

Fall 1964

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Recommended Citation

Jackson Toby, *Is Punishment Necessary*, 55 *J. Crim. L. Criminology & Police Sci.* 332 (1964)

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IS PUNISHMENT NECESSARY?*

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To what extent does a "victim constituency" influence the incidence of punishment? What is the deterrent value of punishment? What is its value as regards the morale of the law-abiding? Does punishment have a role in the rehabilitation of offenders? In the following article, Professor Toby considers these and related questions in the course of examining the currently general assumption that punishment will completely give way to treatment and rehabilitation measures in the handling of offenders.—EDITOR.

Of 11 contemporary textbooks in criminology written by sociologists, ten have one or more chapters devoted to the punishment of offenders.¹ All ten include a history of methods of punishment in Western society and, more specifically, a discussion of capital punishment. Seven discuss punishment in pre-literate societies. Seven include theoretical or philosophical discussions of the "justification" of punishment—usually in terms of "retribution," "deterrence," and "reformation." These theoretical analyses are at least as much indebted to law and philosophy as to sociology. Thus, in considering the basis for punishment, three textbooks refer both to Jeremy Bentham and to Emile Durkheim; three textbooks refer to Bentham but not to Durkheim; and one textbook refers to Durkheim but not to Bentham. Several textbook writers express their opposition to punishment, especially to cruel punishment. This opposition is alleged to be based on an incompatibility of punishment with scientific considerations. The following quotation is a case in point:

"We still punish primarily for vengeance, or

* This article is a revised version of a paper presented to the 1959 meeting of the Eastern Sociological Society.

¹ BARNES & TETERS, *NEW HORIZONS IN CRIMINOLOGY* (3d ed. 1959); CALDWELL, *CRIMINOLOGY* (1956); CAVAN, *CRIMINOLOGY* (1955); ELLIOT, *CRIME IN MODERN SOCIETY* (1952); KORN & McCORKLE, *CRIMINOLOGY AND PENOLOGY* (1959); RECKLESS, *THE CRIME PROBLEM* (2d ed. 1955); SUTHERLAND & CRESSEY, *PRINCIPLES OF CRIMINOLOGY* (5th ed. 1955); TAFT, *CRIMINOLOGY* (3d ed. 1956); TAPPAN, *CRIME, JUSTICE AND CORRECTION* (1960); VON HENTIG, *CRIME: CAUSES AND CONDITIONS* (1947); WOOD & WAITE, *CRIME AND ITS TREATMENT* (1941).

to deter, or in the interest of a 'just' balance of accounts between 'deliberate' evildoers on the one hand and an injured and enraged society on the other. We do not yet generally punish or treat as scientific criminology would imply, namely, in order to change antisocial attitudes into social attitudes."²

Most of the textbook writers note with satisfaction that "the trend in modern countries has been toward humanizing punishment and toward the reduction of brutalities."³ They point to the decreased use of capital punishment, the introduction of amenities into the modern prison by enlightened penology, and the increasing emphasis on non-punitive and individualized methods of dealing with offenders, e.g., probation, parole, psychotherapy. In short, students reading these textbooks might infer that punishment is a vestigial carry-over of a barbaric past and will disappear as humanitarianism and rationality spread. Let us examine this inference in terms of the motives underlying punishment and the necessities of social control.

THE URGE TO PUNISH

Many crimes have identifiable victims. In the case of crimes against the person, physical or psychic injuries have been visited upon the victim. In the case of crimes against property, someone's property has been stolen or destroyed. In pressing

² TAFT, *op. cit. supra* note 1, at 359.

