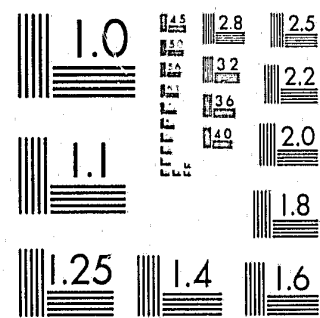


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PUNISHMENT

David Lovell
Philosopher-in-Residence

2417

DEPARTMENT OF CORRECTION
340 CAPITOL AVENUE
HARTFORD, CT 06106

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PUNISHMENT

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I. INTRODUCTION

Tonight I want to make a brief report on the results of my term of residency with the Department of Correction so far, and then move into a discussion of the central concept around which my thinking has revolved: punishment. The main theme of my discussion will be that imprisonment is most properly viewed as a method of state-administered punishment; that state-administered punishment is a necessary institution in a society such as ours; but that in spite of the necessity of the institution, questions can be raised about the legitimacy of the way in which we administer punishment, to which there are no completely satisfying answers. Neither the concept of a necessary institution nor the concept of legitimacy is straightforward, and the distinction between the two is more difficult still. Nevertheless, I will try to explain it. Rather than plunging straightaway into this deep water, let me briefly go over the reasoning that has led me to it. It starts with some of the ideas presented in my first lecture.

I spent some time in the earlier talk trying to explain and illustrate the conception of philosophy that supports my activities this year. For me philosophy is a human practice we all engage in from time to time, with much in common with other practices; debate and psychoanalysis are among its close cousins. Philosophy looks for connections and resemblances between the various artifacts of human consciousness, it questions assumptions — including those embodied in the practice of philosophy — and it seeks the truth wherever it finds itself. The results of philosophical reflection are recognitions that any rational person can achieve, not doctrines about which we must accept expert authority. The most difficult feature of philosophy for many people to accept is its tendency to raise more questions than it answers. But I think that if you reflect on the encounters and conversations that have seemed to produce insight or lead to new wisdom in your personal lives, you will recognize

that the person who asks the right question is generally more helpful than the person who tells you what your problem is.

Another way of understanding philosophy is suggested by some remarks by Ludwig Wittgenstein, an eccentric and solitary figure who was perhaps the outstanding philosophical genius of this century. A philosophical problem can be compared with trying to find your way in an unfamiliar city, in an old quarter whose curving streets, angled intersections, and blind alleys bear the imprint of centuries of use — as do the tortuous pathways between the concepts of pain, crime, responsibility, punishment and justice. There is no map that will keep you from getting lost. You often find yourself back where you started, while trying to go somewhere else. But after many detours and frustrations you begin to know your way around; you know how to get back home when you lose your way. This sort of familiarity will not suddenly transform the old quarter into a rectangular grid, designed according to some modern master plan. These concepts are stubborn and unruly, like the creatures by whose use they have been molded.¹ The difference between tonight's talk and my earlier public presentation is that I plan to get to this quarter more swiftly, and to spend most of my time on just one block.

II. WHAT IS GOOD ABOUT PUNISHMENT

In spite of its small size, stable leadership, professional staff and progressive reputation, Connecticut's Department of Correction suffers from the same problems as other states: severe overcrowding and a public perception that the system is not working. A major theme in my first public lecture was that meeting these problems requires us to take a fresh look at the assumption that the social problem of high crime rates can be alleviated by locking more people up for longer periods of time. Now there is nothing particularly fresh about questioning this assumption; indeed, none of the corrections professionals with whom I have talked really believe it. They didn't need me to tell them that the people who are tempted to deal in drugs or to commit theft, burglary, robbery, assault, rape

and murder — the crimes that seem to inspire the most fear and to occupy most of our criminal justice resources — that these people are not likely to be deterred by increasing the sentences handed out to those we catch. Nor did they need me to tell them that crime is to some extent a market phenomenon, so that the removal of one offender from the streets often simply opens up an opportunity for someone else looking for a fast buck or cheap thrills.²

The idea that crime is a market phenomenon whose extent is affected more by opportunities than by marginal changes in the supply of practicing criminals may be easy to accept in the case of drug dealing, where there is at any given time an established demand for the product. The removal of one drug dealer may simply allow another individual to fill the vacant spot, with no net reduction in the level of such criminal activity. It is less obvious in the case of crimes such as robbery and burglary, although there is reason to think that since these crimes are often committed by small groups the removal of one participant may simply lead to recruitment of a new member of the gang. The role of opportunity in street crime is illustrated by an incident that befell my brother, who during his second year in law school lived in Fort Greene, a rather dangerous neighborhood in Brooklyn. After moving from the area, he returned to visit his old room-mates, coming directly from school dressed as a lawyer, carrying a briefcase. He stopped at a Chinese take-out counter near his former residence, not thinking about how he was dressed. Some neighborhood youths saw him there and departed; one of them returned with several others who indicated that they were carrying pistols (he prudently decided not to call their bluff) and robbed him of the grocery money that he had just gotten from the bank. They left him enough money to pay for the food he had ordered, but someone else came in and feigned sympathy, asking if the robbers had left him anything; at this point he gave up and handed the newcomer the several dollars that remained. In this case it is quite obvious that he presented an opportunity; he was a "mark" whom any one of a large number of people in the neighborhood were willing to victimize. Under such circumstances it is doubtful whether the

removal of a few individuals from the streets will result in any significant change in the level of criminal activity.

