

Perspectives on Punishment

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The two great theories justifying punishment, retributivism and utilitarianism, have undergone noticeable modification and even rapprochement in the last two decades. Even so, they reflect fundamentally different attitudes so that in the last analysis one or the other theory is seen as predominant. At least in the writings of Quinton, Rawls, and Benn, the utilitarian theory is the ultimate reason for having an institution of punishment in society.¹ Herbert Morris has not only presented a forceful restatement of the retributive theory, but has argued for our right to be punished.² One alternative theory, which might be called the "symbolic" or "expressive" theory of punishment, has been proposed by Feinberg.³ Whatever else punishment is, says Feinberg, it is "a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation" by social authority.⁴ Each of these theories has a persuasive element which corresponds to a desire in enlightened societies to understand a social phenomenon, namely crime and the reaction to it, and, by understanding it, control it. Nevertheless, both classic theories rest, I believe, on a narrow and abstract conception of society, value, and justice. Feinberg has opened an interesting line of thinking which is worth pursuing. After exploring what I consider the essential concepts and limitations of the retributive and utilitarian models, I will sketch out elements of a "transactional" model based on a pragmatic theory of meaning and action.

Let us first take a summary view of the retributive theory, by far the oldest, and then inspect Morris' notion of our right to be punished. There are two phases of the retributive theory. The first is simply an idea of justice as the restoration of the status quo which keeps the society in balance. The second phase is a refinement of the first in which the concepts of personhood, choice, and guilt are central. While the former is traceable to the *lex talionis* ("you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe"—Ex. 21: 23-25), the latter is traceable to Christian theology and Enlightenment political theory. The views combine to form an essentially static, mechanical conception of justice as a moral equilibrium which falls out of balance due to a perverse use of one's free will.

Immanuel Kant is perhaps the most impressive philosopher to provide rationalization for the noble sentiment of an eye for an eye. The principle of

punishment, he says, is "None other than the principle of equality." In treating all parties as equals, says Kant, "Accordingly and undeserved evil that you inflict on someone else among the people is one that you do to yourself."⁵ The criminal, in short, wills the punishment when he wills the crime, for he wills the action to become universal. Punishment, in this vein, can be seen as a lesson in moral logic. Kant is quite adamant that only the *jus talionis* can restore the balance by determining "exactly the kind and degree of punishment"; any other considerations only cause judgments to "fluctuate back and forth" and end up with sentences incompatible with "pure strict legal justice." We then see Kant criticize Beccaris, the Italian legal theorist and criminologist who effectively removed torture from prisons, for "sympathetic sentimentality and an affectation of humanitarianism." Kant also undertakes to debate whether unwed pregnant women who have abortions merit death (though they may deserve death morally, legally they are in the state of nature he concludes).

I think this clearly indicates the problem with retributivism, namely, that it strives to perform moral mathematics which restores a balance in a social equation. But the whole notion of "equality" is notoriously imprecise. Historically, in most societies, not all people are absolutely equal. In ancient Babylon, a gentleman's transgression of a law against a propertyless freeman is settled with a fine; if the case is reversed, death is merited. Injury or death to women can be resolved with a fine; adultery means stoning. There is an unquestioned problem with the whole notion of why putting out *my* eye is exactly equal to putting out *your* eye. I am never you, and never can any effort at retribution change that. The speciousness of this notion of equality becomes more evident as societies move away from literal retribution to equating forms of punishment with certain crimes; after all, we no longer put out people's eyes or smash their cars when they smash ours. How do we determine exactly what degree and kind of punishment is equal to what degree and kind of crime? The problem moves from translating dollars into francs to translating dollars into happiness. To the extent that the punishing authority makes a mistake, he too has committed injustice and merits retribution. We can easily sympathize with Shakespeare's humanitarian Portia (whom Kant would call sentimental), when she awards Shylock his pound of flesh, but "no jot of blood," and warns him that if he is over or under his exact pound by "the division of the twentieth part" so the scale tips "in the estimation of a hair" he shall die. The quality of mercy is not strained in our imperfect human world, and our values are not mapped out on a grid.