³ RECKLESS, *op. cit. supra* note 1, at 450.

charges against the offender, the victim may express hostility against the person who injured him in a socially acceptable way. Those who identify with the victim—not only his friends and family but those who can imagine the same injury being done to them—may join with him in clamoring for the punishment of the offender. If, as has been argued, the norm of reciprocity is fundamental to human interaction, this hostility of the victim constituency toward offenders is an obstacle to the elimination of punishment from social life.⁴ Of course, the size of the group constituted by victims and those who identify with victims may be small. Empirical study would probably show that it varies by offense. Thus, it is possible that nearly everyone identifies with the victim of a murderer but relatively few people with the victim of a black-mailer. The greater the size of the victim constituency, the greater the opposition to a non-punitive reaction to the offender.

It would be interesting indeed to measure the size and the composition of the victim constituencies for various crimes. Take rape as an illustration. Since the victims of rape are females, we might hypothesize that *women* would express greater punitiveness toward rapists than *men* and that degrees of hostility would correspond to real or imaginary exposure to rape. Thus, pretty young girls might express more punitiveness toward rapists than homely women. Among males, we might predict that greater punitiveness would be expressed by those with more reason to identify with the victims. Thus, males having sisters or daughters in the late teens or early twenties might express more punitiveness toward rapists than males lacking vulnerable "hostages to fortune."

Such a study might throw considerable light on the wellsprings of punitive motivation, particularly if victimization reactions were distinguished from other reasons for punitiveness. One way to explore such motivation would be to ask the same respondents to express their punitive predispositions toward offenses which do not involve victims at all, e.g., gambling, or which involve victims of a quite different kind. Thus, rape might be balanced by an offense the victims of which are largely male. Survey research of this type is capable of ascertaining the opposition to milder penalties for various offenses. It would incidentally throw light on the comparatively gentle societal reaction to white-collar crime. Perhaps the explanation lies in the

difficulty of identifying with the victims of patent infringement or watered hams.⁵

THE SOCIAL CONTROL FUNCTIONS OF PUNISHMENT

Conformists who identify with the *victim* are motivated to punish the offender out of some combination of rage and fear. Conformists who identify with the *offender*, albeit unconsciously, may wish to punish him for quite different reasons. Whatever the basis for the motivation to punish, the existence of punitive reactions to deviance is an obstacle to the abolition of punishment. However, it is by no means the sole obstacle. Even though a negligible segment of society felt punitive toward offenders, it might still not be feasible to eliminate punishment if the social control of deviance depended on it. Let us consider, therefore, the consequences of punishing offenders for (a) preventing crime, (b) sustaining the morale of conformists, and (c) rehabilitating offenders.

Punishment as a Means of Crime Prevention

Durkheim defined punishment as an act of vengeance. "What we avenge, what the criminal expiates, is the outrage to morality."⁶ But why is vengeance necessary? Not because of the need to deter the bulk of the population from doing likewise. The socialization process prevents most deviant behavior. Those who have introjected the moral norms of their society cannot commit crimes because their self-concepts will not permit them to do so. Only the unsocialized (and therefore amoral) individual fits the model of classical criminology and is deterred from expressing deviant impulses by a nice calculation of pleasures and punishments.⁷ Other things being equal, the anticipation of punishment would seem to have more deterrent value for inadequately socialized members of the group. It is difficult to investigate this proposition empirically because other motivationally relevant factors are usually varying simultaneously, e.g., the situational temptations confronting various individuals, their optimism about the chances of escaping detection, and the differential impact of the same punishment on

⁵ In this connection, it is well to recall that there is less reluctance to steal from corporations than from humans. See A. W. JONES, *LIFE, LIBERTY, AND PROPERTY* (1941).

⁶ DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 89 (1947).

⁷ PARSONS, *THE STRUCTURE OF SOCIAL ACTION* 402-03 (1949).

