THEORIES OF

PUNISHMENT

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Introduction

"Theory of punishment" as used in this volume refers to the guiding rationale for dealing with the adjudicated criminal as implemented by the state's formal system of criminal justice. Punishment theory considers the various points of view regarding the desirable objectives of punishment and the rationale that should sustain the sentencing and correctional system.

Before considering this at somewhat greater length, it should be noted that there are several areas of punishment with which we are not concerned. We do not consider punishment in the interpersonal, informal, or the intrinsic sense, nor is attention given to the nature of punishment in primitive societies. Interesting and important as these areas are, they deal largely with subjects conceptually distinct from formal punishment theory, and can be handled more adequately if treated independently. An effort to combine these quite disparate areas not only would present insurmountable difficulties but also would result in attenuated content with respect to formal punishment theory.[1]

It is this writer's conviction that we do not give sufficient attention to punishment theory in the development, maintenance, and salesmanship of the machinery for the administration of justice. Although matters concerning punishment theory have a way of becoming abstract and difficult to discuss in ordinary terms, it is imperative that every effort be made on the part of *all* persons, those involved in the actual implementation of justice as well as the average citizen, to reflect on the meaning of punishment within the context of the philosophy of punishment. The punishment of the criminal and the objectives of the punishment are, after all, every-

one's concern. Too often we circle around questions that face the issue of the theory of punishment, as we rush on to make changes and to innovate. The importance of the issue is nowhere better stated than in the observation attributed to Winston Churchill: "What is done to the criminal is a very accurate index to the quality of any civilization."

Some years ago, Paul Tappan observed that our "total [punishment] objective remains for the most part inexplicit and confused."[2] It would be less than precise, indeed, overly optimistic, to believe that the situation is very much different today. We are confronted with conflicting punishment ideologies. Too often, however, this conflict is submerged or unrecognized and is not brought to the surface for a healthy airing and open debate.

A parallel and reinforcing aspect of this situation is the existence of a high degree of public and individual ambivalence regarding punishment. Regardless of the position we take on the objectives of punishment we are apt to have strong misgivings. The sustained controversy over the death penalty is one case in point; the circular and erratic enforcement and expectations with respect to vice laws is another.

Still another factor contributing to the confused state of affairs is the sustained existence of public indifference and insensitivity to many phases of the crime problem. Viewed from the perspective of the entire machinery for the administration of justice, the result of this set of circumstances is that difficult, indeed, impossible demands are imposed upon it. In Tappan's words, "The incompatibles remain unreconciled but manage to persist, and thus measures of law and corrections are marked by paradox and inconsistency."[3]

Meanwhile, partly by design, more by default, and in response to pressures on legislators who are expected to initiate action to do something about the crime problem, we continue to pass criminal laws with drunken abandon as if the laws themselves had a sacrosanct or charismatic quality. Further, the passage of laws is too often done without asking whether or not it is reasonable to assume that the behavior can be effectively controlled by the system of criminal justice.

The confused state of affairs notwithstanding, we cannot hope to improve or ameliorate the situation—we cannot hope to make progress in our penal policy—without an open and sustained con-

sideration of the issues and our objectives. The collection of readings in this volume is designed to facilitate this task.

Materials are organized around the classical theories of punishment: retribution, deterrence, rehabilitation, and the integrative theory. The focus of each section is on discussions which argue for, critically examine, or empirically investigate a particular theory. With a few exceptions we present each selection in its entirety so that the continuity of the author's reasoning is retained. While the points of view with respect to any one theory vary to some extent from scholar to scholar, each theory may be generally distinguished from the others in terms of its basic assumptions. Remove this support and the entire framework crumbles.

It should be mentioned at the outset that each theory exists as an ideal, as an aspiration which at most is only approached in real life. A given punishment theory stands as a model which is used as a point of reference for generating and evaluating punishment procedures. Also note that to some extent the several theories overlap, and any attempt to summarize them must of necessity do some damage to the total theme. However, we offer a few generalizing comments at this point as an introduction and as a way of raising questions, not as critiques or detailed statements of the particular theory.

RETRIBUTION

THE RETRIBUTIVIST defends the desirability of a punitive response to the criminal by saying that the punitive reaction is the pain the criminal deserves, and that it is highly desirable to provide for an orderly, collective expression of society's natural feeling of revulsion toward and disapproval of criminal acts. It is argued that this expression vindicates the criminal law and in so doing helps to unify society against crime and criminals. In a very real sense it *is* the retributive response which gives meaning to the label *criminal*, for it is this aspect of our response to the criminal which places him in a lower status than that of law-abiding citizens. Stated another way, *if* it were possible to remove the retributive response from our reaction to the criminal, would we not abandon the meaning that is conventionally attached to the label *criminal*?

Retribution must, however, be viewed within the cultural context. The punitive response and its interpretation are relative to time and place. What is viewed as a punitive response today may be viewed differently at another time and place. Today sustained solitary confinement or complete isolation of the criminal is generally viewed as extreme punishment. In 1800 isolation was seen as a vehicle for rehabilitation and a way for the criminal to repent and make peace with his God.

One need not argue, however, for extreme punitiveness in order to support the retributive position. It should be emphasized that today we seldom hear the argument that penal sanctions should be vengeful, cruel, or a means for giving vent to our purely emotional reactions. While we may reject cruel and extreme forms of punishment, is it not imperative that serious thought be given to how we can best provide for the retributive expression? Morris Cohen has observed:

> An enlightened society will recognize the futility of severely punishing unavoidable retrogression in human dignity. But it is vain to preach to any society that it must suppress its feelings. In all our various social relations—in business, in public life, in our academic institutions, and even in church—people are rewarded for being attractive and therefore penalized for not being so.[4]

Assuming that we should avoid vengeance for vengeance' sake, but that nevertheless the retributive demand needs to be legitimately recognized, there are still many questions to be considered. How do we measure the severity of punishment? A given punishment may have one meaning to one person and a quite different meaning to someone else. This is true for the punished as well as the punishers. Still another crucial question harassing us is the common phenomenon of sustained stigmatization, which is one indication of the demand for retribution. Is sustained stigmatization of the criminal inconsistent with the view that retribution should be tempered with restraint and understanding?

DETERRENCE

THE DETERRENT MODEL developed by the classical school of criminology during the eighteenth and early nineteenth centuries saw

the overriding objective of punishment as the achievement of the greatest happiness for the greatest number. Deterrence is seen as *the* way of achieving this condition. Taking its departure from the rational view of man as a pleasure-seeking, pain-avoiding creature, the objective is to deal with the criminal in such a way as to serve notice on potential offenders. To this end the focus is on the assignment of that appropriate penalty, no more, no less, which will deter potential offenders from committing crimes. Emphasis placed on potential offenders is known as secondary deterrence, in contrast to the deterrence of the offender himself or primary deterrence.

It should be remembered that the classical deterrent model arose in response to the extreme individualization and capriciousness of punishment that had developed by the late seventeenth century. With a view to correcting this situation, to providing maximum protection for the individual, and to achieving the greatest happiness for the greatest number, the early defenders of deterrence proposed to deal with the convicted offender in an exacting manner through the application of a definite scale of penalties, a specific penalty for a specific crime. In addition, it is usually suggested that the optimum conditions envisaged under the classical deterrent model require both celerity and certainty in the apprehension of the criminal. All of these conditions are difficult, if not impossible, to achieve in today's society.

Difficulties notwithstanding, advocates of this position argue that while it is apparent all persons are not deterred, the deterrent objective, which in fact helps to support our entire structure of law enforcement, is still desirable. Regardless of the prevailing crime rates, it is assumed that many persons are in fact deterred; were it not for the operation of the deterrent machinery, the crime rates would be still higher. While there are certainly many who disagree with this position, it can be argued that deterrence is the primary purpose of the state's sanctions.

Given our tradition and historical development, if one chooses to cast aside or reject the deterrent theory he does so at some risk. The view of man as a value-oriented, value-choosing creature has deep roots. Surely we cannot deny that man does make choices. If this is true, then it seems reasonable to assume also that to some extent he weighs, correctly or incorrectly, the consequences of his behavior. And would this not then apply to choices to violate or

not to violate the law? Although extensive data are not available regarding the operation of the deterrent principle, we can point to some examples of persons who *have* been deterred—the decision to take special care to travel within the speed limit when we know that an aggressive effort is being made to arrest speeders. A somewhat different example is our ability to reduce car thefts by locking cars. It is still possible to steal locked cars, and some persons do; but others do not have the technical skills, and still others do not like the odds.

Many questions and problems relevant to the implementation of the deterrent theory remain and we have hardly scratched the surface in our efforts to investigate and to conduct research in this area. This is similarly true of the retributive theory. Because of certain biases which are inherent in the scientific outlook, social scientists have generally eschewed investigations relevant to deterrence and retribution.

REHABILITATION

DURING THE COURSE OF THE TWENTIETH CENTURY there has been an ascendancy of the rehabilitative theory of punishment. Today it is fair to say that on the verbal level an overriding emphasis is placed on this objective by correctional spokesmen.

The keynote of the approach is, of course, the individualization of punishment—perhaps we should say treatment—and working with the individual in such a way that he will be able to make a satisfactory adjustment, or at least a non-criminal adjustment, once he is released from the authority of the state. Since most offenders do return to society, and some never technically leave it, it makes good sense to work with the offender in such a way that he will not again be a criminal liability.

Defenders of the rehabilitative theory sometimes forget, however, that this objective of punishment is also an ideal. Some persons would have us believe that were it not for certain reactionary elements in our society—those defenders of retribution and deterrence who, it is claimed, block the complete realization of the rehabilitative ideal—we would make great strides in dealing with the problem of criminal behavior. At least for the present, however,

we must question whether we in fact do have the knowledge necessary to make significant advances in this direction.

Some persons taking the rehabilitative stance assert that they are "anti-punishment"; they speak of the "crime of punishment" and further contend that the rehabilitative objective is not punishment. Consistent with the definition of punishment as the objective of the state's handling of the adjudicated offender, the "anti-punishment" point of view *is* appropriately considered under the rehabilitative rubric.

INTEGRATIVE

THE INCLUSIVE THEORY argues that it is desirable and possible to articulate a theory of punishment which integrates the several functions of punishment. Retribution, deterrence, and rehabilitation are all seen as objectives of penal programs. Proselytizers for this point of view argue that it is both realistic and reasonable to insist that the machinery for implementing punishment in contemporary society be called upon to achieve several objectives.

Punishment involves working with the offender in such a manner that he can be reassimilated into the community. Simultaneously, society asks that we treat the individual in such a manner as to effectively mitigate, if not completely satiate, the demands for retribution. Further, there is some expectation that the offender be dealt with so that his treatment will serve as an effective deterrent to potential offenders. No one argues, of course, that these demands exist or should exist in a balanced or fixed proportion for all crimes, and indeed they vary from case to case with a given type of crime. This is in part why some scholars refer to punishment as an art.[5]

The reasonableness of a particular theory of punishment depends on (1) the assumptions one makes about the nature of man, (2) the information one accepts as useful knowledge, (3) the kind and extent of knowledge one feels it is possible to achieve, and (4) an assessment of the requirements for implementing the particular theory, and of the probabilities of actually being able to meet these requirements.

Similarly it should be emphasized that specific techniques and

procedures for dealing with the adjudicated offender make sense only within the context of punishment theory. Whether one recognizes it or not, the commendation or negative criticism of a particular mode of handling the offender emanates from the assumptions one makes about the objectives of punishment and the understanding he has of these assumptions and objectives.

Is a solution to the punishment dilemma possible? Can we reasonably expect to approach agreement regarding the objectives of punishment? Consensus may not be possible, but it is the responsibility of all citizens to reflect thoughtfully and intelligently on this subject. Someone has said that the meaning of a problem doesn't lie in its solution but in working at it incessantly. It seems well-advised to take a similar position with respect to the problem of determining the objectives of punishment and in deciding how they should be implemented. Punishment of the offender is a dynamic process that involves the continuous and careful assessment of our objectives and of the alternative consequences of a given judgment at any particular point in time. It is hoped that the collection of materials in this volume will facilitate this kind of reflection.

NOTES

1. For a very useful and interesting summary of the ramifications when punishment is viewed in the broader context, the reader should consult Alfred R. Lindesmith, "Punishment," *International Encyclopedia of the Social Sciences,* Vol. 13, David L. Stills, editor, The Macmillan Company and Free Press, New York, 1968, pp. 217–222.

2. Paul W. Tappan, *Crime, Justice and Correction,* McGraw-Hill Book Company, New York, 1960, p. 237.

3. Ibid.

4. Morris Raphael Cohen, *Reason and Law,* Collier Books, New York, 1961, pp. 60–61.

5. See, for example, Robert G. Caldwell, *Criminology,* Ronald Press Company, second edition, New York, 1965, p. 403.

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tified without regard to his past wrong act and its effects upon himself.

This is not, then, a plea for neglecting the factors of reformation and deterrence or for making punishment harder. It is a plea for the proper understanding of retribution as the primary ground of punishment and as setting the limits within which social coercion can legitimately be exercised for the purposes of reformation and deterrence. On a superficial view it seems kinder to think of reformation alone and to forget about retribution, but in the end this is to forget moral responsibility and to incur the danger of looking upon men in the same light as animals to be trained to any pattern which appears desirable. It is impossible to take a just view of punishment unless we remember that the normal adult has a certain ultimate responsibility for his deliberate actions and, if he acts wrongly, deserves his punishment. This recognition is due to the dignity of the human person.

NOTES

1. F. H. Bradley, *Ethical Studies*, 2nd ed., 1927, pp. 27–8.
2. B. Bosanquet, *Some Suggestions in Ethics*, 2nd ed., 1919, p. 195.
3. St. Thomas Aquinas, *Summa contra Gentiles*, lib. III, cap. 144.

K. G. ARMSTRONG

The Retributivist Hits Back

WHEN KINGSLEY AMIS, in his book *Lucky Jim*, wanted to sum up the intellectual outlook of Professor Welch's wife, whose actions throughout show her to be excessively conservative, stodgy, snobbish, authoritarian, and generally disagreeable, he spoke of "Her opposition to social services because they made people lazy, her attitude to 'so-called freedom in education,' her advocacy of retributive punishment, her fondness for reading what Englishwoman wrote about how Parisians thought and felt." This is interesting, for nowhere else in the book was punishment so much as mentioned. Amis uses advocacy of the Retributive theory purely as a symptom of a rather unpleasant, and certainly outdated, attitude, a symptom which his readers would surely recognize; and I think Amis was right—most of the people who read his book would understand the reference just as he intended it, would regard the theory as something which, if it is not dead already, certainly should be.

C. S. Lewis wrote an article[1] defending retributivism. He is not a man whom one would normally expect to have any difficulty getting material published, yet the article appeared in an Australian periodical because, he said, he could get no hearing for his view in England. He claimed it had become clear during the controversy over the death penalty that his fellow-countrymen almost universally adhered to a combination of the Deterrent and Reformatory theories of punishment. In the British philosophical world the position is apparently similar. J. D. Mabbott says: "In the theory of punishment, retribution has been defended by no philosopher of

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note [for over fifty years] except Bradley. Reform and deterrence are the theories accepted in principle and increasingly influential in practice."[2]

"And," it may be said, "This is just as it should be in an age that claims to be enlightened. Retributive punishment is only a polite name for revenge; it is vindictive, inhumane, barbarous, and immoral. Such an infliction of pain-for-pain's-sake harms the person who suffers the pain, the person who inflicts it, and the society which permits it; everybody loses, which brings out its essential pointlessness. The only humane motive, the only possible moral justification for punishment is to reform the criminal and/or to deter others from committing similar crimes. By making the punishment of wrongdoers a moral duty, the Retributive theory removes the possibility of mercy. The only people who today defend the Retributive theory are those who, whether they know it or not, get pleasure and a feeling of virtue from seeing others suffer, or those who have a hidden theological axe to grind. In any case, the theory is not only morally indefensible but completely inadequate in practice to determine what penalty the criminal should suffer in each case. Finally, the theory can be shown to be wrong by such simple facts of language usage as, for instance, that it makes sense to say 'He was punished for something he did not do,' because, *inter alia*, the theory demands that to say a man was punished for a crime logically necessitates that he committed it. Historically, morally, and logically, the theory is discredited."

These, then, are some of the objections that have been urged against the Retributive theory of punishment. In my view they are all mistaken—either because they are based on confusions about what the theory is, or else because they spring from erroneous moral judgments. One charge, that the proponents of the theory are sadists or have a vested religious interest in it, I shall not deal with. For all I know it could even be true, but it seems irrelevant to the present discussion; philosophers, of all people, should surely be above using the ploy of analysing a man's motives instead of meeting his arguments. As for the objection that the theory is out of date, *i.e.* unfashionable, this seems so ludicrous philosophically that I would not have mentioned it at all if it were not for the unfortunate fact that it is the most common objection of all. I shall certainly

not bother with it any further, giving the reader credit for being free from what Belloc called "The degrading slavery of being a child of one's times."

My aim is not to present, much less to establish as correct, a full-scale Retributive theory, or set of theories, of punishment. I want firstly to sort out the issues in this confusing and confused area, and secondly to meet some of the attempts to discredit retributivism which are made either by painting it, as I myself did in summary fashion above, as a repulsive doctrine which could only be held by the morally insensitive, or else by reducing it to a harmless platitude which we all accept (so that the conflict between it and other theories of punishment turns out to have been no more than a foolish mistake). Let us start the process of clarification by deciding just what is meant by a 'Theory of Punishment', and what it would be for such a theory to be wrong.

I

IT SOON BECOMES CLEAR when one studies the contexts in which the phrase appears that there is not just one type of theory being invariably referred to. Usually a theory sets out to resolve one or more of three main problems, although all too often the reader is not told which of them is being tackled. Indeed, one is often forced to the conclusion that the writers are not clear on the point themselves, which has led to a great deal of confusion and many false oppositions between theories which are not simply different but which are attempting to solve different problems.

PROBLEM 1: *Definition*

The first problem is over the meaning of the word 'punishment', and is thus a definitional or logical issue. We examine the way the word is used in ordinary language, the things to which it is applied, and try to produce some rule which covers all these cases and only these cases. Applying the same technique to many other words we would get a single unequivocal answer on which all users of the language would agree—in short, the definition of the term—

but in the case of 'punishment' there is no such universally acceptable answer, and so we may speak of a 'theory of punishment' in the sense of a claim that a certain definition exactly marks out the correct use of the term.[3] For such a theory to be wrong would be for it to mark out some range of things or activities not in fact ordinarily referred to by the word 'punishment', or else to include only part of the proper range and/or more than the proper range. In this latter case we would probably say that the definition proposed was 'too narrow' or 'too wide', but the theory itself we would say was *wrong*, because it claims that the proposed definition exactly fits normal usage.

PROBLEM 2: *Moral justification of the practice*

The second problem that a theory of punishment may be trying to solve is 'What, if anything, is the moral justification of punishment as such?' Why should it be felt that this particular practice requires moral justification, when in the case of so many other practices—from warning to washing-up—we do not feel that the question even arises? Clearly because punishment involves the deliberate infliction of pain, *i.e.* distress of some sort, normally against the wishes of the recipient, and this is something to which there is a *prima facie* moral objection, the overriding of which requires justification.

It is important to notice that the moral justification of a practice is not the same thing as its general point or purpose, except in the eyes of those who have travelled so far down the Utilitarian road that they never question the means if the end is desirable. Every human practice that is not utterly random or unconscious has some point, but not all have, and many do not need, a moral justification. An act or practice may have a very sound point indeed and still lack moral justification, *e.g.* torturing prisoners to get information, so that to say that the general aim of the practice of punishing criminals is, say, the protection of society is not *eo ipso* to produce a moral justification of the practice, unless we assume that Bentham was right all the way. There is an ambiguity in a phrase like 'The general justifying aim of punishment',[4] between *why* we do it, and why it is morally permissible—if it is—for us to do it.

A theory dealing with the moral justification of punishment as

such could be wrong in two ways: firstly the general moral theory on which it is based could be incorrect, and secondly the theory of punishment could be a misapplication of the general moral theory.

PROBLEM 3: *Penalty-fixing*

The third problem is this: which method or system of determining penalties for crimes is best? A theory of punishment dealing with this problem might better be called a theory of punishments, or a theory of penalties. The point of view from which the advocated method is said to be best varies; sometimes it is in the interest of society as a whole, sometimes of the criminal, sometimes of both. One thing these theories have in common is that they are not so much concerned with what is as with what should be the case. To be wrong, such a theory would have to be advocating a method of determining penalties which was actually *not* best, either because it was not best from the point of view considered, or because some other factor which ought, morally, to be primary had been overruled.

Of these three problems, then, one is definitional, one is concerned with ethics, and one is largely practical, but with important moral overtones. The last two are very commonly dealt with as one, but the distinction is important for reasons which will become apparent later in this article. Given this division of the problems of punishment, and the answering theories, into three categories, what of the attacks on retributivism?

II

IT IS GENERALLY CONSIDERED that certain phrases which crop up fairly regularly in ordinary discourse, such as the troublesome "He was punished for something he did not do," create at least a *prima facie* difficulty for Retributive theories, and a number of different solutions have been offered in recent years.[5] Because it seems to me that all these solutions are more or less mistaken, I want to look again at this issue in the light of the above analysis.

In the case of which of the three problems could a fact of language usage help to establish or prove wrong a theory of punishment? For the definitional problem it would clearly be relevant, and

I shall later examine the significance of a typical phrase. But can such a language fact prove anything about a theory which deals with the second or third problem, or, more specifically, can it prove such a theory wrong? I suggest that it can do so only indirectly.

Any attempt to solve the second or third problem must assume that the logically prior problem of defining the word 'punishment' has already been solved. Unless we know what punishment *is*, what it means to impose a penalty for a crime, we cannot even start to talk about what system of fixing penalties is best, no matter from what point of view we may be considering it. Similarly, we cannot decide what it is that morally justifies punishment until we know what it is we are trying to justify. If the definition of 'punishment' that these theories had worked with were shown not to be in line with usage then they would be wrong in the sense that they would have turned out not to be theories of punishment at all, but rather to be theories of something else. Incidentally, at this point we can already see where A. C. Ewing goes astray in his book *The Morality of Punishment*, for he starts with the assumption that, whatever it is, punishment is morally justified, and then rejects some definitions because he cannot agree that what they produce is morally justifiable (*e.g.* on p. 34). Clearly the logical order is first to decide what punishment is, *then* to decide whether this thing is morally justifiable or not.

But if the term 'punishment' *had* been correctly defined, is it still possible for a fact about usage to prove a theory dealing with the second or third problem wrong? I have already mentioned what it would be for such theories to be wrong in themselves; what, then, is the relevance of word usage?

Take the third problem. Settling what system of fixing penalties is best, no matter from whose point of view it may be considered, is essentially an exercise in practical reasoning. It is hard to see how the fact that the word 'punishment' is sometimes used in certain phrases could ever show that, say, the criminal was not in fact better off when his sentence had been fixed on such-and-such principles. Yet this is exactly what is required to demonstrate that a theory of punishment of the third type is wrong.

The position with theories of the second type is somewhat similar. The way ethical terms are used certainly can show that a general moral theory is incorrect, but this is not true of the way that

non-ethical terms are used. Now 'punishment' is not in itself an ethical term: 'punishment', like all activity words, can occur in ethical propositions, but such propositions are not made ethical by virtue of *its* presence. Nor, if the general moral theory was correct, and, by hypothesis, the term 'punishment' had been correctly defined, could the theory of punishment be shown to be a misapplication of the general moral theory by some fact about word usage. But to establish the truth of this last assertion we will have to make a short excursion into the field of Ethics.

When it has been settled what it is for an activity to be moral or good (general moral theory), we still have to decide whether each particular activity, in this case the activity of punishing, is a case of a moral or good activity. The method employed to decide this varies with the general moral theory, but it will turn out to be one of the following kinds of procedure:

(i) An appeal to intuition in the broadest sense. To decide whether a particular type of activity is good, a duty, what one ought to do, etc., one has simply to reflect (not ratiocinate) on it and one can just 'see' the answer. (Moore, Ross, in fact the majority of recent theories.)

(ii) A factual calculation of the total amounts of pleasure and pain that the action causes. (Hedonistic Utilitarianism.)

(iii) (*a*) A check on whether God has told us, by Revelation, to do it. (The theory that Good is that which God enjoins.)
(*b*) A check on whether the majority of the community approves of it. (The theory that Morality is social convention, *i.e.* Social Externalism.)
(*c*) A simple statement of whether the speaker himself likes or approves of it (Subjectivism) and wants others to do so too (Stevenson, Emotivists generally).

(iv) Settling whether it is in accordance with Human Nature and Man's Final End, both by examining our internal, intuitive attitude to it and by reasoning from what we already know of Man's nature and destiny. (Thomist theory.)

(v) Checking it against a set of specific criteria of various sorts provided by the general theory for determining what is in accordance with the Moral Law (Kant) or what are genuine moral rules (Baier).

Now if we consider all these methods it can be seen that in no case could the theory of punishment (moral justification) produced

by their use be upset by facts about the use of the word 'punishment'. Remember that the original data about what it is for an activity to be good, moral, etc., and what punishment *is* are, in each case, correct by hypothesis. In method (i) no further data at all are introduced, so there is no possibility of error through false information. In method (ii) the additional information is scientific, mainly psychological; it is about how men feel, not about how they use words. In method (iii) there is room for error over (*a*) what God *has* commanded, or (*b*) what the majority of the community *does* approve of—it is very doubtful whether one could make an error over (*c*) what oneself approves of or likes—but neither of these could be *shown* to be erroneous by the way the word 'punishment' is used in sentences not about Revelation or approval. In method (iv) an error could only come in through a false notion of Human Nature or mistakes about Man's Final End; but our ideas about Man's Nature and End are in no way dependent on the question of which sentences using the word 'punishment' make sense and which do not. In method (v) the possible sources of error will vary with the criteria put up by the general moral theory for determining whether an activity constitutes a breach of a genuine moral rule. However, the only criterion which could be shown to have been misapplied by our noting that it made sense to use the word 'punishment' in some given non-ethical sentence would be one which specified that this must not be the case, e.g. 'An activity, to be moral, must be such that the word signifying it cannot sensibly be used in such-and-such sort of non-ethical sentences'. Now, of course, no general theory of morals which would lead to the use of method (v) has such a criterion, and it is hard to see what reason there could ever be for introducing such a one.

We can see, then, that even if a theory of the moral justification of punishment can be wrong in the sense of being a misapplication of the correct general moral theory, whichever that may be, its wrongness can never be proved by the fact that it makes sense to use the word 'punishment' in some given non-ethical sentence. The stage of appeal to language habits has already been passed.

So far, we have established that while a fact about how the word 'punishment' is used might well show that a theory of punishment in the definitional sense was wrong, such a fact could not show that a theory dealing with the moral-justification or penalty-fixing

problems had done so incorrectly, except in the sense that they had dealt with something other than punishment. We must now turn back to definitional theories of punishment, to see what precisely is the effect on them of the fact, if it is a fact, that it makes sense to say, for example, "He was punished for something he did not do".

Irrespective of which problem or problems it sets out to solve, a theory of punishment can usually be put under one of three headings: Retributive, Deterrent, or Reformatory. When the problem is to define punishment these theories provide roughly the following answers:

1. *Retributive:* Punishment is the infliction of pain, by an appropriate authority, on a person because he is guilty of a crime, *i.e.* for a crime that he committed. I do not intend to go into the question of just what constitutes an appropriate authority, because the answer would appear in all three definitions, and it is the *differences* between them, concerning who suffers pain and why, that I wish to stress here. Also, I use the word 'crime' deliberately, as it is ambiguous between an offence against a rule, the law, morality, or someone else's rights.[6]
2. *Deterrent:* Punishment is the infliction of pain on a person in order to deter him from repeating a crime or to deter others from imitating a crime which they believe him to have committed. I am here subscribing to Benn's view that deterrence of the person punished is not reform. Reform means that the man intends to avoid repeating the crime, not from fear of punishment but because he sees that it was wrong.[7]
3. *Reformatory:* Punishment is the infliction of pain on a person in order to reduce his tendency to want to commit crimes or to commit crimes of a particular sort.

I am not urging the acceptance of any one of these three definitions in preference to the others. I have set them out so that we may see what difficulties arise for retributivism in this area from the alleged fact that it makes sense to say "He was punished for something he did not do".

