights, acquire the right to demand restitution from the criminal.

This is not to deny that criminal acts frequently have harmful effects upon other individuals beside the actual victims. All that is denied is that a harmful "effect," absent a specific infringement of rights, may vest rights in a third party. While an elaboration of this

8. Lloyd Weinreb, *Denial of Justice* (New York: The Free Press, 1977).

principle, which would require a detailed analysis of the concept of rights, is beyond the scope of this study, we contend that a violation of rights cannot occur unless one individual has used force, the threat of force, or fraud against another individual.

ENFORCING RIGHTS AND PURSUING GOALS

As indicated at the outset of this discussion on individual rights, a fundamental distinction must be made between moral rights and moral goals. While the two concepts are analytically distinct, they are also integrally related to each other in that moral rights provide a framework within which one may properly pursue a variety of moral goals. To recall Nozick's illuminating phrase, rights constitute "moral side-constraints" that define the limits of permissible action in striving to attain moral goals.

Another useful way of developing the distinction between moral rights and moral goals would be to indicate its similarity with the distinction that Lon Fuller has made in his *The Morality of Law* between the morality of duty and the morality of aspiration.[9] In Fuller's view, the morality of aspiration concerns the never-ending quest for excellence and perfection within human society, while the morality of duty involves the defining of basic rules that are necessary for the very existence of an ordered society. Fuller argues that the only proper function of law within society is to enforce the morality of duty and, while he does not equate the morality of duty with a concept of rights, the two are very compatible. In effect, Fuller contends that the morality of aspiration operates within boundaries established by the morality of duty.

Thus far, our discussion has focused on an elaboration of the concept of moral rights, and it is now appropriate to shift our attention back to the question of moral goals. It should now be clear that any evaluation of the various goals that have been proposed for the criminal justice system must begin with an analysis of their compatibility with the moral rights framework that has been elaborated above. If we accept the existence of moral rights, we must reject any goals that would require us to violate the constraints implied by such rights. Much of the confusion characterizing the current debate over proper goals for the criminal justice system stems from the failure to recognize that such a debate cannot occur in a moral vacuum. Without a moral rights framework that provides an objective standard for evaluating each goal, we are left to wander aimlessly from one goal to another. A moral rights framework provides the necessary context within which a utilitarian calculus may properly be employed to select among competing goals.[10] Freed from a prior commitment to a concept of rights, the utilitarian calculus may result in the adoption of policies that, although advancing certain goals, entail a massive infringement upon individual rights.

In discussing the various goals that have been proposed for the criminal justice system, it soon becomes apparent that virtually every one of these goals may be subsumed under the broad rubric of crime prevention. Thus, such diverse goals as deterrence, rehabilitation, and incapacitation in fact represent subsidiary ends that are all directed toward the larger goal of preventing crime. While the goal of crime prevention is certainly a legitimate and important one for any social system, it is not, strictly speaking, an appropriate goal for the criminal justice system.

Once a certain action has occurred, it should be the function of the criminal justice system to determine whether that action has violated the rights of individuals and, if it has, to take the steps necessary to rectify the imbalance created by the criminal act. The criminal justice system, then, is designed to address only one dimension of the crime problem: justice. In performing this function, the criminal justice system necessarily adopts an exclusively past-oriented approach, focusing on past criminal actions.

This is not to say that crime prevention is unimportant or even that an efficient administration of criminal justice will not contribute to the attainment of this goal. However, it does imply that the prevention of crime or any such goal should constitute merely a by-product of the primary function of the system: the administration of justice. As Professor Weinreb has noted in his book *Denial of Justice:*

> The function of criminal process is to determine criminal guilt with a view toward imposing a penalty. If it provides a civic education for some people (which is doubtful) or a public entertainment, so much the better; but these are not its functions, any more than it is the function of the judicial system to provide comfortable berths for the friends of successful politicians, as it does. Nor is it the function of the criminal process itself to punish or rehabilitate criminals or deter the commission of crime, although

9. Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), pp. 3–32.

10. Throughout this paper we shall describe judgments about moral goals as "utilitarian" in nature. This should not be interpreted as an endorsement of conventional utilitarian methodology. Rather, we mean that within this area our concern is properly with what "works." *How* one determines this is another matter. Although we would suggest a "legal naturalist" methodology—one in which the form of a given process is crafted to follow its intended purpose or function—the articulation of such a theory cannot be undertaken here.

there too, it may be, so much the better if it does. Criminal process is not a means to redistribute income, or encourage patriotism, or promote individual expression, except incidentally.[11]

To the extent that this primary function of the administration of justice is performed effectively, it is reasonable to assume that this in itself will contribute in several ways to the broader goal of crime prevention. For example, as Randy Barnett points out, to the extent that the certainty of a sanction for criminal behavior will deter such behavior, the administration of an effective criminal justice system will have a deterrent effect on criminal behavior. In Chapter 15, "Restitution as an Integrative Punishment," Burt Galaway has also cited a growing body of evidence suggesting that a restitutionary approach to criminal behavior has at least a potentially significant reconciliative effect on the offender.

However, these positive effects arise as a consequence of the administration of criminal justice, and they are not properly goals to which the administration of justice may be subordinated. To do so would be to suggest that certain violations of individual rights should remain unrectified in the interest of some goal, but the only person who may properly make such a choice is the victim of the criminal action. If the victim insists upon the rectification of the previous rights violation, then it is the responsibility of a criminal justice system to assure that such a rectification occurs. In such a situation, justice requires the rectification of the past rights violation, and the subordination of this task to any other goal, would itself constitute an injustice and would contradict the very definition of a criminal justice system. It should be repeated, however, that this insistence on the proper role of a criminal justice system *qua* criminal justice system is not meant to deny or minimize the desirability of pursuing outside the framework of criminal justice certain goals designed to prevent crime.

This point is especially relevant to a consideration of widely quoted criticisms of the administration of the criminal justice system by Alan Dershowitz, a professor at Harvard Law School. Dershowitz argues that prevention has always been an implicit goal of the criminal justice system and that the failure to acknowledge this fact has long obscured a major dimension of the system. According to Dershowitz, a systematic and explicit analysis of the goal of crime prevention would enable us to structure the institutions and procedures of the criminal justice system more effectively.

However, this perspective neglects the crucial distinction between

11. Weinreb, pp. 1–2.

rights and goals. It is true that crime prevention has traditionally been a goal but, as a goal, it is completely irrelevant to the question of criminal justice. The point has already been made that, in its focus on prior rights violations, justice is uniquely and exclusively backward-looking and, as such, it is not properly concerned with such forward-looking goals as prevention of future crime. There is a broad spectrum of activities that may contribute to a goal of crime prevention, ranging from installing a burglar alarm to the hiring of private guards, but that are entirely outside the scope of criminal justice.

To the extent that Dershowitz suggests that it may be proper to infringe individual rights if such infringements would contribute to the goal of crime prevention, he is ignoring the fact that rights, by their very nature, may never be "properly" infringed upon in pursuit of any goal. They are constraints upon goal-oriented policies and are not simply additional goals that may be balanced and subordinated in a utilitarian calculus. In Chapter 16, Randy Barnett has demonstrated that this strict distinction between rights and goals in the area of criminal justice would in fact entail a fundamental reevaluation of the law of criminal attempt. Thus, unless it could be demonstrated that a so-called "attempt" was in fact a past action that had violated another individual's rights, it would be impermissible for the criminal justice system to impose any sanctions against the accused individual. This would be true even if it could be demonstrated that the accused individual had the intent of committing an aggressive act and that such an intention made it probable that the individual would seek to commit the act again.

While sanctions could not be imposed by the criminal justice system upon the accused individual, this does not mean that other individuals in the community could not take certain actions against the accused individual, provided that these actions do not infringe upon that individual's rights. For example, individuals in the community might seek to isolate the accused individual by refusing to associate or trade with him. Such forms of voluntary action can often prove very effective in enforcing the norms of a community and in discouraging the accused individual from pursuing his attempted course of action.

A similar form of analysis would be necessary at any other point in the criminal justice system where it might be demonstrated that sanctions have been applied, not on the basis of past actions, but on the basis of anticipated actions. The purpose of a criminal justice system is to rectify the imbalance created by past violations of individual rights; it should not, and it cannot, seek to do more and still remain true to its fundamental purpose.

In discussing the broad goal of crime prevention, it becomes particularly important to seek a better understanding of the origins of criminal behavior. Perhaps more than any other area of the crime problem, this subject has been one of enormous controversy in which passion and prejudice have often prevailed over reasoned analysis. This is especially troubling since it is very difficult to conceive of the formulation of policy goals in this area without a prior agreement as to the major factors responsible for the behavior that these policy goals will seek to prevent.

In this regard, the path-breaking research by Dr. Stanton Samenow and the late Dr. Samuel Yochelson at St. Elizabeth's Hospital in Washington, D.C., deserves special attention. In Chapter 4, Samenow summarizes the results of their fourteen year project. In the course of their research, they eventually found themselves unable to accept many of the conventional assumptions regarding the origins of criminal behavior, assumptions that they also shared when they began the project. For example, they came to the unexpected conclusion that psychological disorders did not adequately account for criminal behavior, thus confirming many of the theoretical insights of Thomas Szasz. They also could not identify any environmental factors, such as lack of educational opportunities or poverty, that would explain why certain individuals became habitual criminals.

After intensive interviewing of "habitual" or "career" criminals, Samenow and Yochelson concluded that these individuals all shared certain distinctive thinking patterns and that these thinking patterns were not inherited but, instead, represented a series of conscious choices made by each individual, usually at a relatively early stage in life. One immediate implication of their observation is that the conventional goal of "rehabilitation" has been fundamentally misguided. As Samenow indicates, the very term "rehabilitation" suggests restoration to a previously existing condition, whereas his research questions whether the "career" criminal has ever developed the thinking patterns necessary to live responsibly. Based on their initial research, Samenow and Yochelson sought to develop a treatment program that would systematically change the distinctive thinking patterns of the career criminal and, through a process of "habilitation," instill new thinking patterns that would enable the individual to live and act responsibly in society.

Samenow demonstrates considerable sensitivity to the moral and policy implications of his research, and his study explores some of these issues. In particular, he questions the traditional goals of rehabilitation and deterrence and he suggests that criminal sanctions may have the least deterrent effect on precisely those extreme criminals

that he has studied. Based on his research, Samenow also questions whether a restitutionary approach to criminal justice would have any significant rehabilitative effect on the career criminal.

Samenow's work is extremely important for anyone concerned with developing appropriate goals for dealing with the problems of crime. The challenge will be to articulate goals consistent with his analysis that can be pursued without violating the constraints imposed by a framework of moral rights. For example, Samenow's research suggests the need to develop new forms of testing and counseling to identify and treat individuals who appear to exhibit the thinking patterns characteristic of criminal behavior. However, unless such programs are formulated and administered in a manner that is entirely consistent with individual rights, it is not difficult to imagine the enormous potential for abuse that such programs might have. Such programs could not be tolerated unless they relied exclusively on the voluntary and informed participation of the subjects. Potential models do exist for such programs—Alcoholics Anonymous and Synanon are two particularly prominent examples.

Edward Banfield's insights on the relevance of time horizon to criminal behavior, a subject that he discusses in Chapter 5, "Present-Orientedness and Crime," appear to correspond closely with the results of Samenow's empirical research. Banfield argues that an individual's psychological orientation toward the future underlies distinctive patternings of attitudes and that certain individuals exhibit a significantly greater degree of present-orientedness than others. While cautioning that a high degree of present-orientedness in certain individuals will not necessarily result in criminal behavior, Banfield does suggest that such individuals are more likely to commit crime and that they will be less deterred by the threat of punishment.

Gerald O'Driscoll's paper (Chapter 6) on Banfield's concept of time horizon underscores the extent to which this concept is compatible with the theory of time preference developed by the economist Ludwig von Mises. O'Driscoll also contends that Banfield's theories are difficult to reconcile with the assumptions underlying much of the existing literature on the economics of crime. A common characteristic of this literature is to assume that every individual's orientation toward the future is identical and therefore that each will be equally affected by a given structure of incentives and penalties. On the other hand, if Banfield is correct that individuals differ in their orientation toward the future, then one would anticipate that the same structure of incentives and penalties would have a differential effect on each person. Such a conclusion would be particularly disturbing for anyone favoring a utilitarian approach to

criminal sanctions, since it suggests the impossibility of measuring the differential deterrent effect of a particular sanction. O'Driscoll observes that this may be one reason for the enormous difficulties already encountered in the statistical measurement of the impact of various approaches to punishment. The final portion of O'Driscoll's study argues that a strictly utilitarian approach to policy formation would be inadequate.

While Banfield concentrates almost exclusively on the role of various cultures in reinforcing or weakening the natural disposition of the individual to prefer present to future rewards, his analysis tends to overlook the extent to which social institutions may also influence "present-orientedness." Since institutions are far more susceptible to modification than cultures, more systematic research into the relationship between social institutions and individual "time horizons" might suggest institutional reforms that could indirectly contribute to the goal of crime prevention.

Mario Rizzo's paper on "Time Preference, Situational Determinism and Crime" (Chapter 7) critically evaluates the entire concept of present-orientedness as a hypothesis for explaining why some individuals commit crime while others do not. Rizzo also questions whether, in certain contexts, present-orientedness might be considered a rational, rather than defective, attitude. In pursuing this analysis, he focuses attention on the role of political institutions as a source of present-oriented behavior within a social system.

As already mentioned, Samenow's study questions whether a restitutionary approach to criminal justice would have any positive habilitative impact on the hardcore criminal. While there is still insufficient evidence to resolve this question conclusively, the research cited in Burt Galaway's paper on "Restitution as an Integrative Punishment" (Chapter 15) provides reason to believe that a restitutionary system may perform a positive habilitative role for individuals who are not hard core criminals. By requiring the offender to undertake positive actions designed to rectify the imbalance that has been created between the offender and the victim, restitutionary sanctions may help to instill a sense of responsibility and to reduce the offender's sense of alienation from the rest of society. Since restitutionary sanctions have thus far only been applied on a very limited scale within the criminal justice system, the likelihood of such positive effects must remain largely speculative at this point. However, the experimental evidence that is available suggests that, far from requiring the abandonment of habilitation of criminal offenders, a restitutionary system of criminal justice may actually contribute to the attainment of this elusive goal.

Leonard Liggio's paper on "The Transportation of Criminals" (Chapter 12) provides an illuminating historical analysis of one criminal sanction—the transportation of criminal offenders to distant penal colonies—that was primarily designed to incapacitate the criminal offender by isolating him or her from the rest of society. As Liggio notes, the widespread use of prisons in England to achieve the same goal occurred at a much later date as a result of the influence of Bentham's utilitarian political and economic theories. Liggio is critical of the shift from penal colonies to prisons, noting that it imposed a significant additional tax burden upon the population and that it was prompted by a futile desire to rehabilitate the criminal rather than simply to isolate the criminal from the rest of society. In his conclusion, Liggio proposes that we return to the original goal of isolating the criminal.

As with any other goal, the isolation of criminal offenders is a legitimate approach to crime prevention provided that it is undertaken in a manner that does not violate individual rights. In this regard, Liggio indicates that, under Anglo-Saxon common law in England, neighbors formed voluntary, personal associations at the local level and expelled from their association anyone found guilty of a felony crime. Thus, through individual private action involving their right to trade and associate with whomever they chose, neighbors developed highly effective procedures for isolating habitual offenders from their midst.

The papers by John Hospers and Walter Kaufmann in this collection serve to focus attention on certain issues raised by some retributionist theories of justice. One of the great difficulties in discussing a retributionist theory of justice is that there are in fact many variants of the theory, and it becomes essential to identify specifically which one is being discussed. Many traditional formulations of this theory, such as the one expounded by Immanuel Kant, appear to justify the deliberate infliction of pain on criminal offenders, not so much because of the specific criminal action that the offender committed but instead because the offender, by his or her demonstration of reprehensible character, deserved such punishment. Under the influence of this theory the focus of attention shifts subtly from the *action* that deserves punishment to the *individual* who deserves punishment. The criminal act tends to be considered only as an overt indication of the lack of moral worth of the individual committing the act. This approach to criminal legal theory is exemplified by Richard Epstein's attempt to rationalize the distinction between tort and criminal law. As he correctly indicates, the historical distinction is based on just such a moral judgment.

Kaufmann's paper is critical of all variants of retributionist theories, but he appears especially critical of the variant outlined above. In contrast, John Hospers' effort to defend retributionist theories of justice involves the presentation of a "deserts theory" of justice that shares many similarities with the "Kantian" view. For this reason, it is essential to distinguish this variant of retributionist theory from the theory of criminal justice developed earlier in this paper.

The fundamental weakness of this type of retributionist theory is that it does not rest on an explicitly developed theory of rights. This, in turn, has a number of unfortunate consequences. By focusing attention too heavily on the moral worth of the criminal offender, the theory is led to reject the imposition of sanctions upon individuals who had violated the rights of others but who, for a variety of reasons, might not be considered deserving of sanctions. Such a retributive approach is inconsistent with the concept of justice that requires the rectification of all past violations of rights. Moreover, by departing from a theory of criminal justice that is based upon a relationship between two parties, such an approach ignores the rights of the victim entirely and the victim is reduced to the relatively marginal role of witness. For the same reason, by viewing punishment as essentially related only to the moral worth of a given defendant, this approach would encourage the uninvited participation of third parties. By denying the victim's legitimate role in the criminal justice process, there remains no reason why the evaluation of an individual's moral worth and the levying of punishments could not be performed by anyone.

The problems arising from this failure to ground a retributionist theory of criminal justice firmly on a prior explicit theory of individual rights confirms the importance of the rights-goals framework that this paper has described. To summarize the argument this far, we have identified two analytically distinct questions that arise in any systematic consideration of the problem of crime: the justice question and the utilitarian question. We have contended that the general failure to distinguish between the issues raised by each question has been responsible for much of the confusion that characterizes most contemporary discussions of crime.

The first question is the one with which the institutions of the criminal justice system should be exclusively concerned. The issues raised by the justice question are: the definition of individual rights, the identification of categories of acts that constitute violations of those rights, and the rectification of imbalances created by actions that have violated the rights of others. To analyze each of these issues in the detail that they deserve would require a separate book; our purpose at this point is merely to emphasize that this type of analysis constitutes the foundation of a restitutive theory of justice.

In contrast, the utilitarian question has a much broader focus and concerns the issue of how we can maximize various goals (such as deterrence, habilitation, and incapacitation) that seek to prevent crime or to achieve other socially desirable objectives while remaining within the constraints imposed by a framework of moral rights. Properly understood, the latter question can only be answered by first addressing the justice question. The current confusion plaguing the criminal justice system arises typically in one of two ways: either one assumes that the second question can be answered without explicitly addressing the first question or one assumes that the two questions are in fact indistinguishable. The search for a new paradigm must begin with the realization that these two questions are in fact distinct and that, without a firm grounding in a theory of rights, the search for goals in dealing with crime will ultimately prove fruitless.

SUMMARIZING THE RESTITUTIONARY THEORY OF JUSTICE

The preceding discussion seeks to provide a very brief introduction to the elements of a new theory of criminal justice, one combining the strengths of varying traditional theories while, hopefully, resolving many of the contemporary dilemmas. Such a theory might be called a "restitutionary theory of justice." There are two main aspects of this theory: first, it attempts to define the proper scope of any criminal justice system *qua* justice system, and second, it identifies the principles by which a just system should operate. In other words, this theory focuses on the questions that have traditionally occupied the attention of philosophers: it defines the boundaries of justice and it specifies within those boundaries wherein justice resides.

Under a restitutionary theory of justice, the dominant concern of any criminal proceeding should be the fact that some person or persons have violated the rights, properly defined, of another. The settlement of this dispute using principles of justice may not achieve any independent social goals, but it will vindicate the rights of the aggrieved party and thereby vindicate the rights of all persons. For too long we have lost sight of this ultimate purpose of criminal law, and we are now beginning to recognize the consequences. If the rights of one of us is not respected, if the rectification of any one of our rights is ignored for the sake of any "larger" purpose, then the very notion of individual rights itself has been demeaned and all of

our rights diminished. In short, there can be no larger or more important goal than the rectification of each individual wrong. This goal has been entrusted exclusively to the criminal justice system, and it must therefore take precedence over any other competing goal.

One corollary of this analysis is that the traditional objectives of our present institutions have far exceeded the proper function of any criminal justice system. Because of this, not only have additional goals not been attained, but their pursuit has impeded the attainment of the only proper concern of a criminal justice system: justice.

Having stipulated what to some must seem obvious—that a criminal justice system should confine its activities to discovering and enforcing justice—it is necessary to determine with greater precision what constitutes restitutionary justice. While a detailed analysis of this concept would take us far beyond the confines of this work, certain basic principles have been identified in the preceding discussion and should be briefly noted here. These principles of justice are universal and apply with equal force to an infinite variety of specific fact situations.

The Parties to a Criminal Action

A restitutionary theory of justice begins with the principle that there are two parties to any criminal action. They are not, as traditionally conceived, the state and the defendant(s), but are, rather, the victim and the defendant. The state, if it is to play any role, would be restricted to mediating the dispute and enforcing the judgement.

This statement of the principle should not minimize the profound difficulties that may be encountered in defining with greater precision whether someone may be considered a "victim" of certain actions. These difficulties will only be surmounted if we are first able to elaborate a theory of rights that defines the specific rights possessed by all individuals and the circumstances under which these rights would be considered violated. Such a theory would be indispensable, for example, in evaluating the claim that certain so-called "victimless crimes" do in fact involve victims and therefore are an appropriate concern of the criminal justice system.

The Principle of Rectification

The criminal act creates an imbalance between the parties that requires rectification. This imbalance results from the fact that the criminal has infringed upon, and thereby denied, the rights of the victim. The nature of this imbalance is most clearly revealed in the

example of stolen property that must be returned to the original owner. In that case, what has been violated is the victim's right to his property. This circumstance differs only in visibility, and not in principle, from any violation of the victim's rights. Because this imbalance arises from a wrongful imposition on the victim, one variant of the theory of restitutionary justice would hold that this wrongful imposition cannot be rectified by simply inflicting unpleasantness—punishment—on the offender. Rather, the criminal act creates a nexus between the offender and his victim that will be removed only when the offender has performed some constructive act of reparation (either a monetary payment or performance of services) for the victim or the victim's heirs.

This act of reparation should be designed to put the victim or the victim's heirs in the position that they would have been in if the original criminal act had never occurred. While it is a truism that nothing can ever fully compensate for the suffering, or even death, of the victim, this unfortunate fact should not be used as a justification for passivity: there is still an obligation to try as best we can to rectify the imbalance that the criminal act has created.

While we feel more comfortable with a theory of constructive, reparative sanctions, as indicated earlier, others, most notably Murray N. Rothbard in Chapter 11, favor another variant of restitutive justice that more nearly approximates the traditional concept of *lex talionis*. The differences between these two variants of restitutive justice cannot be ignored, but we believe that there are far greater similarities which justify their classification as variants of a single paradigm.

Both variants of restitutionary theory hold that an objective, if occasionally somewhat imprecise, proportioning of a sanction can be achieved through an examination of the nature and extent of the criminal act. Perhaps the most difficult challenge confronting the restitutive approach is, as Walter Kaufmann points out, the determination of what constitutes a "just" sanction. The difficulties of such an undertaking cannot be denied, but the promise of a restitutive paradigm is that, unlike current approaches or even a Kantian form of retribution theory, it provides principles to aid the determination.

Once a determination is made, it is the responsibility of the enforcing agency to protect the rights of the criminal as well as the victim by setting an upper limit on the severity of the sanction that may be imposed. This upper limit would be determined on the basis of the severity of the offense. Extraneous factors should not influence this finding, since what is being judged is not the moral worth or

depravity of either the victim or the defendant but the extent to which the defendant's actions created an imbalance between the defendant and the victim.

The Role of the Victim in Sentencing

Since it is the victim whose rights have been violated, it is up to the victim to insist upon the punishment of the criminal or to pardon. The only person who may forgive an offense is the person who suffered the offense. Possible motives influencing the victim's decision may include preventive considerations, prospects for rehabilitation, blind hatred, or compassion and charity. We may seek to educate victims as to goals that any of us feel are appropriate for him to consider, but we cannot remove from the victim's hands the ultimate decision and responsibility for the sanction.

Since third parties lack any standing in a restitutionary theory of justice, the decision to punish the convicted offender cannot be affected by any broader societal concerns except to the extent that these concerns are shared by the victim and influence his or her decision. More broadly, however, an important societal concern is enforced by a restitutionary system of justice since, in handling each instance of criminal behavior, such a system not only reaffirms the victim's rights but assures everyone else in society that their rights will be similarly vindicated if ever transgressed.

While some have expressed the concern that a criminal proceeding could place an undue burden on the victim by assigning him or her such a prominent role in sentencing, early pilot programs suggest that this role could be structured in a manner that will increase, rather than diminish, the victim's security and well-being. Nevertheless, this concern is a real one and the form of a restitutive system will have to be crafted with great care to avoid any unnecessary burden on the victim. Such a consideration may lead to basic reforms in the adversary system.

The Rights of the Accused

The theory of restitutionary justice is based on the recognition that all individuals possess rights by virtue of their humanity. For this reason, the rights of the victim must be rigorously enforced, but we should not lose sight of the fact that those accused of crime are individuals as well and similarly possess certain rights that may not be violated. If the defendant is, in fact, innocent, then that individual possesses the same rights as any other person. Even if the defendant is in fact guilty, then the individual loses his or her rights only to the

extent that his or her actions transgressed against the rights of others and the individual retains all other rights.

Any attempt to structure a criminal proceeding must cope with the fact that our knowledge of the true circumstances of any past criminal act will necessarily be imperfect and yet realize that our ability to do justice in each case will depend on our success in discovering the truth. While we must be prepared to act on the basis of occasionally erroneous information, we should always recall that the rights of each party are determined by the facts themselves and not by the fact that certain procedures were observed in reaching a particular outcome. Thus, a particular criminal proceeding may result in the injustice of convicting an innocent person on the basis of imperfect information, and the fact that certain procedures were observed cannot eliminate the fact that an injustice has occurred. To hold otherwise would seriously undermine our quest for the procedures and institutions that will be most effective in performing the truth-seeking function. This once again underscores the fact that the questions of criminal process are intimately related to the substantive concept of justice and that it is necessary to consider this latter question before one can begin to craft the procedures and institutions of a criminal justice system.

Standards of Proof

It is incumbent on any neutral third party mediating a dispute to establish a standard of proof before it acts to enforce the claim of a victim against a particular accused individual. Only in this way will the third party be able to minimize its potential liability should the accused individual later charge that the third party wrongfully infringed his or her rights on the basis of imperfect information. By explicitly adopting a standard of proof, the third party provides an objective standard by which any outsider may independently judge the correctness of the decision.

A restitutionary theory of justice would require a fundamental reevaluation of the standard of proof presently employed in criminal proceedings by the state. Two alternatives are consistent with a restitutionary theory of justice that recognizes two parties to a criminal action who each possess certain rights:

Preponderance of the Evidence Standard. If the prosecution can prove by a preponderance of the evidence that the defendant is guilty, then the defendant would be judged to have committed the crime and he would be required to attempt to restore the victim. If,

however, the prosecution fails to meet its burden, then the defendant would be judged to be innocent and would therefore be entitled to compensation by the charging authority for the injustice of being forced to participate in the criminal process. The injury may have included physical confinement, loss of income, assorted expenses, and other less tangible injury as well. In this procedure it would be easier to prove a person guilty than in the current system, but this would be offset by the more serious consequences to the charging authorities in the event that they fail to prove their case.

Reasonable Doubt Standard. An alternative method would raise the requisite standard of proof for both sides. In order to be found guilty of the crime, the defendant would have to be proved guilty beyond a reasonable doubt. By the same token, before the defendant could be compensated for being forced to participate in the criminal process, his or her innocence would have to be established beyond a reasonable doubt as well. If neither party could prove its case, then the resultant losses would remain with the parties originally sustaining them.

CONCLUSION

Any theory that involves a set of clear, concise principles will inevitably be accused of "oversimplification." Although this essay has only attempted to outline the restitutionary view in a highly schematic fashion, even a more detailed elaboration of this position would not escape such a criticism. It is an unfortunate fact that any statement of absolute moral principles today is regarded as inherently suspect. The irony is that the dominant utilitarian and empiricist attitudes in our society have produced a legal system that glorifies complexity and is captivated by the verbal sleight of hand. In fact, it is the present criminal process that "overcomplicates" the crime problem by being theoretically unable to choose among conflicting goals and rationales to arrive at a swift, predictable, and just result. While some may still wish to defend the current system by arguing that justice requires careful and slow deliberation, there is a growing awareness that, rather than serving the ends of justice, the delay and confusion pervading the system only result in the classic case of justice denied. We all pay the price for the unprincipled (or, in some cases, false-principled) nature of the current system.

To defend a principled approach to justice, however, is not to minimize the difficulties involved in its application. The tenets of restitutionary justice may be articulated, understood, and internalized, but still present major problems as one seeks to translate these principles into a viable system of criminal justice. Examples of these problems include the attempt to proportion punishment to fit the crime and the obstacles that will be encountered in seeking to administer efficiently a system of restitutionary payments.

Hard cases cannot be eliminated, but the recognition of this fact is not a condemnation of restitution. The proper function of any theory of justice is to discern the complexities inherent in any legal process and to provide the criteria for solving them. A restitutionary paradigm of justice performs this function by confronting the realities of the criminal act, recognizing the respective rights of the parties, and, thereby, pointing the way to a settlement of the dispute that may be ameliorative and constructive, but that is, above all else, just.

a reasonable place in which to begin.[20] However noble the goals, many problems are inherent in research of this type. Much thought must be given to how to enlist the cooperation of all participants. Even those who may not object to youth evaluation and counseling will be concerned about methods, interpretation of findings, and utilization of results. Children must be safeguarded so that they are not inappropriately labeled and thereby stigmatized for life. Nor is it desirable to coercively remove them from their environment as a part of the research. It seems to us that such research is valuable and desirable, providing that individual rights and civil liberties are safeguarded.

Our work has been welcomed in most quarters because it provides more detailed information about the criminal's patterns of thought and action than previously has been available. Once society understands the nature of the criminal with whom it has to deal, some problems can be solved, and others are placed in better perspective. Illusions can be dispelled and unproductive approaches discarded. The complexities lie in resolving difficult moral and philosophical questions. These involve what society is to do with those who have injured others from a very early age, who resist all efforts at habilitation, and from whom we can expect in the future only more of the same. We hope that our findings of the past sixteen years will be useful to policymakers in their attempts to resolve this social problem.

20. The National Council on Crime and Delinquency (1975) asserted, "Apart from the family, the school should be the most important social structure in preventing delinquency" (*The 1975 Thrust of The National Council on Crime and Delinquency* [Hackensack, New Jersey: an in-house publication]).

Chapter 5

Present-Orientedness and Crime

Edward C. Banfield

Since the seventeenth century, political philosophers have maintained that an irrational bias toward present as opposed to future satisfactions is natural to both men and animals and is a principal cause of crime and, more generally, of threats to the peace and order of society.[1] It is to protect men against this irrationality that civil government exists. Hume makes the fullest statement of the case. All men, he says, have a "natural infirmity"—indeed a "violent propension"—that causes them to be unduly affected by stimuli near to them in time or space; this is the "source of all dissoluteness and disorder, repentence and misery," and because it prompts men to prefer any trivial present advantage to the maintenance of order, it is "very dangerous to society." Government is the means by which men cope with this defect of their nature.

1. Most men, Hobbes wrote in *The Citizen* (ch. 2, paragraphs 27 and 32), "by reason of their perverse desire of present profit" are very unapt to observe the dictates of reasons (which are also the laws of nature). If they did observe them, he said in *Leviathan* (pt. 2, ch. XVII) there would be no need for civil government "because there would be peace without subjection."

Spinoza agreed: ". . . in their desires and judgments of what is beneficial they are carried away by their passions, which take no account of the future or anything else. The result is that no society can exist without government and force, and hence without laws to control and restrain the unruly appetites and impulses of men (*Tractatus Theologico Politicus*, ch. V).

For Locke, the "great principle and foundation of all virtue and worth" is placed in the ability of a man "to deny himself his own desires, cross his own inclinations, and purely follow what reason directs as best, tho' the appetite lean the other way. One who does not know how to resist the importunity of present pleasure or pain for the sake of what reason tells him is fit to be done "is in danger never to be good for any thing" (*Some Thoughts Concerning Education*, paragraphs 33 and 45).

> Here, then, is the origin of civil government and society. Men are not able radically to cure, either in themselves or others, that narrowness of soul which makes them prefer the present to the remote. They cannot change their natures. All they can do is to change their situation, and render the observance of justice the immediate interest of some particular persons, and its violation their more remote. These persons, then, are not only induced to observe those rules in their own conduct, but also to constrain others to a like regularity, and, enforce the dictates of equity through the whole society.[2]

The philosophers' perspective is useful for the present purposes for at least three reasons:

1. It emphasizes a fact—now well-established by experimental psychology—that there is an innate (i.e., biologically given) tendency to choose, as between rewards that are otherwise the same, the one that is nearer in time.[3] Although not of equal strength in all organisms of the same species, some degree of present-orientedness is apparently present in all. That the tendency is innate does not, of course, prevent it from being greatly affected by cultural or other nonbiological forces.

According to Rousseau, the passage from the state of nature to the civil state forces man "to consult his reason before listening to his inclinations"; in the civil state man acquires (*inter alia*) "moral liberty, which alone makes him truly master of himself; for the mere impulse of appetite is slavery." The judgment that guides the general will must be "... taught to see times and spaces as a series, and made to weight the attractions of present and sensible advantages against the danger of distant and hidden evils." This makes a legislator necessary. The legislator ought "... to look forward to a distant glory, and, working in one century, to be able to enjoy the next" (*The Social Contract*, bk. I, ch. VIII; bk. II, chs. VI and VII). In *A Discourse on the Origin of Inequality* he explains (in Part One) that the savage is "without any idea of the future, however near at hand" and (in Part Two) that "as men began to look forward to the future, all had something to lose, everyone had reason to apprehend that reprisals would follow from any injury he might do to another." In this situation men "had just wit enough to perceive the advantages of political institutions, without experience enough to enable them to foresee the dangers. The most capable of foreseeing the dangers were the very persons who expected to benefit by them. ..." Law and property, Bentham maintained, exist to restrain and protect "the man who lives only from day to day ... precisely the man in a state of nature." "To enjoy quickly—to enjoy without punishment—this is the universal desire of man; this is the desire which is terrible, since it arms all those who possess nothing, against those who possess anything. But the law, which restrains their desire, is the most splendid triumph of humanity over itself" (*Principles of the Civil Code*, ch. 9 [Works, vol. 2]).

2. David Hume, *An Enquiry Concerning the Principles of Morals*, 1777 ed., sec. 6, pt. 1, paragraph 196. Other quotations are from the *Treatise of Human Nature*, 1740, bk. 3, pt. 2.

3. George Ainslie, "Specious Reward: A Behavioral Theory of Impulsiveness and Impulse Control," *Psychological Bulletin* 82 (1975): 463–96.

2. It calls attention to the diversity of the ways in which present-orientedness may injure the society. Crime is perhaps the most conspicuous of these, but behavior that is antisocial without being illegal, or that is merely unsocial, also arises from present-orientedness and may represent a greater threat to the "quality of life" or, as it used to be called, civilization. However much the social bond is harmed by assaults, robberies, rapes, and the like, it may be even worse harmed by behavior that is merely regardless of others' wishes, needs, interests, and rights.

3. It raises the question of how society may be protected against the consequences of present-oriented behavior and, especially, of the role of government in that connection.

PRESENT-ORIENTEDNESS AS PSYCHOPATHY

For at least three-quarters of a century, psychiatric literature has discussed "the kind of person who seems insensitive to social demands, who refuses to or cannot cooperate, who is untrustworthy, impulsive and improvident, who shows poor judgment and shallow emotionality, and who seems unable to appreciate the relation of others to his behavior. Such persons are commonly called 'psychopaths.' "[4] That extreme present-orientedness is conspicuous among the traits of the psychopath is evident from the following:

> ... psychopaths are characterized by an over-evaluation of the immediate goals as opposed to remote or deferred ones; unconcern over the rights and privileges of others when recognizing that they could interfere with per-

4. Harrison G. Gough, "A Sociological Theory of Psychopathy," *American Journal of Sociology* 53 (March 1948): 365. Gough's theory is strikingly similar to that of Adam Smith in *The Theory of Moral Sentiments*. George Herbert Mead, Gough says, gave what is probably the most acceptable account of the "self" as a link between the individual and the social community, his view being that the self has its origin in communication and the individual's taking the role of the other. Smith's "abstract spectator" comes into being and functions exactly in the manner of Mead's "generalized other." For Smith, as for Mead, it is the internalization of the group's standards that mainly checks impulse. "The pleasure which we are to enjoy ten years hence," Smith writes,

> interests us so little in comparison with that which we may enjoy today; the passion which the first excites is naturally so weak in comparison with that violent emotion which the second is apt to give occasion to, that one would never be any balance to the other, unless it was supported by the sense of propriety [which is the advice, or command, of the abstract spectator]. (pt. IV, ch. II.)

The psychopath, Gough writes, is unable to foresee the consequences of his own acts, especially their social implications, because he is "... deficient in the very capacity to evaluate objectively his own behavior against the group's standards" (Gough, pp. 364–65).

sonal satisfaction in any way; impulsive behavior, or apparent incongruity between the strength of the stimulus and the magnitude of the behavioural response; inability to form deep or personal attachments to other persons or to identify in inter-personal relationships; poor judgment and planning in attaining defined goals; apparent lack of anxiety and distress over social maladjustment as such; a tendency to project blame onto others and to take no responsibility for failures; meaningless prevarication, often about trivial matters in situations where detection is inevitable; almost complete lack of dependability and of willingness to assume responsibility; and finally, emotional poverty.[5]

What David Shapiro calls "neurotically impulsive styles" involve many of the same traits.[6] Neurotically impulsive people are remarkably lacking in active interests, aims, values, or goals much beyond the immediate concerns of their own lives. Neurotically impulsive people usually do not have abiding, long-range personal plans or ambitions. Durable emotional involvements—deep friendships or love—are not much in evidence. Family interests or even personal career goals are usually not strong. When frustrated they show lack of forebearance or tolerance. Their interests tend to shift erratically in accordance with mood or opportunities of the moment and without being subjected to the critical, searching process that is called judgment. One whose style is impulsive tends to be without moral scruples. He is given to what in others would be called insincerity and lying but in him may be better described as a kind of glibness. He seems free of inhibitions and anxieties. Because his awareness is dominated by what is immediately striking and relevant to his immediate need or impulse, the world of the neurotically impulsive person is seen as discontinuous and inconstant—a series of opportunities, temptations, frustrations, sensuous experiences, and fragmented impressions. This style does not necessarily involve lack of intelligence—it *does* involve lack of concentration and of logical objectivity—but intelligence in the subjective world of the neurotically impulsive can function only to arrange speedy action.

THE PRESENT-ORIENTED CULTURE

That cultures (and subcultures) differ greatly in their tendency to reinforce or weaken the natural disposition of the individual to prefer present to future rewards has long been noted. Early in the last century, for example, John Rae recorded, albeit impressionistically, a great many evidences of differences in the time preferences of cultures.[7]

The normal or typical individual in some cultures exhibits a set of traits remarkably like those of the psychopaths of our culture. For example, Mayhew in his *The Life and Labour of the London Poor* (1851) notes of the "vagabond":

> ... his repugnance to regular and continuous labour—his want of providence in laying up a store for the future—his inability to perceive consequences ever so slightly removed from immediate apprehension—his passion for stupefying herbs and roots, and, when possible, for intoxicating fermented liquors—his extraordinary powers of enduring privation—his comparative insensibility to pain—[his] immoderate love of gaming, frequently risking his own personal liberty upon a single cast—his love of libidinous dances—the pleasures he experiences in witnessing the suffering of sentient creatures—his delight in warfare and all perilous sports—his desire for vengeance—the looseness of his notions as to property—the absence of chastity among his women, and his disregard of female honor—and lastly,—his vague sense of religion—his rude idea of a Creator, and utter absence of all appreciation of the mercy of the Divine Spirit.[8]

The Appalachian mountaineer as described by Weller (1965) has a cultural style in many respects similar to the neurotically impulsive one.[9] The mountaineer, Weller writes, does not think ahead or plan; disregard of time is part of his makeup. As a child he learns the *feeling* of words and to grasp nuances of personal relations, but he does not learn to grasp ideas, concepts, or abstractions. He is reared impulsively, permissively, and indulgently, seldom being required to do what he does not want to do. As a youth, he holds few realistic hopes or ambitions, is seldom able to articulate goals, and is even reluctant to talk about the future. As an adult he tends to be capricious, vacillating, and volatile. He tends also to lack a sense of who

5. This is H.J. Eysenck's summary of the article by Gough cited above. It appears in *Crime and Personality* (London: Paladin, 1971), p. 54.

6. David Shapiro, *Neurotic Styles* (New York, Harper Torchbook, 1965). The author says those exhibiting impulsive styles include (among others) most persons usually diagnosed as psychopathic and certain kinds of male homosexuals, alcoholics, and probably addicts (p. 134).

7. "Statement of Some New Principles on the Subject of Political Economy," first published Boston 1834, reprinted in R. Warren Jones, John Rae, *Political Economy*, vol. 2, University of Toronto Press, 1965.

8. Henry Mayhew, *London Labour and the London Poor* (London: Griffin and Co., 1851), vol. I, p. 4. Frederick Engels, writing at almost the same time (although his book was not published in English until 1887) remarked in *The Condition of the English Working Class*; "The failing of the workers in general may be traced to an unbridled thirst for pleasure, to want of providence, and of flexibility in fitting into the social order, to the general inability to sacrifice the pleasure of the moment to a remoter advantage."

9. Jack E. Weller, *Yesterday's People, Life in Contemporary Appalachia* (Lexington: University of Kentucky Press, 1965). Some of the sentences in the paragraph are Weller's own and others are paraphrases.

he is and where he is going—of being a person in his own right. He is self-centered; all that he does has the self at heart. He does not conceive of a "public good" except as it coincides with his "private good." He sees the government as "they" and expects it to care for him. A fatalist, he has no feeling that he himself is to blame for his lot. His life is pervaded by apprehensions and anxieties, however, arising from a lack of self-confidence. His relations with others, even with members of his family, are difficult and uneasy. Married persons tend to lead separate lives and to have little in common. For the mountaineer work is a necessary evil, not an outlet for creativity or a means of fulfillment.

EFFECTS OF PRESENT-ORIENTEDNESS

Insofar as they are expressed in action, the traits associated with present-orientedness (both psychopathic and culturally given) tend to give rise to a characteristic set of social conditions. These in turn support and perpetuate the traits, the relation being that of a "feedback loop." The principal conditions are listed below along with some of the traits that produce them:

Condition	*Traits*
1. Ignorance (including lack of work skills)	Lack of goals, inability to concentrate
2. Poverty and squalor	Improvidence, untrustworthiness, inability to accept discipline of work, fatalism
3. Unplanned births, illegitimacy	Inability to think ahead or to control impulses; lack of feelings of responsibility, lack of moral scruples
4. Weak or broken family (male absent, lack of parental care of children)	Inability to form deep or durable attachments; inability to tolerate frustration
5. Dependency (welfare, borrowing, handouts, etc.)	Preoccupation with self and with immediate wants; lack of anxiety at failure to achieve
6. Poor health	Impulsiveness (fighting, reckless acceptance of risks); inability to think ahead (failure to secure preventive health care); sensual self-indulgence (abuse of alcohol, tobacco, etc.)

Condition	*Traits*
7. Nonparticipation	Feelings of personal inadequacy; preoccupation with self; unwillingness to accept responsibility
8. Crime and delinquency	Lack of moral scruples; inability to control impulses, to identify with others, to exercise critical faculty called judgment; freedom from inhibitions and anxieties

As one would expect, these conditions prevail in the Appalachian community described by Weller.[10] The mountaineer acquires social but not other skills. Work is for him merely a means of making a living and he is satisfied with a very meager one—enough food, clothing, and shelter for survival (acceptance of undesirable conditions is part of his way of life). He is content to live in squalor (he has no time to exhume himself from mounting piles of trash, but he can sit on his front porch swing doing nothing). Births are unplanned and the illegitimacy rate is high. Households are seldom female-headed, but husbands and wives have little in common and tend to lead separate lives. Small children are played with, but older ones are left pretty much to themselves. There is an off-hand attitude toward money, almost as if it did not matter, and impulsive buying of household appliances is common. The mountaineer expects the government to care for him. He does not join neighborhood groups or the larger organizations of the city (he may, however, involve himself impulsively in a community group, the style of which is not impersonal). Contrary to what one might expect, there is little delinquency and hardly any serious crime.

CRIME IN PARTICULAR

It would be an error to suppose that present-orientedness (whether psychopathic or culturally given) necessarily leads to crime. The psychopath who lives among normal people may be kept out of trouble by caretakers of one sort or another—relatives, friends, lawyers, and so on. In a society the culture of which is present-oriented, one's knowledge that others are as hot-tempered as oneself is apt to constitute (despite Hobbes and the other political philosophers) an effective social control. In such a culture, people are likely to go to great length to avoid giving even accidental offense to others, out of fear

10. Ibid. Here again some sentences are Weller's and others are paraphrases.

of provoking quick reprisals. (This may explain the low crime rate in the Appalachian communities. Weller stresses the unwillingness of mountaineers to do anything that neighbors might construe as interference with them or that might otherwise stir ill-will.)

It is evident, however, that a cohort of present-oriented persons could as a rule be expected to commit a good many more crimes of certain types than a matched cohort of persons who are not present-oriented. The qualification "of certain types" is important. Present-oriented people are, of course, incapable of crimes that require them to think and plan ahead to create organization or give it leadership, or even to be dependable.

The crime proneness of the present-oriented person has obvious connections with his characteristic traits. His inability to foresee the consequences of his actions or to control his impulses tends to behavior that, without being malicious, is criminally reckless. His inability to enter into the feelings of others and his lack of moral scruples together with the traits just mentioned may prompt him to brutal acts such as assault and rape. His improvidence, together with his inability to tolerate frustration, may lead to his "taking things" for which he has a present need; if what he needs is illegal—e.g., narcotics—or if he can get what he needs most easily by violence or the threat of it, his "taking" is likely to involve other crimes as well.