⁴ Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 *AM. SOC. REV.* 161 (1960).

individuals of different status.⁸ Clearly, though, the deterrent effect of anticipated punishments is a complex empirical problem, and Durkheim was not interested in it. Feeling as he did that *some* crime is normal in every society, he apparently decided that the crime prevention function of punishment is not crucial. He pointed out that minute gradation in punishment would not be necessary if punishment were simply a means of deterring the potential offender (crime prevention). "Robbers are as strongly inclined to rob as murderers are to murder; the resistance offered by the former is not less than that of the latter, and consequently, to control it, we would have recourse to the same means."⁹ Durkheim was factually correct; the offenses punished most severely are not necessarily the ones which present the greatest problem of social defense. Thus, quantitatively speaking, murder is an unimportant cause of death; in the United States it claims only half as many lives annually as does suicide and only one-fifth the toll of automobile accidents. Furthermore, criminologists have been unable to demonstrate a relationship between the murder rate of a community and its use or lack of use of capital punishment.

Most contemporary sociologists would agree with Durkheim that the anticipation of punishment is not the first line of defense against crime. The socialization process keeps most people law abiding, not the police—if for no other reason than the police are not able to catch every offender. This does not mean, however, that the police could be disbanded. During World War II, the Nazis deported all of Denmark's police force, thus providing a natural experiment testing the deterrent efficacy of formal sanctions.¹⁰ Crime increased greatly. Even though punishment is uncertain, especially under contemporary urban conditions, the possibility of punishment keeps some conformists law-abiding. The empirical question is: *How many* conformists would become deviants if they did not fear punishment?

Punishment as a Means of Sustaining the Morale of Conformists

Durkheim considered punishment indispensable as a means of containing the demoralizing conse-

⁸ Toby, *Social Disorganization and Stake in Conformity: Complementary Factors in the Predatory Behavior of Young Hoodlums*, 48 J. CRIM. L., C. & P.S. 12 (1957).

⁹ *Op. cit. supra* note 6, at 88.

¹⁰ TROLLE, SYV MÅNEDER UTEN POLITI (SEVEN MONTHS WITHOUT POLICE) (Copenhagen, 1945), quoted in Christie, *Scandinavian Criminology*, 31 SOCIOLOGICAL INQUIRY 101 (1961).

quences of the crimes that could not be prevented. Punishment was not for Durkheim mere vindictiveness. Without punishment Durkheim anticipated the demoralization of "upright people" in the face of defiance of the collective conscience. He believed that unpunished deviance tends to demoralize the conformist and therefore he talked about punishment as a means of repairing "the wounds made upon collective sentiments."¹¹ Durkheim was not entirely clear; he expressed his ideas in metaphorical language. Nonetheless, we can identify the hypothesis that the punishment of offenders promotes the solidarity of conformists.

Durkheim anticipated psychoanalytic thinking as the following reformulation of his argument shows: One who resists the temptation to do what the group prohibits, to drive his car at 80 miles per hour, to beat up an enemy, to take what he wants without paying for it, would like to feel that these self-imposed abnegations have some meaning. When he sees others defy rules without untoward consequences, he needs some reassurance that his sacrifices were made in a good cause. If "the good die young and the wicked flourish as the green bay tree," the moral scruples which enable conformists to restrain their own deviant inclinations lack social validation. The social significance of punishing offenders is that deviance is thereby defined as unsuccessful in the eyes of conformists, thus making the inhibition or repression of their own deviant impulses seem worthwhile. Righteous indignation is collectively sanctioned reaction formation. The law-abiding person who unconsciously resents restraining his desire to steal and murder has an opportunity, by identifying with the police and the courts, to affect the precarious balance within his own personality between internal controls and the temptation to deviate. A bizarre example of this psychological mechanism is the man who seeks out homosexuals and beats them up mercilessly. Such pathological hostility toward homosexuals is due to the sadist's anxiety over his own sex-role identification. By "punishing" the homosexual, he denies the latent homosexuality in his own psyche. No doubt, some of the persons involved in the administration of punishment are sadistically motivated. But Durkheim hypothesized that the psychic equilibrium of the *ordinary* member of the group may be threatened by violation of norms; Durkheim was not concerned about psychopathological punitiveness.

