

Why Punish the Guilty \*

... While philosophers have been preoccupied with the problem of punishing the innocent, some concerned lawyers, social scientists and laymen have seen the central issue to be a quite different one, involving a decision whether to punish at all. Simply stated, they have seen it as necessitating a choice between punishment and something else variously called reform, rehabilitation or treatment. Typically, they resolve the issues against the justifiability of punishment.

Although discussion of the subjects are often obscure and puzzling, superficially, at least, the ultimate resolution seems to make good sense. Punishment, it is said, is simply vindictiveness institutionalized. To punish is to react naturally but irrationally toward one who has harmed another. It is to return evil for evil instead of good for evil; to focus on the offense, not the offender. If the evil of punishment is so simply exposed, the benefit of treatment is no less obvious. For what could be more humane, more civilized, more sensible and more benevolent than directing society's efforts solely toward the end of achieving the rehabilitation or cure of that social misfit who breaks the law? Surely the reigning maxim should be: "Always treat the offender; never punish the crime."

The plausibility of this stand—the question of whether it is right to punish even the guilty—is the central issue which concerns me in this paper. And if we are ever adequately to assess the challenge to punishment made so explicit in recent legal writings, we must begin by asking whether it makes sense to set up a dichotomy between punishment and treatment. If it does, if there are real alternatives to choose from, we must then clarify the respects in which punishment and treatment differ from each other.

To put the problem of differentiation in concrete perspective, com-

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pare the case of a person discovered to have intractable, non-arrested tuberculosis who, because of this, is committed unwillingly to a State hospital for treatment, with that of an embezzler who has dissipated all the funds collected in the annual Easter Seal Campaign and been sentenced to five years in prison for his offense. How does punishment of the one differ from treatment of the other?

To begin with, a punishment must involve an unpleasantness imposed upon a person in virtue of the fact that he is believed to have done some blameworthy action for which he was responsible when he acted. A treatment, on the other hand, need not involve an unpleasantness (although it may, is in the case of the tuberculosis victim); and assessments of responsibility and blameworthiness are simply irrelevant.

Moreover, the nature and magnitude of a punishment must be selected (within some limits) contemporaneously with the decision to punish; at the time of the trial (whether or not the person is still a threat to society) rather than at the time of the presumed misbehavior. Treatment, however, must be believed capable of improving a present condition: it would make no sense to treat someone for a past ailment by which he was no longer afflicted. Thus, unlike punishment, the question of the appropriateness of any particular treatment can be answered only by referring to the state or condition of the person at the time the question is asked.

Having made these distinctions with some degree of confidence, a caveat is no doubt in order. My differentiations are not wholly satisfactory: they are vague, and not entirely accurate. We do, for example, sometimes punish people for their present status or condition rather than for past actions—as when, in California, we convict and imprison a person for the crime of being a common prostitute, or a narcotics addict. Nonetheless, the distinctions I have drawn are more than sufficiently accurate for my purposes. We can now examine and evaluate some of the reasons which have been or might be advanced to support either treatment or punishment of the guilty.

There are at least two quite different arguments commonly advanced to support the claim that treatment ought always to be substituted for punishment, and a good deal of confusion (particularly in nonphilosophical discussions of the evils of punishment and virtues of treatment) results from a failure to get them clear and keep

them separate. The first is superficially the more attractive, though ultimately the less plausible. There is no standard or correct way to state it, but one version might be this:

Everyone would agree that it is wrong to punish someone for something which he could not help; furthermore, no one can help being sick. Therefore, no one ought ever be punished for being sick. In the words of the Supreme Court of the United States: "Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." It just so happens to be the case that everyone who commits a crime is sick. Hence, it is morally wrong to punish anyone who commits a crime.