What does it come to to say that X makes sense, where X is some sequence of words? If we take it loosely, in what I shall henceforth call the weak way, it comes to saying that when we hear X we can understand what is being asserted by the speaker, and this does not necessarily imply that he is using all the words contained in X in their exactly proper way, but only that what is said is, so to

speak, 'near enough'. Thus, for instance, "They half killed him" makes sense in the weak way, even to someone not familiar with the phrase as an idiom, although killing, strictly speaking, is a deed that allows of no degrees—a man is either killed or he is not. But we can also take 'X makes sense' in a tighter way, which I shall henceforth call the strong way, as indicating that each word has been used quite correctly so that an analytical substitution can be made for any term involved without revealing any contradiction, inconsistency, or other logical impropriety.

If 'He was punished for something he did not do' makes sense in the weak way, how does this affect the Retributive definition? It is fairly easy to see that it is not incompatible with the truth of the theory. The person who used the sentence could simply be asserting that someone who was not in fact the perpetrator of a particular crime had been treated as though he were, either because those in authority held sincerely though mistakenly that he *was* guilty of it or because they had deliberately tried to mislead the public.

If, however, the given sentence made sense in the strong way, it is equally obvious that the Retributive theory (definition) *would* be proved wrong. Since, on the definition it proposes, to say that someone was punished for a crime involves saying that he committed it, the Retributive definition would make "He was punished for something he did not do" a self-contradictory proposition. Thus *either* the sentence does not make sense in this strong way *or* the Retributive theory (definition) must be abandoned.

But any satisfaction which advocates of the Deterrent or Reformatory theories might feel over this incompatibility must be short lived, for if the sentence did make sense in the strong way this would be equally fatal to their own proposed definitions, although for a different reason. Here the difficulty lies not in ". . . that he did not do", but in ". . . *for* something . . . ". It is clear that the 'something' referred to is an act, a crime that somebody committed; but on neither the Deterrent nor the Reformatory theory is a man subjected to pain *for* a crime, but *to* deter him or others from committing crimes in the future or *to* rid him of the tendency to commit crime. The only theory with which the given sentence's making sense in the strong way would be compatible would be one which defined punishment as 'The infliction of pain on a person because a crime has been committed, whether by that person or not'. As far

as I know, such a theory is not held by any philosopher in the Western World. That this should be so is, I suggest, strong *prima facie* evidence that the sentence does not in fact make sense in the strong way.

To recapitulate: Only theories of punishment of the definitional type could be affected by a fact of language not involving ethical terms. If it makes sense in the weak way to say "He was punished for something he did not do" then the Retributive theory (definition) is still tenable; if it makes sense in the strong way then not only the Retributive, but also the Deterrent and Reformatory definitions are shown to be wrong. Thus the alleged difficulty is either no difficulty at all, or else it is an insuperable difficulty for all three definitional theories. In neither event are there grounds in word usage for discriminating against retributivism *vis-a-vis* its rivals.

In passing we may note an interesting asymmetry between the sentence we have been discussing and the sentence "He was punished although he was innocent", where this is interpreted to mean not just that the man was innocent of the particular crime for which he was 'punished' but that he was 'punished' although he had not committed any crime at all. If "He was punished although he was innocent", interpreted thus, makes sense in the strong way, then whilst the Retributive theory (definition) is shown to be wrong the Deterrent and Reformatory theories (definition) are still viable.

The treatments of this question given by Flew and Quinton have already been effectively criticized by Baier[8]; but Baier's own analysis differs from the one I have just set out. In his view, the fact that it makes sense to say "He was punished for something he did not do" is *not* incompatible with the Retributive theory, because the theory necessitates as a logical precondition of punishment not that the person who suffers the pain *in fact* committed the crime, but only that he was '*found* guilty' of committing it. This 'finding guilty' can either be informal and implicit (as in the case of a parent punishing a child) or formal and explicit (as in the case of a jury announcing its verdict). But the fault in this solution is that whilst the amended Retributive definition it is based on includes everything that we would call punishment, it also includes things we would *not* call punishment. Merely to go through the moves of the 'game', as he puts it, is not enough to constitute a case of punishment .Take

the case of a man who clearly did not commit a crime, and who is obviously not even believed to have committed a crime; if, despite his known innocence, a court went through the formal motions of a trial, including the moves of the jury uttering the word "Guilty" at the appropriate time and the Judge sentencing him, and if he was duly executed—would it be proper to call this a case of punishment? Or consider a schoolmaster regularly beating one of his pupils after saying the words "Bloggs! You were laughing!" (an informal declaration of guilt) although Bloggs never so much as cracks a smile and the teacher's eyesight is good—would we say Bloggs was being *punished* regularly? Would it not be more natural to say that these were cases of something other than punishment—victimization perhaps?

III

EARLIER, I claimed that a lot of contemporary writing on the subject of punishment is confused, much of the trouble springing from a failure to distinguish between the three separate problems involved. I can best support this claim by taking my examples from the two most quoted post-war articles on punishment.[9] Consider first this paragraph written by Flew[10] in criticism of J. D. Mabbott's article "Punishment": "The objection to saying that the *sole* justification for punishing someone is that he has committed an offence is that Mabbott and almost everyone else would allow that a punishment in certain circumstances was overdetermined in its justification—was justified twice over. Certainly: because, though Mabbott claims to 'Reject absolutely all utilitarian considerations from its justification', he is prepared to appeal to these to justify *systems* of punishment. But if a *system* is to be justified even partly on such grounds, some cases within the system must be partly justifiable on the same grounds: the system surely could not have effects which no case within it contributed."

Here Flew is confusing Problems 2 and 3. The point is that justifying *systems* of punishment, *i.e.* which method or system of determining penalties for crimes is best (Problem 3), is quite distinct from justifying, morally, the practice of punishment as such (Problem 2). There is nothing inconsistent in Mabbott's view that,

whilst the moral justification of inflicting pain on people who commit crimes lies solely in retributive considerations, one system of fixing *what* penalties are to be inflicted for *what* crimes may be better than another from the point of view of its consequences on a particular society, *i.e.* on 'utilitarian' grounds. Flew has failed to realize that the word 'justification' is used in two quite different ways in the context of discussions of punishment, depending on which problem a theory is trying to solve. When dealing with Problem 3 a *system* is 'justified' precisely by establishing that it *is* most in the interests of some stated person or group that penalties should be fixed on the lines it prescribes. Of course it is always possible that some system of determining penalties which has been 'justified' in this way may be objected to on *moral* grounds if it goes against a principle arising from the solution to Problem 2, *e.g.* if a system of fixing penalties, 'justified' by its deterrent effect alone, resulted in overruling the moral principle (derived from a Retributive solution to Problem 2) that a very minor offence ought not to be punished more severely than a very serious one. But this is not surprising; if I say that punishment has a moral justification, I do not thereby resign my right to apply moral criticism to any system of fixing penalties. I might, for instance, hold that the practice of punishing is morally justifiable, yet at the same time say that the Nazi system of partly determining penalties according to the race of the criminal was immoral.

In his article "On Punishment" Quinton recognizes that theories of punishment may deal either with what punishment *is* or with the problem of morally justifying it as a practice (Problems 1 and 2). However, when he proceeds further he confuses the issue by misunderstanding retributivism in two ways. Firstly, he says that it is a logical and not a moral doctrine: "It does not provide a moral justification of the infliction of punishment but an elucidation of the use of the word" (p. 134). We have seen that this is true of the Retributive theory, as it is also true of the Deterrent and Reformatory theories, *but only when the theory deals with Problem 1*. If a particular Retributive theory deals with Problem 2, as it well may, then it *is* a moral doctrine, albeit one that Quinton does not agree with, *e.g.* "The moral justification of punishment is simply that the infliction of pain on those who have inflicted pain on others is a Good-in-itself, since it is a species of justice" would be a possible, though per-

haps poor, Retributive theory dealing with Problem 2. Of course it is true that Retributive theories are very often concerned only with definition, but they can be, and sometimes are, concerned with moral justification or systems of penalty-fixing, *e.g.* C. S. Lewis's article "The Humanitarian Theory of Punishment" argues for a Retributive theory of penalty-fixing, and A. C. Ewing argues against such a theory, thus recognizing its existence.[11] Secondly, Quinton misunderstands retributivism when he says that it regards punishment as trying to bring about "A state of affairs in which it is as if the wrongful act had never happened" (p. 135). He criticizes this doctrine as only applicable to a restricted class of cases: "Theft and fraud can be compensated, but not murder." Here he is confusing *retribution* with *restitution*. If we recover stolen property, or if a confidence man repays the money he got by fraud, then although restitution has been made the retributivist would say that punishment was still due, *i.e.* the *loss* has been annulled but the *crime* has not. Only physically are things as they were before the crime. In the case of murder, restitution is clearly impossible—we cannot get back the life that was taken—but Retributive punishment is still possible. Further, the *lex talionis* is not an *extension* of retributivism, as Quinton claims, but a particular Retributive theory dealing with Problem 3 (penalty-fixing), and in my view a poor Retributive theory, as I shall explain later.

IV

WHAT OF THE OTHER CHARGES against retributivism? Is it, as is so often said, inhumane? This charge, if correct, would count as a moral objection against a Retributive theory of penalty-fixing (Problem 3). In the area of this problem it seems to me that Retributive theories stand up very well to comparison with purely Deterrent or Reformatory theories. If we penalize the criminal according to what he has done, we at least treat him like a man, like a responsible moral agent. If we fix the penalty on a Deterrent principle (*i.e.* What penalty given to this criminal, or class of criminal, will effectively deter others from imitating his crime?) we are using him as a mere means to somebody else's end, and surely Kant was right

when he objected to that! And why stop at the minimum, why not be on the safe side and penalize him 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 offence; that would certainly deter *me* from parking on the spot reserved for the Vice-Chancellor! And of course a deterrent will deter as long as the person on whom the pain is inflicted is *believed* to be guilty by those we wish to deter. It really wouldn't matter, if deterrence is our aim in fixing penalties, whether he was in fact guilty or not; as long as we kept his innocence a secret we could make a very effective example of him. This conclusion has been acted on by more than one government in our own times.

If, on the other hand, our aim in fixing penalties is the reform of the criminal—his *cure*, some might say—then 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 detained 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 found guilty the criminal loses his rights as a human being quite as definitely as if he had been declared insane. This is not a form of humanitarianism I care for. Nor does it become any more humane if we drop the word 'punishment'—it is still just as compulsory. C. S. Lewis wrote a sentence on this point that is worth quoting, even if only as a masterly piece of propaganda: "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 remade 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."[12] And, since prevention is better than cure, why wait until he commits a crime? On the Reformatory theory of penalty-fixing, it is the *tendency* to commit crimes that we want to eliminate, so if a man has the tendency let him be penalized before

the damage is done. Let him be penalized for what he is, not for what he does, and let him be made over into what the authorities (or their experts) want him to be.

The usual riposte to the sort of charges I have been making against Deterrent and Reformatory theories of punishment (penalty-fixing) is to refer back to a Retributive *definition* of punishment and rule out the charges as logically inadmissible.[13] "The short answer to the critics of Utilitarian theories of punishment," writes C. K. Benn, "is that they are theories of *punishment*, not of any sort of technique involving suffering."[14] But to say, to those who ask why we shouldn't punish the innocent when it would be socially useful, that "The infliction of pain on a person is only properly described as punishment if that person is guilty"[15] is to give an answer which is technically correct (for those who subscribe to a Retributive definition of punishment) but which misses the point behind the question.

Suppose the questioner comes back as follows: "All right then, if you want to quibble about terminological niceties when I'm trying to make a serious moral and practical enquiry, I'll rephrase my question. Why shouldn't we do to the innocent that which, when it's done to the guilty, is known as punishment?" At this point those theorists who offer a Utilitarian moral justification for the practice of punishing (*i.e.* a Deterrent and/or Reformatory theory on Problem 2) are in a difficult position; for on their view what morally licenses us to inflict pain on a man is not that he is guilty—that is merely what gives us a *logical* license to use the word 'punishment' to refer to the infliction of pain—but that there will be a socially useful result in terms of his reform and/or the deterrence of others, or, to put it more generally and in Mr. Benn's terminology, that the decrease in mischief to the public will be greater than the increase in mischief to those who are subjected to the pain. The only objection these theorists could raise would be that inflicting pain on the innocent is not in fact an effective deterrent. This empirical hypothesis is of very doubtful validity—it is not hard to think of cases where a very great mischief to the public might be avoided by condemning and executing an innocent man under guise of punishing him, *e.g.* who knows but that Klaus Fuchs might have been deterred from passing information on the A-bomb to the Russians if the Government had previously 'framed' some innocent scientist on an espionage charge and executed him in a blaze of publicity? In any case, most people feel that there is more against 'punishing' the innocent than that it wouldn't effectively reduce crime. Nor does our sense of outrage arise solely from the lying imputation of guilt, as Quinton claims, although this is undoubtedly a partial explanation. Surely our principal objection is to the deliberate infliction of *undeserved* pain, to the *injustice* of it, and this moral objection to taking Deterrent and Reformatory theories of penalty-fixing (Problem 3) to their logical conclusion can only be accounted for on a *Retributive* theory of the moral justification of punishment as such (Problem 2), as I shall show in a moment.

But before we leave the question of penalty-fixing it is worth asking why it should be so often thought that Retributive theories in this area are necessarily barbarous. The charge springs from the misconception, which I mentioned before, that there is only one such theory—the *lex talionis*. In fact, all that a Retributive theory of penalty-fixing needs to say to deserve the name is that 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*. But the 'repayment' (so to speak) need not be in kind; indeed in some cases it *could not* be. What would the *lex talionis* prescribe for a blind man who blinded someone else? Even in those cases where repayment in kind of violent crime is possible there is no reason why we should not substitute a more civilized equivalent punishment; the scale of equivalent punishments will, of course, vary from society to society. There is also no reason, having got some idea of the permissible limits of a man's punishment from Retributive considerations, why we should not be guided in our choice of the form of the penalty by Deterrent and Reformatory considerations.

In the area of the moral justification of the practice (Problem 2) a Retributive theory is essential, because it is the only theory which connects punishment with desert, and so with justice, for only as a punishment is deserved or undeserved can it be just or unjust. What would a just *deterrent* be? The only sense we could give to it would be a punishment which was just from the Retributive point of view and which also, as a matter of fact, deterred other

people. "But," it may be objected, "You are only talking about *retributive* justice." To this I can only reply: What other sort of justice is there?

A vital point here is that justice gives the appropriate authority 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. For a variety of reasons (amongst them the hope of reforming the criminal) the appropriate authority may choose to punish a man less than it is entitled to, but it is never just to punish a man more than he deserves. It is a mistake to argue—as Ewing, for example, does in Chapter II of *The Morality of Punishment*—that, on the Retributive theory, to punish a man less than the exact amount due is an injustice similar to punishing an innocent man. The Retributive theory is not, therefore, incompatible with mercy. Quite the reverse is the case—it is only the Retributive idea that makes mercy *possible*, because to be merciful is to let someone off all or part of a penalty which he is recognized as having deserved.

Retributive punishment is not revenge, although both are species of justice. Revenge is private and personal, it requires no authority of one person or institution over another; punishment requires a whole system of authorities given a right to secure justice. As members of the State, we surrender the right to secure justice ourselves to the authorities that the State appoints (though retaining, for example, our right to punish our own children). It is these State-appointed authorities, not ourselves, who must both punish malefactors and recover for us, by force where necessary, what a reluctant debtor owes us.

Finally, it is a distortion of the Retributive theory to say that it involves the infliction of pain-for-pain's-sake. On my understanding of the theory, pain (which the appropriate authority is morally licensed to inflict because it is deserved) is inflicted for the sake of all or any of a number of different ends. Amongst these are the protection of society, the reform of the criminal—which punishment *may* achieve simply by making the criminal realize the full gravity of what he has done, as a child realizes how serious his offence has

been when he sees how angry it makes his father—and the deterrence of others. All these ends are in themselves both morally and socially desirable; where the infliction of pain is justified by desert, pain may be a morally permissible *means* to achieving them.

V

I DO NOT CLAIM to have demonstrated in this article that Retributive theories are the correct solutions to each of the problems of punishment. My aim has been to make clear the distinction and interconnection between those problems and to show that, if we are to reject Retributive theories, objections more powerful than those currently advanced and accepted will have to be found, since the current objections rest on confusions, or mis-statements of the problem, or mere prejudice.

Where the problem is to define punishment (Problem 1), some sort of Retributive theory now seems to be fairly generally accepted, although whether the offence for which punishment is inflicted is against the Law, some other set of explicit rules, or just the accepted moral standards of a community is still debated. Most of those who have examined the difficulty raised by the currency of the phrase 'He was punished for something he did not do' rightly conclude that the Retributive definition is more or less immune, even if their reasons for so concluding are faulty. That able philosophers should accept such unsatisfactory solutions to the apparent problem bears witness to the strength of their conviction that a Retributive definition is the right one.

The moral justification for the practice of punishment as such (Problem 2) is today sought almost invariably in Reformatory or Deterrent terms. For those who subscribe to simple Utilitarian theories of morals of the total-pain-and-pleasure-to-society type, this is of course automatic, and short of refuting their moral theory as a whole one cannot hope to shift their position on punishment. But most of those philosophers for whom retributivism is not ruled out *a priori* by their general moral theory—*i.e.* most of that great majority who do not subscribe to Hedonistic Utilitarianism—also reject or, more commonly, ignore the Retributive theory of the moral justification of punishment; and this despite the unique ability of

that theory to connect punishment with the notions of desert and justice and, indeed, with the deep-seated general conviction we all have that to strike back and to strike first are two very different things, morally speaking, irrespective of the results they may produce or be intended to produce. This is surprising; for though I have not demonstrated that these considerations in favour of a Retributive theory could never be outweighed by any conceivable arguments for Deterrent and/or Reformatory moral justification, I hope I *have* shown that they are too important to be altogether overlooked, or even to be summarily dismissed. It may be possible not to be moved by them, but they must at least be faced. I have referred to three factors which tend to account for the cavalier treatment of retributivism in the area of Problem 2. First, there is the mistaken belief that a Retributive moral justification of punishment would make the infliction of pain on the guilty a positive, inescapable obligation, instead of merely creating a right to inflict pain which, like other rights, it may in some circumstances be foolish or mean to exercise. Second, there is the failure to distinguish between the moral justification of a practice on the one hand, and its 'general justifying aim' on the other. And third, there is the notion that if one concedes the definitional field to retributivism, there is no further area in which Deterrent and Reformatory theories can have a Retributive rival, that one can 'dissolve' the traditional conflict between the theories by declaring that 'Retributivism is not a moral but a logical doctrine'.

When the problem is to find the best system of penalty-fixing there is no doubt that a purely Retributive theory would have serious weaknesses, both practically, because it may be very difficult to decide which of two crimes is the more serious and thus deserving of severer punishment, and morally, because if Deterrent and Reformatory considerations are altogether ignored when the list of penalties is drawn up a great social good might be sacrificed in order to achieve a small improvement in the accuracy of a punishment from the Retributive standpoint. But, on the other hand, I have pointed out that the charge that Retributive theories of penalty-fixing are barbarous is based on the mistaken assumption that the only such theory is the *lex talionis*, and that a modified Retributive theory is perfectly possible, one which only uses Retributive considerations to fix some sort of upper limit to penalties and then looks

to other factors to decide how much and what sort of pain shall be inflicted. Purely Reformatory or Deterrent theories of penalty-fixing, which lack that limit, run the risk of becoming far more inhumane than even a purely Retributive theory.

Finally, I have been concerned to show that only if one subscribes to a Retributive theory of the moral justification of punishment (Problem 2) has one grounds on which to object to taking the Deterrent and Reformatory theories of penalty-fixing (Problem 3) to their logical conclusion, *i.e.* to inflicting pain on the innocent as a deterrent to others and as a means to removing suspected criminal tendencies before they can be manifested in actual offences. Those who object that such action would not (logically) be punishment are not objecting to the action taking place but only to its being given a certain name. Yet surely most people feel that there is more difference between inflicting pain on the guilty and inflicting pain on the innocent than that one can and the other cannot be called punishment?

NOTES

1. C. S. Lewis, "The Humanitarian Theory of Punishment," *Twentieth Century* (Aust.), March 1949.*

2. J. D. Mabbott, *Contemporary British Philosophy* (ed. H. D. Lewis), p. 289.

3. The claimed definition that has attracted most attention in recent years is that given by A. G. N. Flew in his article "The Justification of Punishment," *Philosophy*, October 1954.

4. This is a key phrase in H. L. A. Hart's article* referred to below. [n. 13]

5. See especially A. M. Quinton, "On Punishment," *Analysis*, June 1954, reprinted in P. Laslett (Ed.), *Philosophy, Politics, and Society;* A. G. N. Flew, "The Justification of Punishment," *Philosophy*, October 1954; K. Baier, "Is Punishment Retributive?" *Analysis*, December 1955; and C. K. Benn, "An Approach to the Problems of Punishment," *Philosophy*, October 1958.

6. For discussions of what the offence is against, see J. D. Mabbott,*

* Also reprinted in this volume.

Mind, April 1939 and *Philosophy*, July 1955, and C. H. Whiteley, *Philosophy*, April 1956.

7. Benn, "An Approach to the Problems of Punishment."

8. Baier, "Is Punishment Retributive?"

9. Flew, "The Justification of Punishment," and Quinton, "On Punishment."

10. Flew, "Justification of Punishment," p. 301. Mabbott's article* appeared in *Mind*, April 1939.

11. A. C. Ewing, *The Morality of Punishment*. In a note published after this article was written, A. S. Kaufman points out that F. H. Bradley, at least, was a retributivist who was not only concerned with the definition of 'punishment', but had a Retributive view on the moral issue. "Anthony Quinton on Punishment," *Analysis*, October 1959.)

12. C. S. Lewis, "The Humanitarian Theory of Punishment."*

13. In an important and constructive paper, which did not appear until after this article was written, H. L. A. Hart has coined the name 'Definitional stop' for this sort of riposte. ("Prolegomenon to the Principles of Punishment,"* The Presidential Address to the Aristotelian Society, 1959–60, p. 5.)

14. Benn, "An Approach to the Problems of Punishment," p. 332.

15. Quinton, "On Punishment," p. 137.

* Also reprinted in this volume.

J. D. MABBOTT

Punishment

I PROPOSE in this paper to defend a retributive theory of punishment and to reject absolutely all utilitarian considerations from its justification. I feel sure that this enterprise must arouse deep suspicion and hostility both among philosophers (who must have felt that the retributive view is the only moral theory except perhaps psychological hedonism which has been definitely destroyed by criticism) and among practical men (who have welcomed its steady decline in our penal practice).

The question I am asking is this. Under what circumstances is the punishment of some particular person justified and why? The theories of reform and deterrence which are usually considered to be the only alternatives to retribution involve well-known difficulties. These are considered fully and fairly in Dr. Ewing's book, *The Morality of Punishment*, and I need not spend long over them. The central difficulty is that both would on occasion justify the punishment of an innocent man, the deterrent theory if he were believed to have been guilty by those likely to commit the crime in future, and the reformatory theory if he were a bad man though not a criminal. To this may be added the point against the deterrent theory that it is the threat of punishment and not punishment itself which deters, and that when deterrence seems to depend on actual punishment, to implement the threat, it really depends on publication and may be achieved if men believe that punishment has occurred even if in fact it has not. As Bentham saw, for a Utilitarian apparent justice is everything, real justice is irrelevant.

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Dr. Ewing and other moralists would be inclined to compromise with retribution in the face of the above difficulties. They would admit that one fact and one fact only can justify the punishment of this man, and that is a *past* fact, that he has committed a crime. To this extent reform and deterrence theories, which look only to the consequences, are wrong. But they would add that retribution can determine only *that* a man should be punished. It cannot determine how or how much, and here reform and deterrence may come in. Even Bradley, the fiercest retributionist of modern times, says "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." Dr. Ewing would maintain that the whole estimate of the amount and nature of a punishment may be effected by considerations of reform and deterrence. It seems to me that this is a surrender which the upholders of retribution dare not make. As I said above, it is publicity and not punishment which deters, and the publicity though often spoken of as "part of a man's punishment" is no more part of it than his arrest or his detention prior to trial, though both these may be also unpleasant and bring him into disrepute. A judge sentences a man to three years' imprisonment not to three years *plus* three columns in the press. Similarly with reform. The visit of the prison chaplain is not part of a man's punishment nor is the visit of Miss Fields or Mickey Mouse.

The truth is that while punishing a man and punishing him justly, it is possible to deter others, and also to attempt to reform him, and if these additional goods are achieved the total state of affairs is better than it would be with the just punishment alone. But reform and deterrence are not modifications of the punishment, still less reasons for it. A parallel may be found in the case of tact and truth. If you have to tell a friend an unpleasant truth you may do all you can to put him at his ease and spare his feelings as much as possible, while still making sure that he understands your meaning. In such a case no one would say that your offer of a cigarette beforehand or your apology afterwards are modifications of the truth still less reasons for telling it. You do not tell the truth in order to spare his feelings, but having to tell the truth you also spare his feelings. So Bradley was right when he said that reform and deterrence

were "external to the matter," but therefore wrong when he said that they may "modify the punishment." Reporters are admitted to our trials so that punishments may become public and help to deter others. But the punishment would be no less just were reporters excluded and deterrence not achieved. Prison authorities may make it possible that a convict may become physically or morally better. They cannot ensure either result; and the punishment would still be just if the criminal took no advantage of their arrangements and their efforts failed. Some moralists see this and exclude these "extra" arrangements for deterrence and reform. They say that it must be the punishment *itself* which reforms and deters. But it is just my point that the punishment *itself* seldom reforms the criminal and never deters others. It is only "extra" arrangements which have any chance of achieving either result. As this is the central point of my paper, at the cost of laboured repetition I would ask the upholders of reform and deterrence two questions. Suppose it could be shown that a particular criminal had not been improved by a punishment and also that no other would-be criminal had been deterred by it, would that prove that the punishment was unjust? Suppose it were discovered that a particular criminal had lived a much better life after his release and that many would-be criminals believing him to have been guilty were influenced by his fate, but yet that the "criminal" was punished for something he had never done, would these excellent results prove the punishment just?

It will be observed that I have throughout treated punishment as a purely legal matter. A "criminal" means a man who has broken a law, not a bad man; an "innocent" man is a man who has not broken the law in connection with which he is being punished, though he may be a bad man and have broken other laws. Here I dissent from most upholders of the retributive theory—from Hegel, from Bradley, and from Dr. Ross. They maintain that the essential connection is one between punishment and moral or social wrongdoing.

My fundamental difficulty with their theory is the question of *status*. It takes two to make a punishment, and for a moral or social wrong I can find no punisher. We may be tempted to say when we hear of some brutal action "that ought to be punished"; but I cannot see how there can be duties which are nobody's duties. If I see a man ill-treating a horse in a country where cruelty to animals is not a

legal offence, and I say to him "I shall now punish you," he will reply, rightly, "What has it to do with you? Who made you a judge and a ruler over me?" I may have a duty to try to stop him and one way of stopping him may be to hit him, but another way may be to buy the horse. Neither the blow nor the price is a punishment. For a moral offence, God alone has the *status* necessary to punish the offender; and the theologians are becoming more and more doubtful whether even God has a duty to punish wrong-doing.

Dr. Ross would hold that not all wrong-doing is punishable, but only invasion of the rights of others; and in such a case it might be thought that the injured party had a right to punish. His right, however, is rather a right to reparation, and should not be confused with punishment proper.

This connection, on which I insist, between punishment and crime, not between punishment and moral or social wrong, alone accounts for some of our beliefs about punishment, and also meets many objections to the retributive theory as stated in its ordinary form. The first point on which it helps us is with regard to retrospective legislation. Our objection to this practice is unaccountable on reform and deterrence theories. For a man who commits a wrong before the date on which a law against it is passed, is as much in need of reform as a man who commits it afterwards; nor is deterrence likely to suffer because of additional punishments for the same offence. But the orthodox retributive theory is equally at a loss here, for if punishment is given for moral wrong-doing or for invasion of the rights of others, that immorality or invasion existed as certainly before the passing of the law as after it.

My theory also explains, where it seems to me all others do not, the case of punishment imposed by an authority who believes the law in question is a bad law. I was myself for some time disciplinary officer of a college whose rules included a rule compelling attendance at chapel. Many of those who broke this rule broke it on principle. I punished them. I certainly did not want to reform them; I respected their characters and their views. I certainly did not want to drive others into chapel through fear of penalties. Nor did I think there had been a wrong done which merited retribution. I wished I could have believed that I would have done the same myself. My

position was clear. They had broken a rule; they knew it and I knew it. Nothing more was necessary to make punishment proper.

