

THE BALANCE OF JUSTICE

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THEORIES of punishment are sometimes divided into retributive theories, deterrent theories, and remedial theories. The remedial theories frequently take the form of denying that there is any such thing as a just punishment: the task of society is to cure its criminals, not to punish them. In this paper I shall take it for granted that there are some punishments which are just: hence I shall not be concerned with remedial theories in the sense indicated. Retributive and deterrent theories have as common ground the assertion that punishment may be justly inflicted; they differ in their explanation of what constitutes the justice of a just punishment.

The retributive theory of punishment is very difficult to state accurately. Indeed, I shall be concerned to argue that it is impossible to state it coherently: but this must be the result, and not the premiss, of our investigation. I shall begin, therefore, by stating the theory as baldly as possible, and then go on to consider the defects of the theory so stated with a view to discovering whether they can be refined away.

To avert misunderstanding, I should remark that there can be no objection to saying that a person who is justly punished for a crime has met with just retribution. The question at issue is whether the notion of 'just punishment' is to be explained by means of the notion of 'retribution' or vice versa. According to the retributive theory of punishment which I wish to criticize, 'retribution' is not a synonym for 'punishment' (or a genus of which reward and punishment are species), but rather a quite independent concept which serves as an explanation of the justice of a just punishment. The essence of the retributive theory is an assimilation of the word 'just' as it occurs in 'just punishment' to the use of it in such phrases as 'just price' and 'just wage'. On this theory, the relation of crime to punishment is the same as that between merchandise and money, services and salary, or work and wages. The theory of retributive justice is an attempt to give an account of the justice of a just punishment in terms of commutative justice.

Justice demands—so the theory runs—that he who has done harm shall suffer harm. Independently of any deterrent or remedial effect which the criminal's suffering may have on himself or others, justice

is better served if the criminal is made to suffer than if he is allowed to go scot free. Each man must be done by as he has done. What a man sows, that let him reap. Ideally, he should suffer exactly as much harm as he has done. Fallible human justice rarely achieves this ideal: being unable, in many cases, to measure the exact harm done, human authority has to be content with broad approximation. The infallible judgments of God, on the other hand, proportion the punishment exactly to the crime of the sinner.

Stated thus crudely, of course, the theory does not sound in the least convincing. It is given plausibility by the use of metaphors, in particular the metaphor of balance and the metaphor of payment. By his crime, we are told, the criminal has upset the balance of justice; by his punishment the balance is restored. By his sin, the sinner incurs a debt; by his subsequent sufferings, this debt is paid off.

These two metaphors exercise a powerful hold on our imagination. That hold can be broken only by making the metaphors as explicit as possible, and treating them with complete seriousness.

Let us take first the metaphor of the balance. Painters portray even-handed justice, blindfold, carrying a pair of scales. That is not the picture which is in question here. Justice, in the metaphor, is neither the weigher nor the scales; justice is the even balance of the scales. When the scales are evenly balanced, justice has been done; when one or other pan is overweight, the scale tilts, and the equilibrium which constitutes justice is disturbed. Into one pan of the scales are put a man's actions; into the other pan is put what happens to him. By his wrongful act, the criminal tilts the scales; into the other pan goes his punishment, and the scales are brought back into the horizontal. As long as the crime goes unpunished, the scale remains tilted and justice unsatisfied. To restore the balance, the punishment must be equal and opposite to the crime.

Clearly, such a picture could not serve as an explanation of the justice of a just punishment. If we have already explained what a just punishment is, we may be able to illustrate our explanation by using some such pictorial representation. But a metaphor cannot take the place of an explanation.

Even as an illustration, the metaphor of the balance is open to serious objection. We may note, firstly, that such a picture leaves no room at all for mercy: as long as the criminal's misdeeds have not been balanced by his sufferings, the scales remain out of equilibrium. Mercy would not be a virtue: it would be an accessory of injustice.