Putting aside these "sentimental" questions, let us ask plainly why is the notion of equality *per se* any justification at all? Unless we are believers in some strange mathematical religion, equality carries no moral authority as a purely abstract idea. There may be equality of opportunity or equality of rights, but here equality is not

the justifying concept. Rather, it is the ideal of a society which values the realization of individual talent and determines its policies, leaders, and legal procedures apart from considerations of wealth, birth, and fame. There is, in short, an ideal of human life which gives meaning and value to that society, and "equality" is an instrumental concept in this ideal.

Equality, as expressed by the *lex talionis*, is simply a device for a covert perpetuation of the status quo of society under the guise of being a "balancing" of the social credits and debits. "Justice" means "the way things are" and "punishment" means "setting things back to they ought to be." Equality does not mean we are all worth the same, are given the same opportunities, or get even the same treatment; it means the maintenance of a number of social functions which give the society cohesion, structure and value. George Herbert Mead has effectively shown how our hostility toward the criminal stems less from the specific act than from the fact that he has threatened a whole system of conventional values, attacked "the social self," as it were.⁶ The original meaning of Apollo's maxim, "Know Thyself," meant, after all, "Know Your Place." It is not a "sentimental" question, then, to ask why, if my eye is put out, yours should be too; the whole world ends up bling. As Karl Meninger says, "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."⁷ We should recall that Plato also argued against Polemarchus that justice meant exchanging harm for harm, giving each his "due." Justice, says Socrates, returns good for evil and seeks to improve men; it cannot by its practice make men worse.⁸

This criticism has ignored what is perhaps the strongest claim of the retribution theory, namely, that it alone is interested in treating persons as persons, i.e. as responsible beings who merit punishment only when they are guilty. As F.H. Bradley puts it, "Punishment is punishment, only where it is deserved. We pay the penalty, because we owe it, and for no other reason; and if punishment is inflicted for any other reason whatever than because it is merited by wrong, it is a gross immorality, a crying injustice, and abominable crime, and not what it pretends to be."⁹ I "deserve" punishment because I am "guilty" of "criminal" action, that is, of "wrong." Punishment denies of the criminal," says Bradley: "his self is a wrongful self."¹⁰ To put it in his pithy phrase, "punishment is inflicted for the sake of punishment." At least Bradley is clear about where he stands vis a vis Plato: "justice implies giving what is due."¹¹

The advantages of this position have been extremely well outlined by Herbert Morris in his article, "Persons and Punishment."¹² Morris begins by recounting Durrenmatt's tale of Alfredo Traps, a man who committed an ingenious murder. At the trial, the prosecution demands the death penalty for what is described as a crime meriting "admiration, astonishment, and respect." Traps own attorney

argues that Traps could not be guilty being a mere pawn of society, "a victim of the age." Traps is incensed, outraged, claims the murder as his, and demands the sentence.¹³ One obvious objection to the notion that we not only have a right to punish but to be punished, observes Morris, is that a right involves being able to make a claim and exercise choice: who, besides Alfredo Traps, would wish to pursue his right to punishment? For Morris, our right to be punished is contrasted with our being subjected to treatment or therapy. If one regards criminals as "sick," one does not regard them as morally responsible, i.e. as guilty; they have not exercised choice, but have "suffered"; they do not "pay their debt to society" for what they have done, but received the benefit of treatment to prevent further "happenings"; their "cure" is not proportionate to their deed, but to how long it may take to heal them. To regard someone as a person is one thing; to regard him as a sick organism is entirely different. "A person has a right to institutions that respect his choices," argues Morris, "Our punishment system does; our therapy system does not."¹⁴ To treat something as an object is precisely to determine our attitudes toward it simply by our choices with disregard or indifference to its, if it has any. Now, says Morris, we all have a right to be treated as persons, and this right is inalienable, natural, and fundamental. To deny this right entails the denial of all moral rights, including ironically, our right to treatment. Our right to be punished simply reflects our right to be treated as persons, not things.

