an announcement of intention to do to him something mutually understood to be disadvantageous to him. Punishment is sometimes justified on the ground that to fail to punish is to break faith with the offender. It is said that he has a right to be punished, and that not to punish him is not to treat him with due respect as a moral agent responsible for his actions, but as if he could not have helped doing them. This is, however, not a point of view likely to be adopted by a criminal who escapes punishment, and seems to be a somewhat artificial way of looking at the matter, and to ignore the difference between a threat and a promise.

But while the law is not a promise to the criminal, it is a promise to the injured person and his friends, and to society. It promises to the former, in certain cases, compensation, and always the satisfaction of knowing that the offender has not gone scot-free, and it promises to the latter this satisfaction and the degree of protection against further offences which punishment gives. At the same time the whole system of law is a promise to the members of the community that if they do not commit any of the prohibited acts they will not be punished.

Thus to our sense that prima facie the state has a right to punish the guilty, over and above the right which it has, in the last resort, of inflicting injury on any of its members when the public interest sufficiently demands it, there is added the sense that promises should prima facie be kept; and it is the combination of these considerations that accounts for the moral satisfaction that is felt by the community when the guilty are punished, and the moral indignation that is felt when the guilty are not punished, and still more when the innocent are. There may be cases in which the prima facie duty of punishing the guilty, and even that of not punishing the innocent, may have to give way to that of promoting the public interest. But these are not cases of a wider expediency overriding a narrower, but of one prima facie duty being more obligatory than two others different in kind from it and from one another.

H. L. A. Hart

Principles of Punishment *

1. Introductory

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

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

* H. L. A. Hart, "Prolegomenon to the Principles of Punishment," in *Punishment and Responsibility* (Oxford: Clarendon Press, 1968), pp. 1–13. The original version of this essay was the 1959 Inaugural Address to the Aristotelian Society, pub. in *Proc. Arist. Soc.*, 60 (1959–60). Reprinted by permission of the author and the publisher.

cases where a statement of this form is true from those where it is not.[1]

Yet quite apart from the uncertainty engendered by these fundamental doubts, which seem to call in question the accounts given of the efficacy, and the morality of punishment by all the old competing theories, the public utterances of those who conceive themselves to be expounding, as plain men for other plain men, orthodox or common-sense principles (untouched by modern psychological doubts) are uneasy. Their words often sound as if the authors had not fully grasped their meaning or did not intend the words to be taken quite literally. A glance at the parliamentary debates or the *Report of the Royal Commission on Capital Punishment* [2] shows that many are now troubled by the suspicion that the view that there is just one supreme value or objective (e.g. Deterrence, Retribution or Reform) in terms of which *all* questions about the justification of punishment are to be answered, is somehow wrong; yet, from what is said on such occasions no clear account of what the different values or objectives are, or how they fit together in the justification of punishment, can be extracted.[3]

No one expects judges or statesmen occupied in the business of sending people to the gallows or prison, or in making (or unmaking) laws which enable this to be done, to have much time for philosophical discussion of the principles which make it morally tolerable to do these things. A judicial bench is not and should not be a professorial chair. Yet what is said in public debates about punishment by those specially concerned with it as judges or legislators is important. Few are likely to be more circumspect, and if what they say seems, as

1. See Barbara Wootton *Social Science and Social Pathology* (1959) for a comprehensive modern statement of these doubts.
2. (1953) Cmd. 8932.
3. In the Lords' debate in July 1956 the Lord Chancellor agreed with Lord Denning that 'the ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community of a crime' yet also said that 'the real crux' of the question at issue is whether capital punishment is a uniquely effective deterrent. See 198 *H. L. Deb* (5th July) 576, 577, 596 (1956). In his article, 'An Approach to the Problems of Punishment,' *Philosophy* (1958), Mr. S. I. Benn rightly observes of Lord Denning's view that denunciation does not imply the deliberate imposition of suffering which is the feature needing justification (p. 328, n. 1).

