
Marxism and Retribution

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Punishment in general has been defended as a means either of ameliorating or of intimidating. Now what right have you to punish me for the amelioration or intimidation of others? And besides there is history—there is such a thing as statistics—which prove with the most complete evidence that since Cain the world has been neither intimidated nor ameliorated by punishment. Quite the contrary. From the point of view of abstract right, there is only one theory of punishment which recognizes human dignity in the abstract, and that is the theory of Kant, especially in the more rigid formula given to it by Hegel. Hegel says: “Punishment is the right of the criminal. It is an act of his own will. The violation of right has been proclaimed by the criminal as his own right. His crime is the negation of right. Punishment is the negation of this negation, and consequently an affirmation of right, solicited and forced upon the criminal by himself.”

There is no doubt something specious in this formula, inasmuch as Hegel, instead of looking upon the criminal as the mere object, the slave of justice, elevates him to the position of a free and self-deter-

An earlier version of this essay was delivered to the Third Annual Colloquium in Philosophy (“The Philosophy of Punishment”) at the University of Dayton in October, 1972. I am grateful to the Department of Philosophy at the University of Dayton for inviting me to participate and to a number of persons at the Colloquium for the useful discussion on my paper at the time. I am also grateful to Anthony D. Wozzley of the University of Virginia and to two of my colleagues, Robert M. Harnish and Francis V. Raab, for helping me to clarify the expression of my views.

mined being. Looking, however, more closely into the matter, we discover that German idealism here, as in most other instances, has but given a transcendental sanction to the rules of existing society. Is it not a delusion to substitute for the individual with his real motives, with multifarious social circumstances pressing upon him, the abstraction of "free will"—one among the many qualities of man for man himself? . . . Is there not a necessity for deeply reflecting upon an alteration of the system that breeds these crimes, instead of glorifying the hangman who executes a lot of criminals to make room only for the supply of new ones?

Karl Marx, "Capital Punishment,"
New York Daily Tribune, 18 February 1853¹

Philosophers have written at great length about the moral problems involved in punishing the innocent—particularly as these problems raise obstacles to an acceptance of the moral theory of Utilitarianism. Punishment of an innocent man in order to bring about good social consequences is, at the very least, not always clearly wrong on utilitarian principles. This being so, utilitarian principles are then to be condemned by any morality that may be called Kantian in character. For punishing an innocent man, in Kantian language, involves using that man as a mere means or instrument to some social good and is

1. In a sense, my paper may be viewed as an elaborate commentary on this one passage, excerpted from a discussion generally concerned with the efficacy of capital punishment in eliminating crime. For in this passage, Marx (to the surprise of many I should think) expresses a certain admiration for the classical retributive theory of punishment. Also (again surprisingly) he expresses this admiration in a kind of language he normally avoids—i.e., the moral language of rights and justice. He then, of course, goes on to reject the applicability of that theory. But the question that initially perplexed me is the following: what is the explanation of Marx's ambivalence concerning the retributive theory; why is he both attracted and repelled by it? (This ambivalence is not shared, for example, by utilitarians—who feel nothing but repulsion when the retributive theory is even mentioned.) Now except for some very brief passages in *The Holy Family*, Marx himself has nothing more to say on the topic of punishment beyond what is contained in this brief *Daily Tribune* article. Thus my essay is in no sense an exercise in textual scholarship (there are not enough texts) but is rather an attempt to construct an assessment of punishment, Marxist at least in spirit, that might account for the ambivalence found in the quoted passage. My main outside help comes, not from Marx himself, but from the writings of the Marxist criminologist Willem Bongers.

thus not to treat him as an end in himself, in accord with his dignity or worth as a person.

The Kantian position on the issue of punishing the innocent, and the many ways in which the utilitarian might try to accommodate that position, constitute extremely well-worn ground in contemporary moral and legal philosophy.² I do not propose to wear the ground further by adding additional comments on the issue here. What I do want to point out, however, is something which seems to me quite obvious but which philosophical commentators on punishment have almost universally failed to see—namely, that problems of the very same kind and seriousness arise for the utilitarian theory with respect to the punishment of the guilty. For a utilitarian theory of punishment (Bentham's is a paradigm) must involve justifying punishment in terms of its social results—e.g., deterrence, incapacitation, and rehabilitation. And thus even a guilty man is, on this theory, being punished because of the instrumental value the action of punishment will have in the future. He is being used as a means to some future good—e.g., the deterrence of others. Thus those of a Kantian persuasion, who see the importance of worrying about the treatment of persons as mere means, must, it would seem, object just as strenuously to the punishment of the guilty on utilitarian grounds as to the punishment of the innocent. Indeed the former worry, in some respects, seems more serious. For a utilitarian can perhaps refine his theory in such a way that it does not commit him to the punishment of the innocent. However, if he is to approve of punishment at all, he must approve of punishing the guilty in at least some cases. This makes the worry about punishing the guilty formidable indeed, and it is odd that this has gone generally unnoticed.³ It has generally been assumed that if the utilitarian theory can just avoid entailing the permissibility of punishing the innocent, then all objections of a Kantian character to the theory will have been met. This seems to me simply not to be the case.

2. Many of the leading articles on this topic have been reprinted in *The Philosophy of Punishment*, ed. H. B. Acton (London, 1969). Those papers not included are cited in Acton's excellent bibliography.

3. One writer who has noticed this is Richard Wasserstrom. See his "Why Punish the Guilty?" *Princeton University Magazine* 20 (1964), pp. 14-19.

What the utilitarian theory really cannot capture, I would suggest, is the notion of persons having rights. And it is just this notion that is central to any Kantian outlook on morality. Any Kantian can certainly agree that punishing persons (guilty or innocent) may have either good or bad or indifferent consequences and that insofar as the consequences (whether in a particular case or for an institution) are good, this is something in favor of punishment. But the Kantian will maintain that this consequential outlook, important as it may be, leaves out of consideration entirely that which is most morally crucial—namely, the question of rights. Even if punishment of a person would have good consequences, what gives us (i.e., society) the moral right to inflict it? If we have such a right, what is its origin or derivation? What social circumstances must be present for it to be applicable? What does this right to punish tell us about the status of the person to be punished—e.g., how are we to analyze his rights, the sense in which he must deserve to be punished, his obligations in the matter? It is this family of questions which any Kantian must regard as morally central and which the utilitarian cannot easily accommodate into his theory. And it is surely this aspect of Kant's and Hegel's retributivism, this seeing of rights as basic, which appeals to Marx in the quoted passage. As Marx himself puts it: "What right have you to punish me for the amelioration or intimidation of others?" And he further praises Hegel for seeing that punishment, if justified, must involve respecting the rights of the person to be punished.⁴ Thus Marx, like Kant, seems prepared to draw the important distinction between (a) what it would be good to do on grounds of utility and (b) what we have a right to do. Since we do not always have the right to do what it would be good to do, this distinction is of the greatest moral importance; and missing the distinction is the Achilles heel of all forms of Utilitarianism. For consider the following example: A Jehovah's Witness needs a blood

