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TOWARD A NEW THEORY OF PUNISHMENT

ABSTRACT. Criteria for a successful theory of punishment include first, that it specify a reasonable limit to punishments in particular cases, and second, that it allow benefits to outweigh costs in a penal institution.

It is argued that traditional utilitarian and retributive theories fail to satisfy both criteria, and that they cannot be coherently combined so as to do so. Retributivism specifies a reasonable limit in its demand that punishment equal crime, but this limit fails to allow benefits to outweigh costs of punishing. Utilitarians demand the latter but cannot guarantee the former. Combinations continue to violate one requirement or the other.

The most vulnerable element of the traditional theories is the retributive limit. An alternative is suggested according to a new but similar model of reciprocal social rights and obligations. The rights of a citizen in the moral community are considered as a package, which reverts temporarily to the community in trusteeship when the citizen seriously violates the rights of others. The community must exercise the least restraint necessary to protect others until the full package of rights can be restored to the individual.

Problems for this new theory and advantages over alternative models are discussed in the final section.

My purpose here is to suggest a new conceptual model for the imposition of punishment by the state, a model which, unlike its predecessors, can specify a reasonable limit to punishment in particular cases. This limit must accord with our moral sensibility in two ways. First, it must prohibit clearly excessive punishments, that is, it must both block punishment of the innocent and protect those found guilty against inordinate penalties. But second, it must not nullify the social benefits of the penal institution. The costs of the institutions involved in administering punitive justice must not exceed their aggregate benefits to society.

In the first section of this paper I will review the failures in this regard of traditional theories taken separately. The second section will explain our inability to combine them intelligibly. In later

sections I will propose modifications leading to a new theory and then consider possible problems for it.

1.

Traditional utilitarian and retributive theories of punishment have failed to satisfy our two criteria for a successful theory. This is true of those theories taken separately, and, more surprisingly, of recent attempts to combine them. Utilitarianism cannot set any reasonable limits upon the punishment of particular individuals because of its exclusively forward-looking stance and its problem of aggregation. As long as there are sufficiently many persons who can benefit from added deterrent protection or enough potential criminals who might be deterred by increased threats, aggregate utility can continue to outweigh disutility from imposing more severe penalties against convicted criminals. According to the utilitarian formula, the severity of their punishments will vary not only with the culpability of their acts, but with the number of similar crimes, the probability of apprehension and conviction for similar crimes in the future, the degree of forethought or deterability of the crime, etc. To be effective as a deterrent, a threat must make prospective losses outweigh gains to the average prudentially calculating potential criminal. Given low rates of conviction for most types of crime and the fact that the degree of punishment will be discounted by this probability in the prudential calculation, this lower limit required by utilitarian deterrence theory may already exceed our judgements as to the penalties warranted by the culpable nature of particular acts.

The standard objection to utilitarian theories of punishment refers to their possible endorsement of punishing innocents. Utilitarians reply that prospective utility from such a policy will not outweigh disutility because of the possible discovery of the deceptions.¹ Since we could not reliably predict success from such

¹ See, for example, T. L. S. Sprigge, 'A Utilitarian Reply to Dr. McCloskey,' *Inquiry* 8 (1965): 264-91.

deception, we are better off adopting a strict rule against practicing it on utilitarian grounds. In this way the utilitarian attempts to eliminate the counterexample to the match between his principle and its moral test cases. It becomes less important, however, whether such reasoning can eliminate all conceivable exceptions to this rule of thumb about prediction once we recognize that the problem of the innocent is but one instantiation of the broader problem regarding degrees of punishment justified by the theory. Punishment beyond desert includes excessive punishment of those found guilty, which does not typically arouse the same disutilitarian outcry upon discovery by a public anxious to protect itself at all moral cost from criminals. The same violation of right is involved, however, as in the case of the innocent. In both cases the individual is not treated as deserved, but used without consent as a means to benefit others.