it often does, unclear, one-sided and easily refutable by pointing to some aspect of things which they have overlooked, it is likely that in our inherited ways of talking or thinking about punishment there is some persistent drive towards an over-simplification of multiple issues which require separate consideration. To counter this drive what is most needed is *not* the simple admission that instead of a single value or aim (Deterrence, Retribution, Reform or any other) a plurality of different values and aims should be given as a conjunctive answer to some *single* question concerning the justification of punishment. What is needed is the realization that different principles (each of which may in a sense be called a 'justification') are relevant at different points in any morally acceptable account of punishment. What we should look for are answers to a number of different questions such as: What justifies the general practice of punishment? To whom may punishment be applied? How severely may we punish? In dealing with these and other questions concerning punishment we should bear in mind that in this, as in most other social institutions, the pursuit of one aim may be qualified by or provide an opportunity, not to be missed, for the pursuit of others. Till we have developed this sense of the complexity of punishment (and this prolegomenon aims only to do this) we shall be in no fit state to assess the extent to which the whole institution has been eroded by, or needs to be adapted to, new beliefs about the human mind.

2. Justifying Aims and Principles of Distribution

There is, I think, an analogy worth considering between the concept of punishment and that of property. In both cases we have to do with a social institution of which the centrally important form is a structure of *legal* rules, even if it would be dogmatic to deny the names of punishment or property to the similar though more rudimentary rule-regulated practices within groups such as a family, or a school, or in customary societies whose customs may lack some of the standard or salient features of law (e.g. legislation, organized sanctions, courts). In both cases we are confronted by a complex institution presenting different inter-related features calling for separate explanation; or, if

the morality of the institution is challenged, for separate justification. In both cases failure to distinguish separate questions or attempting to answer them all by reference to a single principle ends in confusion. Thus in the case of property we should distinguish between the question of the *definition* of property, the question why and in what circumstance it is a *good* institution to maintain, and the questions in what ways individuals may become *entitled* to acquire property and *how much* they should be allowed to acquire. These we may call questions of *Definition*, *General Justifying Aim*, and *Distribution* with the last subdivided into questions of *Title* and *Amount*. It is salutary to take some classical exposition of the idea of property, say Locke's chapter 'Of Property' in the *Second Treatise*,[4] and to observe how much darkness is spread by the use of a single notion (in this case 'the labour of [a man's] body and the work of his hands') to answer all these different questions which press upon us when we reflect on the institution of property. In the case of punishment the beginning of wisdom (though by no means its end) is to distinguish similar questions and confront them separately.

(a) *Definition*

Here I shall simply draw upon the recent admirable work scattered through English philosophical[5] journals and add to it only an admonition of my own against the abuse of definition in the philosopical discussion of punishment. So with Mr. Benn and Professor Flew I shall define the standard or central case of 'punishment' in terms of five elements:

(i) It must involve pain or other consequences normally considered unpleasant.
(ii) It must be for an offence against legal rules.
(iii) It must be of an actual or supposed offender for his offence.
(iv) It must be intentionally administered by human beings other than the offender.

4. Chapter V.
5. K. Baier, "Is Punishment Retributive?," *Analysis* (1955), p. 25. A. Flew, "The Justification of Punishment," *Philosophy* (1954), p. 291. S. I. Benn, *op. cit.*, pp. 325–6.

(v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

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

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

The chief importance of listing these substandard cases is to prevent the use of what I shall call the 'definitional stop' in discussions of punishment. This is an abuse of definition especially tempting when use is made of conditions (ii) and (iii) of the standard case in arguing against the utilitarian claim that the practice of punishment is justified by the beneficial consequences resulting from the observance of the laws which it secures. Here the stock 'retributive' argument[6] is: If *this* is the justification of punishment, why not apply it, when it pays to do so, to those innocent of any crime, chosen at random, or to the wife and children of the offender? And here the wrong reply is: *That*, by definition, would not be 'punishment' and it is the justification of punishment which is in issue.[7] Not only will this definitional stop fail to satisfy the advocate of 'Retribution', it would prevent us from investigating the very thing which modern skepticism most calls in question: namely the rational and moral status of our preference for a system of punishment under which