In Morris' discussion a number of familiar concepts make their appearance. Punishment is but the act of the criminal bringing the consequence upon himself; at least, in choosing the crime "in a system of punishment...a person chooses the punishment that is meted out to him."¹⁵ This is because in society we all assume the burden to respect each others rights--society is a system "in which the rules establish a mutuality of benefit and burden"¹⁶--and those who bear the burden must have some assurance violators, i.e. those who shed their burdens for "unfair" benefits, will be forced back into the "deal" of the "social contract."¹⁷ Punishment is thus "reasonable and just," because the criminal has sought to "redistribute" the system of benefits and burdens. "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."¹⁸ With Polemarchus, Morris says, "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."¹⁹ This means primarily our right to be treated as persons. What are persons? Persons are beings with rights and duties capable of morally choosing to act or not to act in accordance with those rights and duties. A system of rights depends, says Morris, "on the free choices of individuals"; more explicitly, "Implied, then, in any conception of rights are the existence of individuals capable of choosing on the basis of consideration with respect to rules."²⁰ So here we are with the old features of retributivism: the notion of society as an "equilibrium," justice as the maintenance

of that equilibrium, "crime" as the upsetting of that balance due to the "free" actions of a moral will which has reneged on the original commitment to a social contract.

I think that Morris' position is open to a number of criticisms. First, Morris' view could lead to the absurd consequence of rejecting any form of treatment. One can imagine a system where instead of receiving medical treatment for wounds or disease, one received blame or punishment for them due to a belief that these are God's ways of punishing thoughts. One could see that Morris' argument would endorse such a view, for this treats individuals as voluntary agents and persons rather than suffering biological organisms. One could push this even further to Dostoyevsky's guilt-hysterical claim that we are responsible for everything. This weakness is due to the vagaries of the notion of free will which underlies Morris' conception of persons. Rarely is criminal action the result of a purely abstract decision not to follow a rule, i.e. as due to an evil will or wrongful self. Second, there is a flaw with Morris' idea that we are all willing members in an equitable system of benefits and burdens. Most criminals do not see society in this manner; instead they see it as a very unequal system of benefits and burdens with the rules made by those in power for their own self-interest. Most people follow rules because they've been suckered, but anyone who has wised up will get what he can.²¹ If asked, a criminal might well say that *he* didn't put his name on the social contract, someone else did who was not looking out for his best self-interest. Justice and punishment do not then have the meaning of righting wrongs; they are society's attempt to get back at the criminal, to return harm for harm. Strangely, frequently the criminal regards such action as justifiable, just as a soldier in combat might acknowledge the enemy's right to shoot back. The criminal, in short, is likely to buy the retributive theory in some of its aspects. First, he generally sees himself as responsible for his actions, as someone deserving some respect and rights for being a person, and as meriting punishment. In other words, the retributive model offers the criminal the most popular explanation or reason for what is happening to him: he is being punished for what he did and this society's right for his breaking the law. Unfortunately, I should hasten to add, the harsh and arbitrary features of our penal system usually convince the inmate that justice and retribution are different and the current system is immoral. While the retributive model does try to account for human actions as events which have meaning and value, as "moral," it fails by its theoretical limitations, abstract view of moral action, and covert endorsement of a questionable status quo.

Let us briefly turn to the utilitarian model. While the retributive model looks at the past deed and ignores consequences *ruat coelum*, the utilitarian looks steadfastly at the future carefully striving for the greatest good for the greatest number. As Rawls phrases it, "bygones are bygones" and "punishment is justifiable only by reference to the probable consequences of maintaining it as one of the

devices of the social order" or "to promote effectively the interest of society."²² If the retributive theory was committed to the idea of society as a static balance, the utilitarian theory is expressly designed to be progressive and reformatory. Whatever value the individual may have qua individual is overridden by the arithmetically greater value of total good for society as a whole. To be sure, "rule utilitarians" argue that a strict system of individual rights is in society's best interest, but also that this interest is the only possible justification for them. As Benn says, "Appeals to authority apart, we can provide ultimate justification for rules and institutions only by showing that they yield advantages."²³ We are familiar with the traditional criticisms of utilitarianism, the punishment of the innocent, excessive punishment for trivial offenses, the possibility of public torture and degradation, the speciousness of the hedonistic calculus, and so on. These are all claims that rule utilitarians have effectively met, since they are criticisms of undesirable consequences. What the utilitarian cannot say is that they are wrong in and of themselves because they violate the rights of persons based on their intrinsic moral worth.