Whatever the practical difficulties, Durkheim's

¹¹ DURKHEIM, *op. cit. supra* note 6, at 108.

hypothesis is, in principle, testable. It should be possible to estimate the demoralizing impact of nonconformity on conformists. Clearly, though, this is no simple matter. The extent of demoralization resulting from the failure to punish may vary with type of crime. The unpunished traffic violator may cause more demoralization than the unpunished exhibitionist—depending on whether or not outwardly conforming members of society are more tempted to exceed the speed limit than to expose themselves. The extent of demoralization may also vary with position in the social structure occupied by the conformist. Thus, Ranulf suggested that the middle class was especially vulnerable:

“[T]he disinterested tendency to inflict punishment is a distinctive characteristic of the lower middle class, that is, of a social class living under conditions which force its members to an extraordinarily high degree of self-restraint and subject them to much frustration of natural desires. If a psychological interpretation is to be put on this correlation of facts, it can hardly be to any other effect than that moral indignation is a kind of resentment caused by the repression of instincts.”¹²

Once the facts on the rate and the incidence of moral indignation are known, it will become possible to determine whether something must be done to the offender in order to prevent the demoralization of conformists. Suppose that research revealed that a very large proportion of conformists react with moral indignation to *most* violations of the criminal laws. Does this imply that punishment is a functional necessity? Durkheim apparently thought so, but he might have been less dogmatic in his approach to punishment had he specified the functional problem more clearly: making the nonconformist unattractive as a role model. If the norm violation can be defined as unenviable through some other process than by inflicting suffering upon him, punishment is not required by the exigencies of social control.

Punishment can be discussed on three distinct levels: (a) in terms of the motivations of the societal agents administering it, (b) in terms of the definition of the situation on the part of the person being punished, and (c) in terms of its impact on conformists. At this point I am chiefly concerned with the third level, the impact on conformists. Note that punishment of offenders sustains the

morale of conformists only under certain conditions. The first has already been discussed, namely that conformists unconsciously wish to violate the rules themselves. The second is that conformists implicitly assume that the nonconformity is a result of *deliberate defiance* of society's norms. For some conformists, this second condition is not met. Under the guidance of psychiatric thinking, some conformists assume that norm violation is the result of illness rather than wickedness.¹³ For such conformists, punishment of the offender does not contribute to their morale. Since they assume that the nonconformity is an involuntary symptom of a disordered personality, the offender is automatically unenviable because illness is (by definition) undesirable. Of course, it is an empirical question as to the relative proportions of the conforming members of society who make the “wicked” or the “sick” assumption about the motivation of the offender, but this can be discovered by investigation.

In Western industrial societies, there is increasing tendency to call contemporary methods of dealing with offenders “treatment” rather than “punishment.” Perhaps this means that increasing proportions of the population are willing to accept the “sick” theory of nonconformity. Note, however, that the emphasis on “treatment” may be more a matter of symbolism than of substance. Although the definition of the situation as treatment rather than punishment tends to be humanizing—both to the offender and to the persons who must deal with him—there are still kind guards and cruel nurses. Furthermore, it would be an error to suppose that punishment is invariably experienced as painful by the criminal whereas treatment is always experienced as pleasant by the psychopathological offender. Some gang delinquents consider a reformatory sentence an opportunity to renew old acquaintances and to learn new delinquent skills; they resist fiercely the degrading suggestion that they need the services of the “nut doctor.” Some mental patients are terrified by shock treatment and embarrassed by group therapy.

What then is the significance of the increasing emphasis on “treatment”? Why call an institution for the criminally insane a “hospital” although it bears a closer resemblance to a prison than to a

¹² RANULF, MORAL INDIGNATION AND MIDDLE-CLASS PSYCHOLOGY 198 (Copenhagen, 1938).