As I was saying, there is little of profound philosophical import about these observations, though they often seem to be missed by those who talk the loudest in the public arena, who promise greater public safety by "getting tough" on the particular offenders we catch. My emphasis, however, has not been on the practical barriers to a penal solution to the evils — broken communities, failing schools, family abuse and neglect, high unemployment, widespread drug abuse — that lead to high crime rates. My emphasis was on the moral quality of the relationship between the offender and the victim, in which the mere fact that the offender wants something leads him to take it. It is this selfish treatment of the victim merely as a means to an end that underlies our anger and seems to explain our desire for punishment. I tried, in the earlier lecture, to convey the sense that the offender still remains a human being, a member of a community of persons whose relations can be regulated by fairness and respect. If we are willing to see the offender as one of us, I claimed, then it is incumbent on us not to excuse him — which would be a denial of his dignity — but to respond to him as he deserves. We will not impose extra years of confinement on an individual in a futile attempt to protect the public or to deter others, for that would be to treat the individual simply as a means to an end and thus to betray the ideals that justify us in punishing.

I suggested that we are tempted to see The Criminal as an alien and rapacious creature, a barbarian, partly because of the barbarian within each of our breasts. The Criminal is a convenient symbol, both of the desires that we want to express and of the demon that we want to exorcize. It is this fact that makes crime in the streets such a convenient issue for manipulation by politicians and others who seek to profit from our fears.

I also speculated about the likely results for the Department of having someone around who talks the way I've just been talking: would it lead to anything more than a few publications for David Lovell? I didn't for a moment imagine that the problems of correc-

tions would instantly be solved, but I hoped to stimulate a discussion that would sharpen the awareness of policymakers about some of the troubling moral dimensions of corrections. I also hoped to help the Department develop a sense of its purpose that would provide it with a place to stand in its not always harmonious relations with other agencies and with the public at large. I am happy to report that in my judgment these hopes are being fulfilled, largely because of my role as chairman of a committee concerned with clarifying and redefining the Department's mission.

Heavily influenced by my lobbying, the Committee's report suggests that the administration of punishment is the primary purpose of the Department of Correction (in the case of persons detained pretrial, its function is to ensure that they will be available for trial, the outcome of which is punishment if they are found guilty). Punishment involves a judgment that an individual is accountable for a criminal offense and must pay a penalty before he or she can resume full rights of participation in the free community, membership in which requires that we respect the dignity, rights and liberties of others. The positive outcome of punishment should be the restoration to the community of the offender, as a person who has paid his or her debt.

As opposed to the custodial model, the punishment model is heavily imbued with moral principles, which both justify and constrain the imposition of punishment. Under this conception the criminal justice system would be freed of the assumption that its purpose is to lock people up, since locking people up is only one among many possible forms of punishment. The system would also be freed of the misconception that locking people up makes any direct contribution to solving the social problem of high crime rates.

The strongest alternative to a theory of corrections that proceeds from a recognition of its role in punishment is the theory of incapacitation, which holds that the job of corrections is simply to keep sequestered those people from whom we think we need protection. This theory has the benefit of describing accurately the only function that prisons have ever systematically achieved, in spite of a

history of rhetoric about repentance, retribution, deterrence and rehabilitation. The flip side of this coin is that it locks the Department into incarceration as its primary function. More importantly, the incapacitation theory fails to explain why the Department deals only with people accused or convicted of crimes, and it fails to distinguish the function of corrections from other forms of sequestration such as mental hospitalization and medical quarantine. I have already indicated, furthermore, some reasons for doubting whether incapacitation by itself makes enough of a difference to public safety to justify the suffering entailed by its automatic application to offenders.

The most important element in the recommended recognition of the Department's role in punishment is that it makes room for the dignity of the offender, who is punished only on the condition that he or she can be held personally accountable for a wrongful act. The very human qualities that make a person liable to be punished — the capacity for reason and choice — are the qualities that we are obliged to respect, by not treating that person simply as a means to an end. One practical consequence of this view in the administration of corrections is that treatment programs should be fully voluntary and are justified by two considerations: first, some genuine attention to the needs of the offender is necessary to alleviate the extra suffering, beyond the deprivation of liberty, to which offenders are exposed when they are punished by confinement; second, the chances of a successful reconciliation between the punished offender and the community are increased if the offender has had a chance to develop appropriate attitudes, skills and relationships while undergoing punishment.

