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THE CONCEPT AND JUSTIFICATION OF PUNISHMENT

by

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The undersigned certify that they have read and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled THE CONCEPT AND JUSTIFICATION OF PUNISHMENT submitted by Ila Bhattacharya in partial fulfilment of the requirements for the degree of Master of Arts in Philosophy.

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ABSTRACT

There has been considerable philosophical discussion on the subject of punishment in recent years. It is generally claimed that discussions on this subject are mostly confused and confusing. In this thesis I have tried to discuss some of the important philosophical papers on the subject, and have formulated a definition of "punishment" which is neither too narrow nor too wide, and which in my view is consistent with the ordinary uses of the term.

After discussing briefly the nature of moral justification I have considered the Utilitarian and the Retributivist theories of the justification of the practice of punishment. I have tried to point out the difficulties involved in the Utilitarian theory, and have considered a version of the Retributivist position based on the concepts of "desert" and "justice". I have argued that this retributivist version of the justification of the practice of punishment is sounder from the moral point of view, and is consistent with the definition of "punishment" formulated in the earlier part of the thesis.

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CHAPTER I

INTRODUCTION

Philosophical discussions on the subject of punishment have always been influenced by prevailing religious, moral, political and reformist ideas of all sorts. In the British philosophical tradition beginning with Jeremy Bentham until the earlier decades of the present century -- in the writings of neo-idealists and their realist critics -- one can detect many different approaches and treatments of the subject. The nature of punishment, its consequences, the justification of punishment, the state's right to punish, and other related issues were raised and discussed from widely different points of view. However, these discussions did not produce any generally acceptable meaning of 'punishment' nor any agreement on the important problem of the moral justification of punishment.

In 1929 Dr. A.C. Ewing published The Morality of Punishment which was based on a thesis that gained for the author the Green prize in Moral philosophy at the University of Oxford. The work received a Critical Notice by Professor C.D. Broad in Mind, 1930 (vol. xxxix, pp. 347-353). Dr. Ewing supported a "milder form" of retributive theory of punishment to show that it need not be inconsistent with

the duty of Forgiveness nor need it be the expression of any passion for revenge. However, Ewing's own positive theory of punishment was that the infliction of pain could not be appropriate as retribution for sin (as many earlier retributivists had thought it could), but it could be an appropriate expression of disapproval of sin. Since it was impossible to know the exact amount of pain which would be appropriate to a given degree of guilt in any given kind of criminal act, Ewing argued that retribution could not be used in practice as a principle of punishment by the state. In Ewing's view punishment "needs to be educative" -- it needs to be supplemented by the "reformatory and deterrent view". He thus concluded: "Since the 'educative' effects are real and important, we must hold that they ought to be considered in practice as well as in theory."[1]

Dr. Ewing's view that the nature and amount of punishment must take into consideration the educative consequences of punishment ("Punishment as a Moral Education" being the title of Chapter IV of his work) was seen by J.D. Mabbott as a surrender of the whole theory of retribution. Mabbott's 1939 paper in Mind (discussed in the following chapters) became the subject of detailed criticism after the Second World War. Its intensive discussion at the Scots Philosophical Club in 1953 marked the beginning of a new philosophical

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[1] A.C. Ewing, The Morality of Punishment, London: Kegan Paul, Trench, Trubner & Co. Ltd., 1929, p. 120.

interest in the subject of punishment. The result was a large number of articles by philosophers in the 1950's and 1960's which probed the many issues related to the subject of punishment. Newer approaches to the old questions involving the application of new methods of analysis and examination were employed in these discussions.

Contemporary philosophical discussion of punishment has mainly centred around two basic questions, namely, What is punishment? and What is the justification of punishment? But there still remains a great deal of confusion and conflict on these and other related questions. A third problem, namely, that of allocating appropriate penalties for offences often becomes mixed up with the question of justifying the practice of punishment as such. Also, the long standing dispute between the retributivist and utilitarian assumptions on questions concerning punishment, entrenched religious beliefs concerning forgiveness or eternal damnation, legal doctrines, administrative needs, concerns of social reformers, etc., all show up in many of these discussions.

However, in the present essay I intend to concentrate my attention only on the two basic questions, viz., What is punishment? and What is the justification of punishment? in the light of contemporary philosophical contribution on these questions, and with as little digression as possible. The first question is logical or definitional while the second is concerned with ethical considerations. I shall not

directly discuss the problem of allocating penalties, which though related to the subject of this essay, is more a matter of practical reasoning generally tackled by legislators, judges, and penologists. This is not to suggest that systems of penalty-fixing cannot be justified, or objected to, on ethical grounds. But they also raise questions of other sorts; systems of penalty-fixing often vary from culture to culture, and some practices (like punishing persons for smoking marijuana with jail terms) may be based on excessive moralism as well as erroneous beliefs. Any detailed discussion of this problem will take us beyond the scope of the present thesis.[2] But, before I proceed with the discussion as planned, I must show that some views on the subject of punishment, which may be clearly construed as opposed to my plan, are on the whole mistaken. For it has been maintained by some writers on the subject that there cannot be any single concept -- or core meaning -- of punishment. It has also been maintained by some others that the appearance of separateness of the concept of punishment from the justification of the practice of it is illusory. In other words, doubts have been expressed as to whether it is at all possible to separate questions about the justification

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[2] For a discussion of the distinction of these three problems of punishment, see, K.G. Armstrong, "The Retributivist Hits Back", Mind (October, 1961); reprinted in H.B. Acton (ed.), The Philosophy of Punishment, London: McMillan & Co. Ltd., 1969, pp. 138-158.

from questions about the definition of punishment.

In a paper significantly titled "The Complexity of the Concepts of Punishment" Professor H.J. McCloskey argues that much contemporary writing on punishment commits what he calls "The Platonic fallacy of assuming that there is a single, core, paradigm use of 'punishment'." Against this view, he proposes that "there is not a single core" meaning of punishment, "that there are a number of distinct but related concepts of punishment."[3] In this lengthy paper McCloskey discusses punishment in various forms or contexts, such as, "God and Divine punishment", "Morality and Moral punishment", "Society", "Education", "Games", "Family", "Voluntary Associations", "Punishment by the State" as well as notions of "justified punishment", "deserved punishment", and so on, to argue that in different sorts of situations the concepts of an authority who may punish, an offence for which one may or should be punished, etc. are quite different. He writes, for example,

> The tests of what is punishment, of when a person is deserving of punishment, of which punishments are just, of which offences are more serious, and more generally, what is the basic concept and what is the nature of punishment -- institutional or non-institutional -- its justification, seem to differ radically in the various cases.[4]

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[3] H.J. McCloskey, "The Complexity of the Concepts of Punishment", Philosophy, Vol. xxxvii, No. 142 (October, 1962), p. 307.

[4] Ibid., p. 308.

Another writier, similarly puzzled by the variety of forms that punishment may take, comments: "perhaps there is no such thing as punishment-in-general anyway",[5] meaning thereby that there cannot be a concept of punishment as such. However, these writers do not appear to concentrate on the definitional problem at all. They do not try to determine whether there is a basic meaning of "punishment" which may fit the various cases. McCloskey, for example, tries to answer too many questions at the same time, and as a result moves far away from the purely definitional question, namely, What is punishment? although he seems to pose this question again and again. His main blunder, so it appears, is a confusion between concept and context. He is right in pointing out that punishment takes various forms in various contexts, but instead of trying first to use the contextual analysis in order to determine the concept of punishment, he becomes too involved with the different "spheres" and very little with raising the question, what really counts as punishment. A simple analogy will explain what I mean. Education, for example, can take various forms in task and achievement at various levels which, to use McCloskey's phrase, may be "strikingly different" in different contexts, but this in itself is no argument that there cannot be a "core meaning" or concept of education. The same can be said about the con-

[5] Thomas McPherson, "Punishment: Definition and Justification", Analysis (October, 1967), p. 26.

cept of reform. In fact I shall try to show in the following chapter that there is a core meaning of the term punishment which is consistent with the use of the word in widely different contexts.

K.G. Armstrong has argued forcefully that it is necessary to know what punishment is before we can decide about its justifiability or otherwise, or consider the principles of any system of penalty-fixing. In his words, "Clearly the logical order is first to decide what punishment is, then to decide whether this thing is morally justifiable or not."[6] While admitting that this is a view on which philosophers "are for the most part now a days agreed", Thomas McPherson takes exception to this approach to the subject of punishment. He argues that the very doubt whether punishment can be justified or not may have to do with what we understand by punishment. "Coming to see punishment justified", in McPherson's view, "may be a matter of re-defining 'punishment'."[7] This means, in other words, that it is difficult to separate the justification of punishment from its definition (or its proper re-definition). Now, McPherson claims that when one is wondering about the justifiability of inflicting unpleasantness on a person "just because he is guilty of a crime", one may answer himself by saying that "But (this)

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[6] K.G. Armstrong, op. cit., p. 143.

[7] Thomas McPherson, op. cit., p. 24.

...should have the effect of deterring others" or something like that. For the wondering individual then, in McPherson's view, "punishment is the infliction of unpleasantness on a guilty person in the interests of the general happiness."[8] Thus, McPherson tells us that it is hard to keep apart the meaning and justification of punishment. But McPherson is clearly mistaken. In his example, the worried individual is wondering not about the meaning of "punishment" but about the justifiability of punishment. In McPherson's attempt at properly re-defining "punishment", we can see that an account of what "punishment" means is given first as it should, and the added phrase "in the interests of the general happiness" comes later as a means of giving a moral justification. It is easy to see that the justificatory phrase "in the interests of the general happiness" can be replaced by some other phrase such as "to reform the individual"; that this will not in any way affect the first part of the sentence, which is, "punishment is the infliction of unpleasantness on a guilty person". McPherson recognizes that any reference to the purpose or purposes to be served by punishment, if included within the definition of punishment, would make it impossible to ask whether punishment could have any other purposes at all. However, he does not consider it to be a "serious objection, provided the purpose is stated in suffi-

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[8] Ibid., pp. 24-25.

ciently broad terms."[9] But, whether the purpose is stated in broad or narrow terms, it is certainly not the case that the definition of punishment becomes determined (as McPherson claims) by what one may have in mind as its justification. They remain logically distinct. And as they in some ways remain separate, the question: What is punishment? will have to be answered first before we can decide whether the practice is morally justifiable or not.