6. A. C. Ewing, *The Morality of Punishment*, D. J. B. Hawkins, *Punishment and Moral Responsibility* (The King's Good Servant, p. 92), J. D. Mabbott, "Punishment," *Mind* (1939), p. 152.
7. Mr. Benn seemed to succumb at times to the temptation to give 'the short answer to the critics of utilitarian theories of punishment—that they are theories of *punishment* not of any sort of technique involving suffering' (*op. cit.*, p. 332). He has since told me that he does not now rely on the definitional stop.

measures painful to individuals are to be taken against them only when they have committed an offence. Why do we prefer this to other forms of social hygiene which we might employ to prevent anti-social behaviour and which we do employ in special circumstances sometimes with reluctance? No account of punishment can afford to dismiss this question with a definition.

(*b*) *The nature of an offence*

Before we reach any question of justification we must identify a preliminary question to which the answer is so simple that the question may not appear worth asking; yet it is clear that some curious 'theories' of punishment gain their only plausibility from ignoring it, and others from confusing it with other questions. The question is: Why are certain kinds of action forbidden by law and so made crimes or offences? The answer is: To announce to society that these actions are not to be done and to secure that fewer of them are done. These are the common immediate aims of making any conduct a criminal offence and until we have laws made with these primary aims we shall lack the notion of a 'crime' and so of a 'criminal'. Without recourse to the simple idea that the criminal law sets up, in its rules, standards of behaviour to encourage certain types of conduct and discourage others we cannot distinguish a punishment in the form of a fine from a tax on a course of conduct.[8] This indeed is one grave objection to those theories of law which in the interests of simplicity or uniformity obscure the distinction between primary laws setting standards for behaviour and secondary laws specifying what officials must or may do when they are broken. Such theories insist that all legal rules are 'really' directions to officials to exact 'sanctions' under certain conditions, e.g. if people kill.[9] Yet only if we keep alive the distinction

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

9. cf. Kelsen. *General Theory of Law and State* (1945), pp. 30–33, 33–34, 143–4. Law is the primary norm, which stipulates the sanction. . . .' (ibid. 61).

(which such theories thus obscure) between the primary objective of the law in encouraging or discouraging certain kinds of behaviour, and its merely ancillary sanction or remedial steps, can we give sense to the notion of a crime or offence.

It is important however to stress the fact that in thus identifying the immediate aims of the criminal law we have not reached the stage of justification. There are indeed many forms of undesirable behaviour which it would be foolish (because ineffective or too costly) to attempt to inhibit by use of the law and some of these may be better left to educators, trades unions, churches, marriage guidance councils or other nonlegal agencies. Conversely there are some forms of conduct which we believe cannot be effectively inhibited without use of the law. But it is only too plain that in fact the law may make activities criminal which it is morally important to promote and the suppression of these may be quite unjustifiable. Yet confusion between the simple immediate aim of any criminal legislation and the justification of punishment seems to be the most charitable explanation of the claim that punishment is *justified* as an 'emphatic denunciation by the community of a crime'. Lord Denning's dictum that this is the ultimate justification of punishment [10] can be saved from Mr. Benn's criticism, noted above, only if it is treated as a blurred statement of the truth that the aim not of punishment, but of criminal legislation is indeed to denounce certain types of conduct as something not to be practised. Conversely the immediate aim of criminal legislation cannot be any of the things which are usually mentioned as justifying punishment: for until it is settled what conduct is to be legally denounced and discouraged we have not settled from what we are to *deter* people, or who are to be considered *criminals* from whom we are to exact *retribution*, or on whom we are to wreak *vengeance*, or whom we are to *reform*.