As compared with the alternatives, then, a recognition of the Department's critical role as part of a system in which individuals are punished for breaking the law has several outstanding advantages:

1. It is honest in that it recognizes that the individuals with whom the Department deals are being punished, and therefore are suffering; they are not turned over to the Department simply in order to be helped or cured (for-

tunately, since we don't seem to be very good at either one; this is partly a failure in our programs but mainly a reflection of the facts of life, one of which is that the choice to continue getting into trouble with the law remains in the hands of the individual).

2. It recognizes the dignity of the offender, as a person who is accountable for his or her actions; in so doing it provides a ground for the obligation to treat offenders with fairness and respect.
3. It provides a clear sense of the limits of corrections, in several ways. The Department is not responsible for solving the social problem of high crime rates, but for carrying out the penalty deserved by particular individuals for what they have done to other particular individuals. And the right of the state to interfere in the lives of persons being punished is limited by the values that justify it in imposing punishment.

III. WHAT IS WRONG WITH PUNISHMENT

A. Justifying Punishment

In advocating the recognition of punishment as an essential function of criminal justice, I find myself uncomfortably embracing a concept with some very unappealing features. I have indicated some of its advantages over alternative conceptions of the purpose of corrections. We have a clue to its problems in my references to the need to uphold the values that justify society in punishing. The difficulty, I shall assume, is not in describing those values: respect for the dignity, rights and liberties of our fellows; but in the fact that I have been speaking of punishment as an institution that needs a justification. Nobody would ask me, except as a joke, what justifies me in hugging my children. The question of justification normally arises only when there is rea-

son to think something is wrong with the practice in question. In the case of punishment, we have not far to look: punishment essentially involves the deliberate infliction of suffering. Not only that, the suffering is imposed precisely because it is suffering and not, as in medicine or education, as an unavoidable side effect of a practice that is supposed to be directed to the welfare of the persons subjected to it.

I will discuss three ways of justifying punishment: deterrence, moral paternalism and pure retribution. Although they are distinct justifications, they do not necessarily conflict with one another. Each of us may — indeed, I think we do — invoke all three justifications, albeit with some strain. There need be nothing surprising about this, given the complexity of the terrain we have entered. All three of these theories, it is important to remember, are justifications of punishment rather than of what we might more generally call "social intervention." All three theories attempt to support a practice in which the imposition of punishment on particular individuals is justified only by the wrong they have done. In contrast, social intervention, as represented by such diverse activities as welfare, mental health associations, birth control clinics and much actual police work, is usually preventive in nature and involves no judgment that a crime has been committed. Rehabilitation and incapacitation are alike as theories of corrections in that they tend to blur the difference between punishment and social intervention, underestimating the amount of suffering that imprisonment involves and ignoring the danger of the injustice entailed by imposing such suffering without regard to what the offender deserves.

The state administers punishment when the legal authorities inflict suffering on a person because he or she is responsible for breaking the law. I hope it is needless

to say — though I will say it — that the legal framework must itself be legitimate. The legitimacy of the criminal law derives from its expression of moral imperatives, prohibitions whose authority we all should recognize. I am thinking of rules such as "Do not kill," "Do not cause pain," "Do not disable," "Do not deprive of freedom," and a few others.³ The source of the legitimacy of the legal authority, and its relationship to the justice of particular laws and the justice of the institutions (such as property) which the laws may support: these are complicated issues that I propose to ignore, although I think difficult questions can properly be raised about them even in a relatively open society such as ours. Granting for the moment that we can put aside our doubts about the laws that we are punishing people for breaking, we may still question the legitimacy of the methods by which the laws are enforced. To say that a particular practice is illegitimate is to say that it exceeds the bounds within which it must remain if it is to deserve our respect. I have suggested several times that one of the principles that punishment must respect is to avoid treating individuals simply as means to an end. Where this principle is violated, the infliction of suffering by the state is not a deserved punishment but, as Hobbes put it, an act of hostility.⁴ We may be forced to accept the practice, but there is nothing wrong with evasion or resistance if we can get away with it. Whereas I hope we can agree that there is something wrong with murder and torture whether or not we can get away with it.

Because punishment involves the infliction of suffering, it cannot be legitimate unless it is necessary. This is not the case with institutions such as the school, which may be legitimate without being necessary. But what do we mean by describing a practice as necessary?

It seems that we cannot address this question without first asking, "necessary for what?" The institution of schooling, for example, is not needed in order for people to live together and rear children, but it may be needed in order to maintain a technological economy. The question of the necessity of the institution of punishment, then, seems to involve both questions about the importance of the ends it serves and questions about whether punishment in particular is necessary for those ends.