4. Marx normally avoids the language of rights and justice because he regards such language to be corrupted by bourgeois ideology. However, if we think very broadly of what an appeal to rights involves—namely, a protest against unjustified coercion—there is no reason why Marx may not legitimately avail himself on occasion of this way of speaking. For there is surely at least some moral overlap between Marx's protests against exploitation and the evils of a division of labor, for example, and the claims that people have a right not to be used solely for the benefit of others and a right to self-determination.

transfusion in order to live; but, because of his (we can agree absurd) religious belief that such transfusions are against God's commands, he instructs his doctor not to give him one. Here is a case where it would seem to be good or for the best to give the transfusion and yet, at the very least, it is highly doubtful that the doctor has a right to give it. This kind of distinction is elementary, and any theory which misses it is morally degenerate.⁵

To move specifically to the topic of punishment: How exactly does retributivism (of a Kantian or Hegelian variety) respect the rights of persons? Is Marx really correct on this? I believe that he is. I believe that retributivism can be formulated in such a way that it is the only morally defensible theory of punishment. I also believe that arguments, which may be regarded as Marxist at least in spirit, can be formulated which show that social conditions as they obtain in most societies make this form of retributivism largely inapplicable within those societies. As Marx says, in those societies retributivism functions merely to provide a "transcendental sanction" for the status quo. If this is so, then the only morally defensible theory of punishment is largely inapplicable in modern societies. The consequence: modern societies largely lack the moral right to punish.⁶ The upshot is that a Kantian moral theory (which in general seems to me correct) and a Marxist analysis of society (which, if properly qualified, also seems to me correct) produces a radical and not merely reformist attack not merely on the scope and manner of punishment in our society but on the institution of punishment itself. Institutions of punishment constitute

5. I do not mean to suggest that under no conceivable circumstances would the doctor be justified in giving the transfusion even though, in one clear sense, he had no right to do it. If, for example, the Jehovah's Witness was a key man whose survival was necessary to prevent the outbreak of a destructive war, we might well regard the transfusion as on the whole justified. However, even in such a case, a morally sensitive man would have to regretfully realize that he was sacrificing an important principle. Such a realization would be impossible (because inconsistent) for a utilitarian, for his theory admits only one principle—namely, do that which on the whole maximizes utility. An occupational disease of utilitarians is a blindness to the possibility of genuine moral dilemmas—i.e., a blindness to the possibility that important moral principles can conflict in ways that are not obviously resolvable by a rational decision procedure.

6. I qualify my thesis by the word "largely" to show at this point my realization, explored in more detail later, that no single theory can account for all criminal behavior.

what Bernard Harrison has called structural injustices⁷ and are, in the absence of a major social change, to be resisted by all who take human rights to be morally serious—i.e., regard them as genuine action guides and not merely as rhetorical devices which allow people to morally sanctify institutions which in fact can only be defended on grounds of social expediency.

Stating all of this is one thing and proving it, of course, is another. Whether I can ever do this is doubtful. That I cannot do it in one brief article is certain. I cannot, for example, here defend in detail my belief that a generally Kantian outlook on moral matters is correct.⁸ Thus I shall content myself for the present with attempting to render at least plausible two major claims involved in the view that I have outlined thus far: (1) that a retributive theory, in spite of the bad press that it has received, is a morally credible theory of punishment—that it can be, H. L. A. Hart to the contrary,⁹ a reasonable general justifying aim of punishment; and (2) that a Marxist analysis of a society can undercut the practical applicability of that theory.

THE RIGHT OF THE STATE TO PUNISH

It is strong evidence of the influence of a utilitarian outlook in moral and legal matters that discussions of punishment no longer involve a consideration of the right of anyone to inflict it. Yet in the eighteenth and nineteenth centuries, this tended to be regarded as the central aspect of the problem meriting philosophical consideration. Kant, Hegel, Bosanquet, Green—all tended to entitle their chapters on punishment along the lines explicitly used by Green: "The Right of the State to Punish."¹⁰ This is not just a matter of terminology but reflects, I think, something of deeper philosophical substance. These theorists, unlike the utilitarian, did not view man as primarily a maximizer of personal satisfactions—a maximizer of individual utilities. They were

7. Bernard Harrison, "Violence and the Rule of Law," in *Violence*, ed. Jerome A. Shaffer (New York, 1971), pp. 139-176.

8. I have made a start toward such a defense in my "The Killing of the Innocent," forthcoming in *The Monist* 57, no. 4 (October 1973).

9. H. L. A. Hart, "Prolegomenon to the Principles of Punishment," from *Punishment and Responsibility* (Oxford, 1968), pp. 1-27.

10. Thomas Hill Green, *Lectures on the Principles of Political Obligation* (1885), (Ann Arbor, 1967), pp. 180-205.

inclined, in various ways, to adopt a different model of man—man as a free or spontaneous creator, man as autonomous. (Marx, it may be noted, is much more in line with this tradition than with the utilitarian outlook.)¹¹ This being so, these theorists were inclined to view punishment (a certain kind of coercion by the state) as not merely a causal contributor to pain and suffering, but rather as presenting at least a *prima facie* challenge to the values of autonomy and personal dignity and self-realization—the very values which, in their view, the state existed to nurture. The problem as they saw it, therefore, was that of reconciling punishment as state coercion with the value of individual autonomy. (This is an instance of the more general problem which Robert Paul Wolff has called the central problem of political philosophy—namely, how is individual moral autonomy to be reconciled with legitimate political authority?)¹² This kind of problem, which I am inclined to agree is quite basic, cannot even be formulated intelligibly from a utilitarian perspective. Thus the utilitarian cannot even see the relevance of Marx's charge: Even if punishment has wonderful social consequences, what gives anyone the right to inflict it on me?