Even those who look upon human law as a mere instrument for enforcing 'morality as such' (itself conceived as the law of God or Nature) and who at the stage of justifying punishment wish to appeal not to socially beneficial consequences but simply to the intrinsic value of inflicting suffering on wrongdoers who have disturbed by

10. In evidence to the Royal Commission on Capital Punishment, Cmd. 8932. para. 53 (1953). *Supra*, p. *x*, n. 3.

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

(c) General Justifying Aim

I shall not here criticize the intelligibility or consistency or adequacy of those theories that are united in denying that the practice of a system of punishment is justified by its beneficial consequences and claim instead that the main justification of the practice lies in the fact that when breach of the law involves moral guilt the application to the offender of the pain of punishment is itself a thing of value. A great variety of claims of this character, designating 'Retribution' or 'Expiation' or 'Reprobation' as the justifying aim, fall in spite of differences under this rough general description. Though in fact I agree with Mr. Benn [11] in thinking that these all either avoid the question of justification altogether or are in spite of their protestations disguised forms of Utilitarianism, I shall assume that Retribution, defined simply as the application of the pains of punishment to an offender who is morally guilty, may figure among the conceivable justifying aims of a system of punishment. Here I shall merely insist that it is one thing to use the word Retribution *at this point* in an account of the principle of punishment in order to designate the General Justifying Aim of the system, and quite another to use it to secure that to the question 'To whom may punishment be applied?' (the question of Distribution), the answer given is 'Only to an offender for an offense.' Failure to distinguish Retribution as a General Justifying Aim from retribution as the simple insistence that only

11. *Op. cit.*, pp. 326–35.

those who have broken the law—and voluntarily broken it—may be punished, may be traced in many writers: even perhaps in Mr. J. D. Mabbott's [12] otherwise most illuminating essay. We shall distinguish the latter from Retribution in General Aim as 'retribution in Distribution.' Much confusing shadow-fighting between utilitarians and their opponents may be avoided if it is recognized that it is perfectly consistent to assert *both* that the General Justifying Aim of the practice of punishment is its beneficial consequences *and* that the pursuit of this General Aim should be qualified or restricted out of deference to principles of Distribution which require that punishment should be only of an offender for an offence. Conversely it does not in the least follow from the admission of the latter principle of retribution in Distribution that the General Justifying Aim of punishment is Retribution though of course Retribution in General Aim entails retribution in Distribution.

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

The most general lesson to be learned from this extends beyond the topic of punishment. It is, that in relation to any social institution, after stating what general aim or value its maintenance fosters we should enquire whether there are any and if so what principles limiting the unqualified pursuit of that aim or value. Just because the pursuit of any single social aim always has its restrictive qualifier, our

12. *Op. cit. supra*, n. 6. It is not always quite clear what he considers a 'retributive' theory to be.

main social institutions always possess a plurality of features which can only be understood as a compromise between partly discrepant principles. This is true even of relatively minor legal institutions like that of a contract. In general this is designed to enable individuals to give effect to their wishes to create structures of legal rights and duties, and so to change, in certain ways, their legal position. Yet at the same time there is need to protect those who, in good faith, understand a verbal offer made to them to mean what it would ordinarily mean, accept it, and then act on the footing that a valid contract has been concluded. As against them, it would be unfair to allow the other party to say that the words he used in his verbal offer or the interpretation put on them did not express his real wishes or intention. Hence principles of 'estoppel' or doctrines of the 'objective sense' of a contract are introduced to prevent this and to qualify the principle that the law enforces contracts in order to give effect to the joint wishes of the contracting parties.