This—or something like it—is the argument. Although I have stated it in a somewhat outrageous fashion, I doubt that either a more circumspect or a more lengthy statement could save it. But before showing why I think this to be the case, I want to make three preliminary points. First, I shall seek neither to call into question nor to justify the claim that a person ought never be punished (or, for that matter, blamed) for something which he could not, in some meaningful sense, have helped. Rather, I shall assume that this is sound, and shall, therefore, seek to call into question only the remainder of the argument. Second, as I shall interpret it, the argument in no way depends on the truth of determinism. As I construe it, the argument depends upon establishing certain relationships between sickness, crime and the wrongness of punishment, not upon a special relationship between all events. And third, although the fact is not always noted, this argument is not to be interpreted as purporting to demonstrate that it is always wrong to punish people. For, at least as I have stated it, the argument is restricted to the claim that it is always wrong to punish criminals—those who break the law. Thus, someone might think that it is sometimes right to punish people—children or friends for instance—and still consistently maintain that punishment ought never follow the commission of a crime. A fortiori a person need not hold that no one is ever responsible or blameworthy—only that no criminal is responsible or blameworthy.

Turning now to my statement of the argument itself, the first thing that is apparent is that the relevance of sickness to the rightness of the punishment of offenders is anything but certain. Indeed, one is very tempted to argue that the entire argument is a non sequitur

just because we seldom, if ever seek to punish people for being sick. Instead we punish them for the actions they perform. On the surface, at least, it would seem that even if someone is sick, and even if he cannot help being sick, this in no way implies that none of his actions could have been other than what it was. Thus, if the argument against ever punishing the guilty criminal is to be at all persuasive, it must be shown that for one reason or another, the sickness which afflicts all criminals must affect their actions in such a way that they are thereby prevented ever from acting differently. Construed in this fashion, the argument is at least coherent and responsive. Unfortunately there is now no reason to be persuaded by it.

It might be persuasive were there any reason to believe that all criminal acts were, for example, instances of compulsive behavior; if, that is, we thought it likely to be true that all criminals were in some obvious and distinguishable sense afflicted by or subjected to irresistible impulses which compelled them to break the law. For there are people who do seem to be subjected to irresistible impulses and who are thereby unable to keep themselves from, among other things, committing crimes. And it is surely monstrous ever to punish them for these actions. Thus, the kleptomaniac or the person who is truly already addicted to narcotics does seem to be suffering from something resembling a sickness and, moreover, to be suffering from something which makes it very difficult if not impossible for him to control his actions. He deserves pity, not blame; treatment, not punishment.

Now, the notion of compulsive behavior is not without difficulties of its own. How strong, for instance, does a compulsion have to be before it cannot be resisted? Would someone be a kleptomaniac only if he went up and stole an object even though a policeman was known by him to be present and observing his every move? Is there anything more that is meant by compulsive behavior than the fact that it is behavior which is inexplicable or unaccountable in terms of the motives and purposes people generally have? More importantly, perhaps, why do we and why should we suppose that the apparently "motiveless" behavior must be the product of compulsions which are less resistible than those to which we all are at times subjected. In particular, as Barbara Wootton has observed, ". . . it is by no means self-evident that (a wealthy) person's yearnings for valueless



(items) are inevitably stronger or more nearly irresistible than the poor man's hunger for a square meal or for a pack of cigarettes." (*Social Science and Social Pathology*, p. 235.)

But while these are all problems, the more basic one is simply that there is no reason at all to believe that all criminal acts are instances of compulsive behavior. Even if we are persuaded that there are people who are victims of irresistible impulses, and even if we do concede that we ought always to treat and never to punish such people, it surely does not follow that everyone who commits a crime is doing a compulsive act. And because this is so, it cannot be claimed that all criminals ought to be exempted from punishment—treated instead—because they have this sickness.

It might be argued, though, that while compulsive behavior accounts for only some criminal acts, there are other sicknesses which account for the remainder. At this juncture, the most ready candidate to absorb the remaining cases is that of insanity. The law, for example, has always been willing to concede that a person ought never be punished if he was so sick or so constituted that he did not know the nature or quality of his act, or if he did know this, that he did not know that what he was doing was wrong. And more recently, attempts have been made, sometimes successfully, to expand this exemption to include any person whose criminal action was substantially the product of mental defect or disease.