Perhaps the worst tyranny is to be subjected to someone else's idea of what is good. One recalls the horrors of the first Quaker "Penitentiaries" (they gave us the name), set up with the noblest of intentions. The penitent was to be morally transformed by a sentence of solitary confinement with a Bible; most went insane. Even Bentham's Panopticon, progressive as it was for the time, is the image of man transformed into machine, overwhelmed by a total system.²⁵ The systems that came after weren't much better, like Auburn or Sing Sing: narrow, bare confinement, repetitious work, isolation, rules of total silence, flogging. Today we see the effects of the therapy model in the institution of indeterminate sentencing in which the inmate's release to freedom is contingent on a briefly assessed judgment of his moral reform. The result is a contempt by the inmate for society's general welfare as well as for its self-professed ability to improve him.²⁶ The appropriate response of the utilitarian to these examples is that they are unsuccessful attempts to implement an ideal, and are criticizable from the standpoint of the ideal. But what of the ideal? What is "social utility" and who determines it? The hazy appeals to "social interest" or "advantages" or "happiness" may justify "rules" in the abstract, but are too imprecise to justify any system of rules in particular. How do we know what is in society's best self-interest? Can't society be mistaken about its own good? The utilitarian, in short, is open to all the arguments Plato makes against Thrasymachus because he conceives of justice as an advantage of the stronger, the majority, in their own self-interest, whatever that may be.

Quinton, Rawls, and Benn all see the retribution model of punishment, that is, punishing an individual because he is guilty of violating a law, as ultimately justified because of the utilitarian theory of society, that is, we have laws in general

because it is in society's self-interest to do so. In answering the particular question, why did Suggs go to jail, we give the retributivists' answer: because he broke the law, he is guilty. In answering the general question, why are there laws, we give the utilitarian's answer: because we'd be worse off without them; they're for the good of society. If we question this last point, we are pointed to the horrors of the state of nature where human life is "solitary, poor, nasty, brutish, and short."²⁷ We are shown a sort of natural Hell, filled with warring individuals seeking strictly private satisfactions. Unfortunately, this counter-example carries about as much moral force as the description of a spiritual Hell does in justifying the ways of God to man. The practical choice for societies is not between having rules and not rules, but is how to formulate ideals, values, meaning, and practices which effectively organize life so that it comes to embody human significance in broader and richer ways. The justification for a system of punishment must be found in the need of a society to endorse a system of values and meanings and to regulate conduct toward that end. Punishment, in short, is the response to a basic tensive situation in society. The question is whether it is an intelligent or fruitful response.

The retributive theory operates with a world-view in which humans are individual responsible agents capable of meaningful action which merits moral evaluation. But it also operates with an essentially static concept of society and justice. We are assumed to be equal; in fact we are assumed to be complete persons. While most of us like to think of ourselves as meaningful, valuing agents, I think it is perverse to regard society or persons as completed entities existing in a safe logical heaven. There is nothing wrong with these ideas as regulative *ideals*, but the issue is how to realize them. The retributive model is inherently static; it does not explore the creative possibilities of the situation.

The utilitarian model fares a little better, but it has played into a mechanical view of human existence. Moreover, it either justifies too much, like punishing the innocent, or too little, merely endorsing having rules of some sort. While the retributive theory regarded humans as wills bound in contractual agreement with each other by moral imperative, the utilitarian sees individuals as factors in the great social equation. While one looks just at the past, the other is committed only to the future. It is the paradox of our being that we must live in both at once.