¹³ Talcott Parsons has repeatedly suggested the analogy between illness and criminality. See also Aubert & Messinger, *The Criminal and the Sick*, 1 INQUIRY 137 (1958), and WOOTTON, SOCIAL SCIENCE AND SOCIAL PATHOLOGY 203-67 (1959).

hospital for the physically ill? In my opinion, the increased emphasis on treatment in penological thinking and practice reflects the existence of a large group of conformists who are undecided as between the "wicked" and the "sick" theories of nonconformity. When they observe that the offender is placed in "treatment," their provisional diagnosis of illness is confirmed, and therefore they do not feel that he has "gotten away with it." Note that "treatment" has the capacity to make the offender unenviable to conformists whether or not it is effective in rehabilitating him and whether or not he experiences it as pleasant. Those old-fashioned conformists who are not persuaded by official diagnoses of illness will not be satisfied by "treatment"; they will prefer to see an attempt made to visit physical suffering or mental anguish on the offender. For them, punishment is necessary to prevent demoralization.

Punishment as a Means of Reforming the Offender

Rehabilitation of offenders swells the number of conformists and therefore is regarded both by humanitarians and by scientifically minded penologists as more constructive than punishment. Most of the arguments against imprisonment and other forms of punishment in the correctional literature boil down to the assertion that punishment is incompatible with rehabilitation. The high rate of recidivism for prisons and reformatories is cited as evidence of the irrationality of punishment.¹⁴ What sense is there in subjecting offenders to the frustrations of incarceration? If rehabilitative programs are designed to help the offender cope with frustrations in his life situation, which presumably were responsible for his nonconformity, imprisoning him hardly seems a good way to begin. To generalize the argument, the status degradation inherent in punishment makes it more difficult to induce the offender to play a legitimate role instead of a nonconforming one. Whatever the offender's original motivations for nonconformity, punishment adds to them by neutralizing his fear of losing the respect of the community; he has already lost it.

Plausible though this argument is, empirical research has not yet verified it. The superior rehabilitative efficacy of "enlightened" prisons is a humanitarian assumption, but brutal correctional systems have, so far as is known, comparable re-

cidivism rates to "enlightened" systems. True, the recidivism rate of offenders who are fined or placed on probation is less than the recidivism rate of offenders who are incarcerated, but this comparison is not merely one of varying degrees of punishment. Presumably, more severe punishment is meted out to criminals who are more deeply committed to a deviant way of life. Until it is demonstrated that the recidivism rates of strictly comparable populations of deviants differ depending on the degree of punitiveness with which they are treated, the empirical incompatibility of punishment and rehabilitation will remain an open question.

Even on theoretical grounds, however, the incompatibility of punishment and rehabilitation can be questioned once it is recognized that one may precede the other. Perhaps, as Lloyd McCorkle and Richard Korn think, some types of deviants become willing to change only if the bankruptcy of their way of life is conclusively demonstrated to them.¹⁵ On this assumption, punishment may be a necessary preliminary to a rehabilitative program in much the same way that shock treatment makes certain types of psychotics accessible to psychotherapy.

It seems to me that the compatibility of punishment and rehabilitation could be clarified (although not settled) if it were considered from the point of view of the *meaning* of punishment to the offender. Those offenders who regard punishment as a deserved deprivation resulting from their own misbehavior are qualitatively different from offenders who regard punishment as a misfortune bearing no relationship to morality. Thus, a child who is spanked by his father and the member of a bopping gang who is jailed for carrying concealed weapons are both "punished." But one accepts the deprivation as legitimate, and the other bows before superior force. I would hypothesize that punishment has rehabilitative significance only for the former. If this is so, correctional officials must convince the prisoner that his punishment is just before they can motivate him to change. This is no simple task. It is difficult for several reasons:

1. It is obvious to convicted offenders, if not to correctional officials, that *some* so-called "criminals" are being punished disproportionately for trifling offenses whereas *some* predatory business men and politicians enjoy prosperity and freedom.

¹⁴ Vold, *Does the Prison Reform?* 293 ANNALS 42 (1954).

¹⁵ McCorkle & Korn, *Resocialization Within Walls*, 293 ANNALS 88 (1954).