Contemporary writers on the subject of punishment seem to agree that discussions on this subject are mostly confused and confusing. It is my view that the root of all this confusion lies in disagreement about the proper conditions and criteria for the use of the term "punishment".

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[9] Thomas McPherson, op. cit., p. 25.

CHAPTER II

WHAT IS PUNISHMENT?

I

By the question What is punishment? we mean "What do we mean by 'punishment'?" or "What is the concept of punishment?" This is a logical question concerned with the meaning or definition of "punishment". The problem here is that of defining the term "punishment" so that it does not become either too narrow or too wide. If we can determine the conditions and criteria for the correct use of this term, we can meaningfully apply it only to some kinds of things and not to others. So the problem here is a logical or definitional one. The question "Why punishment?" or "How is one to justify punishment?" is, on the other hand, an ethical one and therefore presents a different type of problem.

Ordinary uses of English language point out to the fact that we use the term 'punishment' in diverse ways and various contexts. The Concise Oxford Dictionary gives the following meanings of the verb 'to punish':

1. cause to suffer for offence; chastise; inflict penalty on (offender); inflict penalty for (offence).
2. (colloq). inflict severe blows on (opponent in boxing); (of race, competitor) tax severely the powers of (competitor); take full advantage of (weak bowling, bowler, stroke at tennis); make heavy inroad on (food, etc.)....

The Oxford Universal Dictionary gives the following usages:

1. The act of punishing or the fact of being punished; also, that which is inflicted as a penalty; a penalty imposed to ensure the application and enforcement of a law.
2. Slang and colloq. Severe handling; belabouring, mauling; orig. that inflicted by a puglist upon his opponent; pain, damage, or loss inflicted (without any retributive or judicial character)...

Sometimes people talk about punishment suffered by men at the hands of non-human forces: "An angry sea has punished the sailors". Sometimes they speak of a boxer as having been punished by his opponent. While we can recognize and understand these secondary or metaphorical uses of the term "punishment", normally, however, we use the term as a fact of our social lives -- to state cases about the conscious imposition of a certain penalty by someone in authority for some disapproved act of some person or persons. However, mere recognition of the generally and loosely accepted use of "punishment" does not in itself necessarily mark out the precise and correct meaning of the term.

Since in its ordinary every day use the term remains quite vague, philosophers have tried to formulate 'theories' about the correct meaning of punishment claiming that 'a certain definition marks out the correct use of the term'. However, as we shall see presently, some of these 'theories' do err by being too narrow, since they cannot be applied to all legitimate cases of punishment in various contexts. Some other philosophers' discussions of the meaning of "punishment" seem to go astray by wandering too far from the

definitional problem (as indicated in the preceding chapter). My purpose in briefly discussing some of these will be to determine the core meaning of the word "punishment" which will enable us to apply this term to different cases of punishment, in spite of the differences that these different cases of punishment may exhibit.

Philosophical disputes concerning the correct definition of "punishment" centre around questions as to the nature of "offence" for which a punishment can be imposed. If a punishment is always for an offence of an offender what can it mean to say -- (as is often said in ordinary discourse) -- that someone was punished for something he did not do?. What exactly are the "inflictions" that can properly be described as inflicting a penalty? Must a penalty be physical pain, or can the infliction of some different, though still undesired state of affairs be also a case in point? Then we must ask: who, and under what circumstances, can properly be said to exercise the authority requisite for imposing a penalty? The dictionary meanings of "punishment" quoted in the beginning of the chapter, as now can be seen, do not by themselves enable us to answer these and similar questions with sufficient clarity. Attempts at philosophical clarification serve to point out different elements with their contextual variations involved in the use of punishment, and philosophers tend to disagree as to what elements are really essential for a definition of "punishment".

II.

J.D. Mabbott in the previously mentioned article "Punishment" of 1939[1] offers an account of punishment whereby it is "a purely legal matter", and only a criminal who has broken a law can (logically) be punished. His paper is, on the whole, concerned with the defence of the retributive theory of the justification of punishment, as he asks: "under what circumstances is the punishment of some particular person justified and why?" Mabbott conceives of punishment as being logically connected with legal offences, and not with what may be generally described as social and moral wrong doing. One who speaks of a criminal, according to Mabbott,

> ...means a man who has broken a law, not a bad man; an 'innocent' man is a man who has not broken the law in connection with which he is being punished, though he may be a bad man and have broken other laws. Here I dissent from most upholders of the retributive theory -- from Hegel, from Bradley, and from Dr. Ross. They maintain that the essential connection is one between punishment and moral or social wrong doing.[2]

In this paper Mabbott was also reacting against the view of Dr. A.C. Ewing according to whom punishment "is essentially an expression of moral condemnation."[3] However, Mabbott

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[1] Originally appeared in Mind, Vol. xiviii, No. 190 (1939), pp. 152-167. Reprinted in H.B. Acton (ed.), The Philosophy of Punishment, London, MacMillan and Co. Ltd., 1969, pp. 39-54.

[2] Ibid., p. 41.

[3] Ibid., p. 14.

finds a "fundamental difficulty" with the kind of theory that connects punishment with moral or social wrongs. "It takes two to make a punishment", Mabbott writes, "and for a moral or social wrong I can find no punisher".[4] He therefore thinks that a proper case of punishment can arise only within a "whole set of circumstances" which may be described as a "legal system". In a legal system there will be laws (he mentions college rules as well) to be observed, and there will be disciplinary officers to see that laws and rules are observed. When a criminal disobeys a law, in Mabbott's view, he "brings it on himself", that is to say, he can (logically) be punished. Breaking the law is thus a logically necessary condition of punishment. He also contends that nothing more is "necessary to make punishment proper".

Mabbott's account raises two distinct but related questions: one concerning the precise nature of the sorts of offences that can be punished, and the other concerning the question as to who has the right to inflict the punishment. On both these questions Mabbott's view in the 1939 paper represents, in the words of S.I. Benn, "a rare example of a retributivist who dissociates punishment and moral guilt."[5] But Mabbott seems to believe that he is not always

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[4] Ibid., p. 41.

[5] S.I. Benn, "An Approach to the Problems of Punishment", Philosophy, Vol. xxxiii, No. 127 (October, 1958), pp. 333 f.n.

easy to determine what kinds of offences are simply moral offences, and also to hold that the state cannot punish a person for the moral offences qua moral ones. The offences must have to be legal offences in order to be punishable. These appear to be the reasons for his insisting on a legalistically restricted meaning for the term 'punishment'.

Mabbott's paper has been subjected to criticism on several points. C.W.K. Mundle argued, for example,

> Since Mabbott's version of this theory is not based on moral principles, on what, we may ask, is it based? If it were defended as a tautology, on the grounds that 'punishment' means 'infliction of pain for a legal offence', its weakness would be transparent; for it is very common indeed for parents, teachers, clergymen, etc., to describe as 'punishment' the infliction of pain for moral offences which are not legal offences.[6]

Antony Flew undertook a detailed philosophical analysis of the meaning of punishment. In his account of punishment in the primary sense, Flew enumerated five different positive elements, viz., (i) it must be an evil or unpleasantness to the victim; (ii) it must be for an offence; (iii) it must be of an offender; (iv) it must be the work of personal agencies; and (v) it must be imposed by virtue of some special authority.[7] However, to these five positive criteria

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[6] C.W.K. Mundle, "Punishment and Desert", Philosophical Quarterly, Vol. iv, No. 16 (July, 1954). Reprinted in H.B. Acton (ed.), op. cit., pp. 76-77. Italics not in original.

[7] Antony Flew, "The Justification of Punishment", Philosophy, Vol. xxix, No. 111 (October, 1954), pp. 291-307. Reprinted in H.B. Acton (ed.), op. cit., pp. 83-102 reference to pp. 85-87.

Flew added two negative criteria, one of which was that

> ...we should not insist... that it (punishment) is confined to legal or moral offences, but instead allow the use of the word in connection with any system of rules or laws -- state, school, trade union, trade association, etc.[8]

In his reply to Flew's paper Mabbott stated that he was in "substantial agreement" with Flew's criteria for the standard case (or primary sense) of punishment. And, on the negative criterion seeking extension of the meaning of punishment quoted above, Mabbott noted:

> Flew adds....punishment is not to be limited to the state. Any rule-making authority or its agents can rightly be said to punish. Penance and excommunication, expulsion from club or union, the chastisement of children by parents or teachers, the 'penalties' in games, are to be included as examples of the standard use of 'punishment'. I am not so sure about this, but I do not think anything serious depends on it.[9]

Mabbott is clearly shifting from his earlier stated position. He is no longer claiming that any rule, for the breaking of which a person can rightly be said to be punished must be a legal rule or what we ordinarily understand as a law enforced by the state or state-regulated institutions. A person may be, as often is the case, punished by being excommunicated or severely ostracized (i.e., denied certain rights or privileges). He may be punished for violating a church rule, a caste or community practice, and the like, which may neither

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[8] Ibid., p. 87.