I know that the usual answer to this is that the judge enforces a bad law because otherwise law in general would suffer and good laws would be broken. The effect of punishing good men for breaking bad laws is that fewer bad men break good laws.

[*Excursus on Indirect Utilitarianism.* The above argument is a particular instance of a general utilitarian solution of all similar problems. When I am in funds and consider whether I should pay my debts or give the same amount to charity, I must choose the former because repayment not only benefits my creditor (for the benefit to him might be less than the good done through charity) but also upholds the general credit system. I tell the truth when a lie might do more good to the parties directly concerned, because I thus increase general trust and confidence. I keep a promise when it might do more immediate good to break it, because indirectly I bring it about that promises will be more readily made in the future and this will outweigh the immediate loss involved. Dr. Ross has pointed out that the effect on the credit system of my refusal to pay a debt is greatly exaggerated. But I have a more serious objection of principle. It is that in all these cases the indirect effects do not result from my wrong action—my lie or defalcation or bad faith—but from the publication of these actions. If in any instance the breaking of the rule were to remain unknown then I could consider only the direct or immediate consequences. Thus in my "compulsory chapel" case I could have considered which of my culprits were law-abiding men generally and unlikely to break any other college rule. Then I could have sent for each of these separately and said "I shall let you off if you will tell no one I have done so." By these means the general keeping of rules would not have suffered. Would this course have been correct? It must be remembered that the proceedings need not deceive everybody. So long as they deceive would-be law-breakers the good is achieved.

As this point is of crucial importance and as it has an interest beyond the immediate issue, and gives a clue to what I regard as the true general nature of law and punishment, I may be excused for expanding and illustrating it by an example or two from other fields. Dr. Ross says that two men dying on a desert island would have

duties to keep promises to each other even though their breaking them would not affect the future general confidence in promises at all. Here is certainly the same point. But as I find that desert-island morality always rouses suspicion among ordinary men I should like to quote two instances from my own experience which also illustrate the problem.

(i) A man alone with his father at his death promises him a private and quiet funeral. He finds later that both directly and indirectly the keeping of this promise will cause pain and misunderstanding. He can see no particular positive good that the quiet funeral will achieve. No one yet knows that he has made the promise nor need anyone ever know. Should he therefore act as though it had never been made?

(ii) A college has a fund given to it for the encouragement of a subject which is now expiring. Other expanding subjects are in great need of endowment. Should the authorities divert the money? Those who oppose the diversion have previously stood on the past, the promise. But one day one of them discovers the "real reason" for this slavery to a dead donor. He says "We must consider not only the value of this money for these purposes, since on all direct consequences it should be diverted at once. We must remember the effect of this diversion on the general system of benefactions. We know that benefactors like to endow special objects, and this act of ours would discourage such benefactors in future and leave learning worse off." Here again is the indirect utilitarian reason for choosing the alternative which direct utilitarianism would reject. But the immediate answer to this from the most ingenious member of the opposition was crushing and final. He said, "Divert the money but keep it dark." This is obviously correct. It is not the act of diversion which would diminish the stream of benefactions but the news of it reaching the ears of benefactors. Provided that no possible benefactor got to hear of it no indirect loss would result. But the justification of our action would depend entirely on the success of the measures for "keeping it dark." I remember how I felt and how others felt that whatever answer was right this result was certainly wrong. But it follows that indirect utilitarianism is wrong in all such cases. For its argument can always be met by "Keep it dark."]

The view, then, that a judge upholds a bad law in order that

law in general should not suffer is indefensible. He upholds it simply because he has no right to dispense from punishment.

The connection of punishment with law-breaking and not with wrong-doing also escapes moral objections to the retributive theory as held by Kant and Hegel or by Bradley and Ross. It is asked how we can measure moral wrong or balance it with pain, and how pain can wipe out moral wrong. Retributivists have been pushed into holding that pain *ipso facto* represses the worse self and frees the better, when this is contrary to the vast majority of observed cases. But if punishment is not intended to measure or balance or negate moral wrong then all this is beside the mark. There is the further difficulty of reconciling punishment with repentance and with forgiveness. Repentance is the reaction morally appropriate to moral wrong and punishment added to remorse is an unnecessary evil. But if punishment is associated with law-breaking and not with moral evil the punisher is not entitled to consider whether the criminal is penitent any more than he may consider whether the law is good. So, too, with forgiveness. Forgiveness is not appropriate to law-breaking. (It is noteworthy that when, in divorce cases, the law has to recognize forgiveness it calls it "condonation," which is symptomatic of the difference of attitude.) Nor is forgiveness appropriate to moral evil. It is appropriate to personal injury. No one has any right to forgive me except the person I have injured. No judge or jury can do so. But the person I have injured has no right to punish me. Therefore there is no clash between punishment and forgiveness since these two duties do not fall on the same person nor in connection with the same characteristic of my act. (It is the weakness of vendetta that it tends to confuse this clear line, though even there it is only by personifying the family that the injured party and the avenger are identified. Similarly we must guard against the plausible fallacy of personifying society and regarding the criminal as "injuring society," for then once more the old dilemma about forgiveness would be insoluble.) A clergyman friend of mine catching a burglar red-handed was puzzled about his duty. In the end he ensured the man's punishment by information and evidence, and at the same time showed his own forgiveness by visiting the man in prison and employing him when he came out. I believe any "good Christian" would accept this as representing his duty. But obviously if the

punishment is thought of as imposed *by* the victim or *for* the injury or immorality then the contradiction with forgiveness is hopeless.

So far as the question of the actual punishment of any individual is concerned this paper could stop here. No punishment is morally retributive or reformative or deterrent. Any criminal punished for any one of these reasons is certainly unjustly punished. The only justification for punishing any man is that he has broken a law.

In a book which has already left its mark on prison administration I have found a criminal himself confirming these views. *Walls Have Mouths,* by W. F. R. Macartney, is prefaced, and provided with appendices to each chapter, by Compton Mackenzie. It is interesting to notice how the novelist maintains that the proper object of penal servitude should be reformation (p. 97), whereas the prisoner himself accepts the view I have set out above. Macartney says "To punish a man is to treat him as an equal. To be punished *for an offence against rules* is a sane man's right" (p. 165, my italics). It is striking also that he never uses "injustice" to describe the brutality or provocation which he experienced. He makes it clear that there were only two types of prisoner who were *unjustly* imprisoned, those who were insane and not responsible for the acts for which they were punished (pp. 165–166) and those who were innocent and had broken no law (p. 298). It is irrelevant, as he rightly observes, that some of these innocent men were, like Steinie Morrison, dangerous and violent characters, who on utilitarian grounds might well have been restrained. That made their punishment no whit less unjust (p. 301). To these general types may be added two specific instances of injustice. First, the sentences on the Dartmoor mutineers. "The Penal Servitude Act . . . lays down specific punishments for mutiny and incitement to mutiny, which include flogging. . . . Yet on the occasion of the only big mutiny in an English prison, men are not dealt with by the Act specially passed to meet mutiny in prison, but are taken out of gaol and tried under an Act expressly passed to curb and curtail the Chartists—a revolutionary movement" (p. 255). Here again the injustice does not lie in the actual effect the sentences are likely to have on the prisoners (though Macartney has some searching suggestions about that also) but in condemning men for breaking a law they did not break and not for breaking the law they did break. The second specific instance is that of Coulton, who served his twenty years and then was

brought back to prison to do another eight years and to die. This is due to the "unjust order that no lifer shall be released unless he has either relations or a job to whom he can go: and it is actually suggested that this is really for the lifer's own good. Just fancy, you admit that the man in doing years upon years in prison had expiated his crime: but, instead of releasing him, you keep him a further time—perhaps another three years—because you say he has nowhere to go. Better a ditch and hedge than prison! True, there are abnormal cases who want to stay in prison; but Lawrence wanted to be a private soldier, and men go into monasteries. Because occasionally a man wants to stay in prison, must every lifer who has lost his family during his sentence (I was doing only ten years and I lost all my family) be kept indefinitely in gaol after he has paid his debt?" (p. 400). Why is it unjust? Because he has paid his debt. When that is over it is for the man himself to decide what is for his own good. Once again the reform and utilitarian arguments are summarily swept aside. Injustice lies not in bad treatment or treatment which is not in the man's own interest, but in restriction which, according to the law, he has not merited.

It is true that Macartney writes, in one place, a paragraph of general reflection on punishment in which he confuses, as does Compton Mackenzie, retribution with revenge and in which he seems to hold that the retributive theory has some peculiar connection with private property. "Indeed it is difficult to see how, in society as it is to-day constituted, a humane prison system could function. All property is sacred, although the proceeds of property may well be reprehensible, therefore any offence against property is sacrilege and must be punished. Till a system eventuates which is based not on exploitation of man by man and class by class, prisons must be dreadful places, but at least there might be an effort to ameliorate the more savage side of the retaliation, and this could be done very easily" (p. 166, 167). The alternative system of which no doubt he is thinking is the Russian system described in his quotations from *A Physician's Tour in Soviet Russia,* by Sir James Purves-Stewart, the system of "correctional colonies" providing curative "treatment" for the different types of criminal (p. 229). There are two confusions here, to one of which we shall return later. First, Macartney confuses the retributive system with the punishment of one particular type of crime, offences against property, when he must have

known that the majority of offenders against property do not find themselves in Dartmoor or even in Wandsworth. After all his own offence was not one against property—it was traffic with a foreign Power—and it was one for which in the classless society of Russia the punishment is death. It is surely clear that a retributive system may be adopted for any class of crime. Secondly, Macartney confuses injustice within a penal system with the wrongfulness of a penal system. When he pleads for "humane prisons" as if the essence of the prison should be humanity, or when Compton Mackenzie says the object of penal servitude should be reform, both of them are giving up punishment altogether, not altering it. A Russian "correctional colony," if its real object is curative treatment, is no more a "prison" than is an isolation hospital or a lunatic asylum. To this distinction between abolishing injustice in punishment and abolishing punishment altogether we must now turn.

It will be objected that my original question "Why ought X to be punished?" is an illegitimate isolation of the issue. I have treated the whole set of circumstances as determined. X is a citizen of a state. About his citizenship, whether willing or unwilling, I have asked no questions. About the government, whether it is good or bad, I do not enquire. X has broken a law. Concerning the law, whether it is well-devised or not, I have not asked. Yet all these questions are surely relevant before it can be decided whether a particular punishment is just. It is the essence of my position that none of these questions is relevant. Punishment is a corollary of law-breaking by a member of the society whose law is broken. This is a static and an abstract view but I see no escape from it. Considerations of utility come in on two quite different issues. Should there be laws, and what laws should there be? As a legislator I may ask what general types of action would benefit the community, and, among these, which can be "standardized" without loss, or should be standardized to achieve their full value. This, however, is not the primary question since particular laws may be altered or repealed. The choice which is the essential *prius* of punishment is the choice that there should be laws. This choice is not Hobson's. Other methods may be considered. A government might attempt to standardize certain modes of action by means of advice. It might proclaim its view and say "Citizens are requested" to follow this or that procedure. Or again it might decide to deal with each case as it arose in

the manner most effective for the common welfare. Anarchists have wavered between these two alternatives and a third—that of doing nothing to enforce a standard of behaviour but merely giving arbitrational decisions between conflicting parties, decisions binding only by consent.

I think it can be seen without detailed examination of particular laws that the method of law-making has its own advantages. Its orders are explicit and general. It makes behaviour reliable and predictable. Its threat of punishment may be so effective as to make punishment unnecessary. It promises to the good citizen a certain security in his life. When I have talked to business men about some inequity in the law of liability they have usually said "Better a bad law than no law, for then we know where we are."

Someone may say I am drawing an impossible line. I deny that punishment is utilitarian; yet now I say that punishment is a corollary of law and we decide whether to have laws and which laws to have on utilitarian grounds. And surely it is only this corollary which distinguishes law from good advice or exhortation. This is a misunderstanding. Punishment is a corollary not of law but of law-breaking. Legislators do not *choose* to punish. They hope no punishment will be needed. Their laws would succeed even if no punishment occurred. The criminal makes the essential choice; he "brings it on himself." Other men obey the law because they see its order is reasonable, because of inertia, because of fear. In this whole area, and it may be the major part of the state, law achieves its ends without punishment. Clearly, then, punishment is not a corollary of law.

We may return for a moment to the question of amount and nature of punishment. It may be thought that this also is automatic. The law will include its own penalties and the judge will have no option. This, however, is again an initial choice of principle. If the laws do include their own penalties then the judge has no option. But the legislature might adopt a system which left complete or partial freedom to the judge, as we do except in the case of murder. Once again, what are the merits (regardless of particular laws, still more of particular cases) of fixed penalties and variable penalties? At first sight it would seem that all the advantages are with the variable penalties; for men who have broken the same law differ widely in degree of wickedness and responsibility. When, however, we re-

member that punishment is not an attempt to balance moral guilt this advantage is diminished. But there are still degrees of responsibility; I do not mean degrees of freedom of will but, for instance, degrees of complicity in a crime. The danger of allowing complete freedom to the judicature in fixing penalties is not merely that it lays too heavy a tax on human nature but that it would lead to the judge expressing in his penalty the degree of his own moral aversion to the crime. Or he might tend on deterrent grounds to punish more heavily a crime which was spreading and for which temptation and opportunity were frequent. Or again on deterrent grounds he might "make examples" by punishing ten times as heavily those criminals who are detected in cases in which nine out of ten evade detection. Yet we should revolt from all such punishments if they involved punishing theft more heavily than blackmail or negligence more heavily than premeditated assault. The death penalty for sheep-stealing might have been defended on such deterrent grounds. But we should dislike equating sheep-stealing with murder. Fixed penalties enable us to draw these distinctions between crimes. It is not that we can say how much imprisonment is right for a sheep-stealer. But we can grade crimes in a rough scale and penalties in a rough scale, and keep our heaviest penalties for what are socially the most serious wrongs regardless of whether these penalties will reform the criminal or whether they are exactly what deterrence would require. The compromise of laying down maximum penalties and allowing judges freedom below these limits allows for the arguments on both sides.

To return to the main issue, the position I am defending is that it is essential to a legal system that the infliction of a particular punishment should *not* be determined by the good *that particular punishment* will do either to the criminal or to "society." In exactly the same way it is essential to a credit system that the repayment of a particular debt should not be determined by the good that particular payment will do. One may consider the merits of a legal system or of a credit system, but the acceptance of either involves the surrender of utilitarian considerations in particular cases as they arise. This is in effect admitted by Ewing in one place where he says "It is the penal system as a whole which deters and not the punishment of any individual offender."[1]

To show that the choice between a legal system and its alterna-

tives is one we do and must make, I may quote an early work of Lenin in which he was defending the Marxist tenet that the state is bound to "wither away" with the establishment of a classless society. He considers the possible objection that some wrongs by man against man are not economic and therefore that the abolition of classes would not *ipso facto* eliminate crime. But he sticks to the thesis that these surviving crimes should not be dealt with by law and judicature. "We are not Utopians and do not in the least deny the possibility and inevitability of excesses by *individual persons*, and equally the need to suppress such excesses. But for this no special machine, no special instrument of repression is needed. This will be done by the armed nation itself as simply and as readily as any crowd of civilized people even in modern society parts a pair of combatants or does not allow a woman to be outraged."[2] This alternative to law and punishment has obvious demerits. Any injury not committed in the presence of the crowd, any wrong which required skill to detect or pertinacity to bring home would go untouched. The lynching mob, which is Lenin's instrument of justice, is liable to error and easily deflected from its purpose or driven to extremes. It must be a mob, for there is to be no "machine." I do not say that no alternative machine to ours could be devised but it does seem certain that the absence of all "machines" would be intolerable. An alternative machine might be based on the view that "society" is responsible for all criminality, and a curative and protective system developed. This is the system of Butler's "Erewhon" and something like it seems to be growing up in Russia except for cases of "sedition."

We choose, then, or we acquiesce in and adopt the choice of others of, a legal system as one of our instruments for the establishment of the conditions of a good life. This choice is logically prior to and independent of the actual punishment of any particular persons or the passing of any particular laws. The legislators choose particular laws within the framework of this predetermined system. Once again a small society may illustrate the reality of these choices and the distinction between them. A Headmaster launching a new school must explicitly make both decisions. First, shall he have any rules at all? Second, what rules shall he have? The first decision is a genuine one and one of great importance. Would it not be better to have an "honour" system, by which public opinion in each house or

form dealt with any offence? (This is the Lenin method.) Or would complete freedom be better? Or should he issue appeals and advice? Or should he personally deal with each malefactor individually, as the case arises, in the way most likely to improve his conduct? I can well imagine an idealistic Headmaster attempting to run a school with one of these methods or with a combination of several of them and therefore without punishment. I can even imagine that with a small school of, say, twenty pupils all open to direct personal psychological pressure from authority and from each other, these methods involving no "rules" would work. The pupils would of course grow up without two very useful habits, the habit of having some regular habits and the habit of obeying rules. But I suspect that most Headmasters, especially those of large schools, would either decide at once, or quickly be driven, to realize that some rules were necessary. This decision would be "utilitarian" in the sense that it would be determined by consideration of consequences. The question "what rules?" would then arise and again the issue is utilitarian. What action must be regularized for the school to work efficiently? The hours of arrival and departure, for instance, in a day school. But the one choice which is now no longer open to the Headmaster is whether he shall punish those who break the rules. For if he were to try to avoid this he would in fact simply be returning to the discarded method of appeals and good advice. Yet the Headmaster does not decide to punish. The pupils make the decision there. He decides actually to have rules and to threaten, but only hypothetically, to punish. The one essential condition which makes actual punishment just is a condition he *cannot* fulfil—namely that a rule should be broken.

I shall add a final word of consolation to the practical reformer. Nothing that I have said is meant to counter any movement for "penal reform" but only to insist that none of these reforms have anything to do with punishment. The only type of reformer who can claim to be reforming the system of punishment is a follower of Lenin or of Samuel Butler who is genuinely attacking the *system* and who believes there should be no laws and no punishments. But our great British reformers have been concerned not with punishment but with its accessories. When a man is sentenced to imprisonment he is not sentenced also to partial starvation, to physical brutality, to pneumonia from damp cells and so on. And any movement

which makes his food sufficient to sustain health, which counters the permanent tendency to brutality on the part of his warders, which gives him a dry or even a light and well-aired cell, is pure gain and does not touch the theory of punishment. Reformatory influences and prisoners' aid arrangements are also entirely unaffected by what I have said. I believe myself that it would be best if all such arrangements were made optional for the prisoner, so as to leave him in these cases a freedom of choice which would make it clear that they are not part of his punishment. If it is said that every such reform lessens a man's punishment, I think that is simply muddled thinking which, if it were clear, would be mere brutality. For instance, a prisoners' aid society is said to lighten his punishment, because otherwse he would suffer not merely imprisonment but also unemployment on release. But he was sentenced to imprisonment, not imprisonment *plus* unemployment. If I promise to help a friend and through special circumstances I find that keeping my promise will involve upsetting my day's work, I do not say that I really promised to help him and to ruin my day's work. And if another friend carries on my work for me I do not regard him as carrying out part of my promise, nor as stopping me from carrying it out myself. He merely removes an indirect and regrettable consequence of my keeping my promise. So with punishment. The Prisoners' Aid Society does not alter a man's punishment nor diminish it, but merely removes an indirect and regrettable consequence of it. And anyone who thinks that a criminal cannot make this distinction and will regard all the inconvenience that comes to him as punishment, need only talk to a prisoner or two to find how sharply they resent these wanton additions to a punishment which by itself they will accept as just. Macartney's chapter on "Food" in the book quoted above is a good illustration of this point, as are also his comments on Clayton's administration. "To keep a man in prison for many years at considerable expense and then to free him charged to the eyes with uncontrollable venom and hatred generated by the treatment he has received in gaol, does not appear to be sensible." Clayton "endeavoured to send a man out of prison in a reasonable state of mind. 'Well, I've done my time. They were not too bad to me. Prison is prison and not a bed of roses. Still they didn't rub it in . . .'" (p. 152). This, "reasonable state of mind" is one in which a prisoner on release feels he has been punished but not *additionally* insulted or

ill-treated. I feel convinced that penal reformers would meet with even more support if they were clear that they were *not* attempting to alter the system of punishment but to give its victims "fair play." We have no more right to starve a convict than to starve an animal. We have no more right to keep a convict in a Dartmoor cell "down which the water trickles night and day" (p. 258) than we have to keep a child in such a place. If our reformers really want to alter the system of punishment, let them come out clearly with their alternative and preach, for instance, that no human being is responsible for any wrong-doing, that all the blame is on society, that curative or protective measures should be adopted, forcibly if necessary, as they are with infection or insanity. Short of this let them admit that the essence of prison is deprivation of liberty for the breaking of law, and that deprivation of food or of health or of books is unjust. And if our sentimentalists cry "coddling of prisoners," let us ask them also to come out clearly into the open and incorporate whatever starvation and disease and brutality they think necessary *into the sentences they propose.*[3] If it is said that some prisoners will prefer such reformed prisons, with adequate food and aired cells, to the outer world, we may retort that their numbers are probably not greater than those of the masochists who like to be flogged. Yet we do not hear the same "coddling" critics suggest abolition of the lash on the grounds that some criminals may like it. Even if the abolition from our prisons of all maltreatment other than that imposed by law results in a few down-and-outs breaking a window (as O. Henry's hero did) to get a night's lodging, the country will lose less than she does by her present method of sending out her discharged convicts "charged with venom and hatred" because of the additional and uncovenanted "rubbing it in" which they have received.

I hope I have established both the theoretical importance and the practical value of distinguishing between penal reform as we know and approve it—that reform which alters the accompaniments of punishment without touching its essence—and those attacks on punishment itself which are made not only by reformers who regard criminals as irresponsible and in need of treatment, but also by every judge who announces that he is punishing a man to deter others or to protect society, and by every juryman who is moved to his decision by the moral baseness of the accused rather than by his legal guilt.

NOTES

1. A. C. Ewing, *The Morality of Punishment*, p. 66.

2. Lenin, *The State and Revolution* (Eng. Trans.), p. 93. Original italics.

3. "One of the minor curiosities of jail life was that they quickly provided you with a hundred worries which left you no time or energy for worrying about your sentence, long or short. . . . Rather as if you were thrown into a fire with spikes in it, and the spikes hurt you so badly that you forget about the fire. But then your punishment would *be* the spikes not the fire. Why did they pretend it was only the fire, when they knew very well about the spikes?" (From *Lifer*, by Jim Phelan, p. 40.)

C. W. K. Mundle

Punishment and Desert

My aim is to try to do justice to the so-called retributive theory of punishment, and to discuss en route the original features of the accounts of punishment advanced by Dr. A. C. Ewing[1] and Mr. J. D. Mabbott.[2] In section I, I shall examine Ewing's attempt to provide a compromise between retributive and utilitarian principles. In section II, I shall give my own analysis of what I take to be the essentials of the traditional retributive theory, and shall unfold the implications of this analysis by showing how it renders irrelevant various criticisms which have been considered decisive. In Section III, I shall examine what seems to me the most formidable objection to the traditional retributive theory, the difficulty of applying it to punishment by the State, and, after rejecting Mabbott's conclusions, I shall try to solve this problem. In the last section, I shall offer some reasons for accepting my version of the retributive theory.

I

Ewing presents his own theory after examining in turn each of the traditional theories of punishment—Retributive, Deterrent and Reformatory—and dismissing the claim of each to provide an adequate solution. His own theory, developed in chapter IV, is based on what he calls the 'educative function' of punishment, meaning by this its effectiveness in promoting the moral education of the community. This theory fills a gap between the reformatory and deterrent theo-

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ries, as these are usually conceived and as they are defined by Ewing; for 'reformatory' is used to refer to the effects of punishment in promoting the moral education of the person(s) punished; 'deterrent' to refer to effects on other members of the community. Ewing's distinction between the deterrent and educative functions is that punishment is deterrent insofar as it makes people refrain from wrong actions through fear of punishment, and is educative insofar as it makes them refrain from such actions because they are thought wrong. In support of his view that a penal system has an educative influence, he argues that people tend to divide the actions they believe to be wrong into two classes—'wrong' and 'very wrong indeed'; and that if a certain kind of wrong action is made punishable by law, this fact tends to make people put it into the latter class and regard it as something which 'simply must not be done'. Ewing attaches great importance to this function of punishment. He writes: 'The moral education of the community is a very important object indeed, and if it is desirable for the attainment of this object that crimes should be "annulled" by punishment, then surely we have found a fresh purpose to justify the latter' (p. 102). He even speaks of such moral improvement as being the 'special function' of punishment, and says: 'The moral object of punishment as such is to make people think of a certain kind of act as very bad' (p. 104). But although, in Ewing's view, the educative function is of primary importance, he finds a place in his theory for the claims of each of the traditional theories. 'The "educative" function of punishment must not be treated as the only one, but requires to be supplemented by the ordinary reformatory and deterrent views' (p. 120). Ewing's method of coming to terms with the retributive theory is probably the most original part of his theory. He rejects the retributive principle that it is fitting that a person guilty of a moral offence should suffer for it, that an offender *deserves* to suffer for his offence. In place of this principle he substitutes the following propositions—(*a*) that it is fitting that we should disapprove of moral badness, and (*b*) that the infliction of pain is 'a suitable way of expressing' our disapproval. Ewing maintains that the ideal state of affairs would be one in which the good effects normally produced by punishment could be produced by expressing disapproval without inflicting pain; and this ideal, he points out, may be progressively approached in practice, for the

more sensitive we become to the disapproval of others, the less the pain which need be inflicted to produce the desired effects.

Ewing considers that this solution incorporates what is true and important in the retributive theory. 'But,' he says, 'our view still differs from the retributive theory, as usually interpreted, for

(1) It holds the valuable element in punishment to be not the pain inflicted in proportion to desert but rather the moral disapproval implied thereby. . . .

(2) Without denying the intrinsic value of this attitude of disapproval or even of its expression in punishment, it justifies punishment rather as a means to good than as an end-in-itself. Punishment is valuable not chiefly because it expresses a right attitude of moral disapproval but because it has good consequences' (p. 109–110).

One obvious criticism of Ewing's solution is that he is exaggerating the importance of the educative function of punishment. It is understandable that he should lay stress on this function, since it had not usually been emphasised by philosophers of the utilitarian school. I can, however, see no reason for describing it as 'the moral object' or 'special function' of punishment. We may agree that the moral education of the community is a very important object, but it seems debatable whether it is more important than those stressed in the deterrent theory—protecting the life, liberty and property of law-abiding people, or maintaining law and order. The achievement of these objects is after all necessary for the existence of a civilised society. Moreover, the efficacy of a penal system in promoting the moral education of the community seems much more uncertain than its efficacy in deterring anti-social behaviour through fear of penalties. I do not wish to dispute the contention (made previously by Rashdall[3]) that a penal system has a considerable influence on conventional estimates of the relative wrongness of different kinds of actions; but I do not understand why people should be said to be 'morally improved' if they come to regard an action as morally worse *solely* because it is made punishable by law, or because the penalty is increased. Presumably the purposes of moral education are to convey the reasons why certain actions are wrong and to strengthen the moral motive. The promulgation of a new penal law may further the first purpose *if* it is accompanied by an explanation of the harm caused by the prohibited behaviour. But in that case it

is the explanation, not the threat of penalties, which performs the educative function. Concerning the second purpose of moral education, Ewing concedes that 'men commit crimes as a rule not because they do not know they are wrong, but because the consciousness of their wrongness is lacking in the power to influence action' (p. 100). Can we then have any confidence that the threat of punishment strengthens the moral motive and does not merely provide a non-moral motive for avoiding the proscribed actions? It is, I imagine, on account of such difficulties that utilitarian philosophers have not usually stressed the 'educative' function of punishment, or distinguished it sharply from the deterrent function.

I do not propose to spend more time discussing the relative importance of the reformatory, deterrent and educative effects of punishment. We can readily understand the fact that practical people are often preoccupied with one or other of these functions (e.g. administrators with the prevention of crime, social workers with reform of wayward individuals) and are consequently inclined to justify punishments solely or primarily in terms of one such function. But, from a philosophical standpoint, reformatory, deterrent and educative theories of punishment are merely variations on the utilitarian theme. On utilitarian principles, the question whether a particular punishment, or system of punishments, is justified would depend on the *net* value of *all* its consequences. (And, incidentally, a penal system has consequences of social importance which are not usually taken into account by utilitarian philosophers, e.g. its economic effects on the level of employment, wages, etc.). The basic controversy is between those who maintain that punishment is to be justified by the value of its effects and the defenders of the retributive theory who deny this. Here Ewing attempts to compromise, by saying that punishment is justified partly because it expresses a right attitude of disapproval, but chiefly because it has good consequences.