Now one fairly typical way in which others acquire rights over us is by our own consent. If a neighbor locks up my liquor cabinet to protect me against my tendencies to drink too heavily, I might well regard this as a presumptuous interference with my own freedom, no matter how good the result intended or accomplished. He had no right to do it and indeed violated my rights in doing it. If, on the other hand, I had asked him to do this or had given my free consent to his suggestion that he do it, the same sort of objection on my part would be quite out of order. I had given him the right to do it, and he had the right to do it. In doing it, he violated no rights of mine—even if, at the time of his doing it, I did not desire or want the action to be performed. Here then we seem to have a case where my autonomy may be regarded as intact even though a desire of mine is thwarted. For there is a sense in which the thwarting of the desire can be imputed to me

11. For an elaboration of this point, see Steven Lukes, "Alienation and Anomie," in *Philosophy, Politics and Society* (Third Series), ed. Peter Laslett and W. G. Runciman (Oxford, 1967), pp. 134-156.

12. Robert Paul Wolff, *In Defense of Anarchism* (New York, 1970).

(my choice or decision) and not to the arbitrary intervention of another.

How does this apply to our problem? The answer, I think, is obvious. What is needed, in order to reconcile my undesired suffering of punishment at the hands of the state with my autonomy (and thus with the state's right to punish me), is a political theory which makes the state's decision to punish me in some sense my own decision. If I have willed my own punishment (consented to it, agreed to it) then—even if at the time I happen not to desire it—it can be said that my autonomy and dignity remain intact. Theories of the General Will and Social Contract theories are two such theories which attempt this reconciliation of autonomy with legitimate state authority (including the right or authority of the state to punish). Since Kant's theory happens to incorporate elements of both, it will be useful to take it for our sample.

MORAL RIGHTS AND THE RETRIBUTIVE THEORY OF PUNISHMENT

To justify government or the state is necessarily to justify at least some coercion.¹³ This poses a problem for someone, like Kant, who maintains that human freedom is the ultimate or most sacred moral value. Kant's own attempt to justify the state, expressed in his doctrine of the *moral title* (*Befugnis*),¹⁴ involves an argument that coercion is justified only in so far as it is used to prevent invasions against freedom. Freedom itself is the only value which can be used to limit freedom, for the appeal to any other value (e.g., utility) would under-

13. In this section, I have adapted some of my previously published material: Kant: *The Philosophy of Right* (London, 1970), pp. 109-112 and 140-144; "Three Mistakes About Retributivism," *Analysis* (April 1971): 166-169; and "Kant's Theory of Criminal Punishment," in *Proceedings of the Third International Kant Congress*, ed. Lewis White Beck (Dordrecht, 1972), pp. 434-441. I am perfectly aware that Kant's views on the issues to be considered here are often obscure and inconsistent—e.g., the analysis of "willing one's own punishment" which I shall later quote from Kant occurs in a passage the primary purpose of which is to argue that the idea of "willing one's own punishment" makes no sense! My present objective, however, is not to attempt accurate Kant scholarship. My goal is rather to build upon some remarks of Kant's which I find philosophically suggestive.

14. Immanuel Kant, *The Metaphysical Elements of Justice* (1797), trans. John Ladd (Indianapolis, 1965), pp. 35ff.

mine the ultimate status of the value of freedom. Thus Kant attempts to establish the claim that some forms of coercion (as opposed to violence) are morally permissible because, contrary to appearance, they are really consistent with rational freedom. The argument, in broad outline, goes in the following way. Coercion may keep people from doing what they desire or want to do on a particular occasion and is thus *prima facie* wrong. However, such coercion can be shown to be morally justified (and thus not absolutely wrong) if it can be established that the coercion is such that it could have been rationally willed even by the person whose desire is interfered with:

Accordingly, when it is said that a creditor has a right to demand from his debtor the payment of a debt, this does not mean that he can *persuade* the debtor that his own reason itself obligates him to this performance; on the contrary, to say that he has such a right means only that the use of coercion to make anyone do this is entirely compatible with everyone's freedom, *including the freedom of the debtor*, in accordance with universal laws.¹⁵

Like Rousseau, Kant thinks that it is only in a context governed by social practice (particularly civil government and its Rule of Law) that this can make sense. Laws may require of a person some action that he does not desire to perform. This is not a violent invasion of his freedom, however, if it can be shown that in some antecedent position of choice (what John Rawls calls "the original position"),¹⁶ he would have been rational to adopt a Rule of Law (and thus run the risk of having some of his desires thwarted) rather than some other alternative arrangement like the classical State of Nature. This is, indeed, the only sense that Kant is able to make of classical Social Contract theories. Such theories are to be viewed, not as historical fantasies, but as ideal models of rational decision. For what these theories actually claim is that the only coercive institutions that are morally justified are those which a group of rational beings could agree to adopt in a position of having to pick social institutions to govern their relations:

15. *Ibid.*, p. 37.

16. John Rawls, "Justice as Fairness," *The Philosophical Review* 67 (1958): 164-194; and *A Theory of Justice* (Cambridge, Mass., 1971), especially pp. 17-22.

The contract, which is called *contractus originarius*, or *pactum sociale* . . . need not be assumed to be a fact, indeed it is not [even possible as such. To suppose that would be like insisting] that before anyone would be bound to respect such a civic constitution, it be proved first of all from history that a people, whose rights and obligations we have entered into as their descendants, had *once upon a time* executed such an act and had left a reliable document or instrument, either orally or in writing, concerning this contract. Instead, this contract is a *mere idea* of reason which has undoubted practical reality; namely, to oblige every legislator to give us laws in such a manner that the laws *could* have originated from the united will of the entire people and to regard every subject in so far as he is a citizen as though he had consented to such [an expression of the general] will. This is the testing stone of the rightness of every publicly-known law, for if a law were such that it was impossible for an entire people to give consent to it (as for example a law that a certain class of subjects, by inheritance, should have the privilege of the *status of lords*), then such a law is unjust. On the other hand, if there is a mere *possibility* that a people might consent to a (certain) law, then it is a duty to consider that the law is just even though at the moment the people might be in such a position or have a point of view that would result in their refusing to give their consent to it if asked.¹⁷

The problem of organizing a state, however hard it may seem, can be solved even for a race of devils, if only they are intelligent. The problem is: "Given a multiple of rational beings requiring universal laws for their preservation, but each of whom is secretly inclined to exempt himself from them, to establish a constitution in such a way that, although their private intentions conflict, they check each other, with the result that their public conduct is the same as if they had no such intentions."¹⁸

17. Immanuel Kant, "Concerning the Common Saying: This May be True in Theory but Does Not Apply in Practice (1793)," in *The Philosophy of Kant*, ed. and trans. Carl J. Friedrich (New York, 1949), pp. 421-422.

18. Immanuel Kant, *Perpetual Peace* (1795), trans. Lewis White Beck in the Kant anthology *On History* (Indianapolis 1963), p. 112.