I propose that a pragmatic or "transactional" (in Dewey's sense) account of action provides a richer and more inclusive basis from which the problem of punishment as a social institution can be analyzed. I can do no more here than sketch out some basic features of such an analysis. First of all, we are creatures who live in an environment of meanings and values as well as a physical environment. We are determined by both and act in both. Second, both past meanings and events and future ones have claims on us, and one problem of life is to effect continuity between our past institutions and our ideals, since both affect who we are and who

we will become. A transactional view tries to see the inclusive situation and determine various actions as arising from functional attempts to deal with the world in a meaningful way. We are not atomic units existing in abstract relationship to other units through a social or moral contract, enveloping us like Newtonian space governing atoms. We are social creatures from the start, coming to develop self-understanding and thus meaning and value, through our interaction within the specific context of an historical society. Punishment arises for a number of different reasons; one merely has to reflect on Oedipus to see that one time punishment was the community ridding itself of pollution. If punishment has any general feature, though, it is an attempt on the part of society to express a commitment to certain values and meanings which are regarded as essential for that society to be. It is a significant gesture, to use Mead's term.

Joel Feinberg has explored this idea to some extent. For him, it is essential to the concept of punishment that it be the symbolic expression of "the community's strong *disapproval* that what the criminal did was wrong." He outlines four basic expressive functions of punishment. It disavows the act officially; it disowns the passive acquiescence of the people by taking action of some sort; it vindicates the law, that is, it shows that the law is meant and in what way; and it absolves those individuals who are not guilty by finding those who are. We often associate punishment with "hard treatment"²⁹ says Feinberg, but the two are as distinct as mourning is from the color black. Hard treatment is our society's way of expressing degrees of disapproval. In a Marine boot camp, individuals wear uniforms, take orders, are restricted, and perform hard labor, but they end up being "the few, the proud, the Marines," not "ex-cons." The treatment becomes a source of pride, not shame. Thus, notes Feinberg, "The problem of justifying punishment...may really be that of justifying our particular symbols of infamy."³⁰ He concludes by showing that what the retributive theory is after with its concepts of "giving some one's due" is not measuring equal pain for equal pain, but equal shame for equal guilt. "What justice demands," he says, "is that the condemnatory aspect of the punishment suit the crime, that the crime be of a kind that is truly worth of reprobation. ...Pain should match guilt only insofar as its infliction is the symbolic vehicle of public condemnation."³¹ It might be possible, he speculates, to have a system of punishment using "elaborate public ritual, exploiting the most trustworthy devices of religion and mystery, music and drama, to express in the most solemn way the community's condemnation of a criminal for his dastardly deed," and eliminate physical punishment altogether.³²

What is missing in Feinberg's account is that it is a view which does not view the expression itself as the attempt to regulate a situation. What a pragmatic attitude would do is to try to look at all the functional features of the situation, its expressive ones, legal ones, consequences for social interest, and also the potentialities or

possibilities of the situation toward greater and more inclusive ways of resolution. While punishment may serve the expressive functions Feinberg describes, these functions themselves are not absolute ends. A community is a moral entity and seeks to express its moral values when those values are threatened. I have no doubt that moral language is essential and effective in achieving this end, to some degree. But just as it is unintelligent to scold and shame a problem child to the point where he develops low self-esteem and rebels, so is it dangerous to see punishment as simply a sort of moral emotivism on a grand social scale. One must also explore why someone does something which is essentially anti-social, and, if possible correct the conditions and help the individual work out his problems. It may be that this cannot be done and the individual must be detained; this would be the admission of failure and a resolution to the most basic sort of problem solving. In a society which values individuals and the intrinsic quality of life, this should be regarded with much the same emotion as one defends oneself against one's own child. Such things happen and they are terrible. Never should they be the paradigms of our moral conduct.

To conclude, punishment is a social gesture which seeks to regulate conduct which threatens the values and meanings fundamental to that society. In a society which values individual freedom and rational responsibility, this leads to law. Because a community is a body of habits, we must respect the past as an active ingredient of the present; we cannot and should not change things overnight. These past meanings and values largely determine what is right; they provide the significant interpretive context for understanding a particular act. The retributive theory acknowledges this feature. But to say that justice is an historical affair is not to condemn us to repeat the past forever. The future also has a claim on us to develop more intelligent responses. Ideals as well as scientific advances serve justice too. Psychological, sociological, political, and philosophical issues have bearing on evaluating criminal acts. In practical matters, a new, better solution is more right than an old one.