Now we must keep in mind the reason why moralists have felt that punishment requires to be justified, namely the fact that punishment may be said to involve the 'deliberate infliction of pain'. This phrase suggests pictures of floggings or thumbscrews, so it is important to remember that the pain in question may, and usually does, consist mainly in the frustration of a person's desires, resulting from unwelcome restrictions on his liberty. In most contexts one could

substitute 'constraint' or 'curtailment of rights or privileges' for 'infliction of pain' or 'making (a person) suffer'. Such a substitution would be inappropriate in cases of corporal punishment or the death-penalty, but the question whether penalties of these kinds are justifiable is independent of the question whether we should accept a utilitarian or a retributive theory of punishment. Now we would all, I think, admit that we have a duty not to inflict pain deliberately on another person; but we should also agree that this is not an unconditioned duty, since some other duty may provide a good or sufficient reason for inflicting pain. No one would deny that a sufficient reason for inflicting pain on a person may be provided by the fact that it is necessary for his own welfare or for that of others. Consider the things dentists do in the interests of the patient, or the unpleasant quarantine restrictions that are imposed on infectious people in the interests of others. The controversial question is whether the fact that a person has committed a moral offence constitutes a sufficient reason for inflicting pain on him. Though Ewing does not raise this question in this form, it seems clear from what he does say that he would answer this question in the negative. This is, I think, the main point of disagreement between Ewing and defenders of the retributive theory. Ewing attempts to conciliate the retributionists by conceding that punishment is justified *partly* on retributive (though chiefly on utilitarian) grounds. I am very doubtful, however, whether his modification of the retributive theory leaves this compromise open to him.

As we have seen, Ewing rejects the principle that it is fitting (i.e. morally fitting or right) that a person who commits a moral offence should be made to suffer solely on that account. He replaces this with the claims (*a*) that it is fitting that we should disapprove of moral badness, and (*b*) that the infliction of pain is a suitable way of expressing our disapproval. Ewing clearly intends (*a*) to be an ethical proposition, 'fitting' meaning morally fitting or right. The retributionist would have no complaint if (*b*) were also to be interpreted as an ethical proposition, namely, that it is morally fitting that we should express disapproval by the infliction of pain. In that case (*a*) and (*b*) would together imply the proposition they were introduced to replace. Ewing, however, intends (*b*) to describe a natural phenomenon—the fact that all or most human beings have a propensity to express disapproval by inflicting pain. This seems clear

from his statement 'all my view presupposes is that in a given society a certain amount of pain is a suitable way of expressing a certain degree of disapproval, *just as one tone of voice may be a more suitable way of expressing it than another*' (p. 105, *my italics*). But on this interpretation the conjunction of (*a*) and (*b*) does not imply that punishment is morally justifiable. Given that we ought to disapprove of wrong-doing, and that we have a *natural inclination* to express our disapproval by inflicting pain, this does not warrant the conclusion that this way of expressing disapproval is morally permissible. For all that Ewing has said, the inclination in question might be one that we ought to inhibit, unless utilitarian considerations justify its expression. In view of this, Ewing ought surely to conclude that punishment is justifiable *solely* on utilitarian grounds.

Ewing makes another apparent concession to the retributive theory when he says that 'punishment implies guilt and must be retrospective, insofar as it is inflicted because of a past offence' (p. 44). He does not, however, treat this statement as a tautology, as I think it is. He says, for example: 'If the pain of punishment is educative, why not inflict it on the innocent? The answer is: because it is educative only for the guilty' (p. 91); and he proceeds to give arguments in support of this last contention. But surely such arguments are superfluous. All one need say in answer to his question is that to speak of 'punishing the innocent' is a contradiction in terms, *unless* it means 'inflicting pain on people because they are mistakenly believed to have committed an offence, or on the pretext that they have done so'. In that case the word 'punishing' is being used to mean 'intending (or pretending) to punish'. This view is confirmed by the fact that the O.E.D. defines 'punish' as 'to cause (an offender) to suffer for an offence'. Someone might protest that this definition is too narrow on the grounds that people often speak of punishing animals and infants, which are not deemed to be morally or legally accountable. I doubt, however, whether people who use 'punish' in such contexts intend to depart from the O.E.D. definition. Parents and animal-lovers often display a surprising confidence regarding the knowledge of their charges—'he knows', they will say, 'that he ought not to play with the poker (bring bones into the dining-room)'. If such people were persuaded to regard the chastising of infants or animals merely as a mechanism for inculcating socially desirable habits, merely as a process of 'conditioning', they would, I

think, agree that their use of 'punish' was inappropriate, or at any rate metaphorical. Utilitarian philosophers are of course at liberty to recommend that we redefine 'punishment', e.g. as 'infliction of pain in order to inculcate socially desirable habits' or as 'infliction of pain in order to promote happiness'. But it is not difficult to show that such definitions do not correspond to current usage. The former definition is disposed of by the fact that we describe as a punishment the imprisonment of a hardened criminal, and even if no one believes that the sentence will improve his habits, we regard such punishment as justifiable; the latter by the fact that we do not regard the pain inflicted by a dentist as a punishment.

If the statement that punishment must be inflicted for a past offence is warranted on purely linguistic grounds, it contributes nothing to settling our ethical problem, concerning the *justification* of punishment. A utilitarian may accept the O.E.D. definition and still maintain that punishment can only be justified by the value of its after-effects. On the other hand, the meaning of 'punishment' may change; a time may come when its root meaning is, e.g., 'infliction of pain to inculcate desirable habits'. This eventuality would render it improper to call the retributive theory 'a theory of *punishment*', but the moral principles on which this theory is based would not thereby be invalidated.

II

I SHALL NOW OFFER an analysis of the retributive theory. It is doubtless true that some of its defenders have meant more by 'retribution' than is involved in my analysis, but I feel sure that none of them have meant less. If anyone considers that my analysis omits any essential element of the traditional theory, I should be happy to call my own account 'a moral desert theory'. The theory to be discussed involves three elements, two ethical claims and a verbal recommendation:

Claim 1, that the fact that a person has committed a moral offence provides a sufficient reason for his being made to suffer;

Claim 2 (or 'the principle of proportion') that if (or when) people are made to suffer for their offences, the suffering imposed ought to be proportionate to the moral gravity of their offences;

and *the verbal recommendation* that 'punishment' should be applied only to cases in which a person is made to suffer because (for the reason that) he deserves it on account of a moral offence.

My reasons for formulating the retributive theory in this way will, I hope, become clear in the ensuing discussion. The first points to notice are:

(i) that claims 1 and 2 are not analytic propositions, since they can be denied without contradiction, and the question whether they ought to be accepted cannot be settled simply by studying linguistic usage;

(ii) that although claims 1 and 2 are not usually clearly distinguished, they ought to be distinguished in ethical discussions, since to accept either claim does not commit us to accepting the other;

(iii) that claims 1 and 2 together provide an explication of the concept of *moral desert*;

(iv) that even if claims 1 and 2 are accepted, there are the further questions whether 'punishment' is *in fact* applied only to cases where a person is made to suffer on the ground that he deserves it, or, if not, whether its meaning *should* be restricted in this way. Defenders of the retributive theory must wish to answer at least one of these questions in the affirmative, since they call their view 'a theory of *punishment*'. Now concerning actual usage, I have found that some people are somewhat undecided regarding the kind of reason for which an action must be performed in order to be called 'punishment'. I think it best, therefore, to avoid controversy about 'ordinary language' by interpreting the retributive theory as making a verbal recommendation. This, like any such recommendation, would be in one sense arbitrary; but, if the ethical claims are accepted, the recommendation would be a reasonable one; for it would involve using 'punishment' to mark a distinction which needs to be marked—between cases where people are made to suffer on the ground that they deserve it, and cases where they are made to suffer for other reasons.

The above analysis might, however, be said to be incomplete, on the grounds that claims 1 and 2 do not provide a complete explication of the concept of moral desert, and that for this purpose we need to add a further principle to the effect that for any particular offence there is a determinate kind and/or amount of suffering which is *the* just penalty ('claim 3'). Whereas claim 2 implies only that the worse the offence, the greater should be the penalty, claim 3 involves the

notion of an absolute and precise equation between offence and penalty. Claim 3 seems to be implicit not only in formulae like 'an eye for an eye', but also, for example, in the view mentioned by Hegel when he says 'Reason cannot determine . . . any principle whose application could decide whether justice requires for an offence (i) a corporal punishment of forty lashes or thirty-nine, or (ii) a fine of five dollars or four dollars ninety-three, four, etc., cents. . . . And yet injustice is done at once if there is one lash too many, or one dollar or one cent . . . too many or too few'.[4]

I am not certain whether, or to what extent, claim 3 is implicit in the popular conception of moral desert, but I submit that whereas claim 2 is acceptable, claim 3 is not. In order to apply the principle of proportion, all that is necessary is that we should be able (*a*) to compare different offences in respect of their *relative* moral gravity, and (*b*) to compare different penalties in respect of their *relative* unpleasantness—and surely we can make such comparisons in many, if not all, cases. In order to apply the principle of claim 3, we should need to be able to discern an alleged equivalence between the moral gravity of each offence and some specific penalty—and in order to do this we should presumably have to assess, on an *absolute* scale, both the moral gravity of offences and the unpleasantness of penalties. The contention that it is meaningless to speak of such an equivalence, because, e.g., the terms of the equation are not commensurable, provides one of the commonest criticisms of the retributive theory. For example, the objection which Professor W. G. Maclagan[5] treats as decisive in refuting the retributive theory—'the notion [of an equivalence between guilt and penalty] is, in fact, meaningless. . . . Thus there can be no meaning in saying that we ought to act retributively'—is based on treating claim 3 as an essential element in the retributive theory. An unusual variation of this sort of criticism is given by Ewing, purporting to show that punishment by the State cannot be justified on a retributive theory (pp. 39–40). Ewing argues that the State will almost invariably fail to impose *the precise* penalty which an offender deserves; that 'every excess over the just amount must be in the same ethical position as punishment of "the innocent", an injustice which seems much worse than non-punishment of the guilty', and that too light a penalty is equally an injustice; and, he concludes, 'to do an injustice seems worse than to do nothing at all'. Ewing's argument presupposes that the retributive

theory involves not only claim 3, but also (and this is indeed gratuitous) the principle that all penalties which deviate at all from *the* just penalty are equally unjust!

It might be said that by rejecting claim 3 we render the retributive theory incomplete, since this implies that the answer to the question—what is *the* just penalty for a given offence—is not in principle determinate. If this *is* an objection, it surely applies with equal force against a utilitarian theory of punishment. A utilitarian who argues[6] that punishment could never be justified on retributive principles, because we cannot *know* the precise degree of the offenders' guilt, etc., is exposed to the reply that punishment could no more be justified on utilitarian principles. If we reject the retributive theory on the ground that God alone knows the extent of our moral guilt, we ought equally to reject a utilitarian theory on the ground that God alone knows what constitutes and conduces to our long-run welfare. We mortals can only have more or less confident beliefs concerning the welfare of others, and as to whether, and if so how, we can best promote this. In practice, it would appear that people responsible for imposing punishments can often be more confident in estimating what penalty is deserved, than they could be in solving the formidable problem of assessing the 'net welfare-productivity' of alternative penalties.

Now let us consider the implications of claim 1. To accept claim 1 does not imply, as Ewing seems to think (pp. 13–14), that we should say that punishment is 'an end-in-itself' or that it has 'intrinsic value'. Ewing assumes that we must say this if we reject the utilitarian view. I suggest that the dichotomy—'good-in-itself' or 'good-as-a-means'—is not applicable here. To say that punishment has intrinsic value would imply that the committing of an offence has instrumental value, but surely no-one would embrace this paradox! We may say that the purpose of punishment is to avoid the *dis*-value of injustice, or that the state of affairs in which an offender is punished is less evil than that in which he goes unpunished.

To accept claim 1 does not imply Ewing's conclusion that 'infliction of pain for pain's sake is what the retributive theory enjoins' (pp. 26, 29). The retributionist would say 'for the sake of justice', not 'for pain's sake'. It may be argued that the psycho-analysts have explained the disposition to accept claim 1, have shown it to be a

'rationalisation' of sadistic (and/or masochistic) impulses. The retributionists may however retort that it is not difficult to find a psychological explanation of the disposition to reject what is really a principle of justice, since most of us would like to avoid the suffering we deserve! The issue can scarcely be settled by speculations about the unconscious motives of opponents.

To accept claim 1 does not imply that people responsible for administering punishments should, when so doing, consider *only* retributive principles. Presumably everyone ought, in all his transactions, to consider, and, so far as his other duties permit, to promote the welfare of others. Judges, parents and teachers are not relieved of this duty on the occasions when they incur the duty to punish (which is, on the present view, the duty to impose deserved suffering). To grant that decisions concerning the nature of a penalty should be made in the light of its probable effects on the welfare of the offender and others, is perfectly compatible with claim 1. It does not follow that one reason for making a person suffer is not independently sufficient, simply because other reasons may also warrant such an action. Admittedly, utilitarian considerations sometimes conflict with retributive considerations and may warrant the remission (or an increase) of a deserved penalty. But I see no problem here. Claim 1 does not imply that the duty to punish is an unconditional duty, which could never be outweighed by the duties stressed in reformatory or deterrent theories. Moreover, the acceptance of claim 1 is compatible with widely different views concerning the relative importance of retributive justice and the goals stressed by utilitarians.

III

THERE REMAINS, HOWEVER, a formidable objection to the retributive theory. If the State had a duty to punish *moral* offences as such, the State ought to punish everyone, for which of us is without sin? Only moral offences which have been legislated against are punishable by the State, and, as Ewing puts it, 'it is obviously impracticable for the State to inflict pain . . . on everyone in accordance with their faults' (p. 43). This difficulty seems to warrant Ewing's con-

clusion that, so far as the retributive theory is concerned, the State ought not to punish at all. Now this is really the same difficulty as that which Mr. Mabbott considers fatal to the retributive theory, as traditionally interpreted. He presents it as follows—'It takes two to make a punishment, and for a moral or social wrong I can find no punisher. We may be tempted to say, when we hear of some brutal action, "that ought to be punished"; but I cannot see how there can be duties which are nobody's duties. If I see a man ill-treating a horse in a country where cruelty to animals is not a legal offence, and I say to him: "I shall now punish you", he will reply, rightly, "What has it to do with you? Who made you a judge and ruler over me?" ' (p. 154*). The difficulty is that the facts seem to be incompatible with claim 1. We may want to insist that a man who commits what is a moral, but not a legal, offence deserves to suffer on that account, but if we treat this as implying that his offence is a sufficient reason for his being made to suffer, the question arises—by whom? By God perhaps; but neither the State nor any private citizen is thought to have a duty or a right to punish *an adult* for a moral offence *as such*. It looks as if the most that could be claimed for the retributive theory is that it applies to punishments inflicted by parents and teachers and by God.

Let us consider how Mabbott reacts to the above difficulty. He will have no truck with utilitarian considerations. 'The truth is that while punishing a man and punishing him justly, it is possible to deter others, and also to attempt to reform him, and if these additional goods are achieved the total state of affairs is better than it would be with just punishment alone. But reform and deterrence are not modifications of the punishment, still less reasons for it' (p. 153†). So far, so good; but Mabbott proceeds to treat punishment as a purely legal matter. He holds that the breaking of a law constitutes the only sufficient reason for an act of punishment. Mabbott sums up his position by saying 'No punishment is *morally retributive* or reformative or deterrent. Any criminal punished for any one of these reasons is certainly unjustly punished. The only justification for punishing any man is that he has broken a law' (p. 158†† *my italics*). Mabbott is, in effect, amending claim 1 by substituting 'legal offence' for 'moral offence'. Mabbott, however, claims to be defend-

* P. 44 this volume. † P. 42 this volume. †† P. 48 this volume.

ing a retributive theory of punishment. Thus Ewing and Mabbott meet the same difficulty in very different ways; Ewing by saying that punishment by the State cannot be justified on a retributive theory, Mabbott by adopting a position implying that only punishment by the State is justified, and that such punishment is retributive.

Obviously Mabbott is using 'retributive' in an unusual sense. (He is, I think, using it as equivalent to 'non-utilitarian'.) Neither of the claims which I have taken the retributive theory to be making is involved in Mabbott's theory. Since Mabbott's version of this theory is not based on moral principles, on what, we may ask, is it based? If it were defended as a tautology, on the grounds that 'punishment' *means* 'infliction of pain for a legal offence', its weakness would be transparent; for it is very common indeed for parents, teachers, clergymen, etc., to describe as 'punishment' the infliction of pain for moral offences which are not legal offences. Even if Mabbott were willing to extend his theory to cover breaches of rules promulgated by authorities other than the State, e.g. college authorities—and his examples on pages 155 and 164 suggest this*—his theory would still be unsatisfactory. It would, for example, imply that it is always incorrect to describe a punishment as unjust, provided that the person punished has broken a law and that the penalty falls within the limits prescribed by the law. But this is to ignore something of fundamental importance. Surely a punishment which is legally correct may still be unjust, for example:

(i) where punishment is inflicted for actions which were morally and legally permissible when performed, but are later made punishable by retrospective legislation;[7]

(ii) where punishment is inflicted for breach of a law or order which prescribes a morally wrong action. The sort of case that requires Mabbott's attention is, e.g., that in which an army officer is punished for disobeying an order to kill or torture civilians;

(iii) where the statutory penalty for a legal offence is excessively severe in relation to the moral gravity of the offence, e.g. death for a starving man who steals a loaf.

It seems to me that even if the implications of Mabbott's position might satisfy a practising lawyer, they provide no answer to

* Pp. 44 and 53 this volume.

the questions concerning punishment which have exercised moralists. His position seems tantamount to a refusal to discuss questions concerning the *moral* justification of punishment; for it can, I think, be fairly described as being limited to the claim that punishment for a legal offence and only such punishment is *legally* justifiable.[8] Admittedly this claim cannot be denied without contradiction, but surely the same is true of the claim that punishment for a moral offence, and only such punishment, is *morally* justifiable. To ask if a punishment is legally justified and to ask if it is morally justified is surely to ask two different questions.

We have now called attention to what is cogent in Ewing's criticism of the retributive theory, and what is unsatisfactory in Mabbott's statement of it. The position we have reached is this: the retributive theory breaks down if it is based solely on ethical principles involved in the concept of moral desert; yet if we divorce the theory from these principles we are left with a barren remnant which is of little or no interest to moralists. In view of these findings, is there any escape from the conclusion that punishment, if it *is* justifiable, must be justified on utilitarian grounds? I suggest that there is, provided that we combine the moral and the legalistic versions of claim 1 instead of regarding them as exclusive alternatives. As a *first* step we may replace claim 1, as originally formulated, by the following—'if a person breaks a law, and if his action in so doing constitutes a moral offence, this is a sufficient reason for his being made to suffer'.

To prevent misunderstanding of this formula let me hasten to add that I do not mean by it that, to be justly punishable, an action must be intrinsically wrong, i.e. wrong independently of its being forbidden by law. I am assuming that citizens have a moral obligation to obey the laws of their State, an obligation which derives from the fact that regulation of their behaviour by law is a necessary condition of civilised life. The actions proscribed by law need not, of course, be intrinsically wrong, provided that there is some good reason for proscribing them. However—and this is the point which Mabbott's account ignores—the duty to obey one's State is not an unconditional duty. No problem arises in cases where the State proscribes intrinsically wrong actions, or enforces actions which, as such, are ethically neutral, e.g. the rules of the road. But if the State (or a duly appointed State official) commands one to

perform an intrinsically wrong action, one is faced with a conflict of duties, and one's obligation to obey the State *may* be outweighed by one's obligation not to perform actions of the kind in question. In that case, if one disobeys the State one is not committing a *moral* offence, and although the State is *legally* justified in punishing one's disobedience, it would not be *morally* justified in so doing. I am not suggesting, however, that the opinion of a law-breaker, as to whether it was right for him to break the law, is to be accepted as final! Opinions may differ as to whether a particular act of law-breaking was morally justified. My revised claim 1 involves no reference to the question who is to judge whether an act of law-breaking constitutes a moral offence. If such reference *is* to be included in claim 1, it should read 'if a person A breaks a law, and if A's action in so doing is judged by B to be a moral offence, there will, in B's view, be a sufficient reason for A being made to suffer'. Here B is a variable which may refer to any individual, including A, or to any group of people, e.g. the Government or 'the general public'.

My amended version of the retributive theory implies that punishment of a person by the State is morally justifiable, if and only if he has done something which is both a legal and a moral offence, and only if the penalty is proportionate to the moral gravity of his offence. This seems to me to be satisfactory as far as it goes, but it does not go far enough. We must now extend our solution to make it applicable to punishment in the sphere of education. We can do this by expressing claim 1 in more general terms, i.e. instead of speaking of a *legal* offence or of breaking a *law*, we may speak of disobedience to, or breaking a rule laid down by, persons in authority. This is not an arbitrary step, for surely punishment by a parent or teacher is only justifiable if imposed for an action which is both a moral offence and the breach of a rule or command. Assuming that a child has a duty to obey its parents' commands, yet a breach of this duty would not, I think, be held to justify punishment, if the action commanded were morally wrong and the child disobeyed for this reason. Equally, punishment of a child for a morally wrong action would surely not be justified unless the child had previously been told that such actions were forbidden. If one chastised a child for doing something it had not been forbidden to do, the infliction of pain might be justified as a means of inculcating a desired habit,

but, in that case, it should not, I think, be called 'a punishment'. Such a chastisement would no more be a just punishment than a case where the State penalised a past action on the strength of retrospective legislation. Furthermore, my proposed solution seems compatible with the concept of Divine Retribution. If, in this connection, theologians do not think it necessary to interpret claim 1 as specifying two distinct conditions (committing a moral offence *and* breaking a rule or law), this would presumably be because they identify our moral duties with laws or commands made by God.

IV

WHAT I HAVE TRIED TO DO, in the preceding sections, is so to formulate the retributive theory that it provides a consistent and comprehensive account of punishment which can be defended against the stock arguments of its critics. While I do not think that the ethical claims of the theory can be established by argument, I think I must say something about the acceptability of these claims.

The principle of proportion seems to me to be acceptable, to be a basic principle of justice and, moreover, to be incapable, as it is normally understood, of being derived from utilitarian principles. My reasons for this last statement are, briefly, as follows. (i) If the purpose of punishment were the reform of the offender, correlation between the painfulness of the cure and gravity of the offence would be accidental. The most effective cure for poaching or drunkenness might be more painful than that for murder or treason. (ii) It is sometimes said that, on a deterrent theory, the severest penalties would be justified for minor offences. This, however, ignores Bentham's maxim[9] that we should be 'frugal' in inflicting penalties, since pain is an evil. But this is not to say that the principle of proportion, as it is normally understood, can be derived from a deterrent theory. If some people perform a prohibited action with calculated deliberation and others perform the same action on impulse or in passion, we regard the former as morally worse and as deserving a heavier penalty. The deterrent aim would require, however, that offences of the latter kind should be punished the more severely, since such offences could only be prevented (if at all) by a penalty greater than is needed to prevent deliberate offences. Such implications surely offend our sense of justice.

If one accepts the views given in the preceding paragraph, one cannot adopt an exclusively utilitarian account of punishment; but one might still adopt a predominantly utilitarian account, if one rejected claim 1. Many people nowadays would, apparently, reject claim 1, but I suspect that their attitude to this claim might be due to misunderstanding its implications. The retributive theory, as I have interpreted it, does not imply that any punishment, which is justified because it is deserved, is not also justifiable on account of the value of its after-effects. I doubt if we can point to any cases of *deserved* punishment which have no valuable effects of any kind for the persons punished or for others. This being so, it may appear to be a matter of indifference whether we adopt a retributive theory, or conclude that punishments are multiply justifiable, meaning by this that retributive considerations and utilitarian considerations *each* provide a sufficient reason for the actions which (when not speaking metaphorically) we call 'punishments'. A solution on similar lines has been suggested by Mr. A. G. N. Flew,[10] and it seems to me to be a tenable view, so far as it goes. But, for the following reason, I do not think it goes to the root of the matter. Unless the utilitarian is prepared to adopt the kind of deterrent theory on which punishment is treated as a kind of arbitrary coercion, as a device for making others conform to one's will irrespective of their own preferences or principles, the good effects of punishment to which the utilitarian appeals depend upon the punishments being regarded by the offenders and by others as just, i.e. as deserved for morally wrong actions. This being so, there is an important sense in which retributive considerations are fundamental and utilitarian considerations derivative.

NOTES

1. A. C. Ewing, *The Morality of Punishment*, 1929.
2. J. D. Mabbott, "Punishment," in *Mind*, April 1939.*
3. Rashdall, *The Theory of Good and Evil* (Oxford, 1907), Vol. 1, pp. 296–7.

* Also reprinted in this volume.

4. Hegel, *Philosophy of Right*, tr. T. M. Knox, p. 137.
5. W. G. Maclagan, "Punishment and Retribution," *Philosophy*, July 1939, pp. 290–2.
6. Ewing, *The Morality of Punishment*, pp. 37–8.
7. Mabbott discusses retrospective legislation on p. 155 [p. 44 this volume], but he considers only the situation in which the actions later made punishable were morally wrong when performed.
8. If Mabbott claimed that punishment for a legal offence is alone and is always *morally* justifiable, I could not agree, since, apart from its arbitrary restriction of the meaning of 'punishment,' this view implies that the law of the land is our only criterion, or at any rate our ultimate criterion, of moral justice.
9. Bentham, *Principles of Morals and Legislation*, ch. xv, section xi.
10. A. G. N. Flew, at a symposium of the Scots Philosophical Club at Aberdeen on 16 May 1953.

HERBERT MORRIS

Persons and Punishment

They acted and looked . . . at us, and around in our house, in a way that had about it the feeling—at least for me—that we were not people. In their eyesight we were just things, that was all.

[MALCOLM X]

We have no right to treat a man like a dog.

[GOVERNOR MADDOX *of Georgia*]

ALFREDO TRAPS in Durrenmatt's tale discovers that he has brought off, all by himself, a murder involving considerable ingenuity. The mock prosecutor in the tale demands the death penalty "as reward for a crime that merits admiration, astonishment, and respect." Traps is deeply moved; indeed, he is exhilarated, and the whole of his life becomes more heroic, and ironically, more precious. His defense attorney proceeds to argue that Traps was not only innocent but incapable of guilt, "a victim of the age." This defense Trap disavows with indignation and anger. He makes claim to the murder as his and demands the prescribed punishment—death.

The themes to be found in this macabre tale do not often find their way into philosophical discussions of punishment. These discussions deal with large and significant questions of whether or not we ever have the right to punish, and if we do, under what condi-

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tions, to what degree, and in what manner. There is a tradition, of course, not notable for its present vitality, that is closely linked with motifs in Durrenmatt's tale of crime and punishment. Its adherents have urged that justice requires a person be punished if he is guilty. Sometimes—though rarely—these philosophers have expressed themselves in terms of the criminal's *right to be punished*. Reaction to the claim that there is such a right has been astonishment combined, perhaps, with a touch of contempt for the perversity of the suggestion. A strange right that no one would ever wish to claim! With that flourish the subject is buried and the right disposed of. In this paper the subject is resurrected.

My aim is to argue for four propositions concerning rights that will certainly strike some as not only false but preposterous: first, that we have a right to punishment; second, that this right derives from a fundamental human right to be treated as a person; third, that this fundamental right is a natural, inalienable, and absolute right; and, fourth, that the denial of this right implies the denial of all moral rights and duties. Showing the truth of one, let alone all, of these large and questionable claims, is a tall order. The attempt or, more properly speaking, the first steps in an attempt, follow.

1. When someone claims that there is a right to be free, we can easily imagine situations in which the right is infringed and easily imagine situations in which there is a point to asserting or claiming the right. With the right to be punished, matters are otherwise. The immediate reaction to the claim that there is such a right is puzzlement. And the reasons for this are apparent. People do not normally value pain and suffering. Punishment is associated with pain and suffering. When we think about punishment we naturally think of the strong desire most persons have to avoid it, to accept, for example, acquittal of a criminal charge with relief and eagerly, if convicted, to hope for pardon or probation. Adding, of course, to the paradoxical character of the claim of such a right is difficulty in imagining circumstances in which it would be denied one. When would one rightly demand punishment and meet with any threat of the claim being denied?