Though Kant's doctrine is superficially similar to Mill's later self-protection principle, the substance is really quite different. For though Kant in some general sense argues that coercion is justified only to prevent harm to others, he understands by "harm" only certain invasions of freedom and not simply disutility. Also, his defense of the principle is not grounded, as is Mill's, on its utility. Rather it is to be regarded as a principle of justice, by which Kant means a principle that rational beings could adopt in a situation of mutual choice:

The concept [of justice] applies only to the relationship of a will to another person's will, not to his wishes or desires (or even just his needs) which are the concern of acts of benevolence and charity. . . . In applying the concept of justice we take into consideration only the form of the relationship between the wills insofar as they are regarded as free, and whether the action of one of them can be conjoined with the freedom of the other in accordance with universal law. Justice is therefore the aggregate of those conditions under which the will of one person can be conjoined with the will of another in accordance with a universal law of freedom.¹⁹

How does this bear specifically on punishment? Kant, as everyone knows, defends a strong form of a retributive theory of punishment. He holds that guilt merits, and is a sufficient condition for, the infliction of punishment. And this claim has been universally condemned—particularly by utilitarians—as primitive, unenlightened and barbaric.

But why is it so condemned? Typically, the charge is that infliction of punishment on such grounds is nothing but pointless vengeance. But what is meant by the claim that the infliction is "pointless"? If "pointless" is tacitly being analyzed as "disutilitarian," then the whole question is simply being begged. You cannot refute a retributive theory merely by noting that it is a retributive theory and not a utilitarian theory. This is to confuse redescription with refutation and involves an argument whose circularity is not even complicated enough to be interesting.

19. Immanuel Kant, *The Metaphysical Elements of Justice*, p. 34.

Why, then, might someone claim that guilt merits punishment? Such a claim might be made for either of two very different reasons. (1) Someone (e.g., a Moral Sense theorist) might maintain that the claim is a primitive and unanalyzable proposition that is morally ultimate—that we can just intuit the “fittingness” of guilt and punishment. (2) It might be maintained that the retributivist claim is demanded by a general theory of political obligation which is more plausible than any alternative theory. Such a theory will typically provide a technical analysis of such concepts as crime and punishment and will thus not regard the retributivist claim as an indisputable primitive. It will be argued for as a kind of theorem within the system.

Kant’s theory is of the second sort. He does not opt for retributivism as a bit of intuitive moral knowledge. Rather he offers a theory of punishment that is based on his general view that political obligation is to be analyzed, quasi-contractually, in terms of reciprocity. If the law is to remain just, it is important to guarantee that those who disobey it will not gain an unfair advantage over those who do obey voluntarily. It is important that no man profit from his own criminal wrongdoing, and a certain kind of “profit” (i.e., not bearing the burden of self-restraint) is intrinsic to criminal wrongdoing. Criminal punishment, then, has as its object the restoration of a proper balance between benefit and obedience. The criminal himself has no complaint, because he has rationally consented to or willed his own punishment. That is, those very rules which he has broken work, when they are obeyed by others, to his own advantage as a citizen. He would have chosen such rules for himself and others in the original position of choice. And, since he derives and voluntarily accepts benefits from their operation, he owes his own obedience as a debt to his fellow-citizens for their sacrifices in maintaining them. If he chooses not to sacrifice by exercising self-restraint and obedience, this is tantamount to his choosing to sacrifice in another way—namely, by paying the prescribed penalty:

A transgression of the public law that makes him who commits it unfit to be a citizen is called . . . a crime. . . .

What kind and what degree of punishment does public legal justice adopt as its principle and standard? None other than the principle

of equality (illustrated by the pointer of the scales of justice), that is, the principle of not treating one side more favorably than the other. Accordingly, any undeserved evil that you inflict on someone else among the people is one you do to yourself. If you vilify him, you vilify yourself; if you steal from him, you steal from yourself; if you kill him, you kill yourself. . . .

To say, "I will to be punished if I murder someone" can mean nothing more than, "I submit myself along with everyone else to those laws which, if there are any criminals among the people, will naturally include penal laws."²⁰

This analysis of punishment regards it as a debt owed to the law-abiding members of one's community; and, once paid, it allows re-entry into the community of good citizens on equal status.

Now some of the foregoing no doubt sounds implausible or even obscurantist. Since criminals typically desire not to be punished, what can it really mean to say that they have, as rational men, really willed their own punishment? Or that, as Hegel says, they have a right to it? Perhaps a comparison of the traditional retributivist views with those of a contemporary Kantian—John Rawls—will help to make the points clearer.²¹ Rawls (like Kant) does not regard the idea of the social contract as an historical fact. It is rather a model of rational decision. Respecting a man's autonomy, at least on one view, is not respecting what he now happens, however uncritically, to desire; rather it is to respect what he desires (or would desire) as a rational man. (On Rawls's view, for example, rational men are said to be unmoved by feelings of envy; and thus it is not regarded as unjust to a person or a violation of his rights, if he is placed in a situation where he will envy another's advantage or position. A rational man

20. *Ibid.*, pp. 99, 101, and 105, in the order quoted.

21. In addition to the works on justice by Rawls previously cited, the reader should consult the following for Rawls's application of his general theory to the problem of political obligation: John Rawls, "Legal Obligation and the Duty of Fair Play," in *Law and Philosophy*, ed. Sidney Hook (New York, 1964), pp. 3-18. This has been reprinted in my anthology *Civil Disobedience and Violence* (Belmont, Cal., 1971), pp. 39-52. For a direct application of a similar theory to the problem of punishment, see Herbert Morris, "Persons and Punishment," *The Monist* 52, no. 4 (October 1968): 475-501.

would object, and thus would never consent to, a practice where another might derive a benefit from a position at his expense. He would not, however, envy the position *simpliciter*, would not regard the position as itself a benefit.) Now on Kant's (and also, I think, on Rawls's) view, a man is genuinely free or autonomous only in so far as he is rational. Thus it is man's rational will that is to be respected.