For most people, Eysenck has maintained, the most effective deterrents to crime are the anticipatory pangs of conscience.[11] Early conditioning, he has pointed out, produces a disincentive—namely, the autonomic anxiety and fear reaction provoked by the idea of the crime—that is felt almost simultaneously with the temptation to the criminal act and before any possible gain can be had from it. The impulsive (present-oriented) person is resistant to early conditioning and has had little of it. Therefore, although he is usually aware of what society deems "right" and "wrong," he does not experience the unpleasant subjective state ("pangs of conscience") that for the person who has had early conditioning is usually a sufficient deterrent. It is possible, Eysenck acknowledges, that a child may be conditioned in the "wrong" direction—that is, toward behavior that society wants suppressed.[12] This, presumably, is common in present-oriented cultures.

The threat of punishment at the hands of the law is unlikely to deter the present-oriented person. The gains that he expects from his illegal act are very near to the present, whereas the punishment that

11. Eysenck, pp. 120–123.
12. Ibid., p. 146.

he would suffer—in the unlikely event of his being both caught and punished—lies in a future too distant for him to take into account. For the normal person there are of course risks other than the legal penalty that are strong deterrents: disgrace, loss of job, hardship for wife and children if one is sent to prison, and so on. The present-oriented person does not run such risks. In his circle it is taken for granted that one gets "in trouble" with the police now and then; he need not fear losing his job since he works intermittently or not at all, and as for his wife and children, he contributes little or nothing to their support and they may well be better off without him.

THE PROSPECT

In countries in which irreligion and democracy coexist, de Tocqueville wrote, the instability of society fosters the instability of man's desires, hiding the future and disposing men to think only of tomorrow.[13] Moralists ought therefore to teach their contemporaries that it is only by resisting a thousand petty passions of the hour that the general and unquenchable passion for happiness can be satisfied. Men in power ought to strive to place the objects of human actions far beyond man's immediate range and, above all, to make it appear that wealth, fame, and power are the rewards of labor, not chance.

Since de Tocqueville's day, moralists have largely succeeded in persuading their contemporaries that, God being dead and existence absurd, what matters is the full and unfettered expression of self. Men in power, meanwhile, have responded to the growth and spread of democracy (why did de Tocqueville not anticipate this?) by placing the objects of human action so as to assure their reelection.

Other forces have combined with irreligion and democracy to make the predominant style of modern culture ever more present-oriented or, if the reader prefers, less future-oriented. The rapid growth and spread of affluence, the transfer to the state of most responsibility for providing for the individual's future, the extension of higher education to the masses (education that exalts self, sentiment, and expression while deriding institutions, reasons, and subordination to a common good)—these influences have been powerful in recent decades and there is every reason to expect them to be so for a long time to come. The sudden and tremendous increase in the number and proportion of young people in the 1960s—young people who had money in their pockets and so were free of all constraints—dramatically strengthened these forces.

13. Alexis de Tocqueville, *Democracy in America*, vol. 2 (New York: Knopf, 1948), ch. 17.

As the predominant cultural style becomes ever more hostile toward authority, discipline, and all constriction of individuality, and ever more indulgent toward self-expression, one must expect to see more frequently displayed the traits and conditions associated with present-orientedness. Except as children internalize "a stringent morality based on fear and trembling," Bettleheim warns, they will live out their lives on a primitive ego, one which prefers the experience that gives immediate pleasure, and, although they may acquire bits of knowledge and skill, they will remain essentially uneducated and uneducable.[14] The more present-oriented the culture, it seems safe to say, the less stringent will be its morality and the less that morality will be based on fear and trembling. In the more relaxed and permissive culture that is coming (if it is not already here), personalities that are now judged psychopathic or neurotically impulsive will be considered normal or, at any rate, not remarkable. As those who have not learned in childhood to control their impulses become more numerous, more caretakers will be required to guide and check their conduct. If a considerable degree of present-orientedness is the norm of the culture, where are these caretakers to be found?

In the society that has overcome all concern for the future, the voice of conscience will be so still and soft as to be nearly inaudible. What for most people is still by far the most important deterrent to crime and, more generally, to socially undesirable behavior will be weakened accordingly. As for the deterrent effect of law and the machinery of law enforcement, that, even in the present state of the public mind, is generally of very little effect. In the society that does not concern itself with the future, even the pretense of such deterrence may be given up. "It is possible to imagine," wrote a prophet of the self-expressive culture, "a society flushed with such a sense of power that it could afford to let its offenders go unpunished. What greater luxury is there for a society to indulge in? 'Why should I bother about these parasites of mine?' such a society might ask. 'Let them take all they want. I have plenty.' Justice, which began by setting a price on everything and making everyone strictly accountable, ends by blinking at the defaulter and letting him go scot free."[15]

14. Bettleheim, in Nancy F. and Theodore R. Sizer, *Moral Education* (Cambridge: Harvard University Press, 1970), p. 90.

15. Friedrich Neitzsche, *The Genealogy of Morals* (New York: Macmillan, 1897), Essay 2, sec. 10.

Chapter 6

Professor Banfield on Time Horizon: What Has He Taught Us About Crime?

Gerald P. O'Driscoll, Jr.

INTRODUCTION

Although Professor Banfield's *Unheavenly City*[1] is controversial, I find it a very level-headed, carefully argued essay on urban problems. It is a work that is as intellectually stimulating as Jane Jacob's *Economy of the Cities*, that great paean to urban economy. In many respects these two books are complementary, for they combine to present a balanced view of the central place of the city in social and economic development, and to refute those who advocate a rural and agrarian ideal, glorifying a life that men have been fleeing for centuries.

Banfield's treatment of urban crime is surely one of the more controversial parts of this controversial book. I will argue, however, that his theory of the time horizon, which he uses in his analysis of criminal behavior, is well grounded in economic theory. Ironically, my major criticism of Banfield concerns a similarity in his treatment of policy toward crime with that of the recent economics of crime literature.

The first section of this chapter deals with Banfield's treatment of the role time preference plays in criminal behavior. After showing how well grounded in pure economic theory is his approach, I examine the recent economics of crime literature and relate Banfield's theory to this burgeoning subdiscipline in economics. I argue that he is at his best precisely where he keeps his distance from this sub-

1. All references to Banfield are to *The Unheavenly City Revisited* (Boston: Little, Brown and Co., 1974).

discipline; and his arguments are weak insofar as he shares a common conceptual framework with economists of crime. In the final section, I suggest the need for an alternative approach to social policy toward crime.

THE ECONOMIC BASIS OF PROFESSOR BANFIELD'S THEORY

Time Preference and Crime

In treating a wide range of urban problems, including crime, Banfield employs "class" in a special sense. He defines class in terms of a set of attitudes, rather than an income flow. He argues that what members of a social class in the United States share is "a characteristic patterning that extends to all aspects of life: manners, consumption, child-rearing, sex, politics, or whatever."[2] Banfield sought out a principle to explain the "association of the many, heterogeneous traits that have been found to constitute each 'district patterning.' "[3] For his purpose—"analysis of social problems from a policy standpoint"—he found "psychological orientation toward the future" as "the most promising principle."[4] In Banfield's words:

> The theory or explanatory hypothesis . . . is that the many traits that constitute a "patterning" are all consequences, indirect if not direct, of a time horizon that is characteristic of a class. Thus, the traits that constitute what is called lower-class culture or life style are consequences of the extreme present-orientation of that class. The lower-class person lives from moment to moment, he is either unable or unwilling to take account of the future or to control his impulses. Improvidence and irresponsibility are direct consequences of this failure to take the future into account (which is not to say that these traits may not have other causes as well), and these consequences have further consequences: being improvident and irresponsible, he is likely also to be unskilled, to move frequently from one dead-end job to another, to be a poor husband and father. . . .[5]

It is most important to observe here what Banfield is at great pains to remind the reader: "members of a 'class' as the word is used here are people who share a 'distinct patterning of attitudes, values, and

2. Ibid., p. 53.
3. Ibid.
4. Ibid.
5. Ibid., p. 54. Banfield continues: "The working class is more future-oriented than the lower class but less than the middle class, the middle class in turn is less future-oriented than the upper. At the upper end of the class-cultural scale the traits are all 'opposite' those at the lower end."

modes of behavior,' *not* people of like income, occupation, schooling or status."[6]

To understand the relevance of Banfield's class analysis to criminal behavior, one must consider the traits of the lower class person:

> If he has any awareness of a future, it is of something fixed, fated, beyond his control: things happen *to* him, he does not *make* them happen. Impulse governs his behavior, either because he cannot discipline himself to sacrifice a present for a future satisfaction or because he has no sense of the future. He is therefore radically improvident:, whatever he cannot use immediately he considers valueless. His bodily needs (especially for sex) and his taste for "action" take precedence over everything else—and certainly over any work routine. He works only as he must to stay alive, and drifts from one unskilled job to another, taking no interest in his work.[7]

Having considered the "pathology" of the lower class person,[8] let us examine his place of habitation: the slum. "The slum . . . is an expression of his tastes and style of life."[9] Banfield describes three characteristics of the slum: It is "a place of excitement," a "place of opportunity," and a "place of concealment."[10] The excitement of the slum is of central importance to the lower class individual because his life is a constant search for action.[11] Moreover, the lower class person is often one who defines his life in terms of the group.

Banfield quotes another source as follows: "The goal of group life is constant excitement. Its behavior is episodic; an endless period of "hanging around," punctuated by short adventures undertaken by the group as a whole or by individuals. Life thus tends to be immediate and sensational; past adventures are continually recalled and the future is not anticipated."[12]

The slum is a "place of opportunity" chiefly for the purchase of illegal goods and the performance of illegal acts. Concealment is valuable as it provides escape from capture and censure.[13] The

6. Ibid., p. 56. Banfield remarks that: "A lower class individual is likely to be unskilled and poor, but it does not follow from this that persons who are unskilled and poor are likely to be lower class. (That Italians eat spaghetti does not imply that people who eat spaghetti are Italian!)"
7. Ibid., p. 61.
8. Ibid., p. 63. Banfield views lower class behavior as pathological. Indeed, he employs "normal" to refer to "class culture that is not lower class."
9. Ibid., p. 71.
10. Ibid., p. 72.
11. Ibid.
12. Ibid., p. 123. Banfield quotes from Peter B. Doeringer and Michael J. Piore, *Internal Labor Markets and Manpower Analysis* (Lexington, Massachusetts: Heath Lexington Books, 1971).
13. Ibid., p. 72.

people of the slum lead lives that tend to make criminal activity attractive relative to a life that is crime free. The episodic and present-orientedness of their lives makes crime, which is often episodic in nature and which offers immediate rewards, seem relatively attractive.[14] Moreover, the attitudes and qualities of lower class slum life reduce employment opportunities in legitimate endeavors.[15] The rewards of criminal activity are relatively high, and the costs, in terms of foregone income in legitimate activities, are relatively low. In short, the slum is conducive to criminal behavior.

My chief concern is with Banfield's emphasis on the high time preference (i.e., the short time horizon) of lower class individuals. Indeed, he has defined classes in terms of their orientation toward the present. In bringing his class analysis to bear on criminal behavior, Banfield sees "an element of calculation—indeed, a very considerable one—in practically all criminal behavior."[16] He then summarizes the increasingly prevalent view of crime: "The present scheme implies that when probable costs exceed probable benefits, an individual will not commit the crime. Indeed, he will not commit it even when probable benefits exceed probable costs if another [noncriminal] action promises to be *more* profitable."[17]

Banfield echoes other work on the economics of crime, such as Isaac Erlich's, which amplifies the choices facing a potential criminal:

> Any violation of the law can be conceived of as yielding a potential increase in the offender's pecuniary wealth, his psychic well-being, or both. In violating the law one also risks a reduction in one's wealth and well-being, for conviction entails paying a penalty (a monetary fine, probation, the discounted value of time spent in prison and related psychic disadvantages, net of any direct benefits received), acquiring a criminal record (and thus reducing earning opportunities in legitimate activities), and other disadvantages. As an alternative to violating the law one may engage in legal wealth—or consumption—generating activity, which may also be subject to specific risks. The net gain in both activities is thus subject to uncertainty.[18]

14. There are undoubtedly crimes that involve great sacrifice of present enjoyment for relatively distant future (criminal) return. But this would obviously not be the type of crime committed by Banfield's lower class. It does not seem that the existence of this type of foresightful criminal behavior requires modification of Banfield's analysis of the type of crime considered by him in *The Unheavenly City Revisited*. He does seem to see lower class crime as the most important kind of urban crime.

15. Ibid., pp. 122–26.

16. Ibid., p. 181.

17. Ibid. Strictly speaking, cost is the highest valued alternative foregone. The noncriminal activity would here represent the relevant economic cost. In this case, then, costs of criminal activity do exceed the benefits.

On one hand, Banfield eschews any reference to a "criminal type."[19] Yet he notes the importance of "class-cultural and personality factors [that] enter into the individual's cost-benefit calculus, making him more or less ready to accept one or another type of criminal opportunity (or criminal opportunity in general)."[20] One of these factors is the individual's time horizon:

> This refers to the time perspective an individual takes in estimating costs and benefits of alternative courses of action. The more present-oriented an individual, the less likely he is to take account of consequences that lie in the future. Since the benefits of crime tend to be immediate and its costs (such as imprisonment or loss of reputation) in the future, the present-oriented individual is ipso facto more disposed toward crime than others.[21]

Banfield notes that a number of the other "elements of propensity" toward crime tend to go together with a short time horizon: diminished ego strength, fondness for risk,[22] and little distaste for doing bodily harm to particular individuals.[23]

Before considering further the implications of Banfield's analysis, I will examine the theoretical foundations of his treatment of the time horizon of various individuals and classes. Among those appealing to the economic motivation behind crime, Banfield is unique in placing so much emphasis on the criminal's attitude toward the future. He does bring in other influential factors (e.g., fondness for risk) that are important in most economists' treatment of crime. But he has placed a great burden on his class analysis in explaining criminal behavior. And his definition of class is dependent on his theory of the time horizon.

18. Isaac Erlich, "Participation in Illegitimate Activities: A Theoretical and Empirical Investigation," *Journal of Political Economy* 81 (May–June 1973): 523.

19. Banfield, p. 181. Cf. Erlich, pp. 521–22.

20. Banfield, pp. 181–82.

21. Ibid., p. 183. The benefits of the episodic crime for those who live the "group life" are especially immediate, and thus this analysis is especially suited to slum life. But see n. 14.

22. Economists typically emphasize the importance of risk preference or risk avoidance in explaining criminal behavior. For instance, see Erlich, pp. 524–29.

23. Banfield, pp. 182–83.

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Professor Mises on Time Preference

The comparatively small emphasis that economists place on the role of time in explaining criminal behavior surely reflects the diminished importance of this factor in economics generally. Economists' constructions of pure economic theory are largely timeless. Even where time is considered in economic analysis, it is often treated in an essentially ad hoc manner. But "time" in these constructions does not really change the pure logic of the otherwise timeless analysis. Time does enter in a way that produces consequences that alter economic analysis substantially.

The current state of affairs is in marked contrast to the treatment accorded time in the works of the Austrian School of Economics, from the work of its founder, Carl Menger,[24] down to the present. Perhaps nowhere else is time accorded a more central place than in the work of the late Ludwig von Mises. More to the point, his development of the pure theory of time preference is directly relevant to Banfield's application of time preference analysis.

Mises wished to reconstruct economics so as to dispel the residual feeling, too often shared by economists, that economics is merely the science of wealth. For Mises, economics is "much more than merely a theory of the 'economic side' of human endeavors and of man's striving for commodities and an improvement in his material well-being."[25] Consequently, as Mises argued, "It is no longer enough to deal with economic problems within the traditional framework. It is necessary to build the theory of catallactics upon the solid foundation of a general theory of human action, praxeology."[26]

Being a Kantian, Mises treated time preference as a category of action.[27] All action is future-oriented, as Mises argued in the following passage:

24. In his *Principles of Economics*, Menger argued that: "A process of change involves a beginning and a becoming, and these are only conceivable as processes in time. Hence it is certain that we can never fully understand the causal interconnections of the various occurrences in a process, or the process itself, unless we view it in time and apply the measure of time to it." Carl Menger, *Principles of Economics*, trans. and ed. James Dingwall and Bert F. Hoselitz (Glencoe, Illinois: The Free Press, 1950), p. 67.

25. Ludwig von Mises, *Human Action: A Treatise on Economics*, 3rd ed. rev. (Chicago: Henry Regnery Co., 1966), p. 3.

26. Ibid., p. 7.

27. Ibid., p. 100: "It is acting that provides man with the notion of time and makes him aware of the flux of time. The idea of time is a praxeological category." Also: ". . . All human action is necessarily dominated by a definite categorical element which, without any exception, is operative in every instant of action."

> Action is always directed toward the future; it is essentially and necessarily always a planning and acting for a better future. Its aim is always to render future conditions more satisfactory than they would be without the interference of action. The uneasiness that impels a man to act is caused by dissatisfaction with expected future conditions as they would probably develop if nothing were done to alter them. In any case, action can influence only the future, never the present that with every infinitesimal fraction of a second sinks down into the past. Man becomes conscious of time when he plans to convert a less satisfactory present state into a more satisfactory future state.[28]

Action involves a plan in response to a present dissatisfaction with expected future conditions. We only act in the present moment;[29] but our action is capable of influencing not the present moment in which we find ourselves, but only the more or less distant future.[30]

Time enters into human action in two ways. Allocation of resources involves provision for the future. But individuals can provide for the future in a variety of ways, some more productive of good than others. A period of preparation is necessary in any endeavor.[31] This period of preparation is what Mises called the "period of production." Thus, the period of production is the investment or construction period.[32] But, as Mises continually emphasized, these purely "economic" concepts are derivative from general categories of action.[33]

There is also a period of provision: "the fraction of future time for which the actor in a definite action wants to provide in some way and to some extent."[34] Some individuals are provident, some

28. Ibid.

29. Ibid. "The present is . . . nothing but an ideal boundary line separating the past from the future."

30. Sometimes the interval of time between an action and its effects is so small as to be ignored in practice. This situation may be what people mean when they say that someone is acting entirely in the present. Cf. Mises, p. 101.

31. Ibid., p. 479.

32. Friedrich A. Hayek, *The Pure Theory of Capital* (Chicago: University of Chicago Press, 1941), p. 69.

33. Mises, p. 480: ". . . The period of production as well as the duration of serviceableness are categories of human action and not concepts constructed by philosophers, economists, and historians as mental tools for their interpretation of events."

34. Ibid., p. 481. Mises discussed yet another time dimension, "the duration of serviceableness"—the durability of an economic good. In reality, this involves no *further* consideration of time than the two already adduced. But the economics of the problem (i.e., the durability of goods) are extremely complex. See Hayek, pp. 66–67.

improvident. In this technical language, the former have a longer period of provision, the latter, a shorter period.[35]

Banfield's concept of the time horizon seemingly comprises both the period of production and the period of provision. Thus the upper class individual "looks forward to the future of his children, grandchildren, great-grandchildren (the family 'line'), and is concerned also for the future of such abstract entities as the community, nation, or mankind."[36] In short, what is being described is an individual with a rather extended period of provision. Moreover, this individual "has strong incentives to 'invest' in the improvement of the future situation—i.e., to sacrifice some present satisfaction in the expectation of enabling someone (himself, his children, mankind, etc.) to enjoy greater satisfactions at some future time."[37] The willingness to invest governs how long a period of production of a good[38] an individual will accept.

At the other end of the class-cultural scale is the lower class individual, who has been described previously. The radical improvidence of the lower class individual, described by Banfield, seems to consist both of a short period of provision, and an unwillingness to invest (i.e., to accept) a long period of production for a good.[39]

Thus far we have observed that Banfield deals with a "more or less" problem: For how far into the future does one provide? For a given future good (which may even be for "the community, nation, or mankind"), how much of a present satisfaction will an individual sacrifice? On the other hand, Mises dealt with the fact that all action is future-oriented, but seemingly not with Banfield's problem. Time preference refers to the general preference, other things equal, for satisfaction sooner rather than later.[40] But there are degrees of this time preference.

35. Words like "provident" and "improvident" have pejorative connotations. Yet they can also be used merely to indicate relative positions on a scale of provision for the future. It is in this latter sense that economists usually employ such terms, and such is my sense. At the conference it was asserted that when Banfield uses such phrases as "radically improvident" to describe lower class behavior, he is expressing his (undefended) values. Whether this is true or not, it would be beyond the scope of this paper to deal with such usage. Suffice to say, such usage need not express approval or disapproval. I am not using the words to do so, and neither Banfield's nor my arguments depend on their value-laden connotations.

36. Banfield, p. 57.

37. Ibid.

38. "Good" here is being used in the most general sense of economics, to refer to anything that is the object of a desire and that consequently yields satisfaction.

39. Ibid., pp. 61–62.

40. Mises, p. 483. "Satisfaction of a want in the nearer future is, other things being equal, preferred to that in the farther distant future. Present goods are more valuable than future goods."

The existence of time preference is demonstrated by the fact that men consume at all: "If he were not to prefer satisfaction in a nearer period of the future to that in a remoter period, he would never consume and so satisfy wants. He would always accumulate, he would never consume and enjoy. He would not consume today, but he would not consume tomorrow, either, as the morrow would confront him with the same alternative."[41]

An individual typically does not consume all his resources. The extent to which an individual is willing to defer present satisfaction for future good is a measure of the degree of that individual's time preference. The greater his time preference—that is, the greater the desire for present relative to future satisfaction—the shorter will be the period of production used, and generally, the shorter will be the period of provision. The higher an individual's time preference, the more that individual is like Banfield's lower class individuals. And conversely, the lower his preference for present relative to future satisfaction, the more this individual resembles Banfield's upper class individual.

The higher one's time preference, the less he values future satisfaction, and consequently, the less he is willing to sacrifice for it. In other words, the higher an individual's time preference, the greater is his *discounting* of future events. The greater an individual's discounting of future events, the less do events removed in time impinge on him. In economic terms, such as individual places a lower *present value* on these future events. Banfield's lower class individuals are those who heavily discount the future, and who act accordingly. His upper class individuals discount the future less heavily, and also act accordingly.

Neither Banfield nor Mises need commit themselves to any particular psychological theory of what causes individuals to have a high or low time preference. In particular, Banfield eschews taking a position on the psychological question when he expresses neutrality on the "social heredity" and "social machinery" explanations of behavior.[42]

Banfield has produced an imaginative and fruitful taxonomy that implicitly makes use of the praxeological category of time preference. He has constructed ideal types of lower, working, middle and upper

41. Ibid., p. 484.

42. Banfield, p. 56. "The time-horizon theory does not prejudge this question. It merely asserts that the traits constituting a culture or life style are best understood as resulting from a greater or less ability (or desire) to provide for the future." See also Mises, pp. 486–87.

class behavior, applying his analysis to a wide range of problems, including urban crime.[43] Precisely because he deals with ideal types, Banfield is innocent of the charge of having engaged in hyperbole.[44] While he has scarcely demonstrated conclusively the empirical importance of these ideal types—chiefly because of the near impossibility of ascertaining the numbers in each class—this is scarcely of great moment for our *understanding* of the tendencies produced by extreme present orientation. Moreover, he is correct in his observation that the patterning of traits is a widely observed phenomenon. If this patterning is not explained by orientation toward the future, it must be explained some other way.[45] Finally, as argued above, Banfield's positive analysis is well grounded in economic theory. Before considering his normative recommendations, I must turn to Banfield's place in the economics of crime literature.[46]

BANFIELD AND THE ECONOMICS OF CRIME

Economists generally avoid appeals to differences in tastes in their analysis of human behavior and focus instead on the incentives facing

43. Banfield, p. 54 (footnote reference omitted): "It must be understood that the perfectly present- and future-oriented individuals are ideal types or constructs; the time horizon theory is intended as an analytical tool, not as a precise description of social reality." On ideal types and praxeological categories, see Mises, pp. 59–64, 251–56.

44. Banfield, p. 158. Save perhaps when he states that the "lower class child's conceptual universe lacks the dimension of time; in such a universe people rarely try to change things."

45. Ibid., pp. 56–57. It is worth noting in passing that Mises hinted at an application of time preference analysis to some of the areas that Banfield addresses. See Mises, pp. 15–17.

46. Recent examples of this literature are: M.K. Block and J.M. Heineke, "A Labor Theoretic Analysis of the Criminal Choice," *American Economic Review* 65 (June 1975): 314–25; Erlich, "Participation in Illegitimate Activities"; id., "The Deterrent Effect of Capital Punishment: A Question of Life and Death" *American Economic Review* 65 (June 1975): 397–417; Richard B. McKenzie and Gordon Tullock, *The New World of Economics* (Homewood, Illinois: Richard D. Irwin, 1975); Llad Phillips, Harold L. Votey, Jr., and Darold Maxwell, "Crime, Youth, and the Labor Market," *Journal of Political Economy* 80 (May–June 1972): 491–504; Thomas F. Pogue, "Effects of Police Expenditures on Crime Rates: Some Evidence," *Public Finance Quarterly* 3 (January 1975): 14–45; David Lawrence Sjoquist, "Property Crime and Economic Behavior: Some Empirical Results," *American Economic Review* 63 (June 1973): 439–46; and Ann Dryden Witte, "Testing the Economic Model of Crime on Individual Data" (Chapel Hill, North Carolina: Photocopy, 1976). Further bibliography is available in each of these. Even Wertheimer adapts this line of reasoning in parts. See Alan Wertheimer, "Deterrence and Retribution," *Ethics* 86 (April 1976): 181–99. The classic article in this literature, which dictated the form of much subsequent research, is Garry S. Becker, "Crime and Punishment: An Economic Approach," *Journal of Political Economy* 78 (March–April 1968): 169–217.

decisionmakers. This professional precept comes very close to being a methodological rule.[47] Economists adopt this procedure for several reasons. Two considerations perhaps dominate. Tastes demonstrably vary among people. Knowledge of this fact is one of the common experiences that we all share and upon which we can draw in our social analysis. Since they vary so much, differences in tastes could conceivably *always* be an important factor in explaining individual behavior, especially "abnormal" (e.g., criminal) behavior. But an explanation that can explain (nearly) everything is of limited scientific usefulness. At the very least, then, economists would fall back on explanations couched in terms of taste differences only as a last resort.

Also relevant is the positivist nature of modern economics. Economists place great emphasis on the ability to predict behavior on the basis of models constructed with relatively few variables, which involve stable relationships between the independent and dependent variables. The variables with which economists deal must necessarily be objective and quantifiable; taste variables are neither.[48] Consequently, economists concentrate on constraint variables, as these are believed typically to be both objective and quantifiable.[49] The desires for scientific explanation and prediction reinforce each other in economic research.[50]

But see also Gordon Tullock, "The Welfare Costs of Tariffs, Monopolies and Theft," *Western Economic Journal* 5 (1967): 224–32.

47. The strongest recent statement of this rule is made in George J. Stigler and Gary S. Becker, *"De Gustibus Non Est Disputandum,"* *American Economic Review* 67 (March 1977): 76–90.

48. Erlich, "Participation in Illegitimate Activities," p. 537. Erlich's approach to the economics of crime is typical of what I am describing: "Since psychic elements cannot be accounted for explicitly in an empirical investigation, it will be necessary to modify equations . . . by separating quantifiable from nonquantifiable variables."

49. Economists thus focus on *cost* differences rather than *taste* differences. Costs are believed to be objective and quantifiable. While this is widely believed among economists, it is not true. Costs reflect tastes rather than objective or technological conditions. See James M. Buchanan, *Cost and Choice* (Chicago: Markham Publishing Co., 1969); Gerald P. O'Driscoll, Jr., "The Problem of Social Cost" (Ames, Iowa: Photocopy, 1976); also see the discussion in the text below. In a much more narrowly focused argument, Block and Heineke offer a criticism of the treatment of costs entirely in monetary terms. See Block and Heineke, pp. 319–23.

50. Yet another, sociological, reason might well be adduced for economists' attitudes on this question. The nonspecialist will tend to attribute seemingly strange or idiosyncratic behavior to individuals' unique preferences. The ability to identify differences in taste requires no specialized knowledge. The ability to identify the relevant constraints, and to analyze their effects on behavior, does require specialized knowledge. Consequently, to write and speak in terms of constraints rather than in terms of tastes serves to identify economists as competent practitioners of their profession to other economists.

For these two major reasons, and perhaps others, economists avoid explanations that appeal to the criminal type. Banfield evidently adopts an economic approach to crime by doing likewise. *The Unheavenly City Revisited* would thus belong in the mainstream of the literature on the economics of crime. But the relationship between this book and the economic research on crime is more superficial than real. For Banfield has presented us with a theory of the criminal type: the lower class slum dweller.[51] This individual lives in an environment that presents him with numerous and daily opportunities for crime. Moreover, Banfield tells us, in opposition to the prevailing view on the subject, the lower class slum dweller lives there because he *prefers* to do so. Lower class individuals do not want middle class life: "The dangers and seductions . . . of the lower class world are life itself."[52] Given their high time preference, their episodic existence, and other traits that render them relatively unfit for the performance of legitimate jobs, lower class individuals have an inherent predisposition or "taste" for criminal life.

We now see why economists have generally avoided reference to the time preference of criminals versus that of noncriminals. To have emphasized any such differences would have gone against the fiction adopted by economists that tastes are the same for all individuals and that individuals merely face different constraints or opportunity sets.[53]

On the other hand, Banfield's analysis makes differences in time preference central to the social analysis of criminal behavior, because class is of central importance in understanding criminal behavior. The radically present-oriented individual is more disposed toward a life of crime than are those with a lower time preference.[54] This disposition affects his calculation of the costs and benefits of crime. In particular, the present orientation of lower class individuals makes them less influenced by the prospect of even severe punishment.

> The threat of even very stiff penalties would not have a deterrent effect upon radically present-oriented individuals. It is likely that even to a normal person a punishment appears smaller the farther off in the future it lies. With the radically present-oriented, the distortion of perspective is much greater: a punishment that is far enough off to appear small to a normal person appears tiny, or is quite invisible, to a present-oriented one. His calculus of benefits and costs is defective, since benefits are in the present where he can see them while costs are in the future where he cannot. Accordingly, even if he knows the probability of his being caught is high and that the penalty for the crime is severe, he may commit it anyway; no matter how severe, a penalty that lies weeks or months away is not a part of reality for him.[55]

Two points must be noted. First, if Banfield is correct about the importance of time preference in understanding criminal behavior, then his analysis helps to rationalize the other wise anomalous findings of researchers on the deterrence of punishment. Thus far the tendency has been to suggest that changes in the probability or severity of punishment have differential effects on different types of crime.[56] Banfield's analysis suggests that there are different types of criminals, and that the differences in class, or present orientation, of different types of criminals may be the key factor in the effectiveness of punishment. And, in particular, the archetypal criminal type—the lower class urban slum dweller—will be little affected by the threat of punishment in the relatively distant future, even if there is a high probability of being caught and punished—which demonstrably there is not for almost all crimes.[57] It cannot simply be argued that the lower class will nonetheless respond to marginal changes in the probability and severity of punishment;[58] the relevant punishment may be so far in the future as to be beyond the period of provision of the lower class individual. Or the punishment may be so far away that marginal changes, calculated at the lower class individual's high rate of time discount, may go unnoticed. This is particularly true for crimes that already have severe punishment.[59] Poor and conflicting statistical results in economic studies of crime may very well reflect

51. The reader is reminded that "lower class" does *not* refer to people of modest means, or to any particular race or ethnic group; the term refers to people of all these groups who possess certain attitudes and tastes.

52. Banfield, p. 238. But this is not true of slum dwellers who belong to other than Banfield's lower class. And he suggests that it may not even be true of lower class women. Moreover, other factors beyond the control of the lower class individual could conceivably be responsible for their "taste" for slum life. This latter is an open question.

53. Stigler and Becker have elevated this fiction to the status of a virtual axiom in economics.

54. This is at least true of the type of crime that Banfield considers. See n. 14.

55. Banfield, pp. 63, 201. It is true, of course, that the relatively distant future is more heavily discounted, or evaluated as less important, by all individuals than is the present or relatively near future. This follows from the theory of time preference. The reader should remember that for Banfield "normal" is a technical term. It refers to a class culture that is other than lower class. Banfield argues that this definition is not arbitrary, but that it corresponds to our perception of what is acceptable and what is pathological behavior.

56. Erlich, "Participation in Illegitimate Activities," pp. 532, 545; and Witte, pp. 16–19.

57. Banfield, pp. 199–203.

58. Erlich, "Participation in Illegitimate Activities," p. 522.

59. Banfield, pp. 199–200.

this problem that Banfield has brought to our attention. This would be especially likely if certain types of crime attract lower class individuals' participation, while other types of crime do not.

Second, positivist economists to the contrary notwithstanding, it is impossible to explain very much even in economics without recourse to tastes and other subjective categories. When two members of the same income class, apparently facing the same opportunities, etc., engage in mutually beneficial trade, one is virtually compelled to appeal to differences in preferences to explain this exchange. If one such individual borrows and another lends a sum of money, surely this reflects differences in their time preferences.[60] It is simply a fact of life that some true hypotheses in economics are not verifiable in fact, though they may be in principle.[61]

It might also be noted in passing that it is increasingly accepted in economics that what is a constraint—part of the given data—in one situation is an object of choice in another context. It is not unreasonable to argue that we choose many of those conditions—indeed, a large part of our environment—that appear later both to us and to outside observers as binding constraints that influence all future decisions. Certain tendencies in human capital theory, for example, treat virtually all lifetime situations as having been rationally chosen, though these later appear as constraints in subsequent decisions. To focus attention only on the constraints facing an individual at a given moment, without noting that these selfsame constraints are the outcome of past choices (which reflect tastes) does seem out of step with this other tendency.[62]

The practical relevance of these considerations enters when one considers various policies toward social problems. If the way of life of the lower class has little to do with their money incomes, then attempting to alleviate lower class living conditions by means of supplementing earned incomes may very well be a futile gesture.[63] Likewise, if one believes that crime is largely the result of constraints on those who become criminals (e.g., poverty), where these constraints are largely beyond the individuals' control, then one will be inclined to recommend policies considerably at variance with those that one would select if one saw the problem as reflecting pathological attitudes on the part of the criminal.[64] Thus conclusions such as the following make sense or not in a utilitarian framework (a framework that will be challenged in the final section) depending on one's attitude toward the causes of criminal behavior: "With respect to public policy, the findings of this study support a tentative conclusion that criminal activity may be better controlled by reducing poverty and racial discrimination than by increasing police spending and employment and the severity of capital punishment."[65] In short, then, it is being argued that contrary to what he says about his work, Banfield has produced a theory of the criminal type: the lower class slum dweller. He certainly has not overlooked the role of "inducement" to crime. Here his approach is similar to that of most economists of crime. But in emphasizing the factor of time preference, he has gone beyond the literature on the economics of crime.[66] He takes account of the basic factors that they consider, while at the same time emphasizing a factor that they have overlooked. Yet his results cast doubt on the relevance of the standard models of rational calculation. For they suggest that the actions of a substantial portion of the

60. The reader may find it odd that the author is devoting so much effort to demonstrating the "obvious," *viz.*, that different people have different tastes. The author shares the reader's frustration, for it makes little sense to him that scholars would ever have let themselves be boxed into the intellectual corner in which they felt compelled to *deny* what is obvious.

61. F.A. Hayek, *Full Employment at any Price?* (London: Institute of Economic Affairs, 1975), pp. 30–32.

62. I find it especially ironic that Gary Becker, a leading theorist of human capital, should be arguing forcefully for treating people as if they had the same tastes, and that they do not change over time.

63. Banfield, p. 143: ". . . The capacity of the radically improvident to waste money is almost unlimited." In this regard, it seems to be one of the great insights of Victorian social reformers that there are "undeserving poor." To have wasted the comparatively meager surplus of the middle class on Eliza Doolittle's father would have left the deserving poor unassisted. This line of reasoning leaves open the question of whether there are historical reasons explaining why certain groups may possess the attitudes that they do, and which make them lower class in Banfield's sense. For a well argued account of such reasons, see Thomas Sowell, *Race and Economics* (New York: David McKay Co., 1975).

64. Once one realizes that attitudes change only very slowly, there is little practical difference whether the "social machinery" or "social heredity" explanation is correct. There is little we can do to change attitudes. Changing the material circumstances of the lower class would then do nothing toward altering their present inclination to crime. See Banfield, p. 238. Moreover, even if we adopt a "long run view" and seek to influence the attitudes of not the present, but future generations, income grants to alleviate poverty may be self-defeating. See Sowell, p. 238.

65. Pogue, p. 40. It should be noted that another study found there to be significant marginal net returns from law enforcement. See Erlich, "Participation in Illegitimate Activities," pp. 556–59.

66. Banfield, p. 181. Banfield's own views on the existence of criminal types are not completely clear. He states: "Criminologists generally agree that there is no such thing as a 'criminal type'; presumably they mean that people decide whether or not to do illegal things in essentially the same way that they decide whether or not to do other things." But he also asserts that "there are individuals whose propensity to crime is so high that no set of incentives that is feasible to offer to the whole population would influence their behavior (p. 207)."

criminal class may not fruitfully be analyzed in such terms. Economic analysis of crime should consider Banfield's work more than has heretofore been the case.[67]

THE JUSTICE OF ALTERNATIVE POLICIES

Surely in one respect, Banfield's *Unheavenly City Revisited* shares a common conceptual framework with most other scholarly work on crime. For his is a utilitarian analysis of crime and punishment. The utilitarian adopts the following procedure. He must first have a clear conception of the nonmoral good (e.g., material possessions). Right action is then defined as that which maximizes the nonmoral good. In other words, the rightness of an action depends on its consequences; and *these consequences are the only relevant consideration in deciding whether an action is morally right or not.*

It would be beyond the scope of this paper and the ability of this writer to give a detailed criticism of utilitarianism as a moral principle. What is relevant, however, is to note that utilitarianism is a very special and controversial moral theory that cannot simply be accepted without justification. Yet this is precisely what most writers on the economics of crime seem willing to do.[68] Moreover, the burden of the argument is really on utilitarians in a very important sense. While utilitarians cannot consistently consider anything but the consequences of an action, all other, nonconsequentialist, moral theories may take into account other considerations as well as the consequences of an action.[69] Suffice it to say, utilitarianism is under attack on many fronts, and, in moral philosophy, nowhere more effectively than in John Rawls' *Theory of Justice.*[70] Specifically, in the area of crime and punishment, utilitarianism is incapable of explaining why the innocent should not be punished if so doing would yield a

67. McKenzie and Tullock do consider the existence of "irrational" criminals. They argue that on an aggregative basis, marginal analysis of criminal behavior as a rational activity would still work. See McKenzie and Tullock, pp. 133–35. They also mention the factor of time discounting in explaining one particular technical issue in the standard literature (p. 152).

68. See Banfield, pp. 205–10.

69. It must be repeated that nonconsequentialist theories of ethics are not generally committed to ignoring the consequences of an action, but merely to not basing their judgments solely on the consequences. Utilitarianism, however, is severely limited to consideration of the consequences only. On the subject of utilitarianism and morality, as well as the wider subject of deontological versus teleological theories of morality, see William K. Frankena, *Ethics* (Englewood Cliffs, N.J.: Prentice-Hall, 1963), pp. 11–46 (especially, pp. 13–16).

70. John Rawls, *Theory of Justice* (Cambridge, Massachusetts: Harvard University Press, Belknap Press, 1971).

net social utility.[71] Moreover, as Professor Alan Wertheimer has recently argued:

> If human behavior were such that punishments would have absolutely no deterrent effect whatever, it would be pointless, from a utilitarian perspective, to establish a system of punishments. If, for example, punishing those who shoplift had and could have no effect whatever on the amount of shoplifting, then such punishments would necessarily yield a net disutility —they would inflict pain and suffering on those punished, the society would bear the cost of detection, prosecution, and punishment, and there would be no compensating gain. I am not, of course, arguing that it would be pointless to punish an individual lawbreaker when doing so would have no deterrent effect, but that a *system* of laws and punishment known to have no deterrent effect could not be justified on grounds of utility.[72]

Wertheimer has pointed out the utilitarian's dilemma. Once the deterrence effect is demonstrated to be weak or nonexistent, it is impossible to defend punishment except by invoking considerations other than the consequences of punishing the criminal. Wertheimer also cites Nozick in briefly raising a particularly thorny problem for the utilitarian moral and legal philosopher. In attempting to calculate net social utility, one surely must justify giving equal weight to (or even including) the suffering of the criminal who is being punished and the suffering of the victim.[73] It is simply not obvious that the disutility of the transgressor should be given equal weight in considering the justice of punishment.

Banfield has questioned the deterrence effects of punishment for at least one class of criminals, and he shares the utilitarian's dilemma. He can only suggest a series of policies for dealing with crime that almost everyone would reject as inconsistent with a free society.[74] For a consistent utilitarian, however, there are no moral grounds for rejecting these proposals. Having a free society might not yield "net social utility."[75] Nor, as Banfield has demonstrated, can any propo-

71. Wertheimer, pp. 181–82.

72. Ibid., p. 182. The hold of utilitarianism can be seen in the case of McKenzie and Tullock, p. 148. They note of those who deny the deterrence effects of punishment: "Indeed, we have never been able to understand how people who believe in the conventional wisdom favor imprisonment at all." It never seemed to occur to them that there are other than utilitarian theories of justice.

73. Wertheimer, p. 197.

74. Banfield, pp. 208–10.

75. Wertheimer, p. 181. A fuller treatment of these issues would necessitate distinguishing between what Wertheimer calls "legislative utilitarianism" and "enforcement utilitarianism." Also, one should distinguish between act and rule utilitarianism. Wertheimer's is a defense of enforcement retributivism from a rule utilitarian standpoint.

nent of punishment who is a nonretributivist consistently oppose preventive detention, and a whole host of other antilibertarian measures.[76] But anyone who sees "Justice as Fairness" must oppose these measures. Yet in proposing (albeit tentatively and reluctantly) these outrageous ways of dealing with crime, Banfield is more consistent than his fellow utilitarian social theorists, whose policies do not always belong to the same system of thought as do their theories.

It is time that scholars reconsider their inclination to utilitarianism in moral and political theory. There are other considerations in moral reasoning beside the consequences of an action. Even more to the point, utilitarian reasoning is deficient in respects that even a nonphilosopher can criticize. The concept of social utility is literally nonesensical. In one of the seminal works in economics of this century, Lionel Robbins demonstrated that interpersonal comparisons of utility are impossible.[77] There simply are not conceivable units in which to carry out such comparisons. Utility is not cardinal but ordinal, and the preference rankings of individuals cannot be compared.

The "social cost" analysis that must be undertaken in the utilitarian calculus is on equally shaky grounds. Economic cost is foregone utility. The only relevant cost is choice-influencing cost. Therefore, cost is the foregone utility affecting each individual decisionmaker. These costs are subjective evaluations of displaced alternatives—alternatives not taken, and, hence, not observable or measurable. Thus costs are not something that can be added up to obtain an aggregate, or social, cost. For such a figure would bear no relation to any magnitude that influenced the separate choices of individuals. And the utilities gained and foregone (i.e., the costs) by each individual are not comparable.[78]

Quite apart from the more philosophic arguments against it, utilitarianism relies on procedures that have no scientific basis. Policy toward crime based on utilitarian moral philosophy is at best without the firm support that its adherents apparently believe it has. Until the economics of crime literature takes more account of these prob-

76. Banfield, p. 209.

77. Lionel Robbins, *The Nature and Significance of the Economic Problem*, 2nd ed. (London: Macmillan & Co., 1935).

78. The denial of the existence of social cost is a far more controversial proposition than the one denying interpersonal comparisons of utility. But I believe the former follows from the latter and from certain other considerations of methodological individualism. Nonetheless, while many economists have chosen to ignore Robbins' brilliant argument against interpersonal comparisons of utility, a surprisingly large number have simply never been acquainted with the parallel arguments against social cost. On the latter, see the references in n. 4

lems, it can scarcely claim the attention of serious legal and moral philosophers.[79] It is regrettable that in an otherwise brilliant and superbly argued book, Professor Banfield has fallen prey to utilitarian shibboleths.

CONCLUSION

My purpose has been to examine the relation of Banfield's treatment of the time horizon to the economic theory of time preference. The work of Ludwig von Mises, who developed the theory of time preference more extensively than any other economist, provides a firm theoretical underpinning for Banfield's analysis. It is perhaps ironic that in this sense Banfield's approach takes more account of an important aspect of economic theory than does any of the standard economic literature on crime. Where this literature and Banfield's approach are in opposition, I have come down tentatively on Banfield's side. My chief criticism of his approach is that it shares the utilitarian bias of much of the literature on economic policy. Even some economists who purport to do only positive economics implicitly accept the presuppositions of utilitarians. Briefly noting the philosophic case against utilitarianism as a moral philosophy, I pointed out some of the scientific errors it makes.

One can conclude, then, that shorn of certain of its normative presuppositions, the *Unheavenly City Revisited* is one of the most important books recently written on a complex subject. Though he apparently had no acquaintance with the major work on the theory of time preference that I cited,[80] Professor Banfield's analysis in no way suffered.

79. In all fairness, it must be observed that many writers on the economics of crime draw no direct policy conclusions, though their work is nonetheless suffused with utilitarian presuppositions. But for sins of commission, see, for example, Erlich, "The Deterrence Effect of Capital Punishment," pp. 397–417, whose circumspection does not hide his normative conclusions. Becker, in "Crime and Punishment: An Economic Approach," is perhaps the most egregious offender.

80. Were I writing a detailed history of the concept of time preference, I would have mentioned the work of a number of other figures. Frank A. Fetter is particularly important among these. Fetter's work on the subject will be included in *Capital, Interest and Rent: Essays in the Theory of Distribution*, ed. Murray N. Rothbard (Kansas City: Sheed, Andrews & McMeel, 1977).

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Chapter 7

Time Preference, Situational Determinism, and Crime*

Mario J. Rizzo

Edward Banfield has presented a provocative thesis that "present-orientedness" is responsible for much behavior that is blatantly antisocial in character. "The more present-oriented an individual," Banfield tells us, "the less likely he is to take account of the consequences that lie in the future. Since the benefits of crime tend to be immediate and its costs (such as imprisonment or loss of reputation) in the future, the present-oriented individual is *ipso facto* more disposed toward crime than others."[1] The immediate plausibility of this view masks some very fundamental confusions and ambiguities that, because they have rather broad consequences for the analysis of crime, it will be our task to investigate. Furthermore, the methodological roots of this position pose a number of interesting problems many of which, it should be noted, are not peculiar to Banfield's work but, rather, represent very widespread tendencies in the social sciences.