So our first task is to see when the claim of such a right would have a point. I want to approach this task by setting out two complex types of institutions both of which are designed to maintain some degree of social control. In the one a central concept is punish-

ment for wrongdoing and in the other the central concepts are control of dangerous individuals and treatment of disease.

Let us first turn attention to the institutions in which punishment is involved. The institutions I describe will resemble those we ordinarily think of as institutions of punishment; they will have, however, addtional features we associate with a system of just punishment.

Let us suppose that men are constituted roughly as they now are, with a rough equivalence in strength and abilities, a capacity to be injured by each other and to make judgments that such injury is undesirable, a limited strength of will, and a capacity to reason and to conform conduct to rules. Applying to the conduct of these men are a group of rules, ones I shall label 'primary', which closely resemble the core rules of our criminal law, rules that prohibit violence and deception and compliance with which provides benefits for all persons. These benefits consist in noninterference 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. This system, then, is one in which the rules establish a mutuality of benefit and burden and in which the benefits of noninterference are conditional upon the assumption of burdens.

Connecting punishment with the violation of these primary rules, and making public the provision for punishment, is both reasonable and just. First, it is only reasonable that those who voluntarily comply with the rules be provided some assurance that they will not be assuming burdens which others are unprepared to assume. Their disposition to comply voluntarily will diminish as they learn that others are with impunity renouncing burdens they are assuming. Second, fairness dictates that a system in which benefits and burdens are equally distributed have a mechanism designed

to prevent a maldistribution in the benefits and burdens. Thus, sanctions are attached to noncompliance with the primary rules so as to induce compliance with the primary rules among those who may be disinclined to obey. In this way the likelihood of an unfair distribution is diminished.

Third, it is just to punish those who have violated the rules and caused the unfair distribution of benefits and burdens. 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 not rightfully belong to him. Justice—that is punishing such individuals—restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt. It is important to see that the equilibrium may be restored in another way. Forgiveness—with its legal analogue of a pardon—while not the righting of an unfair distribution by making one pay his debt is, nevertheless, a restoring of the equilibrium by forgiving the debt. Forgiveness may be viewed, at least in some types of cases, as a gift after the fact, erasing a debt, which had the gift been given before the fact, would not have created a debt. But the practice of pardoning has to proceed sensitively, for it may endanger in a way the practice of justice does not, the maintenance of an equilibrium of benefits and burdens. If all are indiscriminately pardoned less incentive is provided individuals to restrain their inclinations, thus increasing the incidence of persons taking what they do not deserve.

There are also in this system we are considering a variety of operative principles compliance with which provides some guarantee that the system of punishment does not itself promote an unfair distribution of benefits and burdens. For one thing, provision is made for a variety of defenses, each one of which can be said to have as its object diminishing the chances of forcibly depriving a person of benefits others have if that person has not derived an unfair advantage. A person has not derived an unfair advantage if he could not have restrained himself or if it is unreasonable to expect him to behave otherwise than he did. Sometimes the rules preclude punishment of classes of persons such as children. Sometimes they provide a defense if on a particular occasion a person lacked the

capacity to conform his conduct to the rules. Thus, someone who in an epileptic seizure strikes another is excused. Punishment in these cases would be punishment of the innocent, punishment of those who do not voluntarily renounce a burden others have assumed. Punishment in such cases, then, would not equalize but rather cause an unfair distribution in benefits and burdens.

Along with principles providing defenses there are requirements that the rules be prospective and relatively clear so that persons have a fair opportunity to comply with the rules. There are, also, rules governing, among other matters, the burden of proof, who shall bear it and what it shall be, the prohibition on double jeopardy, and the privilege against self-incrimination. Justice requires conviction of the guilty, and requires their punishment, but in setting out to fulfill the demands of justice we may, of course, because we are not omniscient, cause injustice by convicting and punishing the innocent. The resolution arrived at in the system I am describing consists in weighing as the greater evil the punishment of the innocent. The primary function of the system of rules was to provide individuals with a sphere of interest immune from interference. Given this goal, it is determined to be a greater evil for society to interfere unjustifiably with an individual by depriving him of good than for the society to fail to punish those that have unjustifiably interfered.

Finally, because the primary rules are designed to benefit all and because the punishments prescribed for their violation are publicized and the defenses respected, there is some plausibility in the exaggerated claim that in choosing to do an act violative of the rules an individual has chosen to be punished. This way of putting matters brings to our attention the extent to which, when the system is as I have described it, the criminal "has brought the punishment upon himself" in contrast to those cases where it would be misleading to say "he has brought it upon himself," cases, for example, where one does not know the rules or is punished in the absence of fault.

To summarize, then: first, there is a group of rules guiding the behavior of individuals in the community which establish spheres of interest immune from interference by others; second, provision is made for what is generally regarded as a deprivation of some thing of value if the rules are violated; third, the deprivations visited upon

any person are justified by that person's having violated the rules; fourth, the deprivation, in this just system of punishment, is linked to rules that fairly distribute benefits and burdens and to procedures that strike some balance between not punishing the guilty and punishing the innocent, a class defined as those who have not voluntarily done acts violative of the law, in which it is evident that the evil of punishing the innocent is regarded as greater than the nonpunishment of the guilty.

At the core of many actual legal systems one finds, of course, rules and procedures of the kind I have sketched. It is obvious, though, that any ongoing legal system differs in significant respects from what I have presented here, containing 'pockets of injustice'.

I want now to sketch an extreme version of a set of institutions of a fundamentally different kind, institutions proceeding on a conception of man which appears to be basically at odds with that operative within a system of punishment.

Rules are promulgated in this system that prohibit certain types of injuries and harms.

In this world we are now to imagine when an individual harms another his conduct is to be regarded as a symptom of some pathological condition in the way a running nose is a symptom of a cold. Actions diverging from some conception of the normal are viewed as manifestations of a disease in the way in which we might today regard the arm and leg movements of an epileptic during a seizure. Actions conforming to what is normal are assimilated to the normal and healthy functioning of bodily organs. What a person does, then, is assimilated, on this conception, to what we believe today, or at least most of us believe today, a person undergoes. We draw a distinction between the operation of the kidney and raising an arm on request. This distinction between mere events or happenings and human actions is erased in our imagined system.[1]

There is, however, bound to be something strange in this erasing of a recognized distinction, for, as with metaphysical suggestions generally, and I take this to be one, the distinction may be reintroduced but given a different description, for example, 'happenings with X type of causes' and 'happenings with *Y* type of causes'. Responses of different kinds, today legitimated by our distinction between happenings and actions may be legitimated by this new

manner of description. And so there may be isomorphism between a system recognizing the distinction and one erasing it. Still, when this distinction is erased certain tendencies of thought and responses might naturally arise that would tend to affect unfavorably values respected by a system of punishment.

Let us elaborate on this assimilation of conduct of a certain kind to symptoms of a disease. First, there is something abnormal in both the case of conduct, such as killing another, and a symptom of a disease such as an irregular heart beat. Second, there are causes for this abnormality in action such that once we know of them we can explain the abnormality as we now can explain the symptoms of many physical diseases. The abnormality is looked upon as a happening with a causal explanation rather than an action for which there were reasons. Third, the causes that account for the abnormality interfere with the normal functioning of the body, or, in the case of killing with what is regarded as a normal functioning of an individual. Fourth, the abnormality is in some way a part of the individual, necessarily involving his body. A well going dry might satisfy our three foregoing conditions of disease symptoms, but it is hardly a disease or the symptom of one. Finally, and most obscure, the abnormality arises in some way from within the individual. If Jones is hit with a mallet by Smith, Jones may reel about and fall on James who may be injured. But this abnormal conduct of Jones is not regarded as a symptom of disease. Smith, not Jones, is suffering from some pathological condition.

With this view of man the institutions of social control respond, not with punishment, but with either preventive detention, in case of 'carriers', or therapy in the case of those manifesting pathological symptoms. The logic of sickness implies the logic of therapy. And therapy and punishment differ widely in their implications. In bringing out some of these differences I want again to draw attention to the important fact that while the distinctions we now draw are erased in the therapy world, they may, in fact, be reintroduced but under different descriptions. To the extent they are, we really have a punishment system combined with a therapy system. I am concerned now, however, with what the implications would be were the world indeed one of therapy and not a disguised world of punishment and therapy, for I want to suggest tendencies

of thought that arise when one is immersed in the ideology of disease and therapy.

First, punishment is the imposition upon a person who is believed to be at fault of something commonly believed to be a deprivation where that deprivation is justified by the person's guilty behavior. It is associated with resentment, for the guilty are those who have done what they had no right to do by failing to exercise restraint when they might have and where others have. Therapy is not a response to a person who is at fault. We respond to an individual, not because of what he has done, but because of some condition from which he is suffering. If he is no longer suffering from the condition, treatment no longer has a point. Punishment, then, focuses on the past; therapy on the present. Therapy is normally associated with compassion for what one undergoes, not resentment for what one has illegitimately done.

Second, with therapy, unlike punishment, we do not seek to deprive the person of something acknowledged as a good, but seek rather to help and to benefit the individual who is suffering by ministering to his illness in the hope that the person can be cured. The good we attempt to do is not a reward for desert. The individual suffering has not merited by his disease the good we seek to bestow upon him but has, because he is a creature that has the capacity to feel pain, a claim upon our sympathies and help.

Third, we saw with punishment that its justification was related to maintaining and restoring a fair distribution of benefits and burdens. Infliction of the prescribed punishment carries the implication, then, that one has 'paid one's debt' to society, for the punishment is the taking from the person of something commonly recognized as valuable. It is this conception of 'a debt owed' that may permit, as I suggested earlier, under certain conditions, the nonpunishment of the guilty, for operative within a system of punishment may be a concept analogous to forgiveness, namely pardoning. Who it is that we may pardon and under what conditions—contrition with its elements of self-punishment no doubt plays a role—I shall not go into though it is clearly a matter of the greatest practical and theoretical interest. What is clear is that the conceptions of 'paying a debt' or 'having a debt forgiven' or pardoning have no place in a system of therapy.

Fourth, with punishment there is an attempt at some equivalence between the advantage gained by the wrongdoer—partly based upon the seriousness of the interest invaded, partly on the state of mind with which the wrongful act was performed—and the punishment meted out. Thus, we can understand a prohibition on 'cruel and unusual punishments' so that disproportionate pain and suffering are avoided. With therapy attempts at proportionality make no sense. It is perfectly plausible giving someone who kills a pill and treating for a lifetime within an institution one who has broken a dish and manifested accident proneness. We have the concept of 'painful treatment'. We do not have the concept of 'cruel treatment'. Because treatment is regarded as a benefit, though it may involve pain, it is natural that less restraint is exercised in bestowing it, than in inflicting punishment. Further, protests with respect to treatment are likely to be assimilated to the complaints of one whose leg must be amputated in order for him to live, and, thus, largely disregarded. To be sure, there is operative in the therapy world some conception of the "cure being worse than the disease," but if the disease is manifested in conduct harmful to others, and if being a normal operating human being is valued highly, there will naturally be considerable pressure to find the cure acceptable.

Fifth, the rules in our system of punishment governing conduct of individuals were rules violation of which involved either direct interference with others or the creation of a substantial risk of such interference. One could imagine adding to this system of primary rules other rules proscribing preparation to do acts violative of the primary rules and even rules proscribing thoughts. Objection to such suggestions would have many sources but a principal one would consist in its involving the infliction of punishment on too great a number of persons who would not, because of a change of mind, have violated the primary rules. Though we are interested in diminishing violations of the primary rules, we are not prepared to punish too many individuals who would never have violated the rules in order to achieve this aim. In a system motivated solely by a preventive and curative ideology there would be less reason to wait until symptoms manifest themselves in socially harmful conduct. It is understandable that we should wish at the earliest possible stage to arrest the development of the disease. In the punishment system, because we are dealing with deprivations, it is understandable that

we should forbear from imposing them until we are quite sure of guilt. In the therapy system, dealing as it does with benefits, there is less reason for forbearance from treatment at an early stage.

Sixth, a variety of procedural safeguards we associate with punishment have less significance in a therapy system. To the degree objections to double jeopardy and self-incrimination are based on a wish to decrease the chances of the innocent being convicted and punished, a therapy system, unconcerned with this problem, would disregard such safeguards. When one is out to help people there is also little sense in urging that the burden of proof be on those providing the help. And there is less point to imposing the burden of proving that the conduct was pathological beyond a reasonable doubt. Further, a jury system which, within a system of justice, serves to make accommodations to the individual situation and to introduce a human element, would play no role or a minor one in a world where expertise is required in making determinations of disease and treatment.

In our system of punishment an attempt was made to maximize each individual's freedom of choice by first of all delimiting by rules certain spheres of conduct immune from interference by others. The punishment associated with these primary rules paid deference to an individual's free choice by connecting punishment to a freely chosen act violative of the rules, thus giving some plausibility to the claim, as we saw, that what a person received by way of punishment he himself had chosen. With the world of disease and therapy all this changes and the individual's free choice ceases to be a determinative factor in how others respond to him. All those principles of our own legal system that minimize the chances of punishment of those who have not chosen to do acts violative of the rules tend to lose their point in the therapy system, for how we respond in a therapy system to a person is not conditioned upon what he has chosen but rather on what symptoms he has manifested or may manifest and what the best therapy for the disease is that is suggested by the symptoms.

Now, it is clear I think, that were we confronted with the alternatives I have sketched, between a system of just punishment and a thoroughgoing system of treatment, a system, that is, that did not reintroduce concepts appropriate to punishment, we could see the point in claiming that a person has a right to be punished, meaning

by this that a person had a right to all those institutions and practices linked to punishment. For these would provide him with, among other things, a far greater ability to predict what would happen to him on the occurrence of certain events than the therapy system. There is the inestimable value to each of us of having the responses of others to us determined over a wide range of our lives by what we choose rather than what they choose. A person has a right to institutions that respect his choices. Our punishment system does; our therapy system does not.

Apart from those aspects of our therapy model which would relate to serious limitations on personal liberty, there are clearly objections of a more profound kind to the mode of thinking I have associated with the therapy model.

First, human beings pride themselves in having capacities that animals do not. A common way, for example, of arousing shame in a child is to compare the child's conduct to that of an animal. In a system where all actions are assimilated to happenings we are assimilated to creatures—indeed, it is more extreme than this—whom we have always thought possessed of less than we. Fundamental to our practice of praise and order of attainment is that one who can do more—one who is capable of more and one who does more is more worthy of respect and admiration. And we have thought of ourselves as capable where animals are not of making, of creating, among other things, ourselves. The conception of man I have outlined would provide us with a status that today, when our conduct is assimilated to it in moral criticism, we consider properly evocative of shame.

Second, if all human conduct is viewed as something men undergo, thrown into question would be the appropriateness of that extensive range of peculiarly human satisfactions that derive from a sense of achievement. For these satisfactions we shall have to substitute those mild satisfactions attendant upon a healthy well-functioning body. Contentment is our lot if we are fortunate; intense satisfaction at achievement is entirely inappropriate.

Third, in the therapy world nothing is earned and what we receive comes to us through compassion, or through a desire to control us. Resentment is out of place. We can take credit for nothing but must always regard ourselves—if there are selves left to regard

once actions disappear—as fortunate recipients of benefits or unfortunate carriers of disease who must be controlled. We know that within our own world human beings who have been so regarded and who come to accept this view of themselves come to look upon themselves as worthless. When what we do is met with resentment, we are indirectly paid something of a compliment.

Fourth, attention should also be drawn to a peculiar evil that may be attendant upon regarding a man's actions as symptoms of disease. The logic of cure will push us toward forms of therapy that inevitably involve changes in the person made against his will. The evil in this would be most apparent in those cases where the agent, whose action is determined to be a manifestation of some disease, does not regard his action in this way. He believes that what he has done is, in fact, 'right' but his conception of 'normality' is not the therapeutically accepted one. When we treat an illness we normally treat a condition that the person is not responsible for. He is 'suffering' from some disease and we treat the condition, relieving the person of something preventing his normal functioning. When we begin treating persons for actions that have been chosen, we do not lift from the person something that is interfering with his normal functioning but we change the person so that he functions in a way regarded as normal by the current therapeutic community. We have to change him and his judgments of value. In doing this we display a lack of respect for the moral status of individuals, that is, a lack of respect for the reasoning and choices of individuals. They are but animals who must be conditioned. I think we can understand and, indeed, sympathize with a man's preferring death to being forcibly turned into what he is not.

Finally, perhaps most frightening of all would be the derogation in status of all protests to treatment. If someone believes that he has done something right, and if he protests being treated and changed, the protest will itself be regarded as a sign of some pathological condition, for who would not wish to be cured of an affliction? What this leads to are questions of an important kind about the effect of this conception of man upon what we now understand by reasoning. Here what a person takes to be a reasoned defense of an act is treated, as the action was, on the model of a happening of a pathological kind. Not just a person's acts are taken from him but

also his attempt at a reasoned justification for the acts. In a system of punishment a person who has committed a crime may argue that what he did was right. We make him pay the price and we respect his right to retain the judgment he has made. A conception of pathology precludes this form of respect.

It might be objected to the foregoing that all I have shown—if that—is that if the only alternatives open to us are a *just* system of punishment or the mad world of being treated like sick or healthy animals, we do in fact have a right to a system of punishment of this kind. But this hardly shows that we have a right *simpliciter* to punishment as we do, say, to be free. Indeed, it does not even show a right to a just system of punishment, for surely we can, without too much difficulty, imagine situations in which the alternatives to punishment are not this mad world but a world in which we are still treated as persons and there is, for example, not the pain and suffering attendant upon punishment. One such world is one in which there are rules but responses to their violation is not the deprivation of some good but forgiveness. Still another type of world would be one in which violation of the rules were responded to by merely comparing the conduct of the person to something commonly regarded as low or filthy, and thus, producing by this mode of moral criticism, feelings of shame rather than feelings of guilt.

I am prepared to allow that these objections have a point. While granting force to the above objections I want to offer a few additional comments with respect to each of them. First, any existent legal system permits the punishment of individuals under circumstances where the conditions I have set forth for a just system have not been satisfied. A glaring example of this would be criminal strict liability which is to be found in our own legal system. Nevertheless, I think it would be difficult to present any system we should regard as a system of punishment that would not still have a great advantage over our imagined therapy system. The system of punishment we imagine may more and more approximate a system of sheer terror in which human beings are treated as animals to be intimidated and prodded. To the degree that the system is of this character it is, in my judgment, not simply an unjust system but one that diverges from what we normally understand by a system of punishment. At least some deference to the choice of individuals is built into the idea of punishment. So there would be some truth in

saying we have a right to any system of punishment if the only alternative to it was therapy.

Second, people may imagine systems in which there are rules and in which the response to their violation is not punishment but pardoning, the legal analogue of forgiveness. Surely this is a system to which we would claim a right as against one in which we are made to suffer for violating the rules. There are several comments that need to be made about this. It may be, of course, that a high incidence of pardoning would increase the incidence of rule violations. Further, the difficulty with suggesting pardoning as a general response is that pardoning presupposes the very responses that it is suggested it supplant. A system of deprivations, or a practice of deprivations on the happening of certain actions, underlies the practice of pardoning and forgiving, for it is only where we possess the idea of a wrong to be made up or of a debt owed to others, ideas we acquire within a world in which there have been deprivations for wrong acts, that we have the idea of pardoning for the wrong or forgiving the debt.

Finally, if we look at the responses I suggested would give rise to feelings of shame, we may rightly be troubled with the appropriateness of this response in any community in which each person assumes burdens so that each may derive benefits. In such situations might it not be that individuals have a right to a system of punishment so that each person could be assured that inequities in the distribution of benefits and burdens are unlikely to occur and if they do, procedures exist for correcting them? Further, it may well be that, everything considered, we should prefer the pain and suffering of a system of punishment to a world in which we only experience shame on the doing of wrong acts, for with guilt there are relatively simple ways of ridding ourselves of the feeling we have, that is, gaining forgiveness or taking the punishment, but with shame we have to bear it until we no longer are the person who has behaved in the shameful way. Thus, I suggest that we have, wherever there is a distribution of benefits and burdens of the kind I have described, a right to a system of punishment.

I want also to make clear in concluding this section that I have argued, though very indirectly, not just for a right to a system of punishment, but for a right to be punished once there is in existence such a system. Thus, a man has the right to be punished rather than

treated if he is guilty of some offense. And, indeed, one can imagine a case in which, even in the face of an offer of a pardon, a man claims and ought to have acknowledged his right to be punished.

2. The primary reason for preferring the system of punishment as against the system of therapy might have been expressed in terms of the one system treating one as a person and the other not. In invoking the right to be punished, one justifies one's claim by reference to a more fundamental right. I want now to turn attention to this fundamental right and attempt to shed light—it will have to be little, for the topic is immense—on what is meant by 'treating an individual as a person'.

When we talk of not treating a human being as a person or 'showing no respect for one as a person' what we imply by our words is a contrast between the manner in which one acceptably responds to human beings and the manner in which one acceptably responds to animals and inanimate objects. When we treat a human being merely as an animal or some inanimate object our responses to the human being are determined, not by his choices, but ours in disregard of or with indifference to his. And when we 'look upon' a person as less than a person or not a person, we consider the person as incapable of rational choice. In cases of not treating a human being as a person we interfere with a person in such a way that what is done, even if the person is involved in the doing, is done not by the person but by the user of the person. In extreme cases there may even be an elision of a causal chain so that we might say that *X* killed *Z* even though *Y*'s hand was the hand that held the weapon, for *Y*'s hand may have been entirely in *X*'s control. The one agent is in some way treating the other as a mere link in a causal chain. There is, of course, a wide range of cases in which a person is used to accomplish the aim of another and in which the person used is less than fully free. A person may be grabbed against his will and used as a shield. A person may be drugged or hypnotized and then employed for certain ends. A person may be deceived into doing other than he intends doing. A person may be ordered to do something and threatened with harm if he does not and coerced into doing what he does not want to. There is still another range of cases in which individuals are not used, but in which decisions by others are made that affect them in circumstances where they have the capacity for choice and where they are not being treated as persons.

But it is particularly important to look at coercion, for I have claimed that a just system of punishment treats human beings as persons; and it is not immediately apparent how ordering someone to do something and threatening harm differs essentially from having rules supported by threats of harm in case of noncompliance.

There are affinities between coercion and other cases of not treating someone as a person, for it is not the coerced person's choices but the coercer's that are responsible for what is done. But unlike other indisputable cases of not treating one as a person, for example using someone as a shield, there is some choice involved in coercion. And if this is so, why does the coercer stand in any different relation to the coerced person than the criminal law stands to individuals in society?

Suppose the person who is threatened disregards the order and gets the threatened harm. Now suppose he is told, "Well, you did after all bring it upon yourself." There is clearly something strange in this. It is the person doing the threatening and not the person threatened who is responsible. But our reaction to punishment, at least in a system that resembles the one I have described, is precisely that the person violating the rules brought it upon himself. What lies behind these different reactions?

There exist situations in the law, of course, which resemble coercion situations. There are occasions when in the law a person might justifiably say "I am not being treated as a person but being used" and where he might properly react to the punishment as something "he was hardly responsible for." But it is possible to have a system in which it would be misleading to say, over a wide range of cases of punishment for noncompliance, that we are using persons. The clearest case in which it would be inappropriate to so regard punishment would be one in which there were explicit agreement in advance that punishment should follow on the voluntary doing of certain acts. Even if one does not have such conditions satisfied, and obviously such explicit agreements are not characteristic, one can see significant differences between our system of just punishment and a coercion situation.

First, unlike the case with one person coercing another 'to do his will', the rules in our system apply to all, with the benefits and burdens equally distributed. About such a system it cannot be said that some are being subordinated to others or are being used by

others or gotten to do things by others. To the extent that the rules are thought to be the advantage of only some or to the extent there is a maldistribution of benefits and burdens, the difference between coercion and law disappears.

Second, it might be argued that at least any person inclined to act in a manner violative of the rules stands to all others as the person coerced stands to his coercer, and that he, at least, is a person disadvantaged as others are not. It is important here, I think, that he is part of a system in which it is commonly agreed that forbearance from the acts proscribed by the rules provides advantages for all. This system is the accepted setting; it is the norm. Thus, in any coercive situation, it is the coercer who deviates from the norm, with the responsibility of the person he is attempting to coerce, defeated. In a just punishment situation, it is the person deviating from the norm, indeed he might be a coercer, who is responsible, for it is the norm to restrain oneself from acts of that kind. A voluntary agent diverging in his conduct from what is expected or what the norm is, on general causal principles, is regarded as the cause of what results from his conduct.

There is, then, some plausibility in the claim that, in a system of punishment of the kind I have sketched, a person chooses the punishment that is meted out to him. If, then, we can say in such a system that the rules provide none with advantages that others do not have, and further, that what happens to a person is conditioned by that person's choice and not that of others, then we can say that it is a system responding to one as a person.

We treat a human being as a person provided: first, we permit the person to make the choices that will determine what happens to him and second, when our responses to the person are responses respecting the person's choices. When we respond to a person's illness by treating the illness it is neither a case of treating or not treating the individual as a person. When we give a person a gift we are neither treating or not treating him as a person, unless, of course, he does not wish it, chooses not to have it, but we compel him to accept it.

3. This right to be treated as a person is a fundamental human right belonging to all human beings by virtue of their being human. It is also a natural, inalienable, and absolute right. I want now to de-

fend these claims so reminiscent of an era of philosophical thinking about rights that many consider to have been seriously confused.

If the right is one that we possess by virtue of being human beings, we are immediately confronted with an apparent dilemma. If, to treat another as a person requires that we provide him with reasons for acting and avoid force or deception, how can we justify the force and deception we exercise with respect to children and the mentally ill? If they, too, have a right to be treated as persons are we not constantly infringing their rights? One way out of this is simply to restrict the right to those who satisfy the conditions of being a person. Infants and the insane, it might be argued, do not meet these conditions, and they would not then have the right. Another approach would be to describe the right they possess as a prima facie right to be treated as a person. This right might then be outweighed by other considerations. This approach generally seems to me, as I shall later argue, inadequate.

I prefer this tack. Children possess the right to be treated as persons but they possess this right as an individual might be said in the law of property to possess a future interest. There are advantages in talking of individuals as having a right though complete enjoyment of it is postponed. Brought to our attention, if we ascribe to them the right, is the legitimacy of their complaint if they are not provided with opportunities and conditions assuring their full enjoyment of the right when they acquire the characteristics of persons. More than this, all persons are charged with the sensitive task of not denying them the right to be a person and to be treated as a person by failing to provide the conditions for their becoming individuals who are able freely and in an informed way to choose and who are prepared themselves to assume responsibility for their choices. There is an obligation imposed upon us all, unlike that we have with respect to animals, to respond to children in such a way as to maximize the chances of their becoming persons. This may well impose upon us the obligation to treat them as persons from a very early age, that is, to respect their choices and to place upon them the responsibility for the choices to be made. There is no need to say that there is a close connection between how we respond to them and what they become. It also imposes upon us all the duty to display constantly the qualities of a person, for what they become they

will largely become because of what they learn from us is acceptable behavior.

In claiming that the right is a right that human beings have by virtue of being human, there are several other features of the right, that should be noted, perhaps better conveyed by labelling them 'natural'. First, it is a right we have apart from any voluntary agreement into which we have entered. Second, it is not a right that derives from some defined position or status. Third, it is equally apparent that one has the right regardless of the society or community of which one is a member. Finally, it is a right linked to certain features of a class of beings. Were we fundamentally different than we now are, we would not have it. But it is more than that, for the right is linked to a feature of human beings which, were that feature absent—the capacity to reason and to choose on the basis of reasons—, profound conceptual changes would be involved in the thought about human beings. It is a right, then, connected with a feature of men that sets men apart from other natural phenomena.

The right to be treated as a person is inalienable. To say of a right that it is inalienable draws attention not to limitations placed on what others may do with respect to the possessor of the right but rather to limitations placed on the dispositive capacities of the possessor of the right. Something is to be gained in keeping the issues of alienability and absoluteness separate.

There are a variety of locutions qualifying what possessors of rights may and may not do. For example, on this issue of alienability, it would be worthwhile to look at, among other things, what is involved in abandoning, abdicating, conveying, giving up, granting, relinquishing, surrendering, transferring, and waiving one's rights. And with respect to each of these concepts we should also have to be sensitive to the variety of uses of the term 'rights'. What it is, for example, to waive a Hohfeldian 'right' in his strict sense will differ from what it is to waive a right in his 'privilege' sense.