Now this idea of treating people, not as they in fact say that they want to be treated, but rather in terms of how you think they would, if rational, will to be treated, has obviously dangerous (indeed Fascistic) implications. Surely we want to avoid cramming indignities down the throats of people with the offhand observation that, no matter how much they scream, they are really rationally willing every bit of it. It would be particularly ironic for such arbitrary repression to come under the mask of respecting autonomy. And yet, most of us would agree, the general principle (though subject to abuse) also has important applications—for example, preventing the suicide of a person who, in a state of psychotic depression, wants to kill himself. What we need, then, to make the general view work, is a check on its arbitrary application; and a start toward providing such a check would be in the formulation of a public, objective theory of rationality and rational willing. It is just this, according to both Kant and Rawls, which the social contract theory can provide. On this theory, a man may be said to rationally will X if, and only if, X is called for by a rule that the man would necessarily have adopted in the original position of choice—i.e., in a position of coming together with others to pick rules for the regulation of their mutual affairs. This avoids arbitrariness because, according to Kant and Rawls at any rate, the question of whether such a rule would be picked in such a position is objectively determinable given certain (in their view) noncontroversial assumptions about human nature and rational calculation. Thus I can be said to will my own punishment if, in an antecedent position of choice, I and my fellows would have chosen institutions of punishment as the most rational means of dealing with those who might break the other generally beneficial social rules that had been adopted.

Let us take an analogous example: I may not, in our actual society, desire to treat a certain person fairly—e.g., I may not desire to honor a contract I have made with him because so doing would adversely

affect my own self-interest. However, if I am forced to honor the contract by the state, I cannot charge (1) that the state has no right to do this, or (2) that my rights or dignity are being violated by my being coerced into doing it. Indeed, it can be said that I rationally will it since, in the original position, I would have chosen rules of justice (rather than rules of utility) and the principle, "contracts are to be honored," follows from the rules of justice.

Coercion and autonomy are thus reconciled, at least apparently. To use Marx's language, we may say (as Marx did in the quoted passage) that one virtue of the retributive theory, at least as expounded by Kant and Hegel on lines of the General Will and Social Contract theory, is that it manifests at least a formal or abstract respect for rights, dignity, and autonomy. For it at least recognizes the importance of attempting to construe state coercion in such a way that it is a product of each man's rational will. Utilitarian deterrence theory does not even satisfy this formal demand.

The question of primary interest to Marx, of course, is whether this formal respect also involves a material respect; i.e., does the theory have application in concrete fact in the actual social world in which we live? Marx is confident that it does not, and it is to this sort of consideration that I shall now pass.

ALIENATION AND PUNISHMENT

What can the philosopher learn from Marx? This question is a part of a more general question: What can philosophy learn from social science? Philosophers, it may be thought, are concerned to offer a priori theories, theories about how certain concepts are to be analyzed and their application justified. And what can the mundane facts that are the object of behavioral science have to do with exalted theories of this sort?

The answer, I think, is that philosophical theories, though not themselves empirical, often have such a character that their intelligibility depends upon certain empirical presuppositions. For example, our moral language presupposes, as Hart has argued,²² that we are vulnerable creatures—creatures who can harm and be harmed by each

22. H. L. A. Hart, *The Concept of Law* (Oxford, 1961), pp. 189-195.

other. Also, as I have argued elsewhere,²³ our moral language presupposes that we all share certain psychological characteristics—e.g., sympathy, a sense of justice, and the capacity to feel guilt, shame, regret, and remorse. If these facts were radically different (if, as Hart imagines for example, we all developed crustaceanlike exoskeletons and thus could not harm each other), the old moral language, and the moral theories which employ it, would lack application to the world in which we live. To use a crude example, moral prohibitions against killing presuppose that it is in fact possible for us to kill each other.

Now one of Marx's most important contributions to social philosophy, in my judgment, is simply his insight that philosophical theories are in peril if they are constructed in disregard of the nature of the empirical world to which they are supposed to apply.²⁴ A theory may be formally correct (i.e., coherent, or true for some possible world) but materially incorrect (i.e., inapplicable to the actual world in which we live). This insight, then, establishes the relevance of empirical research to philosophical theory and is a part, I think, of what Marx meant by "the union of theory and practice." Specifically relevant to the argument I want to develop are the following two related points:

(1) The theories of moral, social, political and legal philosophy presuppose certain empirical propositions about man and society. If these propositions are false, then the theory (even if coherent or formally correct) is materially defective and practically inapplicable. (For example, if persons tempted to engage in criminal conduct do not in fact tend to calculate carefully the consequences of their actions, this renders much of deterrence theory suspect.)

23. Jeffrie G. Murphy, "Moral Death: A Kantian Essay on Psychopathy," *Ethics* 82, no. 4 (July 1972): 284-298.

24. Banal as this point may seem, it could be persuasively argued that all Enlightenment political theory (e.g., that of Hobbes, Locke and Kant) is built upon ignoring it. For example, once we have substantial empirical evidence concerning how democracies really work in fact, how sympathetic can we really be to classical theories for the justification of democracy? For more on this, see C. B. Macpherson, "The Maximization of Democracy," in *Philosophy, Politics and Society* (Third Series), ed. Peter Laslett and W. G. Runciman (Oxford, 1967), pp. 83-103. This article is also relevant to the point raised in note 11 above.

(2) Philosophical theories may put forth as a necessary truth that which is in fact merely an historically conditioned contingency. (For example, Hobbes argued that all men are necessarily selfish and competitive. It is possible, as many Marxists have argued, that Hobbes was really doing nothing more than elevating to the status of a necessary truth the contingent fact that the people around him in the capitalistic society in which he lived were in fact selfish and competitive.)²⁵

In outline, then, I want to argue the following: that when Marx challenges the material adequacy of the retributive theory of punishment, he is suggesting (a) that it presupposes a certain view of man and society that is false and (b) that key concepts involved in the support of the theory (e.g., the concept of "rationality" in Social Contract theory) are given analyses which, though they purport to be necessary truths, are in fact mere reflections of certain historical circumstances.

In trying to develop this case, I shall draw primarily upon Willem Bongers's *Criminality and Economic Conditions* (1916), one of the few sustained Marxist analyses of crime and punishment.²⁶ Though I shall not have time here to qualify my support of Bongers in certain necessary ways, let me make clear that I am perfectly aware that his analysis is not the whole story. (No monolithic theory of anything so diverse as criminal behavior could be the whole story.) However, I am convinced that he has discovered part of the story. And my point is simply that insofar as Bongers's Marxist analysis is correct, then to that same degree is the retributive theory of punishment inapplicable in modern societies. (Let me emphasize again exactly how this objection

25. This point is well developed in C. B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford, 1962). In a sense, this point affects even the formal correctness of a theory. For it demonstrates an empirical source of corruption in the analyses of the very concepts in the theory.