This right to be treated only as deserved of course figures centrally in the backward-looking, nonaggregative retributive theory. Here a strict limit is imposed by the idea that the punishment must equal the crime in degree of harm. This equation may be grounded in somewhat different but related underlying moral theories or social models. In Kant's theory it derives from the requirement that rational agents universalize their principles of action. In recognizing the moral equality of others such agents act only in ways they would will or approve for these other agents as well. By equating degree of punishment with degree of harm from criminal acts we therefore treat criminals as moral agents who have rationally chosen certain courses of conduct. We universalize the consequences of their actions in relation to them. Since they cannot find morally relevant differences between themselves and their victims, as rational subjects they would have to consent to equal treatment. Punishing them within the limit of this equation treats them as rational moral beings and hence restores their moral status in the society. Imposing harm beyond this limit, on the other hand, uses criminals as means to protect others, and that simply multiplies wrongs.

Kant's theory thus provides a deeper justification for the re-

tributive demand that the punishment equal the crime, rather than merely expressing a primitive desire for revenge, as retributivists are often accused of doing. But the premise that the recognition of other persons as moral equals constitutes a demand of rationality itself remains questionable. Modern retributive theories build not so much upon the idea of universalization as upon Kant's notion of a community of equal subjects, all ends in themselves rather than material for communal welfare. In this model of society as a community of equals, Kant's "kingdom of ends," all citizens have equal rights. They retain these rights, however, only as long as they continue to respect the same in others.² When instead they violate particular rights of others, they forfeit those same or equivalent rights themselves. Again we may then treat them as they treated their victims. Indeed some retributivists claim that we must do so, if we are not to allow criminals an unfair advantage over others, who accepted the burdens as well as the benefits of this system of rights and duties.³ Whether this model implies the sufficiency or only the necessity of criminal acts for justifying penalties, it too supports the retributive limit of equality of punishment with crime.

While some such limit is required for capturing our moral sensibility here, pure retributivism fails as a complete theory of punishment as well. In fact it fails to justify a state penal institution at all. It does so because it fails to acknowledge our second criterion and so might allow the social costs of the system to far exceed its benefits to the community. Retributivism views the legal system as meting out treatment in accordance with moral desert. But surely this is not the aim of social institutions; nor is it one that they could fulfill fairly. First, if there were no benefits to be attained by institutionalized punishments, if in fact these benefits did not outweigh the social costs, then it would not be the business of the state to judge us morally. There are many kinds

² Compare W. D. Ross, *The Right and the Good* (O.U.P., 1965), pp. 56–64.

³ Herbert Morris, 'Persons and Punishment,' *The Monist* 52 (1968): 475–501.

of seriously immoral conduct not punishable by law simply because the costs of enforcement would be too high. People act immorally when they gratuitously insult one another or psychologically intimidate or hurt one another. But attempts to enforce legal prohibitions against such conduct would be too costly in terms of loss of privacy as well as monetarily. These costs compared to the benefits of protection against such acts are too high to warrant institutional punishment, although moral blame is clearly fitting. The point may be generalized.

Second, if the purpose of the state were to proportion reward and suffering to moral merit, to be fair it would have to do so over entire lifetimes, and not in reaction to specific criminal acts. Punishments are often imposed upon those already unfairly low on the scale of social benefits and burdens. To represent them as having unfair advantages over others is ironic at best. The deterrence theorist's view of punishment as a necessary evil seems more appealing here than the model of setting the scales straight. We must think of forfeiting particular rights by criminal actions as a necessary condition of punishment, rather than thinking of the state as primarily concerned with proportioning treatment to moral merit. Thus retributivism no more than utilitarianism constitutes a satisfactory complete theory of punishment.

2.

The obvious move at this point would appear to consist in combining the deterrence theory's justification of the institution of punishment with retributive limits to its imposition in particular cases. Several prominent philosophers have suggested doing so.⁴ The motivation for such a mixed theory derives from the fact that each of the traditional models taken separately satisfies one of our two criteria for a successful theory. Unfortunately, as I argued in a

⁴ H. L. A. Hart, 'Prolegomenon to the Principles of Punishment,' in *Punishment and Responsibility* (O.U.P., 1968); John Rawls, 'Two Concepts of Rules,' *Philosophical Review* 64 (1955): 3–32.

previous paper,⁵ these two bedfellows do not lie as comfortably together as recent theorists have thought. It is not simply that each fails to capture by its own principles the central thrust of the other. We cannot expect forward-looking principles to do the work of backward-looking ones or vice versa; normally we reason morally from some combination of the two types. In this case, however, the traditional theories nullify each other when combined. The reason was implied above. Given less than fifty percent chance of apprehension and conviction for almost all classes of crime, punishments within the standard retributive limit that merely equal the harm imposed by the crimes do not provide sufficient prudential reasons to desist.