Let us look at only two concepts very briefly, those of transferring and waiving rights. The clearest case of transferring rights is that of transferring rights with respect to specific objects. I own a watch and owning it I have a complicated relationship, captured in this area rather well I think by Hohfeld's four basic legal relationships, to all persons in the world with respect to the watch. We crudely capture these complex relationships by talking of my 'prop-

erty rights' in or with respect to the watch. If I sell the watch, thus exercising a capacity provided by the rules of property, I have transferred rights in or with respect to the watch to someone else, the buyer, and the buyer now stands, as I formerly did, to all persons in the world in a series of complex relationships with respect to the watch.

While still the owner, I may have given to another permission to use it for several days. Had there not been the permission and had the person taken the watch, we should have spoken of interfering with or violating or, possibly, infringing my property rights. Or, to take a situation in which transferring rights is inappropriate, I may say to another "go ahead and slap me—you have my permission." In these types of situations philosophers and others have spoken of 'surrendering' rights or, alternatively and, I believe, less strangely, of 'waiving one's rights'. And recently, of course, the whole topic of 'waiving one's right to remain silent' in the context of police interrogation of suspects has been a subject of extensive litigation and discussion.

I confess to feeling that matters are not entirely perspicuous with respect to what is involved in 'waiving' or 'surrendering' rights. In conveying to another permission to take a watch or slap one, one makes legally permissible what otherwise would not have been. But in saying those words that constitute permission to take one's watch one is, of course, exercising precisely one of those capacities that leads us to say he has, while others have not, property rights with respect to the watch. Has one then waived his right in Hohfeld's strict sense in which the correlative is a duty to forebear on the part of others?

We may wish to distinguish here waiving the right to have others forbear to which there is a corresponding duty on their part to forbear, from placing oneself in a position where one has no legitimate right to complain. If I say the magic words "take the watch for a couple of days" or "go ahead and slap me," have I waived my right not to have my property taken or a right not to be struck or have I, rather, in saying what I have, simply stepped into a relation in which the rights no longer apply with respect to a specified other person? These observations find support in the following considerations. The right is that which gives rise, when infringed, to a legitimate claim against another person. What this suggests is that the

right is that sphere interference with which entitles us to complain or gives us a right to complain. From this it seems to follow that a right to bodily security should be more precisely described as 'a right that others not interfere without permission'. And there is the corresponding duty not to interfere unless provided permission. Thus when we talk of waiving our rights or 'giving up our rights' in such cases we are not waiving or giving up our right to property nor our right to bodily security, for we still, of course, possess the right not to have our watch taken without permission. We have rather placed ourselves in a position where we do not possess the capacity, sometimes called a right, to complain if the person takes the watch or slaps us.

There is another type of situation in which we may speak of waiving our rights. If someone without permission slaps me, there is an infringement of my right to bodily security. If I now acquiesce or go further and say "forget it" or "you are forgiven," we might say that I had waived my right to complain. But here, too, I feel uncomfortable about what is involved. For I do have the right to complain (a right without a corresponding duty) in the event I am slapped and I have that right whether I wish it or not. If I say to another after the slap, "you are forgiven" what I do is not waive the right to complain but rather make illegitimate my subsequent exercise of that right.

Now, if we turn to the right to be treated as a person, the claim that I made was that it was inalienable, and what I meant to convey by that word of respectable age is that (a) it is a right that cannot be transferred to another in the way one's right with respect to objects can be transferred and (b) that it cannot be waived in the ways in which people talk of waiving rights to property or waiving, within certain limitations, one's right to bodily security.

While the rules of the law of property are such that persons may, satisfying certain procedures, transfer rights, the right to be treated as a person logically cannot be transferred anymore than one person can transfer to another his right to life or privacy. What, indeed, would it be like for another to have our right to be treated as a person? We can understand transferring a right with respect to certain objects. The new owner stands where the old owner stood. But with a right to be treated as a person what could this mean? My having the right meant that my choices were respected. Now if I

transfer it to another will this mean that he will possess the right that my choices be respected? This is nonsense. It is only each person himself that can have his choices respected. It is no more possible to transfer this right than it is to transfer one's right to life.

Nor can the right be waived. It cannot be waived because any agreement to being treated as an animal or an instrument does not provide others with the moral permission to so treat us. One can volunteer to be a shield, but then it is one's choice on a particular occasion to be a shield. If without our permission, without our choosing it, someone used us as a shield, we may, I should suppose, forgive the person for treating us as an object. But we do not thereby waive our right to be treated as a person, for that is a right that has been infringed and what we have at most done is put ourselves in a position where it is inappropriate any longer to exercise the right to complain.

This is the sort of right, then, such that the moral rules defining relationships among persons preclude anyone from morally giving others legitimate permissions or rights with respect to one by doing or saying certain things. One stands, then, with respect to one's person as the nonowner of goods stands to those goods. The nonowner cannot, given the rule-defined relationships, convey to others rights and privileges that only the owner possesses. Just as there are agreements nonenforceable because void is contrary to public policy, so there are permissions our moral outlook regards as without moral force. With respect to being treated as a person, one is 'disabled' from modifying relations of others to one.

The right is absolute. This claim is bound to raise eyebrows. I have an innocuous point in mind in making this claim.

In discussing alienability we focused on incapacities with respect to disposing of rights. Here what I want to bring out is a sense in which a right exists despite considerations for refusing to accord the person his rights. As with the topic of alienability there are a host of concepts that deserve a close look in this area. Among them are according, acknowledging, annulling, asserting, claiming, denying, destroying, exercising, infringing, insisting upon, interfering with, possessing, recognizing and violating.

The claim that rights are absolute has been construed to mean that 'assertions of rights cannot, for any reason under any circumstances be denied'. When there are considerations which warrant

refusing to accord persons their rights, there are two prevalent views as to how this should be described: there is, first, the view that the person does not have the right, and second, the view that he has rights but of a prima facie kind and that these have been outweighed or overcome by the other considerations. "We can conceive times when such rights must give way, and, therefore, they are only prima facie and not absolute rights." (Brandt)

Perhaps there are cases in which a person claims a right to do a certain thing, say with his property, and argues that his property rights are absolute, meaning by this he has a right to do whatever he wishes with his property. Here, no doubt, it has to be explained to the person that the right he claims he has, he does not in fact possess. In such a case the person does not have and never did have, given a certain description of the right, a right that was prima facie or otherwise, to do what he claimed he had the right to do. If the assertion that a right is absolute implies that we have a right to do whatever we wish to do, it is an absurd claim and as such should not really ever have been attributed to political theorists arguing for absolute rights. But, of course, the claim that we have a prima facie right to do whatever we wish to do is equally absurd. The right is not prima facie either, for who would claim, thinking of the right to be free, that one has a prima facie right to kill others, if one wishes, unless there are moral considerations weighing against it?

There are, however, other situations in which it is accepted by all that a person possesses rights of a certain kind, and the difficulty we face is that of according the person the right he is claiming when this will promote more evil than good. The just act is to give the man his due and giving a man what it is his right to have is giving him his due. But it is a mistake to suppose that justice is the only dimension of morality. It may be justifiable not to accord to a man his rights. But it is no less a wrong to him, no less an infringement. It is seriously misleading to turn all justifiable infringements into noninfringements by saying that the right is only prima facie, as if we have, in concluding that we should not accord a man his rights, made out a case that he had none. To use the language of 'prima facie rights' misleads, for it suggests that a presumption of the existence of a right has been overcome in these cases where all that can be said is that the presumption in favor of according a man his rights has been overcome. If we begin to think the right itself is

prima facie, we shall, in cases in which we are justified in not according it, fail sufficiently to bring out that we have interfered where justice says we should not. Our moral framework is unnecessarily and undesirably impoverished by the theory that there are such rights.

When I claim, then, that the right to be treated as a person is absolute what I claim is that given that one is a person, one always has the right so to be treated, and that while there may possibly be occasions morally requiring not according a person this right, this fact makes it no less true that the right exists and would be infringed if the person were not accorded it.

4. Having said something about the nature of this fundamental right I want now, in conclusion, to suggest that the denial of this right entails the denial of all moral rights and duties. This requires bringing out what is purely intuitively clear that any framework of rights and duties presupposes individuals that have the capacity to choose on the basis of reasons presented to them, and that what makes legitimate actions within such a system are the free choices of individuals. There is, in other words, a distribution of benefits and burdens in accord with a respect for the freedom of choice and freedom of action of all. I think that the best way to make this point may be to sketch some of the features of a world in which rights and duties are possessed.

First, rights exist only when there is some conception of some things valued and others not. Secondly, and implied in the first point, is the fact that there are dispositions to defend the valued commodities. Third, the valued commodities may be interfered with by others in this world. A group of animals might be said to satisfy these first three conditions. Fourth, rights exist when there are recognized rules establishing the legitimacy of some acts and ruling out others. Mistakes in the claim of right are possible. Rights imply the concepts of interference and infringement, concepts the elucidation of which requires the concept of a rule applying to the conduct of persons. Fifth, to possess a right is to possess something that constitutes a legitimate restraint on the freedom of action of others. It is clear, for example, that if individuals were incapable of controlling their actions we would have no notion of a legitimate claim that they do so. If, for example, we were all disposed to object or disposed to complain, as the elephant seal is disposed to object when his

territory is invaded, then the objection would operate in a causal way, or approximating a causal way, in getting the behavior of non-interference. In a system of rights, on the other hand, there is a point to appealing to the rules in legitimating one's complaint. Implied, then, in any conception of rights are the existence of individuals capable of choosing and capable of choosing on the basis of considerations with respect to rules. The distribution of freedom throughout such a system is determined by the free choice of individuals. Thus any denial of the right to be treated as a person would be a denial undercutting the whole system, for the system rests on the assumption that spheres of legitimate and illegitimate conduct are to be delimited with regard to the choices made by persons.

This conclusion stimulates one final reflection on the therapy world we imagined.

The denial of this fundamental right will also carry with it, ironically, the denial of the right to treatment to those who are ill. In the world as we now understand it, there are those who do wrong and who have a right to be responded to as persons who have done wrong. And there are those who have not done wrong but who are suffering from illnesses that in a variety of ways interfere with their capacity to live their lives as complete persons. These persons who are ill have a claim upon our compassion. But more than this they have, as animals do not, a right to be treated as persons. When an individual is ill he is entitled to that assistance which will make it possible for him to resume his functioning as a person. If it is an injustice to punish an innocent person, it is no less an injustice, and a far more significant one in our day, to fail to promote as best we can through adequate facilities and medical care the treatment of those who are ill. Those human beings who fill our mental institutions are entitled to more than they do in fact receive; they should be viewed as possessing the right to be treated as a person so that our responses to them may increase the likelihood that they will enjoy fully the right to be so treated. Like the child the mentally ill person has a future interest we cannot rightly deny him. Society is today sensitive to the infringement of justice in punishing the innocent; elaborate rules exist to avoid this evil. Society should be no less sensitive to the injustice of failing to bring back to the community of persons those whom it is possible to bring back.

NOTES

1. "When a man is suffering from an infectious disease, he is a danger to the community, and it is necessary to restrict his liberty of movement. But no one associates any idea of guilt with such a situation. On the contrary, he is an object of commiseration to his friends. Such steps as science recommends are taken to cure him of his disease, and he submits as a rule without reluctance to the curtailment of liberty involved meanwhile. The same method in spirit ought to be shown in the treatment of what is called 'crime.'"

Bertrand Russell, *Roads to Freedom* (London: George Allen and Unwin Ltd., 1918), p. 135.

"We do not hold people responsible for their reflexes—for example, for coughing in church. We hold them responsible for their operant behavior—for example, for whispering in church or remaining in church while coughing. But there are variables which are responsible for whispering as well as coughing, and these may be just as inexorable. When we recognize this, we are likely to drop the notion of responsibility altogether and with it the doctrine of free will as an inner causal agent."

B. F. Skinner, *Science and Human Behavior* (1953), pp. 115–6.

"Basically, criminality is but a symptom of insanity, using the term in its widest generic sense to express unacceptable social behavior based on unconscious motivation flowing from a disturbed instinctive and emotional life, whether this appears in frank psychoses, or in less obvious form in neuroses and unrecognized psychoses. . . . If criminals are products of early environmental influences in the same sense that psychotics and neurotics are, then it should be possible to reach them psychotherapeutically."

Benjamin Karpman, "Criminal Psychodynamics," *Journal of Criminal Law and Criminology*, 47 (1956), p. 9.

"We, the agents of society, must move to end the game of tit-for-tat and blow-for-blow in which the offender has foolishly and futilely engaged himself and us. We are not driven, as he is, to wild and impulsive actions. With knowledge comes power, and with power there is no need for the frightened vengeance of the old penology. In its place should go a quiet, dignified, therapeutic program for the rehabilitation of the disorganized one, if possible, the protection of society during the treatment period, and his guided return to useful citizenship, as soon as this can be effected."

Karl Menninger, "Therapy, Not Punishment," *Harper's Magazine* (August 1959), pp. 63–64.

COLLIN, *op. cit. supra* note 2, at 189, rightly points out that since, under Ferri's system of minute legislative prescriptions, judges will not be called upon to "interpret the will of the legislator" but to investigate the nature of the individual delinquent, the course of judicial decision (*"la jurisprudence"*) "will have to adapt itself constantly to the evolution of scientific doctrines," presenting the dangerous alternative that, either the course of decision will have to follow step by step the development of science, "which would give rise to the most conflicting and perhaps most erroneous decisions," or judges will have to continue to apply the ideas of the framers of the project, "at the risk of maintaining, in the courts of justice, a scientific system abandoned by the majority of scholars." The system proposed herein will avoid at least the latter difficulty; since the *content* of the social-psychiatric categories could change with the advance of science, which advance it is presumed would be reflected in the techniques of the experts attached to the treatment tribunals. The former difficulty could be minimized by providing for a specialized appellate tribunal which would tend to unify the findings of the different treatment boards of a state, and for frequent conferences of the officials and associated scientists of the boards, for exchange of ideas on policy and treatment.

31. The training of this personnel is a *sine qua non* to the success of the entire project. Present training facilities and prejudices are not suitable.

32. "We know that the old analysis of act and intent can stand only as an artificial legal analysis and that the mental element in crime presents a series of difficult problems." POUND, CRIMINAL JUSTICE IN CLEVELAND (1922) 586.

33. One of the most important resolutions adopted by the Ninth International Prison Congress in 1925 was "that the indeterminate sentence is the necessary consequence of the individualization of punishment and one of the most efficacious means of social defence." PRISON ASS'N OF NEW YORK, EIGHTY-FIRST ANNUAL REPORT (1926) 73.

Joseph F. Scott, formerly superintendent of reformatories for New York, in discussing the origin of the first American indeterminate sentence law in New York, says that Mr. Brockway's original draft of the bill in 1877 "embodied an indeterminate sentence without limitation, which was approved by the board of managers and incorporated in their report to the legislature. But, previous to its introduction in the legislature, fearing that the bill in this form might not pass, the draft was altered, limiting the sentence to 'the maximum term provided by law for the crime for which the prisoner was convicted and sentenced.' " This has been the model for all subsequent legislation on the subject. Superintendent Scott was of the conviction, in 1910, that, "Undoubtedly, had the section containing the indeterminate sentence clause as originally drafted been left in the bill, it would have become law, as drafted, and would have given to us the purely indeterminate sentence which we have not been able to obtain up to the present time." Scott, *American Reformatories for Male Adults* in HENDERSON, PENAL AND REFORMATORY INSTITUTIONS (1910) 89, 94.

C. S. LEWIS

The Humanitarian Theory of Punishment

IN ENGLAND we have lately had a controversy about Capital Punishment. I do not know whether a murderer is more likely to repent and make a good end on the gallows a few weeks after his trial or in the prison infirmary thirty years later. I do not know whether the fear of death is an indispensable deterrent. I need not, for the purpose of this article, decide whether it is a morally permissible deterrent. Those are questions which I propose to leave untouched. My subject is not Capital Punishment in particular, but that theory of punishment in general which the controversy showed to be almost universal among my fellow-countrymen. It may be called the Humanitarian theory. Those who hold it think that it is mild and merciful. In this I believe that they are seriously mistaken. I believe that the "Humanity" which it claims is a dangerous illusion and disguises the possibility of cruelty and injustice without end. I urge a return to the traditional or Retributive theory not solely, not even primarily, in the interests of society, but in the interests of the criminal.

According to the Humanitarian theory, to punish a man because he deserves it, and as much as he deserves, is mere revenge, and, therefore, barbarous and immoral. It is maintained that the only legitimate motives for punishing are the desire to deter others by example or to mend the criminal. When this theory is combined, as frequently happens, with the belief that all crime is more or less pathological, the idea of mending tails off into that of healing or

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curing and punishment becomes therapeutic. Thus it appears at first sight that we have passed from the harsh and self-righteous notion of giving the wicked their deserts to the charitable and enlightened one of tending the psychologically sick. What could be more amiable? One little point which is taken for granted in this theory needs, however, to be made explicit. The things done to the criminal, even if they are called cures, will be just as compulsory as they were in the old days when we called them punishments. If a tendency to steal can be cured by psychotherapy, the thief will no doubt be forced to undergo the treatment. Otherwise, society cannot continue.

My contention is that this doctrine, merciful though it appears, really means that each one of us, from the moment he breaks the law, is deprived of the rights of a human being.

The reason is this. The Humanitarian theory removes from Punishment the concept of Desert. But the concept of Desert is the only connecting link between punishment and justice. It is only as deserved or undeserved that a sentence can be just or unjust. I do not here contend that the question "Is it deserved?" is the only one we can reasonably ask about a punishment. We may very properly ask whether it is likely to deter others and to reform the criminal. But neither of these two last questions is a question about justice. There is no sense in talking about a "just deterrent" or a "just cure." We demand of a deterrent not whether it is just but whether it will deter. We demand of a cure not whether it is just but whether it succeeds. Thus when we cease to consider what the criminal deserves and consider only what will cure him or deter others, we have tacitly removed him from the sphere of justice altogether; instead of a person, a subject of rights, we now have a mere object, a patient, a "case."

The distinction will become clearer if we ask who will be qualified to determine sentences when sentences are no longer held to derive their propriety from the criminal's deservings. On the old view the problem of fixing the right sentence was a moral problem. Accordingly, the judge who did it was a person trained in jurisprudence; trained, that is, in a science which deals with rights and duties, and which, in origin at least, was consciously accepting guidance from the Law of Nature, and from Scripture. We must admit that in the actual penal code of most countries at most times

these high originals were so much modified by local custom, class interests, and utilitarian concessions, as to be very imperfectly recognizable. But the code was never in principle, and not always in fact, beyond the control of the conscience of the society. And when (say, in eighteenth-century England) actual punishments conflicted too violently with the moral sense of the community, juries refused to convict and reform was finally brought about. This was possible because, so long as we are thinking in terms of Desert, the propriety of the penal code, being a moral question, is a question on which every man has the right to an opinion, not because he follows this or that profession, but because he is simply a man, a rational animal enjoying the Natural Light. But all this is changed when we drop the concept of Desert. The only two questions we may now ask about a punishment are whether it deters and whether it cures. But these are not questions on which anyone is entitled to have an opinion simply because he is a man. He is not entitled to an opinion even if, in addition to being a man, he should happen also to be a jurist, a Christian, and a moral theologian. For they are not questions about principle but about matter of fact; and for such *cuiquam in sua arte credendum*. Only the expert "penologist" (let barbarous things have barbarous names), in the light of previous experiment, can tell us what is likely to deter: only the psychotherapist can tell us what is likely to cure. It will be in vain for the rest of us, speaking simply as men, to say, "but this punishment is hideously unjust, hideously disproportionate to the criminal's deserts." The experts with perfect logic will reply, "but nobody was talking about deserts. No one was talking about *punishment* in your archaic vindictive sense of the word. Here are the statistics proving that this treatment deters. Here are the statistics proving that this other treatment cures. What is your trouble?"

The Humanitarian theory, then, removes sentences from the hands of jurists whom the public conscience is entitled to criticize and places them in the hands of technical experts whose special sciences do not even employ such categories as rights or justice. It might be argued that since this transference results from an abandonment of the old idea of punishment, and, therefore, of all vindictive motives, it will be safe to leave our criminals in such hands. I will not pause to comment on the simple-minded view of fallen human nature which such a belief implies. Let us rather remember

that the "cure" of criminals is to be compulsory; and let us then watch how the theory actually works in the mind of the Humanitarian. The immediate starting point of this article was a letter I read in one of our Leftist weeklies. The author was pleading that a certain sin, now treated by our laws as a crime, should henceforward be treated as a disease. And he complained that under the present system, the offender, after a term in gaol, was simply let out to return to his original environment where he would probably relapse. What he complained of was not the shutting up but the letting out. On his remedial view of punishment the offender should, of course, be detained until he was cured. And of course the official straighteners are the only people who can say when that is. The first result of the Humanitarian theory is, therefore, to substitute for a definite sentence (reflecting to some extent the community's moral judgment on the degree of ill-desert involved) an indefinite sentence terminable only by the word of those experts—and they are not experts in moral theology nor even in the Law of Nature—who inflict it. Which of us, if he stood in the dock, would not prefer to be tried by the old system?

It may be said that by the continued use of the word punishment and the use of the verb "inflict" I am misrepresenting Humanitarians. 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 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.

If we turn from the curative to the deterrent justification of punishment we shall find the new theory even more alarming. When you punish a man *in terrorem*, make of him an "example" to others, you are admittedly using him as a means to an end; someone

else's end. This, in itself, would be a very wicked thing to do. On the classical theory of Punishment it was of course justified on the ground that the man deserved it. That was assumed to be established before any question of "making him an example" arose. You then, as the saying is, killed two birds with one stone; in the process of giving him what he deserved you set an example to others. But take away desert and the whole morality of the punishment disappears. Why, in Heaven's name, am I to be sacrificed to the good of society in this way?—unless, of course, I deserve it.

But that is not the worst. If the justification of exemplary punishment is not to be based on desert but solely on its efficacy as a deterrent, it is not absolutely necessary that the man we punish should even have committed the crime. The deterrent effect demands that the public should draw the moral, "If we do such an act we shall suffer like that man." The punishment of a man actually guilty whom the public think innocent will not have the desired effect; the punishment of a man actually innocent will, provided the public think him guilty. But every modern State has powers which make it easy to fake a trial. When a victim is urgently needed for exemplary purposes and a guilty victim cannot be found, all the purposes of deterrence will be equally served by the punishment (call it "cure" if you prefer) of an innocent victim, provided that the public can be cheated into thinking him guilty. It is no use to ask me why I assume that our rulers will be so wicked. The punishment of an innocent, that is, an undeserving, man is wicked only if we grant the traditional view that righteous punishment means deserved punishment. Once we have abandoned that criterion, all punishments have to be justified, if at all, on other grounds that have nothing to do with desert. Where the punishment of the innocent can be justified on those grounds (and it could in some cases be justified as a deterrent) it will be no less moral than any other punishment. Any distaste for it on the part of a Humanitarian will be merely a hang-over from the Retributive theory.

It is, indeed, important to notice that my argument so far supposes no evil intentions on the part of the Humanitarian and considers only what is involved in the logic of his position. My contention is that good men (not bad men) consistently acting upon that position would act as cruelly and unjustly as the greatest tyrants. They might in some respects act even worse. Of all tyrannies a

tyranny sincerely 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 busybodies. 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. Their 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 with 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.

In reality, however, we must face the possibility of bad rulers armed with a Humanitarian theory of punishment. A great many popular blue prints for a Christian society are merely what the Elizabethans called "eggs in moonshine" because they assume that the whole society is Christian or that the Christians are in control. This is not so in most contemporary States. Even if it were, our rulers would still be fallen men, and, therefore, neither very wise nor very good. As it is, they will usually be unbelievers. And since wisdom and virtue are not the only or the commonest qualifications for a place in the government, they will not often be even the best unbelievers. The practical problem of Christian politics is not that of drawing up schemes for a Christian society, but that of living as innocently as we can with unbelieving fellow-subjects under unbelieving rulers who will never be perfectly wise and good and who will sometimes be very wicked and very foolish. And when they are wicked the Humanitarian theory of punishment will put in their hands a finer instrument of tyranny than wickedness ever had before. 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 the concepts of Desert and Punishment but those of disease and cure.

We know that one school of psychology already regards religion as a neurosis. When this particular neurosis becomes inconvenient to government, what is to hinder government from proceeding to "cure" it? Such "cure" will, of course, be compulsory; but under the Humanitarian theory it will not be called by the shocking name of Persecution. No one will blame us for being Christian, no one will hate us, no one will revile us. The new Nero will approach us with the silky manners of a doctor, and though all will be in fact as compulsory as the *tunica molesta* or Smithfield or Tyburn, all will go on within the unemotional therapeutic sphere where words like "right" and "wrong" or "freedom" and "slavery" are never heard. And thus when the command is given, every prominent Christian in the land may vanish overnight into Institutions for the Treatment of the Ideologically Unsound, and it will rest with the expert gaolers to say when (if ever) they are to re-emerge. But 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.

This is why I think it essential to oppose the Humanitarian theory of punishment, root and branch, whenever we encounter it. It carries on its front a semblance of mercy which is wholly false. That is how it can deceive men of good will. The error began, perhaps, with Shelley's statement that the distinction between mercy and justice was invented in the courts of tyrants. It sounds noble, and was indeed the error of a noble mind. But the distinction is essential. The older view was that mercy "tempered" justice, or (on the highest level of all) that mercy and justice had met and kissed. The essential act of mercy was to pardon; and pardon in its very essence involves the recognition of guilt and ill-desert in the recipient. If crime is only a disease which needs cure, not sin which deserves punishment, it cannot be pardoned. How can you pardon a man for having a gumboil or a club foot? But the Humanitarian theory wants simply to abolish Justice and substitute Mercy for it. This means that you start being "kind" to people before you have considered their rights, and then force upon them supposed kind-

nesses which they in fact had a right to refuse, and finally kindnesses which no one but you will recognize as kindnesses and which the recipient will feel as abominable cruelties. You have overshot the mark. Mercy, detached from Justice, grows unmerciful. That is the important paradox. As there are plants which will flourish only in mountain soil, so it appears that Mercy will flower only when it grows in the crannies of the rock of Justice: transplanted to the marshlands of mere Humanitarianism, it becomes a man-eating weed, all the more dangerous because it is still called by the same name as the mountain variety. But we ought long ago to have learned our lesson. We should be too old now to be deceived by those humane pretensions which have served to usher in every cruelty of the revolutionary period in which we live. These are the "precious balms" which will "break our heads."

There is a fine sentence in Bunyan: "It came burning hot into my mind, whatever he said, and however he flattered, when he got me home to his house, he would sell me for a slave." There is a fine couplet, too, in John Ball:

> Be ware ere ye be woe
> Know your friend from your foe.

One last word. You may ask why I send this to an Australian periodical. The reason is simple and perhaps worth recording: I can get no hearing for it in England.

NORVAL MORRIS AND DONALD BUCKLE

The Humanitarian Theory of Punishment
A Reply to C. S. Lewis

THE UNIVERSITY OF MELBOURNE has recently established a Department of Criminology. Our Chairman is a Judge of the Supreme Court, and our Board includes specialists in Medicine, Psychology, Sociology, Psychiatry, and Criminology. Already it is clear that we all adhere, to a greater or less degree, to what C. S. Lewis in his entirely delightful article called a "Humanitarian Theory of Punishment."

His thesis is so profoundly opposed to our work as participants in this new Department that it is incumbent upon us to state our position; though we face this task with trepidation, seeing ourselves as Davids with literary slings incapable of delivering a series of blows as incisive as even one phrase from the armoury of Goliath Lewis.

Lewis' vital contention is that the Humanitarian Theory gives to the supposed expert an unwarranted and unjustified power over other men's lives. It is, of course, undeniable that to put a man in a white coat, or to give him a degree a psychology or sociology, does not diminish his sadistic potentialities or the disrupting effects of power on him. Such specialists must be regarded with that healthy scepticism of which Lewis is a fine champion; but scepticism should not lead us to deny their usefulness entirely, and insist—as does Lewis—on purely condign punishment, linked, as he phrases it, to the criminal's "desert." As we shall show, the use of the expert

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does not involve any abandonment of control over him. He can be kept on tap and yet not on top.