26. The writings of Willem Adriaan Bongers (1876-1940), a Dutch criminologist, have fallen into totally unjustified neglect in recent years. Anticipating contemporary sociological theories of crime, he was insisting that criminal behavior is in the province of normal psychology (though abnormal society) at a time when most other writers were viewing criminality as a symptom of psychopathology. His major works are: *Criminality and Economic Conditions* (Boston, 1916); *An Introduction to Criminology* (London, 1936); and *Race and Crime* (New York, 1943).

to retributivism differs from those traditionally offered. Traditionally, retributivism has been rejected because it conflicts with the moral theory of its opponent, usually a utilitarian. This is not the kind of objection I want to develop. Indeed, with Marx, I have argued that the retributive theory of punishment grows out of the moral theory—Kantianism—which seems to me generally correct. The objection I want to pursue concerns the empirical falsity of the factual presuppositions of the theory. If the empirical presuppositions of the theory are false, this does indeed render its application immoral. But the immorality consists, not in a conflict with some other moral theory, but immorality in terms of a moral theory that is at least close in spirit to the very moral theory which generates retributivism itself—i.e., a theory of justice.)²⁷

To return to Bonger. Put bluntly, his theory is as follows. Criminality has two primary sources: (1) need and deprivation on the part of disadvantaged members of society, and (2) motives of greed and selfishness that are generated and reinforced in competitive capitalistic societies. Thus criminality is economically based—either directly in the case of crimes from need, or indirectly in the case of crimes growing out of motives or psychological states that are encouraged and developed in capitalistic society. In Marx's own language, such an economic system alienates men from themselves and from each other. It alienates men from themselves by creating motives and needs that are not "truly human." It alienates men from their fellows by encouraging a kind of competitiveness that forms an obstacle to the development of genuine communities to replace mere social aggregates.²⁸ And in Bonger's thought, the concept of community is

27. I say "at least in spirit" to avoid begging the controversial question of whether Marx can be said to embrace a theory of justice. Though (as I suggested in note 4) much of Marx's own evaluative rhetoric seems to overlap more traditional appeals to rights and justice (and a total lack of sympathy with anything like Utilitarianism), it must be admitted that he also frequently ridicules at least the terms "rights" and "justice" because of their apparent entrenchment in bourgeois ethics. For an interesting discussion of this issue, see Allen W. Wood, "The Marxian Critique of Justice," *Philosophy & Public Affairs* 1, no. 3 (Spring 1972): 244-282.

28. The importance of community is also, I think, recognized in Gabriel de Tarde's notion of "social similarity" as a condition of criminal responsibility. See his *Penal Philosophy* (Boston, 1912). I have drawn on de Tarde's general account in my "Moral Death: A Kantian Essay on Psychopathy."

central. He argues that moral relations and moral restraint are possible only in genuine communities characterized by bonds of sympathetic identification and mutual aid resting upon a perception of common humanity. All this he includes under the general rubric of reciprocity.²⁹ In the absence of reciprocity in this rich sense, moral relations among men will break down and criminality will increase.³⁰ Within bourgeois society, then, crimes are to be regarded as normal, and not psychopathological, acts. That is, they grow out of need, greed, indifference to others, and sometimes even a sense of indignation—all, alas, perfectly typical human motives.

To appreciate the force of Bonger's analysis, it is necessary to read his books and grasp the richness and detail of the evidence he provides for his claims. Here I can but quote a few passages at random to give the reader a tantalizing sample in the hope that he will be encouraged to read further into Bonger's own text:

The abnormal element in crime is a social, not a biological, element. With the exception of a few special cases, crime lies within the boundaries of normal psychology and physiology. . . .

We clearly see that [the egoistic tendencies of the present economic system and of its consequences] are very strong. Because of these tendencies the social instinct of man is not greatly developed; they have weakened the moral force in man which combats the inclination towards egoistic acts, and hence toward the crimes which are one form of these acts. . . . Compassion for the misfortunes of

29. By "reciprocity" Bonger intends something which includes, but is much richer than, a notion of "fair trading or bargaining" that might initially be read into the term. He also has in mind such things as sympathetic identification with others and tendencies to provide mutual aid. Thus, for Bonger, reciprocity and egoism have a strong tendency to conflict. I mention this lest Bonger's notion of reciprocity be too quickly identified with the more restricted notion found in, for example, Kant and Rawls.

30. It is interesting how greatly Bonger's analysis differs from classical deterrence theory—e.g., that of Bentham. Bentham, who views men as machines driven by desires to attain pleasure and avoid pain, tends to regard terror as the primary restraint against crime. Bonger believes that, at least in a healthy society, moral motives would function as a major restraint against crime. When an environment that destroys moral motivation is created, even terror (as statistics tend to confirm) will not eradicate crime.

others inevitably becomes blunted, and a great part of morality consequently disappears. . . .

As a consequence of the present environment, man has become very egoistic and hence more *capable of crime*, than if the environment had developed the germs of altruism. . . .

There can be no doubt that one of the factors of criminality among the bourgeoisie is bad [moral] education. . . . The children—speaking of course in a general way—are brought up with the idea that they must succeed, no matter how; the aim of life is presented to them as getting money and shining in the world. . . .

Poverty (taken in the sense of absolute want) kills the social sentiments in man, destroys in fact all relations between men. He who is abandoned by all can no longer have any feeling for those who have left him to his fate. . . .

[Upon perception that the system tends to legalize the egoistic actions of the bourgeoisie and to penalize those of the proletariat], the oppressed resort to means which they would otherwise scorn. As we have seen above, the basis of the social feeling is reciprocity. As soon as this is trodden under foot by the ruling class the social sentiments of the oppressed become weak towards them. . . .³¹

The essence of this theory has been summed up by Austin J. Turk. “Criminal behavior,” he says, “is almost entirely attributable to the combination of egoism and an environment in which opportunities are not equitably distributed.”³²

31. *Introduction to Criminology*, pp. 75-76, and *Criminality and Economic Conditions*, pp. 532, 402, 483-484, 436, and 407, in the order quoted. Bonger explicitly attacks Hobbes: “The adherents of [Hobbes’s theory] have studied principally men who live under capitalism, or under civilization; their correct conclusion has been that egoism is the predominant characteristic of these men, and they have adopted the simplest explanation of the phenomenon and say that this trait is inborn.” If Hobbists can cite Freud for modern support, Bonger can cite Darwin. For, as Darwin had argued in the *Descent of Man*, men would not have survived as a species if they had not initially had considerably greater social sentiments than Hobbes allows them.

32. Austin J. Turk, in the Introduction to his abridged edition of Bonger’s *Criminality and Economic Conditions* (Bloomington, 1969), p. 14.