B. General Deterrence

The theory of general deterrence provides the most obvious answer to questions about the ends that punishment serves. There are certain rules of conduct, expressed in the criminal law, which all rational creatures wish to see observed with respect to themselves and the people they care about. In the absence of general obedience to the law, so understood, human life would be miserable. Punishment provides a more reliable incentive to obedience than rewards, because there is far greater agreement among people about the evils they wish to avoid than about the goods they wish to obtain. By threatening to inflict suffering that rational creatures generally wish to avoid, punishment deters people generally from inflicting upon each other the evils of robbery, assault, murder, and so forth.⁵ The imposition of suffering on those guilty of breaking the law, then, is justified in terms of the social benefits that it promotes; or more precisely, in terms of the social evils that it discourages.

We may invoke general deterrence as a justification for the existence of the institution of punishment, which is my concern here, without applying it directly to the sentences handed out to particular offenders. It is doubtful whether marginal changes in the severity of punishments will significantly alter the rate at which crimes are

committed; furthermore, sentences must not exceed what offenders deserve if we are to avoid treating individuals simply as means to our ends. I do not think that punishment could be justified unless it served the ends of general deterrence. Even when applied only to the practice of punishment rather than to particular sentences, however, the theory of general deterrence does not seem adequate by itself to justify the suffering that we impose on particular individuals in its name.

Remember that the value of punishment, on this view, consists solely in the threat that it poses to those who are tempted to prey on others. Couldn't we achieve the same purpose merely by pretending to punish the guilty?⁶ The fact that the deception wouldn't work in a world with such a promiscuous flow of information does not settle my uneasiness: we are imposing genuine deprivations on particular persons on the grounds that it is the only way we can appear to be depriving them. Any one of these individuals may properly claim that it isn't really necessary to punish him in order to maintain a threat credible to others; why then should he suffer?

The obvious answer is that if some particular kind of crime is to be punished at all, we must punish all persons who commit it as a matter of fairness. Without stopping here to consider what kinds of distinctions between persons are compatible with fairness, let me note that implicit in this answer is the need to distinguish between crimes: we do not punish all wrongful acts. Our reasons for not punishing various illegal acts include: informal judgments that the offense is trivial or that the offender is basically a good guy who can be let off with a warning; formal judgments that the offender was not legally responsible; and (last, but unfortunately not least) the fact that it costs too much. For those who justify punishment in terms of deterrence, one over-

arching principle in such decisions is whether the crime in question is the kind of act that others are likely to refrain from doing because they see others punished for it.

Imagine, for example, what it would be like to deter people from having sexual intercourse. The example may seem silly because we normal folks have trouble seeing the value of discouraging sex; it's very fashionable nowadays. The problem is less abstract, however, in the case of murders committed by sane people in the heat of passion. Seemingly normal people may "crack" under pressure or "go off," as inmates put it; they kill their spouses, their in-laws, and whoever else happens to get in the way of their pent-up rage. Such men and women are in no position to be deterred by the threat of punishment. Yet we will not accept that these individuals should not be punished, even when (as is often the case) they pose no further danger. It borders on hypocrisy to say that we punish such criminal acts merely because it is the best way we can think of to make other people, whose lives are collapsing, believe that they will be punished for killing.

The upshot of these problems is that general deterrence cannot stand alone as a justification for punishment. It needs to be supplemented by a theory that focuses specifically on the significance of the wrong that this particular man or woman has done. Such a theory is provided by the justification of punishment in terms of moral paternalism, to which I now turn. Before doing so, however, I cannot resist throwing in a quote from George Bernard Shaw. Not being in the habit of mincing words, he preferred to describe deterrence as a form of terrorism.

"...commercial civilization presents an appalling spectacle of pillage and parasitism, of corruption in the press and in the pulpit, of lying advertise-

ments which make people buy rank poisons in the belief that they are health restorers, of traps to catch the provision made for the widow and the fatherless and divert it to the pockets of company promoting rogues, of villainous oppression of the poor and cruelty to the defenceless; and it is arguable that most of this could, like burglary and forgery, be kept within reasonable bounds if its perpetrators were dealt with as burglars and forgers are dealt with today. It is, let us not forget, equally arguable that if we can afford to leave so much villainy unpunished, we can afford to leave all villainy unpunished."⁷

Thank goodness things have changed in the last sixty years.

C. Moral Paternalism

The second justification of punishment is less obvious and in some ways more attractive. This is the theory that supported my attempt, in working with the Departmental Mission Committee, to forge a link between punishment and the restoration of the offender to the community. The punishment of particular offenders expresses our judgment that certain forms of behavior are wrongful, and in so doing it reinforces the efforts of families, schools and communities to uphold the values of mutual respect, consideration and fairness. In labelling the theory 'paternalistic,' I am following Herbert Morris, who recognizes the correspondence between the values that we uphold in our punishment of children and the values in whose name the state punishes criminal offenders.⁸ Although in both cases punishment involves coercion and suffering, it is justified when it promotes the moral good of the person punished. A method of punishment that does nothing but

degrade the person punished is illegitimate.