Let us attempt a reply to Lewis' article by advancing two propositions contrary to his thesis. First, the possibility of linking with the Humanitarian Theory of Punishment a just consideration of the interest of society and of the criminal. Secondly, the impossibility of his suggested return to the Retributive Theory of Punishment. If these propositions be demonstrated, there is little left of Lewis' argument; though its great worth as a warning against the uncontrolled allocation of powers remains.

Lewis rests his case on a suggested dichotomy in which a contrast is drawn between the "deserved" or "just" punishment on the one hand, and therapy or treatment on the other—the latter being the significant purpose of those upholding the Humanitarian Theory of Punishment. To us, this seems an unreal distinction. Whatever the punishment inflicted as a "just" punishment, whatever theory of punishment one may espouse, it cannot be denied that reformation procured in association with it is a desirable thing. To an extent, therefore, some concept of therapy is involved in every desirable theory of punishment. What Lewis opposes is that therapy should be procured through punishment (not in association with it but by means of it), arguing that if treatment be elevated to a purpose as distinct from a mere subsidiary part of a punishment we shall have been delivered over to omnipotent moral busybodies who will work cruelty without end.

Herein then lies the kernel of the discussion—Lewis regards reformation and deterrence as subsidiary and never as a justification of punishment and suggests that the Humanitarian Theory of Punishment has erected them into its vital aims. This, we believe, is a perversion of the Humanitarian theory. To us, the vital purpose of the criminal law is the *protection of the community*, always limiting and conditioning its punishments in the light of two other factors, namely, a determination by its actions never to deny the fundamental humanity of even the most depraved criminal, and secondly, a critical appraisal of the limits of our understandings of the springs of human conduct and our ability to predict its course. There is a third limitation imposed by the community's expectations of penal sanctions which we shall later consider.

Lewis' article omits any reference to the protection of the community as a valid aim of penal sanctions. He stresses the human personality of each individual criminal, and with this we agree. One human personality he overlooks, however, is the individual humanity of the potential *victim* of the criminal. It is this humanity we defend; the humanity of those whose only likely connection with the criminal law is the law's failure to protect them from clearly dangerous people.

There is, surely, a parallel in the medical sphere. None of us shrinks from imposing considerable limitations on the freedom of action of those suffering from an infectious disease, and it is perfectly clear that over a wide area we have a Humanitarian Theory of Social Medicine. By suggesting this, we do not mean to take up the completely determinist position, and do not argue that criminal actions are as inaccessible to the actor's control as are the germs that may infect him. Crime is not a personal disease; it cannot be equated to personal disease; it is, however, a social disease. Looked at from the point of view of society, crime is a disease of an integral part of that society. And it is a virus from which society must seek protection. Thus, Lewis' suggestion that the humanitarians think "all crime is more or less pathological" is untrue if he means by it that crime is regarded as individually pathological. No responsible authority would accept that crime is an individually pathological phenomenon; but it is quite clearly a socially pathological phenomenon. From the point of view of a society, therefore, the prime function of punishment must clearly be the protection of that society.

The complete absence of any regard for the potential victim of the criminal which runs through Lewis' article is to us somewhat shocking. His insistence on the individual personality of the criminal to the extent that the punishment must in some way be regarded by the community as deserved, as capable of being measured by an efficient punishment system, carries with it a total disregard for the essential personality of the potential victims of the criminal. *Per contra*, it seems to us that an argument for this aim of the criminal law—the protection of the community—is conclusive provided it does not carry with it any serious disadvantages. And the disadvantage Lewis sees, and which is undoubtedly a threat, is the possibility

of the abuse of power necessarily given to those aiming to fulfil this purpose. *Can* the expert be kept on tap and not on top?

This risk of administrative abuse of power runs throughout the whole social pattern as we increasingly come to rely on the expert—in economics, in town planning, in many aspects of social organization, indeed in every sphere of our corporate life, including that of the detection and punishment of crime. One of the basic problems of our age is to erect effective controls by which we can make use of the services of experts and yet guard ourselves from their potential authoritarian danger. In the field of penal sanctions, because of our traditional awareness of this danger, this protection can fairly easily be guaranteed.

The Criminal Courts have traditionally represented the common man and the common man's view of morality. The Judges have earned the confidence of the people as unbiased and incorruptible men. The Courts have to hand excellent techniques for controlling the exuberance of the expert in criminology or penology. Let the ultimate control always reside in the Courts, let the expert always be accountable to them, let the criminal always have access to the Court, let the controls of natural justice which the law has built up be applicable, and, it is suggested, the tyranny which Lewis foreshadows will not eventuate. This type of protection of the individual citizen is surely not beyond the wit of a Nation that has built up the concept of a Parliament and the idea of a Jury.

A test case is given by one of the basic demands of those adhering to the Humanitarian theory: for certain types of criminals the Humanitarians wish to substitute for definite sentences some degree of indeterminacy as to the period those criminals will spend in prison. As Lewis points out, herein lies a real risk of tyranny. The answer is again to be found in the existing courts. These should require the expert to give evidence publicly and, subject to cross-examination, to substantiate the reasons for his decision concerning the release of the criminal. The prisoner should have the power to initiate this type of enquiry at regular intervals, and the onus of proof should never shift from the expert.

An example of wise techniques of judicial control of the indeterminate sentence is to be found in the recent Tasmanian Sexual Offences Act 1951, which allows the courts to impose several forms

of indeterminate sentence accompanied by re-educative measures on certain sexual offenders. One of these sentences is called a Treatment Order, and section 13(2) of the Act protects the convicted criminal against the tyranny of the expert by providing that:

> A person against whom a treatment order has been made may petition the court to discharge the order upon the ground—
> (a) that the treatment is unreasonable;
> (b) that the treatment is ineffective;
> (c) that the treatment is not being given or is unduly protracted; or
> (d) that the . . . petitioner is cured of the indisposition which the order was made to cure.

The use of "indisposition" is infelicitous, and there may well be other grounds on which the criminal should be allowed to petition the court; but the need to avoid the abuse of power and the establishment of means of achieving this is clearly recognized in this Act as it is throughout Anglo-American jurisprudence. This recognition constitutes a complete rebuttal of Lewis' worst fears.

We therefore submit that we have demonstrated the practical possibility of a Humanitarian theory carrying with it a due regard for the interests both of society and of the individual criminal. Now let us suggest the impossibility of a return, as Lewis recommends, to the Retributive Theory of Punishment.

For certain types of criminals, given our present moral conscience, a return to a pure Retributive Theory is unthinkable. At both ends of the scale of punishment practically every civilized society has abandoned the Retributive Theory. With child criminals we have abandoned it quite explicitly, holding that the welfare of the child must frequently be regarded as a major consideration motivating courts charged with sentencing juvenile delinquents. The cost to the community of rewarding the larceny of a few sweets by a child with a punishment exactly equated to that social harm, has proved too expensive to be tolerated. It has been calculated that an incurable schizophrenic costs the community some £20,000 throughout his life, and it is clear that the adult criminal costs the community a great deal more. Therefore, both for the child's sake and for the community's, it is frequently necessary to reward the delinquent child with a punishment not "justly related,"

in the sense in which Lewis uses the phrase, to the offence he has committed. The emphasis must be on therapy. We suggest that there would be no responsible opinion reversing this development.

And at the other end of the scale of punishment the community has likewise abandoned any hint of a Retributive Theory. With habitual criminals every civilized society has abandoned any attempt to equate the punishment to the latest crime that that criminal committed. There are various techniques adopted all over the world. By some the habitual criminal is first punished for the crime he has committed and then held in prison for a protracted period on account of his being an habitual criminal. Others add together the man's dangerousness to the community and his latest offence, and impose a sentence on him as an habitual criminal which is clearly unrelated to that offence only. Here again nobody could tolerate the thought of abandoning this Humanitarian approach to punishment and reverting to a purely Retributive one.

It is, we agree, possible to gather some support for a return to the Retributive Theory of Punishment for the graver and more professional type of criminal who has not yet developed into the habitual criminal. It is possible to do this simply because we do not know very much about the causes of crime. It is not possible, however, to find support for such a retrograde step in regard to those people who are at present put on probation. These are asked to atone for their crimes by being good citizens. And the Courts, advised by those who have studied problems of punishment and by those probation officers who are working in society, have decided that the people they put on probation are good risks, that is to say, they are not likely to offend again. A Retributive Theory could not tolerate such an approach to the punishment of these more minor offenders. Agreed, there is room for mercy in a Retributive Theory, but it could not be universally applied mercy for certain types of crimes or criminals—if so, it would no longer be Retributive.

Thus for child delinquents, for habitual criminals, and for those on probation—to take only a few—the punishments accepted by all civilized societies as suitable are not "deserved" punishments in any expiatory talionic sense. This concept of "desert" is really the lynchpin of Lewis' article. As he sees it, the idea of the "deserved" or "just" punishment is an acceptance that for each offence, calculated in the light both of the crime committed and the history

of crimes perpetuated by that individual, there is a price of punishment known fairly widely throughout the community—that there is, in other words, a price-list of deserved punishments. This may well be a true picture of what is in many men's minds; but it is only true for those people who consider a static situation in crime, who consider only two parties to any crime—the criminal and his victim. Now the contrast with this is the Humanitarian Theory which sees crime as a dynamic situation, not involving two parties, but involving many parties: not only a criminal and his victim, but a whole list of future potential victims who, unless they are protected with the best means at our disposal, are likely to suffer hardship. In arranging this protection, however, the Humanitarian must always remember that it should be related to the extent of current knowledge, and to the fact that the community must be expected to bear some risk for its dangerous and pathological elements.

We do not go to the extreme of denying importance to the community's conception of a "deserved" punishment. The punishments imposed on criminals serve purposes other than those we have canvassed—they constitute society's official pronouncement of the gravity with which any criminal action is viewed, and therefore assist in reinforcing that community's sense of right. This sense of right, this group super-ego, must never be exacerbated either by the too great leniency or the extreme severity of any punishment imposed. In other words, the community's sense of a just punishment will create the polarities of leniency and severity between which the criminal law may work out its other purposes.

Where we do deny the validity of this concept of the just or deserved punishment is where it is advanced as a basic philosophic justification of punishment, and not merely as a limiting factor. Kant and Hegel built theories of punishment around this concept which had no more connection with the day-to-day realities of our criminal law than with the pieces on the chess board. It is a similar erection of an emotional sense of right, not applied to the factual exigencies of the task faced by those imposing penal sanctions, that leads to such impossibilities as Lewis' suggested return to the Retributive Theory of Punishment.

By constantly making the experts justify to judges and to juries their actions in relation to criminals, punishment may be kept linked to the social conscience of the community. This, we submit, is a

more truly comprehended "just" or "deserved" punishment than is the entirely emotional, atavistic approach which Lewis advocates.

It must not be assumed that Lewis' version of the Retributive Theory is itself completely satisfactory. Indeed, arguing from no less an authority than St. Thomas Aquinas, we may describe "retribution" as a deprivation or limitation of the individual's powers to continue to exercise his choice between good and evil acts in the area where his delinquency has occurred. (See Dr. Hawkins' article "Punishment and Moral Responsibility" at page 92 of *The King's Good Servant*—Papers read to the Thomas More Society of London, 1948.) In most cases, therefore, the punishment which will take the form of removal from society is itself the retribution, and should logically continue until the prisoner reaches a sufficient state of grace that he no longer intends to transgress. To us, there is no lack of conformity between theories derived from the Scholastic and Humanitarian philosophies.

Lewis may have been led to his conclusion by what appears to us an over-simplified view of the aetiology of crime. He appears to regard any crime solely as the result of a wrong choice between doing good or doing evil. We do not propose to wander into the morass of the free will-determinism argument, for we agree with Lewis that this is a cause of crime. We do not, however, regard it as the only cause of crime which is to us an extremely complicated moral, physical, psychological, and sociological phenomenon in which the totality of the criminal's inheritance and environment, together with his area of free will, will have causal connection with the crime he commits. To relate punishment to but one aetiological factor is to minimize the difficulty of fixing a rational sentence.

Our argument thus leads to a rejection of the Retributive Theory, not only on philosophical but also on purely practical political grounds, and to an acceptance of a morally just Humanitarian approach to punishment. It may be that a vital cause of our different view of punishment from that accepted by Lewis lies in our lower estimation of the efficacy of law as a means of social control. Law stands below Custom and well below Religion as a means of guiding men to the Good Life. It is a relatively blunt instrument of moral control, and should not be thought of as a means of achieving expiation of sin or completely just retribution for evil-doing.

FRANCIS A. ALLEN

Criminal Justice, Legal Values and the Rehabilitative Ideal

ALTHOUGH ONE IS SOMETIMES inclined to despair of any constructive changes in the administration of criminal justice, a glance at the history of the past half-century reveals a succession of the most significant developments. Thus, the last fifty years have seen the widespread acceptance of three legal inventions of great importance: the juvenile court, systems of probation and of parole. During the same period, under the inspiration of continental research and writing, scientific criminology became an established field of instruction and inquiry in American universities and in other research agencies. At the same time, psychiatry made its remarkable contributions to the theory of human behavior and, more specifically, of that form of human behavior described as criminal. These developments have been accompanied by nothing less than a revolution in public conceptions of the nature of crime and the criminal, and in public attitudes toward the proper treatment of the convicted offender.[1]

This history with its complex developments of thought, institutional behavior, and public attitudes must be approached gingerly; for in dealing with it we are in peril of committing the sin of oversimplification. Nevertheless, despite the presence of contradictions and paradox, it seems possible to detect one common element in much of this thought and activity which goes far to characterize the

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Professor H. L. A. Hart

Prolegomenon to the Principles of Punishment

Introductory

The main object of this paper is to provide a framework for the discussion of the mounting perplexities which now surround the institution of criminal punishment, and to show that any morally tolerable account of this institution must exhibit it as a compromise between radically distinct and partly conflicting principles.

General interest in the topic of punishment has never been greater than it is at present and I doubt if the public discussion of it has ever been more confused. The interest and the confusion are both in part due to relatively modern scepticism about two elements which have figured as essential parts of the traditionally opposed "theories" of punishment. On the one hand, the old Benthamite confidence in fear of the penalties threatened by the law as a powerful deterrent, has waned with the growing realisation that the part played by calculation of any sort in anti-social behaviour has been exaggerated. On the other hand a cloud of doubt has settled over the keystone of "Retributive" theory. Its advocates can no longer speak with the old confidence that statements of the form "This man who has broken the law could have kept it" had a univocal or agreed meaning; or where scepticism does not attach to the *meaning* of this form of statement, it has shaken the confidence that we are generally able to distinguish the cases where this form of statement is true from those where it is not.[1]

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Yet quite apart from the uncertainty engendered by these fundamental doubts, which seem to call in question the accounts given of the efficacy, and the morality of punishment by all the old competing theories, the public utterances of those who conceive themselves to be expounding, as plain men for other plain men, orthodox or common-sense principles, untouched by modern psychological doubts are uneasy. Their words often sound as if the authors had not fully grasped their meaning or did not intend the words to be taken quite literally. A glance at the parliamentary debates or the *Report of the Royal Commission on Capital Punishment* shows that many are now troubled by the suspicion that the view that there is just one supreme value or objective (*e.g.*, Deterrence, Retribution, or Reform) in terms of which *all* questions about the justification of punishment are to be answered, is somehow wrong: yet, from what is said on such occasions no clear account of what the different values or objectives are, or how they fit together in the justification of punishment, can be extracted.[2]

No one expects judges or statesmen occupied in the business of sending people to the gallows or prison, or in making (or unmaking) laws which enable this to be done, to have much time for philosophical discussion of the principles which make it morally tolerable to do these things. A judicial bench is not and should not be a professorial chair. Yet what is said in public debates about punishment by those specially concerned with it as judges or legislators is important. Few are likely to be more circumspect, and if what they say seems, as it often does, unclear, one-sided, and easily refutable by pointing to some aspect of things which they have overlooked, it is likely that in our inherited ways of talking or thinking about punishment there is some persistent drive towards an oversimplification of multiple issues which require separate consideration. To counter this drive what is most needed is *not* the simple admission that instead of a single value or aim (Deterrence, Retribution, Reform, or any other) a plurality of different values and aims should be given as a conjunctive answer to some *single* question concerning the justification of punishment. What is needed is the realisation that different principles (each of which may in a sense be called a "justification") are relevant at different points in any morally acceptable account of punishment. What we should look for are answers to a number of different questions such as: What

justifies the general practice of punishment? To whom may punishment be applied? How severely may we punish? In dealing with these and other questions concerning punishment we should bear in mind that in this, as in most other social institutions, the pursuit of one aim may be qualified by or provide an opportunity, not to be missed, for the pursuit of others. Till we have developed this sense of the complexity of punishment (and this prolegomenon aims only to do this)we shall be in no fit state to assess the extent to which the whole institution has been eroded by or needs to be adapted to new beliefs about the human mind.

II

JUSTIFYING AIMS AND PRINCIPLES OF DISTRIBUTION

THERE IS, I THINK, an analogy worth considering between the concept of Punishment and that of Property. In both cases we have to do with a social institution of which the centrally important form is a structure of *legal* rules, though it would be dogmatic to deny the names of Punishment or Property to the similar though more rudimentary rule-regulated practices within groups such as a family, or a school, or in customary societies whose customs may lack some of the standard or salient features of law (*e.g.*, legislation, organised sanctions, courts). In both cases we are confronted by a complex institution presenting different inter-related features calling for separate explanation; or, if the morality of the institution is challenged, for separate justification. In both cases failure to distinguish separate questions or attempting to answer them all by reference to a single principle ends in confusion. Thus in the case of Property we should distinguish between the question of the *definition* of Property, the question why and in what circumstance it is a *good* institution to maintain, and the questions in what ways individuals may become *entitled* to property and *how much* they should be allowed to acquire. These we may call questions of *Definition, General Justifying Aim,* and *Distribution* with the last subdivided into questions of *Title* and *Amount*. It is salutary to take some classical exposition of the idea of Property, say Locke's Chapter "Of Property" in the *Second Treatise,*[3] and to observe how much darkness is spread by

the use of a single notion (in this case "the labour of (a man's) body and the work of his hands") to answer all these different questions which press upon us when we reflect on the institution of Property. In the case of Punishment the beginning of wisdom (though by no means its end) is to distinguish similar questions and confront them separately.

(a) Definition

Here I shall simply draw upon the recent admirable work scattered through English philosophical[4] journals and add to it only an admonition of my own against the abuse of definition in the philosophical discussion of punishment. So with Mr. Benn and Professor Flew I shall define the standard or central case of 'punishment' in terms of five elements:

(i) It must involve pain or other consequences normally considered unpleasant.
(ii) It must be for an offence against legal rules.
(iii) It must be of an actual or supposed offender for his offence.
(iv) It must be intentionally administered by human beings other than the offender.
(v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

In calling this the standard or central case of punishment I shall relegate to the position of sub-standard or secondary cases the following among many other possibilities:

(a) Punishments for breaches of legal rules imposed or administered otherwise than by officials (decentralised sanctions).
(b) Punishments for breaches of non-legal rules or orders (punishments in a family or school).
(c) Vicarious or collective punishment of some member of a social group for actions done by others without the former's authorisation, encouragement, control, or permission.
(d) Punishment of persons (otherwise than under *(c)*) who are neither in fact nor supposed to be offenders.

The chief importance of listing these sub-standard cases is to prevent the use of what I shall call the "definitional stop" in discussions of punishment. This is an abuse of definition especially tempt-

ing when use is made of conditions (ii) and iii) of the standard case against the utilitarian claim that the practice of punishment is justified by the beneficial consequences resulting from the observance of the laws which it secures. Here the stock 'retributive' argument[5] is: If *this* is the justification of punishment, why not apply it when it pays to do so to those innocent of any crime chosen at random, or to the wife and children of the offender? And here the wrong reply is: That, by definition, would not be "punishment" and it is the justification of punishment which is in issue.[6] Not only will this definitional stop fail to satisfy the advocate of 'Retribution'; it would prevent us from investigating the very thing which modern scepticism most calls in question: namely the rational and moral status of our preference for a system of punishment under which measures painful to individuals are to be taken against them only when they have committed an offence. Why do we prefer this to other forms of social hygiene which we might employ instead to prevent anti-social behaviour and which we do employ in special circumstances sometimes with reluctance? No account of punishment can afford to dismiss this question with a definition.

(b) The nature of an offence

Before we reach any question of justification we must identify a preliminary question to which the answer is so simple that the question may not appear worth asking; yet it is clear that some curious "theories" of punishment gain their only plausibility from ignoring it, and others from confusing it with other questions. This question is: Why are certain kinds of action forbidden by law and so made crimes or offences? The answer is: To announce to society that these actions are not to be done and to secure that fewer of them are done. These are the common immediate aims of making any conduct a criminal offence and until we have laws made with these primary aims we shall lack the notion of a 'crime' and so of a 'criminal.' Without recourse to the simple idea that the criminal law sets up, in its rules, standards of behaviour to encourage certain types of conduct and discourage others we cannot distinguish a punishment in the form of a fine from a tax on a course of conduct.[7] This indeed is one grave objection to those theories of law which in the interests of simplicity or uniformity obscure the distinction

between primary laws setting standards for behaviour and secondary laws specifying what officials must or may do when they are broken. Such theories insist that all legal rules are "really" directions to officials to exact "sanctions" under certain conditions, *e.g.*, if people kill.[8] Yet only if we keep alive the distinction (which such theories thus obscure) between the primary objective of the law in encouraging or discouraging certain kinds of behavior and its merely ancillary sanction or remedial steps, can we give sense to the notion of a crime or offence.

It is important however to stress the fact that in thus identifying the immediate aims of the criminal law we have not reached the stage of justification. There are indeed many forms of undesirable behaviour which it would be foolish because ineffective or too costly to attempt to inhibit by use of the law and some of these may be better left to educators, trades unions, churches, marriage guidance councils, or other non-legal agencies. Conversely there are some forms of conduct which we believe cannot be effectively inhibited without use of the law. But it is only too plain that in fact the law may make activities criminal which it is morally important to promote and the suppression of these may be quite unjustifiable. Yet confusion between the simple immediate aim of any criminal legislation and the justification of punishment seems to be the most charitable explanation of the claim that punishment is justified as an "emphatic denunciation by the community of a crime." Lord Denning's[9] dictum that this is the ultimate justification of punishment can be saved from Mr. Benn's criticism, noted above, only if it is treated as a blurred statement of the truth that the aim not of punishment, but of criminal legislation is indeed to denounce certain types of conduct as something not to be practised. Conversely the immediate aim of criminal legislation cannot be any of the things which are usually mentioned as justifying punishment: for until it is settled what conduct is to be legally denounced and discouraged we have not settled from what we are to *deter* people, or who are to be considered *criminals* from whom we are to exact *retribution*, or on whom we are to wreak *vengeance*, or whom we are to *reform*.

Even those who look upon human law as a mere instrument for enforcing "morality as such" (itself conceived as the law of God or Nature) and who at the stage of justifying punishment wish to appeal not to socially beneficial consequences but simply to the

intrinsic value of inflicting suffering on wrongdoers who have disturbed by their offence the moral order, would not deny that the aim of criminal legislation is to set up types of behaviour (in this case conformity with a pre-existing moral law) as legal standards of behaviour and to secure conformity with them. No doubt in all communities certain moral offences, *e.g.*, killing, will always be selected for suppression as crimes and it is conceivable that this may be done not to protect human beings from being killed but to save the potential murderer from sin; but it would be paradoxical to look upon the law as designed not to prevent murder at all (even conceived as sin rather than harm) but simply to extract the penalty from the murderer.

(c) General Justifying Aim

I shall not here criticise the intelligibility or consistency or adequacy of these theories that are united in denying that the practice of a system of punishment is justified by its beneficial consequences and claim instead that the main justification of the practice lies in the fact that when breach of the law involves moral guilt the application to the offender of the pain of punishment is itself a thing of value. A great variety of claims of this character designating 'Retribution' or 'Expiation' or 'Reprobation' as the justifying aim, fall in spite of differences under this rough general description. Though in fact I agree with Mr. Benn[10] in thinking that these all either avoid the question of justification altogether or are in spite of their protestations disguised forms of Utilitarianism, I shall assume that Retribution, defined simply as the application of the pains of punishment to an offender who is morally guilty, may figure among the conceivable justifying aims of a system of punishment. Here I shall merely insist that it is one thing to use the word Retribution *at this point* in an account of the principle of punishment in order to designate the General Justifying Aim of the system, and quite another to use it to secure that to the question "To whom may punishment be applied?" (the question of Distribution) the answer given is "Only to an offender for an offence." Failure to distinguish Retribution as a General Justifying Aim from retribution as the simple insistence that only those who have broken the law—and voluntarily broken it—may be punished may be traced in many

writers even perhaps in Mr. J. D. Mabbott's[11] otherwise most illuminating essay. We shall distinguish the latter from Retribution in General Aim as "retribution in Distribution." Much confusing shadow-fighting between Utilitarians and their opponents may be avoided if it is recognized that it is perfectly consistent to assert *both* that the General Justifying Aim of the practice of punishment is its beneficial consequences and that the pursuit of this general aim should be qualified or restricted out of deference to principles of Distribution which require that punishment should be only of an offender for an offence. Conversely it does not in the least follow from the admission of the latter principle of retribution in Distribution that the General Justifying Aim of punishment is Retribution though of course Retribution in General Aim entails retribution in Distribution.

We shall consider later the principles of justice lying at the root of retribution in Distribution. Meanwhile it is worth observing that both the most old fashioned Retributionist (in General Aim) and the most modern sceptic often make the same and, I think, wholly mistaken assumption that sense can only be made of the restrictive principle that punishment be applied only to an offender for an offence if the General Justifying Aim of the practice of punishment is Retribution. The sceptic consequently imputes to all systems of punishment (when they are restricted by the principle of retribution in Distribution) all the irrationality he finds in the idea of Retribution as a General Justifying Aim; conversely the advocates of the latter think the admission of retribution in Distribution is a refutation of the utilitarian claim that the social consequences of punishment are its Justifying Aim.

The most general lesson to be learnt from this extends beyond the topic of punishment. It is, that in relation to any social institution, after stating what general aim or value its maintenance fosters we should enquire whether there are any and if so what principles limiting the unqualified pursuit of that aim or value. Just because the pursuit of any single social aim always has its restrictive qualifier our main social institutions always possess a plurality of features which can only be understood as a compromise between partly discrepant principles. This is true even of relatively minor legal institutions like that of a contract. In general this is designed to enable individuals to give effect to their wishes to create structures of legal

rights and duties and so to change, in certain ways their legal position. Yet at the same time there is need to protect those who in good faith understand a verbal offer made to them to mean what it would ordinarily mean, accept it, and then act on the footing that a valid contract has been concluded. As against them, it would be unfair to allow the other party to say that the words he used in his verbal offer or the interpretation put on them did not express his real wishes or intention. Hence principles of "estoppel" or doctrines of the "objective sense" of a contract are introduced to prevent this and to qualify the principle that the law enforces contracts in order to give effect to the joint wishes of the contracting parties.

(d) Distribution

This as in the case of property has two aspects (i) Liability (Who may be punished?) and (ii) Amount. In this section I shall chiefly be concerned with the first of these.[12]

From the foregoing discussions two things emerge. First, though we may be clear as to what value the practice of punishment is to promote we have still to answer as a question of Distribution "Who may be punished?" Secondly, if in answer to this question we say "only an offender for an offence" this admission of retribution in Distribution is not a principle from which anything follows as to the severity or amount of punishment; in particular it neither licenses nor requires as Retribution in General Aim does more severe punishments than deterrence or other utilitarian criteria would require.

The root question to be considered is however why we attach the moral importance which we do to retribution in Distribution. Here I shall consider the efforts made to show that restriction of punishment to offenders is a simple consequence of whatever principles (Retributive or Utilitarian) constitute the Justifying Aim of punishment.