Once again, though, the crucial point for my purposes is not the formulation of the most appropriate test for insanity, but the fact that it is far from evident, even under the most "liberal" test imaginable, that it would be true that everyone who commits a crime would be found to be sick and would be found to have been afflicted with a sickness which in some sense rendered the action in question unavoidable. Given all of our present knowledge, there is simply every reason to suppose that some of the people who do commit crimes are neither subject to irresistible impulses, incapable of knowing what they are doing, nor suffering from some other definite mental disease. And, if this is so, then it is a mistake to suppose that the treatment of criminals is on this ground always to be preferred to their punishment.

There is, however, one final version of the claim that every criminal action is excusable on grounds of the sickness of the actor. And

this version does succeed in bringing all the remaining instances of criminality, not otherwise excusable, within the category of sickness. It does so only by making the defining characteristic or symptom of mental illness the intentional commission of an illegal act. All criminals, so this argument goes, who are not insane or subject to irresistible impulses are sociopaths or psychopaths—people afflicted with that mental illness which manifests itself exclusively through the commission of antisocial acts. This sickness, like any other sickness, must be treated rather than punished.

Once this stage of the discussion is reached, it is terribly important that we be aware of what has happened. In particular, we are no longer confronted with the evidentiary claim that all criminal acts are caused by some sickness. We are faced instead with the bare assertion that this must be so—an assertion, moreover, of a somewhat deceptive character. The illness which afflicts these criminals is simply the criminal behavior itself. The disease which is the reason for not punishing the action is identical with the action itself. At this point any attempt to substantiate or disprove the existence of a relationship between sickness and crime is ruled out of order. The presence of mental illnesses of these kinds cannot be reasons for not punishing, or for anything else.

Thus, I would insist that even if it is true that we ought never to punish and that we ought always to treat someone whose criminal action was unavoidable because the product of some mental or physical disease—even if we concede all this—it has yet to be demonstrated, without begging the question, that all persons who commit crimes are afflicted with some disease or sickness of this kind. And, therefore, if it is always wrong to punish people, or if it is always preferable to treat them, then an argument of a different sort must be forthcoming. It is this argument to which I now turn.

The argument goes like this. Let us concede that not all people, and not even all criminals, are sick. Let us grant that there are some and perhaps many persons who are responsible at the time they perform actions which violate the law and who are blameworthy for so acting. It does not follow from this fact alone, so the argument goes, that punishing anyone is ever morally justified. Even if a person was responsible when he acted and blameworthy for having so acted, this does not preclude the possibility that we ought to behave toward

him just as we behave toward those who are sick—that we ought to do something very much like treating him. Surely, this makes more sense than punishing him. The point is not that it is wrong to punish people because they are sick; rather, it is that it is simply more humane and more rational always to concern ourselves solely with the question of how best to effect the most rapid and complete rehabilitation or treatment of the offender. The argument is not that no one is responsible or blameworthy; instead, it is that these descriptions are simply irrelevant to what, on moral grounds, ought to be the only significant considerations: namely, what mode of behavior toward the offender is most apt to maximize the likelihood that he will not in the future commit those obnoxious or dangerous acts which are proscribed by the law. In short, the claim is that we would gain much and lose little were we to abolish the practice of punishing offences and substitute the practice of treating offenders.

There are at least three arguments which can be made in support of such a proposal. Briefly, they are as follows:

First, by making irrelevant the question of whether the actor was responsible when he acted, we can simplify greatly the operation of the criminal law. More specifically, by “eliminating” the issue of responsibility we thereby necessarily eliminate the requirement that the law continue to attempt to make those terribly difficult judgments of legal responsibility which any definite system of punishment requires to be made. And, as a practical matter at least, this is no small consideration. For surely there is no area in which the techniques of legal adjudication have functioned less satisfactorily than in that of determining the actor’s legal responsibility as of the time he violated the law. The attempts to formulate and articulate satisfactory and meaningful criteria of responsibility; the struggles to develop and then isolate specialists who can meaningfully and impartially relate these criteria to the relevant medical concepts and evidence; and the difficulties encountered in requiring the traditional legal fact finding mechanism—the jury—ultimately to resolve these issues: all of these bear impressive witness for the case for ceasing to make the effort.