By means of punishment, we communicate to offenders that they have done wrong, are responsible for their actions, and are capable of redirecting themselves. The suffering that we impose on them is evidence of the importance we place on the principles that they have violated. In imposing punishment we are committing ourselves to the view that the value of our lives to ourselves and to others is bound up with the moral choices we make. Where respect for the humanity of one's fellows is absent, so also will be friendship and trust. The life stories of many of the men and women in our prisons, which are dominated by loneliness, fear and frustration, are negative testimony to the importance of the values that have been neglected or beaten down. The difficulty of getting some of them to recognize what they are missing only makes their testimony stronger and more poignant.

How does this theory answer the questions left by the general deterrence conception? The moral paternalist approach emphasizes the element of reciprocity between the members of society, which is missing from the theory of general deterrence. It is the ideas of "balance" and "paying debts" that justify the punishment of particular offenders in a way that general deterrence (by itself) fails to do.

Maintenance of a community in which our relations can be regulated by trust and respect require that we each restrain our selfish desires. By selfishly and unjustly taking something of value from his or her victim, the offender has upset the balance: he is not carrying his share of the burden of self-restraint. Quite apart from its deterrent effect on others, then, punishment serves to restore the balance by requiring the offender to pay the debt that he or she has incurred by a wrongful act. The talk of "restoring a balance" here is metaphorical, and

should not be confused with requiring an offender to make financial restitution to the victim (although restitution may be an appropriate part of the social response to some crimes). It is not money that weights the scales, on which the offender and the victim are balanced, but suffering; in addition to the burden of self-restraint that we are each obligated to assume, there is the extra burden of suffering imposed on the victim when the offender relinquishes his or her obligation of restraint.

The metaphorical quality of these ideas does not trouble me greatly. Indeed I think that the act of punishment, in spite of its modern overlay of social intervention rhetoric, is nine-tenths moral symbolism and one-tenth measurable social benefit in any case. With crimes like robbery and burglary, it seems reasonable to view punishment as a response to the unfairness of offenders simply taking what they want while the rest of us accept the burden of self-restraint. It is a bit harder, however, to see the offender's rejection of self-restraint as the major factor in our feelings about crimes like murder, rape and disabling assaults.⁹ Here our focus is almost entirely on the harm to the victims. We may use the metaphor of balance in trying to state why the perpetrator should suffer, but then the metaphor seems simply to express more primitive retributive feelings; it does not justify the suffering we impose in terms of an ideal conception of a just community.

Fortunately, there is more to the story. The suffering that we impose does more than forcefully communicate our feelings about the rules that offenders have broken. The suffering itself benefits them directly, in several ways.

First, the awareness that one has broken a rule on which one's family or one's community places great value is a source of guilt. Guilt that is not expiated — or

that one believes one has not expiated — can drive a cycle of debilitating fears, doubts and confusions, which may enter into further failures and attempts to seize things. We suffer because of what we have done. The belief that the suffering can be alleviated by means of a ritual imposition of pain is as deeply rooted — and as successful — as the allied belief that the suffering others have caused us can be alleviated by imposing pain on them. The suffering experienced by offenders, or by children, when we punish them allows them to feel entitled to participate in our family or community as individuals whose guilt has been assuaged, making room for an active conscience.

Second, the relationship between suffering and the expiation of guilt — which we all can recognize — allows the members of the punished offenders' families or communities to accept them as persons whose membership has been renewed because they have paid their debt. I will not try to prove that belonging to a community, and living according to the values I have mentioned, is good for us. Certainly the people in our prisons, whom we have rejected, generally want to belong to some community in which they can be respected — if only the community of the rejected.

It is sad but true that many correctional workers would wonder what these ideas have to do with the operation of prisons. It is sad because the people I have been thinking about, while writing these seemingly lofty generalizations, are prison inmates. The prison is an institution of punishment. The prison is also a miniature society to which offenders have been banished, with its own system of rewards and punishments. Guards and administrators too are members of this society, subject to the emotions I have discussed as well as to the imperatives of management. The moral and psychological problems that arise when we try to justify the punishment of criminal

offenses are duplicated inside the walls, in the attitudes of inmates and staff about disciplinary and classification decisions. There is no more salient feature of prison life than the complaints of inmates about the decisions that have been made about them, particularly in the area of discipline. Deterrence, reform and retribution all enter into these decisions, in ways that are often no more clear to those who make them than to those who are subjected to the consequences. The bitterness of the inmate is often expressed in an exaggerated and self-deceptive manner; but the immature, violent or manipulative behavior which makes prison management such a perpetually precarious enterprise also reflects the fact that the people who live there have a sense of justice.