(d) Distribution

This as in the case of property has two aspects (i) Liability (Who may be punished?) and (ii) Amount. In this section I shall chiefly be concerned with the first of these.[13]

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

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

13. Amount is considered below in Section III (in connection with Mitigation) and Section V.

The standard example used by philosophers to bring out the importance of retribution in Distribution is that of a wholly innocent person who has not even unintentionally done anything which the law punishes if done intentionally. It is supposed that in order to avert some social catastrophe officials of the system fabricate evidence on which he is charged, tried, convicted and sent to prison or death. Or it is supposed that without resort to any fraud more persons may be deterred from crime if wives and children of offenders were punished vicariously for their crimes. In some forms this kind of thing may be ruled out by a consistent sufficiently comprehensive utilitarianism.[14] Certainly expedients involving fraud or faked charges might be very difficult to justify on utilitarian grounds. We can of course imagine that a Negro might be sent to prisón or executed on a false charge of rape in order to avoid widespread lynching of many others; but a system which openly empowered authorities to do this kind of thing, even if it succeeded in averting specific evils like lynching, would awaken such apprehension and insecurity that any gain from the exercise of these powers would by any utilitarian calculation be offset by the misery caused by their existence. But official resort to this kind of fraud on a particular occasion in breach of the rules and the subsequent indemnification of the officials responsible might save many lives and so be thought to yield a clear surplus of value. Certainly vicarious punishment of an offender's family might do so and legal systems have occasionally though exceptionally resorted to this. An example of it is the Roman *Lex Quisquis* providing for the punishment of the children of those guilty of *majestas*.[15] In extreme cases many might still think it right to resort to these expedients but we should do so with the sense of sacrificing an important principle. We should be conscious of choosing the lesser of two evils, and this would be inexplicable if the principle sacrificed to utility were itself only a requirement of utility.

Similarly the moral importance of the restriction of punishment to the offender cannot be explained as merely a consequence of the principle that the General Justifying Aim is Retribution for immorality involved in breaking the law. Retribution in the Distribution of

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

punishment has a value quite independent of Retribution as Justifying Aim. This is shown by the fact that we attach importance to the restrictive principle that only offenders may be punished, even where breach of this law might not be thought immoral. Indeed even where the laws themselves are hideously immoral as in Nazi Germany, e.g., forbidding activities (helping the sick or destitute of some racial group) which might be thought morally obligatory, the absence of the principle restricting punishment to the offender would be a further *special* iniquity; whereas admission of this principle would represent some residual respect for justice shown in the administration of morally bad laws.

J. D. Mabbott

Punishment *

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

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

Dr. Ewing and other moralists would be inclined to compromise with retribution in the face of the above difficulties. They would

* J. D. Mabbott, "Punishment," *Mind*, 48 (1939), pp. 150–67. Reprinted by permission of the author and D. W. Hamlyn, the editor of *Mind*.

not have been productive of that mischief, or have been productive of such a greater degree of good, as has determined the legislator in such a case not to make it penal.[4]

5. Where, though the penal clause might exercise a full and prevailing influence, were it to act alone, yet by the *predominant* influence of some opposite cause upon the will, it must necessarily be ineffectual; because the evil which he sets himself about to undergo, in the case of his *not* engaging in the act, is so great, that the evil denounced by the penal clause, in case of his engaging in it, cannot appear greater. This may happen, 1. In the case of *physical danger;* where the evil is such as appears likely to be brought about by the unassisted powers of *nature.* 2. In the case of a *threatened mischief;* where it is such as appears likely to be brought about through the intentional and conscious agency of *man.*

6. Where (though the penal clause may exert a full and prevailing influence over the *will* of the party) yet his *physical faculties* (owing to the predominant influence of some physical cause) are not in a condition to follow the determination of the will: insomuch that the act is absolutely *involuntary.* Such is the case of physical *compulsion* or *restraint,* by whatever means brought about; where the man's hand, for instance, is pushed against some object which his will disposes him *not* to touch; or tied down from touching some object which his will disposes him to touch.

4. See ch. 3. [Consciousness].

H. L. A. Hart

The Rationale of Excuses *

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

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

* H. L. A. Hart, "Prolegomenon to the Principles of Punishment," in *Punishment and Responsibility* (Oxford: Clarendon Press, 1968), pp. 17–24. The original version of this essay was the 1959 Inaugural Address to the Aristotelian Society, pub. in *Proc. Arist. Soc.*, 60 (1959–60). Reprinted by permission of the author and the publisher.

who break the law unintentionally would be an added wrong and refusal to do this some sign of grace.

