CASE COMMENTS AND NOTES

THE INFLICTION OF PUNISHMENT

MODERN THEORIES—PUBLIC ATTITUDE*

There are several forms of punishment. The infliction of different sorts of punishment depends on whether moral codes or legal codes are transgressed. Ostracism by other members of society may follow on infringement of conventional morality. The exaction of this penalty may be disorganized and capricious. The wrath of God may follow a transgression of the divine law. Superstitious peoples thought that such wrath was manifested by thunderbolts and other unusual phenomena. The incidence of such occurrences as a result of divine displeasure is not commonly recognized in modern times. The torment of an individual's own conscience may result from the transgression of divine law or that individual's own moral code, but this is not now recognized as a sanction because it is not imposed upon the transgressor by an external agency. The system of legal sanctions that is applied in modern societies is usually the most organized infliction of punishment. The range of punishment is diverse, but is imposed according to pre-determined standards. Legal punishment consists of pain (in the wider sense) or unpleasant consequences, both intentionally administered to a person who has offended against the legal rules by the authority of the appropriate state. This defines the modern paradigm or example of punishment.

Punishment inflicted by the law may be morally permissible if it is exacted in accordance with certain conditions. The first criterion is that the law prohibiting a certain course of conduct should coincide with an opinion held by the majority of the inhabitants of the society that the conduct is morally wrong.

The precepts of morality are not necessarily coextensive with the dictates of the law in any given society. Just as the moral code of an individual may differ from the law of the society in which he lives, so the collective morality of its citizens may differ from such law.

If the content of the collective morality of people differs from the legal demands made upon them, the difference usually consists in the moral code encompassing less than the legal code. This fact has been recognized by philosophers in different ways.

The "school of natural law" philosophers envisaged a necessary connection between law and morality.[1] According to the exponents of this school, the law was bound to incorporate and add its own sanction to certain rules of morality.

The law laid down by a government could not abrogate or modify a natural right which derived its force from the law of God. Furthermore,

* It is here maintained that there must be a diminution of the public attitude of revulsion towards those who are convicted criminals before the proposals of recent authors (to the effect that mens rea should be a more important factor in sentencing than in conviction) may be successfully implemented.

1 Aristotle, in *Nicomachean Ethics*, was an early subscriber to this doctrine. Bentham's vehement denunciation of the natural law philosophy stemmed from the fact that he had listened to Sir William Blackstone's natural law orientated lectures.

one could always discover what the dictates of the law of God were by discovering what was the greatest human happiness.[2] This index appears in a more refined form in the teachings of the Utilitarians. Although some provisions of human law were thus fixed and immutable, this was not the case with all. Human law had some provisions on questions to which morality was indifferent. For example, there may be a statute prohibiting people from looking out of the window, or preventing people from possessing false scales. In that situation the natural law philosophers recognized that there was no transgression of the moral code though there was an infringement of the law. The conventional morality was indifferent as to whether one observed the prohibition or submitted to the penalty. Such an attitude is prevalent today with a large number of petty offences. Most citizens do not regard it as serious to incur a fine for parking too long at a meter. A similar public attitude exists towards the evasion of income tax. The penalty for these transgressions is regarded simply as a tax on the course of conduct, or as a risk which may or may not eventuate. There is, however, a public sentiment opposed to the one just expounded. It is that if an offence has been made such by the law then there is not only a legal, but also a moral duty to obey that provision of the law, simply because it is the law. Because of the proliferation of legislation in the last few decades, it has become apparent that not all legal rules can be backed up with an equal strength of moral conviction. The idea that "because something is the law there is a moral duty to observe it," is declining as a result.

There are also some situations in which morality or the general public good demands that there should be some rule, but is indifferent as to the content of the rule. For example, there is very little difference between driving on the left or the right hand side of the road. All that is important is that there should be conformity to whatever rule is enacted.

The sort of Utilitarianism that Bentham undertook necessitated a redefinition of good and evil in terms of pleasure and pain. This was central to the Utilitarian view of morality. However, Bentham was led into no confusion between what morality demanded the law to be and what the law in fact was. Thus, his theory of when punishment would be morally justified proceeded purely from the Utilitarian premise.

