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REFLECTIONS ON SOME THEORIES OF PUNISHMENT

JOEL MEYER

The fear of acts which disrupt social equilibrium has inspired the imposition of punishment by those who have the power to establish and enforce the desired standards of conduct. Punishment has developed from the infliction of pain in revenge to the use of science to rehabilitate, so that there is considerable disparity between what has historically been called punishment¹ and the current methods of coercing conformity and dealing with offenders. For the purpose of this Comment the term punishment, unless distinguished, will be defined as the method which society uses to enforce the desired standards of conduct and methods of dealing with the offender after a crime has been committed. This definition includes the use of torture, imprisonment and treatment.

Retribution, deterrence, and rehabilitation have been called the aims or justifications for punishment. While they all involve to some extent suffering and deprivation of freedom these are primary in retribution and deterrence; the primary emphasis of rehabilitation being treatment. For retributive and deterrent purposes, the nature of the crime determines the type of punishment, while the personality of the offender determines the type of treatment meant to rehabilitate.

The motives for the infliction of punishment are

¹ Punishment has been historically defined as an infliction of evil, pain or deprivation of good. Jerome Hall has defined punishment as:

First, punishment is a privation (evil, pain, disvalue). Second, it is coercive. Third, it is inflicted in the name of the State; it is authorized. Fourth, punishment presupposes rules, their violation, and more or less formal determination of that expressed in a judgment. Fifth, it is inflicted upon an offender who has committed a harm and this presupposes a set of values by reference to which both the harm and punishment are ethically significant. Sixth, the extent or type of punishment is in some defended way related to the commission of the harm, and aggravated or mitigated by reference to the personality of the offender, his motive and temptation.

Hobbes defined punishment as an evil inflicted by public authority on the person who has been judged by the same authority as a transgressor of law, so that the will of men may be disposed to obedience. Swartz, *Punishment and Treatment of Offenders* 16 BUFFALO L. REV. 368 (1967). Jeremy Bentham defined punishment as an evil resulting to an individual from direct intention of another, on account of some act that appears to have been done or omitted. It is an evil, a physical evil; either a pain or a loss of pleasure. J. BENTHAM, *RATIONALE OF PUNISHMENT* (1830).

dependent upon custom, tradition, level of knowledge, and social and economic conditions. As society develops, gaining more understanding of crime and its causes, it changes its beliefs about the most effective method to discourage undesired conduct and encourage socially acceptable behavior. There is no unanimous acceptance of any of the goals of punishment. Each has been praised and criticized. The purpose of this comment is to analyze the various goals to determine the validity of each in our present society.

RETRIBUTION

The instinctive reaction to criminal acts is retaliation by the injured person. It is vengeance, a way of releasing and expressing hostility towards the criminal and his conduct. Primitive man, following his basic instinct of self-preservation, retaliated against those who injured him or his possessions. Retaliation by the victim was immediate and savage. He demanded punishment in kind, and the inner peace of the victim was not restored until the wrongdoer had been made to suffer. Originally punishment was an individual responsibility, but as society developed, this type of personal vengeance could no longer be tolerated and the individual was forced to relinquish his right to deal personally with the malefactor, in return for a promise by society to punish the criminal. Retribution was exacted by attributing to the community collectively the resentment and anger of the wronged individual. The feelings of the injured party were subordinated to society's interest of punishing the offender.

Retribution is neither an enforced expiation intended to eliminate the evil from man, nor punishment to deter, but is aimed at restoring equilibrium.² To accomplish this end, punishment

² Aristotle advocated punishment to restore social equilibrium. He stated:

The law looks only to the difference created by the injury and treats men as previously equal, where the one does, and the other suffers injury . . . and so this unjust, being unequal, the judge endeavors to reduce to equality again because when one party has been wounded and the other has struck him . . . the suffering and the doing are divided into equal shares; well, the judge tries to restore equality by penalty and thereby taking the gain. ARISTOTLE, *ETHICS*, Bk. V. 112 (E. P. Dutton

should be swift and equivalent to the crime itself, without consideration of mitigating factors such as provocation, poverty, age, and mental responsibility.³ This has been criticized as a justification for punishment for it places the punisher on the same moral and ethical level as the wrongdoer.⁴ The violator is condemned as a murderer and is sentenced to death. The state executes the wrongdoer, but in so doing commits the same moral wrong as did the murderer. Can two wrongs make a right? Is not society guilty of the crime for which it has condemned? This criticism has been answered on two grounds.⁵ First the detriment imposed by society upon the wrongdoer is not defined as a crime because it has not been committed in violation of a legislative prohibition. On the contrary, it is imposed in conformity with the commands of society. Second, the punishment imposed by the law is for the benefit of society, not its detriment.

Except in cases involving abhorrent crimes, the community is not moved by resentment. Retribution then no longer serves the purpose of vengeance, but becomes an outlet for our own anti-social aggressiveness. The criminal serves as a scapegoat. Professor Sutherland has suggested:

The criminal thus becomes the handy scapegoat upon which he (ordinary citizen) can transfer his feeling of his own tendency to sinfulness and thus by punishing the criminals he deludes himself into a feeling of righteous indignation, thus, bolstering up his own self respect and serving in this round-about way, both to restrain himself from like indulgences to keep himself upon the path of cultural progress.⁶

Using punishment to satisfy emotions, either for vengeance or to satisfy aggressive instincts, gives only temporary satisfaction with no lasting effect. The original wrong is not corrected, for punishment does not give life back to the murdered victim, or the money back to the robbery victim. Using the criminal as a scapegoat only creates further hostility between the criminal and society which may result in future injury to the whole community. Retribution also fails to recognize

that all persons who commit crimes are not free agents, but to some extent are at the mercy of environmental factors. Punishment should not only serve as an emotional release for society, but should also help the individual.

DETERRENCE

Deterrence is the use of punishment to prevent the offender from repeating his offense and to demonstrate to other potential offenders what will happen to them if they follow the wrongdoer's example. It was first advocated by Plato:

No one punishes a wrongdoer on account of his wrongdoing unless one takes unreasoning vengeance like a wild beast. But he who undertakes to punish with reason does not avenge himself for the past offense since he cannot make what was done as though it never came to pass; he looks to the future and aims at preventing that particular person and others who see him punished from doing wrong again.⁷

During the nineteenth century, a theory of punishment was developed which stated that life is regulated by calculating the pleasures and pains involved in contemplated actions, and that the aim of punishment was to increase the pain over the pleasure of the act to deter the contemplated act. Punishment tipped the scale towards desired conduct.⁸

The essential question to be asked in reference to deterrence is its effectiveness. If it were 100% effective, there would be no crime. But studies show that new persons enter into the life of crime and that convicts return to their criminal ways.⁹ If deterrence works, it follows that the more severe the punishment, the more effective it would be. But again, studies have shown that there is no evidence that the abolition of the death penalty has ever produced an increase in the murder rate, or that restoration of the penalty has ever caused a decrease.¹⁰ But it is not the severity and incon-

⁷ Privette, *supra* note 2, at 57.

⁸ *Id.* at 76.

⁹ In Eastern Pennsylvania Penitentiary 67% were repeat offenders, 70% in Massachusetts, 80% in New York, 63% in Michigan, and 80% in Louisiana; 45 NEB. L. REV. 604 (1966). But statistical studies are not completely accurate, for there is no way of measuring the rate of recidivism had there been no punishment, or the number of persons who never entered into the life of crime because of their fear of punishment.

¹⁰ ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-53, REPORT, par. 65. See also Vold, *Extent and*

& Co. ed. 1950) quoted in Privette, *Theories of Punishment*, 29 U.K.C.L. REV. 76 (1958).

³ SUTHERLAND AND CRESEY, *PRINCIPLES OF CRIMINOLOGY* (1960).

⁴ Leopold, *What is Wrong With the Prison System*, 45 NEB. L. REV. 36 (1966).