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

Bentham's argument was a reply to Blackstone who, in expounding the main excusing conditions recognized in the criminal law of his day,[1] claimed that 'all the several pleas and excuses which protect the committer of a forbidden act from punishment which is otherwise annexed thereto may be reduced to this single consideration: the want or defect of *will*' . . . . [and to the principle] 'that to constitute a crime . . . . there must be first, a vitious will.' In his Introduction to the Principles of Morals and Legislation[2] under the heading 'Cases unmeet for punishment' Bentham sets out a list of the main excusing conditions similar to Blackstone's; he then undertakes to show that the infliction of punishment on those who have done, while in any of these conditions, what the law forbids 'must be inefficacious: it cannot act so as to prevent the mischief.' All the common talk about want or defect of will or lack of a 'vitious' will is, he says, 'nothing to the purpose,' except so far as it implies the reason (inefficacy of punishment) which he himself gives for recognising these excuses.

Bentham's argument is in fact a spectacular non sequitur. He sets out to prove that to *punish* the mad, the infant child or those who break the law unintentionally or under duress or even under 'necessity' must be inefficacious; but all that he proves (at the most) is the quite different proposition that the *threat* of punishment will be ineffective so far as the class of persons who suffer from these conditions is concerned. Plainly it is possible that though (as Bentham says) the *threat* of punishment could not have operated on them, the actual *infliction* of punishment on those persons, may secure a higher measure of conformity to law on the part of normal persons than is secured

1. *Commentaries*, Book IV, Chap. II. 2. Chap. XIII esp. para. 9, n. 1.

by the admission of excusing conditions. If this is so and if Utilitarian principles only were at stake, we should, without any sense that we were sacrificing any principle of value or were choosing the lesser of two evils, drop from the law the restriction on punishment entailed by the admission of excuses: unless, of course, we believed that the terror or insecurity or misery produced by the operation of laws so Draconic was worse than the lower measure of obedience to law secured by the law which admits excuses.

This objection to Bentham's rationale of excuses is not merely a fanciful one. Any increase in the number of conditions required to establish criminal liability increases the opportunity for deceiving courts or juries by the pretence that some condition is not satisfied. When the condition is a psychological factor the chances of such pretence succeeding are considerable. Quite apart from the provision made for mental disease, the cases where an accused person pleads that he killed in his sleep or accidentally or in some temporary abnormal state of unconsciousness show that deception is certainly feasible. From the Utilitarian point of view this may lead to two sorts of "losses." The belief that such deception is feasible may embolden persons who would not otherwise risk punishment to take their chance of deceiving a jury in this way. Secondly, a criminal who actually succeeds in this deception will be left at large, though belonging to the class which the law is concerned to incapacitate. Developments in Anglo-American law since Bentham's day have given more concrete form to this objection to his argument. There are now offences (known as offences of 'strict liability') where it is not necessary for conviction to show that the accused either intentionally did what the law forbids or could have avoided doing it by use of care: selling liquor to an intoxicated person, possessing an altered passport, selling adulterated milk[3] are examples out of a range of 'strict liability' offences where it is no defence that the accused did not offend intentionally, or through negligence, e.g., that he was under some mistake against which he had no opportunity to guard. Two things should be noted about them. First, the common justification of this form of criminal liability is that if proof of intention or lack of care

3. See Glanville Williams, *Criminal Law*, 2nd edn., Chap. VI, for a discussion of the protest against 'strict responsibility.'

were required guilty persons would escape. Secondly, 'strict liability' is generally viewed with great odium and admitted as an exception to the general rule, with the sense that an important principle has been sacrificed to secure a higher measure of conformity and conviction of offenders. Thus Bentham's argument curiously ignores both the two possibilities which have been realized. First, actual punishment of these who act unintentionally or in some other normally excusing manner may have a utilitarian value in its effects on others; and secondly, when because of this probability, strict liability is admitted and the normal excuses are excluded, this may be done with the sense that some other principle has been overridden.