[9] J.D. Mabbott, "Professor Flew on Punishment", Philosophy, (July, 1955). Reprinted in H.B. Acton (ed.), op. cit., p. 119.

be covered by a nation's stated laws nor be enforceable in a court of law. Also the matter of chastisement of children by parents and teachers -- within certain limits -- is in many societies left largely outside the scope of law and law-enforcing agencies. Though moral offences which are not legal offences vary from community to community and even among families within any given community, we cannot say that persons are not punished for violating a large body of rules which are enforced by communities, associations and families, rules which are not strictly legal ones. If, on the other hand, this large variety of informal rules are claimed to be legal, then the meaning of the term "legal" will be made too wide to be of any significance.

Mabbott's "logical and legal" account of punishment in the 1939 paper came under sharp attack on another point. Miss M.R. Glover in a "Note" in Mind of October, 1939 pointed out that since laws themselves are subject to moral assessment, a sharp distinction between legal and moral guilt may not be easy to sustain. Though this has directly to do with the moral justification of legal penalties, the discussion has some bearings on the concept of punishment itself. C.W.K. Mundle states the case in the following way:

> If Mabbott claimed that punishment for a legal offence is alone and is always morally justifiable, I could not agree, since, apart from its arbitrary restriction of the meaning of 'punishment', this view implies that the law of the land is our only criterion, or at any rate our ultimate criterion, of moral justice.[10]

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[10] C.W.K. Mundle, "Punishment and Desert", in H.B. Acton (ed.), op. cit., p. 77 f.n.

A.R. Manser, in a paper entitled "It Serves You Right", raises a similar objection to Mabbott's 1939 position. In his view

> It is the wrong that is important, not the breaking of the rule, for the retributionist; by confining himself to cases of breaking rules, Mr. Mabbott is talking about something very different...[11]

It may be remembered that Mabbott in his 1939 paper claimed that "nothing more" than the breaking of a rule was necessary to make punishment "proper". However, in his later (1955) account Mabbott seems to shift his position on this point as well. He now maintains that punishment is a 'prima facie obligation' of the authority whose law is broken. But there may be cases where a law or a legal system is so repugnant to moral agents, that such factors may or must override any demand on the authority to punish the breaking of a law. "Sabotage from within a system", he now maintains, "may sometimes be a duty".[12] By admitting in the same context that "punishment is an ethical claim",[13] he also seems to modify his earlier position (a) that there cannot be any punishment for moral offences which are not legal offences at the same time, and (b) that there may not be moral grounds on which a legal authority may refuse to administer punishment.

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[11] A.R. Masner, "It Serves You Right", Philosophy, Vol. xxii, No. 142, (October, 1962), p. 301.

[12] J.D. Mabbott, op. cit. (1955), p. 123.

[13] Ibid., p. 124.

The foregoing considerations indicate that there are difficulties in conceiving of punishment as an activity that takes place only within the legal context. In ordinary discourse, for example, we use the word "punishment" in a broader sense to cover inflicting penalties for offences of various sorts -- against the law, against some explicit rules set by schools, clubs, and other organizations, and against the more informal moral standards of the family or a community. Again, an offence can be something a person has done or failed to do -- something forbidden or required -- by an appropriate authority. Thus an act of commission (forbidden by law, by rule, or by a person in authority), or an act of omission (failure to perform in a manner appropriate to one's function and responsibility) may constitute an offence in a variety of circumstances. Similarly, our notion of <u>authority</u> or one who has the right to punish varies with the nature of the offence involved. However, we do think that the authority is some person or some institution that has been <u>accorded</u> certain relevant rights and responsibilities. A judge punishing a criminal, a teacher scolding a pupil, a parent chastising a child, for offences of different kinds, can claim to act with the authority accorded to them by the very fact of being placed in those positions.[14] This will no doubt distinguish an act of punishment from that of private

[14] A more detailed discussion of what is normally regarded as an offence, and the nature of authority in various contexts, can be carried out on the basis of sociological investigations and considerations, but that is outside the scope of this thesis.

vengeance or revenge, for an act of the latter kind is carried out without any authority whatsoever. However, in spite of philosophical disputes about the precise nature of what "offence" and "authority" will mean in the context of punishment, one point seems to emerge quite clearly and is accepted by most writers on the subject: a punishment is a penalty which can be inflicted by some person or body with authority on an offender for an offence. This has traditionally been taken to be the retributive meaning of "punishment"; and in my view, it represents the central meaning of the term.

III

Now, if wrong doing of some sort and punishment -- according to the core meaning of "punishment" -- are inseparably connected, we seem bound to consider a difficulty that is said to arise from the fact that statements like "He was punished for something he did not do" crop up in ordinary discourse on punishment in various contexts. It is indeed easy to see why phrases like "punishing the innocent" seem to create a special problem for the proposed definition of "punishment" since it requires us to say that a person is subjected to punishment for an offence and for no other reason, and not simply to deter him or others from committing offences in the future or to reform him. It is, therefore, not surprising that a number of contemporary philosophers,

who accept this meaning of "punishment", have addressed themselves to this problem arising from a fact of language usage.

According to Mr. Anthony M. Quinton the verb 'to punish' is a performatory word like 'to promise'. Thus, 'I am punishing you for something you have not done' -- in the first-person-present use, would be as absurd as saying 'I promise to do something which is not in my power'. However, in his view, it would be proper to say "they punished him", irrespective of whether they thought him guilty or not, provided that they said "we are going to punish you" and inflicted suffering on him.[15] In other words, so long as "they punished him" is a report or description of what the prescribers said, the statement "they punished him for what he did not do" is "perfectly proper", because, on Quinton's view, the use of punishment in the third person non-performative sense does not have to satisfy the logical conditions necessary for prescribing punishment in the first person, e.g., "I punish you". But Quinton appears to be mistaken in assuming that the verb "to punish" is a performatory word like the verb "promise". If we assume that they are alike then as K.E. Baier points out, it would imply that merely "to say 'I am punishing you....' were to punish you, just as 'I promise you', is to promise

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[15] Anthony M. Quinton, "On Punishment", Analysis, Vol. 14, No. 6 (June, 1954); reprinted in H.B. Acton (ed.), op. cit., pp. 55-64; p. 60.

you."[16] Baier suggests that Quinton's supposed use of "I am punishing you...." could at best mean "I am sentencing you"; but this offers Quinton no help since saying just that would not actually be punishing but merely sentencing someone. And to say 'I am sentencing you for something you have not done' is not absurd. It is conceivable that a judge may disagree with the verdict of the jury ("guilty"), but still feel obliged to pass on a sentence as the verdict requires.

Baier argues in this way that to say "I am punishing you for something you have not done" is not as absurd as to say "I promise you to do something which is not in my power." "It need not be absurd at all", he says. Though he argues that punishment "is indeed of its very nature retributive", i.e., we cannot punish someone who is found to be "not guilty" -- he seems to believe that someone may be punished who has been "found guilty" without <u>being</u> actually guilty. Antony Flew, in a "postscript (1967)" appended to his earlier paper (1954) in the Acton collection appears to agree generally with Baier's analysis. However, it may be worthwhile to state briefly what Baier found objectionable in Flew's original paper on the question of punishing the innocent -- a point Flew conceded in his "postscript".

Flew argued in his 1954 paper that one of Mabbott's main mistakes was to insist that punishment is <u>necessarily</u>

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[16] K.E. Baier, "Is Punishment Retributive?", <u>Analysis</u>, Vol. 16, No. 2 (December, 1955); reprinted in H.B. Acton (ed.), <u>op. cit.</u>, pp. 130-137 also p. 135. Italics in original.

and always retributive in the definitional sense. He maintained, on the other hand, that (i) any system of inflicting punishment on innocents or scapegoats could not properly be described as a system of punishment; however, (ii) "it would be pedantic to insist in single cases that people (logically) cannot be punished for what they have not done."[17] In other words, Flew attempted to explain away the puzzle by claiming that punishment of an offender for an offence -- need not be taken to mean that this is a matter of universal logical necessity -- but should be understood only as a matter of "necessary truth in the great majority of cases.". Baier, while agreeing with Flew that a system of inflicting punishment on scapegoats could not be properly called a system of punishment at all, disagreed with Flew that a single case of inflicting unpleasantness on an innocent scapegoat as such could be a case of punishment. In Baier's view, the contrast between a system and single cases within the system is misleading -- for whether a case of inflicting unpleasantness is a case of punishment in the proper sense is not a matter of statistics. Baier recognizes that judges and jurymen can be corrupt and very inefficient; there may be, as there certainly are, cases of mistakes and ghastly judicial errors, but these should be understood as cases of "breach of the rule", and therefore, not punishment in the proper sense. He writes:

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[17] Antony Flew, op. cit., pp. 85-86; also p. 100. Italics in original.

> Not merely that judges usually, but not always, discharge the accused when he has been found 'not guilty', but that is their job or duty to do so. If, after the jury has found the accused 'not guilty', the judge says, 'I sentence you to three years hard labour', this is not just an unusual case of punishing the man who is innocent, but not a case of punishment at all. And here it would not only not be pedantic, let alone wrong, but perfectly right to say that this case was not a case of punishment.[18]

In all this Baier seems to be right. However, what has been said so far about Baier's own account of the meaning of "punishment", including the citation of the foregoing passage, would suggest that his conception of punishment is what he calls a "whole game" consisting of several stages, such as, rule-making, penalty-fixing, finding guilty or reaching guilty verdict, pronouncing sentences, and finally administering punishment. The last act, administering or inflicting punishment cannot be performed without going through the entire complex procedure. (Baier admits that these activities may take rudimentary forms in cases of parents punishing their children.) If in following the procedure one is found "not guilty", one cannot (logically) be punished. However, Baier contends (as pointed out earlier),

> But at the same time, someone may be punished, i.e., have hardship inflicted on him as punishment, although he was guilty of no offence, since he may have been found guilty without being guilty. For all judges and jurymen are fallible and some are corrupt.[19]

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[18] K.E. Baier, op. cit., p. 134. Italics in original. For Mabbott's criticism of Flew, see Mabbott, op. cit. (1955), pp. 125-126.