To deny that injustices occur confirms the cynical in their belief that "legitimate" people are not only as predatory as criminals but hypocritical to boot. When correctional officials act as though there were no intermediate position between asserting that perfect justice characterizes our society and that it is a jungle, they make it more difficult to persuade persons undergoing punishment that the best approximation of justice is available that imperfect human beings can manage.¹⁶

2. Of course, the more cases of injustice known to offenders, the harder it is to argue that the contemporary approximation of justice is the best that can be managed. It is difficult to persuade Negro inmates that their incarceration has moral significance if their life experience has demonstrated to them that the police and the courts are less scrupulous of *their* rights than of the rights of white persons. It is difficult to persuade an indigent inmate that his incarceration has moral significance if his poverty resulted in inadequate legal representation.¹⁷

3. Finally, the major form of punishment for serious offenders (imprisonment) tends to generate a contraculture which denies that justice has anything to do with legal penalties.¹⁸ That is to say, it is too costly to confine large numbers of people in isolation from one another, yet congregate confinement results in the mutual reinforcement of self-justifications. Even those who enter prison feeling contrite are influenced by the self-righteous inmate climate; this may be part of the reason recidivism rates rise with each successive commitment.¹⁹

In view of the foregoing considerations, I hypothesize that punishment—as it is now practiced in Western societies—is usually an obstacle to rehabilitation. Some exceptions to this generalization should be noted. A few small treatment institutions have not only prevented the development of a self-righteous contraculture but have managed to establish an inmate climate supportive of changed values.²⁰ In such institutions punishment has re-

¹⁶ See the interesting discussions of human fallibility in the works of Reinhold Niebuhr—e.g., *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS* (1950).

¹⁷ Trebach, *The Indigent Defendant*, 11 *RUTGERS L. REV.* 625 (1957).

¹⁸ For a discussion of the concept of contraculture, see Yinger, *Contraculture and Subculture*, 25 *AM. SOC. REV.* 625 (1960).

¹⁹ Sellin, *Recidivism and Maturation*, 4 *NAT'L PROBATION AND PAROLE A.J.* 241 (1958).

²⁰ McCORKLE, ELIAS & BIXBY, *THE HIGHFIELDS STORY* (1958), and Empey & Rabow, *Experiment in*

habilitative significance for the same reason it has educational significance in the normal family: it is legitimate.

To sum up: The social control functions of punishment include crime prevention, sustaining the morale of conformists, and the rehabilitation of offenders. All of the empirical evidence is not in, but it is quite possible that punishment contributes to some of these and interferes with others. Suppose, for example, that punishment is necessary for crime prevention and to maintain the morale of conformists but is generally an obstacle to the rehabilitation of offenders. Since the proportion of deviants is small in any viable system as compared with the proportion of conformists, the failure to rehabilitate them will not jeopardize the social order. Therefore, under these assumptions, sociological counsel would favor the continued employment of punishment.

CONCLUSION

A member of a social system who violates its cherished rules threatens the stability of that system. Conformists who identify with the victim are motivated to punish the criminal in order to feel safe. Conformists who unconsciously identify with the criminal fear their own ambivalence. If norm violation is defined by conformists as willful, visiting upon the offender some injury or degradation will make him unenviable. If his behavior is defined by conformists as a symptom of pathology they are delighted not to share, putting him into treatment validates their diagnosis of undesirable illness. Whether he is "punished" or "treated," however, the disruptive consequence of his deviance is contained. Thus, from the viewpoint of social control, the alternative outcomes of the punishment or treatment processes, rehabilitation or recidivism, are less important than the deviant's neutralization as a possible role model. Whether punishment is or is not necessary rests ultimately on empirical questions: (1) the extent to which identification with the victim occurs, (2) the extent to which nonconformity is prevented by the anticipation of punishment, (3) what the consequences are for the morale of conformists of punishing the deviant or of treating his imputed pathology, and (4) the compatibility between punishment and rehabilitation.

Delinquency Rehabilitation, 26 *AM. SOC. REV.* 679 (1961).