This last claim assumes that the gain to the criminal also roughly equals the harm to the victim, but this is often the case. In crimes against property, where the dollar amounts of gain and loss are identical, that amount may mean more in utility to the criminal, who normally has less initial wealth. Since almost every type of crime in this category is successful more than half the time, deterrence demands far greater penalties than retributivists should allow. Retributivists, however, might seize this horn of the dilemma by denying that acceptable penalties lack deterrent force. Most people do not require such stringent threats to deter them from criminal activities. The shape of most persons' utility indifference curves and their positions on them render the mere thought of apprehension and ensuing social disgrace sufficient as deterrent. Then too we may hope that most are not Bayesian calculators in the narrow prudential sense, that they are rather swayed by their moral consciences from seriously culpable criminal acts. But deterrent threats, if they are to have force at all, address themselves to potential criminals who fit this model of the prudential calculator and who have little to lose otherwise by attempting crimes. For such individuals effective threats would have to exceed retributive limits, and the reply fails.

⁵ 'The Paradox of Punishment,' *Philosophy and Public Affairs* 9 (1979): 42-58.

Punishments within those limits, on the other hand, would not provide sufficient social benefits to be worth the costs of the system. Thus, if the mixed theory meets one of our criteria, it cannot meet the other. Advocates of deterrence have often seized the second horn of this dilemma by arguing that their theory does capture the sensible element in retributivism. Beginning with Bentham, they have pointed out that the goal of deterrence itself tends to proportion penalties to gravities of crimes. As he had argued,⁶ in order to discourage the escalation of minor crimes into major ones, in order to encourage the criminal to choose the lesser evil, deterrent threats must be more severe in relation to more serious potential crimes. If the penalty for rape or kidnapping is the same as that for murder, for example, the rapist or kidnapper is only encouraged to kill his victim and reduce his chances of apprehension. On utilitarian grounds punishments are further justified for more serious crimes first, to offset the greater gain to the potential criminal and so continue to deter him, and second, to protect the potential victim from the greater harm. But this reply too is insufficient, since proportionality is not equivalent to the absolute limit on punishment entailed by retributive theories. In fact deterrent threats sufficient to make benefits in the form of protection outweigh costs continue to be uniformly too severe even when fully proportionate.

The deterrence theorist might venture one final more sophisticated reply to the effect that threats beyond the standard retributive limit may nevertheless honor the spirit of retributivism. When criminals are adequately warned of punishments but nevertheless accept the risks involved in their criminal activities, they do so voluntarily. Although they do not literally consent to being punished, there is a sense in which they consent to taking the risks that they know may result in punishment.⁷ This is true when they

⁶ J. Bentham, *An Introduction to the Principles of Morals and Legislation* (New York: Humanities Press, 1962), chapters xvi-xvii.

⁷ Compare E. van den Haag, 'Punishment as a Device for Controlling the Crime Rate,' forthcoming in *Rutgers Law Review*.

are aware in advance of these risks, no matter how severe the penalties. At least it is so as long as they are not forced to commit crimes, but do so willingly in full knowledge of the possible consequences. Thus the Kantian requirement could be argued to be satisfied by the public announcement of typical penalties for crimes. Since criminals can avoid harm from punishment, however severe, while victims cannot avoid harm from crimes, we must protect the latter as best we can.

The point can be made in terms of the more modern retributive model as well. Since criminals, like others, can avoid all penalties and all risks of penalties by foregoing criminal activities, but choose instead to break the rules and assume the risks, they must consider themselves at least as well off as others in relation to these rules with their sanctions. In fact, since they could have maintained the same relation to the rules as others by foregoing criminal gains in light of their threats, they must consider assumption of risks of present penalties preferable. To lower penalties below already ineffective deterrent threats would increase the unfair advantage of criminals over their victims. Since the former can avoid the harm imposed upon them while the latter cannot, effective deterrents only correct an otherwise unfair situation. The retributive goal of fairness can be argued to be better achieved by deterrence theory once fairness to victims and others who forego criminal activities is figured.