[19] Ibid., p. 132. Italics in original.

It will be clear that while Flew tries to resolve problems about saying "he was punished for something he did not do" by assuming that the retributive meaning of "punishment" applies only to the system of punishment as a whole and not always to individual cases, Baier's analysis relies heavily on what he calls "the constitutive rules of this whole 'game'... called punishing or administering punishment...."[20] One of these rules is that for someone to be punished, he must be found guilty. But this definition of punishment, as K.G. Armstrong rightly points out will include not only "everything that we would call punishment, (but) also... things we would not call punishment. Merely to go through the moves of the 'game'... is not enough to constitute a case of punishment."[21] It is quite conceivable that a person, despite his known innocence, may be subjected to all the formal motions of the judicial process. He may be found guilty, sentenced, and eventually have something disagreeable inflicted on him and be said thus to be punished. But it would be quite unnatural to describe this as an act of punishment; a more appropriate description of this sort of act would be victimization. Baier's contention that to call an act punishment "the procedure leading up to this finding (guilty) need

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[20] Ibid., p. 131.

[21] K.G. Armstrong, "The Retributivist Hits Back", Mind (October, 1961); reprinted in H.B. Acton (ed.), op. cit., pp. 138-158, p. 149.

only be formally and not materially correct"[22] makes it impossible to distinguish a proper act of punishment from planned and deliberate infliction of unpleasantness by authorities on scapegoats. On the question of "punishing the innocent", it must be pointed out, the material correctness of innocence or guilt is really the point at issue.

It can be argued, as K.G. Armstrong does, that "He was punished for something he did not do" can be understood in "the weak way" -- the way the statement is generally used in ordinary discourse -- which is not incompatible with the proposed definition of "punishment". When people use this statement, what they really mean is either an innocent person has been mistakenly declared guilty of some offence (judicial error), or he has been deliberately and purposely punished to mislead the public into thinking that the real culprit of a crime has been apprehended and punished (punishing a scapegoat). Instances of people being 'punished' by mistake or by being 'framed up' by the forces of 'law and order' are not all that rare even in those countries which have highly developed judicial procedures. In non-legal circumstances cases of 'punishment' in the form of social criticism, moral reprobation, etc., for entirely unfounded accusations are more common. Competition, rivalry and petty jealousy often impel people to indulge in character-assassination through whisper campaigns or systematically malicious gossip. And

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[22] K.E. Baier, op. cit., p. 137.

it is instances of this kind that people generally refer to as punishing the innocent. The use of the word "punish" in this weak way is not exactly proper but 'near enough'. Compare 'half-killed' in the sentence 'they half-killed him' (to use Armstrong's analogy); here we can understand what is meant.

However, if the sentence "He was punished for something he did not do" is taken in what Armstrong would say is "the strong way" -- so that all the words contained in the statement are taken as being used in their exactly proper sense -- then it would be impossible to ascribe any acceptable meaning to the word "punishment". As Armstrong argues, the proposed meaning becomes untenable on account of 'he did not do' what he was accused of doing. It would be incoherent to use the sentence in the strong way. But some other recommended definitions of "punishment", the reformative and deterrent, for example, become equally meaningless for there will not be the "for something", -- an act or crime -- that a person committed from which to deter him or rid him. The only meaning of punishment, Armstrong writes,

> ...with which the given sentence's making sense in the strong way would be compatible would be one which defined punishment as 'the infliction of pain on a person because a crime has been committed, whether by that person or not.' As far as I know, such a theory is not held by any philosopher in the western world. That this should be so is, I suggest, strong prima facie evidence that the sentence does not in fact make sense in the strong way.[23]

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[23] K.G. Armstrong, op. cit., p. 148.

What all this shows is that the sentence "He was punished for something he did not do", when taken in the strong way, contains misleading suggestions not uncommon in ordinary speech. Armstrong succeeds in showing that if we try to deduce a definition of punishment which is compatible with the strong sense of the statement then we are led to absurdity. Another way out of the puzzle would be to show that the apparent difficulty that seems to rise from the statement can be resolved by restating the "incomplete" sentence in question in a form that will reveal the real conditions or facts underlying its ordinary use. Thus, if we restate the intended meaning of the sentence, and say "He was mistakenly punished for something he did not do" or "He was knowingly (hence, wrongfully) punished for something he did not do so that it was a case of victimization", any alleged difficulty for the proposed meaning of punishment ceases to be a difficulty. Taken in either the strong or weak sense, the statement "He was punished for something he did not do" does not seem to present any logical difficulty for the core meaning of "punishment" that I have proposed in the preceding section. To the question, "Why should the innocent be not punished?" the answer is: whatever harm is done to the innocent cannot be punishment; this is not what "punishment" means.

IV

There is a common misconception that "punishment" is

only another name for "revenge": one dictionary meaning of 'revenge' is "to inflict punishment or exact retribution for an injury, harm, wrong, etc., done to oneself or another" - O.U.D. While there may be some supporters of this concept of punishment who are vindictive or who believe in infliction of pain for pain's sake, it will be a mistake to assume that the logical meaning of "punishment" (as retribution) must necessarily be inhumane or barbarous.

The misconception is possibly due to the long-lasting use of the word "pain" as essential to the meaning of punishment. The term "pain" has physical implications, and systems of punishment almost everywhere in the past included infliction of physical pain, as with flogging, as methods of punishing. However, in many contemporary societies the forms of punishment which involve obvious infliction of physical pain, like flogging a criminal or beating a pupil with a strap, are on the way out. So is the conceptual association of physical pain with punishment. Antony Flew, for example, in explaining this element of punishment states,

> ...it must be an evil, an unpleasantness to the victim. By saying 'evil - following Hobbes - or 'unpleasantness' and not 'pain', the suggestion of flogging and other forms of physical torture is avoided. Perhaps this was once an essential part of the meaning of the word, but for most people now its employment is restricted.[24]

J.D. Mabbott, prominent among modern retributivists, goes a few steps further. He thinks Flew uses 'evil' or

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[24] Antony Flew, op. cit., p. 85.

'unpleasantness' as "wide terms to cover both physical pain and mental suffering." In Mabbott's view, punishments nowadays do not involve afflictions of pain or suffering, either physical or mental. The word "evil", in his opinion, is rather misleading as it "carries too much moral flavour". In keeping with the trends of the time, Mabbott believes he can also weaken the standard objection against the traditional 'retributive' notion of punishment that it only adds evil to evil. He argues that punishments nowadays are not infliction of positive pain but

> They are the deprivation of a good.... Imprisionment and fine are deprivation of liberty and property. The death sentence is deprivation of life; and in this extreme case every attempt is made to exclude suffering..... It may be said that this does not affect the mental agony of awaiting the end. But again the aim of punishment is not to cause mental agony. If it were so, delay in execution would be desirable and the waiting period would be the punishment. But delay is defended on the ground that time must be given for an application for a reprieve.[25]

Mabbott goes further on to say that

> The world is a worse place the more evil there is in it.... But it does not seem to me necessarily a worse place whenever men are deprived of something they would like to retain; and this is the essence of modern punishment.[26]

It should be clear that punishment does not mean revenge, nor does the notion, if Mabbott is right, suggests the infliction of any positive physical pain. However, the changing trends

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[25] J.B. Mabbott, op. cit. (1955), p. 117.

[26] Ibid., p. 118.

in penology, and the attitude of public at large concerning the methods of punishing do not in any way affect the meaning of "punishment".

The core meaning of "punishment" is that it is a penalty inflicted by an authority on the offender for an offence. As we have seen earlier that offences (acts of commission or omission) in different contexts, such as legal crimes, moral wrong doings, violations of club or school regulations or of family rules, etc., take different forms. The penalty imposed for each of these offences also varies according to context. For the same kind of offence different legal systems, societies, clubs, school systems, libraries, families can, as they usually do, impose different penalties. Penalties may also vary in all these contexts with the passage of time and with changing trends. In many cases, where there are no fixed rules, or what rules are there are flexible, different persons in authority can impose different penalties. We know some professors refuse to accept term papers when a student fails to meet the deadline, while some others will accept them but give the student a somewhat lower grade or mark it more strictly since the student, by taking longer time to finish the paper what he along with others were entitled to, has broken the rule. When generalized, all these penalties in different contexts will be called punishments in the proposed sense. For in all of these cases, irrespective of their circumstantial differences, the elements which constitute the central meaning of punishment are present.

It does not seem necessary for our present purpose nor is it possible to offer an exhaustive list of the many forms penalties may take in various circumstances. However, it should be indicated that imposition of penalties in the form of physical pain, mental suffering, deprivation of liberty (by imprisonment) and of property (by fine), expulsion from a club, school, church, or other social organizations, moral reprobation, blame,[27] censure, criticism,[28] social ostracism, detention after school hours, scolding by one in the position of authority, chastisement and disciplinary actions of various kinds, etc., when they affect the life and conduct of a person when he is subjected to one or more of them may be considered to be cases of punishment consistent with the definition of "punishment" formulated earlier. Further, when a person comes to acknowledge his own wrong doing, and brings upon himself (on his own authority as a moral agent) remorse, self-blame, self-criticism, and penance -- that is what the Oxford Univer-

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[27] For a discussion, see, S.I. Benn, op. cit., pp. 325-341, and J.E.R. Squires, "Blame", Philosophical Quarterly (January, 1968); reprinted in H.B. Acton (ed.), op. cit., pp. 204-211. We blame the person we punish, but from this it does not follow all cases of blaming are also cases of punishing. Also, punishing requires some authority but blaming does not. Furthermore, we blame weather, icy roads, etc., but punish only persons. However, when blaming of persons results in their being deprived of privileges, it becomes punishment.