Perhaps we can add elements to the picture to overcome this

defect; but there is a more radical difficulty which no tinkering can remedy. It is essential to the metaphor that what goes into one pan must be equal and opposite to what goes into the other pan. That is to say, the only difference between what the criminal does and what he suffers must be precisely that in the one case it is his action, and in the other his suffering. But how are we to describe what he does and what he suffers? If we give a purely physical description, then what he does will not be a crime; if we give a moral description, then what he suffers will not be a punishment. In stating the theory earlier, I chose the first horn of this dilemma: he who does harm must suffer harm. But clearly, this will not do, since only the *wrongful* infliction of harm may justly be punished. On the other hand, it is equally clear that we cannot state the principle of retribution thus: he who does harm wrongfully must suffer harm wrongfully. For the retributive theory was meant to explain, and the balance metaphor to illustrate, how he who has done harm wrongfully may suffer harm *rightfully*. Once punishment and crime have to be described in different terms, then the notion of retribution loses its plausibility, and the balance picture its appropriateness.

The second illustrative metaphor—that of payment—is used in two ways. Sometimes the criminal is regarded as contracting by his crime a debt which is paid off when he is punished. Alternatively, the crime may be looked upon as a piece of labour, for which the grim reward of punishment is due. The wages of sin is death.

This metaphor has its place: but is not that of explaining what constitutes a just punishment. It has the disadvantage of suggesting that justice is equally well served if crime is punished as if no crime is committed at all. But clearly, a society in which there are no criminals is a juster society than a society in which every citizen is a criminal and every citizen is punished. In the first of the two forms given above, the payment metaphor has the advantage over the balance metaphor of leaving a place for mercy. A debt may be remitted just as a crime may be forgiven. None the less there are other difficulties peculiar to this metaphor. It is by no means clear to whom the debt is due. One would expect the offender's debt to be to the person whom he has injured. But if A has assaulted B he cannot avoid sentence on the grounds that B has forgiven him for his attack. Should we say then that the debt is owed to society? But in what way does society profit from the suffering of one of its members, unless that suffering is either deterrent or remedial?

This brings us to the crucial argument against any purely retributive theory of punishment. The essential element in punishment, according to such a theory, is the harming of the criminal, whether

in his life, liberty, or property. This harm is sought directly as an end in itself, and not as a means to deter or correct. But to seek the harm of another as an end in itself is the paradigm case of an unjust action. Retribution of this kind would not restore any balance of justice or square any accounts. It would increase, instead of diminishing, the amount of injustice in the world. Popular wisdom, which has many adages which seem to favour the retributive theory, has one which is conclusive against it: two blacks don't make a white. We must not render evil for evil.

An upholder of the retributive theory would protest that the criminal's suffering is sought not as an end in itself, but as a means to the restoration of justice. But this is to trifle. For on the retributive theory all that 'the restoration of justice' *means* is that the criminal is to suffer in proportion to his crime. The restoration of justice is not some further, separately identifiable, end to which the offender's sufferings are a means – it *is* those sufferings, in these circumstances; just as when money is handed over to pay a debt, the payment of the debt is not some further, separately identifiable, end to which the handing over of the money is a means, but *is* that handing over, in the circumstances in which it takes place.

Oddly enough, the root of the error contained in the retributive theory of punishment is the same as the root of the error contained in the purely remedial theory. Both theories attempt to give an account of crime and punishment as two episodes in a criminal's life, considered in isolation both from the authority imposing the punishment and the society in which the criminal lives. The retributive theory, starting from the premiss that it is just to punish, reaches the conclusion that it is just to render evil for evil. The remedial theory, starting from the premiss that it is unjust to render evil for evil, reaches the conclusion that it is unjust to punish.

Both premisses are true; they lead to false conclusions only if punishment is considered in isolation from authority, law, and society. Punishment may be imposed only by authority. On this there is general agreement: but it is not always noticed that the principle is a matter of logic, and not of morals. 'Punishment may be imposed only by authority' is not the same sort of sentence as 'sexual intercourse may take place only between married persons'. Connection with authority is not something extraneous to punishment; it is part of its essence. There is not some independently identifiable activity known as punishing, which is legitimate only when exercised by authority, as there is an independently identifiable activity of sexual intercourse which is licit only if it takes place between persons married to each other. No activity whatever can

be rightly called 'punishing' unless it is performed by authority.