No doubt this claim will strike many as extreme and intemperate—a sample of the old-fashioned Marxist rhetoric that sophisticated intellectuals have outgrown. Those who are inclined to react in this way might consider just one sobering fact: of the 1.3 million criminal offenders handled each day by some agency of the United States correctional system, the vast majority (80 percent on some estimates) are members of the lowest 15-percent income level—that percent which is below the “poverty level” as defined by the Social Security Administration.³³ Unless one wants to embrace the belief that all these people are poor because they are bad, it might be well to reconsider Bonger’s suggestion that many of them are “bad” because they are poor.³⁴ At any rate, let us suppose for purposes of discussion that Bonger’s picture of the relation between crime and economic conditions is generally accurate. At what points will this challenge the credentials of the contractarian retributive theory as

33. Statistical data on characteristics of offenders in America are drawn primarily from surveys by the Bureau of Census and the National Council on Crime and Delinquency. While there is of course wide disagreement on how such data are to be interpreted, there is no serious disagreement concerning at least the general accuracy of statistics like the one I have cited. Even government publications openly acknowledge a high correlation between crime and socioeconomic disadvantages: “From arrest records, probation reports, and prison statistics a ‘portrait’ of the offender emerges that progressively highlights the disadvantaged character of his life. The offender at the end of the road in prison is likely to be a member of the lowest social and economic groups in the country, poorly educated and perhaps unemployed. . . . Material failure, then, in a culture firmly oriented toward material success, is the most common denominator of offenders” (*The Challenge of Crime in a Free Society, A Report by the President’s Commission on Law Enforcement and Administration of Justice*, U. S. Government Printing Office, Washington, D.C., 1967, pp. 44 and 160). The Marxist implications of this admission have not gone unnoticed by prisoners. See Samuel Jorden, “Prison Reform: In Whose Interest?” *Criminal Law Bulletin* 7, no. 9 (November 1971): 779-787.

34. There are, of course, other factors which enter into an explanation of this statistic. One of them is the fact that economically disadvantaged guilty persons are more likely to wind up arrested or in prison (and thus be reflected in this statistic) than are economically advantaged guilty persons. Thus economic conditions enter into the explanation, not just of criminal behavior, but of society’s response to criminal behavior. For a general discussion on the many ways in which crime and poverty are related, see Patricia M. Wald, “Poverty and Criminal Justice,” *Task Force Report: The Courts*, U.S. Government Printing Office, Washington, D.C., 1967, pp. 139-151.

outlined above? I should like to organize my answer to this question around three basic topics:

1. *Rational Choice*. The model of rational choice found in Social Contract theory is egoistic—rational institutions are those that would be agreed to by calculating egoists (“devils” in Kant’s more colorful terminology). The obvious question that would be raised by any Marxist is: Why give egoism this special status such that it is built, a priori, into the analysis of the concept of rationality? Is this not simply to regard as necessary that which may be only contingently found in the society around us? Starting from such an analysis, a certain result is inevitable—namely, a transcendental sanction for the status quo. Start with a bourgeois model of rationality and you will, of course, wind up defending a bourgeois theory of consent, a bourgeois theory of justice, and a bourgeois theory of punishment.

Though I cannot explore the point in detail here, it seems to me that this Marxist claim may cause some serious problems for Rawls’s well-known theory of justice, a theory which I have already used to unpack some of the evaluative support for the retributive theory of punishment. One cannot help suspecting that there is a certain sterility in Rawls’s entire project of providing a rational proof for the preferability of a certain conception of justice over all possible alternative evaluative principles, for the description which he gives of the rational contractors in the original position is such as to guarantee that they will come up with his two principles. This would be acceptable if the analysis of rationality presupposed were intuitively obvious or argued for on independent grounds. But it is not. Why, to take just one example, is a desire for wealth a rational trait whereas envy is not? One cannot help feeling that the desired result dictates the premises.³⁵

35. The idea that the principles of justice could be proved as a kind of theorem (Rawls’s claim in “Justice as Fairness”) seems to be absent, if I understand the work correctly, in Rawls’s recent *A Theory of Justice*. In this book, Rawls seems to be content with something less than a decision procedure. He is no longer trying to pull his theory of justice up by its own bootstraps, but now seems concerned simply to *exhibit* a certain elaborate conception of justice in the belief that it will do a good job of systematizing and ordering most of our considered and reflective intuitions about moral matters. To this, of course, the Marxist will want to say something like the following: “The considered and reflective in-

2. *Justice, Benefits, and Community.* The retributive theory claims to be grounded on justice; but is it just to punish people who act out of those very motives that society encourages and reinforces? If Bonger is correct, much criminality is motivated by greed, selfishness, and indifference to one's fellows; but does not the whole society encourage motives of greed and selfishness ("making it," "getting ahead"), and does not the competitive nature of the society alienate men from each other and thereby encourage indifference—even, perhaps, what psychiatrists call psychopathy? The moral problem here is similar to one that arises with respect to some war crimes. When you have trained a man to believe that the enemy is not a genuine human person (but only a gook, or a chink), it does not seem quite fair to punish the man if, in a war situation, he kills indiscriminately. For the psychological trait you have conditioned him to have, like greed, is not one that invites fine moral and legal distinctions. There is something perverse in applying principles that presuppose a sense of community in a society which is structured to destroy genuine community.³⁶

Related to this is the whole allocation of benefits in contemporary

tuitions current in our society are a product of bourgeois culture, and thus any theory based upon them begs the question against us and in favor of the status quo." I am not sure that this charge cannot be answered, but I am sure that it deserves an answer. Someday Rawls may be remembered, to paraphrase Georg Lukács's description of Thomas Mann, as the last and greatest philosopher of bourgeois liberalism. The virtue of this description is that it perceives the limitations of his outlook in a way consistent with acknowledging his indisputable genius. (None of my remarks here, I should point out, are to be interpreted as denying that our civilization derived major moral benefits from the tradition of bourgeois liberalism. Just because the freedoms and procedures we associate with bourgeois liberalism—speech, press, assembly, due process of law, etc.—are not the only important freedoms and procedures, we are not to conclude with some witless radicals that these freedoms are not terribly important and that the victories of bourgeois revolutions are not worth preserving. My point is much more modest and noncontroversial—namely, that even bourgeois liberalism requires a critique. It is not self-justifying and, in certain very important respects, is not justified at all.)

36. Kant has some doubts about punishing bastard infanticide and dueling on similar grounds. Given the stigma that Kant's society attached to illegitimacy and the halo that the same society placed around military honor, it did not seem totally fair to punish those whose criminality in part grew out of such approved motives. See *Metaphysical Elements of Justice*, pp. 106-107.

society. The retributive theory really presupposes what might be called a “gentlemen’s club” picture of the relation between man and society—i.e., men are viewed as being part of a community of shared values and rules. The rules benefit all concerned and, as a kind of debt for the benefits derived, each man owes obedience to the rules. In the absence of such obedience, he deserves punishment in the sense that he owes payment for the benefits. For, as rational man, he can see that the rules benefit everyone (himself included) and that he would have selected them in the original position of choice.

