

ESTUPPEL  
p 53

# On Guilt and Innocence

*Essays in Legal Philosophy  
and Moral Psychology*

Herbert Morris

UNIVERSITY OF CALIFORNIA PRESS

Berkeley • Los Angeles • London

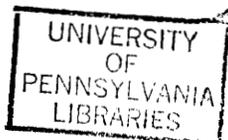
BJ  
1471.5  
M674

University of California Press  
Berkeley and Los Angeles, California

University of California Press, Ltd.  
London, England

Copyright © 1976 by  
The Regents of the University of California

ISBN: 0-520-02349-8  
Library of Congress Catalog Card Number: 72-89789  
Printed in the United States of America



# Contents

M. H.

M

C94745

Preface	vii
1 Punishment for Thoughts	1
2 Persons and Punishment	31
Guilt and Shame	59
Thomas Szasz and <i>The Manufacture of Madness</i>	64
Herbert Fingarette and <i>The Meaning of Criminal Insanity</i>	74
3 Guilt and Suffering	89
4 Shared Guilt	111
5 Lost Innocence	139

## 2 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 Lester Maddox

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 Traps 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

---

Reprinted from *The Monist* (October 1968).

conditions, 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 it 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 punishment 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, additional 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 of 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 in 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.<sup>1</sup>

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 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 non-compliance.

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 agreements 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 to 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, 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 defend 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, abdication, 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 "property 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 forbear 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 the 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

1. No miss an opportunity here - it is the slapper who waives his right to complain.



Escalate



perhaps this is a post-hoc consent?

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.

? why?

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 this will 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.

? no



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 as 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 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 surely 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 noninterference. In a system of rights, on the other hand, there is a point in 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.

## NOTE

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

B. F. Skinner, *Science and Human Behavior* (New York: Macmillan Co., 1953), pp. 115-116: "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."

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

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

## GUILT AND SHAME

There is another way of thinking about and responding to individuals that one may find more appealing and rational than the world of guilt and a way which comes closer to what we understand by morality than the world of health and sickness. It is, however, a world devoid of moral criticism and punishment and associated moral emotions of indignation and resentment and guilt. Let us imagine set before us a description of a path to be followed. We can imagine this done by descriptions such as "the thing that is done is" or, alternatively, but to the same end, employing the concept of a model man, actual or imagined, and indicating that he manifests in his life attachment to the path. Here, when there is conduct that is not that of the path, the responses we are to imagine are those that follow upon a student's failing to work out a problem or failing to grasp a point. Invoked, that is, are the concepts of blindness, ignorance, stupidity, forgetfulness, weakness. One who fails to solve a puzzle may simply be disturbed with himself but he does not for this reason alone view his conduct as wrong. Not moving along the path is not yet knowing it or knowing it and forgetting it or knowing it and nevertheless stumbling. This world is one in which it would be natural to respond with patience, with understanding, with reminders as to how the answer is to be found. I am tempted to say that this world is analogous to that of the psychoanalyst and his analysand. What is the path? What defeats one's getting onto it? And then there are the constant reminders of the seductive byways and self-imposed blindnesses, all with the goal of aiding the person to achieve the right path, but none of it clouded with moral judgment. To be sure it is within the capacity of the individual to get on the right track, but if he is not, it is not because he has chosen to do evil. It is that he is ignorant or blind or something like that. Collapsed here, then, are the distinctions we observe between moral good and evil and men choosing the one or the other and our knowing or not knowing how to achieve

---

Excerpted from the article "Guilt and Punishment," in *The Personalist*, vol. 52, no. 2 (Spring 1971).