My difficulties with applying the parental model of punishment do not, in short, stem from doubts about whether its moral and emotional prerequisites are present in the people subjected to our correctional system. By and large prison inmates are capable of recognizing why what they have done is wrong, of feeling guilt, and of wanting to make up for their actions in order to participate in a decent community. My difficulties with the theory have to do with the relationship between the ritual imposition of pain, the relief of guilt, and the nurturing of conscience.

Many parents nowadays discipline their children in ways that do not involve a deliberate, ritual imposition of a measure of pain or some other deprivation. They get angry, intervene, scold and explain; they also judiciously reward their children, with the idea that by these means their children will grow up to be considerate and fair, even when the threat of punishment is absent. Most important, they try to exemplify in their own conduct the same virtues that they try to impart in their punishments.

These are the features of the parental model of criminal punishment which give it its distinctively hopeful flavor.

It is folly to maintain that these methods could succeed without a show of anger and superior power, and hypocrisy to believe that such demonstrations cause no suffering or guilt. Nor can parents honestly claim that they do not intend to cause pain. These parents, however, may not impose a formal deprivation or rule-bound penalty after the incident. Yet it is precisely the fact that suffering is imposed because it is painful, and not as a by-product of intervention, which most people see as the essence of punishment. The children of parents who fail to acknowledge the retaliatory feature of punishment may not have enough opportunity to relieve their guilt. Consequently, they may suffer from unreasonably guilty feelings and other allegedly middle-class inhibitions, from which many of the young men and women in our prisons seem to be free. But perhaps the lingering of guilt is the price we pay for conscience.

Many correctional workers resist seeing their role in terms of punishment because the prevailing rhetoric in the field has for many decades been one of social intervention. The communicative and moralistic components of effective parental punishment have wrongly been recast as techniques of social intervention, leaving nothing to punishment but the ritual imposition of pain on wrongdoers. And there are ample reasons to doubt whether retaliation by itself can serve the moral objectives which the paternalistic model attributes to punishment. The strongest reason for doubt is the failure of retaliation, by itself, to engage the offender's guilt.

Recently I overheard a dialogue between a concerned correctional officer and an older, obviously unbalanced inmate, who was loudly proclaiming that he honestly ex-

pected to return to boozing and robbery when he got out. "What if the owner of the store has a gun too, and shoots you on the way out?" The man shrugged and said, "Well, there'll be one dead fella." Is this the attitude of a person who is too selfish to feel guilt? Guilt presupposes a minimal level of concern about one's self, and the meaning of one's actions, which many of the men and women in our prisons have, amazingly enough, never developed.¹⁰ When they appear before official committees their expressions of remorse are rarely credible, seeming only to reflect an attempt to say what they think the officials want to hear. But they do suffer from an abysmal self-image, which would take the form of guilty feelings if they had enough self-awareness to care about what they are doing to themselves as well as to others. Far from being a sign of the self-assurance of the wicked, their apparent lack of guilt may be a sign that they do not recognize a self about which they can be either assured or guilty.

A related explanation for the apparent lack of guilty feelings in many prison inmates is that they have been punished repeatedly and abusively, both by the adults in their homes and by the legal authorities. The ritual imposition of pain, by itself, may be altogether too effective in relieving guilt. Excessive or unexplained punishment, rather than nurturing conscience, may leave people feeling that they owe nothing to their community and indeed that whatever they take from others is simply compensating for the suffering they have already paid out.

What these observations suggest is not that the moral paternalistic theory is a poor justification of punishment. Indeed I believe that it describes the only conditions under which punishment is fully just. We must rather conclude that the success of punishment entirely depends on how and why it is administered. In particular it requires a form of communication between the punishers

and the punished which we usually fail to achieve: communication that emphasizes the dignity of individuals, the importance of the values they may be missing, and their responsibility for their choices. With some offenders such communication may be practically impossible in any case. But by and large the failure is ours. If we set out to design a system of state-administered punishment that would systematically defeat the objectives of the moral paternalist theory, I doubt that we could come up with anything more efficient than our present system of cattlecar courtroom processing and large-scale, fortified warehouses.

This is not to say that imprisonment per se is the worst possible form of punishment. Certainly it is benign in comparison with the methods in vogue several hundred years ago. In terms of the paternalist theory, the deprivation of liberty is an appropriate punishment for those who commit crimes of personal violence: such behavior makes it unreasonable for others to tolerate their presence in the community, and locking them up — at least during the initial stages of the punishment — may be the only way to get their attention. However, it is ludicrous to think that the moral objectives of punishment could be met for every offender by variations on just one method.