There are two quite different notions of "present-orientedness" between which Banfield fails to distinguish. The first is "present-orientedness" as an *explicandum*, or what we shall call relatively

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1. Edward C. Banfield, *The Unheavenly City Revisited* (Boston: Atlantic–Little, Brown, 1974), p. 183.

present-oriented behavior. It is the task of theory to explain this phenomenon. The second sense is "present-orientedness" as an *explicans*, i.e., the subjective state that explains the existence of certain behavior. This notion we shall refer to as high time preferences or a high internal rate of discount (schedule). Concern with only relatively present-oriented *behavior* rather than high time preferences leaves the former inexplicable by any sort of "time orientation." To be sure, we are not contending that time preferences exist in a kind of disembodied world apart from real action or behavior. On the contrary, differences in time preferences are *imputed* to an individual or group of individuals on the basis of action under certain *ceteris paribus* conditions. Unless these conditions are precisely specified, confounding of the two senses of present-orientedness is the likely result.

In the purely behavioristic sense, present-orientation is obviously a matter of degree: the existence of some present orientation is a necessary prerequisite for the emergence of any human action at all.[2] To put it another way, the existence of human action entails some "preference" for the present or else every action would always be postponed to some never-arriving future. Note that we have not used the words "consumption" or "savings" here. This is because we are interpreting "action" in its broadest possible sense, including behavior directed toward the attainment of the present desire to ensure future consumption. However, certain human physiological requirements make it impossible that we shall ever observe an optimal zero present consumption level. Hence, the relative character of present-oriented behavior reflects itself in the varying degrees of provision for consumption today versus consumption tomorrow.

Referring to what is obviously the preference or *explicans* sense of present-orientedness, Banfield says of the lower class or high time preference individual that "His calculus of benefits and costs is *defective* . . ."[3] [emphasis added]. The sense in which a decisionmaking calculus can be "defective" is not clearly spelled out. Surely, if there were some aspect of an individual's decision framework that brought about a systematic frustration of his *own* ends then we might, in a *wertfrei* manner, talk of a "defective" calculus. However, no claim that high time preferences systematically thwart the actor's own goals can possibly be sustained. Time preferences constitute an integral *part* of those goals, e.g., a pint of strawberries today is preferred (under certain conditions) to two pints of strawberries tomorrow.

2. Ludwig von Mises, *Human Action*, 3rd. ed. (Chicago: Henry Regnery Company, 1966), p. 484.

3. Banfield, p. 201.

Hence, if high time preferences cannot be inappropriate from the point of view of the individual's purposes, the appelation "defective" must be viewed from some other vantage point. *If* it is true, as Banfield claims, that this "defective" calculus results in criminal behavior, then might we not be justified in saying that high time preferences are in some sense "irrational"[4] from *society's* point of view? This formulation is, of course, naked holism.[5] Society can have no viewpoint apart from its individual members, and "rationality" is a term that has meaning only in the context of an individual's means-ends framework. To be sure, some or even most individuals will disapprove of the resultant criminal behavior. Yet people disapprove of many things. Shall we then call any decisionmaking framework that results in (majority) disapproved behavior "defective"? Clearly, the issue cannot be resolved on the basis of time preferences alone, for it is the behavioral consequence that is of paramount importance.

In this regard, we are told that a radically present-oriented culture or lifestyle is not "normal" or is "pathological."[6] This "seems fully warranted both because of the relatively high incidence of mental illness in the lower class and also because *human nature* seems loath to accept a style of life that is so radically present-oriented."[7] The second point is devoid of literal meaning and, unfortunately, I am unable to find any coherent meaning in it at all. Therefore, only the first point shall be discussed. Here, Banfield fails to make an important distinction.

Even if psychopathological individuals engage in more present-oriented behavior than the rest of us, it does not follow that all or even a significant number of highly present-oriented people are psychopaths. Indeed, Banfield presents no evidence that any substantial proportion of highly present-oriented (*explicandum* sense) people are, by any generally accepted psychological standards, "pathological." Hence, the invocation of "mental illness" may be of no usefulness as an explanation. Of course, one may claim that "radical" present-oriented behavior is itself a sufficient condition for psychopathology. Then, however, the issue is reduced to a tautology. Finally, it may be claimed that the term "pathological" actually refers to sociopsychopathological behavior. This usage is, however, to

4. See the transformation of the term "irrational" into the quasi-medical "psychopathological" below. While the former appears to be a matter of judgment, the latter *seems* to be a statement of fact.

5. F.A. Hayek, *The Counterrevolution of Science* (New York: Free Press, 1955), ch. VI; and Karl R. Popper, *The Poverty of Historicism* (New York: Harper Torchbooks, 1964 (Reprint of 1957 edition)), pp. 17–19.

6. Banfield, p. 63.

7. Ibid. (emphasis added).

be criticized on two grounds: (1) it is strictly improper to use the term "pathological" in a sense other than one referring to an individual's homeostatic system; and (2) the term "psychopathological" is an example of an unhelpful analogy run wild—in what sense does it mean anything other than "defective," and in what sense does the latter mean anything but "disapproved"?

To refer to some time preferences as "defective" and some kinds of behavior as "pathological" diverts our attention from the survival properties that implicit rules of behavior can have in given contexts.[8] Admittedly, this presupposes an equilibrium or optimal adjustment of individuals to their environments. If this were not the case, then the decision and behavior patterns need not have survival value. Nevertheless, there must surely be *some* presumption that long-enduring characteristics of a culture or subculture have utility in promoting the survival of its members in a certain context. For example, in a society where, because of political instability (e.g., continual agression by a foreign power), the future is highly uncertain, extreme present-oriented behavior can indeed be rational (i.e., appropriate to the achievement of given individual ends).

Until now we have concerned ourselves with what is, in a way, merely a prelude to Banfield's application of the time-orientedness theory. In his explanation of (much?) criminal behavior, Banfield stresses the importance, as we have previously noted, of differential internal rates of discount. Some, or many, or most individuals who commit crime do so because on average they discount the future costs of their acts more heavily than do noncriminals.[9] A major difficulty with this conjecture is that the evidence adduced to support it does not adequately distinguish between Banfield's view and an equally plausible alternative hypothesis.

Let us hypothesize that the main explanation for criminal behavior lies in the differences in the rates of trade-off between present and future consumption faced by different members of society. For example, assume that all of the costs of criminal behavior lie in the future (say, one year from now) and that the future is certain. Further assume that there are two individuals, both of whom would receive the same payoff from the commission of a given criminal act (say, $1,000). On the one hand, individual A has high opportunity costs of time, and imprisonment would cost him in terms of foregone income $1,040 one year from now. On the other hand, individual B has lower opportunity costs of time and the cost of the criminal act is for him only $1,020 one year from now. If both individuals discount the future by exactly the same rate—3 percent—individual A will find commission of the crime too costly, while individual B will leap at the opportunity. In this stylized example, we have explained criminal behavior without any recourse to differential degrees of present-orientedness (or future discounting) and relied entirely on differential costs. Banfield's evidence does not, I believe, adequately distinguish between these two (equally) plausible hypotheses.

Now, of course, Professor O'Driscoll's point elsewhere in this volume becomes quite relevant. "Tastes," we are told, "*demonstrably* vary among people. Knowledge of this fact is one of the common experiences that we all share, and upon which we can draw in our social analysis."[10] Here, I'm afraid, we have a terminological difficulty. It is not *tastes* that demonstrably vary but, rather, it is choices or acts of individuals that so vary. Differences in tastes may or may not explain differences in choices. For example, two individuals may be in the same wealth position and may face the same trade-off between present and future consumption and yet one may save more than the other. In *this* case, we can say that their time preferences or tastes as between present and future consumption differ. If, however, they faced different rates of trade-off, could we make the same statement with equal confidence? Not, to be sure, unless we recognize no distinction between the terms "choices" and "tastes" even when choices are made in differing circumstances. This last consideration provides the reason why even Professor Rothbard's notion of "demonstrated preferences" will not be adequate to defend O'Driscoll's viewpoint.[11]

Returning to our alternative explanation for criminal behavior, it might be argued (in Banfield's defense) that the reason individual B has lower opportunity costs of time in legitimate activities is because of his high present-orientedness. Of course, now we have shifted the context of the analysis from a purely static to a dynamic one. In the latter context, the argument would run something like this: individ-

8. F.A. Hayek, "Notes on the Evolution of Systems of Rules of Conduct," in *Studies in Philosophy, Politics and Economics* (Chicago: University of Chicago Press, 1967), pp. 66–81.

9. In more technical language, the effect of high time preference on present-oriented behavior *in general* can be formulated in the following way. Let us postulate a two period model where the money value of present consumption is measured on the horizontal axis and the money value of the next period's consumption along the vertical axis. Then, a person with high time preferences (or a high time preference pattern) is one whose indifference curves are relatively steep. Given the same interest rate and wealth constraint, an individual with high time preferences will consume more today than one with lower time preferences.

10. Chapter 6, p. 153 (emphasis added).

11. Murray N. Rothbard, "Toward a Reconstruction of Utility and Welfare Economics," in *On Freedom and Free Enterprise*, ed. Mary Sennholz (Princeton: D. Van Nostrand, 1956), pp. 225–32.

ual B's legitimate opportunities next year are poor because last year his intense preference for present consumption made him unwilling to invest in the acquisition of skills that would have increased the market value of his time. Again, there is plausibility in this argument, but what evidence has Banfield presented for it that would enable us to decide between this hypothesis and other (equally) plausible ones? To be more precise, how can we differentiate among differences in natural intellectual endowments, attitudes toward risk, legal constraints, and social and racial discrimination as alternative hypotheses? Banfield's evidence does not distinguish among them.

It should be possible, at least in principle, to determine whether certain groups are characterized by higher time preferences than average. If we control for the after tax rate of return on assets and the level of real wealth, we could attribute differences in the savings-consumption ratio to time preferences.[12] It is these differences that might be usefully viewed as a proxy for the height of the time preference pattern. *A priori* it is not clear that significant differences would be found, nor if they are, how important they will be relative to other causes of crime.

II

Whatever the role of time orientation in the explanation of criminal behavior, it has a clear place in the explanation of government activities. To see this, consider first the position of a private corporation. Owners of such a corporation can capture, through its stock, the present value of the firm, and hence have an incentive to concern themselves with its long-run profit situation.[13] The appropriability of present value by owners creates pressure on the firm to set up an incentive structure adequate to ensure efficient behavior on the part of both managers and the board of directors.[14] This does not mean that managers, for example, will perfectly reflect the wishes of the owners but, rather, that such control will be *optimal*, subject to the costs of monitoring.[15] Furthermore, maximization of the firm's present value will be independent of the personal time preferences of the owners. This is because once they have maximized the present value of their income stream they can (within some limits) arrange their consumption pattern to suit their time preferences. Hence, "present-orientedness" on the part of some owners is not important.

12. In practice the issue is more complicated than this because the form in which real wealth is held may have an effect. Where human wealth cannot easily be transformed into nonhuman wealth the ratio of the former to the latter will be of significance.

13. Roland McKean and Jacquelene Browning, "Externalities from Government and Non-Profit Sectors," *Canadian Journal of Economics* (November 1975): 580.

14. On these issues, see Henry Manne, "Mergers and the Market for Corporate Control," *Journal of Political Economy* (April 1965).

15. Armen A. Alchian and Harold Demsetz, "Production, Information Costs, and Economic Organization," *American Economic Review* (December 1972): 777–95.

On the other hand, voters cannot capture or appropriate the present value of the state's action (or inaction). Therefore, unless their own future self-interest is affected, they are unlikely to worry (very much) about distant benefits or losses.[16] Moreover, high voter information costs and the necessity to choose candidates on the basis of many issues at once compound the problem. This is because legislators are therefore quite unlikely to capture the present value of their deeds in the form of voter approbation or disapprobation (except in special cases). The absence of appropriability of future benefits distorts the rate of trade-off between present and future goods in favor of the former. Therefore, a voter or legislator will exhibit greater present-oriented behavior in the political sphere than he would in the private sphere where there is more complete appropriability. Consequently, the greater present-orientation of the state is not the result of high time preference individuals being attracted to statecraft but, rather, to the distorted present-future trade-off that characterizes much of the political sphere.

There are many ways in which the present-oriented behavior of the state manifests itself. We shall concern ourselves here with only two. In the first place, it is now well understood[17] that government borrowing to finance deficits distorts the voluntary savings-consumption pattern established by the market. Issuance of bonds to finance the deficit will, of course, drive interest rates upward. At the new higher rates, some private investment will be "crowded out" by the new government demand for savings. This means that there will be a substitution of government consumption for the investment in real capital that would have occurred in the absence of the deficit. The higher current consumption level today implies a lower consumption level tomorrow, and hence a change in the allocation of consumption over time established by the nongovernment sector.

The second example of present-oriented behavior is somewhat paradoxical. Let us suppose that the monetary authorities increase the quantity of base money and that the banks increase loans to businesses. The greater availability of loans will lower the market rate of interest below the natural rate (i.e., the rate at which real

16. McKean and Browning, p. 580.

17. Franco Modigliani, "Long-Run Implications of Alternative Fiscal Policies and the Burden of the National Debt," *Economic Journal* (December 1972): 730–55.

savings equals real investment *ex ante*).[18] *If* this lower market rate is expected to endure, then there will be an increase in the relative profitability of investment projects with a longer time horizon. It will appear *as if* real savings have voluntarily increased and that people wish to engage in more time-consuming (and more productive) methods of production. Hence, it may seem as though there has been an all-around increase in the *future* orientation of the economic system. This way of looking at matters is, however, quite misleading. When the market rate of interest rises again some (though not all) of the longer investment projects will be abandoned due to a decrease in their relative profitability.[19] The previous misallocation of resources is revealed, business losses ensue, and unemployment rises. The earlier future orientation of the production structure is, from the point of view considered here, really irrelevant. What the credit expansion has brought is a boom *today* (especially in the capital goods industries) at the expense of a recession *tomorrow*. If it were possible to compel the state to bear the full burden of this resource misallocation (i.e., if the losses were appropriable by the monetary authorities), then the "cycle effect" would be unprofitable from its own point of view. A Hayekian business cycle effect yields no net benefits and hence reduces the present value of the "system."

What we have seen is that, in our society at least, the State is a *source* of relatively present-oriented behavior. Since legislators cannot appropriate or own the distant future benefits of long-sighted action, their activities will be characterized by more immediate concerns. Professor Murray Rothbard has cogently summarized this situation in *Power and Market*:

> It is curious that almost all writers parrot the notion that private owners, possessing time preference, must take the "short view," while only government officials can take the "long view" and allocate property to advance the "general welfare." The truth is exactly the reverse. The private individual, secure in his property and in his capital resource, can take the long view, for he wants to maintain the capital value of his resource. It is the government official who must take and run, who must plunder the property while he is still in command.[20]

Though it may be conceded that the State through its officials has a clear *incentive* to act in a relatively present-oriented manner, one might, in a defensive posture, claim that these officials do not, in fact, act in accordance with that incentive. They resist the temptation, as it were, and promote *our* true interests. This, of course, is based on the artificiality of assuming that men in the private sphere act in accordance with self-interest but, once they are channeled into the so-called public sphere, they do not. There is growing evidence of many sorts that this is untrue.[21]

There is an aspect of the Rothbard quote that may give us pause. This is the reference to the State's officials as plundering and running. Ought we to interpret this language as permissible hyperbole? Does not the present-oriented behavior of the State consist of a kind of mere benign immediate concern? The answer to these questions depends very much on the moral views one holds. The State may do nothing *illegal* when it taxes (at least to pay interest on government bonds) and consumes, but what, if any, is the relationship between the current high rates of taxation and theft? I am *not* referring to the question (important though it may be) of whether high taxes create an incentive for theft, but rather, I am asking whether they are *morally* equivalent to theft. The answer ought not—in an exploratory collection of papers such as this—be taken for granted or considered obvious.

18. F.A. Hayek, *Prices and Production*, 2nd ed. (New York: A.M. Kelly, 1967 (Reprint of 1935 edition)), Lecture III.

19. F.A. Hayek, *Profits, Interest and Investment* (New York: A.M. Kelly, 1975 (Reprint of 1939 edition)), pp. 3–82.

20. Murray N. Rothbard, *Power and Market* (Menlo Park, California: Institute for Humane Studies, 1970), p. 140. See also id., pp. 47–52.

III

> There are more things in heaven and earth, Horatio,
> Than are dreamt of in your philosophy.
>
> *Hamlet*, Act I, Sc. V

The view that some individuals commit crime because of their relatively high time preferences is a particular instance of a more general mode of analyzing criminal behavior that, in turn, stems from an even more fundamental perspective in the social sciences. This mode of analysis is what Spiro Latsis has recently called "situational determinism."[22] Human action, from this viewpoint, is a species of "highly constrained reaction."[23] Hypothesize an individual with stable tastes and a situation with some constraints as well as different

21. See, for example, George J. Stigler, *The Citizen and the State* (Chicago: University of Chicago Press, 1975).

22. Spiro J. Latsis, "Situational Determinism in Economics," *British Journal for the Philosophy of Science* (1972):207–45.

23. Spiro J. Latsis, "A Research Programme in Economics," in *Method and Appraisal in Economics*, ed. S.J. Latsis (Cambridge: Cambridge University Press, 1976), p. 17 (emphasis added).

relative costs of alternate paths of behavior. Introduce, then, the "trivial animating law"[24] of narrowly conceived rationality, and actions assume the character of mechanistic reactions to shocks. Present-orientedness plus A, B, and C determine a set of reactions D. Explanation of human behavior takes on the character of mere computation or logical deduction. This was realized quite early in the development of contemporary economic theory by Pareto. Speaking of indifference curves (preference functions), Pareto said, "The individual can vanish now, provided that he leaves us this photograph of his tastes."[25] If an individual's (or an ideal type of an individual's) tastes are given, then the *objective situation* (i.e., income and relative prices) determine his choices. There have been elaborations of this basic structure: the substitution of permanent income for current income as the relevant constraint, or the introduction of a time price as well as a money price, etc. Yet Pareto's essential insight as to the mechanistic or logically deterministic character of equilibrium economics (and much contemporary social science) remains accurate.

Fritz Machlup, in a recent article[26] on Latsis' work, has adopted a position that is important for us to consider. In effect Machlup claims that all well-constructed models yield perfectly determinate results.[27] In general, "*any* model designed to present [exhibit] a causal connection between an independent variable and a dependent variable under given conditions . . . must display the dependent variable as a *logical* consequence of all the premises in the model."[28] That this is a characteristic of the *model* and not necessarily of the real *world* is granted: ". . . the applicability of the model with its determinate conclusion is always open to question; it is *never* certain . . . ."[29] Nevertheless, all of this tells us what we presumably have known all along, *viz.*, that the full meaning of a model consists in its use. If the constructor of a mechanistic model claims that it essentially explains some specified instance of human behavior, then he is asserting the determinate character of (most of) that behavior. Furthermore, it is indeed unfortunate that much model building is intimately connected with attempts to make *specific* historico-temporal predictions, because this ignores the important

24. Ibid., p. 21.

25. Vilfredo Pareto, *Manuel D'Economie Politique* (New York: AMS Press, 1969 (Reprint of 1909 edition)), p. 170.

26. Fritz Machlup, "Situational Determinism in Economics," *British Journal for the Philosophy of Science* (1974):271–84.

27. Ibid., p. 283.

28. Ibid., p. 280 (emphasis added).

29. Ibid. (original emphasis).

role of a more general form of explanation. To explain the *principle* of certain forms of human behavior may do no more than "predict" the overall *pattern* of, say, market response to a change in a given variable.[30] This may exclude certain types of response, but it leaves a variety of alternatives open as possible consequences of the given change.

The relevance of the foregoing discussion to our general concern with time preference and crime is this: if criminal behavior is determined by high time preferences along with several other variables, then in what sense is criminal behavior voluntary? To put the issue another way, in which sense are criminals *responsible* for what they do if their behavior is determinate? Here it is important to distinguish between two types of variables that can be said to determine (criminal) behavior. They can be broadly classed into objective and subjective variables. It might be reasonably contended that determination by subjective factors is not really determinism at all because these factors are, in effect, what constitutes the individual. Unfortunately, this view cannot be directly used to salvage the notion of individual responsibility. Only the objective variables can be observed, and hence the subjective ones must be viewed through their objectifiable proxies. Therefore, it appears *as if* objective phenomena determine (criminal) behavior. Indeed, many investigators may wish to omit any reference whatsoever to (directly) unobservable subjective factors in the name of Occam's razor. So we are back to our dilemma: whither individual responsibility in a world of puppets?

One possible solution to this problem is to emphasize that men *choose* their ends, i.e., that tastes or preferences of all sorts are to be considered voluntary. Determinism, then, exists only with reference to the given framework of ends and means. In such a framework, the maximization of utility requires (necessitates) certain behavior. So the necessity here is of a conditional nature: *if* men seek to fulfill particular ends, given the availability of x, y, and z means, then they must do a, b, and c. However, men are free not to choose those particular ends.

The proposed solution is really a compromise which apparently permits the retention of both situational determinism and genuine choice. Yet this cannot be. The simplicity and plausibility of this solution unfortunately masks a number of significant complications discussed by G.L.S. Shackle. "In order to have recipes of action for attaining his ends, a man," Shackle tells us, ". . . must also know

30. F.A. Hayek, "The Theory of Complex Phenomena," in *Studies in Philosophy, Politics and Economics* (Chicago: University of Chicago Press, 1967), pp. 22–42.

what actions of other people his own act will accompany."[31] The determinateness of behavior in a given means-end framework is for one individual thus dependent on the ends chosen by other individuals. To put the issue succinctly: ". . . if we claim that men can choose their ends in some substantial meaning of the word 'choose,' how can any man know what ends, and therefore what actions, others are *simultaneously* choosing. . . . If there is choice of ends, there are no complete laws prescribing the means of attaining ends. There is no complete rationality."[32] There are no problems of this sort for Robinson Crusoe, since for him there are no other individuals whose actions might affect how Crusoe will use available means to attain his given ends (once chosen). In a multiperson world, complete determinateness of an individual's behavior demands "pre-reconciliation"[33] of individual plans. Therefore, our proposed solution to the dilemma of determinism implicitly concedes too much. It is incorrect to say that once an individual chooses his ends there are strict laws determining his behavior. This is not enough for determinism. The choices of others must be either eradicated or pre-reconciled. The former requires that we treat only one individual as free, an exception to a general rule for which no plausible argument could be adduced. Pre-reconciliation, on the other hand, is not an empirical feature of societies as we know them.

It is important to stress here the kind of uncertainty on which the case for indeterminism rests. If the choices (of ends) and hence the actions of others are merely uncertain in the actuarial sense, then there is no *real* uncertainty. In this case, if an individual's decisions depend on the behavior of a large number of people or if he can insure, then actuarial risk can be converted into a fixed cost.[34] This form of uncertainty is susceptible to elimination and therefore does not affect the "complete rationality" of the decision-making process. The kind of uncertainty we have in mind is one most often ignored by economists and other social scientists, *viz.*, Knight's "estimates" or "true uncertainty."[35] In this case, ". . . there is no possibility of forming *in any way* groups of instances of sufficient homogeneity to make possible a quantitative determination of true probability."[36]

31. G.L.S. Shackle, *The Nature of Economic Thought* (Cambridge: Cambridge University Press, 1966), p. 71.

32. Ibid., p. 72 (original emphasis).

33. G.L.S. Shackle, *Epistemics and Economics* (Cambridge: Cambridge University Press, 1972), pp. 53–54.

34. Frank H. Knight, *Risk, Uncertainty and Profit* (Chicago: University of Chicago Press, 1971 (Reprint of 1921 edition)), p. 213.

35. Ibid., pp. 225, 232.

36. Ibid., p. 231 (original emphasis).

The mental processes involved in decision-making under true uncertainty are even today not well understood, and nonrational factors (e.g., intuition) may be of considerable importance here. In any event, the determinateness of an action given certain objectively specifiable data is out of the question. It is this kind of uncertainty that is important in matters of entrepreneurship, and may well be the main uncertainty faced in most decisions.[37] Real world uncertainty is doubtless often a complex of actuarial risk and Knightian true uncertainty. Yet it is only the latter that is, in principle, ineradicable and gives rise to the main problems of an uncertain world. Decision-making under this mode of uncertainty requires that we *go beyond* the objective data because in these cases such data is, by definition, insufficient.

The argument up to this point has shown that choice of ends where that choice is truly uncertain negates the possibility of situational determinism. Hence, even *given* the ends of an individual, his actions cannot be viewed as determinate. Even in a world in which the only uncertainty is actuarial risk (or in which all behavior could be "explained" *as if* it were merely risky) the givenness of ends still does not yield a pure form of determinism. To see this, we must inquire into the precise nature of human ends.

Thomas Aquinas implicitly argues against the view that if ends are taken as given, human acts are determinate. He reports the (incorrect) view in the following way: "But the principle of human acts is not in man himself, but outside him, since man's appetite is moved to act by the appetible object which is outside him, and which is as a *mover unmoved*."[38] In his reply to this view, Aquinas emphasizes two things: (1) movement toward an end is movement according to an intrinsic principle (i.e., the *actor* desires); and (2) movement toward an end requires knowledge. He states: ". . . the voluntary is defined not only as having *a principle within* the agent, but also as implying *knowledge*. Therefore, since man especially knows the end of his work, and moves himself, in his acts especially, is the voluntary to be found."[39] An illuminating extension of Aquinas' second argument is possible. What is knowledge of an end? Clearly, it is not knowledge of something that now exists. It is "knowledge" or anticipation of a future "sensation" that moves men to act. Hence, the goal toward which action is directed is not a (current) real world perception or sensation but, rather, an imagined one: an idea. Without inquiring as to where ideas come from, we shall follow common sense and say

37. Ibid., p. 226.

38. Thomas Aquinas, *Summa Theologica*, I–II, q. 6 (a.1).

39. Ibid. (original emphasis).

that a person's ideas are his own. Therefore, the givenness of ends does not imply determinism in any but a formal sense.

In a recent article, Stigler and Becker attempt to extend Pareto's dispensing of the individual by claiming that much human behavior can be explained without assuming "that tastes . . . change capriciously [or] differ importantly between people."[40] This is an attempt to extinguish altogether the notion of choice in any meaningfully free sense. In effect, Stigler-Becker individuals are *endowed* with certain basic tastes and then seek to maximize utility in the usual way. A main difference between this and the conventional approach is that the tastes are here defined over very basic (unobservable) commodities such as love, power, etc. The choice among observable market goods is determined by shadow prices (including time price) and an income constraint. Differences in market goods purchases are then never (or almost never) due to differences in tastes, but rather to differences in the true prices of these goods (which satisfy the constant tastes) or to differences in full income. "On our view," they propose, "one searches, often long and frustratingly, for the *subtle* forms that prices and incomes take in explaining differences among men and periods."[41] The assumption of lifelong constancy of tastes (including time preferences[42]) does not in itself imply a pure situational determinism,[43] but it pushes us much farther along that road.

A detailed examination of the Stigler-Becker view would be inappropriate here so we shall discuss only two general points. In the first place, the constancy of tastes must, in a broader sense, include the constancy of the entire means-ends framework.[44] If the individual's *perception* as to what constitutes an appropriate means to a given end changes exogenously, then behavior will change without alteration in tastes, prices, or income. The perception of a means-ends framework is a necessary prerequisite for application of the entire constrained utility maximization apparatus. This perception will necessarily be affected by the *undeliberate* acquisition of knowledge or information.[45] Hence, the alteration of "extra-economic" factors

40. George J. Stigler and Gary S. Becker, *"De Gustibus Non Est Disputandum,"* American Economic Review (March 1977):76.

41. Ibid. (emphasis added).

42. Ibid., p. 89.

43. We would at least have to confine all uncertainty to the actuarial risk variety. For other qualifications, see below.

44. For a discussion of the importance of the perception of the means-ends framework, see Israel M. Kirzner, *Competition and Entrepreneurship* (Chicago: University of Chicago Press, 1973), ch. 2.

45. Israel M. Kirzner, "Knowing About Knowledge: A Subjectivist View of the Role of Information" (Unpublished paper, New York University, 1977).

will affect responsiveness of behavior to economic variables, and produce an element of indeterminateness.

Second, a leap from the constancy of tastes view to pure determinism can occur only in the context of maximizing behavior. "Outside" forces do not *compel* individuals to maximize utility, although it is consistent with the "rational" pursuit of happiness. If individuals do not engage in maximizing behavior, then changes in, say, relative prices might produce no effect or, perhaps, a perverse effect on their relevant actions. If, on the other hand, we say that it is man's nature to be "rational," we misuse the concept of determinism to call the derived actions "determinate." To do so would come perilously close to saying that any behavior that can be explained is not free.[46]

The discussion in this section might seem somewhat belabored to those who take the common sense view that men (especially criminals) are free and hence responsible for their actions. Yet contemporary social science—especially economics—is becoming less and less congenial to this view. Thus, it has been necessary to examine the determinist implications of the economic approach to the explanation of behavior. One fundamental point ought to be kept in mind, however. The perception of man in everyday life is that his actions are free, that he really chooses among alternatives, and that he could have done otherwise. For this reason alone, the *notion* of truly free choice is one that doubtless affects the way men behave, as it colors their perception of the relevant actions of other men. Consequently, it seems reasonable to construct our models so as to include the very basis of that which makes us human.

46. None of the above discussion implies that the constancy of tastes "hypothesis" (or, more exactly, positive heuristic) is invalid or useless. When these qualifications and limitations are kept in mind, the framework can serve useful purposes.

Part II

Criminal Responsibility: Philosophical Issues

Any assessment of crime and criminals necessitates moral judgement. We speak of the "culpable" offender, the "guilty" defendant, and the criminal "violator." Utilitarian or majoritarian philosophy notwithstanding, such terms require an understanding of the ethical dimension of criminal justice and the acts that we seek to sanction. What gives some the right to assess the acts of their fellow men and to punish accordingly? The papers in this section attempt to approach this question from several perspectives.

John Hospers outlines a retributive justification for punishment. He views punishment as properly directed toward the "just deserts" of criminal offenders, that is, their moral worth. Central, then, to his formulation is an assessment of criminal intent and the acts that evidence that intent. Walter Kaufmann objects to such a project and argues that, since the past is unalterable, any justification of punishment as "balancing the books" is a dangerous and misleading fiction.

Richard Epstein attempts to rationalize the traditional distinction between the criminal law and tort law. His formulation of the object of criminal law remarkably resembles Hospers' concept of just deserts. Murray N. Rothbard shifts the focus of inquiry from the criminal to an assessment of criminal *acts* as violations of the rights of victims for which the criminal should be assessed a proportionate penalty. Rothbard's essay, with its emphasis on the victim's rights, and even the criminal's right to proper punishment, is a significant and provocative departure from traditional retribution theory which, perhaps, merits a new label.

Chapter 8

Retribution: The Ethics of Punishment

John Hospers

The question of what considerations justify the infliction of punishment on a person who is guilty of a crime has been a subject of disagreement among philosophers throughout the history of Western philosophy. I shall attempt in this chapter to present the merits of a view of punishment that is currently somewhat out of fashion—the retributive theory. But I shall defend retribution in a somewhat milder form than some theorists have done, with the result that those who favor "sterner" versions of the theory may not be satisfied with it.

I shall restrict my discussion on several counts.

1. I shall consider only legal punishment for crimes (crimes being acts contrary to law), and not consider other forms of punishment, e.g., the punishment of children by parents.
2. I shall assume that the crimes for which punishment is justified are "genuine" crimes, not, e.g., "victimless crimes" such as prostitution. The reasons why these should not be considered crimes is beyond the scope of this chapter.
3. I shall not consider the question of which persons or which institutions should administer the punishment. In fact it is the state that in all civilized societies today administers punishment, but I shall neither attempt to defend the state as the institution authorized to administer punishment nor exclude other institutions from this role—and thus I shall not raise the question of who should administer punishment in an anarchist society.

I

In defending the retributive theory I shall not travel the "high priori road" by defining any other possibility than the retributive out of existence. For example, in a recent column in *Newsweek*,[1] George Will writes: "The silliest argument is that [punishment] is wrong because it is retributive. *All* punishment is retributive. . . . The point is a logical [one]. It is that the word 'punishment' is only properly used to describe suffering inflicted by authority in response to an offense. Punishment is always 'to retribute,' to 'pay back for' guilt."

But of course this doesn't settle the traditional battle between retributive and utilitarian theories. Utilitarians will simply respond that in that event people should never be punished, only incarcerated, isolated, treated, or in some other way be made to give up their freedom so that others may be deterred. If a man is imprisoned for ten years just to set an example to others or to stop a crime wave, and we say to him, "Of course, you're not really being punished, since punishment is necessarily retributive, and we're not exacting retribution," he is not likely to be very much consoled by this reflection. What words we attach to it, he may say, doesn't really matter; he is still being locked up for ten years and as far as he's concerned that's punishment. The question *why* we should fine or imprison people is a substantive moral question not to be disposed of by semantic sleight of hand.

There are several views popularly associated with the term "retributive theory" that I shall not defend. First, I shall not defend the idea of retribution as *vengeance*. Ordinarily the term "vengeance" refers to the actions of the aggrieved party to "get even" with the aggressor outside the jurisdiction of laws and courts. One disadvantage of this is that the acts of aggression tend to be indefinitely perpetuated (e.g., the Hatfields and the McCoys). Another is that in the absence of law there are no rules known in advance specifying the limits of punishment for each offense: a person could respond to birdshot with machine guns in the name of vengeance.

Second, I shall not defend the concept of retribution as *lex talionis*, visiting upon the aggressor a punishment identical with (or even similar to) the offense of which he was guilty. ("An eye for an eye" was not even taken literally in the Old Testament.) According to this view, the punishment should be a kind of mirror image of the crime: the murderer should himself be killed as punishment. Lacking an exact similarity between the two, the aggressor should be made to suffer a punishment that is felt to be peculiarly fitting or appropriate

1. George Will, *Newsweek*, 19 November 1976.

to his crime—such as Mussolini being hanged by his toes in a public square, the same punishment to which he condemned so many others. But such a narrow view of justice, besides raising questions as to why it should be applied at all, cannot in any case be applied to all offenses. What punishment would be sufficient for a Stalin who condemned not one but millions to torture and death? His is only one life, and the lives he took number in the millions. And if being killed is the proper punishment for killing, what is the proper punishment for rape? Or for a toothless aggressor who knocks someone else's teeth out?

The term "retribution" is, indeed, so rife with misleading associations that I would prefer not to speak of "the retributive theory" at all, but rather "the *deserts* theory." The only form of the so-called retributive theory that I would defend at all is its most general one, the one that marks off the theory itself without being committed to any special versions such as the ones I have described: namely, the view that each person should be treated (and in the case of crimes, punished) *in accordance with his desert*. Thus formulated, there is no implication that desert must take the special form of *lex talionis*, although desert might well take that form in specific cases.

Now, "treatment in accord with desert" is probably the most frequently encountered definition of the term "justice" itself. And indeed I gladly accept this definition of "justice"—partly because it is already in common use and already familiar; partly because it is brief, terse, and relatively clear; and more important, because it is sufficiently general, and other proffered definitions tend to cover only parts or aspects of it. For example, Mill in Chapter 5 of *Utilitarianism* discusses five definitions of "justice," of which this is only one; but some of those he lists, such as "injustice is breaking faith with someone," appear to be special cases of the general definition. Finally, I accept it because it sets in bold relief the contrast (and potential clash) between justice and utility, which I shall discuss later; and this concept suffices as neatly as any other, with the possible exception of "rights," to show why "utility is not enough."

Other views may have some points in their favor, but if they yield justice when applied, they do so only in those cases in which the deserts theory and the other theories coincide in practice. The deserts theory is in fact the only one primarily concerned with justice. The philosopher Francis H. Bradley has given the theory its classical formulation.

> Punishment is punishment, only when it is deserved. We pay the penalty because we owe it, and for no other reason; and if punishment is inflicted for any other reason whatever than because it is merited by wrong, it is a

> gross immorality, a crying injustice, an abominable crime, and not what it pretends to be. We may have regard for whatever considerations we please —our own convenience, the good of society, the benefit of the offender; we are fools, and worse, if we fail to do so. Having once the right to punish, we may modify the punishment according to the useful and the pleasant; but these are external to the matter; they cannot give us a right to punish, and nothing can do that but criminal desert.[2]

To many, in fact, the statement "It is fitting that a person who has committed a crime against others should be made to suffer for it" will seem as close to a self-evident moral truth as is to be found. To those who desire something more specific, the justification presented by Professor Herbert Morris in his essay "Persons and Punishment" will be helpful. It is to the interest of everyone in a society, says Professor Morris, to have

> . . . rules that prohibit violence and deception, and compliance with which provides benefits for all persons. These benefits consist in non-interference by others with what each person values, such matters as continuance of life and bodily security. The rules define a sphere for each person, then, which is immune from interference by others. Making possible this mutual benefit is the assumption by individuals of a burden. The burden consists in the exercise of self-restraint by individuals over inclinations that would, if satisfied, directly interfere or create a substantial risk of interference with others in proscribed ways. If a person fails to exercise self-restraint even though he might have and gives in to such inclinations, he renounces a burden which others have voluntarily assumed and thus gains an advantage which others, who have restrained themselves, do not possess . . .
>
> . . . A person who violates the rules has something others have—the benefits of the system—but by renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage. Matters are not even until this advantage is in some way erased. Another way of putting it is that he owes something to others, for he has something that does rightfully belong to him. Justice—that is, punishing such individuals—restores the equilibrium of benefits and burdens by taking from the individuals what he owes, that is, exacting the debt.[3]

II

At first glance the position seems simple enough: each person should be treated in accord with his or her desert—whether it is a grade for

2. Francis H. Bradley, *Ethical Studies*, 2nd ed. (London: H.S. King and Co., 1876), pp. 26–27.

3. Herbert Morris, "Persons and Punishment," in *Human Rights*, ed. A.I. Melden (Belmont, California: Wadsworth Publishing Co., 1970), pp. 113–14.

achievement in a course, wages for work performed, or punishment for crimes committed. But of course there are difficulties. Professor Walter Kaufmann, in his book *Without Guilt and Justice*,[4] finds so much difficulty here that he would throw out the concepts of justice and desert entirely. For example, "It is quite impossible to say how much income surgeons, lawyers, executives, or miners deserve."[5] Professor Kaufmann includes both "retributive justice" and "distributive justice" (justice in punishment and justice in rewards) in his criticism. It is, he says, just as impossible to say what punishment an armed robber or a rapist deserves as it is to say what rewards people in different trades and professions deserve for their labor.

He makes a detailed and powerful case for the view that no person or committee in a college or university administration can say truly what a given assistant professor deserves by way of salary increase or promotion.[6] To what extent shall we consider teaching to be a criterion of desert? And what if he is a popular teacher at the undergraduate level but impossible for graduate students (or vice versa)? How much shall we consider publications? How strongly should quantity of publications be weighed in relation to quality (and who is to judge the quality)? How important is unpublished research? How important is work on committees and other administrative work, which someone has to do if a university is to function? What about rapport with colleagues and exchange of ideas with them? People can disagree endlessly about the various weights to be attached to each item, and also about the extent to which a given instructor fulfills the criteria in each category. Cases like this, and countless others, present us with bewildering complexities. What are we to say of them?

It is true that in view of the large number of variables (possibly their indeterminate number), and problems about the weights to be attached to each, that it is impossible to arrive at a mathematically precise outcome that one could call just. But I do not find this any more so in discourse about justice than about other kinds of moral discourse, e.g., about which alternative act one ought to perform, or which specific goals are most worth aiming at. The resultant duties that emerge from Sir David Ross' list of *prima facie* duties[7] is equally indeterminate: one has to weigh, for example, the *prima facie* duty

4. Walter Kaufmann, *Without Guilt and Justice* (New York: Peter H. Wyden, 1973).

5. Ibid., p. 71.

6. Ibid., pp. 75–78.

7. William David Ross, *The Right and the Good* (Oxford: The Clarendon Press, 1930), ch. 2.

of beneficence against the *prima facie* duty of fidelity—and according to Ross if we could achieve 1000 units of net good by keeping a promise and 1001 by breaking it we should keep the promise even if doing so achieves less good; if, however, we could achieve a million units of good by breaking it we should do so. At what point of increasing good achieved by breaking the promise should we break it? Ross provides no answer; and if the answer were given, "Break it if more than 13,749 units of good are thereby achieved," this wouldn't help, because (1) we wouldn't be able to identify this cutoff point if we found it, and (2) we would still want to know why this cutoff point was chosen rather than some other.

But, it will be objected, this difficulty is encountered because in Ross' ethics, as indeed in other systems of deontological ethics, we are trying to weigh incommensurables against one another. So let's try a simpler ethical theory, utilitarianism. In utilitarianism our only duty is to achieve maximum possible intrinsic good; but if we hold that there is a plurality of intrinsic goods, e.g., happiness and knowledge, then we still have the same problem of incommensurables as before. So let's take the simplest form of utilitarianism, hedonistic utilitarianism, in which the only thing to consider is happiness. Even here, however, we encounter insuperable difficulties. (1) There is the familiar point that happiness is unquantifiable—I can't say that today I am 3.7 times happier than a year ago at this time. (2) And even if happiness were quantifiable we could not achieve the quantification in fact in every case in which we would have to compare the degrees of happiness of various people. Even if I could say that I enjoy chocolate ice cream just twice as much as vanilla, I could not know that I enjoy chocolate just twice as much as you do. So the impossibility of arriving at an exact result bedevils utilitarianism, even in its simplest form, just as much as it does deontological systems of ethics. In spite of all this I never hear the objection that discussion about right and wrong should be abandoned. Still, the difficulties of trying to weigh various factors against one another in the case of right action, or various kind of values against one another in the case of goodness, are no less severe than the difficulties in estimating desert. We just have to do the best we can with what we have.

Example: should one reveal under torture the names of one's friends in the underground? One would ordinarily say no, it would be wrong to do so. But what if you know that there is a limit to the torture you can withstand, that if you don't give the information now you will be pushed beyond that point anyway, so that the added suffering you will endure will be pointless? And what if you have reason to believe that even if they don't get the information from you they will get it from one of your friends, someone who is also being interrogated and has a lower torture threshold than you do? And what if you have excellent reason to believe that the war is nearly won anyway, the Allied invasion of Normandy is imminent, and any information you divulge is likely (but not certain) to be of little use? How much weight is to be attached to such considerations? One could easily list several dozen others that would have a bearing on the question of what you should now do. There is no doubt that this makes moral decisions extremely difficult—but it is precisely because of difficulties like this that moralists have distinguished between objective duty and subjective duty (or as Russell put it in his essay "The Elements of Ethics,"[8] between the *most fortunate act* and the *wisest act*): the act that *does* achieve the most good (which only the eye of omniscience could discern at the time), and the act that *at the time of acting* appears on the basis of all the available evidence to be (on the whole, on balance), the one most likely to achieve it. It is only the latter for which we can be praised or blamed as moral agents, until such time as we receive the gift of omniscience. This conclusion—that the situation is too vastly complicated to admit of an answer that is either precise or certain—is widely accepted in matters of good and bad, right and wrong. Why then should it not equally be accepted in matters of justice and desert? I conclude, then, that the idea of desert need not be scrapped on the grounds that Professor Kaufmann proposes; and that if it should, so on the same grounds should goodness and rightness and most concepts in the sphere of ethics.

It seems to me that, both in the area of right and wrong and in the area of justice and desert, there are certain paradigms that govern our moral judgments. We may dispute endlessly, and with good reason, whether a given proposed act is right or wrong[9]—but not whether it is wrong to inflict suffering on others without reason. We may dispute endlessly whether this man deserves a prison sentence and for how long—but not whether an innocent person should be imprisoned, and not whether a person guilty of a trivial offense such as stepping on somebody's toe should be imprisoned for twenty years. Such paradigm cases seem to me as clear in the case of deserts as in the case of right and wrong.

Complex though particular judgments of desert can be, it seems to

8. Bertrand Russell, "The Elements of Ethics," in *Readiness in Ethical Theory*, 2nd ed., eds. Wilfred Sellars and John Hospers (Englewood Cliffs, New Jersey: Prentice-Hall, 1970), pp. 3–29.

9. The dispute may center on moral points, e.g., what constitutes sufficient reason, or on empirical points, e.g., what are the facts of the specific case at hand?

me that Professor Kaufmann makes them even more complex than they are. In the case of the assistant professors, he includes what a given candidate *desires* and what he *needs* as relevant to the estimate of what he deserves. I do not see how these factors are relevant at all. Surely one's desert (in the case of the promotion or the raise) depends on one's past performance, and on one's future potential as reflected in one's past performance. When one considers also whether the assistant professor has independent means, or whether he has a large family to support, one is considering what he needs but *not* what he deserves. The fact that one candidate is a millionaire who doesn't need the promotion (at least not for financial reasons) and another is the sole support of a large family, is simply irrelevant to his desert as a teacher. If the ability and performance of the millionaire are somewhat better, and the promotion is given to the other candidate anyway, this is surely an admission *not* that need is relevant to estimates of desert, but that one is using criteria *other* than desert (or in addition to desert) in deciding whether teachers should be promoted. And so, I think, the decision procedure as regards desert is actually simpler than Professor Kaufmann has pictured it, since he has intertwined factors relevant to desert with others that have nothing to do with it.

III

Are there any guidelines we can fruitfully adopt in attempting to punish offenders in accord with their desert?

Emile Durkheim once claimed that a proper measure of ill-desert was the degree of public indignation or resentment caused by the act. "In cases," he said, "which outrage the moral feelings of the community to a great degree, the feeling of indignation and desire for revenge which is excited in the minds of decent people is, I think, deserving of legitimate satisfaction."[10] I do not, of course, know what he meant by "decent people." But I fail to see how the degree of public indignation, which may be irrational and misguided and depends largely on how and whether the media fan the flames, is any measure of desert. It has to do with public reaction to the act, not the degree of culpability attaching to it.

A more fruitful suggestion, made by Professor John Kleinig in his book *Punishment and Desert*,[11] is to list each crime in order of severity, then list an equal number of penalties in order of severity beginning with the smallest penalty it is feasible to give (say a $10 fine or a day in jail) and ending with the most severe, and then match the items on the two lists. There would then be a one-to-one correlation between the seriousness of crimes and the gravity of the punishments. This procedure would at least make sure that a person who committed a less serious offense would never get punished more than a person who committed a more serious one.

10. Emile Durkheim, *The Division of Labor in Society*, trans. George Simpson (Paris, 1893; Rpt. New York: The Free Press, 1933), bk. 1, ch. 2.

11. John Kleinig, *Punishment and Desert* (The Hague: Martinus Nijhoff, 1973), pp. 118–24.

There are certainly worse schemes than this; yet this one raises problems. (1) Not everyone would agree on which offenses are the most serious. (2) Even if they did, they might not agree on the severity of the punishment appropriate to each—some might begin with ten days in jail and proceed with rapidly increasing severity to capital punishment, although the rank ordering of crimes and gravity of punishments would remain the same. (3) But most of all, it is surely a "fallacy of misplaced abstractness" simply to list offenses in order of seriousness, by type, without regard to the circumstances in which they were committed, whether intentionally or not, etc.—all of which would have to be taken into consideration in estimating desert. In some circumstances, a theft may be worse than a mugging: you can't consider merely the *type* of offense, you must consider the individual circumstances of each case. This makes things much more difficult, but justice requires no less than this.