This reply, whether phrased in terms of consent to risk or unfair advantage, fails as well to resolve the dilemma. That a certain action is performed in full knowledge that a certain reaction might follow does not in itself justify the reaction. Advance warning of unpleasant consequences is insufficient warrant for imposing them. The fallacy in the above reasoning from hypothetical consent is similar to the mistake of philosophers who appeal to hypothetical promises to justify moral duties (e.g., to the state). What is often overlooked is that the promises must be independently justifiable, at least permissible, if they are to have moral force. If I promise you to do something immoral, that does not mean I ought then to do it (only that I ought not to have promised it). Similarly, my

warning you that I will shoot you if you don't hand over your wallet does not justify my doing so, even if you can avoid the risk of harm but choose not to do so. The point does not change if I warn you of a violent reaction to some immoral act that you choose nevertheless to perform, if the act does not in itself merit the reaction. Nor is it altered in institutional contexts. Warning shoplifters that they will be tortured does not justify doing so, even if they can avoid the harm and yet choose to assume the risk. In general, if punishments beyond those deserved, as desert is determined by retributive reasoning, are unwarranted or unfair, then advance publication of threats fails to warrant them.

We may turn to the second formulation. The premise there was that criminals must consider themselves as well off as others in relation to whatever risks of punishment exist, since they prefer to assume the risks however high at present. It was concluded that reducing threats beneath reasonable deterrent force only increases an already unfair advantage over others relative to law. The reply here is that relative advantages and disadvantages must again be figured in relation to the whole set of distributive, and not merely punitive, rules that define relative social positions. We may say more plausibly in regard to subjective satisfaction with positions that those persons are relatively advantaged who can forego criminal activity and remain satisfied without assuming risks of punishment. While we cannot represent the average criminal as relatively advantaged, let alone unfairly so, we need not deny that he does typically treat his victim unfairly. The question is whether we are permitted to be unfair to some, to treat them more severely than deserved, in order to prevent unfairness to others. Justice still appears to prohibit our using criminals as means to protect the community in this way. A backward-looking limit to permissible punishment still appears necessary from a moral point of view, and the retributive limit remains not only uncapturable, but too restrictive to contain penalties demanded by deterrence theory.

Thus neither theory seems capable of seizing the opposing horn of the dilemma we have posed for the possibility of combining them. Nor do I see any way through the horns within the frame-

works of the traditional theories. Attempting to increase police and prosecution efficiency to the point where the probability of suffering punishment for criminals was sufficiently high to give real deterrent force to threats within retributive limits would involve prohibitive social costs, if they could be successful at all given the current state of the art of detection. Such costs would include threats to procedural rights and losses of privacy. Thus success in this attempt would not entail raising benefits of the system above total costs.

Of course one remaining moral alternative is to attack the social causes of crime. But failing that effort, and given the fact that at present our society appears to be backing away from all efforts in that direction, the shortcomings of the two traditional theories of punishment, and our inability to combine them in an intelligible way, calls for a new approach to the topic. Problems with the one alternative approach in the literature, the idea of treating criminals as psychological patients, are notorious and require little further comment.⁸ These include the very pretense that criminals are sick, the claim that psychologists know how to cure them, and the idea that involuntary treatment contexts are any less punitive than traditional punishments, that they require no retributive limits. I conclude that a new approach is indeed in order if we are successfully to ground our practice in theory.

3.

We may begin charting the new direction by noting that the premise intuitively most vulnerable in our argument that defined the dilemma for the two traditional theories was the retributivist's requirement that punishment equal crime in degree of harm imposed. Yet on standard retributive grounds this claim seems both natural and irreplaceable. Since punishment involves denial of rights normally held by all, we must maintain that the criminal has

⁸ See, for example, American Friends Service Committee, 'The Crime of Treatment,' in J. Feinberg and H. Gross (eds.), *Philosophy of Law* (Encino, Ca.: Dickenson Publishing Co., 1975).

forfeited by his actions those rights we justifiably deny. We seemingly cannot view the criminal as forfeiting all his rights by his actions, however, since we intuitively accept limits to reasonable penalties. Certainly we cannot substitute the deterrence theorist's claim that increasingly severe punishments are justified as long as the sum total benefit to the community in the form of deterrent protection outweighs the sum total additional harm imposed independently of past action or desert. In aggregating benefits and harms in this way, the theory does allow sacrifice of some for the benefit of others and is vulnerable to the usual objection to utilitarianism. If we rather view individuals as possessing separate rights, only some of which are forfeited by harmful acts, it seems natural to say that those rights forfeited are the very ones violated, and we are back to standard retributivism.