[28] See, John Charvet, "Criticism and Punishment", Mind (October, 1966). Blame, when applied to human conduct, seems to go beyond judgment or statement, and constitutes criticism. Criticism is always an attempt to secure "correction". See, H.B. Acton (ed.), op. cit., pp. 35-36.

sal Dictionary calls "the performance of some act of self-mortification or submission to some penalty" -- these can be regarded as cases of punishment. In these and similar cases, the individual is not only recognizing his own guilt and acknowledging himself as an offender, but also undergoing unpleasantness or depriving himself of something he would otherwise like to retain. "I am punishing myself" (or in the third person "He is punishing himself") is not meaningless.

A person may, however, bring punishment upon himself for other reasons as well. One may seek 'protective custody' to avoid possible reprisals from enemies, or go to jail by committing a crime in order to avoid a more acute misery. An example comes readily to mind. Some years ago on a bitterly cold winter night a man found himself in downtown Edmonton in an unendurable situation with no place to go for shelter. He waited for a police car and when one came by, the man smashed a store-front window so as to be seen by the police men in the patrol car. He was arrested and locked up for the night, and was later brought to trial. Now, even if the consequences were what this man desired and expected, from our point of view, this would be a case of punishment. It was clearly an offence that fell within a legal category -- and even if the judge treated him leniently later in the matter of assigning the penalty (I do not know), the definition of punishment is not logically connected with the good, temporary or permanent, that punishment will do to the offender.

Another point requires brief consideration. If punishment is a penalty, can we say that a person is punished when he is not aware that he has been penalized? Let us imagine the case of a school teacher who was considered for a promotion by the School Board but was not promoted because of some unfavourable information in his career file. If the teacher was aware that he was being considered for the promotion, he would on being refused the promotion, certainly wonder why he did not get it. He might wonder, for example, 'Is it possible I am being punished for something?' But suppose, our teacher was not ambitious, and was not even aware that his case came up for consideration. Since he was not expecting a promotion, the confidential decision of the School Board did not give him any feeling of pain, suffering, unpleasantness, or deprivation of something he would have liked to have. Was he then, punished? The question is, must a person always know that he is being in fact punished? Or, in other words, can we say 'He is being punished without knowing it?' I think the answer, though debatable, can be 'yes'. If our teacher had known the real circumstances, he would have certainly recognized this as a case of punishment. The point is worth remembering since in government and commercial establishments, educational institutions, community leagues, and other social organizations people are punished without their ever knowing that they are in fact being punished.

What I have tried to show so far are that (i) the proposed definition of punishment can provide us with the core

meaning of the term; (ii) there is no logical justification for treating this definition of punishment in a narrow legalistic way since the meaning is appropriate to cover many ordinary uses of "punishment" in different contexts; (iii) the definition can easily cope with any alleged difficulty arising out of troublesome ordinary statements like "He was punished for something he did not do"; (iv) the proposed concept of punishment need not be barbarous, instead, it is logically quite consistent with a wide range of penalties or forms of punishment including remorse, self-criticism, and penance; and lastly, (v) it may not be inconsistent with the practice of punishing people without their being aware that they are, in fact, punished.

CHAPTER III

THE JUSTIFICATION OF PUNISHMENT

I

On Moral Justification. The word "justification", as any dictionary will reveal, has several meanings. However, the meaning with which we are concerned here is one of "showing something to be just, right, or proper" (O.U.D.). This may be taken as the general meaning of justification which has many varieties. The demand for justification can be made in any area of intellectual operation as well as in that of social practice. If confronted with the question "With what justification?" a Euclid will reply by adducing a derivation from axioms, a physicist will offer a demonstration, an archaeologist will come out with some "discoveries", a historian will cite documentary evidence. In other words, questions such as "Why?", "With what right?", "For what reason?", arise not only in moral or ethical discourse concerning social practices but also in discourse of other sorts, including the discourse of purely theoretical or intellectual operations. And justifications in the latter, in doing geometry, history, etc., are themselves theoretical reasons. They are not moral or prudential reasons.

As rational human beings we use reason (a capacity) in

all forms of deliberation, that is, when we are not absent-minded or being carried away by passion or under hypnosis or the influence of drugs. However, the use of the word "reason" occurs in connection with different activities for different purposes. The same sentence which include the word "reason" may be used in different activities, but the sentences do not serve to pose the same questions or make the same claims. It would be easy to show what I have in mind by pointing out the different use of the word "reason" in cases where we would most naturally be able to replace it by (i) "explanation" but not "justification", and by (ii) "justification" but not "explanation". If we ask an individual whether he had a reason for acting in a certain manner and what it was, this may be interpreted either as a request for an explanation or a justification. These are different sorts of request and different considerations are relevant to meet these different sorts of request. In explanation when we use the word "reason" in expressions such as "His reason for doing x" or "The reason why I did x", what is meant is that the reason has actually moved (in a metaphorical way of speaking) the agent to do as he did.

> In explanation... no factor can be the reason why the agent did something, or can be the agent's reason for doing something, unless the agent actually was moved to act in this way by that factor.[1]

When we ask for moral justification, on the other hand, we

[1] Kurt Baier, The Moral Point of View, New York, Random House, 1967, p. 41.

are interested in the matter of right and wrong, good and evil, and not in what actually did move the agent to do what he did. In asking for justification we try to determine whether the agent has taken the right or the best course, or at least a good course that was open to him. It is on the basis of these sorts of considerations that we decide whether to praise or blame the agent. The difference or the logical distance between the use of "reason" when one is only seeking an "explanation" and the use of it when one is seeking "justification" becomes quite obvious in those cases when we acknowledge a course recommended by reason as the best course but are rather unable or unwilling to get ourselves to follow it. The best reason (justification) may not be his or her reason (explanation) for acting in a certain way.

However, the question about the rightness (or justification) of a particular action is one thing; the question about the justification of a social practice as a practice is another. The former type of question can be answered by appealing to the standards of rightness as they may prevail in a society, standards which are not questioned. The second type of question is not a question about the rightness of a single action, but a case of questioning the rightness of the practice as a whole. To decide about a question of this sort we are required to carry on moral considerations of a different sort than is necessary to determine whether a particular conduct fits into the prevailing norm. Thus,

whether punishment as a social practice is justifiable or not will have to be answered on the basis of those principles of "morality" which can be formulated in terms independent of occasion, person, expediency, and authority. As we shall presently see, the rival theories of the justification of the practice of punishment are engaged precisely in this kind of moral consideration.

The two rival theories of the justification of punishment we are about to consider both accept the social practice of punishment. Both assume that punishment can be justified, and therefore, the problem for them is how to justify the practice. It is, on the whole, true that philosophers generally accepted the practice, and were more interested in justifying the institution of punishment. There were some notable exceptions, as H.B. Acton points out, like Fourier and Marx in the nineteenth century; and a few others in recent years who wish to substantially alter or abolish the practice of punishment as it is ordinarily understood.[2] I shall consider briefly two recent views advocating drastic changes in the practice of punishment, primarily, legal punishment.

Giorgio Del Vecchio in a paper entitled "The Struggle Against Crime"[3] argues that punishment as the dealing out of

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[2] H.B. Acton, op. cit., pp. 29-30.

[3] Included in the H.B. Acton volume, pp. 197-203. Translated into English by Professor A.H. Campbell. Quotations in this paragraph are from this source.

evil for evil (on a reciprocal basis) is open to moral objections. In his view, the grounds like those of retribution, reform and so on that are generally advanced as the purposes of punishment are bad grounds, since facts prove that the practice of punishment does not achieve any of those purposes. He points out that the history of criminal law is largely a history of abolition of various sorts of cruelties once tolerated in the name of punishment. He points out the introduction in modern legislation of conditional suspension of sentence, the institution of open prisons, special courts for juveniles. Del Vecchio believes that we should do away with the system of inflicting "suffering on the prisoners and to deprive them of the possibility of working". He argues that a fundamental maxim of justice is that everyone should bear the consequences of his acts, and proposes that the man who has committed a crime has a duty and should be given the opportunity to repair the harm which he has caused to another by working and compensating the victim. He is aware that the calculation of the damage done cannot always be absolutely accurate, but can only be approximate. However, punishment should take the form of "legally admitted debts"; there should be, he suggests, a special office or department "to maintain surveillance over the way of life of those who have not satisfied" their debts. For those who may not willingly work and pay their debts "compulsory imposition of prescribed tasks" would be justified.

One can certainly agree with Professor Del Vecchio that

crime is not just an individual act but a social phenomonon, and that our primary interest should be to diminish "the scourge of crime". However, his ideas, as H.B. Acton rightly points out are full of practical difficulties. Criminals are not known to be good workers; many of them may not be able to earn enough to make a living as well as to make compensatory payments; damages in such circumstances will have to be calculated in terms of the earning capacity of the offender rather than in terms of the amount of harm or damage to the victims.[4] However, the most important cricitism of Professor Del Vecchio's ideas is that they cannot be read as a proposal for the elimination of the institution of punishment; they are at best serious and well intentioned suggestions for penal reform.

Like Professor Del Vecchio, Lady Barbara Wootton is skeptical about the personal or social value of the current practice of punishment. Reporting on the advances in medical psychology and legal practices based on ideas of criminal responsibility, she observed that "revolutionary though the prospect of abandoning the concept of responsibility may be, it is clear that we are travelling steadily towards it."[5] This tendency, she points out gives rise to all sorts of paradoxes in the legal system of punishment. One such para-

[4] H.B. Acton (ed.), op. cit., p. 34.