⁵ Mueller, *Punishment, Correction and the Law*, 45 NEB. L. REV. 58 (1966).

⁶ SUTHERLAND, *supra* note 3 at 302.

venience of punishment alone which deters, but also the moral condemnation of the community which most persons wish to avoid. People's respect for the legal ideology and its administration may determine the effectiveness of deterrent punishments.¹¹

Certainty of punishment and detection may deter the normal person who thinks about his actions and the consequences, but the criminal mind does not operate like a normal mind. The criminal often acts irrespective of the consequences, learning little from experience and living for the present. Deterrence fails in crimes of emotion and passion, or in acts governed by greed, impulse or fear. When the criminal seeks punishment from a sense of guilt, or considers punishment as the collection by society of its due, or desires punishment to take him out of the "rat race of life," deterrence is of no effect.¹² Deterrence also fails when the offender does not recognize the accepted standards of conduct and considers violation of the standards his duty and responsibility.

Often punishment, instead of deterring, develops a sense of caution in the criminal. He will think twice before he repeats the crime, not to refrain from acting, but to contrive methods of evading the punishment or detection.¹³ In this way, punishment has not reformed the criminal, but has taught him the necessity of developing practices to evade detection. The hope of escaping justice may be a stronger feeling than the fear of pain.

Deterrence is an advertisement of punishment to effect fear in the potential criminal. Thus punishing the innocent can serve the purposes of such a system as easily as punishing the guilty. It is questionable whether a criminal should be punished in excess of his just desserts, merely for the benefit of those potential criminals who in the absence of such extra punishment might themselves commit a crime. There is a limit to which a criminal can be used to benefit society at large.¹⁴ Why should X be punished to deter the conduct of Y? This makes the punished criminal a martyr.

Trend of Capital Crimes in the United States, ANNALS, Nov. 1952, p.1.

¹¹ Andenees, *General Prevention-Illusion or Reality* 43 J. CRIM. L.C. & P.S. 176 (1952). He suggests that punishment has three sorts of preventive effects: 1) the deterrent effect; 2) the strengthening of moral inhibitions; and 3) the stimulation of habitual law abiding conduct.

¹² Leopold, *supra* note 4 at 77.

¹³ SUTHERLAND, *supra* note 3 at 288.

¹⁴ Alexander, *Philosophy of Punishment*, 13 J. CRIM. L.C. & P.S. 235 (1922).

REHABILITATION

Rehabilitation is punishment based on psychology and sociology of crime. The ideal of rehabilitation is to return the offender to society neither embittered nor resolved to get even for his degradation and suffering, but possessing a new set of values and morals and a desire to contribute to society. During the Middle Ages, the Church advocated the use of punishment to aid the individual in cleansing himself of sins.¹⁵ Punishment became a source of interior purification, repentance and redemption. As society has gained more knowledge of crime and the criminal, it has been recognized that many criminals who are emotionally disturbed or products of environment require thoughtful, individual and positive treatment.

Rehabilitation is motivated by a belief in the worth and dignity of every person and a willingness of society to expend its time and energy to reclaim him for his own sake, not merely to keep him from again harming society. It is a difficult process and cannot perform miracles. There are those who are not suited for treatment. It requires a constructive program with adequate facilities and personnel for re-educating and reorganizing the criminals' attitudes. Motivation, stimulation, ideas, and patterns of conduct must be provided.¹⁶

Rehabilitation is necessarily an individualistic approach. People are treated as if their conduct can be manipulated and controlled. There will be unequal treatment for offenses which are similar, which may be resented by the offender as a violation of equal protection. Since the individual will be punished for what he is or is believed to be rather than for what he has done, there is the problem whether the criminal should be deprived of his freedom in excess of that which would be taken were his reform not considered the purpose.¹⁷ If his offense is minor, but the possibility of his reformation is thought to be difficult and requiring a great length of time, his punishment may exceed the nature of his crime. There is also the problem of giving the proper motivation and insisting on the goals of normal society, many of which are morally ambiguous.¹⁸ But by studying each criminal, his history, associates, environment and mental

¹⁵ Privette, *supra* note 1 at 67-68.