These problems are indeed difficult, but not, I think, insuperable. As to the first point, there is much more agreement than might at first be apparent on which offenses are the most serious. Does anyone really believe that petty theft is worse than murder? When you steal from someone you take away something he owns, which he may be able to replace; if you take his life you take from him everything. The long tradition of natural law theory testifies to a large measure of agreement on which offenses are the most serious. Killing someone is, in general, worse than maiming him; maiming him is worse than giving him a temporary injury or pain; injuring is worse than stealing his wallet or trespassing on his yard. And there would, surely, be much more agreement than there is if people would engage in calm rational give and take discussions ("in a cool hour") of each issue, rather than simply repeating without thought, as many do now, whatever prejudices they have been taught to perpetuate.

As to the second point, undeniably there are people of lenient temperament and people of severe or "retributive" temperament, and every possible stage in between. But this situation could be ameliorated considerably if each person asked himself (á la Kant and Hare), "What would I wish done to me if I committed this offense?"

A person with a hypersensitive ego would gladly electrocute someone for the crime of stepping on his toe; but it is unlikely that he would be willing to have the same thing done to him if the circumstances were reversed, and consequently he would be reluctant to approve a *general rule of conduct* prescribing such punishment for such behavior. The mother of the hoodlum, who pleads for clemency for her dear boy who has just knifed a classmate to death in the street, would probably have a different view if she put herself in the place of the mother of the boy who was murdered—and vice versa.

On the third point, it is of utmost importance that each case be seen in all its concrete particularity, with whatever features distinguish it from other cases falling within the same category: I believe that if this were done (and it is not always easy to do), the measure of agreement on desert would be vastly increased. Since deserts are individual, and individuals differ in merit and demerit, we must not say in general that some types of offenses are always worse than others. Once we know not only the *kind* of offense a person has committed, but the circumstances in which it was performed, whether he did it deliberately, the kind of pressures on him when he did it, his whole psychological "set," and a host of other factors, we have much more data for deciding what he deserves than when we know only the type of crime he committed and then attempt to correlate the gravity of that type of crime with the gravity of the punishment. A person who steals food from a store may well be adjudged less deserving of punishment if he was hungry and had tried repeatedly to find work but failed—although the offense still falls into the same category, theft. When we know the concrete particulars of the individual case, people (at least people whose minds are not entirely closed and who are willing to discuss the issue rationally at all) will usually be much more inclined to agree about what an individual deserves than at the initial stage when the case is simply subsumed under a certain heading and is described no further.

IV

There *is* a difficulty about punishment and desert that is more troublesome than any of those I have discussed, although this one has been little noted. It is that in punishing someone, we are forcibly *imposing* on him something against his will, and of which he may not approve. It's not like the case of tolerating conflicting lifestyles (which we gladly do), but a matter of imposing on others penalties against their will and without their sanction.

Libertarians are especially sensitive about this issue, for they really

wish to impose nothing forcibly on anyone else; they would prefer to live and let live. Liberals (twentieth-century sense), by contrast, shouldn't mind too much—they do it, or at least vote for doing it, all the time. They are constantly forcing their ideals on everyone else in the form of voting to make everyone cough up more tax money to pay for the implementation of those ideals. The unadmitted but pervasive formula underlying their actions is "I'm so convinced that my ideals are worthy ones that I'll force you to pay for them with added tax money whether you believe they're worthy or not." The wheels of liberals are already generously greased in this direction, from constant practice in forcing their ideals upon others (via the State) in the economic area; they tend to have a messianic delusion about their ability and their authority to manage and legislate the lives of others. If they feel wise enough to prescribe panaceas and force them on everyone in the social and economic spheres, it is not surprising to find that they feel themselves endowed with the same infinite wisdom in the area of what punishments (or treatments) to inflict. But libertarians above all don't want to be caught in this kind of situation; to force their ideals upon others, whether in the form of extracting taxes from others or regulating their lives or their businesses, is absolutely anathema to them, and utterly contradicts their first principle, "The lives of other human beings are not yours to dispose of."

There is, of course, a built-in qualification in this libertarian view. Libertarians consider it immoral for any individual to interfere forcibly in the life of another *unless* that other person has first forcibly imposed his will on someone. When that happens, the victim is entitled to respond according to the rule ("The use of force is permissible") that the aggressor himself has implicitly laid down. And in the case of genuine crimes, as opposed to "victimless crimes," this is what has happened: in murder, manslaughter, rape, mugging, robbery, embezzlement, plunder, etc., someone has initiated a forcible intrusion into the life of someone else, and that someone else need not then "take it lying down" by letting the aggressor's blade plunge into his heart. There is nothing contrary to libertarian doctrine in an act of self-defense.

And yet there is a problem, and a very serious one, in the infliction of punishment: some person (judge or parent) or some group (jury, council of elders) sits in judgment on someone else and determines what punishment if any the aggressor shall be made to suffer. Not everyone, not even everyone of good faith, would agree that the punishment pronounced is the right one, yet some punishment must be given. The only alternative is to abandon punishment entirely and

let aggressors go free. *Someone* must decide what the punishment shall be. And as far as I can see, short of letting all aggressors go free, there is absolutely no way around this: someone has to make the decision, whether a judge or a jury, whether the State or a private agency, whether by a code of law or custom or by the whims of an emperor. But please note that this is a problem that attends not only the deserts theory but *any* theory of punishment (or for that matter of compulsory "treatment"): whenever you punish, for whatever reason, under the banner of whatever theory, you sit in judgment on someone else, playing God with his life, determining how his life (or his income) is to be disposed of. Only a just and omnipotent God could do this without error, and none of us is omnipotent or wholly just. And there lies the problem. If you want a problem, not only for the deserts theory but for any theory of punishment, this is it.

V

According to the deserts theory, at least in the form in which I would defend it, guilt is a *necessary* condition for punishment, but not a *sufficient* condition for punishment. In other words, if a person is not guilty he should never be punished, but if he is guilty it does not follow that he should be punished. (I would not say, "Do justice though the heavens fall.") The decision that A has committed the offense does not automatically carry with it a prescription to punish A, for there are conditions that if present will suffice to break the connection.

First, there are conditions that if present negate the claim to desert. I shall mention two obvious ones:

1. *Coercion.* If the agent was coerced into performing the act, this negates the claim that the agent deserves punishment for it. But unfortunately the matter is not so simple as this. Coercion is a matter of degree, and much depends on the degree of coercion exercised. At one end of the spectrum is the case of the man who is bigger and stronger than you who forces you to pull the trigger by laying his fingers on yours; in such a case of course it is he who deserves punishment and not you—in fact it is not your act at all but his—he is the agent, you the patient. Normally, however, coercion involves not a physical act by another but the *threat* of harm to you if you fail to do something the coercer wants; in such cases it is still up to you whether you will do the act or not. And here the situations range from extremely dire threats to relatively trivial ones. In the case of revealing the names of your colleagues in the underground, you might well merit ill-desert if you named them even under torture, since the lives of many others are at stake and you knew the risks when you volunteered for the job. Most cases of coercion, however, are less extreme than this. "If you don't let me marry your daughter, I'll beat you up" is coercion, but you can still freely decide whether it's better to be beaten than to give him your daughter in marriage; in spite of the coercion, you still have some control over the situation. "If you don't do what I want, I'll leave you," said by your wife, still has an element of coercion in it—there is a threat, but since it is not a threat to your life or limb, many would deny this example the status of coercion; yet having her with you (in spite of her disposition to utter such threats) might mean more to you than your life or limb, so the threat could still be devastatingly effective. On the other hand, "If you don't do as I say, I'll sneeze" would not be construed as coercion at all: essential to the notion of coercion are extremely unwelcome consequences to you for not submitting, and in this case you would probably say, "Go ahead—sneeze!" And if your mother-in-law said "If you don't do what I want, I'll move out," this could even be construed not as a threat but as a promise.

2. *Insanity.* This one is even messier, because of the vagueness of the term "insanity." (a) According to the M'Naghten Rule, a person is insane if he is ignorant of "the nature and quality of his act" and "the fact that it was wrong." Besides being extremely vague, such a criterion considers only the impairment of one's rational functions and leaves the volitional untouched. (b) If one says that a person is insane if "he is unable to understand what he is doing and to control his conduct at the time he commits a harm forbidden by criminal law,"[12] we are involved in endless disputes about whether on the particular occasion he could or could not have controlled his conduct, and to what extent. (There is a troublesome problem of degree here: almost everyone can control his conduct to a certain extent, in certain circumstances but not others—e.g., at gunpoint but not under pressure of more ordinary stimuli.) (c) If one applies as a test whether "he could have done otherwise at that moment," there is no clear way to resolve the contrary to fact conditional statement that *if* certain conditions had been fulfilled (an exact repetition of those he did confront?) *then* he would have acted otherwise than he did. No matter which formula we try to apply, we seem in the end to fall back on a highly intuitive test: "Is he just plain crazy or not?"

12. Jerome Hall, *General Principles of Criminal Law*, 2nd ed. (Indianapolis: Bobbs-Merril Co., 1960).

Dr. Thomas Szasz has made a powerful and (it seems to me) convincing case for the view that if a person has not committed a crime he should not be forcibly incarcerated, either in jail or in a mental institution.[13] But the case confronting us now is a different one: assuming that he *has* committed a crime, should a plea of insanity ever be admitted to enable him to escape an otherwise mandatory prison sentence? I am far less certain about the answer to this one: I am inclined to say Yes, but there is (a) so much vagueness about what constitutes insanity, and (b) so much skulduggery by psychiatrists themselves (one testifying that the defendant is insane, the other that he is not), that it is difficult to think of any concrete case in which the plea of insanity is clearly justified.

Second, there are conditions that if present do not negate desert, but only the obligation to punish, in spite of the fact that desert is present. I shall mention two:

1. Sometimes a person may deserve punishment but there are special reasons why it should not be carried out. For example, an old man guilty of a serious crime is dying of cancer and there is no longer any point in punishing him. (Some would say "He's been punished enough"—though scourges of nature can hardly be called punishment.) So he receives a suspended sentence—which of course is not the same as finding him innocent or exonerating him. The same might be said for an expectant mother whose imprisonment might jeopardize the health of her unborn child. (There are, of course, severe limits to all this. If a murderer is not apprehended until thirty years later, I do not see how the mere passage of time does anything to lessen his ill-desert.)

2. No matter how much a person might deserve a given penalty, it should be administered only if it has been arrived at through a fair trial, by prescribed procedures, and by impartial and competent judges. Suppose for example that a person deserves a certain penalty and that it was indeed pronounced, but that the judge or jury or attorneys suppressed evidence or broke laws to obtain the evidence, witnesses perjured themselves, or a confession was arrived at through bullying and beating the defendant. Then it is at least arguable that the punishment should not be carried out, no matter how richly it was deserved.

13. See Chapter 3.

VI

I have endeavored to defend the deserts theory only in its most general form, and have frankly admitted the difficulties that attend it in practice, as indeed similar difficulties attend all ethical theories when put into practice. But my principal reason for holding to it nonetheless is the really insuperable difficulties that attend any alternative to it.

The principal alternative, of course, is the utilitarian theory (more aptly called the "results" theory). "The past is past," says the utilitarian—and he intends this to be taken in the non-tautological sense, such as "What's past should be forgotten"; even if he said, "What's past cannot be changed," this too is a necessary truth. In the matter of punishment, as in all other moral matters, says the utilitarian, we should consider only how we can help make the future better. This is a plausible enough appeal, since presumably we all want to help make the future better. The question is (1) how—whether we can do this by considering, in the matter of punishment, only the future consequences of punishing and not the nature of the past deed (and doer) for which the punishment was administered, and (2) whether in any case making the future better is the only goal relevant to the situation, particularly when doing so ignores considerations of justice.

The utilitarian theory has sometimes been called the deterrence theory, but this is a mistake. One function of punishing, according to the utilitarian theory, is indeed to deter potential lawbreakers, but it is only one of several, and it can in fact be overriden by the others. The consequences of punishing that the utilitarian must consider seem to be at least four:

1. Consequences to the aggressor. The aim of punishing should be to make him a better person—to reform him, or at any rate to rehabilitate him—so that he will emerge in such a state as never to repeat his offense.
2. Consequences to potential aggressors. This aim is deterrence—to show people what happens if you commit crimes, and thus to discourage you from trying to commit them.
3. Consequences to society in general. The aim here is to protect the public from dangerous persons by isolating them, in prisons or work farms or whatever, from the rest of society during the period that they constitute a threat.
4. Consequences to the aggrieved party, i.e., the victim. The aim of punishing here is not to "undo the crime"—that is impossible—

but to make restitution to the victim (or in the case of murder, the victim's family) by improving his lot in some way, such as working for him or making his life more pleasant or in some way producing for him good consequences out of the bad situation that he caused. The traditional utilitarian theory is ordinarily limited to the first three kinds of consequences, although there is no reason why, in his consideration of consequences, the utilitarian should not consider the victim also—not only as a member of "society in general," but specifically as the aggrieved party to whom good consequences should accrue.

When this fourth kind of consequence is considered exclusively, we have what is called the "restitution theory of punishment." But we must be careful: all depends on how it is formulated. If the theory asserts, not that we should aim to produce good consequences for the victim, but that the victim *deserves* recompense for the agression against him, then the restitution theory becomes retributive (deserts)—but with this special twist, that it considers not the desert of the *aggressor* but the desert of the *victim*.

It is quite improbable that all of these aims will be fulfilled in any particular case of utilitarian punishment. First, imprisonment seldom rehabilitates lawbreakers; if that were the sole purpose of punishing, prisons should close up shop tomorrow. Most prisoners learn about crime and are far more oriented toward it after they emerge from prison than before they go in.

The second aim, deterrence, is somewhat more effective: many people who would otherwise kill and steal are deterred from doing so by the thought that they may get caught. Unfortunately, however, deterrence is only sporadically effective. It is much more effective for minor offenses, such as overparking and shooting game out of season, than for major crimes like murder. Most murders are committed "in the heat of passion," with no thought of future consequences at the time, and at that moment no severity of threatened future punishment would be sufficient to deter them. Deterrence then is a mixed bag.

But even if deterrence fails in a particular case, the third aim may be achieved: the protection of others. Even if the offender is not improved by punishment, and even if no one else is deterred from crime by his being imprisoned, at least while he is out of circulation other people are protected from further acts of aggression by him. This third utilitarian aim is really the most important one; even if the other two don't work, other people must be protected, and it is more important to protect the innocent than to protect the freedom of the offender to do what he wants.[14]

An unwelcome fact for the utilitarian, but a fact nonetheless, is that very often the utilitarian functions of punishing work against each other. What deters others may not improve the offender or protect society, and where protection is most needed, deterrence or reformation are often least effective. Utilitarians tend to assume that the greatest degree of deterrence and protection of society is needed for the most serious crimes. But this is far from being the case. A man has done what he felt he had to do, namely, kill his wife; apart from that one act he has no aggressive tendencies whatever; society does not need to be protected from him because he is not dangerous to anyone, nor is he any more likely than you or I to initiate any further acts of aggression. If he were let loose today he would be no threat to anyone—not nearly as much as petty thieves, whose offenses are less grave but who are much more likely to repeat their acts over and over again. Would the utilitarian, in view of this, have the courage of his convictions and recommend that the petty thief remain imprisoned indefinitely and that the murderer be released?

"But other people need to be *deterred* from acts of murder, and this can be done only by imprisoning the murderer, to make an example of him." So apparently it is not the murderer's ill-desert that counts, it is how his imprisonment may affect *other* people. And this, of course, is to use the offender simply as a means to an end—someone else's end; it makes him a sacrificial lamb on the altar of other people's (real or supposed) well-being. Besides, the effectiveness of deterrence is least in major crimes like murder; at the moment he commits the deed, the killer is not deterred by threats of punishment or by any other considerations of "rational egoism" as the overparker is. Many persons guilty of murder, then, (1) don't need to be "rehabilitated," (2) are less likely to deter others through his imprisonment than any other type of offender, and (3) don't need to be imprisoned to protect society, since he has no dangerous proclivities that society needs to be protected from.[15] The one consider-

14. Even this aim, however, is not achieved by the prison system. Even the most hardened prison wardens agree that 80–85 percent of the people in prisons don't belong there, and that if the entire prison population of the United States were released tomorrow, Americans would be just as safe (or unsafe) as they are now: most of the dangerous people are not in prisons but right around us, in the streets. See Jessica Mitford, *Cruel and Usual Punishment* (New York: A.A. Knopf, 1973).

15. Besides, the effectiveness of deterrence depends not on *whether* he is punished, but on *how much publicity* attends his punishment, i.e., on how many people know about it. If no one knows he is imprisoned, no one is likely to be deterred by that fact.

ation that would justify punishing the murderer, namely that he has committed the most serious of crimes and accordingly *deserves* it, is a consideration that the utilitarian excludes from consideration.

The utilitarian, aiming still at the production of good consequences, is likely to throw out *punishing* the offender and substitute *treating* him. "Treatment, not punishment"—this is supposed to be "the wave of the future" in penal systems. (He need not, of course, favor it in every case: many prisoners are quite immune to any "treatment.") "Don't punish him, that's barbaric—treat him, mold his personality so that he will never commit offenses in the future"—this is now the watchword; it all sounds very attractive, very enlightened, very humanitarian.

Yet this manifestation of the utilitarian theory is the most ominous of all, as the reading of Bruce Ennis' *Prisoners of Psychiatry*[16] or virtually any of the books by Dr. Thomas Szasz will quickly demonstrate. First, there is a vast difference between *voluntary* and *compulsory* treatment. Therapy voluntarily entered upon may often achieve the desired ends; compulsory treatment is far less effective, and, when it is, its effect is to mold him in directions that other people want for him rather than what he himself wants. Second, even when treatment is not strictly compulsory, great pressure—such as depriving him of access to prison facilities or locking him up in solitary for months on end until he decides to "cooperate"—can be brought to bear to make him engage in it. Third, by what standards will the treatment be conducted? What is to be the criterion of "improvement?" It is almost inevitable that the prisoner will be considered "unimproved" or "unrehabilitated" until he has conformed to the image the therapist desires for him. Fourth, how long will it last? A prison sentence is for a definite maximum period of months or years, and then at last he is free. But in treatment, he stays in until the therapist certifies that he is "cured," which may be ten days, ten years, or for the rest of the prisoner's life. Even if he is in for a trivial offense, his period of treatment may not be short: the therapist may find so many things wrong with his psyche that it will take years to "cure" him. (And if he can meanwhile be used as cheap labor to do jobs in the institution, he will not be treated at all but simply left in year after year to do the menial jobs.) The man is the therapist's prisoner, and if he doesn't respond in the way the therapist wants he can be in forever. In Soviet Russia, where the fashion is to place dissenters in mental institutions, they are subjected to deprivation,

16. Bruce Ennis, *Prisoners of Psychiatry* (New York: Harcourt Brace Jovanovich, Inc., 1972).

shock, cold, and a variety of injected chemicals until they "see the error of their ways" or until the prisoner dies of the therapy. In this respect, American prisoners and psychiatric institutions are not far behind. C.S. Lewis put the matter eloquently in his essay "The Humanitarian Theory of Punishment":

> They are not punishing, not inflicting, only healing. But do not let us be deceived by a name. To be taken without consent from my home and friends; to lose my liberty; to undergo all those assaults on my personality which modern psychotherapy knows how to deliver; to be re-made after some pattern of "normality" hatched in a Viennese laboratory to which I never professed allegiance; to know that this process will never end until either my captors have succeeded or I have grown wise enough to cheat them with apparent success—who cares whether this is called punishment or not? That it includes most of the elements for which any punishment is feared—shame, exile, bondage, and years eaten by the locust—is obvious. Only enormous ill-desert could justify it; but ill-desert is the very conception which the humanitarian theory has thrown overboard.[17]

VII

The utilitarian theory of punishment (or treatment) is a failure both in theory and in practice. Some of its inadequacies have apparently been perceived, for there have been several attempts to "combine" the deserts and the results (utilitarian) theories in order to arrive at a satisfactory "compromise" theory.[18]

It has been suggested that the deserts theory is acceptable in providing a *justification* for punishing at all (unless the person has committed a crime he should not be punished, no matter how socially beneficial punishing him might be); the deserts theory *sets a limit* on who may be punished. But once a person has been adjudged guilty, then the results (utilitarian) theory takes over: the sole purpose from that point on should be to produce good consequences.

The "deserts" part of this compromise theory seems to me acceptable, the "results" part not. Granted that we are not to incarcerate the innocent (though on the utilitarian theory it is far from clear why we should always accept this proviso); once guilt has been deter-

17. C.S. Lewis, "The Humanitarian Theory of Punishment," *Res Juridicae* 6 (1953): 224–30. Reprinted in W. Sellars and J. Hospers, *Readings in Ethical Theory* (Prentice-Hall, 1970).

18. I have discussed these points, as well as some of those in the following section, in "Punishment, Protection, and Retaliation," in *Justice and Punishment*, eds. J. Cederblom and W. Blizek (Cambridge, Massachusetts: Ballinger Publishing Co., 1977), pp. 9–30.

mined, we are to consider only future consequences. When this is done, of course, considerations of desert must be abandoned. What if the offender is a perennial public nuisance of a minor sort (always annoying people, engaging them in unwanted conversations, etc.) and the welfare of society would be promoted in this case by keeping him locked up for many years; shouldn't this be done, if the total well-being of the 500 people he would otherwise bother is greater because of his incarceration than the total discomfort visited upon him? He is one and society is many; many individuals find him to be a thorn in their flesh, and moreover he is immune to any known techniques of therapy on the outside. If we are to consider only future effects, the "incurable" petty offender should certainly receive a longer sentence than the "model prisoner murderer" who will never do it again and whose future incarceration (from the point of view of producing good consequences) would be pointless. Would the compromise theory really accept this consequence?

It has been suggested by John Rawls[19] that each of the two theories has its proper place, but in a somewhat different way. When we ask what is the justification for punishing a particular person we should be desert theorists: we say, *because* you were tried and found guilty of committing armed robbery. But when we ask what offenses should be punished and how much, and what laws should be passed forbidding which types of acts, then we should be utilitarians, and consider only the consequences of prescribing various punishments for various types of offense.

This compromise view seems at first to give each party its due, plus the impression that each of them was right all along; each settles for a piece of the pie. But I do not find this compromise theory any more satisfactory than the previous one. *Why* should the legislator be a utilitarian about punishment any more than the judge? Why should they not *both* consider what range of punishment is *deserved* for the given offense? Why should the legislator's eye, as opposed to the judge's eye, be solely on the results of punishing? Why must the legislator but not the judge turn a blind eye to deserts? Consider our previous case: Suppose it is determined with high probability that incarcerating the minor but "incurable" nuisancemaker for forty years has highly desirable consequences for society as a whole, and that to punish a one time murderer (the kind who'll make a model prisoner and needs no rehabilitation) is not. Is this consideration to be taken as decisive? Is one then to pass a law incarcerating such

19. John Rawls, "Two Concepts of Rules," *Philosophical Review* 64 (1955): 3–32.

nuisancemakers for years, or indefinite sentences, and giving this kind of murderer a suspended sentence? If you consider only what the results of punishing would be, you might very well come up with this legislative plan. It is popularly taken for granted that the worse the crime (the more deserving of punishment), the more severe will be the sentence, even on utilitarian grounds, since there's that much more to be deterred and to protect ourselves against; but as we have already observed, this is not so: there is simply *no correlation* between the gravity of an offense and the utilitarian consequences of punishing it. Once this lack of correlation is clearly perceived, and we *then* ask, "Why should we punish a less serious offense more severely," our question now stands out naked, as it were, shorn of its utilitarian trappings; and now it is by no means obvious that we should still answer, "We should assign the heaviest punishments to whatever offenses will produce the best consequences to punish." In fact, the very asking of the question should now make it clear that legislators should *not* go about passing laws with only utilitarian considerations in mind.

VIII

The fact is that between the deserts theory and the results theory there lies an unbridgeable gulf:

1. Utilitarianism (results theory) is future-looking, whereas deserts (and justice) are past-looking. According to utilitarianism, each of us has but one kind of duty, to produce optimific (i.e., the best possible) consequences in each particular case; and this is as true, according to the utilitarian, in the specific area of punishment as in all other areas of human action. The past is of no importance except insofar as consideration of it may affect future consequences. Desert, by contrast, is past-looking; what you deserve depends on your past record. This is true in all deontological ethics: you keep a promise because you have made it (not in order to produce optimific consequences, though it may sometimes do that too). You pay for repairs to the house you have damaged, even though you might achieve more total good by repairing the poor man's house next door (which you did not damage) with the same money. You owe special consideration to those who have benefited you, even though more total good might be achieved by ignoring your benefactors and helping those who have never lifted a finger for you. And one punishes *because* offenses against justice have occurred in the past: if punishing also does some good to somebody or other, that is a fringe benefit.

2. Desert is *individualistic*; utilitarianism by contrast is *collectivistic*. This point is less obvious but ever so much more important. The utilitarian is always concerned with the *total amount* of good to be brought about, not with a just *distribution* of it.

If maximum social utility were to result from an innocent person being railroaded ("telished") for a crime he did not commit, as long as others were deterred by his imprisonment, the community felt secure, etc., the utilitarian would in all consistency have to approve this deed, as long as it had optimific social effects. True, the innocent man wouldn't be very happy about it, but his happiness is but a small weight in the balance against the great weight of social good that would be achieved by sacrificing him. If, now, one says that this wouldn't actually happen because the real criminal might turn up (thus losing all the recently restored confidence in the efficiency of the police department), we could easily doctor up the scenario so that this wouldn't happen—e.g., by having the judge and no one else know that the real culprit was dead. Anyway, is *that* the only reason why we shouldn't railroad the innocent? If other people don't know it happened, does that make it better? Surely the reason we shouldn't do it is simply that he isn't guilty, and thus doesn't deserve the sentence; nor would the social good to be achieved by sacrificing him, which might under some circumstances (e.g., during a crime wave) be very great indeed, justify punishing him for what he did not do. Once again we would be using him as a means to other person's ends—sacrificing him to some (real or imaginary) "greater social good." We would not be concerned at all with justice, but only with "social engineering." Anyone who is tempted by that prospect should read Solzhenitsyn's *The Gulag Archipelago*.

Kant was surely right about this—that one should treat other human beings as ends, never merely as means toward someone else's end. And if this is accepted, the morality of punishing someone not because he deserves it but to achieve some "greater social 'good' " stands condemned at its very inception. That is most importantly what is wrong with utilitarianism—that it would permit such a thing. It considers the *total*, but not the *individual*. The individual counts, but only as an infinitesimally small fraction of the total. Rawls himself has put the finger on this Achilles' heel of utilitarianism:

> The most natural way . . . of arriving at utilitarianism . . . is to adopt for society as a whole the principle of rational choice for one man. . . .
>
> In this conception of society separate individuals are thought of as so many different lines along which rights and duties are to be assigned and scarce means of satisfaction allocated in accordance with rules so as to give the greatest fulfillment of wants. The nature of the decision made by the ideal legislator is not, therefore, materially different from that of an entrepreneur deciding how to maximize his profit by producing this or that commodity, or that of a consumer deciding how to maximize his satisfaction by the purchase of this or that collection of goods. In each case there is a single person whose system of desires determines the best allocation of limited means. The correct decision is essentially a question of efficient administration. This view of social cooperation is the consequence of *extending to society the principle of choice for one man*, and then, to make this extension work, *conflating all persons into one* through the imaginative acts of the impartial sympathetic spectator. *Utilitarianism does not take seriously the distinction between persons.*[20]

Having emphasized the individualistic character of desert as opposed to utility, I must now attach a qualifier for purposes of practical application: that sometimes it is justifiable to be collectivistic because one cannot know or cannot reasonably determine what each individual deserves. For example, automobile insurance premiums are much higher for unmarried males under twenty-five. This is so because this group as a whole has the highest accident rate. Yet there are many unmarried males under twenty-five who are extremely safe drivers, with perfect records, who are unjustly penalized because they are in the same category as a large number of others who are not. The high premiums are surely unjust to them—they pay more because *others* in their group have more accidents. Suppose we now object that insurance companies are behaving unjustly, and that they should scrutinize every case individually. The companies reply that if they did this, it would take so much work time and require the addition of so many employees that everyone's rates would have to go up.

Whether this is so in this particular instance I do not know: but there are surely cases where the cost and effort that would have to go into the evaluation of each individual case simply are not worth the trouble—that the case is not worth all that effort, and that in such cases individual deserts must be sacrificed. If there is a grand total of $1 for bonuses to be distributed among twenty employees, it isn't worth spending many dollars to figure out who deserves 25¢, who deserves 10¢, who 5¢, and who nothing at all.

This concession, then, and only this, I am willing to make to collectivism: that sometimes to discover deserts in each individual case is impossible, or not feasible, or simply not worth the trouble

20. John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), pp. 26–27 (emphasis added).

and expense. Obviously this applies only to cases of less than life or death importance. In a criminal trial, where a man's life (or years of his life) is at stake, it is obviously of great importance to uncover the truth and the whole truth about each individual case brought before the court, even though doing so is extremely costly and time-consuming. The same, I would add, is true of admissions offices in colleges and universities: when many would like to be admitted but only some can be, it is of great importance to take pains to discover who does and who does not merit admission. Going beyond a certain point with this, like spending $10,000 per student, wouldn't be worth the cost and would soon bankrupt the college. But very often admissions boards are collectivistic out of laziness—because it is so much easier to admit candidates by group quotas, based on race or sex or high school grades (never mind *which* high school), rather than to go into the laborious business of estimating the deservingness of each individual candidate. Yet his fate for years to come may depend on this decision. If it is always unjust to imprison an innocent man, it is also unjust to admit a less deserving student (regardless of age or sex or race) in preference to a more deserving one.

IX

Some of the same causes of concern that I have discussed in connection with the utilitarian theory apply also to the *restitution* theory. True, the restitution theory is not collectivistic; its concern is for the individual victims of the crime. It is also concerned (at least in one formulation of the view, already mentioned) with the deserts of the victim. But it is not equally concerned with the deserts of the offender. I shall consider just two kinds of cases.

1. One man purposely inflicts $10,000 worth of damage or injury; another man does it inadvertently, perhaps in spite of his best efforts to avoid doing it. The amount of damage or injury is the same, and so presumably the amount of restitution required in the two cases would be the same. But this seems to me a rather discomfiting consequence of the theory, for the two offenders' *deserts* are not the same. Whether the offender did it deliberately does enter into a consideration of his desert. There is a difference between murder and manslaughter, and everyone agrees that murder should be more harshly punished. But the damage done may be exactly the same; and when death is involved, the victim is equally dead both ways. On the restitution theory, should not the amount of restitution be equal? I find this disturbing because no consideration is given to the offender's desert.

2. Even more disturbing are cases involving unsuccessful attempts at crime. If I try to kill you but don't succeed because I'm a bad shot, I am morally as guilty as if I had succeeded; if I didn't succeed, it isn't because I didn't try. Legally, however, we do not punish unsuccessful attempts as much as we do successful ones, because in fact the attempted deed was never completed. Just the same, we don't let attempted murders go unpunished. For attempting to kill I merit considerable ill-desert. Attempting to kill, of course, is different from *intending* to kill; for intending to kill you, in spite of moral ill-desert, I am not legally punishable at all (who of us would go free if we were punished for our intentions?). An intention is not yet a deed: I might change my mind when the time came.

Now how do things stand with the restitution theory? If the attempt does not succeed, there is nothing to make restitution for. If you know that I am going to make the attempt, I might have to make restitution to you for scaring you or causing you fear or panic, but if you don't know, then there is no damage or injury to you at all, and presumably no restitution. In other words, there would be restitution required only if attempts succeeded. I confess to being unhappy about not penalizing attempts. If you don't penalize attempts, more attempts will be made, and more of them are likely to succeed. Besides, the man who attempts to kill you deserves a penalty; some would even say he deserves as great a penalty as if he had succeeded.

Consider now the opposite case: if I do something unknowingly or accidentally, not meaning to hurt you or damage your property, I may nevertheless be liable for huge damages. Mrs. O'Leary's cow upsets a lantern, which lights fire to the barn and through a chain reaction destroys the whole city of Chicago—so at least goes the legend. Does she deserve to be made to pay for that huge loss, which she couldn't do in a hundred lifetimes of hard labor? Perhaps that is why New York City has had a law on the books for over a century providing that if you inadvertently (never intentionally) start a fire in a building, the damages for which you are liable are limited to the building in which the fire starts. Perhaps this is to keep people from having to pay for large damages they inadvertently cause beyond their desert. This particular law, of course, has its problems too: if you are going to start a fire indoors in New York, make sure you do it in a small building.

Does a person who causes damages or injury accidentally, or fails through negligence to do something he should have done, deserve any penalty at all? Surely he may, depending on whether he could have taken steps to avoid the act or omission. I didn't mean to leave the bicycle on the sidewalk, I was going to take it into the garage in a few minutes, but meanwhile a blind man passed by, tripped over it, and was injured; surely I do merit some ill-desert for my negligence. The trouble is that the actual damage caused may have very little relation to the degree of my culpability. I may be extremely negligent or reckless and nothing happens, and I may be trivially negligent or reckless and through some fluke a huge catastrophe occurs.

The problem of relating damage to desert is an acutely practical one. The problem stems from the fact that damage or injury did occur, and someone has to pay for it. Since it would be unjust for the victim who suffered the injury to have to pay for it (he has already suffered the injury), and since it would also be unjust for every taxpayer to have to help pay for it, the only solution seems to be for the person who caused the injury or damage in the first place to pay for it (who else are we going to get hold of to do it?), even though the amount he has to pay is way out of line with his desert. I suppose some people would say that it was quite just for him to be made to pay for it all, no matter how large the amount or how unintentional the offense; but in that case justice would depend far too much on factors that are accidental, whimsical, outside your or my control. The person who pleads that this solution is just is probably simply extending the term "just" ad hoc to cover this case since he doesn't know how else to handle it. Such a solution, however, smacks of intellectual dishonesty. I would much prefer to say that there *is* no just solution in such cases. I would say that if someone accidentally struck you and bloodied your nose, and didn't know you were a hemophiliac and might consequently bleed to death, and nevertheless is made to pay $50,000 in hospital bills and for expensive blood transfusions, this solution, whether or not it is a practicable one, is not a just one. The trouble is that every other available solution is even less just.

X

Both the utilitarian and the restitution theories are defective to the extent that they fail to consider desert. I see no help for it: there are times when we have to be concerned with matters of desert, however much complexity and vagueness may plague us in the determination of it. When we compare the worthiness of various goals, we need to

talk about goodness and value. When we consider alternative courses of action, we need to talk about right and wrong. And when we believe that someone isn't being fairly treated, we need to talk about justice and desert. We cannot eliminate these terms from our moral vocabulary.

A thug on the city streets, looking for a new source of kicks, beats up an old lady with a shopping bag on the way to the market, slashes her face to ribbons, rapes her, and then clubs her to death. Yes, I want to see him punished, not only to deter others, not only because we must be protected against him and his kind, but because to do nothing in this case is to flout justice. I not only want him to mend his ways, I want him to feel guilty—guilty as hell—so that he can comprehend the enormity of his crime. Even if I knew that punishing him would deter no others, I would still say he deserved to be punished.

But much less dramatic cases than these will suffice. When Howard Hughes had been in the hands of the "Mormon Mafia" for several years, although his already well-developed tendencies toward secretiveness and paranoia were reinforced by the men around him, there were still times when he apparently yearned to escape from that psychological vise. On one occasion, when Hughes and his entourage had moved to Bayshore Inn overlooking Vancouver Bay,

> When they took Hughes up the elevator to the suite they had picked out for him, Hughes went over to the window and looked out, instead of scuttling into his bedroom.
>
> "The aides had picked the big middle room for The Office," Margulis said. "The boss gazed out the window a little while and watched a seaplane landing in the harbor. He said he liked the view.
>
> "The aides didn't like that one bit," said Margulis. "They told me to get him away from the window and into his bedroom.
>
> "Then something happened that really frosted me. The boss said he liked the big room and the view and said it would make a nice sitting room for him. He hadn't had a sitting room for years, and he'd always had the windows taped and never looked out.
>
> "They warned him that somebody could fly past the sitting room in a helicopter and shoot his picture with a telephoto lens. 'Here's *your* room,' they told him, and took him into another little blacked-out bedroom, with the draperies all taped down tight. He just went along with them, and they had him back in the cave again. After a while he got into bed, and called for a movie, and everything was just the way it had been for years."[21]

21. *Time*, 13 December 1976, p. 36.

When I read that passage I felt a strong sense of *moral outrage.* Here was a sick recluse who showed glimmerings of desire to escape from his condition, and here they were pushing him back into sickness again. "But nobody forced him!" I can hear someone say. "Hughes went back into the taped-up room of his own free will." And it's true they didn't exactly force him, they conned him. They were afraid that if he went public again they would be out of jobs, their importance to him would be over and so would their extravagant salaries; so they did what they could to keep things working to their advantage. No, they didn't force him physically—they worked on him mentally at what they knew was a weak spot and it worked.

One could say that Hughes was crazy, at least in some segments of his complex personality. But even if true, that would be nothing to the purpose. The point is that *they* weren't crazy: they knew exactly what they were doing. They made sure that they kept on controlling him, never letting him out of their grasp, perhaps simply to retain power, perhaps ultimately to get hold of his money, but at any rate they knowingly and deliberately frustrated any attempt by him to get himself out of his cocoon. I don't know what they deserved, I can't even say they deserved legal punishment, but I had the overwhelming feeling of enormous ill-desert on their part. What I felt was not covered by the idea that they could be made better persons, or that others should be deterred from doing what they were doing, or that society should be protected against the machinations of such men. I would not particularly deny any of these things, but they were perfectly distinct from (and far less strong than) the overwhelming conviction of their ill-desert. The other convictions were not even related to it as first cousins.

I would rest the case with two questions, substantially the same questions that J.D. Mabbott posed in his classic essay "Punishment."[22] (1) Suppose a person is punished for a heinous crime, but that the punishment did not improve him, that no one was deterred by his imprisonment, and that no one was protected because of his isolation from them. Does this show, or even tend to show, that his punishment was unjust? The answer seems to me obviously no. (2) Suppose a person is punished, and emerges a changed and bettered person; that countless others have been deterred from crime by his example; and that many more have felt (or truly have been) protected because he was imprisoned—but that in fact he never committed the deed at all for which he was convicted. Would any or all of these benefits show, or even tend to show, that his punishment was just? The answer again is obviously no.

22. J.D. Mabbott, "Punishment," *Mind* 48 (1939):152–67.

XI

Suppose a student has been lazy the whole term, had done no work, and absorbed nothing from the course. But suppose that he would be happier if he got an A, in fact he needs the A to improve his grade average and go on to school, that the teacher would be happier if he accepted the student's bribe of $100 for giving him the A, and that nobody else would ever know the difference. Would this lead us to believe that he should receive the A? No, for the simple reason that he didn't deserve it. The utilitarians on punishment are analogous to those who agree to give the undeserving student an A. The good results would not justify giving the undeserved grade; and the good results of "telishment" would not justify punishing the innocent. That is the profound but simple truth underlying the deserts theory.

If, finally, one wishes to say that the general *practice* of giving As only to those who deserve them is a good practice, in that on the whole the effects of adhering to the practice turn out to be the best, I would agree that this is, or tends to be, so. And if one wishes to say that the general practice of rewarding or punishing in accord with desert produces the most good in the long run—not in every individual case, but only as a general rule—then I will agree once more that this *tends* to be the case. If this is construed as assent to rule-utilitarianism as opposed to act-utilitarianism, at least in one meaning of the dozens of senses of these terms that philosophers have now spun out, so be it—I shall not object. But that is simply a consequence or by-product of my conviction, not the heart of it. My reason for saying that the thing should not be done, the grade of A in one case and the punishment of the innocent in the other—is simply that the individuals concerned do not deserve it. That is enough by itself, just as it stands. All the rest is a fringe benefit. In moral philosophy it is always the simple and obvious truths, long since recognized by the common man, that we in the ivory tower seem to lose sight of first.

Chapter 9

Retribution and the Ethics of Punishment

Walter Kaufmann

The wording of the topic assigned to me may suggest that retribution constitutes the ethical factor in punishment. This is certainly what many people believe, although this view is less prevalent in discussions of punishment during the second half of the twentieth century than it was fifty or a hundred years ago. Still, it is widely held that punishment can be viewed in a variety of perspectives, considering, for example, its efficiency, but that these approaches are nonethical and that only retribution makes punishment moral. I have been asked to speak on this topic because I have criticized this view.[1] Let us begin by asking:

WHAT IS PUNISHMENT?

Punishment involves at least two persons (call them A and B) and two acts. A holds a position of authority in relation to B, claims that B has done some wrong, and by virtue of his authority causes something unpleasant to happen to B in return for (as a punishment for) this claimed wrong. This is what is meant by punishment. If A does not claim that B has done some wrong, one speaks of maltreatment or torture, not of punishment; and if A does not hold a position of authority one speaks of revenge.

1. *Without Guilt and Justice* (New York: Peter H. Wyden, 1973; New York: Dell Publishing Co., A Delta Book paperback, 1975). The present paper is based on this book and especially on Chapter 2, "The Death of Retributive Justice." The following section is actually quoted with a few small changes from Section 17 in Chapter 2.

B could be an animal, but only if A treats B more or less as a person. Thus B could well be a dog or a cat; but we do not call it punishment when we kill a mosquito that has just bitten us. If A and B are one and the same person and we say, "Why do you keep punishing yourself?" we are using the term figuratively but still in a manner that is wholly consistent with our explication: B assumes the role of A and punishes himself. Finally, A could be a deity, who in that case would act more or less like a person—specifically, like a father, a judge, or possibly a teacher.

What is the purpose of this institution of punishment? It is encountered in many, if not all, societies and is used not only by political authorities but also by parents and teachers and even in games. Its ubiquity makes a mockery of any search for "the purpose," as if there were always one purpose only, the same everywhere. In different societies, contexts, and ages, punishment served various functions. Its entertainment value was more important in some places than in others. But the desire to see justice done, to do to the offender what he deserved, was never the primary reason for instituting punishments. The primary purpose of proclaiming a penal code is to prevent some evil. But this does not mean that the penalties are intended solely for deterrence. In Deuteronomy 19, "eye for eye" is actually introduced: "The rest shall hear and fear, and shall never again commit any such evil in your midst." Deterrence is very important indeed, but often understood far too narrowly.

A penal code deters people from committing crimes not only (1) by engendering fear but also (2) by inculcating a moral sense. A trivial penalty (say, a five cent fine) suggests that an offense is trivial, while a severe penalty conveys the sense that the crime for which it is decreed is grave. The code may also deter people simply (3) by informing them of what is forbidden. At first glance, it may seem to be overly subtle to distinguish this function from the first two. In fact, in many cases one is neither frightened nor led to feel that anything is immoral, and it is quite common for people to know that certain acts are forbidden without having any idea what penalties have been decreed for offenders. In such cases the third function is in evidence, but not the first two. But crimes occur in spite of all this, and the penalties are intended to undo, or at least to minimize, the damage. How?

(4) By preventing private vengeance, lynchings, and a general breakdown of order. Often the offense injured others who, in the absence of a penal code, might have taken the law into their own hands.

(5) By seeing to it that the breaking of a law does not become

an invitation to other men to emulate the lawbreaker. The punishment is meant to deter others and thus to reenforce the code. The offender has weakened the law and come close to annulling its deterrent effect; now the punishment is meant to undo this negative consequence and thus to restore the deterrent effect.

(6) By providing a safety valve for the unlawful desires that smolder below the surface and are fanned to the danger point by the commission of a crime. Many people have wanted to do what the criminal did but were kept from doing it by the law or by their conscience. Now he makes them look silly; they were timid, he was bold; they were weak, and he was strong—if he gets away with it. And he seems to have gotten away with it. Hence many people are burning to do what he did. The penal code provides an outlet for this criminal desire. He has killed someone, and now you—many of you—also want to kill. All right; kill him! He has maimed someone, and now many of you also want to maim someone. All right; maim him! Thus the desire for talion—for doing to the criminal what he has done to someone else—does not evidence any profound sense of justice or a primordial conviction that this is clearly what the criminal deserves.

These last three functions (4–6) interpenetrate. But the desire to proportion punishments to crimes is not born of the feeling that anything *less* than this would not be justice; it represents an attempt to keep cruelty in bounds. For as soon as people are invited to vent their criminal desires on the criminal, the same dangers reappear that we have just considered (under 4 and 5): as long as he is to be killed in any case, why merely kill him? Why not hang him first, then take him down alive, cut out his entrails. Why not have an orgy? Historically, the call for talion has generally signified a great advance over wanton cruelty.[2]

The fourth and fifth functions still come under the heading of deterrence. The sixth might be called cathartic, to use an ugly word for an ugly fact. Punishment purges the society—not, as often claimed, by removing some mythical pollution, but in a more palpable psychological sense. The purge, of course, affords only temporary relief, and unfortunately there is evidence that it is addictive. But this function of punishment has often been mistaken for a demand for retributive justice.

The traditional distinction between three functions of punishment

2. Cf. Paul Reiwald, *Die Gesellschaft und ihre Verbrecher* (Zurich: Pan-Verlag, 1948), pp. 268f., 273, 294, and also 16ff. where it is pointed out that in eighteenth-century England the punishment for treason began with hanging; then the offender was taken down while still alive and his entrails were cut out and burned before his eyes; and then he was beheaded and quartered.

—deterrence, reform, and retribution—is not subtle enough. One should distinguish ten functions—four more in addition to the six considered so far.

(7) Punishment is often justified as a means of reforming the offender. Thus a child is punished to teach him a lesson and to make him a better person. Lawbreakers have been pilloried, whipped, sent to prison, branded, maimed, and fined to reeducate them. Hardly solely for that purpose, but we need not doubt that this was often held to be one aim of punishment—and more rarely also one function of punishment.

(8) Recompense or restitution is scarcely a punishment as long as it is merely a matter of returning stolen goods or money. But suppose one has insulted another person and is required to make a public apology, or one has to make up to someone else some form of humiliation, inconvenience, or suffering. When the offender is humiliated, inconvenienced, or made to suffer in turn because this is held to be some recompense for the offended party, we enter the realm of punishment. Similarly, when it is claimed that the lawbreaker has harmed society and must now pay his debt to society, recompense is invoked as the purpose of punishment. The point is not that the offender deserves to suffer; it is rather that the offended party desires compensation. Again, the various functions often interpenetrate

(9) Expiation is also a form of recompense, but here the underlying idea is that some god has been offended and must be appeased. The notion of expiation depends on religious beliefs and makes no sense apart from them. Here I am sticking closely to the traditional meaning of "expiation." If it were objected that the notion also makes sense in relation to a sovereign, a parent, or anyone at all who sees himself as standing in God's place, I should say that such cases are best included under number 8.