Now this may not be too far off for certain kinds of criminals—e.g., business executives guilty of tax fraud. (Though even here we might regard their motives of greed to be a function of societal reinforcement.) But to think that it applies to the typical criminal, from the poorer classes, is to live in a world of social and political fantasy. Criminals typically are not members of a shared community of values with their jailers; they suffer from what Marx calls alienation. And they certainly would be hard-pressed to name the benefits for which they are supposed to owe obedience. If justice, as both Kant and Rawls suggest, is based on reciprocity, it is hard to see what these persons are supposed to reciprocate for. Bonger addresses this point in a passage quoted earlier (p. 236): “The oppressed resort to means which they would otherwise scorn. . . . The basis of social feelings is reciprocity. As soon as this is trodden under foot by the ruling class, the social sentiments of the oppressed become weak towards them.”

3. *Voluntary Acceptance*. Central to the Social Contract idea is the claim that we owe allegiance to the law because the benefits we have derived have been voluntarily accepted. This is one place where our autonomy is supposed to come in. That is, having benefited from the Rule of Law when it was possible to leave, I have in a sense consented to it and to its consequences—even my own punishment if I violate the rules. To see how silly the factual presuppositions of this account are, we can do no better than quote a famous passage from David Hume’s essay “Of the Original Contract”:

Can we seriously say that a poor peasant or artisan has a free choice to leave his country—when he knows no foreign language or manners, and lives from day to day by the small wages which he ac-

quires? We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master, though he was carried on board while asleep, and must leap into the ocean and perish the moment he leaves her.

A banal empirical observation, one may say. But it is through ignoring such banalities that philosophers generate theories which allow them to spread iniquity in the ignorant belief that they are spreading righteousness.

It does, then, seem as if there may be some truth in Marx's claim that the retributive theory, though formally correct, is materially inadequate. At root, the retributive theory fails to acknowledge that criminality is, to a large extent, a phenomenon of economic class. To acknowledge this is to challenge the empirical presupposition of the retributive theory—the presupposition that all men, including criminals, are voluntary participants in a reciprocal system of benefits and that the justice of this arrangement can be derived from some eternal and ahistorical concept of rationality.

THE upshot of all this seems rather upsetting, as indeed it is. How can it be the case that everything we are ordinarily inclined to say about punishment (in terms of utility and retribution) can be quite beside the point? To anyone with ordinary language sympathies (one who is inclined to maintain that what is correct to say is a function of what we do say), this will seem madness. Marx will agree that there is madness, all right, but in his view the madness will lie in what we do say—what we say only because of our massive (and often self-deceiving and self-serving) factual ignorance or indifference to the circumstances of the social world in which we live. Just as our whole way of talking about mental phenomena hardened before we knew any neurophysiology—and this leads us astray, so Marx would argue that our whole way of talking about moral and political phenomena hardened before we knew any of the relevant empirical facts about man and society—and this, too, leads us astray. We all suffer from what might be called the *embourgeoisment* of language, and thus part of any revolution will be a linguistic or conceptual revolution. We have grown accustomed to modifying our language or con-

ceptual structures under the impact of empirical discoveries in physics. There is no reason why discoveries in sociology, economics, or psychology could not and should not have the same effect on entrenched patterns of thought and speech. It is important to remember, as Russell remarked, that our language sometimes enshrines the metaphysics of the Stone Age.

Consider one example: a man has been convicted of armed robbery. On investigation, we learn that he is an impoverished black whose whole life has been one of frustrating alienation from the prevailing socio-economic structure—no job, no transportation if he could get a job, substandard education for his children, terrible housing and inadequate health care for his whole family, condescending-tardy-inadequate welfare payments, harassment by the police but no real protection by them against the dangers in his community, and near total exclusion from the political process. Learning all this, would we still want to talk—as many do—of his suffering punishment under the rubric of “paying a debt to society”? Surely not. Debt for what? I do not, of course, pretend that all criminals can be so described. But I do think that this is a closer picture of the typical criminal than the picture that is presupposed in the retributive theory—i.e., the picture of an evil person who, of his own free will, intentionally acts against those just rules of society which he knows, as a rational man, benefit everyone including himself.

But what practical help does all this offer, one may ask. How should we design our punitive practices in the society in which we now live? This is the question we want to ask, and it does not seem to help simply to say that our society is built on deception and inequity. How can Marx help us with our real practical problem? The answer, I think, is that he cannot and obviously does not desire to do so. For Marx would say that we have not focused (as all piecemeal reform fails to focus) on what is truly the real problem. And this is changing the basic social relations. Marx is the last person from whom we can expect advice on how to make our intellectual and moral peace with bourgeois society. And this is surely his attraction and his value.

What does Bonger offer? He suggests, near the end of his book, that in a properly designed society all criminality would be a problem “for the physician rather than the judge.” But this surely will not do. The

therapeutic state, where prisons are called hospitals and jailers are called psychiatrists, simply raises again all the old problems about the justification of coercion and its reconciliation with autonomy that we faced in worrying about punishment. The only difference is that our coercive practices are now surrounded with a benevolent rhetoric which makes it even harder to raise the important issues. Thus the move to therapy, in my judgment, is only an illusory solution—alienation remains and the problem of reconciling coercion with autonomy remains unsolved. Indeed, if the alternative is having our personalities involuntarily restructured by some state psychiatrist, we might well want to claim the “right to be punished” that Hegel spoke of.³⁷

Perhaps, then, we may really be forced seriously to consider a radical proposal. If we think that institutions of punishment are necessary and desirable, and if we are morally sensitive enough to want to be sure that we have the moral right to punish before we inflict it, then we had better first make sure that we have restructured society in such a way that criminals genuinely do correspond to the only model that will render punishment permissible—i.e., make sure that they are autonomous and that they do benefit in the requisite sense. Of course, if we did this then—if Marx and Bonger are right—crime itself and the need to punish would radically decrease if not disappear entirely.

37. This point is pursued in Herbert Morris, “Persons and Punishment.” Bonger did not appreciate that “mental illness,” like criminality, may also be a phenomenon of social class. On this, see August B. Hollingshead and Frederick C. Redlich, *Social Class and Mental Illness* (New York, 1958). On the general issue of punishment versus therapy, see my *Punishment and Rehabilitation* (Belmont, Cal., forthcoming 1973).