On this basis, then, I believe there is a theoretical foundation for evaluating punishment both as a moral and as a socially progressive institution. The prison stands as our society's ultimate attempt to punish. It must pass the tests: does it succeed in regulating conduct by endorsing society's central values and meanings? Does it treat persons as persons? Does it exploit the creative possibilities of the situation? There is a qualified yes and no to each of these questions. Aside from these issues, there is a place for experimental efforts to rehabilitate the inmate through counselling, job training, and education, just as there is a place for prisoners rights and a correctional system rigorously monitored by the public. There is also a place for "community corrections" and the obligation of society to deal with care or compensation for the victims of crime. Just as we acknowledge what a person *may be* as well as what he has been, there is a need to acknowledge

that we are liberated through our ideals of social life as they are practically implemented in the present.

NOTES

1. See A.M. Quinton, "On Punishment" (1954) in Edward Allen Kent, *Law and Philosophy* (New Jersey: Prentice Hall, 1970), pp. 297-304, John Rawls, "Two Concepts of Rules" (1954) in *Philosophy of Law*, ed. Feinberg and Gross (Dickenson Pub. Co, 1975), pp. 556-561, and Stanley I. Benn, "An Approach to the Problems of Punishment," (1958), *op.cit.*, pp. 561-71.
2. Herbert Morris, "Persons and Punishment" in *On Guilt and Innocence* (Berkeley: University of California Press, 1976), pp. 31-59. See Edmond L. Pincoffs, "Classical Retributivism" in Feinberg and Gross, pp. 515-523.
3. Joel Feinberg, "The Expressive Function of Punishment," in *Doing and Deserving* (New Jersey: Princeton Univ. Press, 1970), pp. 95-118.
4. *Ibid.*, p. 98.
5. Immanuel Kant, *The Metaphysical Elements of Justice*, tr. John Ladd (Indianapolis: Bobbs-Merrill Co. Inc., 1975), quoted in Kent, *op.cit.*, p. 287.
6. George Herbert Mead, "The Psychology of Punitive Justice" (1917-1918), in *Selected Writings*, ed. Andrew Reck (Indianapolis: Bobbs-Merrill Co. Inc., 1964), pp. 212-239.
7. Karl Menninger, "Therapy, Not Punishment," cited in Morris, *op. cit.*, p. 58. See his *The Crime of Punishment*.
8. See *Republic* I, 335 d. See also *Crito* and Cairns article, "Plato as Jurist" in Paul Friendlander's *Plato*, Vol I.
9. F.H. Bradley, *Ethical Studies*, second edition (London: Oxford Univ. Press, 1927), pp. 26-27.
10. *Ibid.*, p. 27.
11. *Ibid.*, p. 29.
12. Morris, *op.cit.*
13. *Ibid.*, p. 31.
14. *Ibid.*, p. 41.
15. *Ibid.*, p. 48.
16. *Ibid.*, p. 33.
17. Morris doesn't appeal directly to the idea of a social contract, but it is pretty evident as the background of the rights model. See p. 33.
18. Morris, *op.cit.*, p. 34.
19. *Ibid.*, p. 55.
20. *Ibid.*, pp. 55-56.
21. See John Irwin, *Prisons in Turmoil* (Boston: Little Brown & Co, 1980), Ch. I.
22. Rawls, *op.cit.*, p. 557.
23. Benn, *op.cit.*, p. 562.
24. See Ronald L. Goldfarb and Linda Singer, *After Correction* (New York: Simon and Schuster, 1973), pp. 36-8.
25. See Michel Foucault, *Discipline and Punish*.
26. See Irwin, p. 45.
27. Hobbes, *Leviathan* I:13.
28. Feinberg, *op.cit.*, p. 98.
29. *Ibid.*, p. 116.
30. *Ibid.*, p. 100.
31. *Ibid.*, p. 118.
32. *Ibid.*, pp. 115-16.