(10) Finally, there is the claim that justice requires retribution, and that justice is done when, and only when, the offender is punished: he deserves to be punished, and until he actually is punished he fails to get what he deserves. This claim, which figures prominently in the rhetoric about punishment, is open to several criticisms;

(a) The notion of desert is questionable.

(b) The first seven functions are clearly future-oriented. The eighth (recompense) is at least partly future-oriented, but it also hinges on the notion of desert. The ninth (expiation) is a variant of the eighth that introduces the supernatural. But retribution is past-oriented and frequently based on the claim that a past event needs to

be—and can be—undone. This is a superstition. The past is not a blackboard, punishments are not erasers, and the slate can never be wiped clean: what is done is done and cannot be undone.

(c) The intuitive certainty that nevertheless often accompanies the belief that an offender fails to get what he deserves until he is punished can be explained psychologically.

Before we develop some of these objections, it is important to consider the matter of ethics.

ETHICS IN HISTORICAL PERSPECTIVE

We usually take for granted that there is a discipline called ethics, and we rarely if ever ask what it amounts to. But when discussing "the ethics of punishment," we should know what we are talking about. Asked to define ethics, one might say that it is the science of right and wrong. If pressed about the word "science," one might speak instead of systematic or, perhaps better, sustained reflection. If questioned whether ethics really concerns itself with every kind of right and wrong, including, for example, right and wrong chess moves or right and wrong answers to problems in arithmetic, one might qualify these two terms and speak of "moral" right and wrong. But at that point one would beg the question, inasmuch as "moral" is used simply as a synonym for "ethical." And to say that ethics is the study of ethical right and wrong does not tell us what ethics amounts to. But at this point it may suffice to say merely that ethics is the study of what makes human actions right or wrong.

Specifically, what are we doing when we discuss the ethics of punishment? We have defined punishment and seen that this institution serves a variety of purposes. Perhaps we can even agree that it would be very unsatisfactory to discuss punishment at length and ignore ethical questions. But what are the "ethical" questions that need to be taken into account?

Ethics was born among the Greeks in the fifth century B.C. When one person is singled out as its founder, this is generally Socrates. Actually, his immediate forerunners include not only some of the Sophists but also Aeschylus, Sophocles, and Euripides. In the *Oresteia*, most notably in the last play of this trilogy, the *Eumenides*, we encounter sustained reflection on rival claims of right and wrong, and similar issues were central in many other Greek tragedies.[3] It remains startling that this kind of reflection has not been a feature of all

3. For more detailed discussion, see Kaufmann, *Tragedy and Philosophy* (Garden City, New York: Doubleday, 1968; Anchor Books, 1969).

times and climes. Nevertheless it is possible and illuminating to see it against the background of some earlier stages and to distinguish five stages in all.

1. Originally, "right" meant conforming to tradition, and "wrong" was what violated tradition. At this point, or rather during the ages when this attitude prevailed, there was no distinctively moral sense of "right" or "wrong." One might therefore speak of a *preethical stage*, and in many ways the *Iliad* is still preethical in this sense.[4]

2. The second stage is reached when tradition clashes with tradition. In a tightly knit society whose members stay put in one place and have few contacts with other societies this need never have happened, especially during the millennia before the art of writing was invented. But as outside influences multiplied, tradition ceased more and more to speak with a single voice. Literacy did its share to facilitate comparisons. When individuals arise to criticize convention by appealing to a rival tradition, as the Hebrew prophets did, we reach the *protoethical stage*. In Greek tragedy we see how this stage gives rise to the next. The characterization just given fits the *Eumenides* and *Antigone*, but in these plays and in many of Euripides' we encounter a delight in argument that offers a stark contrast to the Hebrew prophets.

3. The next stage is reached when some of the Sophists discover that arguments cannot prove that a convention is right. Skepticism emerges and results in *ethical relativism*. If ethics is understood as sustained reflection, it begins with the Sophists, and this is the oldest ethical position. For the Hebrew prophets did not engage in sustained reflection or in a more or less systematic study of right and wrong. Socrates may have concentrated on conduct more exclusively than the major Sophists did, and to that extent he may be the father of ethics, but the main reason why he is so often singled out in this way is surely that Plato, the first philosopher known to us from complete works and not merely fragments, acknowledged Socrates as his master; and in the earliest complete works on ethics that we know—some of Plato's dialogues—Socrates leads the discussion. Yet we do not know for sure to what extent, if any, the historical Socrates developed a response to ethical relativism.

4. What Plato and many subsequent moral philosophers tried to do was precisely this: to counter ethical relativism. Plato's way of

4. For a striking example, see *Iliad*, 6:57ff.

doing this is still with us in the twentieth century. It is illuminating to distinguish three elements in his strategy, which in essentials has also been the strategy of Kant and many others. First, he presents himself as the champion of a tradition and the opponent of the relativistic critics of that tradition whom he sees as moral nihilists. Second, he is actually far from endorsing any one tradition in toto; like later theologians, he selects and reinterprets without realizing fully how this procedure is open to the criticisms of the ethical relativists. Finally—and this is why, like Kant, he has been revered as a great philosopher—he offers arguments in defense of his *ethical absolutism*. Upon close examination, his arguments, like Kant's, do not stand up. And having discovered that, one finds that philosophers of this kind actually offer bad reasons for an expurgated version of the moral code on which they were brought up.

To understand this position, it is essential to recognize the three moves on which it depends. The contrast of a hallowed tradition with moral nihilism provides some sanction by authority as well as a powerful threat, as if this version of ethical absolutism were all that stood between us and disaster. We are lulled into forgetting that there are many traditions and many versions of ethical absolutism. In typical Manichaean fashion, the absolutist poses as a savior from moral chaos—no, not as *a* savior but as *the* savior, as if he provided the one and only alternative to moral nihilism. We do not ordinarily think of Plato and Kant as Manichaean, but their dualism is palpable and involves them again and again in ignoring significant alternatives. Absolutists with widely different positions abound, and it is sustained reflection on this fact and on divergent codes that leads to ethical relativism. The first element of Plato's strategy thus involves a crucial mistake. In Plato's case we cannot be altogether sure that he himself failed to realize this, for he defended the "noble lie" and argued that one has to deceive people in order to save them.[5]

The second element of this strategy involves a common form of self-deception. It consists in what I call "exegetical thinking," which is to say that a tradition or a text is endowed with authority; that one then reads one's own ideas into it; and that one gets them back endowed with authority.[6]

The third and last element of this strategy bears the burden of giving this whole enterprise the name of philosophy. We are offered arguments, often even alleged proofs. Plato scholars, however, no

5. *Republic*, 414, et passim.

6. For more detailed discussion, see, e.g., *Without Guilt and Justice*, Section 6, and the chapter on "The Art of Reading" in Kaufmann, *The Future of the Humanities* (New York: Reader's Digest Press, 1977).

longer accept Plato's arguments, and Kant scholars are appalled by what a close study of Kant's arguments in his books on ethics shows.[7]

The reason for singling out Plato and Kant is, of course, that they are widely considered as great as any philosopher of any time. To prove the case against them in detail and to show how the same analysis applies to Christian absolutists, some utilitarians, and various contemporary writers would obviously be impossible in a short essay. That the absolutist position is based on reason, and ultimately on authority, if only that of the thinker's own moral intuitions, seems plain. I am suggesting that it is also based on a more or less sweeping disregard for rival authorities and different moral intuitions.

5. The last stage to be mentioned here is *critical ethics*, meaning critical reflection on alternatives. Perhaps representatives of critical ethics can claim Socrates as a forerunner with at least as much right as Plato had to do this. But my own ethics being of this type, I have no wish to invoke any authority. What is remarkable is rather how little ethics of this kind is to be found before the nineteenth century.

Critical ethics does not involve the absurd view that any ethic is as good as any other. On the contrary, that view is thoroughly uncritical. Nor does critical ethics entail a lack of moral convictions. It does entail what Nietzsche once called "the courage for an *attack* on one's convictions."[8] Far from treating one's own ultimate intuitions as authoritative and finding corroboration in the consensus of like-minded individuals, past or present, one asks systematically what speaks for and against one's own views, and what speaks for and against various alternatives. In the process, many positions are discovered to be confused, inconsistent, or based on shoddy evidence or arguments, while a few—sometimes only one but often more than one—seem tenable.

When we place the ethics of punishment in this framework, two points emerge. First, those who defend retribution as the ethical function of punishment are generally absolutists who consider it intuitively obvious that certain crimes call for certain punishments and who ignore history, which shows how many brilliant writers felt

7. See, for example, Lewis White Beck, *A Commentary on Kant's Critique of Practical Reason* (Chicago: The University of Chicago Press, 1960); and Robert Paul Wolff, *The Autonomy of Reason: A Commentary on Kant's Groundwork of the Metaphysics of Morals* (New York; Evanston, Illinois; San Francisco; and London: Harper & Row, 1973).

8. In a posthumously published note, *Gesammelte Werke, Musarionausgabe* (Munich: Musarion Verlag, 1920–29), vol. XVI, p. 318.

no less sure that the same crimes called for very different punishments. Second, by no means all absolutists have been retributivists. In fact, retributivism does not occupy a privileged position in any of the five stages considered here.

RETRIBUTION IN HISTORICAL PERSPECTIVE

It might be neat to distinguish the same five stages just considered. But it meets the eye that neither the Sophists nor Plato defended retribution, and even Aristotle ignored retribution in his careful analysis of justice. We shall therefore concentrate on the first two stages and on some non-Greek versions of ethical absolutism.

A.S. Diamond has shown that in early penal codes homicide was punished with fines; and in the many more or less primitive tribes he studied, pecuniary fines for homicide outnumbered capital punishment by a ratio of better than five to one: 73 percent versus 14 percent; and in the remaining 13 percent the punishment was also a fine: the slayer had to turn over to the victim's family a number of women, children, or slaves. It is only in what Diamond calls "Late Middle and Late Codes (including England, 1150 and onwards)" that intentional homicide is taken to require capital punishment.[9]

The belief that wrongs call for retribution is not primordial, instinctive, and universal—a timeless truth inscribed in the hearts of all men that only moral nihilists and relativists dare to question. It is rather a belief that developed in historical times. Of course, that does not prove it to be false, but it does refute one argument on which retributivists often rely, the appeal to the *consensus gentium*, the consensus of all nations. In addition to eliminating this prop, historical study also shows how shaky the appeal to moral intuition is.

In the Code of Hammurabi, around 1700 B.C., capital punishment is invoked rather frequently, but for the most part the reason for it would not seem to be retribution, much less an attempt to approximate the punishment of the crime. To be sure, if a noble has destroyed the eye of another noble, his eye shall be destroyed; if he has broken the bone of another noble, "they shall break his bone"; and if he has knocked out a tooth of a noble "of his own rank, they shall knock out his tooth."[10] If the victim is not a noble, the punishment is a fine, and this is also the case when a commoner has struck the

9. A.S. Diamond, *Primitive Law* (London: Longmans, 1935; Methuen, 1971), especially p. 316. See also *Iliad*, 9:632ff.

10. *Ancient Near Eastern Texts Relating to the Old Testament*, 2nd ed., ed. James B. Pritchard (Princeton: Princeton University Press, 1955), pp. 163–80.

cheek of a commoner. But what needs emphasis is that the cases in which the punishment is so similar to the crime that we may think that the underlying principle is surely retribution are the exception, not the rule, even in the section of the code on which we have concentrated. If a noble has struck the cheek of a noble of higher rank, he is to receive sixty lashes with an oxtail whip in the assembly. If he has struck the cheek of noble of his own rank, he is to pay a fine. If a slave has struck the cheek of a noble, they cut off his ear; if a son has struck his father, they cut off his hand.

In other sections of this code it is even more obvious that it does not rest on the principle of retribution. It may suffice to cite two consecutive laws (§154f.). If a noble has had intercourse with his daughter, they shall make him leave the city. If he has chosen a bride for his son, and the son has had intercourse with her, but later he himself has lain in her bosom and he is caught, they shall bind that noble and throw *him* into the water. The translator has "him" but says in a footnote: "Through a scribal error the original has 'her.'" One may wonder whether this was a scribal error, and, if it was, how many women may have died on its account. Either way, whether he or she was drowned, it will come as a surprise that this offense was considered so much more serious than incest between father and daughter. In any case, retribution is not invoked as the basic principle.

Even Hammurabi may be assigned to the protoethical stage rather than to the preethical stage, if it is assumed that the point of such a codification of law is that convention occasionally clashed with convention and it was necessary for that reason to determine clearly which traditions were to be binding. When we consider the Hebrew Bible, the so-called Old Testament, this is plainly so. Here an awareness of alternatives is stressed from the start. Moses is said to have been schooled in the wisdom of Egypt, and his laws are meant to give shape to a different way of life—different not only from that of Egypt but also from that of other nations.

It has often been claimed that the Law of Moses is based on the principle of an eye for an eye and a tooth for a tooth, but anyone who has studied Exodus, Leviticus, Numbers, and Deuteronomy knows that this is not so, although this phrase occurs three times. Even where it does occur, exceptions are noted, and it is not by any means suggested that retribution is what is sought. Indeed, in one of the three passages (Deuteronomy 19), as we have seen above, the phrase is actually introduced: "The rest shall hear and fear, and shall never again commit any such evil in your midst."

Perhaps the Book of Job is best understood as belonging to a later

stage. Here we find sustained reflection and argument, and traditional views are called into question. But the author's view cannot be categorized as ethical relativism. In a way, then, this book does not quite fit into the scheme I have outlined. The reason for bringing it up nevertheless is that it represents an attack on the views of Job's friends who understand human suffering as divine retribution for human wrongdoing. Job maintains, and so does the author of the book, that Job, who suffers grievously, has done no wrong, and in the final chapter God says twice that Job has spoken the truth while his friends have not. In a theological context one would have to stress that Job and the author of the book deny God's goodness and justice.[11] In the present context it is more important to insist that they reject the view, apparently widespread even then, that the good and evil fortunes of men may be understood as the result of divine retribution.

Looked at superficially, this may seem to be irrelevant to "the ethics of punishment." In fact, beliefs about divine justice are as relevant as Plato's beliefs about the idea of justice, for in both cases it is assumed that what is at stake is *the paradigm of justice.* Moreover, those who believe that all suffering is deserved and more or less directly due to divine retribution will feel, as Augustine and many outstanding Christians after him did and taught, that compassion for those God chooses to punish is sinful. The ethical implications of the Book of Job, on the other hand, include the view that it is entirely appropriate to feel compassion for the unfortunate. Their suffering is not necessarily deserved.

It has often been claimed falsely that the friends of Job represent the mainstream of old Testament thought. In fact, the Book of Job, in which Job's "friends" are rebuked and repudiated, is at one with the ethic of Moses and the prophets and specifically with the insistence on compassion for widow, orphan, stranger, and slave and the refrain that the children of Israel, having been slaves in Egypt, should understand how it feels to be oppressed. Isaiah 53, on the suffering servant, is also close to the Book of Job.

11. Of course, this is not the way the Book of Job has usually been read. See *The Dimensions of Job: A Study and Selected Readings*, presented by Nahum N. Glatzer (New York: Schocken Books, 1969). In addition to a long introductory essay, Glatzer presents, with short prefatory notes, thirty-two interpretations. My own (pp. 237–45, reprinted in abbreviated form from *The Faith of a Heretic*, 1961) he introduces as "one of the boldest and most incisive and sensitive reflections on the Joban problem. His analysis stresses Job's protest against divine injustice and his denial of God's goodness—issues carefully avoided by theological moralists." I mention this only because my reading might strike some people not versed in biblical scholarship as eccentric.

In the Old Testament, retribution had never achieved the central importance that it assumed in the New Testament. In the New Testament men's laws, society, and this world are depreciated radically, and justice is to be found only in the divine judgment that consigns a few to heaven and the mass of men to hell and eternal damnation. In this divine judgment all other functions of punishment drop away. As Pope Pius XII noted in his address to the Sixth International Congress of Penal Law, October 3, 1953,[12] "The Omnipotent and All-Knowing Creator can always prevent the repetition of a crime by the interior moral conversion of the delinquent"—or, we might add, in any number of other ways. "But the supreme Judge, in His Last Judgment, applies uniquely the principle of retribution." This shows, according to the pope, that "modern theories" are wrong when they "fail to consider expiation of the crime committed . . . as the most important function of punishment."

Liberal Protestantism has spread a very different but historically untenable conception of the Gospels. In fact, the notion that retribution is the crucial ethical function of punishment is rooted in the New Testament, at least as far as Western civilization is concerned. This is no small matter, for it did not remain for a twentieth century pope to exhort Christians to an *imitatio Dei* in these matters. The belief in a God who was held to punish relatively trivial offenses with eternal tortures was taken to justify cruelties that have no parallels in the codes of Moses or Hammurabi. Moreover, Jesus neither counselled nor showed compassion for the damned, and Augustine among others taught expressly that one must not feel compassion for them.

Of the other religions in which similar doctrines prevailed it will suffice to mention Hinduism with its doctrine of reincarnation. Here the wisdom of Job's friends poisoned a whole society. The widow, the poor, and the oppressed are held to deserve their fates and to suffer just retribution for the wrongs they did in previous lives. Again, compassion would be sinful.[13]

The notion that just retribution is possible was not born of philosophical reflection and much less of the experience of human legislators. It was born of the unsupported claim that—in the words of Jesus cited by Pius XII—"the Son of Man will come with his angels in the glory of his Father, and then he will repay every man for what he has done"[14]; or of the equally unsupported claim that there is a

12. *The Catholic Mind*, February 1954.

13. The views presented here are defended much more fully in some of my other writings, especially in *Religions in Four Dimensions* (New York, Reader's Digest Press, 1976).

14. Matthew 16:27, cited by the pope along with Romans 2:6 and 13:4. The RSV lists the following parallel passages: Matthew 10:33; Luke 12:9; 1 John 2:28; Romans 2:6; Revelations 22:12. It would be easy to lengthen the list.

law, *karma*, that governs the transmigration of souls, insuring that after death everybody gets what he deserves.

Two of the most impressive men of the enlightenment still tried their hands at attempts to emulate God's alleged justice. In his first inaugural address, Jefferson proppsed nothing less than "Equal and exact [!] justice to all men." For him this did not entail the abolition of slavery; but in 1779 he had actually drafted "A Bill for Proportioning Crimes and Punishments," whose provisions are likely to strike a modern reader as grotesque: "Whosoever shall be guilty of rape, polygamy, or sodomy with man or woman, shall be punished, if a man, by castration, if a woman, by cutting through the cartilage of her nose a hole of one half inch in diameter at the least." And:

> whosoever on purpose, and of malice forethought, shall maim another, or shall disfigure him, by cutting out or disabling the tongue, slitting or cutting of a nose, lip, or ear, branding, or otherwise, shall be maimed, or disfigured in like sort; or if that cannot be, for want of the same part, then as nearly as may be, in some other part of at least equal value and estimation, in the opinion of the jury, and moreover shall forfeit one half of his lands and goods to the sufferer.

Kant stated that:

> Whoever steals makes everybody else's property insecure; he thus robs himself (in accordance with the law of retribution) of the security of all possible property; he has nothing nor can acquire anything but still wants to live, which is not possible unless others feed him. But since the state will not do this for nothing, he has to place his powers at the disposal of the state for whatever labor it deems fit. . . .

And, Kant also said:

> Even if civil society were to dissolve with the full agreement of all its members (e.g., a people on an island resolved to scatter all over the world), the last murderer still confined to prison would first have to be executed in order that everybody received what his deeds deserved, lest a blood guilt should stick to the people that had not insisted on this penalty. . . .[15]

The major critics of retributivism (for example, Bentham, Nietzsche, and Shaw) have been more or less militant anti-Christians,

15. See *The Complete Jefferson; Containing his Major Writings, Published and Unpublished, except his Letters*, ed. Saul K. Padover (New York: Duell, Sloan and Pearce, 1943), pp. 90–102; and Immanuel Kant, *Metaphysische Anfangsgründe der Rechtslehre* (1797), § 49E.

but by no means moral nihilists. On the contrary, the turn against retributivism has been motivated ethically for the most part.

OBJECTIONS TO RETRIBUTION

It is arguable that this whole chapter should have concentrated on this topic, recapitulating all the major arguments. But it is a mistake to think of philosophy only or mainly as the amassing of arguments. It is important to gain perspective on a problem or position and to perceive its relation to other problems and alternative positions. That is what has been attempted here so far. It is important to realize that retribution is not one of the three functions of punishment, along with deterrence and reform, but rather one function among many more, of which ten have been considered here. It is also crucial to realize how it is a relative latecomer, and how small a role if any it has played in many codes. Finally, we can hardly begin to understand its place in the modern world until we grasp its relation to Christianity.

Instead of recapitulating all or even most of the arguments to be found in a vast literature, I should like once again to concentrate on a few especially important points that need more discussion.

1. What has hurt retributivism more than any argument is the conjunction of three cultural developments: the eclipse of Christianity; the spread of humanitarianism, to which some of the greatest nineteenth century novelists contributed; and the emergence of depth psychology. The type of psychology that is at issue here is tied above all to four names: Dostoevsky, Tolstoy, Nietzsche, and Freud. I shall say no more about the first two developments, but it may be useful to indicate at least briefly how depth psychology has contributed to the marked decline of faith in retribution. One simply cannot understand the change in the whole climate of opinion about punishment without paying some attention to the rise of depth psychology.

It has become a commonplace that criminals are not essentially different from law-abiding citizens. Manichaeans do not see their enemies as essentially like themselves, and most Christians had not thought of the damned as essentially like the saved. The insistence of the new psychology that criminals are not profoundly different from other men went well with the spread of humanitarianism. But Freud and Nietzsche also attacked from the opposite side the sharp division between respectable society on the one hand and the abnormal and criminal on the other. They exposed the unedifying motives and emotions of the normal and respectable and thus showed us punishment in a new light. Even when the cathartic function of punishment described above has not been perceived as clearly as I have sought to present it, capital punishment and the claim that retribution is required are no longer seen today as they were seen by Kant and Hegel, T.H. Green and Bernard Bosanquet.

Green still claimed that "Indignation against wrong done to another has nothing in common with a desire to revenge a wrong done to ourself."[16] This claim was crucial not only to *his* defense of retribution as the distinctively ethical factor of punishment. Yet it is psychologically naive in the extreme. The Buddha knew that in the sixth century B.C., but before Nietzsche and Freud very few other people did. On January 28, 1804, the British *Morning Herald* could still publish the following report that Green, who was born some thirty years later, might still have taken at face value, while many, if not most, readers today will consider it a vivid refutation of Green's view of indignation:[17]

> The enormity of Thomas Scott's offence [*sic*], in endeavouring to accuse Captain Kennah, a respectable officer, together with his servant, of robbery, having attracted much public notice, his conviction, that followed the attempt, could not be but gratifying to all lovers of justice. Yesterday, the culprit underwent a part of his punishment: he was placed in the pillory, at Charing Cross, for one hour. On his first appearance, he was greeted by a large mob with a discharge of small shot, such as rotten eggs, filth, and dirt from the streets, which was followed up by dead cats, rats, etc., which had been collected in the vicinity of the Metropolis by the boys in the morning. . . .

If we are immune to all attempts to convince us that what Thomas Scott received was what Jefferson called "exact justice," this is surely not because such a claim could not be supported by arguments at least as good as Jefferson's and Kant's arguments for other punishments. Scott had tried to undermine respect for Captain Kennah, and it could be argued that retributive justice demanded that he be subjected to loss of respect.

Branks were iron frames placed over a woman's head, with a sharp metal bit entering the mouth, and were used to punish scolds. Surely it could be argued that this punishment fitted the crime and was not wholly disproportionate. Yet nobody nowadays takes seriously the

16. T.H. Green, *Lectures on the Principles of Political Obligation* (London: Longmans Green, 1937), p. 184. First published posthumously in 1895.

17. The report is quoted by William Andrews, *Old-Time Punishments, 1890* (London: Tabard Press, 1970), p. 84f. The chapter on "The Pillory" shows that the scene described was typical.

claim that retributive justice demands such punishments as branks or pillories, or gags and ducking stools, or branding and maiming. And one of the most important reasons for these changes is an awareness of the motives that find expression in such punishments.

It may be objected that being a scold or falsely accusing a man of armed robbery are not crimes at all, or that at least they involve no direct physical harm, and that any physical punishment is therefore obviously disproportionate. But that is really beside the point at issue here. What requires explanation is that attempts to devise ingenious punishments that could perhaps be defended as proportionate have all but disappeared and hardly anyone in the Western world advocates *public* punishments of any kind. This does not necessarily mean that we have become more humane. But it has come to be felt widely that the "lovers of justice" who feel gratified by watching and contributing to the punishments of wrongdoers are not so different from these wrongdoers and anything but admirable. Hence the tendency has been to prevent such spectacles as that described in the *Morning Herald* by no longer punishing offenders in public. This change of procedure also has the advantage that *we* do not see what is done and hence are not haunted by the vision of brutal warders and inhuman prison conditions. We know that punishment in action is not fit for the daylight—and keep it out of the light; and even most of the judges who send people to prison refrain from ever setting foot in a prison lest they see what they do.

2. The most important argument against retributive justice is that punishments can never be deserved. This means that a punishment can never be wholly proportionate. The admission that some punishments are more disproportionate than some others does not entail that there is one punishment that is perfectly proportionate any more than the claim that X is warmer or softer than Y, or more beautiful than Y, entails that there must be a perfectly warm, soft, or beautiful entity (Plato's error). Most retributivists are Platonists without realizing it. They even extend his ancient error to punishment, as he did not.

It is surely obvious that for many, indeed most, crimes there is no wholly proportionate punishment; for example, seducing a child, raping a child, arson, treason, traffic violations, genocide, embezzlement, fraud, forgery. Nevertheless some people still believe that at least in some cases there are perfectly proportionate penalties that make retribution feasible. The prime example has always been homicide or at least premeditated murder. Yet it meets the eye that being killed suddenly, unexpectedly, is altogether different from a protracted trial and a long period of imprisonment under the sentence of death; and usually the mode of execution bears no resemblance to the method of the murder. To this one might also add the difference in the family circumstances, the age, and the attitude toward life of the original victim and the criminal. I am not arguing against the death penalty at this point but only against the claim that capital punishment for murder is a wholly proportionate penalty and thus an example of just retribution.

My thesis that punishments can never be deserved also means that the notion of desert is a confused notion and that on closer examination we find that desert cannot be calculated. This point is equally relevant to distributive justice and retributive justice, and I have developed it at length elsewhere, mainly in the context of "An Attack on Distributive Justice."[18]

I have also tried to show how the origin of the idea of justice, which I equate with the idea that a reward or a punishment is deserved, is to be found in a promise that if X does *this*, X will receive that reward or punishment. When the promise is not fulfilled, or its fulfillment is delayed, one feels that X has a reward or punishment coming to him, that X deserves it; and only when the promise is fulfilled does one feel that justice has been done. The promised reward or punishment need not be presented as perfectly proportionate, and it may even be capricious, provided only that the person who makes the promise is viewed as having some authority. This analysis applies both to the historical past and to our childhood in which we develop notions of justice. (Guilt feelings are the sense that we deserve to suffer, that we have a punishment coming to us. "Guilty" means at bottom "deserving of suffering.")

At a later stage, when conventions are examined critically and one begins to look for inconsistencies, one is struck by the occasional rhetoric of proportionality and the discovery that actually punishments as well as rewards are not proportionate. Instead of admitting at this point that desert is incalculable and that people cannot be given what they deserve in this more refined sense of the term, which

18. *Without Guilt and Justice*, ch. 3. Chapter 4 is "The Birth of Guilt and Justice." John Hospers believes that if we scrapped the idea of desert, then "on the same grounds should goodness and rightness and most concepts in the sphere of ethics" (Chapter 8, p. 187) be scrapped. I cannot agree. We can give examples of what we consider good, loving, honest, and courageous; but most people who defend justice are unable to specify just punishments and distributions. And whenever someone does make bold to give examples, which is unusual in the 1970s, most of the other advocates of "justice" who are present are quick to disagree. This shows how "just" is very different from "courageous," "honest," and many other moral terms.

involves not merely the fulfillment of a promise but proportionality, some great religious teachers, notably including Jesus or the evangelists, have claimed that after death everybody will receive precisely what he deserves. Hence Jefferson still believed in the possibility of "exact justice," or at least paid lip service to it and lent it his immense prestige. Speculation about the proportionate punishments after death gave rise to a veritable pornography of punishment and allowed the sadistic imagination rather free rein. Speculation about proportionate rewards, on the other hand, has remained a rather barrren affair.

We simply cannot determine who deserves what. "Exact justice" and "simple justice" are chimeras; and what one generation considers simple justice often strikes the very next generation as simply outrageous. This would long have become a commonplace if it were not for the prestige of glib religious claims that after death all of us receive our just deserts and that divine or perfect justice consists in exact retribution.

Philosophers have been confused further by the Platonic error that if X is softer than Y, there must be something that is perfectly soft. But I can admit that if a child steals a penny and her father beats her to death for it after first torturing her for a week, this punishment is more disproportionate, undeserved, and outrageous than it would have been for him to torture her for four days and to stop beating her before she was dead; but from this it does not follow that there is a punishment for stealing a penny that would be truly proportionate and deserved, or another one that would be "perfectly" outrageous. As Gerard Manley Hopkins said in the opening words of one of his best poems: "No worst, there is none." And we might add: No best either.

3. Even if a punishment could be proportionate, it would not follow that it ought to be imposed. Clearly, hanging Eichmann was a less proportionate punishment for the crime of which he was found guilty than it would have been to all but kill him again and again, millions of times, and always to bring him back at the last moment to be subjected to a similar procedure. From the fact that most of us would object to the more proportionate punishment *on ethical grounds* it follows that the attempt to make punishments proportionate—that is, the retributive factor—cannot be the distinctively ethical factor of punishment.

It may be objected that most of us are simply mistaken and that Eichmann ought to have been tortured for years. For my purposes here it is sufficient to note that the view that retribution is the distinctively ethical factor of punishment does entail this conclusion.

While I find this conclusion odious (and actually asked Ben Gurion to commute Eichmann's sentence and let him go free), I must admit that the plea for torture in such cases is less inhumane and much more rational than the words of Jesus in the first three Gospels, comforting his disciples with the assurance that "if anyone will not receive you or listen to your words . . . it shall be more tolerable in the day of judgment for the land of Sodom and Gomorrah [that is, for the greatest evildoers of all time] than for that town."[19]

It may be asked on what grounds I would oppose torturing Eichmann. The answer is simple. If anyone deserved torture, he and Himmler, Beria, Stalin, and Hitler would have been prime candidates. But I hold that no human being deserves torture, that the attempt to determine what a human being deserves is misconceived and hopeless, and that a society that condemns all forms of torture might diminish human cruelty. But there are times and cases that lead one to wonder whether this last hope is too optimistic.

4. It should be abundantly clear, but it may be well to say so expressly, that I have not argued for the abolition of punishment. As indicated in the opening section of this chapter, punishment has many functions. We cannot dispense with punishment. We need rules and laws, and these require sanctions in the form of penalties. In our penal codes we have reduced the staggering variety of *Old-Time Punishments* or *Curious Punishments of Bygone Days*, to cite the titles of two old books (1890 and 1896) to mainly two or three: fines, imprisonment, and in some places also capital punishment. The deceptive charm of fines and prison terms is that both permit neat quantification and measurement and thus go well with the old conceit that desert is calculable. Actually, of course, it is common knowledge among those who have reflected on these matters that a $20 fine is not the same for a rich man and a poor man, nor is the same prison sentence for two people necessarily the same punishment. Since we cannot dispense with punishment, it is important to bring some imagination to the modes of punishment. In this connection it may be well to conclude with a word about restitution.

RESTITUTION

This subject is considered at length by other contributors to this symposium, and I cannot deal with it in depth at the end of this chapter. Only a few very brief observations are in order here.

I am all for a future-directed orientation and believe that those who have wronged others should ask themselves how they can make

19. Matthew 10:14 and 11:34; Mark 6:11; and Luke 10:10ff.

it up to them or, if that is impossible, as it often is, how they can make it up to humanity. To some extent, the courts might encourage and help offenders to find appropriate ways and means. But this path is strewn with difficulties.

The central problem is the one I have tried to develop in this chapter. "Restitution" is a chimera like "exact justice." The term is based on and invites the same superstition that I have attacked earlier.[20] The past is not a blackboard, the slate cannot be wiped clean, and what is done cannot be undone. As I try to show in a forthcoming book, *Time is an Artist*, most people are loath to admit irrevocable change. Their attitudes toward history and death, toward other men and even more so women, and toward so-called restorations of works of art and archaeological sites show this in a multitude of ways. So do many beliefs about retribution and restitution. In fact, there is no proportionate punishment for seducing a child, raping a child, treason, traffic violations, or genocide, and there cannot be any "restitution" in such cases. If we should decide nevertheless to speak of "restitution," we should at least realize how misleading this term is. Like fines and prison terms, it seems to allow for quantification and measurement and thus invites the old superstition that we can have exact justice and perhaps even restore the *status quo ante.* In this way "restitution" may lead us back into the ancient errors that I have criticized here.

That is not all. If we recognize these errors and permit the courts to exercise a great deal of discretion in decreeing how a particular offender is to make "restitution," we invite arbitrariness and monstrous inequities. Goethe's Mephistopheles calls himself

> Part of the force that would
> Do evil evermore and yet creates the good.[21]

Conversely, those who would do good often create evil. Good and humane intentions are not adequate safeguards.

In spite of these caveats, we must explore alternatives to our present penal system, because that is a horror. And we cannot write off the suggestions that are often lumped together under the heading of "restitution" either because that term is unfortunate or because of the other difficulties mentioned. The problems of punishment are exceptionally thorny, and *all* paths are strewn with difficulties. Our task is to develop a system that is better than what we have now. No best, there is none.

20. See 10b, pp.214–215.

21. *Goethe's Faust: The Original German and a New Translation and Introduction* by Walter Kaufmann (Garden City, N.Y.: Doubleday, 1961, Anchor Book, 1962) lines 1335f.

Chapter 10

Crime and Tort: Old Wine in Old Bottles

Richard A. Epstein

The relationship between crime and tort is much vexed in the judicial and academic literature. Most people recognize that the two systems of individual responsibility have much in common, but that much, too, separates them. In this essay I wish to investigate the reasons why the two rules of tort and crime should overlap and diverge, and then, having established the general framework, to show how it applies to key substantive questions about individual responsibility that must be confronted in both systems. With the general part of the explanation completed, I want to turn to the question of under what circumstances, if any, the victim of a crime should be entitled to compensation (sometimes called "restitution") in a criminal proceeding from his assailant.[1]

1. In this essay I shall discuss only the issue of restitution, and not the related question of "compensation." These two terms have in the specialized literature somewhat technical meanings that are clearly brought out in Stephen Schafer, *Compensation and Restitution to Victims of Crime*, 2nd ed. (Montclair, New Jersey: Smith, Patterson Publishing Co., 1970), p. x:

> Compensation is an attempt to counterbalance the victim's loss resulting from a criminal attack. It represents a sum of money awarded to him for the damage or injury caused by a crime. It is an indication of the responsibility assumed by society; it is, in essence, civil or neutral in character and thus represents a non-criminal goal in a criminal case. Restitution differs in that it allocates the responsibility to the offender. The restoration or reparation of the victim's position and rights that were damaged or destroyed by the criminal attack become, in effect, a part of the offender's sentence.

See, for a discussion of the compensation issue, the Symposium in *Minn. L. Rev.* 50 (1965):213–310.

I. OVERLAP AND DIVERGENCE

A moment's glance should convince even the most casual observer of the obvious points of both similarity and difference in the tort and the criminal law. It has been observed more than once that the ordinary street mugging is properly conceived of as both a crime and as an (intentional) tort; and it is generally understood that the action of the state in prosecuting the criminal offense does not bar the private claim for civil damages, and that, of course, the civil action does not bar the criminal prosecution. Yet it is also clear that in many typical situations there is either a crime but no tort or a tort but no crime: a conspiracy that works no harm is regarded as criminal but not tortious; and the same is the case with an unsuccessful attempt to commit a crime that works no harm to its intended victim or to any third party. Likewise, the ordinary traffic case, sounding in negligence, that gives its victim a civil action for damages does not under any view constitute a crime, even if criminal negligence is treated as a form of criminal responsibility.[2] Given the clear differences between the two systems, moreover, it follows that they cannot be regarded as complementary, if separate, parts of a comprehensive whole. It has often been said, for example, that both the law of crime and tort are directed toward the control of antisocial behavior, and that both are ultimately based upon some type of deterrence theory.[3] It still remains the case that such a theory is inadequate, for if the tort law is solely a means of reinforcing penal sanctions, or vice versa, then what

2. The clear opposition between the civil and criminal standards of negligence can be easily illustrated. Civil negligence rests upon objective considerations, and the question asked always is whether the defendant as the man of ordinary skill and prudence, exercised reasonable care under the circumstances. And cases too numerous to mention have stressed that the test is the due care of the reasonable man, and not of the plaintiff with his own frailties and weaknesses. The criminal standard is quite different, as the language of the Model Penal Code suggests:

> §2.02. General Requirements of Culpability
> (2) Kinds of Culpability Defined
> (d) Negligently
>
> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involve a gross deviation from the standard of care that would be exercised by a reasonable man in his situation.

3. Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown and Co., 1964), Lecture II.

are the functions of each body of rules when their substantive commands diverge?

There has been in the literature only sporadic and ineffectual efforts to account for the differences (let alone the similarities) between the tort and the criminal law. The late Dean Prosser captured the customary view by identifying the difference between the two systems "in the interests affected and the remedy afforded by the law."[4] Thus the crime is treated as the offense against the state and public at large, while the tort is treated as an offense against the particular individual who seeks compensation and redress through the legal system. Likewise, the object of the tort law is thought (the question of relief to one side) to be the award of compensation to deserving injured parties, while the object of the criminal law is thought to be the punishment of the criminal, be it by death, incarceration, or fine, whether for purposes of retribution, deterrence, or even rehabilitation.

The traditional bases for distinction are devoid of accuracy and analytic power. First, as will be discussed in greater detail, it is by no means clear that different interests are involved in the law of crime and tort, as both interests presuppose the invasion of individual rights in person and property. It is true that there are some circumstances in which the conduct of a given individual will give rise to private actions, while other situations call for the invocation of the public force. But this observation, however true, only restates the question: when should the state, with its exclusive franchise, intervene on behalf of the public, and when should redress be left to the injured party? *A fortiori*, the distinction does not tell us anything about our central question: why the persistent substantive distinctions between criminal and civil actions? The mere statement that the interests affected are different gives no clue whatsoever to applicable principles at work in either or both areas.

Similar observations can be immediately made about the second purported difference between tort and crime—that one looks to the punishment of the accused and the other looks to the compensation of the victim. The problem with this test, quite simply, is that at best it tells us only the *consequences* that flow once certain conduct is described as criminal and/or tortious. Yet the object of the inquiry is to determine, not the consequences of the distinction, but the reasons why it should be drawn in the first place. This proferred distinction between the two systems therefore begs the very question that

4. William L. Prosser, *Handbook on the Law of Torts*, 4th ed. (St. Paul, Minnesota: West Publishing Co., 1971), p. 7.

we have asked, because it assumes what we seek to learn—why the principles of punishment differ from those of compensation.

II. HOLMES AND THE UNIFICATION OF TORT AND CRIME

One possible response to the failure to find a suitable account of the differences between tort and crime is that no such account can be found because no such distinction in fact exists. In effect the argument is that the two systems are at bottom governed by the same principles because they serve the same social ends. The implications of this are of course immense, for if the position is correct, it marks a fundamental repudiation of our traditional legal view, and requires us to reorganize the substantive principles in either, or more likely both, areas. It is therefore of importance to examine the arguments in some detail, in order to isolate the source of their confusion and error.

One of the major theoretical efforts to unify the law of tort and crime is that of Oliver Wendell Holmes in *The Common Law*, which almost 100 years after its publication still retains, because of its vigor and in spite of its errors, a central place in our legal culture. Holmes always sought to work out the relationships between legal categories upon a grand scale, and one of his chief ambitions was to show why and how the law of tort and crime could be reduced to a single set of principles.

For Holmes the central concept making possible the unification of crime and tort is that of "reasonable foresight," foresight based upon circumstances known to the wrongdoer or discoverable by him through the exercise of reasonable care. In order to establish the dominance of foresight within his system, Holmes made searching critiques of both tort and crime. In dealing with the law of tort, Holmes noted an uneasy truce amongst the fashionable theories of responsibility. There is first strict liability, described by Holmes as the theory that an individual "acts at his peril." There is next the theory of Austin, the "criminalist," that tortious liability can be imposed only in those circumstances in which there is an identifiable culpable mental state—the want of actual care under the subjective theories of negligence. And last there is general theory of objective negligence, which Holmes did so much to promote and to advance.[5]

In order then to demonstrate the superiority of his chosen alternative, the objective test, Holmes proceeded in fine Aristotelian style

5. Holmes.

to show how it overcame the weaknesses of the first two positions.[6] One of the great (indeed consuming) attractions of the old strict liability theory was its protection to innocent bystanders against the harmful conduct of their neighbors. The great (perceived) advantage of the subjective theories of negligence was the importance it attached to the personal responsibility of the defendant in determining legal liability. Each position, however, lays bare the weaknesses of the other: the strict liability theory was harsh on individual defendants, and the subjective theory of negligence made innocent persons bear the "slips" of "a man born hasty and awkward,"[7] of neighbors who were forever doing damage to those who came near them. The test of reasonable foresight split the difference between the two positions. It held individuals to act at their "proper"[8] peril (and thereby smuggled a judgmental premise into a legal conclusion) while recognizing that some mental element, if only the foresight of the man of ordinary prudence and intelligence, was still required for tortious liability.

Holmes used a different route to establish criminal responsibility bottomed on reasonable foresight.[9] Originally, Holmes noted, a primitive sense of justice mistakenly placed criminal responsibility only on those persons who acted maliciously, in the strong sense of acting with specific hatred or ill-will toward the plaintiff. Actual malice as the test of criminal responsibility is of course too restrictive, because it permits deliberate infliction of harms upon strangers if done with the best of motives. It would be intolerable if, for example, terrorists could escape punishment for the killing of innocent people because they killed not out of the specific dislike of their victims, but only to make dramatic social protest for their cause, however just. Malice, then, cannot be the test, and we are therefore driven back, says Holmes, to the notion of intention to harm, which does permit punishment of the terrorist with noble motives. Yet Holmes says that intention itself cannot be the ultimate test. Here we need only consider the case where one individual knows that one necessary consequence of his deliberate choice is the harm to another person, harm that the wrongdoer both knew and foresaw. Consider only the individual who sets off a bomb in order to take down an abandoned building, but does so with the knowledge that other individuals within the building or neighborhood are certain to be injured

6. Ibid., pp. 107–10.
7. Ibid., p. 108.
8. Ibid.
9. Ibid., pp. 52–56.

by the explosion. Once it is knowledge rather than specific intent that is decisive, then it becomes possible to take the final short step and to say that it is not the defendant's knowledge that counts in a criminal proceeding, but the knowledge attributable to the reasonable man acting in the same circumstances as the accused. And so the test of reasonable foresight under the circumstance governs responsibility under the criminal law as well as under the tort law.

The force and eloquence of Holmes' presentation should not conceal its major defects.[10] It is easy enough to move from actual malice to intention to harm, from intention to harm to certain or substantial knowledge that harm will result, and from there to recklessness about whether a certain harm will come to pass. Yet the gap between these conceptions and the test of reasonable foresight raises insuperable problems because we are never told why we should equate those bases of responsibility that appeal to the accused's mental state with a distinct version of responsibility that does not. While the obviousness of harmful consequences and manifest dangers associated with certain activities may well be evidence that an accused did possess the requisite mental state,. it should remain open to the accused to present evidence in rebuttal. Revert for a moment to a variation of Holmes' own example:[11] if a workman on a scaffold drops a plank that strikes and kills a pedestrian below, there is no criminal offense (putting aside statutory offenses of a strict liability nature), even though he knows of the dangers inherent in his work, so long as he could establish that the falling was attributable only to simple inadvertance or neglect. No amount of reliance upon the test of reasonable foresight could displace that evidence if it is believed and acted upon by the jury. Indeed, we can make the point even stronger, for suspicion of criminal conduct will arise only if there was some special relationship between the workman and the injured party, say a personal feud, that provides a motive for a criminal conduct. Objective standards may be important upon questions of proof, but if the issue is theory and principle, then the position of Holmes must be, as it properly is, rejected.

10. See also, the powerful critique in Jerome Hall, "Interrelationships of Criminal Law and Torts," *Columbia Law Review* 43 (1943):760–75.

11. Holmes, pp. 55–56. In this case Holmes actually speaks of a workman who "throws" a heavy beam into what he knows to be a crowded street. Here the case is easily treated as one of wanton conduct because of what the workman both knows and does. Let the beam drop and it will be difficult to escape tortious liability, yet the case for criminal responsibility is reduced to the vanishing point.

III. THE DISTINCTION BETWEEN TORT AND CRIME RECONSTRUCTED

We have thus arrived at an impasse. Holmes' efforts to find a theoretical base for the distinction between tort and crime have failed, as have those designed to collapse tort and crime into a unitary structure. It is therefore time for a fresh start, to explain anew the different profiles of tort and criminal law. My hope is not to present a novel conclusion, but to give some support for a position generally, if uneasily, held. At the outset we must beware of pressing too far the distinction between tort and crime, for the similarities of language and approach are as important as the differences.[12] Let me first, then, speak to the points of identity, and then to the points of difference.