¹⁶ Leopold, *supra* note 4 at 44-57.

¹⁷ Geiber and McAnany, *Punishment: Current Survey of Philosophy and Law*, 11 ST. LOUIS L.J. 491, 504 (1967).

¹⁸ *Id.* at 525.

capacity, society can attempt to guide the criminal back to a useful life.

PUNISHMENT OR TREATMENT?

Retribution and deterrence constitute an approach, called the legalistic approach, which believes that the criminal must be made to suffer. Under this approach, crime is believed to be an expression of free will. The opposing approach, the behavioristic approach, believes that crime is a product of forces not wholly within the control of the offender. It advocates an inquiry into the personality and behavior of the criminal so that society can comprehend the problem and work out methods of control based on this understanding.¹⁹ In both methods, suffering and detention of the wrongdoer is required; but with retribution and deterrence it is the primary purpose, while it is only incidental to treatment.

Those who advocate the punitive aspect claim that only through fear of punishment will the general public be prevented from engaging in crime. But this ignores the fact that it is not only the unpleasantness and suffering which deters crime, but also the stigma which attaches to the offender for committing the crime.

Most people require the respect and approval of other members of society. To keep society's respect, persons will refrain from socially unacceptable conduct whether the offender will be officially treated or punished. Substitution of treatment for punishment would not result in the outbreak of crime for group pressure and fear of loss of status will itself deter crime.²⁰

If treatment is substituted for punishment, there will not be a return to an era when victims sought revenge for their injury. The fear that the victim will take the law into his own hands is based upon the assumption that the victim demands vengeance which he will satisfy by himself if society fails to satisfy it. But these persons would not object to the criminal being treated, if they understood that they, society, and the criminal would all benefit. As long as society is attempting to deal with the problem and is not allowing the situation to go unnoticed, it is assumed that this will satisfy the victim.

Punitive reaction is not the only method of gaining respect for the laws and protecting the values of society. By understanding the causes of crime and controlling crime through this under-

standing, the public can also learn to respect the law.

Punishment can have an adverse effect upon the community by isolating the criminal and making him a confirmed enemy of society.²¹ When he is isolated from society, neither the criminal nor society gain an understanding of each other. The criminal is forced to associate with other criminals where he can find recognition and prestige. After serving his sentence he is released to society physically, but does not rejoin it socially. The punished person feels a sense of alienation from all normal activity and this serves to intensify his instincts to get even with society. If the offenders are to be turned into law-abiding citizens, they must be assimilated into society and treated as persons with such potential. If the prisoner leaves prison with a feeling of bitterness and hatred, or a desire to take revenge upon society for making him suffer, then punishment has failed.

Even if some acts are prevented by punishment, this may not prove that the punishment has promoted social welfare. While a person may learn to fear the punishment, he may also learn to fear the punisher and thus become estranged or alienated from society. Punishment, while in some aspects creating respect for the law, may also create lack of respect for law and lack of initiative and self respect.²²

If only the punitive aspect of punishment is considered, the situation which caused the crime is ignored and remains the same as before the punishment was inflicted. Punishment often stops constructive efforts. The criminal is locked up and forgotten. Even if he repents and is resolved to reform his ways, he must be helped to accomplish these good intentions. Treatment involves not only a determination to change one's behavior, but a constructive process of organizing and reorganizing behavior and assimilation into the group.

CONCLUSION

Society can protect itself in three ways. It can protect itself by permanently isolating the offender. This will not make the individual a useful member of society, but it will protect the group by incapacitating him. Secondly, society can attempt to return the criminal to the community with respect and appreciation of the conventional values. Third, society can deal with causations of crime and attempt to prevent crimes from incurring. Neither

¹⁹ RUBIN, *The Law of Criminal Corrections* (1963).

²⁰ SUTHERLAND, *supra* note 3 at 314.

²¹ RUBIN, *supra* note 19 at 664.

²² SUTHERLAND, *supra* note 3 at 317.