Second, I think it fair to say that most people do not like to punish others. They may, indeed, have no objection to the punishment of others; but the actual task of inflicting and overseeing the infliction of an organized set of punishments is, I am sure, distaste-

ful to most. It is all too easy, therefore, and all too typical, for society to entrust the administration of punishments to those who, if they do not actually enjoy it, at least do not find it unpleasant. Just as there is no necessary reason for punishment ever to be needlessly severe, so there is no necessary reason for those who are charged with the duty of punishing to be brutal or unkind. Nonetheless, it is simply a fact that it is difficult, if not impossible, to attract sensitive, kindly or compassionate persons to assure this charge. No such analogous problem attends the call for treatment.

These are both serious and real practical objections to punishment. There is in addition a more sweeping theoretical objection. It is this. If there is one thing which serves to differentiate the techniques of punishment from that of treatment it is that punishment necessarily permits the possibility and even the desirability that punishment will be imposed upon an offender even though he is fully “cured”—even though there is no significant likelihood that he will behave improperly in the future. And, in every such case in which a person is punished—in every case in which the infliction of the punishment will help the offender not at all (and may in fact harm him immeasurably)—the act of punishment is, on moral grounds, seriously offensive. Even if it were true that some of the people who commit crimes are responsible and blameworthy, and even if it were the case that we had meaningful techniques at our disposal for distinguishing those who are responsible from those who are not—still, every time we inflict a punishment on someone who will not himself be benefited by it, we commit a seriously immoral act. This claim, or something like it, lies, I think, at the base of the case which can be made against the punishment of the guilty. Any system of social punishment must permit, and probably must require, that people be made to suffer even though the suffering will help the sufferer not at all. It is this which the analogue to a system of treatment expressly prevents, and it is in virtue of this that a system of treatment is clearly preferable.

There are, of course, a variety of objections to this proposal and to the premises upon which it rests; and there are, correspondingly, a number of arguments which might be advanced in favor of punishing the guilty. I wish to consider four.

The first is this. It is important to recognize (especially because it



is all too often overlooked) that treatment as an alternative to punishment may itself have certain undesirable features. In particular, any system of treatment would necessarily permit of the possibility that the treatment deemed to be required might be more unpleasant than the corresponding punishment. To take just one example, at present we typically punish the offense of indecent exposure by a maximum term of six months—at least for the first few offenses. Now it is also the case that, as yet, there is no “cure” for indecent exposure. Psychiatrists know of no simple way to treat someone who does expose himself so as to “cure” him of doing so. Under these circumstances, so the argument might go, treatment would be more unpleasant than punishment.

The point is that punishments are of a fixed maximum extent—they always have a definite point of termination, set in advance. Treatment, on the other hand, ends at the moment of cure, be that moment imminent or distant. Thus, given an offense whose punishment is relatively minor and whose treatment is as yet undiscovered, the punishment of this offense will involve a lesser interference with the actor's freedom than would his indefinite confinement under a program of treatment.

In a sense, this is a special case of a still more general objection. Treatments, no less than punishments, are capable of giving rise to serious moral problems. If, for instance, a person can be treated effectively only by performing a prefrontal lobotomy or by altering in some other more sophisticated fashion, his basic personality or identity, it might well be that punishment would have the virtue (and it is no small one) of leaving the individual intact. Imprisonment may be a poor way to induce a person to behave differently in the future, but imprisonment may, nonetheless, permit him to remain the same person throughout. In short, treatments as well as punishments may involve serious interferences with the most significant moral claims an individual can assert. Like punishments, treatments of the type contemplated will doubtless be imposed without the actor's consent. The substitution of treatment for punishment could never, therefore, absolve us from involvement in that difficult but unavoidable task of assessing and resolving the competing claims of society and the individual.