The first point shared by the law of tort and crime is a common method of legal argumentation—the method of presumptions.[13] With both, the essential task of substantive legal theory is to identify all those conditions and circumstances that justify withholding or imputing individual responsibility. Yet there is no logically complete statement of the conditions for responsibility that is without unstated qualifications and exceptions. The inability to develop logically complete rules of responsibility is not and should not be taken as an invitation to abandon the pursuit of order and structure in legal thought. In effect the idea of substantive presumptions—think only of the literal meaning of the phrase *prima facie* case—is treated as a way to organize legal thought that falls midway between logical completeness and total disorder. Under a system of presumptions, the facts are taken one at a time (the order and selection are, of course, crucial) and incorporated in a system that with constant elaboration and expansion begins to approximate the desired complete statement of the conditions for individual responsibility. And if, thankfully, most cases are dominated by routine features, effective resolution of a few central questions should allow easy determination of a large number of cases. The content of the presumptions is not—and should not be—the same in tort and criminal law, but the difference in substantive principles should not obscure the identity in legal

12. Hall, pp. 753–56.

13. For a detailed elaboration and defense of the method, see Richard Epstein, "Pleadings and Presumptions," *U. Chi. L. Rev.* 40 (1973):556; for the application of the method in the torts context, see my three articles, id., "A Theory of Strict Liability," *J. Legal Studies* 2 (1973):151; id., "Defenses and Subsequent Pleas in a System of Strict Liability," *J. Legal Studies* 3 (1974):165; and id., "Intentional Harms," *J. Legal Studies* 4 (1975):391.

method, particularly between two bodies both concerned with different facets of the single question of individual responsibility.[14]

There are substantive as well as formal similarities between the law of crime and tort. These concern, on the one side, the nature of the protected individual interests, and on the other, the need for human conduct and behavior as a prerequisite for imposing any kind of legal responsibility. We consider them in order.

Previously in this essay we noted the case for distinguishing tort and crime on the ground that each sought to protect different "interests" from the wrongful conduct. At this point I want to elaborate the argument in order to press the point one step further, by urging that criminal and tort law can only be understood by recognizing that both vindicate precisely the same set of individual interests. Begin, for example, with the tort law. It is traditional to identify several different types of interests over which the plaintiff is entitled to exclusive possession and control. The first of these proprietary interests is the interest that each individual has in his own person; that is, an interest, however odd the terminology may sound today, that belongs to each individual by natural right, in the sense that he is not obligated to take any affirmative steps to secure that interest.[15] Closely connected is the interest in freedom of locomotion, protected by the action for (false) imprisonment. There is next the protection of the interest in property possessed or owned, no matter how acquired. And lastly, there is the class of so-called "relational" interests, as when the plaintiff asserts his right to make offers to contract with others with whom he chooses (subject to their right to accept or decline) or claims the benefit of an obligation of contract, status, or statute in another to support and maintain him. The last class of interests involves both possible advantageous commercial relationships, and the familial between the decendent and the members of his family.

Now it seems tolerably clear that these are precisely the same interests that are protected under the criminal law. The crimes of assault and battery, rape, and the like are all concerned with the inviolability of the person and contemplate, via different substantive theories, invasions of exactly the same interest as that protected by the tort law. Likewise, the crimes of arson and the many forms of

14. The passage in the text is not meant to suggest that the method of presumptions cannot apply to other substantive areas, such as contracts. To the contrary, I believe it can and does: one should usually keep his promises, constituting the basic moral premise at the bottom of a very complex structure.

15. "[E]very man has a property in his own person; this nobody has any right to but himself." John Locke, *Of Civil Government—Second Treatise*, ch. 5, § 27.

larceny, robbery, and the like are all concerned with external things that are also protected under the tort law. The only apparent cleavage between tort and crime arises with death cases and relational interests, as there is no criminal analogue to the survivor's wrongful death actions in tort. This is, however, easily explainable, since the criminal punishment for murder or manslaughter is not destroyed in its inception by want of a suitable private plaintiff to press a claim; the state in its public capacity can maintain an action even if the decedent cannot. The destruction of the survivor's relational interests thus no longer need be the subject of an analogous criminal action. It is fully vindicated in the prosecution of the greater offense of manslaughter or murder, which of course has no precise equivalent in tort.

There are other types of interest that might be thought to break the symmetry between tort and crime. Here treason and counterfeiting serve as the two stock examples. It would, however, be a mistake to conclude that the interests implicated in these crimes have no tort analogues. Indeed, these offenses involve interests—the protection of the state against force or in the integrity of its currency—for which the state has sole entitlement, both qua private owner and qua state.[16] Thus the state could preserve the currency of the realm by preventing insane or ignorant individuals from printing or circulating counterfeit bills. Likewise it could confiscate counterfeit bills from private parties who in good faith came into possession of them. Similarly, certain acts, such as not observing blackout regulations during wartime, could and should be treated as civil wrongs even if done out of ignorance or by inadvertance; yet those same actions could well be treasonable if done to give aid and comfort to the enemy. Properly understood, these cases present no more difficulty to the general conclusion that the protected interests in tort and crime are the same than does the case of the government mail truck destroyed by a private person.

The common features of tort and criminal law also can be approached from the point of view of the defendant's conduct that invades (or that threatens to invade)[17] that interest. Under both the

16. There is a delicate question of whether the state should be required to compensate any person who in good faith paid value for counterfeit money. Treating the question under private law principles, the counterfeiter could not give better title than he had even to an innocent person. That point in turn suggests that no compensation should be payable, leaving the third party with dubious remedy against the person who gave him the counterfeit cash in the first instance.

17. The parenthetical qualification is obviously needed to deal with attempts under the criminal law. See *infra* at pp. 248–249.

tort and the criminal law, all damage to property or injury to life is not the proper subject of legal intervention. Thus, where one person is killed by lightning or maimed by a wild animal, there may be need of redress on the one side, but clearly no right to demand it either of a tort defendant or of a criminal accused. In order to establish any nexus between plaintiff's harm and defendant's conduct, it is universally necessary, as a minimal condition, to point to some individual conduct on the part of the person charged with wrongdoing. The types of conduct subject to further investigation under both branches of law are two: (1) actions; and (2) the failure to act, but only in situations where there is a duty to act. In both tort and crime some concept of volition, however difficult to define, is essential to distinguish the class of human behavior from the class of natural events, including those that involve bodily motions not attributable to human actions. Thus in an early trespass case,[18] it was stated, because there is no human action, there is no liability, "as if a man take my arm by force and strike another." And the want of liability in the tort law is, moreover, marked by an equivalent want of responsibility under the criminal law, and for the same reason: the motion was not an action for there was no possible description of the person whose arm moved (we cannot say actor) under which that motion could be attributed to him and not to another. As we have not crossed the line from natural events to human action, the question whether a person's conduct supports charges of tortious or criminal responsibility cannot arise.

Similar issues are raised in connection with failures to act. Here the major conceptual problem is that responsibility does not depend in any straightforward way upon the conduct of the individual to be charged. To escape this problem the conduct theory seeks, both in tort and in crime, to go back one step in the chain of events and focus on the individual's assumption of a particular duty, usually created by entering into some form of voluntary relationship with, or for the benefit of, the person to whom the duty is owed. The prior assumption of duty thus functions as a substitute for the act causing or threatening harm. This theory is somewhat strained whenever the affirmative obligations are imposed by virtue of status. But here the formation of the relationship (e.g., being the parent of a child) normally is sufficient conduct upon which to impose subsequent duties to act. Yet awkwardness remains when we treat prior conduct as creating a duty for which there is not an explicit assumption, as with the unwanted child. The statute case is even more embarrassing, for there the "out" employed in status cases is unavailable, leaving us reduced to the assertion that the individual is bound not by his conduct, but by the conduct of his publicly chosen agent. The upshot is that here we should exercise real caution in selecting the types of obligations to impose, and in choosing the penalties for noncompliance. Similarly, the criminal law of omissions also places a special duty upon the state to give actual notice of the obligation upon which the individual is to be charged. Thus the better view of the subject has it that an individual cannot be charged with a criminal omission where he knows the external circumstances that under the statute call forth the duty but does not know of the duty itself. Here, as in the case of crimes of commission, it is impossible to argue that the very nature of the act gives the actor the sense of its inherent wrong.[19]

These, then, are the elements of commonality between the tort and the criminal law. They are the elements, moreover, that speak to

18. Weaver v. Ward, Hobart 134, 80 English Reports 284 (1616).

19. Henry Hart, "The Aims of the Criminal Law," *Law and Contemp. Probs.* 23 (1958):401, 413:

> [A]lmost every one is aware that murder and forcible rape and the obvious forms of theft are wrong. But in any event, knowledge of wrongfulness can fairly be assumed. For any member of the community who does these things without knowing that they are criminal is blameworthy, as much for his lack of knowledge as for his actual conduct. This seems to be the essential rationale of the maxim, *Ignorantia legis neminem excusat.*

We must, however, beware of pushing Hart's argument too far. Ignorance of the law itself is clearly no offense, however blameworthy, in anyone who does not commit murder, forcible rape, or theft. And if it was an offense, it would not be an offense punishable with the same severity as the associated crime. The rule is troublesome because it rejects the importance of mental states concerning the question of whether the accused knows his conduct constitutes a criminal offense when it is assumed that there must be knowledge or intention to do each element of the offense. The basis for its widespread acceptance rests, however, not upon its theoretical compatibility with theories of criminal responsibility, but upon the administrative convenience, indeed necessity, of the rule. We know that the overwhelming proportion of individuals who engage in these forms of conduct know them to be both wrongs and prohibited. To allow the tiny proportion of individuals who may not know to prove their case on this issue will allow the others to deflect attention from the central issues in their cases. The price for the pure theory is simply too high. The argument contains its own limitations. Where we deal with the nonperformance of affirmative obligations that can only be described as *malum prohibitum*, the overpowering probability of knowledge will no longer apply. See, e.g., Lambert v. California, 355 U.S. 225 (1957), where for constitutional reasons of notice and due process, the Supreme Court created an exception to the maxim of "ignorantia legis" for the "wholly passive" conduct of failing to register in California after being convicted elsewhere of crimes that would be felonies in California. Note that where legal requirements are more broadly known, the administrative case for *ignorantia juris* reasserts its grip, even with omissions, as in driving an automobile without a license.

the language, approach, and method, if not the ultimate purposes that each is designed to serve. To complete the program of analysis, it is now necessary to turn to the way the two systems diverge. To establish that divergence, we begin with an analysis of the relationship between the plaintiff's *prima facie* case in tort law, and the state's *prima facie* case in a criminal prosecution. Once the differences are established, and the reasons for them made clear, I hope it will be possible to give satisfactory explanations of tort and crime and the relationship between them.

In most discussions of the relationship between crime and tort, it is taken for granted that the plaintiff's tort action is made out merely by showing that the defendant deliberately caused harm to plaintiff's person or property or that the defendant could not have prevented the harm so caused by the exercise of reasonable care. In effect, therefore, the standard point of departure treats the defendant's causation of harm, standing alone, as insufficient to establish a *prima facie* liability; proof of negligence or wrongful intention is required as well. True, it has been understood that the tort law recognizes isolated pockets of strict liability, say for ultrahazardous activities[20] but these have, at least until recently, been regarded as primitive forms of liability that have resisted, perhaps because of institutional conservatism or inarticulate public policy, incorporation into the general system of tort law based upon individual fault.

The characterization of the general rule of tortious liability has had an unfortunate influence on the discussion of the relationship between tort and crime. Once it is clear that strict (causal) liability does not represent the basic position of the tort law, distinguishing between tort and crime is a more troublesome task, for we are asked to identify the differences between two systems, both of which demand some form of individual "fault." The problem is difficult enough when objective negligence is contrasted with the *mens rea* of the criminal law, and it becomes well-nigh intractible with subjective negligence—which is largely a reflection of the criminal law concern with personal responsibility. The basic problem, moreover, is made still more acute under either objective or subjective view if the general liability rule gives way to a softer standard of judgment for infants and insane persons—the very persons for whom special rules are furnished under the criminal law. The problems with negligence are yet further compounded when we are pressed to explain how intentional torts should be distinguished from crimes, since the individual mental state of the party charged is of central concern for

20. See, American Law Institute *Restatement (Second) of Torts*, §§519, 520. Siegler v. Kuhlman, 81 Wash. 2d 448, 502 P.2d 1181 (1973).

both tort and criminal law. Finally, the problem scarcely looks better when we turn to strict liability. Here there is not only some support for the doctrine as a tort principle, but much support, too, in the criminal law, particularly with the wave of public welfare or regulatory offenses. If both tort and crime admit all possible substantive theories of responsibility, how can any clear distinctions be made between them?

The major problem with the traditional approach to this issue is that its purported account of the differences in tort and crime is made on the assumption of the soundness, at least in broad outline, of the substantive doctrines in both areas. In my view, the nub of the problem is the substantive confusion present in both areas. The basic point throughout, I believe, can be stated as follows: in the tort law alone the fundamental question is always, which of the two parties to the lawsuit should bear the loss, where a decision in favor of the one necessarily precludes a decision in favor of the other? The equities between parties must, therefore, be resolved on a comparative basis, in which it is possible that the most marginal distinctions between them will be decisive on the liability question. That constraint is not the only determinant of the rules of tortious liability, for it operates within a system of rules that as a substantive matter permits recovery only for the defendant's invasion of a recognized interest in person and property. The constraint, however, is crucial in helping construct a complete liability system out of the building blocks of the substantive law. The criminal law stands in sharp opposition, for it does not labor under such a comparative constraint. If two parties are involved in a dispute, each will escape punishment only if the state's prosecution is frustrated, and vice versa. But the state can choose to dispose of the case of each individual party to a private dispute in a manner that does not prejudice the treatment of the other. In criminal cases, therefore, it is possible to measure the conduct of each individual against an ideal standard of judgment, rather than by constant comparison to the conduct of another party. The difference, then, between the two systems persists across the length and breadth of both areas of law. The discussion has, so far, been perfectly general, and it is now essential to show, first, how in the tort law this constraint permits the organization of the standard theories of strict liability, negligence, and intention, and second, how in the criminal law it invites treating *mens rea* as a fundamental prerequisite of criminal liability. It is then necessary to show how the difference in orientation carries over to other substantive issues, particularly those involving defenses that depend upon the choice of basic legal theories.

Let us begin our revisionist enterprise with a review of the basic

principles governing tort actions.[21] The typical tort case involves an injury to one party for which redress is sought from another. The question that must be resolved by the court is whether compensation for the hurt, however measured, should be compelled from one party for the benefit of the other. When the question is put in that manner, it is clear that the plaintiff must show some kind of damages in order to claim redress, for without hurt nothing should be recovered because nothing has been lost. Yet more than plaintiff's injury is required to make out a case, as any defendant could demure with ease (say "so what!") to a *prima facie* case that simply stated, "I am hurt," as this case fails to connect plaintiff's hurt with the defendant. It is in this simple fashion that the tort law necessarily raises the issue of causal connection between the defendant's conduct and the harm to the plaintiff's person or property. In the simplest case, the connection is established by the direct and immediate application of force by the defendant to the person or property of the plaintiff. It is possible, moreover, in all systems to identify more complicated causal connections that take into account not only the defendant's conduct but also the actions of the plaintiff, or of a third party, as well as of course natural events, sometimes called acts of God.[22] The exact parameters of the causal argument, the exact relationship between direct and indirect harms, and the precise limitations and uses of "proximate cause" raise problems that, I believe, permit fairly precise common sense answers. For purposes of this treatment, however, it is sufficient to assume that these complications created by an extended causal chain have been solved one way or another. To determine the appropriate basis of liability in torts, we must focus on the easiest of stranger situations—those involving the direct use of force: hitting, shooting, etc. of another.

On this last issue, as noted above, three separate and distinct theories have continually vied for supremacy in the tort literature: strict (causal) liability, negligence, and intentional harms. My basic position is that the *prima facie* case is always one of strict liability in all tort actions involving physical harm. *As between* two parties, the one that has caused harm to the person and property of another should, *prima facie*, bear the loss for the harm so inflicted. Holmes' account of strict liability, for example, is indeed stronger than his rejection of it.

21. I have covered this ground in much greater detail in my three articles on tort theory, *supra* n. 13.

22. See my *Theory of Strict Liability*, pp. 160–89.

> Every man, it is said, has an absolute right to his person and so forth, free from detriment at the hands of his neighbors. In the case put, the plaintiff has done nothing; the defendant, on the other hand, has chosen to act. As between the two, the party whose voluntary [read: volitional] conduct has caused the damage should suffer, rather than one who has no share in producing it.[23]

Holmes rejected the position because he felt, wrongly, that it could not be contained within proper or workable causal limits, and because he did not understand the defenses that limit the principle that a man always acts at his peril. Here, in my view, the principle of fairness "as between the parties" which requires comparing the plaintiff's conduct to the defendant's conduct is relevant throughout. What the defendant did to the plaintiff makes out the *prima facie* case; what the plaintiff did to the defendant makes out the (*prima facie*) defense. If it be urged, for example, that the defendant should not be liable because he struck the plaintiff by accident only because he himself was attacked by a third party, the complete response is that it is better that the defendant seek his remedy (if it has value) from that party than to use the fact of his own necessity to force a wholly innocent plaintiff (one who has done nothing), to bear the loss, comforted only by an uncertain right of redress. The impact of the third party's conduct does not address the equities between the two parties to the case; it is properly treated as the gist of the injured party's action against the third party, which states, "you made me hit X."

The same plaintiff's argument cannot be made, however, when the defendant argues that he struck the blow in response, say, to threats of force from the plaintiff. Here the defendant can indeed say that as between himself and the person who made him strike the blow (now no longer a third party) he should be entitled to prevail; he made the plaintiff do nothing, while the plaintiff made him act. The plaintiff should, without regard to his negligence or intention, be held responsible for the consequences of his own conduct, which here include the actions of another that he compelled, on exactly the same grounds that strict liability applied to the defendant. The choice must be made between these two parties: the plaintiff, far from being wholly passive, performed those very acts that made the defendant strike and harm him. Note Holmes' argument for strict liability, and the reason why on its own terms it no longer applies. The central limitations upon responsibility in a strict liability system depend not upon proving a defendant's lack of negligence or intention,

23. Holmes, p. 84.

but upon showing that the *plaintiff's own conduct disentitles* him to relief that would otherwise be his.

Having thus far established the basic strict liability principle, we need now to account for both intention and negligence. Let us take negligence first.

In my view, the issue of negligence, fairly conceived, can arise only when there is a special relationship between the parties (whether or not it is one that rises to the level of a formal contract, e.g., gratuitous bailment) that supports some obligation of the defendant to care for the plaintiff. Thus the negligence issue should not arise for example in routine automobile accidents between strangers, as these are best decided in accordance with the causal contributions of the two parties to the accidents, under a system of strict liability with defenses discussed above. Negligence may well be, however, of real importance in actions brought by visitors on the land against its owner or occupier, by users or consumers of a particular product against its seller or manufacturer and in professional liability actions, particularly against physicians or hospitals. There, as the plaintiff wishes to share in the benefit of a joint enterprise, it is often appropriate, unless otherwise agreed, that he share in its burdens as well as its benefits. One simple illustration is that of medical malpractice, where it would be quite inconceivable that a plaintiff should recover for the pain and hurt of successful surgery that he had requested of the defendant.[24] Unlike the stranger cases considered above, the plaintiff treats the pain of the procedure (and the risk of yet greater loss) as the price for those benefits he hopes to get from the operation. Yet the assumption of risk provided by the medical agreement does not cover all the possible risks of treatment to which it seems thus far to apply. In general it has been held, and held correctly, that those harms that could have been avoided or prevented by the exercise of reasonable care are, unless otherwise agreed, not included in the harms for which the defendant escapes liability. As between the two parties, the party who agrees to bear the loss must do so. Negligence is important not as an abstract principle of justice, but only as a test for distributing by implied agreement the risks between the parties.

There is next the question of how intentional torts should be treated under the tort law. Here I have no wish to argue that intention is an unintelligible concept in tort cases, for such would preclude a principled defense of *mens rea* in the criminal law. Nor do I want to argue that intention to harm has no place in the overall structure of the tort law. To the contrary, it has a central role to play, but one unconnected with the *prima facie* case. To make the point concrete, assume that A strikes B's car after B has (without any imputation of negligence) driven across the midline of a highway, to avoid some greater danger that lurks on the other side of the road. Thus far no reference to the precise mental state of either party is made, for none is necessary to say each has acted. If the case turned only on the facts given, B's own conduct should serve as a causal bar to recovery. If, moreover, A by counterclaim seeks to recover his collision damages, he can prevail on the same causal principles sufficient to defeat the B's primary action. Now change the situation with one additional fact. Assume that A saw the plaintiff's car across the road, and decided to continue at high speed, deliberately inflicting harm upon the plaintiff. Here courts in every jurisdiction would (and should) hold that the defendant's dominance on causal principles should yield, given the proof of the additional mental element in the case. The element of intention (here A's) does not appear as part of the original *prima facie* case, but only serves as a way of overcoming any affirmative defense based upon plaintiff's (here B's) conduct, at least—and the limitation is crucial—to the extent that the damages were both caused and intended by the defendant.

We must now look to the way in which these three types of theories should function in the criminal law system. The proper treatment of strict liability, negligence, and intentional harms assumes very different dimensions within the criminal law system, for here we are freed from the necessity of tying decisions about the fate of one party to decisions about the fate of the other. There is, of course, no *necessary* reason why, once freed from the constraints of the zero sum game, criminal judgments cannot adopt tort standards of liability. One could punish for murder the automobile driver who killed a pedestrian when faced with a hazard not of his own making, even though he did what he could to avoid the harm, and even if he spared the life of others whom he might have killed. We could punish as a thief the man who absent-mindedly walks off with the book belonging to another, or punish as a vandal the man who breaks the neighbor's window while playing a game of catch. Yet there is a pervasive social sense that something must be deeply wrong in a system that is prepared to sacrifice the life or liberty of one individual when the harm inflicted upon him is not for the benefit of another, particularly since redress by tort remedies is already available to the injured

24. Note that the negligence standard also works in cases of omission, as with the failure to perform certain diagnostic tests, for here the assumed undertaking by the physician establishes whatever duty to act is required. For a more detailed discussion, see Richard Epstein, "Medical Malpractice: The Case for Contract," *Am. Bar. Found. Res. J.* 1 (1976):87, 102–103.

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party. That sense is born of the view that we should distinguish between accidental and deliberate harms, and not rest content with the observation that anyone who does anything knows that it could go awry, or knows that he could have done it better. There is, in short, the sense that even though we are not logically committed as a society to take a nontortious view of responsibility when faced with the question of punishment, we are well advised to do so. One can and must, therefore, understand and defend the position of those who, like Jerome Hall and Henry Hart,[25] always thought that the criminal law works best when it deals with conduct of the defendant that the law thinks worthy of moral condemnation, and that it works worst when in the name of effective social control it modifies its standards by judging actors at their peril. At bottom, I think, lies a sense that enormous caution is needed before criminal liability is imposed and that the individual subjected to punishment should by virtue of what he has done be *deserving* of that punishment. The theory is, I think, retributive, even though I for one do not choose to put too much stress upon the word.

IV. APPLICATIONS

We are now in a position to see the way in which the basic differences between the theories of tortious and criminal responsibility work themselves out in the context of particular rules. The most obvious place in which these differences assert themselves is on the question of the proper relationship between the actual harm of the victim and the mental state of the party charged with that harm.

Briefly put, the position must be that the intention to harm is immaterial (to the *prima facie* case) in the tort law, whereas the actual harm itself is immaterial to the criminal law. Common acts, such as street muggings, may well be actionable as torts and punishable as crimes. Yet that fact should not obscure the essential point that the grounds for punishment and the grounds for liability are never the same. The act itself may be a unitary phenomenon, but the descriptions under which it is judged in the two systems do and should diverge.

The law of attempts follows necessarily from the view that the state should punish any person whose own conduct is worthy of moral condemnation. It cannot make any difference whether or not the accused who shot at his target hit it or, for reasons totally fortuitous, missed. Hitting or missing is at best morally neutral, as it is not to the accused's credit that he did not succeed for reasons beyond his control. Under the criminal law, human *conduct* (for while attempts necessarily involve mental states, they also presuppose public and overt physical conduct) is judged by descriptions that do not take into account contingencies external to the will. The elimination of the comparative judgments between persons will in some cases work in a relaxation of standards or responsibility by the inclusion of mental elements. In other cases it will toughen those standards by factoring out those features of conduct—notably its success or failure—that do not entitle a person to either credit or blame. The treatment of attempts in criminal law illustrates that the criminal law standard of responsibility is not necessarily lower than the tort standard.

The sharp, separate profiles of tortious and criminal responsibility are not only brought into relief by the law of attempts, but also by the efforts to do away with the *mens rea* requirement through the creation of the so-called strict liability offenses of the criminal law. As a matter of principle, these strict liability offenses are totally contrary to the general theory of criminal responsibility—barring, as they do all defenses based upon mistake, knowledge, good faith, intention, or reasonable care—and only the strongest possible case can maintain their legitimacy.[26] These statutes are usually designed to facilitate the deterrence of certain types of institutional behavior that would escape public regulation and control if the accused were given the protection of the general principles of criminal responsibility. Yet examination of the typical situation governed by these statutes should make it apparent that they are all better understood not as criminal remedies, but as disguised tort (or contract) provisions, applicable where private remedies are inadequate.

Private actions for selling goods at short weight are plainly insufficient to stop the practice because the trifling amounts involved in each case do not make it worth anyone's while to sue. And suits to recover for injuries caused by dangerous products or toxic substances are, even if successful, less desirable than the prevention of these harms, in some cases by collective public action. This limited justification for public remedies—the ineffective protection of admitted individual rights by private remedies—implies that the state acts not to vindicate a public sense of moral responsibility, where it can summon on its behalf the special rights of the sovereign, but as a self-appointed agent for aggrieved private parties. As essentially private

25. See Jerome Hall, *General Principles of Criminal Law*, 2nd ed. (Indianapolis: Bobbs-Merrill Co., Inc., 1960), ch. 3; and Hart, pp. 522–25.

26. See Hart.

actions, these cases belong outside the criminal law, for the state ought to be able to resort to private remedies only when it limits itself to the types of sanctions normally available to private parties. Fines are thus acceptable as substitutes for private damage judgments, and cease and desist orders a substitute for injunctions and other forms of specific relief. Yet incarceration is unacceptable for the very reason that it is not a remedy available to the private parties whom the state represents. And civil disabilities associated with punishment —the loss of the voting franchise, etc.—are likewise inappropriate. The procedures, moreover, should be governed by civil and not criminal conceptions on all matters relating to, for example, discovery, privilege, and burden of proof. Public protection is fully achieved by tort techniques, even with public suits. And the condemnation of individual defendants should rest on the same principles applicable to ordinary criminal cases, it being strictly necessary to prove the usual mental conditions relating to knowledge or intention.

The differences between tort and crime affect not only the treatment of the *prima facie* case, but also of the possible defenses that could be raised to it. The point is well made in connection with mistakes of fact, whether they go to the question of whether the party charged has invaded or threatened the interests of another, or to the question of *whether he has* any possible excuse or justification for an admitted invasion. Although the cases lack a proper uniformity and clarity on the point, the mistake of a defendant, even if reasonable and in good faith, should not constitute an affirmative defense to a tort action brought by a stranger, unless that stranger induced that mistake.[27] As between the two parties, the plaintiff should be disentitled to a recovery only by his own action, which is not involved where the plaintiff is not the source of the defendant's error. Thus the man who cuts timber he believes to be his own must answer to the owner if his cutting was done in the best of faith or for the noblest of motives.

In criminal cases the accused often takes advantage of the mistake doctrine by saying that if the state of affairs was as he believed them to be, his actions would not constitute a crime, and, if proved, the claim is indeed a fair one. Yet there is no reason why this doctrine, when applied as a neutral principle of judgment, cannot work in favor of criminal responsibility, even where no tort action is possible. Where the accused believed the state of facts to be such that, if true, his conduct would have amounted to a criminal offense, then there is no reason in principle why he should escape liability because the

27. See Holmes, p. 97; Courvoisier v. Raymond, 23 Colo. 113, 57 P. 284 (1896); Siegel v. Long, 169 Ala. 79, 53 So. 753 (1910).

facts turned out to be such that no offense was in fact committed. Thus if the accused believes that property he is about to take belongs to another, it should make no difference in the application of the criminal law that by some fluke or confusion the property is unowned, that the accused happens to own it, that a gift was about to be made, or that the owner has not communicated a subjective consent to allow the accused to use it. The consent point illustrates the difficulty of importing tort conceptions to the criminal law. To make the action turn on the fortuitous consent of a third party means that we can no longer judge the accused on the strength of its own conduct, as we must now investigate as well the mental state of another individual. What possible reason is there under the criminal law for the conviction of A to depend upon whether B lost, say by reason of infancy or insanity, the competence to allow A to use his car? The insanity of the accused is surely relevant to criminal responsibility, but why the insanity of another party?[28]

The same principles should apply not only to completed acts, but to attempts as well. If it is attempted murder to shoot at and miss a human being, it should make no difference to the theory if the accused shoots at and misses a scarecrow whom he believes to be a human being. Any impulse to retreat in practice from the rigors of a rule that judges the accused's conduct on the strength of his perceptions of the relevant facts cannot rest on theoretical grounds. It must rely instead on the simpler point that it is not worth the time and effort of the state to ferret out cases of this sort, when the evidence supporting the improper mental state of the accused is apt to be fragile and incomplete. Yet this administrative argument itself might not be conclusive, for it could well turn out that the best accommodation of theory and practice is to allow the rules of criminal responsibility to be settled on theoretical grounds, leaving it to prosecutors with discretion to move only when the evidence in a particular case appears to support conviction. The temptation to work evidentiary problems into the fabric of the substantive law is better avoided, if not in practice, then surely in theoretical discussions.[29]

28. For a contrary view, see Fletcher, "The Right Deed for the Wrong Reason: A Reply to Mr. Robinson," *U.C.L.A. L. Rev.* 23 (1975):293.

29. There are of course proof difficulties that might move us toward an abandonment of the theoretical position in cases involving both mistakes and attempts. In Oviedo v. United States, 525 F.2d 881 (5th Cir. 1976), the court relied upon these proof complications to overturn the conviction of the accused who had attempted to sell to a federal agent what he believed to be heroin, but which was in fact a harmless substitute, procaine hydrochloride. The decision is disturbing because the court conceded that in the case at bar the extensive evidence was sufficient to support the conviction. It therefore rested its case upon the general fears of abuse, which were, however, never substantially documented.

The difference between crime and tort extends not only to the *prima facie* case, but also to defenses. Thus the defenses to strict liability in tort, based upon plaintiff's causal conduct, or plaintiff's assumption of the risk of accidental harm, or plaintiff's trespass upon defendant's property have no place within the criminal law. Since *mens rea* is part of the *prima facie* case in the criminal law, the defenses that in tort law are overridden by showing the deliberate nature of the defendant's infliction of harm need never be raised in criminal contexts at all. Instead, the question to be faced will be that of *justification*, a common problem for intentional harms in both tort and criminal law. Yet here too there are, of course, points of difference that bring us back to the question of mistake. Under tort law a defendant may wish to plead that he deliberately harmed the plaintiff because he was in the mistaken but good faith belief that he was being attacked by the plaintiff; he may be able to show, too, that his mistake was eminently reasonable and induced by some third party for whose conduct the defendant is in no sense responsible. The purported justification fails, for the defendant cannot show that his mistakes were induced by the plaintiff, who is wholly innocent; the proper remedy therefore is an action against the third party (who could of course be directly sued by the injured party). Yet with criminal law the arguments are quite different, for now the question is the mental state of the defendant, and, without the constraints of tort law, it is possible to make judgments about that state taking into account only the bona fides of the belief and not its source. The elements of duress and coercion can be brought into the case and considered wholly apart from their source. Though we need not excuse A for the harm he deliberately inflicted upon C while acting under threats from B, where only property damage has occurred, that position is surely attractive. Where personal injury has resulted, however, it may well be that *mitigation* of offense is preferable to the complete excuse.

There is, of course, the converse situation, where the facts surrounding the act may be sufficient if known to justify or mitigate such actions, but the accused has acted without such knowledge. Thus assume, to borrow an example from Professor Fletcher,[30] that the accused, while hospitalized, harbors a grudge toward his physician, and resolves to kill him during the next examination. He does so, not knowing at the time that the physician, who also harbored a grudge, was about to kill the patient by secretly injecting air into his veins. The patient's action was in fact done in self-defense, and that

30. See Fletcher.

alone should protect him from tortious liability even if he was utterly unaware of the justification at the time he acted. The key to analyzing tort liability is the physician's forfeiture of rights by his wrongful conduct, not the patient's knowledge of his own justification. Yet, by the same token, the patient's conduct is of the sort worthy of moral condemnation when considered in isolation and on the strength of the facts as he perceived them. There is, therefore, in principle no reason to exonerate him from criminal liability on account of the good fortune that the physician acted as he did.

The differences in tort and criminal theory carry over to the treatment of the insanity issue. In a tort system based upon negligence there is some temptation to treat the defendant's insanity as a relevant consideration in determining whether his conduct satisfied the reasonableness standard, and no less an authority than Holmes was prepared to allow it as an independent defense, at least in extreme cases. Under a strict liability theory, however, insanity has no place in cases of accidental harms between strangers. However much insanity has influenced the defendant's condition, it cannot be treated on a par with plaintiff's conduct, and thus cannot work a forfeiture of the plaintiff's valid *prima facie* case based only upon the defendant's causing him harm. As between the two parties, the defendant must bear the costs associated with his own condition.

In the criminal system, however, it is clear in principle at least that insanity does and should bear upon the question of responsibility. Note some extreme forms of madness appear to be easy to decide in principle, however difficult they may be to prove in fact. The case that first comes to mind is that of a person who kills another person, all the time thinking that he is slicing a loaf of bread. The accused's insanity is strictly speaking not even an independent defense, as it only serves as a powerful means of proving that the accused did not have the requisite *mens rea* for murder or manslaughter. There are of course still other cases where it is conceded that the accused intended to kill his victim. To these the insanity defense functions, where accepted, to excuse the accused as lacking the capacity to govern his own conduct. Concerns of this sort are captured for example in statements of the insanity defense which speak of conduct which is the "product of a mental defect"[31] or that is attributable to

31. See Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), overruled in Brawner v. United States, 471 F.2d 969 (D.C. Cir. 1972), where the court, noting the abuses in the case of expert testimony, adopted the test of the Model Penal Code, § 401(1): "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law."

an "irresistable impulse." And much the same logic applies where it is said that the accused "couldn't help" doing what he did because of his insanity. Behind all rules of this character is the sense that conduct controlled by forces from within the accused but nonetheless beyond the influence of his will, cannot be treated as free or voluntary. As the *source* of coercion is not an ultimate issue in criminal cases, the defense of internal compulsion serves as well as external compulsion and, perhaps, even better, since it undermines the capacity for rational judgment.

It is easy, however, to be suspicious of the fraud and abuse to which only insanity defense is subject to in practice, given our inability to make judgments about whether the requisite conditions for its application have been satisfied. As has been observed more than once, it is difficult to litigate a distinction between "irresistable impulse" and "an impulse that has not been resisted." And a note of skepticism is rightly raised, when, as Dr. Szasz repeatedly points out, the individual who insists that he could not make his conduct conform to law is the very person clever enough to plan a killing or a robbery. Given the difficulties of proof and the frailties of social institutions, criminal and tort law are both under constant pressure to make compromises between what is desired as a matter of legal theory and what is attainable as a matter of practice. When such compromises are raised it is quite easy to treat them as representing ultimate legal or moral judgments and to lose sight of the larger theoretical structure of the legal system. These practical problems are, no doubt, quite acute in criminal cases where the insanity defense is raised, and may well demand, as Dr. Szasz insists, the removal of the insanity issue from criminal cases, no matter what pure theory might require.

We could, I believe, extend the basic analysis to cover other issues faced by both tort and criminal law, and do so in a manner that preserves the hard-edged and systematic distinctions between them. That distinction is blurred all too often by the analytic confusions and the administrative compromises that are part and parcel of any ongoing legal system. Legal rules and their underlying principles cannot be responsible for the errors of commission and omission made by those who work on and write about them. My initial purpose of identifying the points of differences and the points of similarity between tort and crime has, I believe, been done, and done as our basic intuitions would have it done. The old instincts are correct; and we should drink old wine in old bottles.

V. CRIME AND RESTITUTION

To complete our task, it is necessary to turn our attention to the specific problem that provoked this analysis in the first place—the issue of restitution from the individual criminal to his victim.

There is a compelling intellectual case to be made for allowing the victims of crimes to recover civil damages from their aggressors. In most cases, even though the two bodies of law are developed from divergent assumptions about individual responsibility, the same conduct that supports criminal prosecution usually supports a civil suit, even if the converse is not always true. The real issue, however, is not the *entitlement* question—should civil damages be allowable to victims of crimes—but the procedural question—should the tort action be brought as part and parcel of the criminal proceedings? Here the differences in both substantive and procedural rules preclude any easy unification of the two systems into a single trial. There may still, however, exist the possibility of some limited awards to victims, under some special rules, which do not seek to track the general principles of tort law.

Unification is most difficult where the victim seeks full tort damages from a criminal assailant. How in a unified system should we treat the routine mugging that raises issues of both criminal responsibility and tortious liability? If we argued that restitution to victims of crimes presupposes a determination of criminality, then we must first complete the criminal phase of the case before turning to its civil aspects. But note the perils in that course of action. One obvious point is that the death of the accused terminates the criminal aspects of the case, but not the civil aspects. But that theoretical point aside, there are others that go to the logistics of the case. For example, how should a private attorney for the injured plaintiff coordinate his behavior with the activities of the government prosecutor, not only at trial but before trial as well? Plea bargaining does not resemble civil settlements and may be impaired if a criminal concession is treated as creating a civil right. Private discovery may drag on long after the criminal case is ready for trial. Suppose, too, that the accused is acquitted for failure to prove *mens rea*, or by reason of insanity. Judgments of that sort (unlike a judgment that the accused did not do the mugging) should have no effect upon any civil suit against the wrongdoer, for issues of causation and damages (including economic loss and medical expenses) are the very stuff of which ordinary civil actions are made. What then should be done? Since the civil action remains, should the case be transferred out of the criminal division into the civil division, or should the trial judge who heard the crimi-

nal side of the case be retained, perhaps for days or weeks, to hear the civil suit as well? The first alternative undercuts the specialization of the bench and the bar. The second makes the criminal trial an unessential "preliminary canter" for the civil suit. Finally, we cannot escape those same problems even with a conviction in the criminal case: the choice of forum is still intractable, and the thorny issues of damages still remain to be tried.

The legal problems extend not only to substantive issues, but to procedural issues as well. The criminal and the civil law have different burdens of proof on crucial common questions of fact. In a criminal case, the state must establish the elements of the offense beyond a reasonable doubt, whereas the plaintiff in a civil action can prevail by a simple preponderance of the evidence. Thus, where the jury thinks it only likely that the accused attacked the injured victim, it must acquit the defendant of criminal liability, even though it must decide the civil case for the plaintiff. Does the restitution ideal envision the criminal standard of guilt as controlling in the civil action? If so, there is a real disadvantage to the injured party of going this route instead of suing in tort. If not, then there are real questions as to how the jury is to be instructed.

The differences in legal structure involve far more than the proper burden of proof. The two systems have different rules on admissibility of evidence, different rules of discovery, and different rules on privilege, as exemplified by the nonapplicability of the self-incrimination privilege to civil cases. The question of competence to stand trial also differs between the two systems. There is no need to elaborate the differences here, as they vary from state to state and from crime to crime. The very existence of these differences, whatever their precise form in any given jurisdiction, is, I believe, a strong indication of the inherent dangers of compressing two totally divergent types of cases into a single lawsuit in order to exploit their common factual core.

These remarks are directed toward the effort to make a full scale tort action part and parcel of a criminal case. All these difficulties do not apply, however, where an effort is made to provide some simple form of relief that might well be appropriate to a criminal prosecution. In the simplest example, an accused is convicted of the theft of a television set, which is now in the hands of the police. There is no reason why the victim of the theft should have to initiate a separate civil action to recover the television. It should be in the power of the court to order it returned to its rightful owner, as is doubtless done today. Where the property taken is destroyed, the problem is of course more complicated, and here the best approach might be to impose a civil fine equal to the property's value, at least if the property has a readily determinable market value. Where it does not, it may be best to impose some form of fine payable to the victim to impress upon the criminal the fact that his actions have both private and public ramifications. In all of these situations there is no real possibility that the differences between tort and crime will assert themselves; and avoided is the common danger that victims, required to bear the cost of a private action, will find it too expensive to pursue as a matter of course.

Most criminals are judgment proof, and few injured parties will sue for meager rewards from insolvent defendants. Some fine imposed after the criminal proceedings, a fine that in no sense attempts to measure the true value of the injury, could be made payable to the victim, and might, in principle, have a desirable effect, particularly if immediately collected. The precise measure of the fine is difficult to determine, but one guesses (cautiously) that it should be measured by the nature of the offense and the severity of the injuries. Where such a fine is imposed, moreover, the coordination between the civil and criminal case can be maintained, by allowing the accused, in the event that a tort judgment is entered against him, to credit the fine against civil damages to be paid. A system of this sort should not require the presence of a separate tort action for the injured party, nor of specialized tort counsel for the defendant. Its effect is partially compensatory and essentially symbolic.

The real problem with limited restitution is how to proceed in the event that the criminal does not have the funds to discharge the civil fine. It seems difficult to require the plaintiff to maintain civil actions for collection at some later time. By the same token it is cumbersome for the criminal justice system—the court or correction authorities—to bear the burden of enforcing the monetary obligation long after the criminal trial is done with, particularly as they are already overburdened with tasks that are not effectively performed. The project may well be worth a try, although there is good reason to have strong doubts about the entire matter.

As those brief remarks suggest, the entire matter is from a practical point of view far from clear. The substantive division between tort and crime will of course persist for the foreseeable future, no matter how fervently some might wish to collapse the one area into another. The changes that are desirable must be made on an incremental basis, and by those whose knowledge is not only of what ought to be, but what in fact is.

Chapter 11

Punishment and Proportionality

Murray N. Rothbard

Few aspects of libertarian political theory are in less satisfactory state than the theory of punishment.[1] Usually, libertarians have been content to assert or develop the axiom that no one may aggress against the person or property of another; what sanctions may be taken against such an invader has been scarcely treated at all. We have elsewhere advanced the view that the criminal loses his rights *to the extent* that he deprives another of his rights: the theory of "proportionality." We must now elaborate on what such a theory of proportional punishment may imply.

In the first place, it should be clear that the proportionate principle is a *maximum*, rather than a mandatory, punishment for the criminal. In the libertarian society, there are only two parties to a dispute or action at law: the victim, or plaintiff, and the alleged criminal, or defendant. It is the plaintiff that presses charges in the courts against the wrongdoer. In a libertarian world, there would be no crimes against an ill-defined "society," and therefore no such person as a "district attorney" who decides on a charge and then presses those charges against an alleged criminal. The proportionality rule tells us *how much* punishment a plaintiff *may* exact from a convicted wrongdoer, and no more. It imposes the maximum limit on punishment that may be inflicted before the punisher himself becomes a criminal aggressor.

1. It must be noted, however, that *all* legal systems, whether libertarian or not, must work out some theory of punishment, and that existing systems are in *at least* as unsatisfactory a state as punishment in libertarian theory.

Thus, it should be quite clear that, under libertarian law, capital punishment would have to be confined strictly to the crime of murder. For a criminal would only lose his right to life if he had first deprived some victim of that same right. It would not be permissible, then, for a merchant whose bubblegum had been stolen to execute the convicted bubblegum thief. If he did so, then *he* the merchant, would be an unjustifiable murderer who could be brought to the bar of justice by the heirs or assigns of the bubblegum thief.

In libertarian law, there would be no *compulsion* on the plaintiff or his heirs to exact this maximum penalty. If the plaintiff or his heir, for example, did not believe in capital punishment, for whatever reason, he could voluntarily forgive the victim part or all of his penalty. If he were a Tolstoyan, and was opposed to punishment altogether, he could simply forgive the criminal, and that would be that. Or—and this has a long and honorable tradition in older Western law—the victim or his heir could allow the criminal to *buy his way out* of part or all of his punishment. Thus, if proportionality allowed the victim to send the criminal to jail for ten years, the criminal could, if the victim wished, pay the victim to reduce or eliminate this sentence. The proportionality theory only supplies the upper bound to punishment—since it tells us how much punishment a victim may *rightfully* impose.

A problem might arise in the case of murder—since a victim's heirs might prove less than diligent in pursuing the murderer, or be unduly inclined to let the murderer buy his way out of punishment. This problem could be taken care of simply by people stating in their wills what punishment they should like to inflict on their possible murderers. The believer in strict retribution, as well as the Tolstoyan opponent of all punishment, could then have their wishes precisely carried out. The deceased, indeed, could provide in his will for, say, a crime insurance company to which he subscribes to be the prosecutor of his possible murderer.

If, then, proportionality sets the upper bound to punishment, how may we establish proportionality itself? The first point is that the emphasis in punishment must be, not on paying one's debt to "society," whatever that may mean, but in paying one's "debt" to the victim. Certainly, the *initial* part of that debt of *restitution*. This works clearly in cases of theft. If A has stolen $15,000 from B, then the *first*, or initial, part of A's punishment must be to restore that $15,000 to the hands of B (plus damages, judicial and police costs, and interest foregone). Suppose that, as in most cases, the thief has already spent the money. In that case, the first step of proper libertarian punishment is to force the thief to work, and to allocate the ensuing income to the victim until the victim has been repaid. The ideal situation, then, puts the criminal frankly into a state of *enslavement* to his victim, the criminal continuing in that condition of just slavery until he has redressed the grievance of the man he has wronged.[2]

We must note that the emphasis of restitution-punishment is diametrically opposite to the current practice of punishment. What happens nowadays is the following absurdity: A steals $15,000 from B. The government tracks down, tries, and convicts A, all at the expense of B, as one of the numerous taxpayers victimized in this process. Then, the government, instead of forcing A to repay B or to work at forced labor until that debt is paid, forces B, the victim, to pay taxes to support the criminal in prison for ten or twenty years' time. Where in the world is the justice here? The victim not only loses his money, but pays more money besides for the dubious thrill of catching, convicting, and then supporting the criminal; and the criminal is still enslaved, but *not* to the good purpose of recompensing his victim.