[5] Barbara Wootton, Social Science and Social Pathology, London, George Allen & Unwin Ltd., 1959, p. 251.

dox is described as follows:

> Anyone with practical experience of offenders will have known some among them who are apparently totally lacking in regard for other people, and at the same time totally unresponsive either to reformative treatment or to such punitive measures as it is nowadays thought proper to impose. Such people used to be thought extremely wicked: today they are classified as cases of mental disorder. Paradoxically, this has the effect that, if you are consistently (in old-fashioned language) wicked enough, you may hope to be excused from responsibility for your misdeeds; but if your wickedness is only moderate, or if you show occasional signs of repentance or reform, then you must expect to take the blame for what you do and perhaps also to be punished for it.[6]

Lady Wootton is also disturbed by the fact that different courts impose very different penalties for the same kind of offence. In her view, one way of eradicating these problems would be to forget the notion of mens rea (guilty mind), and extend the doctrine to "strict liability" or "absolute liability". She thinks that the court should only establish whether or not the accused has committed the offence for which he was indicted. Once guilt is established, the question of sentencing should be settled by a group of "reform commissioners" who would be specialists in sorting out cases of accident, mistake, and other mitigating circumstances; the convicted will receive the kind of treatment as required from the reform commissioners. In Lady Wootton's view the distinction between punishment and treatment, and that between prisons and mental hospitals has already become blurred; they are now a "genuinely hybrid institution". By substituting

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[6] Ibid., pp. 250-251.

treatment for imprisonment in the conventional sense, the prisons will become "places of safety" where offenders can receive the treatment from experts which is most likely to produce desired effects.[7] "Forget responsibility", she urges, "and we can ask, not whether an offender ought to be punished, but whether he is likely to benefit from punishment."[8]

However, it is not quite clear, as both H.B. Acton and William Kneale point out, that Lady Wootton wants to make all criminal liabilities absolute or strict. If this is what she wants, then as Kneale points out, the procedure is neither necessary nor desirable. The extent of an accused person's responsibility for a crime can always be decided in advance before he is tried. And he adds, "What men need in society before all else is security from arbitrary interference, and it seems to me that it is the first task of the courts to provide this."[9] It may be true that the amount of moral responsibility of a criminal is difficult to calculate, and courts and jurymen may not always be able to do this calculation in a competent manner. However, to hand over this task to some other body (and one is not quite sure what sort of

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[7] See, Barbara Wootton, Crime and Criminal Law (1963), pp. 80-82. Quoted from, H.B. Acton (ed.), op. cit., pp. 29-31.

[8] The Times, 13 February, 1960. Quoted by W. Kneale, "The Responsibility of Criminals", in H.B. Acton (ed.), op. cit., pp. 173-174.

[9] Ibid., p. 195.

people will be in her body of "reform commissioners"), and to empower it with the authority of sentencing and treating the criminals could lead to arbitrary interference with the lives of the convicted prisoners or patients.

The view of Professor Del Vecchio and Lady Wootton would at least indicate that people are becoming a little suspicious about the purpose and the efficacy of the practice of punishment. Professor H.L.A. Hart attempts to give an explanation "of the mounting perplexities which now surround the institution of criminal punishment." His words are worth quoting as he believes that the suspicions are due to relatively contemporary scepticism about certain essential aspects of the traditional theories of the justification of punishment. He says:

> 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 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 cases where this form of statement is true from

those where it is not.[10]

What Professor Hart is saying is that with the advance in sociology, psychology, medicine, and a better understanding of linguistic usages, people are beginning to doubt the validity of some of the basic assumptions underlying the two traditional theories of punishment. I believe, to this one can add that the failure to reconcile these two diverse moral view points, through more or less sustained debate over a period of two centuries, is also a major source of confusion and intellectual dissatisfaction.

II

The Utilitarian Theory. A discussion of the utilitarian justification of punishment should begin with a reference to Bentham -- the father of utilitarianism -- who held the doctrine that nothing was good or right unless it maximized human happiness according to the principle "the greatest happiness of the greatest number". Bentham believed that the behaviour of mankind was dominated by the influence of pain and pleasure. By increasing pleasure and by diminishing pain human happiness could therefore be extended. Utility, for the Utilitarians, therefore, meant that what served to increase human happiness; Bentham also believed that such

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[10] H.L.A. Hart, "Prolegomenon to the Principles of Punishment", The Presidential Address, Proceedings of the Aristotelian Society, (1959-60), p. 1.

happiness could be quantified in arithmetical terms. The principle of justifying anything as morally valuable in terms of the quantified approach expressed by the phrase the "greatest happiness of the greatest number" is not easy to maintain philosophically; it is, as perceived by Bentham's immediate follower John Stuart Mill, of less universal scope in the fields of ethics, aesthetics, and literary criticism than Bentham fondly believed. It would require us, as Stephen Toulmin points out, "to rate Christmas Day in the Workhouse as a finer epic than Paradise Lost -- and this alone is enough to show that he has falsified our notion of 'value'."[11]

However, Bentham's immediate concerns were to show how this principle, particularly the inquiry into the use of every law of his time, would expose the rigidity and harshness of the existing legal system. And his work laid a solid foundation for much of that legal and social reform which was one of the most crying needs of the early nineteenth century England.

Bentham's primary interest was in legal punishment and most of those who have discussed his views on punishment have done so from a legalistic point of view (Hart offers a notable example). However, a brief consideration of Bentham's case may help us to come directly to the general utilitarian justification of punishment as such. In Chapter XIII of his

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[11] Stephen Toulmin, Reason in Ethics, Cambridge University Press, 1968, p. 196.

Principles of Morals and Legislation, entitled "Cases Unmeet for Punishment", Bentham points out four kinds of cases in which punishment is unfitting. The cases are: (i) where it is groundless, because there is no mischief or offence to prevent; (ii) where it "must be inefficacious: it cannot act as to prevent the mischief"; (iii) where punishment is unprofitable, because it involves greater loss to the society than the harm or mischief it is designed to prevent; and (iv) where it is needless, i.e., the mischief it is designed to prevent can be prevented in certain other ways, viz., instruction. Item (ii) has received the most attention from Bentham's followers and critics since here Bentham covers not only cases where punishment serves no useful purpose, but also the cases (infancy, insanity, lack of intent, necessity, etc.) where persons involved in committing offences are not at the time of action in conditions when they can be said to be susceptible to influence by threats. Conversely, the main criterion of "effective" punishment is deterrence of the offender or of others by example.

The contemporary Utilitarians, on the whole, share with Bentham the view that the moral justification of the practice of punishing people for offences must be in principle forward-looking: punishment which is itself a mischief or evil must not be inflicted except to bring consequences which are socially desirable. However, while they seem to agree that the strongest element in their theory of justification is deterrence, in many other respects the Utilitarians seem to

disagree amongst themselves and also with Bentham.

Bentham, we have noted earlier, talks of punishment being "unprofitable" where it involves greater loss to the community than the mischief it is designed to prevent. Many contemporary Utilitarians reject this Benthamite 'hedonistic calculus'. Though the question is one of justifying particular acts of punishment, some contemporary Utilitarians argue that to insist on balancing consequences of punishment with the mischief committed is "to miss the point of punishment as an institution."[12] They argue that punishment is inflicted on the basis of certain rules which are desirable; and "once rules are accepted, there is no need to justify every particular application of them in terms of beneficient consequences."[13] Punishment, they argue, would not be an effective deterrent, unless it could be applied to every breach of an accepted rule. This is not to say that there cannot be some circumstances which may be treated as exceptions -- like those mentioned by Bentham himself -- where breach of a rule may not call for punishment (act of an insane person, for example). But a quasi-quantitative comparison of mischiefs of two different sorts and their consequences cannot,

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[12] S.I. Benn and R.S. Peters, Social Principles and the Democratic State, London, George Allen and Unwin, 1968, p. 185.

[13] Ibid., p. 191. cp.: "No amount of theoretical ingenuity will alter the fact that, in the terms the utilitarian himself has adopted, the offence remains an evil and so does the punishment." -- J.F. Doyle, "Justice and Legal Punishment", Philosophy, Vol. XLII, No. 159 (January, 1967), p. 57.

in their view, be made a measure of punishment.

It must be acknowledged that the penal reforms of recent years in many advanced societies have been laying considerable emphasis on making punishment constructive and directed to the offender's rehabilitation in the society on his release. Thus, many citizens are eager to believe that in fact sentences of imprisonment are often related to the education and preparation of prisoner for a useful life after his release. Most Utilitarians seem to place emphasis, in varying degrees, on the reformative benefits that may result from punishment. One way of preventing the offender from repeating the offence is, of course, to reform him. We have noted before (Chapter I) Dr. A.C. Ewing's view that punishment "needs to be educative". Similar views have been expressed by others. Moritz Schlick, for example, has maintained that

> Punishment is an educative measure, and as such is a means to the reformation of motives, which are in part to prevent the wrong-doer from repeating the act (reformation) and in part to prevent others from committing a similar act (intimidation).[14]

However, in relating punishment to reformation we should make a distinction between reformative measures (viz., treatment, counselling, training, supervision, after-care, etc.) which may accompany the punishment (prison terms, suspended sentences, etc). from the idea that punishment itself can be reformative.

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[14] Moritz Schlick, "When is a Man Responsible?", in Bernard Berofsky (ed.), Freewill and Determinism, New York, Harper & Row, 1966, p. 60.

If it can be shown that punishment in any form (imprisonment, fine, detention at school, chastisement at home, etc.) can in itself lead the punished -- on an understanding of past wrong doing and not out of fear of further punishment -- to resolve not to repeat the offence, then and then alone the practice of punishment can be justified solely on the ground of reformation. But there is hardly any evidence that punishment in any context produces this kind of effect in very many cases.