On this issue modern extended forms of Utilitarianism fare no better than Bentham's whose main criterion here of 'effective' punishment was deterrence of the offender or of others by example. Sometimes the principle that punishment should be restricted to those who have voluntarily broken the law is defended not as a principle which is rational or morally important in itself but as something so engrained in popular conceptions of justice[4] in certain societies, including our own, that not to recognize it would lead to disturbances, or to the nullification of the criminal law since officials or juries might refuse to co-operate in such a system. Hence to punish in these circumstances would either be impracticable or would create more harm than could possibly be offset by any superior deterrent force gained by such a system. On this footing, a system should admit excuses much as, in order to prevent disorder or lynching, concessions might be made to popular demands for more savage punishment than could be defended on other grounds. Two objections confront this wider pragmatic form of Utilitarianism. The first is the factual observation that even if a system of strict liability for all or very serious crime would be unworkable, a system which admits it on its periphery for relatively minor offences is not only workable but an actuality which we have, though many object to it or admit it with reluctance. The second objection is simply that we do not dissociate ourselves from the principle that it is wrong to punish the hopelessly insane or those who act unintentionally, etc., by treating it as something merely em-

4. Michael and Wechsler, "A Rationale of the Law of Homicide" (1937), 37 C.L.R., 701, esp. pp. 752–7, and Rawls, *op. cit.*

bodied in popular mores to which concessions must be made sometimes. We condemn legal systems where they disregard this principle; whereas we try to educate people out of their preference for savage penalties even if we might in extreme cases of threatened disorder concede them.

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

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

(a) We may look upon the principle that punishment must be reserved for voluntary offences from two different points of view. The first is that of the rest of society considered as *harmed* by the offence

(either because one of its members has been injured or because the authority of the law essential to its existence has been challenged or both). The principle then appears as one securing that the suffering involved in punishment falls upon those who have voluntarily harmed others: this is valued, not as the Aim of punishment, but as the only fair terms on which the General Aim (protection of society, maintenance of respect for law, etc.) may be pursued.

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

(*c*) Criminal punishment as an attempt to secure desired behaviour differs from the manipulative techniques of the Brave New World (conditioning, propaganda, etc.) or the simple incapacitation of those with antisocial tendencies, by taking a risk. It defers action till harm has been done; its primary operation consists simply in announcing certain standards of behaviour and attaching penalties for deviation, making it less eligible, and then leaving individuals to choose. This is a method of social control which maximizes individual freedom within the coercive framework of law in a number of different ways, or perhaps, different senses. First, the individual has an option between obeying or paying. The worse the laws are, the more valuable the possibility of exercising this choice becomes in enabling an individual to decide how he shall live. Secondly, this system not only enables individuals to exercise this choice but increases the power of individuals to identify beforehand periods when the law's punishments will not interfere with them and to plan their lives accordingly. This very obvious point is often overshadowed by the other merits of restricting punishment to offenses voluntarily committed, but is worth separate attention. Where punishment is not so restricted individuals

will be liable to have their plans frustrated by punishments for what they do unintentionally, in ignorance, by accident or mistake. Such a system of strict liability for all offences, if logically possible,[5] would not only vastly increase the number of punishments, but would diminish the individual's power to identify beforehand particular periods during which he will be free from them. This is so because we can have very little ground for confidence that during a particular period we will not do something unintentionally, accidentally, etc.; whereas from their own knowledge of themselves many can say with justified confidence that for some period ahead they are not likely to engage intentionally in crime and can plan their lives from point to point in confidence that they will be left free during that period. Of course the confidence thus justified, though drawn from knowledge of ourselves, does not amount to certainty. My confidence that I will not during the next twelve months intentionally engage in any crime and will be free from punishment, may turn out to be misplaced; but it is both greater and better justified than my belief that I will not do unintentionally any of the things which our system punishes if done intentionally.

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