The standard example used by philosophers to bring out the importance of retribution in Distribution is that of a wholly innocent person who has not even unintentionally done anything which the law punishes if done intentionally. It is supposed that in order to avert some social catastrophe officials of the system fabricate evi-

dence on which he is charged, tried, convicted, and sent to prison or death. Or it is supposed that without resort to any fraud more persons may be deterred from crime if wives and children of offenders were punished vicariously for their crimes. In some forms this kind of thing may be ruled out by a consistent sufficiently comprehensive utilitarianism.[13] Certainly expedients involving fraud or faked charges might be very difficult to justify on utilitarian grounds. We can of course imagine that a negro might be sent to prison or executed on a false charge of rape in order to avoid widespread lynching of many others; but a *system* which openly empowered authorities to do this kind of thing, even if it succeeded in averting specific evils like lynching, would awaken such apprehension and insecurity that any gain from the exercise of these powers would by any utilitarian calculation be offset by the misery caused by their existence. But official resort to this kind of fraud on a particular occasion in breach of the rules and the subsequent indemnification of the officials responsible might save many lives and so be thought to yield a clear surplus of value. Certainly vicarious punishment of an offender's family might do so and legal systems have occasionally though exceptionally resorted to this. An example of it is the Roman *Lex Quisquis* providing for the punishment of the children of those guilty of *majestas*.[14] In extreme cases many might still think it right to resort to these expedients but we should do so with the sense of sacrificing an important principle. We should be conscious of choosing the lesser of two evils, and this would be inexplicable if the principle sacrificed to utility were itself only a requirement of utility.

Similarly the moral importance of the restriction of punishment to the offender cannot be explained as merely a consequence of the principle that the General Justifying Aim is Retribution for immorality involved in breaking the law. Retribution in the Distribution of punishment has a value quite independent of Retribution as Justifying Aim. This is shown by the fact that we attach importance to the restrictive principle that only offenders may be punished even where breach of this law might not be thought immoral: indeed even where the laws themselves are hideously immoral as in Nazi Germany, *e.g.*, forbidding activities (helping the sick or destitute of some racial group) which might be thought morally obligatory, the

absence of the principle restricting punishment to the offender would be a further *special* iniquity; whereas admission of this principle would represent some residual respect for justice though in the administration of morally bad laws.

III

JUSTIFICATION, EXCUSE AND MITIGATION

WHAT IS MORALLY at stake in the restrictive principle of Distribution cannot, however, be made clear by these external examples of its violation by faked charges or vicarious punishment. To make it clear we must allot to their place the appeals to matters of Justification, Excuse, and Mitigation made in answer to the claim that someone should be punished. The first of these depends on the General Justifying Aim; the last two are different aspects of the principles of Distribution of punishment.

(a) Justification and Excuse

English lawyers once distinguished between 'excusable' homicide (*e.g.*, accidental non-negligent killing) and 'justifiable' homicide (*e.g.*, killing in self-defence or the arrest of a felon) and different legal consequences once attached to these two forms of homicide. To the modern lawyer this distinction has no longer any legal importance: he would simply consider both kinds of homicide to be cases where some element, negative or positive, required in the full definition of criminal homicide (murder or manslaughter) was lacking. But the distinction between these two different ways in which actions may fail to constitute a criminal offence is still of great moral importance. Killing in self-defence is an exception to a general rule making killing punishable; it is admitted because the policy or aims which in general justify the punishment of killing (*e.g.*, protection of human life) do not include cases such as this. In the case of 'justification' what is done is regarded as something which the law does not condemn or even welcomes.[15] But where killing (*e.g.*, accidental) is excused, criminal responsibility is excluded on a different footing. What has been done is something which is deplored, but the psychological state of the agent when he

did it exemplified one or more of a variety of conditions which are held to rule out the public condemnation and punishment of individuals. This is a requirement of fairness or of justice to individuals independent of whatever the General Aim of punishment is, and remains a value whether the laws are good, morally indifferent, or iniquitous.

The most prominent of these excusing conditions are those forms of lack of knowledge which make action unintentional: lack of muscular control which make it involuntary, subjection to gross forms of coercion by threats, and types of mental abnormality, which are believed to render the agent incapable of choice or of carrying out what he has chosen to do. Not all these excusing conditions are admitted by all legal systems for all offenders. Nearly all penal systems make some compromise at this point as we shall see with other principles; but most of them are admitted to some considerable extent in the case of the most serious crimes. Actions done under these excusing conditions are in the misleading terminology of Anglo-American law done without "mens rea";[16] and most people would say of them that they were 'not voluntary' or 'not wholly voluntary.'

(b) Mitigation

Justification and Excuse though different from each other are alike in that if either is made out then conviction and punishment are excluded. In this they differ from the idea of Mitigation which presupposes that someone is convicted and liable to be punished and the question of the severity of his punishment is to be decided. It is therefore relevant to that aspect of Distribution which we have termed Amount. Certainly the severity of punishment is in part determined by the General Justifying Aim. A utilitarian will for example exclude in principle punishments the infliction of which is held to cause more suffering than the offence unchecked, and will hold that if one kind of crime causes greater suffering than another then a greater penalty may be used to repress it. He will also exclude degrees of severity which are useless in the sense that they do no more to secure or maintain a higher level of law-observance or any other valued result than less severe penalties. But in addition to restrictions on the severity of punishment which follow from the

aim of punishing special limitations are imported by the idea of Mitigation. These, like the principle of Distribution restricting liability to punishment to offenders, have a status which is independent of the general Aim. The special features of Mitigation are that a good reason for administering a less severe penalty is made out if the situation or mental state of the convicted criminal is such that he was exposed to an unusual or specially great temptation, or his ability to control his actions is thought to have been impaired or weakened otherwise than by his own action, so that conformity to the law which he has broken was a matter of special difficulty for him as compared with normal persons normally placed.

The special features of the idea of Mitigation are however often concealed by the various legal techniques which make it necessary to distinguish between what may be termed 'informal' and 'formal' Mitigation. In the first case the law fixes a maximum penalty and leaves it to the judge to give such weight as he thinks proper in selecting the punishment to be applied to a particular offender to (among other considerations) mitigating factors. It is here that the barrister makes his 'plea in mitigation.' Sometimes however legal rules provide that the presence of a mitigating factor shall always remove the offence into a separate category carrying a lower maximum penalty. This is 'formal' mitigation and the most prominent example of it is Provocation which in English law is operative only in relation to homicide. It is not a matter of Justification or Excuse for it does not exclude conviction or punishment; but "reduces" the charges from murder to manslaughter and the possible maximum penalty from death to life imprisonment. It is worth stressing that not every provision reducing the maximum penalty can be thought of as "Mitigation": the very peculiar provisions of s. 5 of the Homicide Act 1957 which (*inter alia*) restricted the death penalty to types of murder not including, for example, murder by poisoning, did not in doing this recognise the use of poison as a "mitigating circumstance." Only a reduction of penalty made in view of the individual criminal's special difficulties in keeping the law which he has broken is so conceived.

Though the central cases are distinct enough the border lines between Justification, Excuse, and Mitigation are not. There are many features of conduct which can be and are thought of in more

than one of these ways. Thus, though little is heard of it, duress (coercion by threat of serious harm) is in English law in relation to some crimes an Excuse excluding responsibility. Where it is so treated the conception is that since *B* has committed a crime only because *A* has threatened him with gross violence or other harm, *B*'s action is not the outcome of a 'free' or independent choice; *B* is merely an instrument of *A* who has 'made him do it.' Nonetheless *B* is not an instrument in the same sense that he would have been had he been pushed by *A* against a window and broken it: unless he is literally paralysed by fear of the threat, we may believe that *B* could have refused to comply. If he complies we may say '*coactus voluit*' and treat the situation not as one making it intolerable to punish at all, but as one calling for mitigation of the penalty as gross provocation does. On the other hand if the crime which *A* requires *B* to commit is a petty one compared with the serious harm threatened (*e.g.*, death) by *A* there would be no absurdity in treating *A*'s threat as a Justification for *B*'s conduct though few legal systems overtly do this. If this line is taken coercion merges into the idea of "Necessity"[17] which appears on the margin of most systems of criminal law as an exculpating factor.

In view of the character of modern sceptical doubts about criminal punishment it is worth observing that even in English law the relevance of mental disease to criminal punishment is not always as a matter of Excuse though exclusive concentration on the M'Naghten rules relating to the criminal responsibility of the mentally diseased encourages the belief that it is. Even before the Homicide Act 1957 a statute[18] provided that if a mother murdered her child under the age of 12 months "while the balance of her mind was disturbed" by the processes of birth or lactation she should be guilty only of the felony of infanticide carrying a maximum penalty of life imprisonment. This is to treat mental abnormality as a matter of (formal) Mitigation. Similarly in other cases of homicide the M'Naghten rules relating to certain types of insanity as an Excuse no longer stand alone; now such abnormality of mind as "substantially impaired the mental responsibility"[19] of the accused is a matter of formal mitigation, which like provocation reduces the homicide to the category of manslaughter which does not carry the death penalty.

IV

THE RATIONALE OF EXCUSES

THE ADMISSION OF excusing conditions as a feature of the Distribution of punishment is required by distinct principles of Justice which restrict the extent to which general social aims may be pursued at the cost of individuals. The moral importance attached to these in punishment distinguishes it from other measures which pursue similar aims (*e.g.*, the protection of life, wealth, or property) by methods which like punishment are also often unpleasant to the individuals to whom they are applied, *e.g.*, the detention of persons of hostile origin or association in war time, or of the insane, or the compulsory quarantine of persons suffering from infectious disease. To these we resort to avoid damage of a catastrophic character.

Every penal system in the name of some other social value compromises over the admission of excusing conditions and no system goes as far (particularly in cases of mental disease) as many would wish. But it is important (if we are to avoid a superficial but tempting answer to modern scepticism about the meaning or truth of the statement that a criminal could have kept the law which he has broken) to see that our moral preference for a system which does recognise such excuses cannot, any more than our reluctance to engage in the cruder business of false charges or vicarious punishment, be explained by reference to the General Aim which we take to justify the practice of punishment. Here, too, even where the laws appear to us morally iniquitous or where we are uncertain as to their moral character so that breach of law does not entail moral guilt, punishment of those who break the law unintentionally would be an added wrong and refusal to do this some sign of grace.

Retributionists (in General Aim) have not paid much attention to the rationale of this aspect of punishment; they have usually (wrongly) assumed that it has no status except as a corollary of Retribution in General Aim. But Utilitarians have made strenuous, detailed efforts to show that the restriction on the use of punishment to those who have voluntarily broken the law is explicable on purely utilitarian lines. Bentham's efforts are the most complete, and their failure is an instructive warning to contemporaries.

Bentham's argument was a reply to Blackstone who in expounding the main excusing conditions recognised in the criminal law of his day,[20] claimed that "all the several pleas and excuses which protect the committer of a forbidden act from punishment which is otherwise annexed thereunto reduce to this single consideration: the want or defect of will" . . . . [and to the principle] "that to constitute a crime . . . . there must be first a vitious will." In the Principles of Morals and Legislation[21] under the heading "Cases unmeet for punishment" Bentham sets out a list of the main excusing conditions similar to Blackstone's; he then undertakes to show that the infliction of punishment on those who have done what the law forbids while in any of these conditions "must be inefficacious: it cannot act so as to prevent the mischief." All Blackstone's talk about want or defect of will or lack of a "vitious" will is he says "nothing to the purpose," except so far as it implies the reason (inefficacy of punishment) which he himself gives for recognising these excuses.

Bentham's argument is in fact a spectacular *non-sequitur*. He sets out to prove that to *punish* the mad, the infant child, or those who break the law unintentionally or under duress or even under "necessity" must be inefficacious; but all that he proves (at the most) is the quite different proposition that the *threat* of punishment will be ineffective so far as the class of persons who suffer from these conditions are concerned. Plainly it is possible that the actual *infliction* of punishment on those persons, though (as Bentham says) the *threat* of punishment could not have operated on them, may secure a higher measure of conformity to law on the part of normal persons than is secured by the admission of excusing conditions. If this is so and if Utilitarian principles only were at stake, we should, without any sense that we were sacrificing any principle of value or were choosing the lesser of two evils, drop from the law the restriction on punishment entailed by the admission of excuses; unless, of course, we believed that the terror or insecurity or misery produced by the operation of laws so Draconic was worse than the lower measure of obedience to law secured by the law which admits excuses.

This objection to Bentham's rationale of excuses is not merely a fanciful one. Any increase in the number of conditions required to establish criminal liability increases the opportunity for deceiving

courts or juries by the pretence that some condition is not satisfied. When the condition is a psychological factor the chances of such pretence succeeding are considerable. Quite apart from the provision made for mental disease, the cases where an accused person pleads that he killed in his sleep or accidentally or in some temporary abnormal state of unconsciousness show that deception is certainly feasible. From the Utilitarian point of view this may lead to two sorts of 'losses.' The belief that such deception is feasible may embolden persons who would not otherwise risk punishment to take their chance of deceiving a jury in this way. Secondly, a murderer who actually succeeds in this deception will be left at large, though belonging to the class which the law is concerned to incapacitate. Developments in Anglo-American law since Bentham's day have given more concrete form to the objection to this argument. There are now offences (known as offences of "strict liability") where it is not necessary for conviction to show that the accused either intentionally did what the law forbids or could have avoided doing it by use of care: selling liquor to an intoxicated person, possessing an altered passport, selling adulterated milk[22] are examples out of a range of 'strict liability' offences where it is no defence that the accused did not offend intentionally, or through negligence, *e.g.*, that he was under some mistake against which he had no opportunity to guard. Two things should be noted about them. First, the justification of this form of criminal liability can only be that if proof of intention or lack of care were required guilty persons would escape. Secondly, 'strict liability' is generally viewed with great odium and admitted as an exception to the general rule with the sense that an important principle has been sacrificed to secure a higher measure of conformity and conviction of offenders. Thus Bentham's argument curiously ignores both the two possibilities which have been realised. First, actual punishment of those who act unintentionally or in some other normally excusing condition may have a utilitarian value in its effects on others; and secondly, that when because of this probability, strict liability is admitted and the normal excuses are excluded, this may be done with the sense that some other principle has been overridden.

On this issue modern extended forms of Utilitarianism fare no better than Bentham's whose main criterion here of 'effective' pun-

ishment was deterrence of the offender or of others by example. Sometimes the principle that punishment should be restricted to those who have voluntarily broken the law is defended not as a principle which is rational or morally important in itself but as something so engrained in popular conceptions of justice[23] in certain societies, including our own, that not to recognise it would lead to disturbances, or to the nullification of the criminal law since officials or juries might refuse to cooperate in such a system. Hence to punish in these circumstances would either be impracticable or would create more harm than could possibly be offset by any superior deterrent force gained by such a system. On this footing, a system should admit excuses much as, in order to prevent disorder or lynching, concessions might be made to popular demands for more savage punishment than could be defended on other grounds. Two objections confront this wider pragmatic form of Utilitarianism. The first is the factual observation that even if a system of strict liability for all or very serious crime would be unworkable, a system which admits it on its periphery for relatively minor offences is not only workable but an actuality which we have, though many object to it or admit it with reluctance. The second objection is simply that we do not disassociate ourselves from the principle that it is wrong to punish the hopelessly insane or those who act unintentionally, etc., by treating it as something merely embodied in popular *mores* to which concessions must be made sometimes. We condemn legal systems where they disregard this principle; whereas we try to educate people out of their preference for savage penalties even if we might in extreme cases of threatened disorder concede them.

It is therefore impossible to exhibit the principle by which punishment is excluded for those who act under the excusing conditions merely as a corollary of the general Aim—Retributive or Utilitarian —justifying the practice of punishment. Can anything positive be said about this principle except that it is one to which we attach moral importance as a restriction on the pursuit of any aim we have in punishing?

It is clear that like all principles of Justice it is concerned with the adjustment of claims between a multiplicity of persons. It incorporates the idea that each individual person is to be protected against the claim of the rest for the highest possible measure of

security, happiness, or welfare which could be got at his expense by condemning him for the breach of the rules and punishing him. For this a moral license is required in the form of proof that the person punished broke the law by an action which was the outcome of his free choice, and the recognition of excuses is the most we can do to ensure that the terms of the licence are observed. Here perhaps the elucidation of this restrictive principle should stop. Perhaps we (or I) ought simply to say that it is a requirement of Justice, and Justice simply consists of principles to be observed in adjusting the competing claims of human beings which (i) treat all alike as persons by attaching special significance to human voluntary action and (ii) forbid the use of one human being for the benefit of others except in return for his voluntary actions against them. I confess however to an itch to go further; though what I have to say may not add to these principles of Justice. There are, however, three points which even if they are restatements from different points of view of the principles already stated, may help us to identify what we now think of as values in the practice of punishment and what we may have to reconsider in the light of modern scepticism.

(*a*) We may look upon the principle that punishment must be reserved for voluntary offences from two different points of view. The first is that of the rest of society considered as *harmed* by the offence (either because one of its members has been injured or because the authority of the law essential to its existence has been challenged or both). The principle then appears as one securing that the suffering involved in punishment is a return for the harm done to others: this is valued, not as the Aim of punishment, but as the only fair terms on which the General Aim (protection of society, maintenance of respect for law, etc.) may be pursued.

(*b*) The second point of view is that of society concerned not as harmed by the crime but as *offering* individuals including the criminal the protection of the laws on terms which are fair, because they not only consist of a framework of reciprocal rights and duties, but because within their framework each individual is given a *fair* opportunity to choose between keeping the law required for society's protection or paying the penalty. From the first point of view the actual punishment of a criminal appears not merely as something useful to society (General Aim) but as justly extracted from the criminal as a return for harm done; from the second it appears as a

price justly extracted because the criminal had a fair opportunity beforehand to avoid liability to pay.

(*c*) Criminal punishment as an attempt to secure desired behaviour differs from the manipulative techniques of the Brave New World (conditioning propaganda, etc.) or the simple incapacitation of those with anti-social tendencies by taking a risk. It defers action till harm has been done; its primary operation consists simply in announcing certain standards of behaviour and attaching penalties for deviation, making it less eligible, and then leaving individuals to choose. This is a method of social control which maximises individual freedom within the coercive framework of law in a number of different ways, or perhaps, different senses. First, the individual has an option between obeying or paying. The worse the laws are, the more valuable the possibility of exercising this choice becomes in enabling an individual to decide how he shall live. Secondly, this system not only enables individuals to exercise this choice but increases the power of individuals to identify beforehand periods when the law's punishments will not interfere with them and to plan their lives accordingly. This very obvious point is often overshadowed by the other merits of restricting punishment to offences voluntarily committed, but is worth separate attention. Where punishment is not so restricted individuals will be liable to have their plans frustrated by punishments for what they do unintentionally, in ignorance, by accident or mistake. Such a system of strict liability for all offences, it is logically possible,[24] would not only vastly increase the number of punishments, but would diminish the individual's power to identify beforehand particular periods during which he will be free from them. This is so because we can have very little grounds for confidence that during a particular period we will not do something unintentionally, accidentally, etc.; whereas from their own knowledge of themselves many can say with justified confidence that for some period ahead they are not likely to engage intentionally in crime and can plan their lives from point to point in confidence that they will be left free during that period. Of course the confidence justified does not amount to certainty though drawn from knowledge of ourselves. My confidence that I will not during the next twelve months intentionally engage in any crime and will be free from punishment, may turn out to be misplaced; but it is both greater and better justified than my belief

that I will not do unintentionally any of the things which our system punishes if done intentionally.

V

REFORM AND THE INDIVIDUALIZATION OF PUNISHMENT

THE IDEA OF Mitigation incorporates the conviction that though the amount or severity of punishment is primarily to be determined by reference to the General Aim, yet Justice requires that those who have special difficulties to face in keeping the law which they have broken should be punished less. Principles of Justice however are also widely taken to bear on the amount of punishment in at least two further ways. The first is the somewhat hazy requirement that 'like cases be treated alike.' This is certainly felt to be infringed at least when the ground for different punishment for those guilty of the same crime is neither some personal characteristic of the offender connected with the commission of the crime nor the effect of punishment on him. If because at a given time a certain offence is specially prevalent a Judge passes a heavier sentence than on previous offenders ("as a warning") some sacrifice of justice to the safety of society is involved though it is often acceptable to many as the lesser of two evils.

The further principle that different kinds of offence of different gravity (however that is assessed) should not be punished with equal severity is one which like other principles of Distribution may qualify the pursuit of our General Aim and is not deducible from it. Long sentences of imprisonment might effectually stamp out car parking offences, yet we think it wrong to employ them; *not* because there is for each crime a penalty 'naturally' fitted to its degree of iniquity (as some Retributionists in General Aim might think); nor because we are convinced that the misery caused by such sentences (which might indeed be slight because they would need to be rarely applied) would be greater than that caused by the offences unchecked (as a Utilitarian might argue). The guiding principle is that of a proportion within a system of penalties between those imposed for different offences where these have a distinct place in a common-sense scale of gravity. This scale itself no doubt consists of

very broad judgments both of relative moral iniquity and harmfulness of different types of offence: it draws rough distinctions like that between parking offences and homicide, or between 'mercy killing' and murder for gain, but cannot cope with any precise assessment of an individual's wickedness in committing a crime. (Who can?) Yet maintenance of proportion of this kind may be important: for where the legal gradation of crimes expressed in the relative severity of penalties diverges sharply from this rough scale, there is a risk of either confusing common morality or flouting it and bringing the law into contempt.

The ideals of Reform and Individualization of punishment (*e.g.*, corrective training, preventive detention) which have been increasingly accepted in English penal practice since 1900 plainly run counter to the second if not to both of these principles of Justice or proportion. Some fear, and others hope, that the further intrusion of these ideals will end with the substitution of "treatment" by experts for judicial punishment. It is, however, important to see precisely what the relation of Reform to punishment is because its advocates too often mis-state it. 'Reform' as an objective is no doubt very vague; it now embraces any strengthening of the offender's disposition and capacity to keep within the law which is intentionally brought about by human effort otherwise than through fear of punishment. Reforming methods include the inducement of states of repentance or recognition of moral guilt or greater awareness of the character and demands of society, the provision of education in a broad sense, vocational training, and psychological treatment. Many seeing the futility and indeed harmful character of much traditional punishment speak as if Reform could and should be the General Aim of the whole practice of punishment or the dominant objective of the criminal law:

> The corrective theory based upon a conception of multiple causation and curative rehabilitative treatment should clearly predominate in legislation and in judicial and administrative practices.[25]

Of course this is a possible ideal but is not an ideal for punishment. Reform can only have a place within a system of punishment as an exploitation of the opportunities presented by the conviction or compulsory detention of offenders. It is not an alternative General Justifying Aim of the practice of punishment but something the

pursuit of which within a system of punishment qualifies or displaces altogether recourse to principles of justice or proportion in determining the amount of punishment. This is where both Reform and individualized punishment have run counter to the customary morality of punishment.

There is indeed a paradox in asserting that Reform should "predominate" in a system of Criminal Law, as if the main purpose of providing punishment for murder was to reform the murderer not to prevent murder; and the paradox is greater where the legal offence is not a serious moral one: *e.g.*, infringing a state monopoly of transport. The objection to assigning to Reform this place in punishment is not merely that punishment entails suffering and Reform does not; but that Reform is essentially a remedial step for which *ex hypothesi* there is an opportunity only at the point where the criminal law has failed in its primary task of securing society from the evil which breach of the law involves. Society is divisible at any moment into two classes: (i) those who have actually broken a given law and (ii) those who have not yet broken it but may. To take Reform as the dominant objective would be to forgo the hope of influencing the second and—in relation to the more serious offences—numerically much greater class. We should thus subordinate the prevention of first offences to the prevention of recidivism.

Consideration of what conditions or beliefs would make this appear a reasonable policy brings us to the topic to which this paper is a mere prolegomenon: modern sceptical doubt about the whole institution of punishment. If we believed that nothing was achieved by announcing penalties or by the example of their infliction either because those who do not commit crimes would not commit them in any event or because the penalties announced or inflicted on others are not among the factors which influence them in keeping the law then some dramatic change concentrating wholly on actual offenders would be necessary. Just because at present we do not entirely believe this we have a dilemma and an uneasy compromise. Penalties which we believe are required as a threat to maintain conformity to law at its maximum may convert the offender to whom they are applied into a hardened enemy of society; while the use of measures of Reform may lower the efficacy and example of punishment on others. At present we compromise on this relatively new aspect of punishment as we do over its main elements. What makes

this compromise seem tolerable is the belief that the influence which the threat and example of punishment exerts is often independent of the severity of the punishment and is due more to the disgrace attached to conviction for crime and to the deprivation of freedom which many reforming measures at present used, would in any case involve.

NOTES

1. See Barbara Wootton *Social Science and Social Pathology* for a clear and most comprehensive modern statement of these doubts.

2. In the Lords' debate in July 1956 the Lord Chancellor agreed with Lord Denning that "the ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation of the committing of a crime" yet also said that "the real crux of the question at issue is whether capital punishment is a uniquely effective deterrent." See 198 *H. L. Deb* (5th July) 576, 577, 596 (1956). In his article "An Approach to the Problems of Punishment" (*Philosophy*, 1958) Mr. S. L. Benn rightly observes of Lord Denning's view that denunciation does not imply the deliberate imposition of suffering which is the feature needing justification (325 n.1).

3. Chapter IV.

4. K. Baier, "Is Punishment Retributive?" *Analysis*, March 16, p. 26 (1955). A Flew, "The Justification of Punishment," *Philosophy*, 1954, pp. 291–307. S. I. Benn, *op. cit.* pp. 325–326.

5. Ewing, *The Morality of Punishment*, D. J. B. Hawkins, *Punishment and Moral Responsibility** (The Kings Good Servant, p. 92), J. D. Mabbott, "Punishment."* *Mind*, 1939, p. 153.

6. Mr. Benn seemed to succumb at times to the temptation to give "The short answer to the critics of utilitarian theories of punishment—that they are theories of *punishment* not of any sort of technique involving suffering" (*op. cit.* p. 322). He has since told me that he does not now rely on the definitional stop.

7. This generally clear distinction may be blurred. Taxes may be imposed to discourage the activities taxed though the law does not announce this as it does when it makes them criminal. Conversely fines payable for some criminal offences because of a depreciation of currency became so small that they are cheerfully paid and offences are frequent. They are then felt to be mere taxes because the sense is lost that the rule is meant to be taken seriously as a standard of behavior.

* Also reprinted in this volume.

8. Cf. Kelsen, *General Theory of Law and State*, 30–3, 33–34, 143–144 (1946). "Law is the primary norm which stipulates the sanction. . . . " (*id.* 61)

9. In evidence to the Royal Commission on Capital Punishment, Cmd. 8932. § 53 (1953). Supra, n.2.

10. *Op. cit.*, pp. 326–335.

11. *Op. cit.* It is not always quite clear what he considers a "retributive" theory to be.

12. Amount is considered below in Section III (in connexion with Mitigation) and Section V.

13. See J. Rawls, "Two Concepts of Rules," *Philosophical Review*, 1955, pp. 4–13.

14. Constitution of emperors Arcadius and Honorius.

15. In 1811 Mr. Purcell of Co. Cork, a septuagenarian, was knighted for killing four burglars with a carving knife. Kenny, *Outlines of Criminal Law*, 5th Ed., p. 103, n.3.

16. Misleading because it suggests moral guilt is a necessary condition of criminal responsibility.

17. *i.e.*, when breaking the law is held justified as the lesser of two evils.

18. Infanticide Act, 1938.

19. Homicide Act, 1957, sec. 2.

20. *Commentaries*, Book IV, Chap. 11.

21. Chap. XIII.

22. See Glanville Williams, *The Criminal Law*, Chap. 7, p. 238, for a discussion of and protest against strict liability.

23. Weschler and Michael, "A Rationale of the Law of Homicide," 37 *Columbia Law Review*, 701, esp. pp. 752–757, and Rawls, *op. cit.*

24. Some crimes, e.g., demanding money by menaces, cannot (logically) be committed unintentionally.

25. Hall and Glueck, *Cases on Criminal Law and its Enforcement*, 8 (1951).

JEROME HALL

The Purposes of a System for the Administration of Criminal Justice

"CRIMINAL LAW" in English-speaking countries refers primarily to the common law of crimes, and the fact that much of it has been enacted into legislation has not altered its paramount significance. This law, as is well known, has its roots in popular custom and belief and it extends rather definitely from the beginning of the thirteenth century to the present one. If the origin of the professional literature may be conveniently located in the work of Bracton, we also have an unbroken line of thoughtful analysis and scholarship in the criminal law from that brilliant century to our own times.

It is also clear that while many changes have been made, for example, by the invention of the offenses comprising "theft," changes in punishment, especially in the latter eighteenth and early nineteenth centuries,[1] and the rise in this century of probation, parole, presentence hearings and so on, there has also persisted a core of ethical principle in the criminal law which was progressively refined as knowledge advanced. It is expressed in an organized set of ideas; and this system of criminal law,[2] no less than that of the physical sciences, is evidence of a high order of imagination and rationality. Man is distinguished not only by such conceptual thought and reasoning but also by language, by a body of knowledge and the invention of instruments to apply it, by artistry and, last, though

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