In fact, such philosophers as Ewing, Schlick, Benn, Peters, and others who want to see punishment playing some sort of reformative role tend to place a much stronger emphasis on deterrence as the justification of punishment. Benn and Peters admit that "it is questionable, on utilitarian grounds, whether the reformative benefits alone of the institution (punishment) would justify it."[15] It is also argued that reformative treatment or other measures, even if administered humanely, will "certainly be accompanied by some compulsion and carry some elements of stigma and rebuke, which would tend to act as deterrents."[16] Then, again, if the primary end of punishment and its main justification is deterrence, as has been held by Bentham and the majority of contemporary Utilitarians, over-emphasis of reformation may have a self-defeating effect. S.I. Benn puts it this way:

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[15] S.I. Benn and R.S. Peters, op. cit., p. 180.

[16] Ibid., p. 180.

"Reformative treatment might cure criminal inclinations by relaxing the rigours of punishment; it might nevertheless defeat its purpose by reducing the deterrent effect for others."[17] He also argues (so does Peters) that when an offender comes to realize that "crime does not pay" and as a result becomes reformed, he is merely deterred by "an example" which is his own experience as any one else who may learn the same lesson at second hand. All this will show that contemporary Utilitarians are not at all eager to defend a "therapeutic conception" of punishment.[18] In Professor Hart's view

> Reform can only have a place within a system of punishment as an exploitation of the opportunities presented by the conviction or compulsory detention of offenders. It is not an alternative General Justifying Aim of the practice of punishment....[19]

"The strongest utilitarian argument", writes S.I. Benn,

> ...for punishment in general is that it serves to deter potential offenders by inflicting suffering on actual ones. On this view, punishment is not the main thing; the technique works by threat.[20]

Now it can be readily admitted that punishment (or the threat

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[17] S.I. Benn, "An Approach to the Problems of Punishment", Philosophy, Vol. XXXIII, No. 127 (October, 1958), p. 330.

[18] See, Max Atkinson, "Justifie and Deserved Punishment", Mind, Vol. LXXVIII, No. 311 (une, 1969), pp. 354-356; also, S.I. Benn and R.S. Peters, op. cit., pp. 179-180.

[19] H.L.A. Hart, op. cit., pp. 24-25.

[20] S.I. Benn, op. cit., p. 330. Italics mine.

of it) produces certain advantageous results. We can very well imagine what kind of chaotic situation we should be in if there were no penalties for the violation of traffic rules on the highways and in the cities. There would be disorder in almost every sphere of our social life if there were not certain rules to be observed, and no threat of punishment for not observing them. Every society affirms certain values and rules; and proscribes some types of conduct as undesirable -- many of which are also punishable. This may be said to be a characteristic of social organizations, and there is a reason (explanatorily speaking) why societies do have a system of inflicting punishment. But the real issue for our purpose is: Does the existence of threat to potential offenders constitute the justification of punishment? In other words, does the technique of threatening those who have not yet committed any offence by punishing those who have committed offences provide a good reason for punishment in general? In the paragraphs immediately following I intend to point out briefly some of the fundamental weaknesses in this view of the justification of punishment in general.

The notion of deterrence can be applied to punishment in at least two different ways. One can speak of punishment as a form of special deterrence in connection with deterring or preventing actual offenders from repeating the offence. In this context the imposition of any kind of penalty can serve as an example of punishment operating as a spcial deterrent. Deterrence can also be spoken of as general

deterrence when we express a belief that the infliction of punishment serves as a "threat" to deter normal persons who have not yet committed any offence and who know that society is already punishing actual offenders. Many utilitarians seem to place a stronger emphasis on the latter. However, appeals both to special and to general deterrence in order to provide a moral justification of the practice of punishment present serious difficulties.

Bentham, it may be recalled, set out to show that punishing the insane, the infant, those who commit offences unintentionally or under duress, or psychological compulsion, and the like, would be "inefficacious". His point was that any threat of further punishment for a repetition of the offence would be ineffective so far as these classes of people were concerned. Now, if Bentham is right, it can be argued, that the mere fact that a man has repeated his offensive behaviour a number of times is some evidence that he is not responsible since he is unable to take threats seriously. If we are to understand responsibility as required by Bentham's "Cases Unmeet for Punishment", we may have to concede that a repeated offender must be in some way non-responsible, since he has broken the rule in spite of his knowledge and past experience that penalties are attached to such acts. What shall we do in the cases where special deterrence does not work, or the offender is not reformed? In the cases of serious repeated crimes the hard core of those who defy special deterrence can be punished, consistent-

ly with the Utilitarian principle, with any appropriate penalty such as, life-imprisonment or deportation, that will secure prevention of the offences harmful to the community. If the persistent offender, on the other hand, indulges only in petty offences, i.e., if he is only a moderate nuisance of a sort, we shall face a difficulty in deterring him without violating Bentham's principle of "frugality". (This instructs us not to inflict any heavier suffering that would do more harm than it would prevent.) What do we do, for example, with an undeterrable pick-pocket, an almost senile great uncle who breaks family rules, or a child who is noisy in the class? It is hard to bring ourselves to imprison a pick-pocket for life or to expel a child permanently from school because he is somewhat noisy in the class. It would be disagreeable to most people that petty offenders of this kind should face the prospect of detention in a lunatic asylum for an indefinite period. Since we do not yet know of any dependable method of curing or reforming various types of offenders, the effective deterrence of petty offences may call for extraordinary harsh punishments. My point is: if we take <u>special</u> deterrence too seriously the result is bound to be unjust punishment and what is undeserved and unjust cannot be justified.

More important from the utilitarian point of view is the justification of punishment on the ground that it works as a threat to <u>potential</u> offenders. Now, it must be assumed that in any given society the number of potential or future

offenders is much larger than the number of actual offenders at any particular time, and also that we do not have any accurate means of finding out who among the normal adults, adolescents and children will in future commit offences of various sorts. However, if threatening this large number of people is used as the primary justification of punishment, it can be argued that this aim can be more effectively achieved by punishing every offender including those whom Bentham wanted to exclude. In other words, if punishment needs to be justified only in terms of its having a utilitarian value as a general deterrent, we can best secure it by introducing a system of "strict liability" and disallowing any "excusing conditions". As H.L.A. Hart points out,

> Plainly is it possible that the actual infliction of punishment on those persons, though (as Bentham says) the threat of punishment could not have operated on them, may secure a higher measure of conformity to law on the part of normal persons than is secured by the admission of excusing conditions.[21]

Some opponents of the utilitarian theory of the justification of punishment have extended this line of argument by indicating that it would be possible to "punish an innocent person" or hang a scapegoat without sacrificing any utilitarian principles. Contemporary Utilitarians have objected to this by claiming, in Benn's words, that the "utilitarian theories of punishment is that they are theories of punishment, not of any sort of technique involving suffering."[22] In other

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[21] H.L.A. Hart, op. cit., p. 18. Italics in original.

[22] S.I. Benn, op. cit., p. 332.

words, utilitarianism does not have to distort the meaning of punishment. In this they are possibly right. However, the problem of reconciling Bentham's rationale of excuses, i.e., that given in his "Cases Unmeet for Punishment" with the utilitarian principle of "effectiveness" remains unsolved. In Hart's words, "On this issue modern extended forms of Utilitarianism fare no better than Bentham's whose main criterion of 'effective' punishment was deterrence of the offender or others by example."[23]

Earlier I have indicated briefly that the utilitarian method of determining value on the principle of "greatest happiness of the greatest number" has some fundamental shortcomings. The use of the principle of deterrence as the moral justification of the practice of punishment is derived from the utilitarian conception of value. However, when for the sake of the so-called "greatest happiness" we are punishing an offender to use him as "an example", we are in fact using him "as a mere means to somebody else's end, and surely Kant was right when he objected to that!"[24] While it is unnecessary to dwell on this point at any length, it can be argued that using an offender to warn others so that they may not commit offences in future is morally unsound. "What right have you", asked Marx more than a hundred years ago, "to

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[23] H.L.A. Hart, op. cit., p. 19.

[24] K.G. Armstrong, "The Retributivist Hits Back", in H.B. Acton (ed.), op. cit., p. 152.

punish me for the amelioration or intimidation of others?"[25] And this remains, in spite of the considerable contribution of utilitarian thinking to the cause of social reform, the chief moral objection to the utilitarian justification of the practice of punishment.

III

The Retributive Theory. What is commonly known as the retributive theory (of the justification) of punishment has many different versions.[26] In what follows I shall try to explain some of the general features of the retributivist's position, contrasting, where necessary, with the utilitarian view.

Unlike the Utilitarian, the retributivists look to the past, the act of offence for which alone an individual can be punished. They, generally speaking, agree with Hegel's criticism of the utilitarian position.

> To base a justification of punishment on a threat is to liken it to the act of a man who lifts his stick to a dog. It is to treat a man like a dog instead of with the freedom and respect due to him

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[25] Karl Marx, "Capital Punishment", in T.B. Bottomore and M. Rubel (ed.), Karl Marx: Selected Writings in Sociology and Social Philosophy, Middlesex, Penguin Books Ltd., 1953, p. 233. Quoted in James F. Doyle, "Justice and Legal Punishment", Philosophy, Vol. XLII, No. 159 (January, 1967), p. 53.

[26] William Kneale suggests "a better reason" for rejecting the retributive theory, "namely, dissatisfaction with the whole web of metaphor to which it belongs". H.B. Acton (ed.), op. cit., p. 181.

> as a man. But a threat, which after all may rouse a man to demonstrate his freedom in spite of it, discards justice altogether.[27]

The retributivist insists that punishment is linked with past wrong doing, and a theory for the justification of the practice of punishment must start from there.