How might we alter this view while retaining a plausible, theoretically grounded limit to justified punishments? We cannot remain within the narrow retributive view, but we must retain the notion of forfeiture of rights and the duty of the penal institution to honor many rights even while imposing punishments. One initial alteration is to view the rights of a citizen as a package obtained upon attaining citizenship or entering into a moral community with others. When one comes of age to establish relations with others on a moral basis, he acquires his own full set of moral rights as well. Here full citizenship in a moral community, with all the protections that affords, is seen not as automatic or as a birth-right, but as a privilege for which one must qualify. The model emphasizes that membership in this community involves duties as well as rights and that, at least for adult persons, packages of rights and duties are reciprocal. One is not granted the full set of rights without accepting the full set of duties. The latter is both necessary and sufficient for the former.

According to this model, then, when a person violates rights of others, he loses his full standing in the moral community. Of course being accused of a crime does not yet entail full loss of rights; in fact it activates certain procedural rights to defense against the accusation. But after proof of guilt the criminal's pack-

age reverts temporarily to trusteeship by the community. This still does not entail loss of all rights. First, the duty and goal of the community under the trusteeship is the expeditious restoration of full rights and duties of citizenship. Second, the community retains the obligation during this period to honor as many pre-existing rights of the criminal as are compatible with his maintaining normal moral relations, i.e., refraining from harming others. His criminal acts, in addition to forfeiting full moral standing, constitute evidence that retention of full liberty would result in further harm to others, which cannot be permitted. Such acts therefore provide both backward- and forward-looking grounds for restraint in denial of preexisting rights, both grounds being necessary as we have seen. But he is to be restrained only to the degree necessary to prevent further crimes during this period. Thus in punishing we are required to exercise the least force and restraint necessary for maintaining acceptable relations among citizens, until full return to community membership and full restoration of rights is achieved. The limit here is implied by the goal, but the goal aims to restore a great good to the criminal, rather than to use him for the benefit of others.

In practice the emphasis here will be upon both incapacitation and rehabilitation, rather than upon deterrence or retribution. The purpose is neither to deter others sufficiently nor to pay back in kind, but to restrain and redirect through means that do not unnecessarily violate rights. In the idea of least restraint necessary for the purpose of restoration to full standing in the moral community we achieve a limit to justified penalties which, unlike the retributive limit of equality of crime and punishment, does not render the costs of the system out of line with the benefits. Here the end is permanent protection of the community from further harm from particular criminals, and the means are to be suited to the end. If successful within reasonable time periods, the benefits to both criminals and potential victims appear to be worth the costs involved. At least in this model the justification for the imposition of punishment in the particular case need not nullify the overall social purpose of the institution.

The suggested model also seems preferable to others that have placed these goals over those of deterrence and retribution. As mentioned above, one such alternative involves the notions of disease and medical treatment, typically out of place here. The typical criminal is no more a victim of an identifiable and curable pathological condition than he is a purely rational prudential calculator à la deterrence theory, or a premeditating, morally malicious sinner who deserves only to be paid back in his kind. All these psychological caricatures oversimplify both the diversity of criminal types and the complexity of economic, sociological, and psychological forces at work upon even the most common types, were they isolable. The model suggested here makes no such simplifying assumptions. It assumes only that many criminals can be rehabilitated, a premise to which I will return below.