Correspondingly, as a practical matter, a system of treatments is

clearly capable of encouraging attitudes which, if they predominated, could only be viewed with alarm. In deeming irrelevant all questions of responsibility and blameworthiness, such a system might well encourage a neglect of just those features which distinguish adult human beings from children. Such a system might thereby all too easily induce a blurring of the differences between the moral claims of responsible adults and those of persons who are not responsible. If a society which punishes offenders always runs the risk of being needlessly cruel and lacking in compassion, one which treats offenders runs the risk of being stiflingly paternalistic and insensitively manipulative.

Neither of these objections is, of course, decisive. A system of treatment need not be attended by these defects. Within such a system certain treatments might be deemed impermissible for the same reasons that some punishments are presently proscribed. Modes of undesirable but untreatable behavior might be tolerated just because the alternatives were less desirable still. At best, the two objections advanced so far are persuasive only as reminders that the substitution of treatment for punishment would be no panacea for the ills of social disorder and offense.

There are, however, two affirmative arguments for punishing the guilty. The first is, I think, not an argument but merely an assertion—the assertion that the guilty ought to be punished because they deserve it. Bradley's claim, for instance, that there is a necessary connection between punishment and guilt, that “we pay the penalty because we owe it, and for no other reason,”\* is surely as susceptible of this interpretation as any other. Yet as it stands, the assertion is manifestly unsatisfying. Punishment is an evil, an unpleasantness; it requires that someone suffer. Its infliction demands justification. What does it mean, therefore, to say that the guilty deserve punishment? Why do they deserve anything even though they are guilty? And, more importantly, why do they deserve to suffer, to be punished? These are questions which must be answered before we would be entitled to be persuaded that punishing even the guilty is morally permissible.

There is, however, an argument of sorts which can be made. It

\* F. H. Bradley, *Ethical Studies* (2nd Ed.), pp. 26–27.

focuses on the fact that to say of anyone that he is guilty is to imply that he was responsible at the time he acted, that he chose freely to perform that action rather than others which were open to him. And, it insists, it is this fact that the action was the outcome of the actor's free choice which makes punishment permissible (if not deserved or required.) Punishment of the guilty is not immoral, because the actor had a fair opportunity to choose between obeying the law or being punished.

It is easy, I think, to make too much of this argument. It is true, of course, that the punishment of the guilty—in this sense of guilty—is less undesirable than the punishment of those who are not responsible; or of those who are innocent. But this is not the same as showing that punishment is justifiable. More specifically, the precise import of the presence of free choice remains far from clear. Criminals, even the most hardened ones, do not choose to be punished. In punishing them we are not giving them what they asked for or requested. We are not fulfilling their desires. (If we were, oddly, we would think they were not responsible and hence not properly subject to punishment.) Still, you might say, they knew what to expect, they could have avoided the punishment by obeying the law. This certainly is true, but not yet wholly satisfactory by any means. Should it not be relevant, for example, whether the offender had an opportunity to choose that the laws would be such that they would present him with these choices. Does the ostensibly general case for punishing the guilty depend on the existence of democracy? If so, no one has suggested such a restriction before.

This and similar objections aside, the more basic point is that showing that the commission of the offense was avoidable does not indicate, at least to me, why the offender ought to be made to suffer.

At this point, of course, we must consider the final argument for punishing the guilty—the argument that punishment deters others from the commission of comparable offenses, and that treatment would not. H.L.A. Hart has put the argument this way: It is paradoxical to suppose that the main purpose of “providing punishment for murder was to reform the murderer, not to prevent murder. And the paradox is greater where the legal offense is not a serious one, e.g. infringing a state monopoly of transport. Reform foregoes the hope of influencing those who have not broken the law, but who

may, in favor of those have broken it.” (“Prolegomenon to the Principles of Punishment,” *Proceedings, Aristotelian Society*; 1959–60; p. 25.)