The moral paternalist theory is better able than the others to provide a sense of legitimate purpose for both the agents of punishment and the punished. It provides the best justification for the suffering which is an essential part of punishment. By means of the idea of balance, it attempts to account for the legitimate feelings of those who have been harmed by criminal acts, in a way that general deterrence fails to do. I have suggested, however, that the notion of balance may rest on more primitive retributive feelings rather than justifying them.

Furthermore, the historical record of methods of punishment provides little assurance that the institutions we are likely to have will be justifiable in terms of the parental model. Given that the institution of punishment is necessary, the theory states the further conditions that it must meet if the institution is to deserve general support. If we could avoid punishment, however, the virtues of the moral paternalist goals would not be enough to justify the suffering that will occur in our actual practices. So we still need a conclusive reason for thinking punishment necessary. That reason is provided by the theory of retribution.

C. Pure Retribution

The third theory, which I have called 'pure retribution' for lack of a better name, is difficult to state without appearing simple-minded or barbaric.¹¹ Part of the difficulty in stating the theory is that rather than answering the questions of justification left by the other theories, it suggests that the questions are mistaken: punishment does not need to be justified. The other theories addressed the questions of necessity and legitimacy as means-end questions: punishment was justified as a way of achieving deterrence of crime, a fair social balance, or moral reform. From the point of view of pure retribution, it is misleading to discuss the institution of punishment as though we had a choice whether or not to have it. Punishment is necessary in the sense that it is an ineradicable response to perceived wrongdoing. To ask whether we are justified in wanting the guilty to suffer is like asking whether human beings are justified in eating, sleeping or having sex. The example of sexuality is useful because the fact of its necessity does not prevent us from attempting to regulate its expression in terms of principles of respect and fair play. The claims

I am making for pure retribution are admonitions to face the facts, not arguments that anything goes.

The pure retribution conception of punishment is the least complimentary in terms of its projected social benefits. Its virtue is that it connects the administration of punishment by the state, with all of its formal apparatus and ritual for the determination of guilt and the pronouncement of sentence, to the most basic and least deliberate of our responses. I get up in the middle of the night, trip over a child's toy, and angrily kick it across the room: behold the majesty of the law. We may properly attempt to rationalize and limit the punishment response in terms of the ideas of guilt, expiation, responsibility, justice and law. But the link between crime and punishment is made in the forges of anger and desire. The reason for the suffering of the guilty is the fact that we want it. We want it.

The desire for punishment is well expressed by the poet Heinrich Heine, in a letter to Freud:

"Mine is a most peaceable disposition. My wishes are: a humble cottage with a thatched roof, but a good bed, good food, the freshest of milk and butter, flowers before my window, and a few fine trees before my door; and if God wants to make my happiness complete, He will grant me the joy of seeing some six or seven of my enemies hanging from those trees. Before their death I shall, moved in my heart, forgive them all the wrong they did me in their lifetime. One must, it is true, forgive one's enemies — but not before they have been hanged."¹²

It has often been noted that the ideas of crime and punishment are conceptually connected. It is part of the

definition of a crime that it calls for punishment, so that asking why crimes should be punished is like asking why triangles should have three sides. Defenders of retribution see this statement as a profound truth, while critics dismiss it as an evasion of the question of justification. Without pushing the issue of the conceptual connection, we may note that the natural relationships between crime and punishment are many and various, running in both directions. If we accept what has been said about the deep-rooted character of the retributive emotions, it is obvious that crime causes us to punish. But punishment also causes crime, in two ways: the past experience of abusive punishment is a major factor in the alienation between offenders and their families or communities, which they formalize by their crimes; and many crimes are apparently motivated by retributive emotions. There is no group more thoroughly involved with the need to get back at those who have hurt them than the men and women in our jails and prisons. Often the experience of punishment at the hands of the state feeds right into the cycle.

I do not wish to claim dogmatically that the drama of crime and punishment is an intrinsic feature of any human society. I do not see how we can know a priori what the extent of human possibilities is. But surely in a culture such as ours, which emphasizes the satisfaction of individual desires, there will always be fertile ground for both crime and punishment. Whatever the suffering and frustration that lies in the background, people will engage in forbidden acts, taking things of value from others because they want them. And we will punish them because we want them to suffer. From this point of view the machinery of law, of courts and corrections, amounts to a restrained and rule-governed method of satisfying desires that are going to be there in any case. It is a

legally sanctioned alternative to private vengeance, which in the absence of state-administered punishment would take a far more bloodthirsty form.

There is nothing particularly noble about justifying the activity of corrections as a method of taking care of inevitable desires. Pimps can make the same kind of claim for prostitution. The analogy is not intended to be offensive, but to point out that the necessity of punishment is nothing to be self-righteous about. This is why I have wanted to distinguish, within the general topic of justification, between establishing the necessity of punishment and establishing the legitimacy of the methods we employ in fulfilling this unpleasant necessity.