Clearly, we would not be willing to describe as 'punishment' just *any* misfortune which fell upon a wrongdoer subsequent to his misdeeds. A murderer who falls to his death down a manhole before arrest has escaped punishment, not suffered it. A slanderer who suffers an attack of lumbago for a week after uttering his slander cannot escape sentence on the plea that he has already been punished for his crime. A fraudulent promoter who loses the fruits of his speculation at *chemin-de-fer* has not thereby done any service to justice. Of course, we may say that such misfortunes are providential punishments for the sins which preceded them. But to see the hand of God in the fortuitous or self-inflicted miseries of criminals is *eo ipso* to see these sufferings as proceeding from authority.

Suffering consequent upon misdoing, even if imposed precisely on account of the misdeeds, is still not punishment unless those who inflict it have authority over the offender. A child who revenges himself on cruel parents by strewing thistles in their bed is not thereby punishing his parents, however much their cruelty may have merited punishment. A man who injures a fellow-man out of spite may well say, 'I did it to punish him'; but in saying this he is arrogating to himself an authority over his victim. He is, literally, adding insult to injury.

If it is a mistake to separate punishment from the authority which imposes it, it is equally a mistake to regard its infliction as being, in general, for the sake of the criminal. I say 'for the sake of', for the mistake occurs equally whether one thinks of the purpose of punishment as being to benefit the criminal or whether one regards it as directed to harming him. The purpose of parental punishment is indeed to benefit the child. It aims to benefit him by curing him of whatever vice he is being punished for; and it cures him, if it cures him, by deterring him from repeating his offence.

But the purpose of society's punishment of criminals is not primarily, or necessarily at all, to benefit the criminal. Nor is it to benefit the law-abiding citizens, by protecting them from 'the criminal classes'. It is for the benefit of every citizen as such, but its benefit to him is indirect. The threat of punishment benefits the citizen by deterring himself and others from the commission of crime, and thus helping to enforce the laws which are drawn up for the benefit of the community as a whole. The exaction of punishment benefits the citizen by ensuring that the threat of punishment is not an empty threat.

The problem 'what constitutes the justice of a just punishment?' is not quite the same as the problem 'how should society treat those

who have broken its laws?'. The problem of punishment is sometimes stated as if it were a problem about the attitude which society should adopt to a specific minority, namely the class of criminals. But society does not contain a class of criminals in the same way as it may contain a class of Jews or Catholics. The class of criminals is defined, as the class of Jews and the class of Catholics are not, partly by the attitude which society takes up towards the members of the class. There are many attitudes which a society may take up towards ethnic or religious minorities; but the only attitude which it can adopt towards the class of criminals is to aim to eliminate it. A criminal is, by definition, a member of a class which society wishes to have no members.

To be sure, society is unlikely to succeed in its aim: crime is always with us. But we cannot disguise our failure in this aim by pretending that it is success in some other aim. The primary purpose of punishment is to prevent citizens from becoming criminals; hence punishment will never be understood if it is regarded as a transaction between society and those who have already become criminals. When a man is punished, the purpose of punishment has, in his case, already been thwarted. The most effective punishment is one which never has to be inflicted. 'Trespassers will be prosecuted' is an announcement which is best verified by there being no trespassers and no prosecutions.