This model represents an improvement as well over views that emphasize incapacitation as the goal of punishment, but that, like deterrence theories, see the imposition of punishment as justified sufficiently by the protection it affords others. Such views cannot help endorsing measures such as preventive detention, an expedient on a par with punishment of the innocent, in fact identical with it in all but name. A defender of preventive detention (in theory) might argue the irrationality of allowing and even requiring prevention of harmful acts once they are in motion, but prohibiting their prevention when they can be predicted with equal certainty. One might also view as inconsistent the approval of medical quarantine but prohibition of preventive detention, which is seemingly analogous.⁹ But regarding the latter there is first of all the epistemological problem in practice: we cannot predict actions with the same certainty with which we perceive them, or with the same accuracy with which we can predict the spread of disease, and probably never will be able to do so. We may add to this problem the invasions of privacy that would be necessary to administer predictive tests. Extensive psychological tests of all

⁹ See Ferdinand Schoeman, 'On Incapacitating the Dangerous,' *American Philosophical Quarterly* 16 (1979): 27-35.

persons, even if they could be reliably predictive, would be far more intrusive than rare and simple tests for carriers of epidemic diseases.

Finally there are purely moral considerations against the policy justified by other models for warranted incapacitation. First, to the degree that we rely upon predictions of behavior alone as the basis of reward and restraint, we are adopting a mechanistic view of human agency. This view is unobjectionable in relation to disease and its spread, hence benign as a model for the practice of quarantine. But in the case of action in contrast to the contraction of disease, we prefer to view ourselves as autonomous, whatever the inductive evidence for or against our truly being so. One could reply that support for the policy of preventive detention need not deny autonomous human agency. Reliance upon predictive data might be held to imply only that autonomous actions themselves fall into regular patterns.¹⁰ Sufficient regularity itself might be argued to provide inductive grounds for inferences regarding future behavior, even if freely chosen. But this argument does not strike me as sound. Unless the perceived regularities in behavior were taken as evidence for genuine deterministic causal mechanisms, they would not provide sufficient support for denial of rights without forfeiture by prior actions. For there would be no grounds for believing that previous regularities were not purely accidental, able to be reversed at will by future agents. Adoption of the mechanistic view, on the other hand, would require broad changes in our moral and social systems beyond penal practices that we are justifiably reluctant to make.

A second, independent moral consideration against the practice, even on a theory that emphasizes incapacitation and rehabilitation as goals of the penal institution, is the fact that it is worse to cause harm than to fail to prevent it. Support for this claim would require a treatment of positive and negative rights and duties beyond the scope of this paper. But I do believe it to be part of our common moral framework: e.g., the bystander who

¹⁰ Cf. Schoeman, 'On Incapacitating the Dangerous,' *ibid.*

fails to prevent the preventable crime at minimal cost to himself is still not as culpable as the criminal (even if the latter's intentions are no more sinister or less excusable). Since preventive detention imposes harm merely to prevent it, and without other justification, this consideration counts heavily against it.

All these considerations together suffice to warrant a rule against the policy of predictive denial of rights. We don't want our rights against detention weighed against the predicted good that might accrue to the community from their denial. The right of the innocent is granted precisely to block such calculation. But if our justification of restraint looks exclusively to the future, then we seem forced to engage in the doubtful probability calculations when contemplating a policy not ruled out in principle. These calculations are part and parcel of aggregative moral reasoning in the absence of rights. Without objections in principle to the idea of preventive detention it would indeed appear irrational not to calculate in this way as best we could. The theory advocated here does provide such in principle prohibition. It shares with retributivism the requirement that rights be forfeited through proven actions before punishment may be imposed. Although in this case the rights forfeited are those whose retention would result in continued violation of the conditions for citizenship in the moral community, they must still be forfeited before denied. In looking both backward and forward, the theory improves in the protection of rights upon exclusively forward-looking theories, whether deterrence or newer versions.