However, in their positive formulation of the theory the retributivists do not seem to rely upon the same moral theory or even the same set of concepts. Kant, consistently with his doctrine that a man must always be treated as an end, seemed to believe that punishment should be treated as an end in itself. Hegel considered that the "precise point at issue" in justifying the practice of punishment was that "crime is to be annulled, not because it is the producing of an evil, but because it is an infringement of the right as right...."[28] Bradley, on the other hand, believed that there was only one reason (justification) for punishment: "only where it is deserved. We pay the penalty because we owe it, and for no other reason...."[29] J.D. Mabbott, in his 1939 paper, similarly talks of punishment as paying a debt; he

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[27] Hegel, Philosophy of Right (Knox's translation), p. 246. Quoted by A.R. Manser, "It Serves You Right", Philosophy, Vol. XXXVII, No. 142 (October, 1962), pp. 298-299.

[28] T.M. Knox (Translation), Hegel's Philosophy of Right, Oxford Cladendon Press, 1942, pp. 69-70. Quoted by James F. Doyle, op. cit., p. 56.

[29] F.H. Bradley, Ethical Studies, pp. 69-77, Quoted by A.R. Manser, op. cit., p. 295.

also quotes an ex-convict as saying "To punish a man is to treat him as an equal. To be punished for an offence against rules is a sane man's right."[30] It seems clear that the retributivists use different concepts in justifying the practice of punishment. However, the concepts of right, of being deserved, of paying a debt, etc., belong to the domain of moral arguments. Quinton is clearly mistaken when he claims that "The retributive thesis... is not a moral doctrine, but an account of the meaning of the word 'punishment'."[31]

Contemporary philosophers, who defend the retributivist position, tend to rely mainly on two concepts, those of desert and justice, to offer a moral justification of the practice of punishment.[32] A brief analysis of these two concepts and their use in the context of punishment will help us to understand the retributivist position.

Desert is a moral concept. The Oxford Universal Dictionary lists three meanings of the word as follows:

1. Deserving; merit or demerit.
2. That in conduct or character which deserves reward or punishment.
3. That which is deserved, whether good or evil.

The concept of "desert" connects the infliction of a penalty on a person who is punished with his past conduct, with his

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[30] H.B. Acton (ed.), op. cit., pp. 45-46. Italics in origina.

[31] H.B. Acton (ed.), op. cit., p. 59.

[32] See, articles by K.G. Armstrong, James F. Doyle, A.R. Manser, C.W.K. Mundle, and Robert A. Samek.

offence. It makes punishment deserved from an ethical point of view irrespective of the value of after-effects. It can also serve as a criterion of proportion of penalty, that is to say, indicate what punishment is deserved and what is not. What is one's desert is earned, either as reward of punishment; to speak of it as desert indicates what is due. The retributivists point out that, on a [illegible] theory, the severest penalties would be justified for minor offences, but this is not possible if we taken into account "that which is deserved" by an individual for his conduct or character.

To connect punishment with the concept of desert is also to connect it with that of justice: "for only as a punishment is deserved or undeserved can it be just or unjust."[33] The word "justice" has both moral and legal meanings, and both sorts are relevant to the moral justification of the practice of punishment. The Oxford Universal Dictionary gives, among others, the following two meanings for the word "justice".

> I. The quality of being morally just or righteous; the principle of just dealing; just conduct....
> II. 1. Exercise of authority or vindication or right by assignment of reward or punishment; requital of desert....
> 2. The administration of law, or the forms and processes attending it....
> 3. Infliction of punishment....

The Retributivist will point out that the practice of punishment as well as the proportion of penalty (desert) must be

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33 K.G. Armstrong, "The Retributivist Hits Back", in H.B. Acton (ed.), op. cit., p. 155.

based on considerations which are morally just. The principle of just dealing will involve consideration of equality, impartiality, fairness, etc., which will make the infliction of punishment just and morally justifiable. And, it is only from a retributive point of view we can talk of punishment as being deserved and just. ("What would a just deterrent be?" -- the retributivist asks.). Another vital point about the concept of justice in the context of punishment is indicated by the second dictionary meaning quoted above. It gives the person in authority, (the judge, teacher, parent, etc.) the <u>right</u> to punish offenders. And only those authorities who have been given the right to secure justice have the right to administer punishment in appropriate spheres. Where this right is absent, infliction of penalty will be without authority, and therefore unjust.

Thus the retributivist argues that a proper grasp and application of the concepts of <u>desert</u> and <u>justice</u> can provide a satisfactory moral justification for the practice of punishment. The justification is provided (i) by linking punishment with the offence for which one is punished; (ii) by not punishing a man more severely than he deserves to be; (iii) by ensuring that the practice is based upon decisions by appropriate authorities who have the right to punish and who will punish only when someone has deserved to be punished.

CHAPTER IV

CONCLUSION

I have attempted to offer a definition of "punishment" which is neither too narrow, (for example, too legalistic) nor too wide (for example, too easy to apply to the infliction of any suffering), and which is consistent with the ordinary usage of the word. The pre-condition of punishment is offence or guilt, and it can be inflicted only by an institution or a person who has appropriate legal or moral authority to do so. I have also indicated that punishment can take many forms, but that most punishments nowadays are not supposed to involve the infliction of physical pain or severe mental suffering. The variety of contexts in which punishment is practiced is often overlooked in the strictly legalistic discourse on the subject.

On the question of justification, the Utilitarian position is very popular with social reformers, penal administrators, and the majority of the public. But many professional philosophers, though sympathetic to the utilitarian concern with desirable social goals, are not impressed by the utilitarian justification of the practice of punishment. H.B. Acton has summed up the situation in the following way.

> Some critics in the early fifties, impressed by the distinction between logical and ethical justification, thought they could take the heat and importance out of

> retribution by making guilt part of the meaning or definition of punishment. But it became clear that there are difficulties in the way of regarding the varying severity of punishments as means of deterrence or reform as utilitarians require.[1]

I have indicated some of the short-comings -- the difficulties Acton refers to in the foregoing passage as well as the moral issue of treating individuals as means for deterring others -- which weaken the utilitarian justification of punishment.

Many people are opposed to retribution as they do not always distinguish it from simple revenge. But the retributivist's justification of punishment in the version which I have tried to formulate is based on considerations of desert and justice; and punishment based on these grounds is different from retaliation carried out with anger and hatred. Some philosophers -- (A.M. Quinton and S.I. Benn, for example) -- believe that retributivism cannot offer any moral justification of punishment on the assumption that it is a logical doctrine and not a moral one. They are mistaken. The retributivists point out, and in my view rightly, that their theory can create the right to inflict punishment in appropriate cases and in an appropriate manner. Retributive considerations are essential to decide whether an act deserves to be punished.

It is also assumed that the retributivist by creating the right to inflict penalty makes punishment an "inescapable obligation" on the part of the authority. But the retributi-

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[1] H.B. Acton (ed.), op. cit., p. 37.

vists point out that to create a right to punish is not to make the authority "necessarily and invariably obliged" to punish or to punish to the limit of justice.[2] The retributivists also argue that it is only their theory "that makes mercy possible, because to be merciful is to let someone off all or part of a penalty which he is recognized as having deserved."[3] Alwynne Smart, in a paper entitled "Mercy", similarly argues that

> The utilitarian has no choice; he must recommend the course of action that produces most good, and if this means imposing a certain penalty he cannot act mercifully and impose less than that penalty. Real mercy is never a possibility for him.... The notion of mercy seems to get grip only on a retributivist view of punishment.... Such a possibility is open to him only because his ethic is a multi-principled one, or at least is not based on only one principle.[4]

If these arguments are valid, they will show that retributive punishment is not necessarily vindictive or severe, and also that the utilitarian moral theory lacks the structure to provide for mercy and forgiveness. This is a point worth mentioning, for many people seem to believe that the opposite is true.

The retributivists, it should be pointed out, are not at all opposed to the ideas of deterrence and reform. Nor

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[2] See K.G. Armstrong, "The Retributivists Hits Back", in H.B. Acton, op. cit., p. 155; also, J.D. Mabbott, "Professor Flew on Punishment", in Ibid., p. 123..

[3] K.G. Armstrong, op. cit., p. 155.

[4] Alwynne Smart, "Mercy", in H.B. Acton (ed.), op. cit. pp. 224-225.

do they think that deterring offences and reforming the offenders should not be our primary social aims. However, they argue that the practice of punishment cannot be justified on those grounds. Mabbott made this point in his 1939 paper:

> The truth is that while punishing a man and punishing him justly, it is possible to deter others, and also to attempt to reform him, and if these additional goods are achieved the total state of affairs is better than it would be with the just punishment alone. But reform and deterrence are not modifications of punishment, still less reasons for it.[5]

In his 1955 paper he quotes Sir Alexander Paterson as making the same point in saying that "Men are sent to prison as a punishment and not for punishment."[6] What this means is that considerations of desert and justice are essential in justifying punishment in any context. If good consequences, such as, deterrence and reform follow from punishment, they are "extras" and highly desirable, but these consequences in themselves are no moral justification for inflicting penalties on offenders. We must first have good reasons to decide what acts are punishable, that is to say, have adequate justification of punishing certain people for their certain acts before we can talk about deterring them and other people from committing those acts, and about reforming those who have already committed such acts.

The retributivists and the Utilitarians may share a set of common social goals. However, on the issue of moral

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[5] H.B. Acton, op. cit., p. 40. Italics mine.

[6] Ibid., p. 125. Italics in original.

justification of punishment their positions are irreconcilable. The retributivist's position is philosophically sounder, and can be accepted without abandoning concern for the socially useful results which punishment may bring. The version of retributivism -- in terms of desert and justice -- which I have tried to explain can be used in justifying the large variety of cases that are covered by my earlier formulation of the definition of punishment.

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