In saying that the problem of how to treat offenders is not the same as the problem of the justification of punishment, I do not, of course, wish to suggest that it is a false or trivial problem. It is one of the most difficult questions facing society: but it is a question which cannot be answered merely by a theory of punishment. What is done by society to offenders must be deterrent, if it is to be punishment at all; but society has not fulfilled all justice merely by providing deterrents from crime. There is, or may be, a place also for preventive detention, corrective training, and compulsory psychiatric treatment. Preventive detention and corrective training are not, as such, punishments. Preventive detention is frequently imposed—as under wartime 18B regulations—without any crime being alleged. It may obviously be highly desirable to teach useful trades to those detained in Borstal; but being taught a trade is not in itself a punishment. What makes it a punishment is that it takes place under Borstal conditions. Again, a court may decide that a person brought before it is in need of medical attention. But to say that a law-breaker deserves not punishment but treatment is *eo ipso* to say that he is not a criminal, because not responsible for his illegal action. These examples bring out the extremely limited

applicability of even a correct theory of punishment.

On a deterrent theory, what becomes of the proportion between crime and punishment? It seems that we must look for a proportion, not between the individual's crime and the individual's punishment, but between the harm done to society if a particular crime goes unchecked, and the harm done to it by the imposition of a particular punishment for this type of crime. An individual may be justly punished though he has done no harm at all; as when a man is fined for driving when drunk even though he has brought his car home safely. On a deterrent theory, the justice of a particular punishment of a particular individual can be assessed only by ascertaining whether it was inflicted in accordance with the provisions of a just law.

We are now in a position to see why the justice of a just punishment cannot be explained simply by a comparison with the notion of a just price or a just wage. The two sorts of justice differ because of their different relation to the justice of a law. The justice of a law fixing prices is subsequent to, and dependent on, the independently ascertainable justice of a just price; whereas the justice of a just punishment is dependent on, and not ascertainable independently of, the justice of the law which imposes it.

But how is the justice of the law itself decided? In somewhat the same way as the justice of a just war. Clearly, the harm which will be done by the enforcement of a punishment must not be greater than the harm prevented by the law to which the punishment is attached. Thus, it would be patently unjust to enforce life imprisonment as a punishment for drunkenness. But this principle needs to be supplemented by further principles which are by no means easy to state accurately, and which require, for their application, detailed statistical research. It seems clear that a punishment must not cause harm greater than that needed to deter from the crime in question. It is perhaps for this reason that in many jurisdictions an attempted crime is punished less severely than a successful crime. Since men intend to succeed in what they attempt, the attachment of a severe penalty only to the successful execution of a crime has as great a deterrent effect as the attachment of an equally severe penalty to all attempts at the crime.

The principle stated at the beginning of the previous paragraph may seem to place a premium on exceptionally severe punishments. According to this principle, it might be argued, the imposition of the death penalty for swearing might well be justified; for people would be so terrified of the punishment that nobody would ever swear. Hence, the punishment would never be exacted, and thus

there would be no harm to set against the advantage of conversational decorum. It is therefore clear that we must add that the mere threat of punishment—even if rarely carried out—must not be so great a burden on the community as to outweigh the good done by the law to which it attaches. In the case of particular laws, therefore, the justice or injustice of the punishments attached to them must be decided by a consideration of the importance of the end to be achieved by the law, the effectiveness of the particular punishment as a deterrent, and the disadvantages caused to the community by the exaction or threat of such a punishment for such a crime.

Many Christians are prepared to accept a deterrent theory of punishment in the field of human affairs, but feel constrained to apply a retributive theory to the judgments of God. The pains of Hell are clearly not remedial: and those who suffer there are now beyond deterring. Must we not say, therefore, that to deter is human, to avenge divine?

Such an argument is based on a misunderstanding of the notion of deterrence. No punishment, clearly, is inflicted to deter the criminal from committing the crime for which he is being punished. If he has to be punished, then he has already failed to be deterred from the crime in question. At best, punishment may deter him from committing it again; but primarily it is aimed at deterring others. Similarly, as St Thomas explains on more than one occasion, the pains of Hell are deterrent—deterrent not for the damned, but for those others who are kept from sinning by the fear of Hell. On any view of punishment, there are difficulties in giving an explanation of how the sufferings of the damned are justly inflicted. But such difficulties are in no way lessened by setting up a theory of punishment whose sole effect is to make God the author of injustice.