Whether the method of imprisonment can live up to the ideals that justify us in punishing is for me an unresolved question. It will not be resolved so long as imprisonment retains its present monopoly on state-administered punishment in this country. As Shaw pointed out, the bodily punishment of offenders in public was a blood sport, degrading to its eager spectators. The use of imprisonment avoids this evil, but by the same token it leads us to underestimate drastically the amount of suffering that we are imposing; we keep it out of sight.

The monopoly of imprisonment is responsible for the prevalence of incapacitation as a motive behind sentencing practices, and for the dominance of custodial considerations in the running of institutions. When we house under one roof a large number of offenders, representing a diversity of moral claims, it is inevitable that we will fail to deal with each as he or she deserves. The injustices and confusions involved in the management of large penal institutions are embittering for both inmates and staff members. Furthermore, the long-term experience of incarceration is one of dependency, which leaves people less fit for coping with life on the outside. It also re-

moves people from the marketplace at a time in their lives when they need to be active if they are to have a chance in the competitive struggle for success on which our culture places such great value.¹³ As presently practiced, imprisonment is an experience of rejection without reconciliation; in the eyes of offenders as well as their communities, it certifies their identification with criminal values.

These pessimistic reflections may lead some correctional workers to resist accepting the administration of punishment as a description of their task. Such a reaction, though understandable, will not lessen the destructive effects of imprisonment; it only leads to our adding hypocrisy to the catalogue of evils that go along with crime and punishment. We must recognize that both the punishers and the punished are accountable for their parts in an enterprise which is at best morally problematic. Perhaps we can then dedicate ourselves to achieving, through a variety of methods of punishment, the objectives of the parental model: fair dealing, the credible communication of decent values, and reconciliation between offenders and society. These are not luxuries to be provided, if we can afford it, once the custodial imperative has been met. They represent the only conditions under which the practice of corrections can be anything other than a further contribution to the cycle of suffering and retaliation.

FOOTNOTES

1. I cannot find the source of the explicit comparison of a philosophical problem with being lost in an old city, although it can be inferred from Ludwig Wittgenstein, Philosophical Investigations, tr. G. E. M. Anscombe (New York: Macmillan, 1953; Basil Blackwell & Mott ed., 1958), Part I, S. 18. The comparison may have come from Robert Ammerman, teacher of a graduate seminar on Wittgenstein at the University of Wisconsin.
2. Robert Martinson, "Restraint and Incapacitation: An Analytical Introduction," in Marvin Wolfgang, ed., Prisons: Present and Possible (Lexington, Mass.: D. C. Heath, 1979), pp. 55-88.
3. Bernard Gert, The Moral Rules (New York: Harper & Row, 1966, 1973).
4. Thomas Hobbes, Leviathan (1651) (Bobbs-Merrill-Liberal Arts Press, 1958), Ch. 28.
5. Gert, op. cit., pp. 55-59.
6. This problem is raised in Richard Wasserstrom, "Capital Punishment as Punishment: Some Theoretical Issues and Objections," in Peter French, Theodore Uehling, Jr., and Howard Wettstein, eds., Midwest Studies in Philosophy VII (Minneapolis: University of Minnesota Press, 1982), pp. 473-502.
7. George Bernard Shaw, "Imprisonment," in Gertrude Ezorsky, ed., Philosophical Perspectives on Punishment (Albany: State University of New York Press, 1972), p. 292. Originally a preface to S. and B. Webb, English Prisons Under Local Government (London: Longmans Green, 1922).
8. Herbert Morris, "A Paternalistic Theory of Punishment," American Philosophical Quarterly 18:4 (October 1981), pp. 263-271. See also "Persons and Punishment," The Monist (October 1968), reprinted in Morris, On Guilt and Innocence (Berkeley: University of California Press, 1976), pp. 31-57.

Footnotes (continued)

9. Wasserstrom, op. cit., pp. 496-499. On a less hopeful conception of human nature it may be claimed that the repression of rapacious and murderous desires does require an immense effort, though we are rarely conscious of it. The "social balance" notion can then account for our angry feelings about such crimes in terms of our envy of violent criminals. Such a theory may be defensible in psychoanalytic terms but it does not fit well with the idealistic tone of the 'moral paternalist' approach.
10. I owe this perspective to Francis Nielsen, Director of the Audiobatics Program at Hudson Correctional Facility in Hudson, New York.
11. This section of the paper is greatly indebted to Graeme Newman, The Punishment Response (Philadelphia: J. B. Lippincott, 1978), especially Chs. 1, 2, 10 and 13.
12. Sigmund Freud, Civilization and its Discontents, tr. James Strachey (New York: W. W. Norton, 1961), p. 57. Cited by Newman, op. cit., p. 287.
13. Robert Martinson, "The Paradox of Prison Reform," in Ezorsky, op. cit., pp. 309-322. Reprinted from the New Republic, 1972.

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