The idea of primacy for restitution to the victim has great precedent in law; indeed, it is an ancient principle of law that has been allowed to wither away as the state has aggrandized and monopolized the institutions of justice. In medieval Ireland, for example, a king was not the head of state but rather a crime-insurer; if someone committed a crime, the first thing that happened was that the king paid the "insurance" benefit to the victim, and then proceeded to force the criminal to pay the king in turn (restitution to the victim's insurance company being completely derived from the idea of restitution to the victim). In many parts of colonial America, which were too poor to afford the dubious luxury of prisons, the thief was indentured out by the courts to his victim, there to be forced to work for his victim until his "debt" was paid. This does not necessarily mean that prisons would disappear in the libertarian society, but they would undoubtedly change drastically, since their major goal would be to force the criminals to provide restitution to their victims.[3]

In fact, in the Middle Ages generally, restitution to the victim was the dominant concept of punishment; only as the state grew more

2. Significantly, the only exception to the prohibition of involuntary servitude in the Thirteenth Amendment to the U.S. Constitution is the "enslavement" of criminals: "Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

3. On the principles of restitution and "composition" (the criminal buying off the victim) in law, see Stephen Schafer, *Restitution to Victims of Crime* (Chicago: Quadrangle Books, 1960).

powerful did the governmental authorities encroach ever more into the repayment process, increasingly confiscating a greater proportion of the criminal's property for themselves, and leaving less and less to the unfortunate victim. Indeed, as the emphasis shifted from restitution to the victim, from compensation by the criminal to his victim, to punishment for alleged crimes committed "against the state," the punishments exacted by the state became more and more severe. As the early twentieth century criminologist William Tallack wrote, "It was chiefly owing to the violent greed of feudal barons and medieval ecclesiastical powers that the rights of the injured party were gradually infringed upon, and finally, to a large extent, appropriated by these authorities, who exacted a double vengeance, indeed, upon the offender, by forfeiting his property to themselves instead of to his victim, and then punishing him by the dungeon, the torture, the stake or the gibbet. But the original victim of wrong was practically ignored." Or, as Professor Schafer has summed up: "As the state monopolized the institution of punishment, so the rights of the injured were slowly separated from penal law."[4]

While it is the first consideration in punishment, restitution can hardly serve as the complete and sufficient criterion. For one thing, if one man assaults another, and there is no theft of property, there is obviously no way for the criminal to make restitution. In ancient forms of law, there were often set schedules for monetary recompense that the criminal would have to pay the victim: so much money for an assault, so much more for mutilation, etc. But such schedules are clearly wholly arbitrary, and bear no relation to the nature of the crime itself. We must therefore fall back upon the view that the criterion must be loss of rights by the criminal *to the same extent* as he has taken away.

But how are we to gauge the nature of the extent? Let us return to the theft of the $15,000. Even here, simple restitution of the $15,000 is scarcely sufficient to cover the crime (even if we add damages, costs, interest, etc.). For one thing, mere loss of the money stolen obviously fails to function in any sense as a deterrent to such future crime (although we will see below that deterrence itself is a faulty criterion for gauging punishment). If, then, we are to say that the criminal loses rights *to the extent that he deprives the victim*, then we must say that the criminal should not only have to return the $15,000 but that he must be forced to pay the victim *another* $15,000, so that he, in turn, loses those (to the $15,000 worth of

4. William Tallack, *Reparation to the Injured and the Rights of the Victims of Crime to Compensation* (London, 1900), pp. 11–12; Schafer, pp. 7–8.

property) that he had taken from the victim. In the case of theft, then, we may say that the criminal must pay *double* the extent of theft: once for restitution of the amount stolen, and once again for loss of what he had deprived another.[5]

But we are still not finished with elaborating the extent of deprivation of rights involved in a crime. For A had not simply stolen $15,000 from B, which can be restored and an equivalent penalty imposed. He had also put B into a state of fear and uncertainty, of uncertainty as to the extent that B's deprivation would go. But the penalty levied on A is fixed and certain in advance, thus putting A in far better shape than was his original victim. So that for proportionate punishment to be levied we would also have to add *more* than double so as to compensate the victim in some way for the uncertain and fearful aspects of his particular ordeal.[6] What this extra compensation should be it is impossible to say exactly, but that does not absolve *any* rational system of punishment—including the one that would apply in the libertarian society—from the problem of working it out as best one can.

In the question of bodily assault, where restitution does not apply, we can again employ our criterion of proportionate punishment; if A has beaten up B in a certain way, then B has the right to beat up A (or have him beaten up by judicial employees) to a bit more than the same extent. Here allowing the criminal to buy his way out of this punishment could indeed be permitted, but *only* as a voluntary contract with the plaintiff. For example, suppose that A has severely beaten B; B now has the right to beat up A as severely, or a bit more, or to hire someone or some organization to do the beating for him (who in a libertarian society, could be marshals hired by privately competitive courts). But A, of course, is free to try to buy his way out, to pay B for waiving his right to have his aggressor beaten up.

The victim, then, has the right to exact punishment up to the proportional amount as determined by the extent of the crime, but he is also free either to allow the aggressor to buy his way out of punishment, *or* to forgive the aggressor partially or altogether. The proportionate level of punishment sets the *right* of the victim, the permissible *upper bound* of punishment; but how much or whether the victim decides to *exercise* that right is up to him. As Professor Armstrong puts it:

5. This principle of libertarian double punishment has been pithily described by Professor Walter Block as the principle of "two teeth for a tooth."

6. I am indebted to Professor Robert Nozick of Harvard University for pointing out this problem to me.

> . . . there should be a proportion between the severity of the crime and the severity of the punishment. It sets an upper limit to the punishment, suggests what is *due*. . . . Justice gives the appropriate authority [in our view, the victim] the *right* to punish offenders up to some limit, but one is not necessarily and invariably *obliged* to punish to the limit of justice. Similarly, if I lend a man money I have a right, in justice, to have it returned, but if I choose not to take it back I have not done anything unjust. I cannot claim more than is owed to me but I am free to claim less, or even to claim nothing.[7]

Or, as Professor McCloskey states: "We do not act unjustly if, moved by benevolence, we impose less than is demanded by justice, but there is a grave injustice if the deserved punishment is exceeded."[8]

Many people, when confronted with the libertarian legal system, are concerned with this problem: would somebody be allowed to "take the law into his own hands"? Would the victim, or a friend of the victim, be allowed to exact justice personally on the criminal? The answer is, of course, yes, since *all* rights of punishment derive from the victim's right of self-defense. In the libertarian, purely free market society, however, the victim will generally find it more convenient to entrust the task to the police and court agencies.[9] Suppose, for example, that Hatfield_1 murders McCoy_1. McCoy_2 then decides to seek out and execute Hatfield_1 himself. This is fine, except that McCoy_2 may have to face the prospect of being charged with murder in the private courts by Hatfield_2. The point is that *if* the courts find that Hatfield_1 was indeed the murderer, then nothing happens to McCoy_2 in our schema except public approbation for executing justice. But if it turns out that there was not enough evidence to convict Hatfield_1 for the original murder, or if indeed some other Hatfield or some stranger committed the crime, then McCoy_2 cannot plead any sort of immunity; he then becomes a murderer liable to be executed by the courts at the behest of the irate Hatfield heirs. So that just as, in the libertarian society, the police will be mighty careful to avoid invasion of the rights of any suspect unless they are absolutely convinced of his guilt and willing to put *their* bodies on the line for this belief, so few people will "take the law into their own hands" unless they are similarly convinced. Furthermore, if Hatfield_1 merely beat up McCoy_1, and then McCoy kills him in return, this too would put McCoy up for punishment as a murderer. So that the almost universal inclination would be to leave the execution of justice to the courts, whose decisions based on rules of evidence, trial procedure, etc., similar to what may apply now, would be accepted by society as honest and as the best that could be achieved.[10]

It should be evident that our theory of proportional punishment—that people may be punished by losing their rights to the extent that they have invaded the rights of others—is frankly a *retributive* theory of punishment, a "tooth (or two teeth) for a tooth" theory.[11] Retribution is in bad repute among philosophers, who usually dismiss the concept quickly as "primitive" or "barbaric" and then race on to

7. K.G. Armstrong, "The Retributivist Hits Back," *Mind* (1961), reprinted in *Theories of Punishment*, ed. Stanley E. Grupp (Bloomington: Indiana University Press, 1971), pp. 35–36.

8. We would add that the "we" here should mean the victim of the particular crime. H.J. McCloskey, "A Non-Utilitarian Approach to Punishment," *Inquiry* (1965), reprinted in *Philosophical Perspectives on Punishment*, ed. Gertrude Ezorsky (Albany: State University of New York Press, 1972), p. 132.

9. In our view, the libertarian system would not be compatible with monopoly state defense agencies, such as police and courts, which would instead be privately competitive. There is no space here to go into the pragmatic question of precisely *how* such an "anarcho-capitalist" police and court system might work in practice. For a discussion of this question, see Murray N. Rothbard, *For a New Liberty* (New York: Macmillan, 1973), pp. 219–52.

10. All this is reminiscent of the brilliant and witty system of punishment for government bureaucrats devised by the great libertarian, H.L. Mencken. Mencken proposed that any citizen,

> having looked into the acts of a jobholder and found him delinquent may punish him instantly and on the spot, and in any manner that seems appropriate and convenient—and that, in case this punishment involves physical damage to the jobholder, the ensuing inquiry by the grand jury or coroner shall confine itself strictly to the question whether the jobholder deserved what he got. In other words, I propose that it shall be no longer *malum in se* for a citizen to pummel, cowhide, kick, gouge, cut, wound, bruise, maim, burn, club, bastinado, flay or even lynch a jobholder, and that it shall be *malum prohibitum* only to the extent that the punishment exceeds the jobholder's deserts. The amount of this excess, if any, may be determined very conveniently by a petit jury, as other questions of guilt are now determined. The flogged judge, or Congressman, or other jobholder, on being discharged from hospital—or his chief heir in case he has perished—goes before a grand jury and makes complaint, and, if a true bill is found, a petit jury is empaneled and all the evidence is put before it. If it decides that the jobholder deserves the punishment inflicted upon him, the citizen who inflicted it is acquitted with honor. If, on the contrary, it decides that this punishment was excessive, then the citizen is adjudged guilty of assault, mayhem, murder, or whatever it is, in a degree apportioned to the difference between what the jobholder deserved and what he got, and punishment for that excess follows in the usual course.

H.L. Mencken, *A Mencken Crestomathy* (New York: Alfred A. Knopf, 1949), pp. 386–87.

11. Retribution has been interestingly termed "spiritual restitution." See Schafer, pp. 120–21. Also see the defense of capital punishment for murder by Robert Gahringer: "An absolute offense requires an absolute negation; and one might well hold that in our present situation capital punishment is the only effective symbol of absolute negation. *What else could express the enormity of*

a discussion of the two other major theories of punishment: deterrence and rehabilitation. But simply to dismiss a concept as "barbaric" can hardly suffice; after all, it is possible that in this case, the "barbarians" hit on a concept that was superior to the more modern creeds.

Professor H.L.A. Hart describes the "crudest form" of proportionality, such as we have advocated here (the *lex talionis*), as "the notion that what the criminal has done should be done to him, and wherever thinking about punishment is primitive, as it often is, this crude idea reasserts itself: the killer should be killed, the violent assailant should be flogged."[12] But "primitive" is scarcely a valid criticism, and Hart himself admits that this "crude" form presents fewer difficulties than the more "refined" versions of the proportionality-retributivist thesis. His only reasoned criticism, which he seems to think dismisses the issue, is a quote from Blackstone: "There are very many crimes, that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery. . . ."[13] But these are scarcely cogent criticisms. Theft and forgery constitute robbery, and the robber can certainly be made to provide restitution and proportional damages to the victim; there is no conceptual problem there. Adultery, in the libertarian view, is not a crime at all, and neither is "defamation."

Let us then turn to the two major modern theories and see if they provide a criterion for punishment that truly meets our conceptions of justice, as retribution surely does.[14] *Deterrence* was the principle

murder in a manner accessible to men for whom murder is a possible act? Surely a less penalty would indicate a less significant crime." Robert E. Gahringer, "Punishment as Language," *Ethics* 71 (October 1960):47–48. (Italics Gahringer's)

On punishment in general as negating an offense against right, cf. also F.H. Bradley: "Why . . . do I merit punishment? It is because I have been guilty. I have done 'wrong' . . . the negation of 'right,' the assertion of not-right. . . . The destruction of guilt . . . is still a good in itself; and this, not because a mere negation is a good, but because the denial of wrong is the assertion of right. . . . Punishment is the denial of wrong by the assertion of right. . . ." F.H. Bradley, *Ethical Studies*, 2nd ed. (Oxford: Oxford University Press, 1927), reprinted in *Philosophical Perspectives on Punishment*, ed. Gertrude Ezorsky (Albany, N.Y.: State University Press of New York, 1972), pp. 109–10.

12. For an attempt to construct a law code imposing proportionate punishments for crime—as well as restitution to the victim—see Thomas Jefferson, "A Bill for Proportioning Crimes and Punishments . . . ," in *The Writings of Thomas Jefferson*, vol. 1, eds. A. Lipscomb and A. Bergh (Washington, D.C.: Thomas Jefferson Memorial Association, 1904), pp. 218–39.

13. H.L.A. Hart, *Punishment and Responsibility* (New York: Oxford University Press, 1968), p. 161.

14. Thus, *Webster's* defines "retribution" as "The dispensing or receiving of reward or punishment according to the deserts of the individual. . . ."

put forth by utilitarianism, as part of its aggressive dismissal of principles of justice and natural law, and the replacement of these allegedly metaphysical principles by hard practicality. The practical goal of punishment was then supposed to be to deter further crime, either by the criminal himself or by other members of society. But this criterion of deterrence implies schemas of punishment that almost everyone would consider grossly unjust. For example, if there were no punishment for crime at all, a great number of people would commit petty theft, such as stealing fruit from a fruitstand. On the other hand, most people have a far greater built-in inner objection to themselves committing murder than they have to petty shoplifting, and would be far less apt to commit the grosser crime. Therefore, if the object of punishment is to deter crime, then a far greater punishment would be required for preventing shoplifting than for preventing murder, a system that goes against most people's ethical standards. As a result, with deterrence as the criterion there would have to be stringent capital punishment for petty thievery—for the theft of bubblegum—while murderers might only incur the penalty of a few months in jail.[15]

Similarly, a classic critique of the deterrence principle is that, if deterrence were our sole criterion, it would be perfectly proper for the police or courts to execute publicly for a crime someone whom *they* know to be innocent, but whom they had convinced the public was guilty. The knowing execution of an innocent man—provided, of course, that the knowledge can be kept secret—would exert a deterrence effect just as fully as the execution of the guilty. And yet, of course, such a policy, too, goes violently against almost everyone's standards of justice.

The fact that nearly everyone would consider such schemes of punishments grotesque, despite their fulfillment of the deterrence criterion, shows that people are interested in something more important than deterrence. What this may be is indicated by the overriding objection that these deterrent scales of punishment, or the killing of

15. In his critique of the deterrence principle of punishment, Professor Armstrong asks: ". . . why stop at the minimum, why not be on the safe side and penalize him [the criminal] in some pretty spectacular way—wouldn't that be more likely to deter others? Let him be whipped to death, publicly of course, for a parking offense; that would certainly deter me from parking on the spot reserved for the Vice-Chancellor!" Armstrong, pp. 32–33. Similarly, D.J.B. Hawkins writes: "If the motive of deterrence were alone taken into account, we should have to punish most heavily those offenses which there is considerable temptation to commit and which, as not carrying with them any great moral guilt, people commit fairly easily. Motoring offenses provide a familiar example." D.J.B. Hawkins, "Punishment and Moral Responsibility," *The Modern Law Review* (November 1944), reprinted in *Theories of Punishment*, ed. Stanley E. Grupp (Bloomington: Indiana University Press, 1971), p. 14.

an innocent man, clearly invert our usual view of justice. Instead of the punishment "fitting the crime," it is now graded in inverse proportion to its severity or is meted out to the innocent rather than the guilty. In short, the deterrence principle implies a gross violation of the intuitive sense that justice connotes some form of fitting and proportionate punishment to the guilty party and to him alone.

The most recent, supposedly highly "humanitarian" criterion for punishment is to "rehabilitate" the criminal. Old-fashioned justice, the argument goes, concentrated on punishing the criminal, either in retribution or to deter future crime; the new criterion humanely attempts to reform and rehabilitate the criminal. But on further consideration, the "humanitarian" rehabilitation principle not only leads to arbitrary and gross injustice, it also places enormous and arbitrary power to decide men's fates in the hands of the dispensers of punishment. Thus, suppose that Smith is a mass murderer, while Jones stole some fruit from a stand. Instead of being sentenced in proportion to their crimes, their sentences are now indeterminate, confinement ending upon their supposedly successful "rehabilitation." But this gives the power to determine the prisoners' lives into the hands of an arbitrary group of supposed rehabilitators. It would mean that instead of equality under the law—an elementary criterion of justice—with equal crimes being punished equally, one man may go to prison for a few weeks, if he is quickly "rehabilitated," while another man remain in prison indefinitely. Thus, in our case of Smith and Jones, suppose that the mass murderer Smith is, according to our board of "experts," rapidly rehabilitated. He is released in three weeks, to the plaudits of the supposedly successful reformers. Meanwhile, Jones, the fruit stealer, persists in being incorrigible and clearly *un*rehabilitated, at least in the eyes of the expert board. According to the logic of the principle, he must stay incarcerated indefinitely, perhaps for the rest of his life; for while the crime was negligible, he continued to remain outside the influence of his "humanitarian" mentors.

Thus, Professor K.G. Armstrong writes of the reform principle:

> The logical pattern of penalties will be for each criminal to be given reformatory treatment until he is sufficiently changed for the experts to certify him as reformed. On this theory, every sentence ought to be indeterminate —"To be determined at the Psychologist's pleasure," perhaps—for there is no longer any basis for the principle of a definite limit to punishment. "You stole a loaf of bread? Well, we'll have to reform you, even if it takes the rest of your life." From the moment he is guilty the criminal loses his rights as a human being. . . . This is not a form of humanitarianism I care for.[16]

16. Armstrong, p. 33.

Never has the tyranny and gross injustice of the "humanitarian" theory of punishment as reform been revealed in more scintillating fashion than by C.S. Lewis. Noting that the "reformers" call their proposed actions "healing" or "therapy," rather than "punishment," Lewis adds:

> But do not let us be deceived by a name. To be taken without consent from my home and friends; to lose my liberty; to undergo all those assaults on my personality which modern psychotherapy knows how to deliver . . . to know that this process will never end until either my captors have succeeded or I grown wise enough to cheat them with apparent success—who cares whether this is called Punishment or not? That it includes most of the elements for which any punishment is feared—shame, exile, bondage, and years eaten by the locust—is obvious. Only enormous ill-desert could justify it; but ill-desert is the very conception which the Humanitarian theory has thrown overboard.

Lewis goes on to demonstrate the particularly harsh tyranny that is likely to be levied by "humanitarians" out to inflict their "reforms" and "cures" on the populace:

> Of all tyrannies a tyranny exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busy-bodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience. They may be more likely to go to Heaven yet at the same time likelier to make a Hell of earth. This very kindness stings with intolerable insult. To be "cured" against one's will and cured of states which we may not regard as disease is to be put on a level of those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals. But to be punished, however severely, because we have deserved it, because we "ought to have known better," is to be treated as a human person made in God's image.

Furthermore, Lewis points out, the rulers can use the concept of "disease" as a means for terming any actions that they dislike as "crimes" and then to inflict a totalitarian rule in the name of therapy.

> For if crime and disease are to be regarded as the same thing, it follows that any state of mind which our masters choose to call "disease" can be treated as crime; and compulsorily cured. It will be vain to plead that states of mind which displease government need not always involve moral turpitude and do not therefore always deserve forfeiture of liberty. For our masters

> will not be using concepts of Desert and Punishment but those of disease and cure.... It will not be persecution. Even if the treatment is painful, even if it is life-long, even if it is fatal, that will be only a regrettable accident; the intention was purely therapeutic. Even in ordinary medicine there were painful operations and fatal operations; so in this. But because they are "treatment," not punishment, they can be criticized only by fellow-experts and on technical grounds, never by men as men and on grounds of justice.[17]

Thus, we see that the fashionable reform approach to punishment can be at least as grotesque, and far more uncertain and arbitrary, than the deterrence principle. Retribution remains as our only just and viable theory of punishment, and equal treatment for equal crime is fundamental to such retributive punishment. The "barbaric" turns out to be the just, while the "modern" and the "humanitarian" turn out to be grotesque parodies of justice.

17. C.S. Lewis, "The Humanitarian Theory of Punishment," *Twentieth Century* (Autumn 1948–49), reprinted in *Theories of Punishment*, ed. Stanley E. Grupp (Bloomington: Indiana University Press, 1971), pp. 304–307; also see Francis A. Allen, "Criminal Justice, Legal Values and the Rehabilitative Ideal," in Grupp, pp. 317–30.

Part III

Responses to Criminal Conduct: Alternative Approaches

The last dimension of criminal justice to be considered here involves the determination of the appropriate penalty to be assessed against the criminal. The papers in this section echo several of the themes presented in the preceding chapters. However, here the task is to formulate a framework from which policy directives might emerge.

Leonard Liggio begins this enterprise by providing a historical examination of the English experience with the transportation of criminals to distant colonies. His analysis explores the origins and impact of such a program and measures its success with an eye toward contemporary application. William McDonald then examines the evolving nature of the victim's role in America, emphasizing the fact that the current exclusion of the victim from any meaningful participation in the criminal process runs counter to the early traditions of American justice. He discerns a need to integrate the victim once again into the justice system.

One such proposal, state compensation to crime victims, is scrutinized by Roger Meiners. In his paper, Meiners considers the enormous costs imposed by such a program as well as the potential for fraudulent abuse inherent in the system. Far more promising is the restitution proposal of Burt Galaway. Galaway surveys the burgeoning field of restitution, analyzing possible difficulties with restitution as well as its many potential benefits. While Galaway advocates the addition of restitution to the range of sentencing options currently employed, Randy Barnett urges consideration of a restitutive paradigm of justice. Building on many of the insights presented by the

Restitution: A New Paradigm of Criminal Justice*

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This paper will analyze the breakdown of our system of criminal justice in terms of what Thomas Kuhn would describe as a crisis of an old paradigm—punishment. I propose that this crisis could be solved by the adoption of a new paradigm of criminal justice—restitution. The approach will be mainly theoretical, though at various points in the discussion the practical implications of the rival paradigms will also be considered. A fundamental contention will be that many, if not most, of our system's ills stem from errors in the underlying paradigm. Any attempt to correct these symptomatic debilities without a reexamination of the theoretical underpinnings is doomed to frustration and failure. Kuhn's theories deal with the problems of science. What made his proposal so startling was its attempt to analogize scientific development to social and political development. Here, I will simply reverse the process by applying Kuhn's framework of scientific change to social, or in this case, legal development.[1]

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1. What immediately follows is a brief outline of Thomas Kuhn's theory. Those interested in the *defense* of that theory should refer to his book, *The Structure of Scientific Revolutions*, 2nd ed., enl. (Chicago: University of Chicago Press, 1970). A paradigm is an achievement in a particular discipline that defines the legitimate problems and methods of research within that discipline.

In the criminal justice system we are witnessing the death throes of an old and cumbersome paradigm, one that has dominated Western thought for more than 900 years. While this chapter presents what is hoped to be a viable, though radical alternative, much would be accomplished by simply prompting the reader to reexamine the assumptions underlying the present system. Only if we are willing to look at our old problems in a new light do we stand a chance of solving them. This is our only hope, and our greatest challenge.

THE ROOTS OF WESTERN CRIMINAL JUSTICE

For nearly a millenium, the focus of Western criminal justice has been on one thing—the punishment of the criminal. This is not to say that the rationale for punishment has always been the same—far from it. Reasons and justifications have been many and varied. Whatever the end may be, however, punishment remains the means. It was not always thus.

While it is true that punishment for offensive behavior is as old as man himself, it only came to dominate Western European society, as we shall see, in the eleventh and twelfth centuries. What is most interesting is the nature of the system that preceded the rise of punishment. An examination of the "primitive" Germanic (Frankish and Anglo-Saxon) and Irish tribal folk law yields surprising conclusions.[2]

This achievement is sufficiently unprecedented to attract new adherents away from rival approaches while providing many unsolved questions for these new practitioners to solve. As the paradigm develops and matures, it reveals occasional inabilities to solve new problems and explain new data. As attempts are made to make the facts fit the paradigm, the theoretical apparatus gradually becomes bulky and awkward, like Ptolemaic astronomy. Dissatisfaction with the paradigm begins to grow. Why not simply discard the paradigm and find another that better fits the facts? Unfortunately, this is an arduous process. All the great authorities and teachers were raised with the current paradigm and see the world through it. All the texts and institutions are committed to it. Radical alternatives hold promise but are so untested as to make wary all but the bold. The establishment is loath to abandon its broad and intricate theory in favor of a new and largely unknown hypothesis. Gradually, however, as the authorities die off and the problems with the old paradigm increase, the "young turks" get a better hearing in both the journals and the classroom. In a remarkably rapid fashion, the old paradigm is discarded for the new. Anyone who still clings to it is now considered to be antiquated or eccentric and is simply read out of the profession. All research centers on the application of the new paradigm. Kuhn characterizes this overthrow of one paradigm by another as a revolution.

2. What follows is a brief summary of an extremely rich and interesting historical period. Those interested in a more expanded outline should see Stephen Schafer, *Compensation and Restitution to Victims of Crime*, 2nd ed. enl. (Montclair, New Jersey: Patterson Smith Publishing Corp., 1970); Richard E. Laster, "Criminal Restitution: A Survey of its Past History and an Analysis of its Present Usefulness," *University of Richmond Law Review* 5 (1970):71–80; L.T. Hobhouse, *Morals in Evolution* (London: Chapman & Hall, 1951); Bruce Jacobs, "The Concept of Restitution: An Historical Overview," in *Restitution in Criminal Justice*, eds. Joe Hudson and Burt Galaway (Lexington, Massachusetts: Lexington Books, 1977), pp. 45–62; those interested in a cross-cultural historical analysis should see Laura Nader and Elaine Combs-Schilling, "Restitution in Cross-Cultural Perspective," in *Restitution in Criminal Justice*, pp. 27–44.

3. Harold Berman, "The Western Legal Tradition" (Unpublished, Harvard Law School, 1975), p. 99; Schafer, p. 5.

4. Berman, p. 99.

5. Ibid.; See also Schafer, p. 6; Frederick Pollock and Frederic William Maitland, *The History of English Law* (Cambridge: Cambridge University Press, 1898), 2:460.

6. "Among the Franks, Goths, Burgundians, and other barbarous peoples, this was the name given to a sum of money paid, as satisfaction for a wrong or personal injury, to the person harmed." *Black's Law Dictionary*, 4th ed., rev. (St. Paul, Minnesota: West Publishing Co., 1968), p. 358.

7. Joseph R. Peden, "Property Rights in Medieval Ireland: Celtic Law versus Church and State," *Journal of Libertarian Studies* 1 (1977):86.

8. Ibid.

In the absence of any developed central political authority, monetary sanctions were substituted for unrestricted violence, the "blood feud," to resolve interclan conflicts.[3] While every tribe had its own law, the content of these laws was markedly similar from tribe to tribe:[4]

> The first written collection of tribal laws, such as the Salic Law of the Franks (about 500 A.D.) and the Law of Ethelbert of Kent (about 600 A.D.) were concerned chiefly with controlling the blood-feud by establishing monetary rates of payment. These could serve as a basis of negotiations between the household of a victim and that of his assailant, or as the basis of adjudication by the tribal assembly.... There was an extremely elaborate system of accounting: under the Laws of Ethelbert, for example, the four front teeth were worth 6 shillings each, the teeth next to them four, the others one; thumbs, thumbnails, forefingers, middle fingers, ringfingers, little fingers and their respective fingernails were all distinguished and a separate *bot* (price) was set for each....[5]

The Germanic system of composition[6] had its analogue in medieval Ireland as well: "The honor-price (*dire* or *enclann*) was the payment due to any free man if his honor or rights were injured or impugned in any fashion by another person."[7] Penalties were fixed for specific crimes according to the seriousness of the offense and the social rank of the victim.[8]

Even in Iceland the normal penalty for murder was the giving of: "... blood money varying in amount according to the social status of the deceased.... Murder was a purely civil wrong, a matter for

the individuals or families affected to avenge or compromise as they thought fit. In fact, they always or almost always compromised by the giving and acceptance of an agreed sum of money."[9]

A.S. Diamond's research on the sanctions imposed for homicide confirms the fact that fines were the accepted sanction throughout the Western World. He summarizes his findings as follows. Of the fifty to one hundred scattered tribal communities "as to which the information available is of undoubted reliability," 73 percent called for a pecuniary sanction versus 14 percent that demanded death—better than five to one. The remaining 13 percent called for a certain number of persons to be handed over to the family of the victim as a sanction. This too is actually a fine, though not a monetary one. One hundred percent of the Early and Early Middle codes, as Diamond labels them, beginning with the Salic code mentioned above (500–600 A.D.) and lasting through the Anglo-Saxon laws (900–1100 A.D.), called for pecuniary sanctions for homicide. It was not until the Late Middle and Late codes (including England, 1150 A.D. and onwards) that death was established as the exclusive (100 percent) sanction for intentional homicide.[10]

To understand why this sudden and rapid shift occurred, it is necessary to take note of certain historical events: "Two closely interconnected factors . . . made for conscious overt change: one was the influence of Christianity on legal concepts; the other was the development of the kingship as a trans-local and trans-tribal institution, uniting large areas containing various peoples."[11] The Norman conquest of Europe marked the beginning of a radical change in societal structure. The anarchical, communitarian tribal society was soon to be supplanted by the hierarchical feudal system and the rise of the nation state.

With the conquest of England, ownership of all land reverted to the king, William the Conqueror, who then granted large tracts to his favorites and to the church. These grants were then "sub-infeuded" to men of less influence. Legal and political authority was vested in the king as chief lord. The king was no longer a tribal chief (*dux*), but truly a king (*rex*).[12]

The rise of Christianity begat a rise in power and influence of ecclesiastical law: "Jurists all over Europe . . .began to organize and synthesize the tribal, local and feudal customs of the various Europe-

9. A.S. Diamond, *Primitive Law* (London: Longmans, Green and Co., 1935), p. 148.
10. Ibid., p. 316, n. 5.
11. Berman, p. 107.
12. Ibid., p. 108.

pean peoples . . . and various earlier collections and interpretations of those ecclesiastical writings, decisions and decrees."[13] This was the canon law. With this system as their model and rival, the kings created their own new secular legal system.[14]

Prior to this, the nascent state concerned itself only with its own affairs and disputes: "It did not include among its functions the repression of wrongs between individual and individual, between family and family, between clan and clan."[15] As the king came to be considered a ruler with divine authority, this policy of noninterference in private disputes rapidly changed. The crown began to claim a share of the composition payment as:

> . . . a commission for its trouble in bringing about a reconciliation between the parties, or, perhaps as the price payable to the malefactor either for the opportunity which the community secures for him of redeeming his wrong by a money payment, or for the protection which it affords him after he has satisfied the award, against further retaliation on the part of the man whom he has injured.[16]

As the kings monopolized the institutions of dispute settlement, their share of the payments increased as well, eventually to absorb the whole amount.[17] The issues of injury and damages to the victim became divorced from the criminal law and became a separate field in civil law.[18] The criminal law now concerned itself entirely with offenses against the king—so-called "breaches of the king's peace." As Oppenheimer puts it:

> Clothed with divine honors the king enters the area of primitive justice. Disobedience to his command is sacrilege. At first but one god among many, he becomes before long the only one that has to be reckoned with in the sphere of criminal law. The law now flows exclusively from his will, and every act of transgression is an act of revolt against his omnipotence . . . the monarch thus becomes the main channel through which notions primarily belonging to private law find their way into criminal jurisprudence.[19]

13. Ibid., p. 114.
14. Ibid.
15. Heinrich Oppenheimer, *The Rationale of Punishment* (London: University of London Press, 1913), p. 162.
16. Ibid., pp. 162–63.
17. Stephen Schafer, "Restitution to Victims of Crime—An Old Correctional Aim Modernized," *Minnesota Law Review* 50 (1965): 246, n. 6.
18. Schafer, *Compensation and Restitution*, p. 7.
19. Oppenheimer, pp. 173–74.

Once this new attitude was established in England, it was not long before the English kings and church authorities sought to extend their influence to other parts of Europe. Thus, the Anglo-Norman invasion and partial conquest of Ireland in the late twelfth century brought with it a concerted effort to do away with the Irish legal system.[20] It took the English five centuries to finally accomplish this goal.[21]

The system of composition throughout Europe only surrendered after a struggle.[22] Far from being abandoned by the people voluntarily, it was deliberately and forcibly co-opted by the crown and then discarded. The image of state criminal punishment arising from a bloody Hobbesian jungle is pure myth. Monetary payments had replaced violence as the means of dispute settlement and functioned well for over 600 years. It was only through the violent conquest of England, Ireland, and other parts of Europe that state criminal punishment was reluctantly accepted.

THE CRISIS IN THE PARADIGM OF PUNISHMENT

> Political revolutions are inaugurated by a growing sense, often restricted to a segment of the political community, that existing institutions have ceased adequately to meet the problems posed by an environment they have in part created. . . . In both political and scientific development the sense of malfunction that can lead to crisis is prerequisite to revolution.[23]

Kuhn's description of the preconditions for scientific and political revolutions could accurately describe the current state of the criminal law. However, simply to recognize the existence of a crisis is not enough. We must look for its causes. The Kuhnian methodology suggests that we critically examine the paradigm of punishment itself.

The problems that the paradigm of punishment is supposed to solve are many and varied. A whole literature on the philosophy of punishment has arisen in an effort to justify or reject the institution of punishment. For our purposes the following definition from the *Encyclopedia of Philosophy* should suffice: "Characteristically punishment is unpleasant. It is inflicted on an offender because of an offense he has committed; it is deliberately imposed, not just the natural consequence of a person's action (like a hangover), and the

20. Peden, p. 88.
21. Ibid., p. 94.
22. Schafer, *Compensation and Restitution*, p. 9.
23. Kuhn, p. 92.

unpleasantness is *essential* to it, not an accompaniment to some other treatment (like the pain of the dentist's drill)."[24]

Two types of arguments are commonly made in defense of punishment. The first is that punishment is an appropriate means to some justifiable end such as, for example, deterrence of crime. The second type of argument is that punishment is justified as an end in itself. On this view, whatever ill effects it might engender, punishment for its own sake is good.

The first type of argument might be called the *political* justification of punishment, for the end that justifies its use is one that a political order is presumably dedicated to serve: the maintenance of peaceful interactions between individuals and groups in a society. There are at least three ways that deliberate infliction of harm on an offender is said to be politically justified.

1. One motive for punishment, especially capital punishment and imprisonment, is the "intention to deprive offenders of the power of doing future mischief."[25] Although it is true that an offender cannot continue to harm society while incarcerated, a strategy of punishment based on disablement has several drawbacks.

Imprisonment is enormously expensive. This means that a double burden is placed on the innocent, who must suffer the crime and, in addition, pay through taxation for the support of the offender and of his family if they are forced onto welfare. Also, any benefit of imprisonment is temporary; eventually, most offenders will be released. If their outlook has not improved—and especially if it has worsened—the benefits of incarceration are obviously limited. Finally, when disablement is permanent, as with capital punishment or psychosurgery, it is this very permanence, in light of the possibility of error, which is frightening. For these reasons, "where disablement enters as an element into penal theories, it occupies, as a rule, a subordinate place and is looked upon as an object subsidiary to some other end which is regarded as punishment. . . ."[26]

2. Rehabilitation of a criminal means a change in his mental *habitus* so that he will not offend again. It is unclear whether the so-called treatment model that views criminals as a doctor would view a patient is truly a "retributive" concept. Certainly it does not con-

24. Stanley I. Benn, "Punishment," in *The Encyclopedia of Philosophy*, ed. Paul Edwards (New York: Macmillan Publishing Co., 1967), 7:29 (emphasis added).
25. Oppenheimer, p. 255.
26. Ibid.

form to the above definition characterizing punishment as deliberately and essentially unpleasant. It is an open question whether any end justifies the intentional, forceful manipulation of an individual's thought processes by anyone, much less the state. To say that an otherwise just system has incidentally rehabilitative effects that may be desirable is one thing, but it is quite another to argue that these effects themselves justify the system. The horrors to which such reasoning can lead are obvious from abundant examples in history and contemporary society.[27]

Rehabilitation as a reaction against the punishment paradigm will be considered below, but one aspect is particularly relevant to punishment as defined here. On this view, the visiting of unpleasantness itself will cause the offender to see the error of his ways; by having "justice" done him, the criminal will come to appreciate his error and will change his moral outlook. This end, best labeled "reformation," is speculative at best and counterfactual at worst. On the contrary, "it has been observed that, as a rule . . . ruthless punishments, far from mollifying men's ways, corrupt them and stir them to violence."[28]

3. The final justification to be treated here—deterrence—actually has two aspects. The first is the deterrent effect that past demonstrations of punishment have on the future conduct of others; the second is the effect that threats of future punishment have on the conduct of others. The distinction assumes importance when some advocates argue that future threats lose their deterrent effect when there is a lack of past demonstrations. Past punishment, then, serves as an educational tool. It is a substitute for or reinforcement of threats of future punishment.

As with the goals mentioned above, the empirical question of whether punishment has this effect is a disputed one.[29] I shall not attempt to resolve this question here, but will assume *arguendo* that punishment even as presently administered has some deterrent effect. It is the moral question that is disturbing. Can an argument from deterrence alone "justify" in any sense the infliction of pain on a

27. See Thomas Szasz, *Law, Liberty, and Punishment* (New York: Macmillan Publishing Co., 1963).

28. Giorgio del Vecchio, "The Struggle against Crime," in *The Philosophy of Punishment*, ed. H.B. Acton (London: Macmillan Co., 1969), p. 199.

29. See, e.g., Samuel Yochelson and Stanton E. Samenow, *The Criminal Personality. Vol. I: A Profile for Change* (New York: Jason Aronson, Inc., 1976), pp. 411–16.

criminal? It is particularly disquieting that the actual levying of punishment is done not for the criminal himself, but for the educational impact it will have on the community. The criminal act becomes the occasion of, but not the reason for, the punishment. In this way, the actual crime becomes little more than an excuse for punishing.

Surely this distorts the proper functioning of the judicial process. For if deterrence is the end, it is unimportant whether the individual actually committed the crime. Since the public's perception of guilt is the prerequisite of the deterrent effect, all that is required for deterrence is that the individual is "proved" to have committed the crime. The actual occurrence would have no relevance except insofar as a truly guilty person is easier to prove guilty. The judicial process becomes, not a truth-seeking device, but solely a means to legitimate the use of force. To treat criminals as means to the ends of others in this way raises serious moral problems. This is not to argue that men may never use others as means, but rather to question the use of force against the individual because of the effect such use will have on others. It was this that concerned del Vecchio when he stated that "the human person always bears in himself something sacred, and it is therefore not permissible to treat him merely as a means towards an end outside of himself."[30]

Finally, deterrence as the ultimate justification of punishment cannot rationally limit its use. It "provides *no* guidance until we're told *how much* commission of it is to be deterred."[31] Since there are always some who commit crimes, one can always argue for more punishment. Robert Nozick points out that there must be criteria by which one decides how much deterrence may be inflicted.[32] One is forced therefore to employ "higher" principles to evaluate the legitimacy of punishment.

It is not my thesis that deterrence, reformation, and disablement are undesirable goals. On the contrary, any criminal justice system should be critically examined to see if it is having these and other beneficial effects. The view advanced here is simply that these utilitarian benefits must be incidental to a just system; they cannot, alone or in combination, justify a criminal justice system. Something more is needed. There is another more antiquated strain of punishment theory that seeks to address this problem. The *moral* justifications of punishment view punishment as an end in itself. This

30. Del Vecchio, p. 199.

31. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 61 (emphasis in original).

32. Ibid., pp. 59–63.

approach has taken many forms.[33] On this view, whatever ill or beneficial results it might have, punishment of lawbreakers is good for its own sake. This proposition can be analyzed on several levels.

The most basic question is the truth of the claim itself. Some have argued that "the alleged absolute justice of repaying evil with evil (maintained by Kant and many other writers) is really an empty sophism. If we go back to the Christian moralists, we find that an evil is to be put right only by doing good."[34] This question is beyond the scope of this treatment. The subject has been extensively dealt with by those more knowledgeable than I.[35] The more relevant question is what such a view of punishment as a good can be said to imply for a system of criminal justice. Even assuming that it would be good if, in the nature of things, the wicked got their "come-uppance," what behavior does this moral fact justify? Does it justify the victim authoring the punishment of his offender? Does it justify the same action by the victim's family, his friends, his neighbors, the state? If so, what punishment should be imposed and who should decide?

It might be argued that the natural punishment for the violation of natural rights is the deserved hatred and scorn of the community, the resultant ostracism, and the existential hell of *being* an evil person. The question then is not whether we have the right to inflict some "harm" or unpleasantness on a morally contemptible person—surely, we do; the question is not whether such a punishment is "good"—arguably, it is. The issue is whether the "virtue of some punishment" justifies the *forceful* imposition of unpleasantness on a *rights violator* as distinguished from the morally imperfect. Any *moral* theory of punishment must recognize and deal with this distinction. Finally, it must be established that the state is the legitimate author of punishment, a proposition that further assumes the moral and legal legitimacy of the state. To raise these issues is not to resolve them, but it would seem that the burden of proof is on those seeking to justify the use of force against the individual. Suffice it to say that I am skeptical of finding any theory that justifies the deliberate, forceful imposition of punishment within or without a system of criminal justice.

The final consideration in dealing with punishment as an end in itself is the possibility that the current crisis in the criminal justice system is in fact a crisis of the paradigm of punishment. While this,

33. For a concise summary, see Oppenheimer, p. 31.

34. Del Vecchio, p. 198.

35. See, e.g., Walter Kaufmann, *Without Guilt and Justice* (New York: Peter H. Wyden, Inc., 1973), esp. ch. 2.

if true, does not resolve the philosophical issues, it does cast doubt on the punishment paradigm's vitality as the motive force behind a system of criminal justice. Many advocates of punishment argue that its apparent practical failings exist because we are not punishing enough. All that is needed, they say, is a crackdown on criminals and those victims and witnesses who shun participation in the criminal justice system; the only problem with the paradigm of punishment is that we are not following it.[36] This response fails to consider *why* the system doggedly refuses to punish to the degree required to yield beneficial results and instead punishes in such a way as to yield harmful results. The answer may be that the paradigm of punishment is in eclipse, that the public lacks the requisite will to apply it in anything but the prevailing way.

Punishment, particularly state punishment, is the descendant of the tradition that imparts religious and moral authority to the sovereign and, through him, the community. Such an authority is increasingly less credible in a secular world such as ours. Today there is an increasing desire to allow each individual to govern his own life as he sees fit provided he does not violate the rights of others. This desire is exemplified by current attitudes toward drug use, abortion, and pornography. Few argue that these things are good. It is only said that where there is no victim the state or community has no business meddling in the peaceful behavior of its citizens, however morally suspect it may be.[37]

Furthermore, if the paradigm of punishment is in a "crisis period," it is as much because of its practical drawbacks as the uncertainty of its moral status. The infliction of suffering on a criminal tends to cause a general feeling of sympathy for him. There is no rational connection between a term of imprisonment and the harm caused the victim. Since the prison term is supposed to be unpleasant, at least a part of the public comes to see the criminal as a victim, and the lack of rationality also causes the offender to feel victimized. This reaction is magnified by the knowledge that most crimes go unpunished and that even if the offender is caught, the judicial process is long, arduous, and far removed from the criminal act. While this is obvious to most, it is perhaps less obvious that the punishment paradigm is largely at fault. The slow, ponderous nature of our system of justice

36. See, e.g., "Crime: A Case for More Punishment," *Business Week*, 15 September 1975, pp. 92–97.

37. This problem is examined, though not ultimately resolved, by Edwin M. Schur in *Crimes Without Victims—Deviant Behavior and Public Policy, Abortion, Homosexuality, and Drug Addiction* (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1965).

is largely due to a fear of an unjust infliction of punishment on the innocent (or even the guilty). The more awful the sanction, the more elaborate need be the safeguards. The more the system is perceived as arbitrary and unfair, the more incentive there is for defendants and their counsel to thwart the truth-finding process. Acquittal becomes desirable at all costs. As the punitive aspect of a sanction is diminished, so too would be the perceived need for procedural protections.

A system of punishment, furthermore, offers no incentive for the victim to involve himself in the criminal justice process other than to satisfy his feelings of duty or revenge. The victim stands to gain little if at all by the conviction and punishment of the person who caused his loss. This is true even of those systems discussed below that dispense state compensation based on the victim's need. The system of justice itself imposes uncompensated costs by requiring a further loss of time and money by the victim and witnesses and by increasing the perceived risk of retaliation.

Finally, punishment that seeks to change an offender's moral outlook, or at least to scare him, can do nothing to provide him with the skills needed to survive in the outside world. In prison, he learns the advanced state of the criminal arts and vows not to repeat the mistake that led to his capture. The convict emerges better trained and highly motivated to continue a criminal career.

The crisis of the paradigm of punishment has at its roots the collapse of its twin pillars of support: its moral legitimacy and its practical efficacy. As Kaufmann concludes, "the faith in retributive justice is all but dead."[38]

ATTEMPTS TO SALVAGE THE PARADIGM OF PUNISHMENT

"All crises begin with the blurring of a paradigm and the consequent loosening of the rules for normal research."[39] And yet until a new paradigm is presented, authorities will cling to the old one, either ignoring the problem or salvaging the paradigm with ad hoc explanations and solutions. Why are paradigms never rejected outright? Why must there always be a new paradigm before the old one is abandoned? Kuhn does not explicitly discuss this, but R.A. Childs hypothesizes "that, as such, paradigms may serve the function of increasing man's sense of control over some aspect of reality, or

38. Kaufmann, p. 46.
39. Kuhn, p. 82.

some aspect of his own life. If this is so, then we would expect that a straightforward abandonment of a paradigm would threaten that sense of control."[40]

This psychological need for an explanation may in turn explain the many efforts to shore up the paradigm of punishment. The three attempts to be examined next have at their roots a perception of its fundamental errors, and at the same time they highlight three goals of any new paradigm of criminal justice.

Proportionate Punishment

The king abandoned the composition system for the system of punishment because punishment struck terror in the hearts of the people, and this served to inspire awe for the power of the king and state. But there was no rational connection between the seriousness of the crime and the gravity of the punishment and, therefore, no limit to the severity of punishment. Hideous tortures came to be employed: "But some of the men of the Enlightenment sought to counter the inhumanity of their Christian predecessors with appeals to reason. They thought that retributive justice had a mathematical quality and that murder called for capital punishment in much the same way in which two plus two equals four."[41]

The appeal to proportionality was one of the early attempts to come to grips with deficiencies in the paradigm of punishment. It was doomed to failure, for there is no objective standard by which punishments can be proportioned to fit the crime. Punishment is incommensurate with crime. This solution is purely ad hoc and intuitive. We shall, however, find the *goal* of proportionate sentencing useful in the formation of a new paradigm.