Competing claims concerning the efficacy of punishment as a deterrent abound in the literature. For obvious methodological reasons it is virtually impossible to accumulate reliable empirical evidence bearing on this question, and I pretend no thorough acquaintance with those empirical inquiries which have been undertaken. (Many, by the way, focus upon the evidence which is thought to show that the threat of capital punishment does not deter. Nothing, of course, follows from this data as to the efficacy of threats of unpleasantness of other kinds.) For the purposes of argument, therefore, I shall assume that the threat of punishment can in some circumstances deter people from acting in certain ways. And I shall look, instead, at the position which holds that, given the deterrent effect of punishment, the punishment of the guilty is clearly and conclusively shown to be justifiable. There are only two points I wish to make.

First, in discussing or accepting this position it is very easy to confuse two quite different propositions. One is that the only persons who will be capable of being deterred by the threat of punishment are those who are capable of exercising freedom of choice. This proposition is doubtless true. Unless a person has the ability to guide and control his actions, he cannot be influenced effectively by the fear or dislike he has of the sanctions which he believes will be visited upon him if he behaves in certain ways.

The other proposition is that in order to deter others it is proper to punish those persons who are capable of exercising freedom of choice and who, in so doing, violate the law. The two propositions are distinguishable. The first makes a statement about the class of persons *who are deterrable*; the second makes an assertion about the class of persons *whom it is right to punish*. Furthermore, it is important to see what the connection between these two propositions is. The argument presently under consideration is not that punishment will have a desirable effect upon the guilty offender, that punishing him will have a beneficial effect upon his future conduct. Rather, it is that the punishment of the guilty offender will have an influence upon the present and future decisions of others. The case for punishing the guilty is that by punishing them we most effectively



bring home to other members of the class of responsible persons the undesirability of engaging in similar conduct. The point I wish to make is this: If there were some other way by which we could make all potential, responsible offenders believe that they would be punished were they to break the law, the punishment of the guilty would be unnecessary. It is the belief that they will be punished, and that punishment is to be avoided because it is so unpleasant, which deters people from breaking the law. The punishment of the guilty must, on this view, be justifiable only because it appears to be the most available means by which to inculcate that belief—and not because there is anything especially fitting about punishing the guilty.

And this leads directly into my final point. I began by referring to recent philosophical concern about the punishment of an innocent person, known to be such, whenever the consequences of punishing him would be justifiable on utilitarian grounds (such as those argued in "Judgment at Nuremberg"). And this is wrong, it is insisted, because it is wrong to use a person simply as a means by which to bring it about that others will be benefited. In an extreme enough case we might think it justifiable to punish an innocent man, but, in H.L.A. Hart's words, "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." (p. 169)

Now my point is simply this. If I am right in thinking that the case for punishing the guilty must be made ultimately on the claim that such is justifiable as the only realistic means by which to deter potential offenders, then those who are so horrified by the presence of the bare possibility of the punishment of the innocent ought to be far more concerned than they are over the punishment of the guilty. If I am even partly right, it is paradoxical, to say the least, that those who worry so much about the punishment of the innocent fail even to consider that the punishment of the guilty may be offensive for precisely those same reasons which they are so ready to regard as decisive whenever the possibility of the punishment of the innocent is raised. In both cases the objection is identical: a person is used as a means to benefit others—whether through deterrence in punishing the guilty; or some other real or presumed benefit to others, in punishing the innocent.

If it is correct, as I think it is, that any instance of the punishment of an innocent person would, at a minimum, involve the sacrifice of important moral principles, then it is also correct that every time a guilty person is punished in order to deter others, some of these same principles are correspondingly denigrated.

And such a conclusion is not without important social consequences. It requires, for one thing, that we scrutinize with excessive care the claim that the punishment of some will deter others. It suggests, for another, that we search with appreciably more zeal than we have in the past for alternative methods of achieving this same end of deterrence. It suggests too, that we strive more earnestly than we have to date to eliminate those all too prevalent conditions which make criminal behavior—even when punishment is a real and immediate threat—the most plausible means by which to obtain needed, though relatively minimal, satisfactions. And it demands, finally, a change in our attitude toward every instance of punishment, for it demands that we never view a punishment as something which is the obviously fitting, appropriate or deserved reaction to an offense: that we see it as, at best, a needed but nonetheless lamentable form of societal control.