There is one further advantage that should be noted, this time over retributivism. I have been representing the retributive limit thus far as too strong, as restricting punishments to levels at which they cannot be socially useful. But in other cases it is too weak, allowing penalties properly regarded as too severe. I have in mind specifically the case of capital punishment. Retributivism, which permits penalties up to the level of harm imposed by the crimes in question, would in some versions demand the death penalty and in others allow it, if it could be shown to serve a useful deterrent purpose. I find institutional killing odious, when it is justified only

as retribution or in order to minimize loss of unspecified lives in the future. Again the principle to which I appeal is that it is worse to kill than to fail to minimize aggregate loss of life in future-oriented policy. We are all guilty of the latter in our public allocations for highway safety and medical technology, but this does not make us all murderers. We do all share in the guilt for murder, however, when we advocate and impose capital punishment. Yet the traditional theories of punishment, even backward-looking, rights-oriented retributive theories, fail to explain the wrong in this practice. The new model does explain it. Because capital punishment always exceeds the least restraint necessary to protect society from repetitions of harmful acts by convicted criminals, it is clearly ruled out.

4.

Despite these advantages, many problems would face the full articulation of this theory and its implications for practice. First, there may be a suggestion that all rights are conventional, that they originate with particular social organizations or societies, and that they can be granted or withheld at the pleasure of others in the state or community. To block this interpretation I have referred to membership in the moral community rather than in a particular state or political regime, and I have spoken of moral rather than legal rights. The criterion for full membership in this community requires only the ability to honor those rights enjoyed by others. The same set must be granted to anyone who meets this criterion, a necessary and sufficient condition. Thus there is no implication that rights originate politically with the origin of government. Rather the state is morally limited by preexisting moral rights, and penal institutions can be criticized on grounds of failing to honor those rights.

On the other hand, the model of community here reflects the contractarian tradition in moral philosophy and therefore shares certain problems with other versions of contract theory. Questions arise, for example, regarding rights of children and animals, who

fail to meet the criterion for full community membership. In most contract models the motivation for granting rights to others is self-regarding: the rights are granted in return for acceptance of correlative obligations. I have not appealed to self-interested contractors but have counted moral capacity as necessary for full membership in the community. Of course in this regard, as I hope in general, children differ importantly from animals. Not only do they differ in capacity for moral self-restraint during childhood, but they normally will develop into persons with full sets of obligations and capabilities of honoring them. Equally important from this point of view is the fact that this development can be affected for better or worse by treatment along the way. This motivates us in the case of children but not animals to exercise and demonstrate reasonable moral constraints during upbringing, constraints not so severe that they harden rather than sensitize. In both cases, however, the idea of least restraint necessary to prevent harm in the short and long runs, which is central in the model for punishment, can be of use here too in explaining our obligations to subjects who temporarily or permanently lack full moral capacities themselves. According to this model we must honor those rights compatible with relations that at least accord with moral demands, i.e., avoidance of harms, even when moral motives and concepts are lacking. Thus I see the questions that arise here as answerable within this framework.

There will also be objections directed more specifically to the issue of punishment from advocates of the more traditional theories. The utilitarian might hold the new theory and implied practice inadequate for the purpose of deterrence. Of course the prospect of incapacitation and involuntary rehabilitation would have some deterrent effect in itself. But the threat of being rehabilitated, even if involuntarily, may certainly sound less ominous than the threat of a lengthy fixed sentence in a more old-fashioned prison. Two points may be offered in reply. First, granted that the prospect of a program of rehabilitation and perhaps a job upon release from custody reduces the odiousness of a sentence and hence the force of its deterrent threat, this is not sufficient reason

to abolish such programs and ensure the return of hardened criminals to society. Even from a utilitarian viewpoint the failure to rehabilitate may be more costly than the weaker deterrent for first offenders. Then too it should be noted that the greater fault lies with the society that fails to offer work or support prior to the context of rehabilitation, not with the opportunity offered in that context.

Second, we have seen that attempts at fully satisfactory deterrence fail anyway, unless the threats far exceed our judgments of desert and violate our sense of justice. We cannot fault a theory for not requiring unjust punishments. If we could solve the problem of the repeat offender, or at least come closer to solving it than do present deterrence oriented policies, the gains will have been worth the losses. As pointed out earlier, most people do not require threats of stiff legal sanctions to deter them from criminal activity; and those who might be thought to require them do not seem to be deterred by them even when they exceed the bounds of justice.