Rehabilitation

It was noted earlier that the infliction of punishment tends to focus attention on the plight of the criminal. Possibly for this reason, the next humanitarian trend was to explore the proper treatment of criminals. Punishment failed to reform the criminal, and this led observers to inquire how the situation might be improved. Some felt that the sole end of the penal system was rehabilitation, so attention was turned to modifying the criminal's behavior (an obviously manipulative end). Emphasis was placed on education, job training, and discipline.

Unfortunately, the paradigm of punishment and the political reali-

40. R.A. Childs, "Liberty and the Paradigm of Statism," in *The Libertarian Alternative*, ed. Tibor Machan (Chicago: Nelson-Hall Co., 1974), p. 505.
41. Kaufmann, p. 45.

ties of penal administration have all but won out. There is simply no incentive for prison authorities to educate and train. Their job is essentially political. They are judged by their ability to keep the prisoners within the walls and to keep incidents of violence within the prison to a minimum; as a result, discipline is the main concern. Furthermore, since he is sentenced to a fixed number of years (less time off for good behavior—so-called good time), there is no institutional incentive for the prisoner to improve himself apart from sheer boredom. Productive labor in prison is virtually nonexistent, with only obsolete equipment, if any, available. Except perhaps for license plates and other state needs, the prisoners produce nothing of value; the prisons make no profit and the workers are paid, if at all, far below market wages. They are unable to support themselves or their families. The state, meaning the innocent taxpayer, supports the prisoner, and frequently the families as well via welfare.

Rehabilitation has been a long-time goal of the penal system, but the political nature of government-run prisons and the dominance of the paradigm of punishment has inevitably prevented its achievement. Prisons remain detention centers, all too temporarily preventing crime by physically confining the criminals.

Victim Compensation

It is natural that the brutalities resulting from the paradigm of punishment would get first attention from humanitarians and that the persons subjected to those practices would be next. Until recently, the victim of crime was the forgotten party. Within the last few years a whole new field has opened up, called victimology.[42] With it has come a variety of proposals, justifications, and statutes.[43]

Certain features are common to virtually every compensation proposal: (1) compensation for crimes would be dispensed by the state from tax revenue; (2) compensation is "a matter of grace" rather than an assumption by the state of legal responsibility for the criminal loss suffered by the victim; (3) most proposals allow for aid only on a "need" or "hardship" basis; (4) most are limited to some sort of crime of violence or the threat of force or violence; and (5) none questions the paradigm of punishment.

42. For a brief definition of "victimology," see Emilo C. Viano, "Victimology: The Study of the Victim," *Victimology* 1 (1976):1–7. For an extensive collection of papers on various aspects of victimology, see Emilo C. Viano, ed., *Victims and Society* (Washington, D.C.: Visage Press, 1976).

43. For a discussion and list of symposiums, journal articles, and statutes concerning victim compensation, see Steven Schafer, *Compensation and Restitution*, pp. 139–57, and appendix; see also Joe Hudson and Burt Galaway, eds., *Considering the Victim: Readings in Restitution and Victim Compensation* (Springfield, Illinois: Charles C. Thomas, 1975), esp. pp. 361–436.

The goal of these proposals and statutes is laudable. The victim *is* the forgotten man of crime. But the means proposed is the same tired formula: welfare to those in "need." In short, the innocent taxpayer repays the innocent victim (if the victim can prove he "needs" help), while the guilty offender is subjected to the sanction of punishment with all its failings. Like proportionate punishment and rehabilitation, the goal of victim compensation is a recognition of very real problems in our criminal justice system, and at the same time it ignores the source of these problems: our conception of crime as an offense against the state whose proper sanction is punishment. Until a viable, new paradigm is presented, ad hoc solutions like the ones discussed here are all that can be hoped for. And it is a vain hope indeed, for they attack the symptoms while neglecting the causes of the problem. What is needed is a new paradigm.

OUTLINE OF A NEW PARADIGM

The idea of restitution is actually quite simple. It views crime as an offense by one individual against the rights of another. The victim has suffered a loss. Justice consists of the culpable offender making good the loss he has caused. It calls for a complete refocusing of our image of crime. Kuhn would call it a "shift of world-view." Where we once saw an offense against society, we now see an offense against an individual victim. In a way, it is a common sense view of crime. The armed robber did not rob society; he robbed the victim. His debt, therefore, is not to society; it is to the victim. There are really two types of restitution proposals: a system of "punitive" restitution and a "pure" restitutional system.

Punitive Restitution

"Since rehabilitation was admitted to the aims of penal law two centuries ago, the number of penological aims has remained virtually constant. Restitution is waiting to come in."[44] Given this view, restitution should merely be added to the paradigm of punishment. Stephen Schafer outlines the proposal: "[Punitive] restitution, like punishment, must always be the subject of judicial consideration. Without exception it must be carried out by personal performance by the wrong-doer, and should even then be equally burdensome and just for all criminals, irrespective of their means, whether they be millionaires or labourers."[45]

44. Gerhard O.W. Mueller, "Compensation for Victims of Crime: Thought Before Action," *Minnesota Law Review* 50 (1965):221.

45. Schafer, *Compensation and Restitution*, p. 127.

There are many ways by which such a goal might be reached. The offender might be forced to compensate the victim by his own work, either in prison or out. If it came out of his pocket or from the sale of his property this would compensate the victim, but it would not be sufficiently unpleasant for the offender. Another proposal would be that the fines be proportionate to the earning power of the criminal. Thus, "A poor man would pay in days of work, a rich man by an equal numbers of days' income or salary."[46] Herbert Spencer made a proposal along similar lines in his excellent "Prison-Ethics," which is well worth examining.[47] Murray N. Rothbard and others have proposed a system of "double payments" in cases of criminal behavior.[48] While closer to pure restitution than other proposals, the "double damages" concept preserves a punitive aspect.

Punitive restitution is an attempt to gain the benefits of pure restitution, which will be considered shortly, while retaining the perceived advantages of the paradigm of punishment. Thus, the prisoner is still "sentenced" to some unpleasantness—prison labor or loss of X number of days income. That the intention is to preserve the "hurt" is indicated by the hesitation to accept an out-of-pocket payment or sale of assets. This is considered too "easy" for the criminal and takes none of his time. The amount of payment is determined not by the *actual harm* but by the *ability of the offender to pay.* Of course, by retaining the paradigm of punishment this proposal involves many of the problems we raised earlier. In this sense it can be considered another attempt to salvage the old paradigm.

Pure Restitution

"Recompense or restitution is scarcely a punishment as long as it is merely a matter of returning . . . stolen goods or money. . . . The point is not that the offender deserves to suffer; it is rather that the offended party desires compensation."[49] This represents the complete overthrow of the paradigm of punishment. No longer would the deterrence, reformation, disablement, or rehabilitation of the criminal be the guiding principle of the judicial system. The attainment of these goals would be incidental to, and as a result of, reparations paid to the victim. No longer would the criminal deliberately be made to suffer for his mistake. Making good that mistake is all that would be required. What follows is a possible scenario of such a system.

46. Ibid.

47. Herbert Spencer, "Prison-Ethics," in *Essays: Scientific, Political and Speculative* (New York: D. Appleton & Co., 1907), 3:152–91.

48. Chapter 11.

49. Kaufmann, p. 55.

When a crime occurred and a suspect was apprehended, a trial court would attempt to determine his guilt or innocence. If found guilty, the criminal would be sentenced to make restitution to the victim.[50] If a criminal is able to make restitution immediately, he may do so. This would discharge his liability. If he were unable to make restitution, but were found by the court to be trustworthy, he would be permitted to remain at his job (or find a new one) while paying restitution out of his future wages. This would entail a legal claim against future wages. Failure to pay could result in garnishment or a new type of confinement.

If it is found that the criminal is not trustworthy, or that he is unable to gain employment, he would be confined to an employment project.[51] This would be an industrial enterprise, preferably run by a private concern, which would produce actual goods or services. The level of security at each employment project would vary according to the behavior of the offenders. Since the costs would be lower, inmates at a lower security project would receive higher wages. There is no reason why many workers could not be permitted to live with their families inside or outside the facility, depending, again, on the trustworthiness of the offender. Room and board would be deducted from the wages first, then a certain amount for restitution. Anything over that amount the worker could keep or apply toward further restitution, thus hastening his release. If a worker refused to work, he would be unable to pay for his maintenance, and therefore would not in principle be entitled to it. If he did not make restitution, he could not be released. The exact arrangement that would best provide for high productivity, minimal security, and maximum incentive to work and repay the victim cannot be determined in advance. Experience is bound to yield some plans superior to others. In fact, the experimentation has already begun.[52]

While this might be the basic system, all sorts of refinements are

50. The nature of judicial procedure best designed to carry out this task must be determined. For a brief discussion of some relevant considerations, see Laster, pp. 80–98; Burt Galaway and Joe Hudson, "Issues in the Correctional Implementation of Restitution to Victims of Crime," in *Considering the Victim*, pp. 351–60. Also to be dealt with is the proper standard of compensation. At least initially, the problem of how much payment constitutes restitution would be no different than similar considerations in tort law. This will be considered at greater length below.

51. Such a plan (with some significant differences) has been suggested by Kathleen J. Smith in *A Cure for Crime: The Case for the Self-Determinate Prison Sentence* (London: Gerald, Duckworth & Co., 1965), pp. 13–29; see also Morris and Linda Tannehill, *The Market for Liberty* (Lansing, Michigan: Privately printed, 1970), pp. 44–108.

52. For a recent summary report, see Chapter 15.

conceivable, and certainly many more will be invented as needs arise. A few examples might be illuminating. With such a system of repayment, victim *crime insurance* would be more economically feasible than at present and highly desirable. The cost of awards would be offset by the insurance company's right to restitution in place of the victim (right of subrogation). The insurance company would be better suited to supervise the offender and mark his progress than would the victim. To obtain an earlier recovery, it could be expected to innovate so as to enable the workers to repay more quickly (and, as a result, be released that much sooner). The insurance companies might even underwrite the employment projects themselves as well as related industries that would employ the skilled worker after his release. Any successful effort on their part to reduce crime and recidivism would result in fewer claims and lower premiums. The benefit of this insurance scheme for the victim is immediate compensation, conditional on the victim's continued cooperation with the authorities for the arrest and conviction of the suspect. In addition, the centralization of victim claims would, arguably, lead to efficiencies which would permit the pooling of small claims against a common offender.

Another highly useful refinement would be *direct arbitration* between victim and criminal. This would serve as a sort of healthy substitute for plea bargaining. By allowing the guilty criminal to negotiate a reduced payment in return for a guilty plea, the victim (or his insurance company) would be saved the risk of an adverse finding at trial and any possible additional expense that might result. This would also allow an indigent criminal to substitute personal services for monetary payments if all parties agreed.

Arbitration is argued for by John M. Greacen, deputy director of the National Institute for Law Enforcement and Criminal Justice. He sees the possible advantages of such reform as the

> . . . development of more creative dispositions for most criminal cases; for criminal victims the increased use of restitution, the knowledge that their interests were considered in the criminal process; and an increased satisfaction with the outcome; increased awareness in the part of the offender that his crime was committed against another human being, and not against society in general; increased possibility that the criminal process will cause the offender to acknowledge responsibility for his acts.[53]

53. John M. Greacen, "Arbitration: A Tool for Criminal Cases?" *Barrister* (Winter 1975):53; see also Galaway and Hudson, *Considering the Victim*, pp. 352–55; "Conclusions and Recommendations, International Study Institute on Victimology, Bellagio, Italy, July 1–12, 1975," *Victimology* 1 (1976):150–51; Ronald Goldfarb, *Jails: The Ultimate Ghetto* (Garden City, New York: Anchor Press/Doubleday, 1976), p. 480.

Greacen notes several places where such a system has been tried with great success, most notably Tucson, Arizona, and Columbus, Ohio.[54]

Something analogous to the medieval Irish system of *sureties* might be employed as well.[55] Such a system would allow a concerned person, group, or company to make restitution (provided the offender agrees to this). The worker might then be released in the custody of the surety. If the surety had made restitution, the offender would owe restitution to the surety, who might enforce the whole claim or show mercy. Of course, the more violent and unreliable the offender, the more serious and costly the offense, the less likely it would be that anyone would take the risk. But for first offenders, good workers, or others that charitable interests found deserving (or perhaps unjustly convicted) this would provide an avenue of respite.

RESTITUTION AND RIGHTS

These three possible refinements clearly illustrate the flexibility of a restitutional system. It may be less apparent that this flexibility is *inherent* to the restitutional paradigm. Restitution recognizes rights in the victim, and this is a principal source of its strength. The nature and limit of the victim's right to restitution at the same time defines the nature and limit of the criminal liability. In this way, the aggressive action of the criminal creates a *debt* to the victim. The recognition of rights and obligations makes possible many innovative arrangements. Subrogation, arbitration, and suretyship are three examples mentioned above. They are possible because this right to compensation[56] is considered the property of the victim and can therefore be delegated, assigned, inherited, or bestowed. One could determine in advance who would acquire the right to any restitution that he himself might be unable to collect.

The natural owner of an unenforced death claim would be an insurance company that had insured the deceased. The suggestion has been made that a person might thus increase his personal safety by insuring with a company well known for tracking down those who injure its policyholders. In fact, the partial purpose of some insurance schemes might be to provide the funds with which to track down the malefactor. The insurance company, having paid the beneficiaries, would "stand in their shoes." It would remain possible, of course, to simply assign or devise the right directly to the benefi-

54. Greacen, p. 53.

55. For a description of the Irish system, see Peden; for a theoretical discussion of a similar proposal, see Spencer, pp. 182–86.

56. Or, perhaps more accurately, the compensation itself.

ciaries, but this would put the burden of enforcement on persons likely to be unsuited to the task.

If one accepts the Lockean trichotomy of property ownership,[57] that is, acquiring property via exchange, gifts, and *homesteading* (mixing one's labor with previously unowned land or objects), the possibility arises that upon a person's wrongful death, in the absence of any heirs or assignees, his right to compensation becomes unowned property. The right could then be claimed (homesteaded) by anyone willing to go to the trouble of catching and prosecuting the criminal. Firms might specialize in this sort of activity, or large insurance companies might make the effort as a kind of "loss leader" for public relations purposes.

This does, however, lead to a potentially serious problem with the restitutional paradigm: what exactly constitutes "restitution"? What is the *standard* by which compensation is to be made? Earlier we asserted that any such problem facing the restitutional paradigm faces civil damage suits as well. The method by which this problem is dealt with in civil cases could be applied to restitution cases. But while this is certainly true, it may be that this problem has not been adequately handled in civil damage suits either.

Restitution in cases of crimes against property is a manageable problem. Modern contract and tort doctrines of restitution are adequate. The difficulty lies in cases of personal injury or death. How can you put a price on life or limb, pain or suffering? Is not any attempt to do so of necessity arbitrary? It must be admitted that a fully satisfactory solution to this problem is lacking, but it should also be stressed that this dilemma, though serious, has little impact on the bulk of our case in favor of a restitutional paradigm. It is possible that no paradigm of criminal justice can solve every problem, yet the restitutional approach remains far superior to the paradigm of punishment or any other conceivable rival.

This difficulty arises because certain property is unique and irreplaceable. As a result, it is impossible to approximate a "market" or "exchange" value expressed in monetary terms. Just as there is no rational relationship between a wrongfully taken life and ten years in prison, there is little relationship between that same life and $20,000. Still, the nature of this possibly insoluble puzzle reveals a restitutional approach theoretically superior to punishment. For it must be acknowledged that a real, tangible loss *has* occurred. The problem is

57. For a brief explanation of this concept and several of its possible applications, see Murray N. Rothbard, "Justice and Property Rights," in *Property in a Humane Economy*, ed. Samuel L. Blumenfeld (La Salle, Illinois: Open Court Publishing Co., 1974), pp. 101–22.

only one of incommensurability. Restitution provides *some* tangible, albeit inadequate, compensation for personal injury. Punishment provides none at all.[58]

It might be objected that to establish some "pay scale" for personal injury is not only somewhat arbitrary but also a disguised reimplementation of punishment. Unable to accept the inevitable consequences of restitutional punishment, the argument continues, I have retreated to a pseudorestitutional award. Such a criticism is unfair. The true test in this instance is one of primacy of intentions. Is the purpose of a system to compensate victims for their losses (and perhaps, as a consequence, to punish the criminals), or is its purpose to punish the criminals (and perhaps, as a consequence, to compensate the victims for their losses)? The true ends of a criminal justice system will determine its nature. In short, arbitrariness *alone* does not imply a retributive motive. And while arbitrariness remains to some extent a problem for the restitutional paradigm, it is less of a problem for restitution than for punishment, since compensation has *some* rational relationship to damages and costs.

ADVANTAGES OF A RESTITUTIONAL SYSTEM

Assistance to Victims

The first and most obvious advantage is the assistance provided to victims of crime. They may have suffered an emotional, physical, or financial loss. Restitution would not change the fact that a possibly traumatic crime has occurred (just as the award of damages does not undo tortious conduct). Restitution, however, would make the resulting loss easier to bear for both victims and their families. At the same time, restitution would avoid a major pitfall of victim compensation-welfare plans: since it is the criminal who must pay, the possibility of collusion between victim and criminal to collect "damages" from the state would be all but eliminated.

The Reporting of Crime

The possibility of receiving compensation would encourage victims to report crimes and to appear at trial. This is particularly true if there were a crime insurance scheme that contractually committed the policyholder to testify as a condition for payment, thus rendering unnecessary oppressive and potentially tyrannical subpoenas and

58. That the "spiritual" satisfaction that punishment may or may not provide is to be recognized as a legitimate form of "compensation" is a claim retributionists must defend.

contempt citations. Even the actual reporting of the crime to police is likely to be a prerequisite for compensation. Such a requirement in auto theft insurance policies has made car thefts the most fully reported crime in the United States. Furthermore, insurance companies that paid the claim would have a strong incentive to see that the criminal was apprehended and convicted. Their pressure and assistance would make the proper functioning of law enforcement officials all the more likely.

Restitution: A Rehabilitation Aid

Psychologist Albert Eglash has long argued that restitution would aid in the rehabilitation of criminals. "Restitution is something an inmate does, not something done for or to him. . . . Being reparative, restitution can alleviate guilt and anxiety, which can otherwise precipitate further offenses."[59] Restitution, says Eglash, is an active effortful role on the part of the offender. It is socially constructive, thereby contributing to the offender's self-esteem. It is related to the offense and may thereby redirect the thoughts that motivated the offense. It is reparative, restorative, and may actually leave the situation better than it was before the crime, both for the criminal and victim.[60]

Restitution: A Self-Determinative Sentence

This is a genuinely "self-determinative" sentence.[61] The worker would know that the length of his confinement was in his own hands. The harder he worked, the faster he would make restitution. He would be the master of his fate and would have to face that responsibility. This would encourage useful, productive activity and instill a conception of reward for good behavior and hard work. Compare this with the current probationary system and "indeterminate sentencing" where the decision for release is made by the prison bureaucracy, based only (if fairly administered) on "good behavior"; that is, passive acquiescence to prison discipline. Also, the fact that the worker would be acquiring *marketable* skills rather than more skillful methods of crime should help to reduce the shocking rate of recidivism.

59. Albert Eglash, "Creative Restitution: Some Suggestions for Prison Rehabilitation Programs," *American Journal of Correction* 40 (November-December 1958):20.

60. Ibid.; see also Eglash's "Creative Restitution: A Broader Meaning for an Old Term," *Journal of Criminal Law and Criminology* 48 (1958):619–22; Burt Galaway and Joe Hudson," Restitution and Rehabilitation—Some Central Issues," *Crime and Delinquency* 18 (1972):403–10.

61. Smith, pp. 13–29.

Taxpayers' Savings

The savings to taxpayers would be enormous. No longer would the innocent taxpayer pay for the apprehension and internment of the guilty. The cost of arrest, trial, and internment would be borne by the criminal himself. In addition, since now-idle inmates would become productive workers (able, perhaps, to support their families), the entire economy would benefit from the increase in overall production.[62]

Crime Would No Longer Pay

Criminals, particularly shrewd white collar criminals, would know that they could not dispose of the proceeds of their crime, and, if caught, simply serve time. They would have to make full restitution, plus enforcement and legal costs, thereby greatly increasing the incentive to prosecute. While this would not eliminate such crime, it would make it rougher on certain types of criminals, like bank and corporation officials, who harm many by their acts with a virtual assurance of lenient legal sanctions.[63] It might also encourage such criminals to keep the money around for a while so that, if caught, they could repay more easily. This would make a full recovery more likely.

A restitutional system of justice would benefit the victim, the criminal, and the taxpayer. The humanitarian goals of proportionate punishment, rehabilitation, and victim compensation are dealt with on a *fundamental* level, making their achievement more likely. In short, the paradigm of restitution would benefit all but the entrenched penal bureaucracy and enhance justice at the same time. What then is there to stop us from overthrowing the paradigm of punishment and its penal system and putting in its place this more efficient, more humane, and more just system? The proponents of punishment and others have a few powerful counterarguments. It is to these that we now turn.

OBJECTIONS TO RESTITUTION

Practical Criticism of Restitution

It might be objected that "crimes disturb and offend not only those who are directly their victim, but also the whole social

62. An economist who favors restitution on efficiency grounds is Gary S. Becker, although he does not break with the paradigm of punishment. Those interested in a mathematical "cost-benefit" analysis should see his "Crime and Punishment," *Journal of Political Economy* 76 (1968):168–217.

63. This point is also made by Minocher Jehangirji Sethna, "Treatment and Atonement for Crime," in *Victims and Society*, p. 538.

order."[64] Because of this, society—that is, individuals other than the victim—deserves some satisfaction from the offender. Restitution, it is argued, will not satisfy the lust for revenge felt by the victim or the "community's sense of justice." This criticism appears to be overdrawn. Today most members of the community are mere spectators of the criminal justice system, and this is largely true even of the victim.[65] One major reform being urged presently is more victim involvement in the criminal justice process.[66] The restitution proposal would necessitate this involvement. And while the public generally takes the view that officials should be tougher on criminals, with "tougher" taken by nearly everyone to mean more severe in punishing, one must view this "social fact" in light of the lack of a known alternative. The real test of public sympathies would be to see which sanction people would choose: incarceration of the criminal for a given number of years, or the criminal's being compelled to make restitution to the victim. While the public's choice is not clearly predictable, neither can it be assumed that it would reject restitution. There is some evidence to the contrary.[67]

64.. Del Vecchio, p. 198.

65. William F. McDonald, "Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim," *American Criminal Law Review* 13 (1976): 659; see also his paper "Notes on the Victim's Role in the Prosecutional and Dispositional Stages of the Criminal Justice Process" (Paper presented at the second International Symposium on Victimology, Boston, September 1976); Jack M. Kress, "The Role of the Victim at Sentencing" (Paper presented at the Second International Symposium on Victimology, Boston, September 1976).

66. McDonald, "Towards a Bicentennial Revolution," pp. 669–73; Kress, pp. 11–15. Kress specifically analyzes restitution as a means for achieving victim involvement.

67. In two types of studies conducted for the Ventura County Board of Supervisors, Ventura, California, support for a restitutional program was indicated:

> Both the citizen attitude survey and the Delphi goal-seeking exercise revealed a strong concern for the *victim* as the 'forgotten man' of criminal justice. The Delphi panelists, in particular, emphasized the need for new kinds of criminal penalties in which the offender would be required to make restitution to his victim(s).

Development of a Model Criminal Justice System (Santa Barbara, California: Public Safety Systems, 1973), p. 85. The report recommends the implementing of a system of restitution. In the two cities mentioned earlier (Columbus and Tucson), support, at least by the parties involved, appeared strong. In the thousands of cases arbitrated by trained law students in Columbus, only 4 percent proceeded further up in the criminal system. In Tucson after one year the program has been successful in all but nine of 204 cases (with the cost of handling each case at $304 compared with $1,566 required to process the average felony case). General approval of restitution in lieu of punishment was indirectly referred to in the *Columbia Law Review*'s oft-cited study, "Restitution and the Criminal Law":

This brings us to a second practical objection: that monetary sanctions are insufficient deterrents to crime. Again, this is something to be discovered, not something to be assumed. There are a number of reasons to believe that our current system of punishment does not adequately deter, and for the reasons discussed earlier, an increase in the level of punishment is unlikely. In fact, many have argued that the deterrent value of sanctions has less to do with *severity* than with *certainty*,[68] and the preceding considerations indicate that law enforcement would be more certain under a restitutional system. In the final analysis, however, it is irrelevant to argue that more crimes may be committed if our proposal leaves the victim better off. It must be remembered that our goal is not the suppression of crime; it is doing justice to victims.

A practical consideration that merits considerable future attention is the feasibility of the employment project proposal. A number of questions can be raised. At first blush, it seems naively optimistic to suppose that offenders will be able or willing to work at all, much less earn their keep and pay reparations as well. On the contrary, this argument continues, individuals turn to crime precisely because they lack the skills that the restitutional plan assumes they have. And if these workers have the skills, but refuse to work, what could be done? Would not the use of force to compel compliance be tantamount to slavery? This criticism results in part from my attempt to sketch an "ideal" restitution system; that is, I have attempted to outline the type toward which every criminal justice system governed by the restitution paradigm should strive. This is not to say that every aspect of the hypothetical system would, upon implementation, function smoothly. Rather, such a system could only operate ideally once the paradigm had been fully accepted and substantially articulated.

With this in mind, one can advance several responses. First, the

> [E]ven where the complainant can be persuaded to continue the criminal case, after having received private satisfaction, his apathy is often so pronounced and his demeanor so listless that he becomes an extremely weak witness. . . . Also the knowledge of actual restitution seems to greatly assuage the jury. Even the knowledge of the existence of a civil suit can lead the jury to recommend leniency or acquittal.

CLR 39 (1939):1189; see also n. 31. Restitution, it seems, is accepted and preferred by the average person. Early studies indicate that, when properly administered, even offenders perceive a restitutionary sanction as fair (William Marsella and Burt Galaway, "Study of the Perceived Fairness of Restitution as a Sanction for Juvenile Offenders" [Paper presented to the Second International Symposium on Victimology, Boston, September 1976]); see Chapter 15.

68. Yochelson and Samenow, pp. 453–57.

problem as usually posed assumes the offender to be highly irrational and possibly mentally unbalanced. There is no denying that some segment of the criminal population fits the former description.[69] What this approach neglects, however, is the possibility that many criminals are making rational choices within an irrational and unjust political system. Specifically I refer to the myriad laws and regulations that make it difficult for the unskilled or persons of transitory outlook[70] to find legal employment.[71] I refer also to the laws that deny legality to the types of services that are in particular demand in economically impoverished communities.[72] Is it "irrational" to choose to steal or rob when one is virtually foreclosed from the legal opportunity to do otherwise? Another possibility is that the criminal chooses crime not because of foreclosure, but because he enjoys and obtains satisfaction from a criminal way of life.[73] Though morally repugnant, this is hardly irrational.

Furthermore, it no longer can be denied that contact with the current criminal justice system is itself especially damaging among juveniles.[74] The offenders who are hopelessly committed to criminal behavior are not usually the newcomers to crime but those who have repeated exposure to the penal system. In Kuhn's words, "Existing institutions have ceased to meet the problems posed by an environment *they have in part created.*"[75] While a restitutionary system

69. For a discussion rejecting the usefulness of the latter description, see Szasz, pp. 91–146; for a recent study verifying Szasz's thesis, see Yochelson and Samenow, esp. pp. 227–35.

70. Edward C. Banfield put forth his controversial theory of time horizon in his book *The Unheavenly City* (Boston: Little, Brown & Co., 1970) and amplified it in *The Unheavenly City Revisited* (Boston: Little, Brown & Co., 1974), and, most recently, in Chapter 5. See also Chapter 1. A contrary, but ultimately compatible view, is presented by Yochelson and Samenow, pp. 369–72.

71. For example, minimum wage laws, and so-called closed shop union protectionist legislation.

72. For example, laws prohibiting gambling, prostitution, sale of drugs, "jitney" cab services, etc.

73. Yochelson and Samenow, *The Criminal Personality*, pp. 247, 249: "It is not the environment that turns a man into a criminal. Rather it is a series of choices that he makes at a very early age. . . . [T]he criminal is not a victim of circumstances." This is in essence the main conclusion of their research. (For a concise summary of their provocative book, see Joseph Boorkin, "The Criminal Personality," *Federal Bar Journal* 35 [1976]:237–41.) In *The Criminal Personality. Volume 2: The Process of Change* (New York: Jason Aronson, Inc., 1977) they relate and examine the methods they have employed to change the criminal thought pattern. Of course, such an approach can itself be subject to abuse. See Chapter 4.

74. See, e.g., Edwin M. Schur, *Radical Noninterventionism, Rethinking the Delinquency Problem* (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1973).

75. Kuhn, p. 92 (emphasis added).

might not change these hard core offenders, it could, by the early implementation of sanctions perceived by the criminal to be just, break the vicious circle which in large part accounts for their existence.

Finally, if offenders could not or would not make restitution, then the logical and just result of their refusal would be confinement until they could or would. Such an outcome would be entirely in their hands. While this "solution" does not suggest who should justly pay for this confinement, the problem is not unique to a restitutionary system. In this and other areas of possible difficulty we must seek guidance from existing pilot programs as well as from the burgeoning research in this area and in victimology in general.

Theoretical Criticisms of Restitution

Richard Epstein has attempted to rationalize the historic distinction between criminal law and tort law.[76] He concludes, quite correctly, that the traditional division can only be explained by the notion of *mens rea* or criminal intent. Tort law involves compensating wrongfully injured victims. The criminal law, on the other hand, is concerned with punishing persons for their bad intentions as manifested by their bad acts.

The proof of this distinction for Epstein is the law of attempts. This category of crime specifies that: "When a person attempts to commit a crime such as murder, but fails for some reason to achieve his intended result, he may be guilty of an attempt."[77] Since an attempt may or may not result in an actual harm to an identifiable victim, those that do not may not, under a restitutive theory of justice, be subject to a sanction. Epstein views this as a fundamental flaw in a restitutionary approach, for he feels that those persons with bad intentions deserve punishment. Such a position is supported by John Hospers' paper[78] on the deserts theory of retribution.

It is interesting to note that the history of criminal justice that I sketched earlier bears out this characterization. Pollock and Maitland observe that: "Ancient law has as a general rule no punishment for those who have tried to do harm but have not done it. The idea of punishment is but slowly severed from that of reparation, and where no harm is done there is none to be repaired."[79] And: "[English law] started from the principle that an attempt to do harm was no

76. See Chapter 10.

77. Note, "Why Do Criminal Attempts Fail? A New Defense," *The Yale Law Journal* 70 (1960):160.

78. Chapter 8.

79. Pollock and Maitland, p. 507.

offence [sic]."[80] As Jerome Hall put it: "Criminal attempt is conspicuous for its absence in early English law. There is not the slightest suggestion of theory or general doctrine. . . . [T]here seem to have been no specific findings of liability for wrong-doing that fell short of the major crimes."[81]

What then of the criticism? Under a pure restitutionary approach there can be no compensation without a harm having occurred, and without compensation, there is no liability. Without a real victim, in short, there can be no crime. Unless one can justify a retreat to some sort of "symbolic" payment, which is doubtful, it seems that we are forced to the conclusion that a *bare* criminal attempt, even with an "overt act," is, without more, not a crime. It is important to note that though not itself a crime, the concept of an attempt is not irrelevant to a proper theory of justice. Rather, as we will see, it will assume a role of no small importance.

While such a suggestion to abolish attempts as a separate category of crime might seem absurd at first, a closer analysis reveals a basic plausibility. The most important observation to be made is that most unsuccessful attempts worthy of sanction are still crimes in a restitutionary system. For example, attempted murder is usually an aggravated assault and battery, attempted armed robbery is usually an assault, attempted car theft or burglary is usually a trespass. In this way the law of attempt is actually a form of double counting whose principle function is to enable the police and prosecutor to overcharge a crime for purposes of a later plea negotiation. Furthermore, some categories of attempt, such as conspiracy laws and possessory laws—e.g., possession of burglarious instruments—are shortcuts for prosecutors unable or unwilling to prove the actual crime and are a constant source of selective, repressive prosecutions.

In fact and in theory, any attempt to violate individual rights that resulted in an actual harm, such as the creation of fear on the part of the intended victim or bystanders (an assault), would be a crime in a restitutionary system and sanctionable as such. The only type of unsuccessful attempt that would escape liability would be the case of someone who unsuccessfully tried to commit a crime without otherwise violating anyone's rights and *without anyone knowing about it.* It surely is not absurd to ask whether anyone's rights have really been violated, and if not, whether a crime has actually occurred. It may, in fact, be both a practical as well as a theoretical virtue that

80. Ibid., p. 507, n. 4.

81. Jerome Hall, "Criminal Attempts—A Study of the Foundations of Criminal Liability," *The Yale Law Journal* 49 (1940):789, 791.

badly motivated but harmless acts are not labeled as criminal. In any case, no system governed by any principle can prosecute acts that no one knows about.

Does this mean that an attempt to commit a crime has no relevance to crime? As I indicated earlier, I think it does.[82] Most objections to the abolition of attempt are not really intent-motivated at all, but instead revolve around the fear that we would be legally powerless to prevent or deter crimes if we had to wait for damages to be incurred before we could rightly act. But it does not follow from the proposition that one cannot prosecute an unsuccessful or abandoned attempt that harmed no one, that one can do nothing about an attempt in progress. Rather, if someone is truly attempting to commit a crime, then the victim and anyone who is willing to help him can engage in self-defense. Once this is recognized, the question is not *whether* you can act to protect yourself, but *when.*

The proper answer to this question is not the quantitative one that Robert Nozick, for one, seems to favor of asking how high a probability of harm must exist before you can defend yourself.[83] Such an approach would all but abolish the concept of individual rights, upon which, presumably, his theory is or should be grounded. The correct response is a qualitative one, and it is precisely the approach taken by the traditional theory of attempt. In a case less than a certainty, the only justifiable use of force is that used to repel an overt act that is something more than mere preparation, remote from time and place of the intended crime. It must be more than "risky," it must be done with the specific intent to commit a crime and directly tend in some substantial degree to accomplish it. He who uses force in any other circumstance is himself an aggressor.

Let's say, for example, that you are minding your own business when someone gets it into his head that you are about to attack him. He then jumps on you in the mistaken belief that you are attempting to attack him. You bring an action for restitution for assault and battery on Professor Epstein's theory of strict causal liability. He justifies his action as self-defense. To sustain his burden of proof and avoid liability, he must prove that you were in fact attempting to

82. I agree with Professor Epstein that the crime of attempt includes both intention and an "overt act." This is the definition I will use here. An overt act ". . . must . . . be something more than mere preparation, remote from time and place of the intended crime; [It must be] . . . done with the specific intent to commit the [crime], and directly tend in some substantial degree to accomplish it. . . ." (*State v. Dumas*, 118 Minn. 77, 84, 136 N.W. 311, 314 [1912] quoted in Lloyd L. Weinreb, *Criminal Law* [Mineola, New York: Foundation Press, 1969], p. 375).

83. See Nozick.

attack him. If he cannot sustain his burden then, regardless of his good faith belief, the principle of comparative justice between the parties dictates that he is liable. This is, in fact, how Professor Epstein decides what, in essence, is the same set of facts in the case of *Courvoiser v. Raymond.*[84]

This is not to say that such a qualitative judgment is an easy one; on the contrary, matters of proof in this area are quite difficult. To ascribe a particular quality to an act, it is critical to determine the attacker's state of mind, and in this way evidence of the total circumstances and especially motive becomes probative. Motive is not a part of the *prima facie* case, and a good prosecutor is quick to point this out to a jury. Motive is merely evidence of intent that itself is only a necessary, but insufficient, indicia of the quality of the act. In this way it is probably more accurate to say that you need the intent to prove the nature of the act than to say (as Epstein seems to) that you need the act to prove the nature of the intent.

Though attempts that have caused no harm are not crimes in a restitutionary scheme, it can now be seen that while the attempt is in progress, its qualitative nature justifies the use of self-defense by the victim or, as his agent, by law enforcement authorities. Attempt is therefore an important, though sometimes misunderstood, concept in criminal law. And before finishing this discussion it should be pointed out that Epstein's principle of comparative justice (not to mention simple restitutionary justice) dictates that the cost of a justified self-defense effort must be born by the attempting party, in which case the act would no longer be a pure attempt, but, since a loss has been wrongfully inflicted, this would be a completed crime and compensable on pure restitutionary principles.

In the last analysis, I do not conclude that Professor Epstein is fundamentally wrong in his explication of the current criminal justice paradigm. Rather, I conclude that he accurately perceives the dominant assumptions of the current paradigm and shows that unless the restitutionist is prepared to reject those assumptions, restitution can only be integrated in a compromised manner. But Professor Epstein merely restates the assumptions, he does not defend them. If a pure restitutional paradigm is correct, then the assumptions are false and there remains no theoretical obstacle to an admittedly radical departure from the current criminal justice paradigm: the complete and total implementation of a restitutionary theory of justice.

84. 23 Colo. 113, 47 Pac. 284 (1896), discussed in his article "A Theory of Strict Liability," *Journal of Legal Studies* 2 (1973):173.

Distributionary Criticisms of Restitution

There remains one criticism of restitution that is the most obvious and the most difficult with which to deal. Simply stated, it takes the following form: "Doesn't this mean that rich people will be able to commit crimes with impunity if they can afford it? Isn't this unfair?" The *practical* aspect of this objection is that whatever deterrent effect restitution payments may have, they will be less for those most able to pay. The *moral* aspect is that whatever retributive or penal effect restitution payments may have they will be less for those who are well off. Some concept of equality of justice underlies both considerations.

Critics of restitution fail to realize that the "cost" of crime will be quite high. In addition to compensation for pain and suffering, the criminal must pay for the cost of his apprehension, the cost of the trial, and the legal expenditures for *both* sides. This should make even an unscrupulous wealthy person think twice about committing a crime. The response to this is that we cannot have it both ways. If the fines would be high enough to bother the rich, then they would be so high that a project worker would have no chance of earning that much and would, therefore, have no incentive to work at all. If, on the other hand, you lower the price of crime by ignoring all its costs, you fail to deter the rich or fully compensate the victim.

This is where the option of arbitration and victim crime insurance becomes of practical importance. If the victim is uninsured, he is unlikely to recover for all costs of a very severe crime from a poor, unskilled criminal, since even in an employment project, the criminal might be unable to earn enough. If he had no hope of earning his release, he would have little incentive to work very hard beyond paying for his own maintenance. The victim would end up with less than if he had "settled" the case for the lesser amount that a project worker could reasonably be expected to earn. If, however, the victim had full coverage criminal insurance, he would recover his damages in full, and the insurance company would absorb any disparity between full compensation and maximal employment project worker's output. This cost would be reflected in premium prices, enabling the insurance company that settled cases at an amount that increased the recovery from the criminal to offer the lowest rates. Eventually a "maximum" feasible fine for project workers would be determined based on these considerations. The "rich," on the other hand, would naturally have to pay in full. This arrangement would solve the practical problem, but it should not be thought of as an imperative of the restitutional paradigm.

The same procedure of varying the payments according to ability

to pay would answer the moral considerations as well (that the rich are not hurt enough) and this is the prime motive behind *punitive* restitution proposals. However, we reject the moral consideration outright. The paradigm of restitution calls not for the (equal) hurting of criminals, but for restitution to victims. Any appeal to "inadequate suffering" is a reversion to the paradigm of punishment, and by varying the sanction for crimes of the same magnitude according to the economic status of the offender, it reveals its own inequity. *Equality of justice means equal treatment of victims.* It should not matter to the victim if his attacker was rich or poor. His plight is the same regardless. Any reduction of criminal liability because of reduced earning power would be for practical, not moral, reasons.

Equality of justice derives from the fact that the rights of men should be equally enforced and respected. Restitution recognizes a victim's right to compensation for damages from the party responsible. Equality of justice, therefore, calls for equal enforcement of each victim's right to restitution. Even if necessary or expedient, any lessening of payment to the victim because of the qualities of the criminal is a violation of that victim's rights and an inequality of justice. Any such expedient settlement is only a recognition that an imperfect world may make possible only imperfect justice. As a practical matter, a restitutional standard gives victims an enormous incentive to pursue wealthy criminals, since they can afford quick, full compensation. Contrast this with the present system, where the preference given the wealthy is so prevalent that most victims simply assume that nothing will be done.

The paradigm of restitution, to reiterate, is neither a panacea for crime nor a blueprint for utopia. Panaceas and utopias are not for humankind. We must live in a less than perfect world with less than perfect people. Restitution opens the possibility of an improved and more just society. The old paradigm of punishment, even reformed, simply cannot offer this promise.

OTHER CONSIDERATIONS

Space does not permit a full examination of other less fundamental implications of such a system. I shall briefly consider five.

Civil Versus Criminal Liability

If one accepts a restitutionary standard of justice, what sense does it make to distinguish between crime and tort, since both call for payment of damages? For most purposes I think the distinction collapses. Richard Epstein, in a series of brilliant articles, has articulated

a theory of strict liability in tort.[85] His view is that since one party has caused another some harm and one of the parties must bear the loss, justice demands that it falls on the party who caused the harm. He argues that intention is only relevant as a "third stage" argument; that notwithstanding some fault on the part of the plaintiff (a second stage argument), the defendant intended the harm and is therefore liable.[86] With a restitutional system I see no reason why Epstein's theory of tort liability could not incorporate criminal liability into a single "system of corrective justice that looks to the conduct, broadly defined, of the parties to the case with a view toward the protection of individual liberty and private property."[87]

There would, at least initially, be some differences, however. The calculation of damages under the restitutionary paradigm that includes cost of apprehension, cost of trial, and legal costs of both parties would be higher than tort law allows. A further distinction would be the power of enforcers to confine unreliable offenders to employment projects.[88]

85. Epstein, pp. 151–204.

86. Richard A. Epstein, "Intentional Harms," *Journal of Legal Studies* 3 (1975):402–408; see also his article "Defenses and Subsequent Pleas in a System of Strict Liability," *Jour. of Legal Stud.* 3 (1974):174–85.

87. Epstein, "Intentional Harms," p. 441. As indicated above, Epstein himself would disagree based on his emphatic distinction between tort and criminal law. He rests this distinction on two characteristics of the criminal law: (1) that its function is to punish (and therefore *mens rea* is required and more stringent procedural safeguards are appropriate); and (2) that since the defendant is prosecuted by the state, fairness as between the parties is not relevant. From these assumptions, Epstein reasons quite correctly that the two systems are inherently different. It should be obvious that a restitutionary paradigm undermines both assumptions. Gilbert M. Cantor, in "An End to Crime and Punishment" (*Shingle* 39 [May 1976]:99–114), takes precisely this view, arguing that

> the time has come to abolish the game of crime and punishment and to substitute a paradigm of restitution and responsibility. I urge that we assign (reassign, actually) to the civil law our societal response to the acts or behaviors we now label and treat as criminal. The goal is the *civilization* of our treatment of offenders. I use the word, "civilization" here in its specific meaning: to bring offenders under the civil, rather than the criminal law; and in its larger meaning: to move in this area of endeavor from barbarism toward greater enlightenment and humanity. (p. 107; emphasis in original.)

88. It would seem that the only way to account for these differences would be an appeal to the *mens rea* or badness of the criminal as opposed to the unintentional tortfeasor. Yet such an approach, it might be argued, is not available to a restitutionary system that considers the moral outlook of an offender to be irrelevant to the determination of the proper criminal sanction. A possible response is that this overstates the restitutionist claim. That a criminal's mental state does not justify punishment does not imply that it is not relevant to *any* aspect of the criminal justice process. It may well be that it is relevant to the consideration of methods by which one is justified in extracting what, on other grounds, is shown to be a proper sanction, that is, restitution.

Criminal Responsibility and Competency

Once a criminal sanction is based not on the offender's badness but on the nature and consequences of his acts, Thomas Szasz's proposal that the insanity plea be abolished makes a great deal of sense,[89] as does his argument that "all persons charged with offenses —except those grossly disabled—[are fit to stand trial and] should be tried.[90] On this view, Epstein's concept of fairness *as between the parties* is relevant. A restitution proceeding like a

> lawsuit is always a comparative affair. The defendant's victory ensures the plaintiff's [or victim's] defeat. . . . Why should we prefer the injurer to his victim in a case where one may win and the other lose? . . . As a matter of fairness between the parties, the defendant should be required to treat the harms which he has inflicted upon another as though they were inflicted upon himself.[91]

Victimless Crimes

The effect of restitutional standards on the legality of such crimes as prostitution, gambling, high interest loans, pornography, and drug use is intriguing. There has been no violation of individual rights, and consequently no damages and, therefore, no liability. While some may see this as a drawback, I believe it is a striking advantage of the restitutional standard of justice. So-called victimless crimes would in principle cease to be crimes. As a consequence, criminal elements would be denied a lucrative monopoly, and the price of these services would be drastically reduced. Without this enormous income, organized crime would be far less able to afford the "cost" of its nefarious activities than it is today.

Legal Positivism

What is true for victimless crimes is true for the philosophy of legal positivism. On the positivist view, whatever the state (following all the correct political procedures) says is law, is law; hence, whatever the state makes a crime is a crime. A restitutional standard would hold the state to enforcing individual rights through the recovery of individual damages.

89. Szasz, pp. 228–30.

90. Ibid., pp. 228–29. "The emphasis here is on gross disability: it should be readily apparent or easily explicable to a group of lay persons, like a jury" (p. 229). But even the qualification of gross disablement might be unjustified (see Yochelson and Samenow, pp. 227–35).

91. Epstein, "Strict Liability," p. 398. In Chapter 10, p. 253, he takes exactly this approach with the insanity defense in tort law.

Legal Process

Because the sanction of crime would no longer be punitive, the criminal process could explore less formal procedures for dispute settlement. Also, the voice of the victim would be added to the deliberations. One possible reform might be a three-tiered verdict: guilty, not proven, and not guilty. If found "guilty," the offender would pay all the costs mentioned above. If the charges are "not proven," then neither party would pay the other. If found "not guilty," the defendant would be reimbursed by the enforcement agency for his costs and inconvenience. This new interpretation of "not guilty" would reward those defendants who, after putting on a defense, convinced the trier of fact that they were innocent.[92]

These and many other fascinating implications of restitution deserve a more thorough examination. As any new paradigm becomes accepted, it experiences what Kuhn calls a period of "normal research," a period characterized by continuous expansion and perfection of the new paradigm as well as a testing of its limits. The experimentation with restitutionary justice will, however, differ from the trial and error of the recent past, since we will be guided by the principle that the purpose of our legal system is not to harm the guilty but to help the innocent—a principle that will above all restore our belief that our overriding commitment is to do justice.

92. For other intriguing criminal process reforms see Lloyd L. Weinreb, *Denial of Justice* (New York: The Free Press, 1977).

Index

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