From my point of view the more serious problem for the theory occurs at the upper rather than the lower limit of intuitively reasonable punishment. Retributivists can question whether treatment of offenders according to the new model, especially in regard to lengths of penalties, would improve upon the deterrence model in satisfying our sense of justice. The difficulty arises when a prisoner has not been rehabilitated within a period of time thought reasonable as punishment. While the retributive limit is weaker in the case of capital crimes, it is clearly stronger in this case of a less deadly but more persistent criminal type. The new theory, like the goal of deterrence, may fail to protect this criminal adequately. Two replies may again be offered here, but I am not confident that either is fully successful. One is simply that we seemed forced at a certain point to balance the rights of the criminal against those of the potential victim. While we cannot use criminals in any way we wish in order to deter other potential criminals, we can perhaps demand that they not repeat their crimes. We can do the minimum necessary to try to ensure this,

especially if the effort at rehabilitation aims to improve rather than worsen the criminal's own lot. The aim is to enable him to lead a noncriminal life satisfactory from his point of view, so that he will not be tempted to further crime.

But while this reply seems acceptable in relation to some criminal types, it may fail when applied to others, for example chronic shoplifters. It may be that the time, degree of restraint, and methods necessary to cure the chronic shoplifter forever would exceed that thought reasonably just. The total costs might also far exceed the benefits. If this is true of shoplifters, it is more clearly true of parking meter violators. Various misdemeanors lacking in serious moral culpability require yet a different model. Here we think of penalties more as a tax on the conduct in question than as a withdrawal of rights or punishment proper.¹¹ A single model cannot account for all our justifiable reactions to all classes of illegal conduct; the one I have been advocating must be restricted to a major class of crimes, those that are seriously culpable and harmful. We must address this class first in a theory of punishment, since such crimes will draw the most severe and difficult to justify penalties. My claim is that the new model succeeds better than traditional theories in this domain.

The second and final point is that we nullify the objection of the retributivist to the extent that our attempts at rehabilitation become more successful. Not only in theory but in practice too our only reasonable hope may be to improve our methods and programs of rehabilitation so that they are successful more of the time. At least these efforts must proceed hand in hand with further attempts to ameliorate the social and economic causes of crime in our society. If at present we are retreating from egalitarian social programs and from failed penal innovations to fixed penalties in the spirit of retributivism, and if we retreat further to

¹¹ Richard Posner seems to think the former model applicable to all criminal law, but it is just as out of place in relation to serious crimes as mine is in relation to very minor ones. See his *Economic Analysis of Law* (Boston: Little, Brown, and Co., 1972), p. 68.

acquiesce in demands for stiffer deterrent threats, I for one would hope these trends are temporary. The model I am suggesting will be acceptable in practice only when combined with more enlightened rehabilitative programs. It should be understood in that light, not as a call to restrain or incapacitate criminals indefinitely.

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SENTENCING: MUST JUSTICE BE EVEN-HANDED? *

ABSTRACT. The question considered is whether a convicted criminal has been treated unjustly if the only reason he receives a much heavier sentence than another criminal convicted of the same crime is that he came before a different judge. The answer offered is that such a criminal would *not* be treated unjustly. The principle of equality in punishment, *properly* understood, does not forbid even such gross disparities in sentence (though it also does not require them). The paper discusses the 1978 Model Sentencing and Corrections Act in detail and has important consequences for the current movement to reform punishment to assure "just deserts".

A decade ago a distinguished federal judge, Marvin Frankel, published a sharp attack on the discretion judges had in setting criminal sentences. The attack included an anecdote drawn from a prison director's testimony before Congress several years before. That anecdote suggests the question I want to consider in this paper:

Take, for instance, the cases of two men we received last spring. The first man had been convicted of cashing a check for \$58.40. He was out of work at the time of his offense, and when his wife became ill and he needed money for rent, food, and doctor bills, he became the victim of temptation. He had no prior criminal record. The other man cashed a check for \$35.20. He was also out of work and his wife had left him for another man. His prior record consisted of a drunk driving charge and a nonsupport charge. Our examination of these cases indicated no significant differences for sentencing purposes. But they appeared before different judges and the first man received 15 years in prison and the second man 30 days.¹

The anecdote is disturbing (even if we suppose 15 years for forging a check for \$58.40 not to be out of proportion to the crime). If

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¹ Marvin E. Frankel, *Criminal Sentences: Law without Order* (New York: Hill and Wang, 1972), pp. 21–22.