The object of the substantive provisions of the law is the preservation of society. To reduce to a minimum the number of infringements of legal prohibitions, the law has usually had sanctions annexed. The sanctions have been so often regarded as an integral part of the law itself that the notion of the necessity of sanctions has been incorporated into many traditional definitions of law.[3]

Therefore, punishment is a society's formal expression of the distaste which it has for certain courses of conduct.[4] Reliance on this simple retributive justification for punishment has diminished in modern times. Similarly, confidence in some of the other justifications of punishment (such as deterrence, prevention, and reform) is now more limited. There is an ever increasing doubt about the efficacy of the theory of deterrence

2 Blackstone, *Commentaries on the Laws of England* 40 (3d ed.).
3 Such as that of Austin, *Province of Jurisprudence Determined.*
4 The question of what amounts to punishment has long vexed lawyers and philosophers. For attempts at definition and description see: Bentham, *Principles of Morals and Legislation*; Flew, *The Justification of Punishment*, 1954, Philosophy 291; Mabbott, *Punishment*, 1939, Mind 152.

because it is felt that the part played by calculation of any sort in anti-social behaviour has been exaggerated. There are also many situations in which the law imposes strict liability, and in such a case there might be infringement without any moral culpability. For example, even if I were speeding to take my injured grandmother to hospital, I should still have committed an offence. Because of the doubts relating to the justifications for punishment, it has been questioned whether the whole institution of punishment is the best way to discourage certain kinds of conduct. However, it is suggested here that the imposition of punishment may in fact deter people from committing crimes, it may prevent them in future, or it may reform them. Though none of these reasons by itself may justify punishment, together they do, provided certain other conditions may be fulfilled.

It is, therefore, morally acceptable that punishment may be inflicted under certain conditions because punishment may be justified by certain social aims. It is always important that the type of punishment and the severity of punishment should be consistent with the social aim which is most important in the circumstances. It has already been observed that the reason for the infliction of punishment is a compound of such aims as deterrence and prevention, but this should not prevent the realization that often one justification will be more important than the others. Thus, one might say that the primary purpose of awarding a long prison sentence to a man who habitually indulges in homosexual acts is to reform him. (There are, of course, real doubts as to whether this end may be achieved by imprisonment.) The imprisonment of an illegal abortionist may often be prompted by a desire to prevent others from carrying on that occupation. The general aim of imposing the punishment may vary in emphasis as a result not only of the nature of the crime itself, but also as a result of the attendant circumstances. The likelihood that a man will commit the same sort of offence again, the amount of money stolen, and many other factors may be taken into account to change the approach from a primarily deterrent one to a basically preventive justification.

Thus, it is fairly clear that punishment should only be inflicted on those who are both legally and morally responsible. Further, it should only be exacted when the punishment is designed to secure some benefit to society. This can only be the case where the aim of the punishment is other than a purely retributive one. The benefits that accrue to society usually entail some benefit to the convicted person, too. However this is not usually the case where the primary purpose of imposing punishment is to prevent future transgressions by this individual. In all other cases, however, it would be just to impose punishment only in situations in which there is some real responsibility on the part of the convicted person. The law at present does not always secure that punishment is only inflicted where there is responsibility. In some cases the law is designed to inflict punishment on those who are not at fault. This is the case where a fine is imposed on a company for using trucks in a defective condition. The idea behind imposing the fine is to encourage others to observe the law. Similarly, a man may suffer loss of freedom when he committed a murder while acting under the influence of an insane delusion. In these and many other cases, punishment may

be exacted in the absence of any real responsibility. The infliction of the punishment may be said to be immoral in such cases, because only where one is really responsible can one be said to be capable of preventing oneself from acting in a way that was prohibited.

Those who approve of punishment without responsibility ought logically to be emphasizing the preventive aim of punishment. The only logical aim of punishing those not responsible for their conduct is the hope that they will be prevented from further such conduct. Thus, it is permissible to lock up an insane murderer in a mental institution because thereafter he may not engage in that sort of conduct. However there is no point in locking up such a person who is extremely unlikely to repeat the transgression. It would be iniquitous to punish a person who was not responsible for his crime, merely out of a misplaced sense of vengeance or retribution. Similarly, there can be no question of deterring those who are not responsible for their conduct.

Although for a crime to have been committed there must be an intention to do the acts which constitute the crime, this does not amount to a statement that the criminal must have been really responsible for his conduct. There is criminal liability in many situations in which there is an intention to do the acts, but no realization that they would cause harm, or that they were wrong.

It may be beneficial for us to take all transgressors and subject them to the sort of treatment which is appropriate in each case to ensure conformity with the rules.[5] In that case we should not be concerned at all with responsibility because it is a factor relating to the past; we should be more concerned with the future. If we do dispense with the concept of responsibility in a complete or a limited way, then we must ensure that the social stigma of a criminal conviction is diminished. This would automatically ensure the diminution of the ancillary moral sanction of distaste. It might also be necessary to alter the legal punishment because of the absence of this moral sanction. There is a further difficulty in that the criminal law is supported in part by this public odium. This is because most people are more concerned that a thing is morally wrong than that it is legally wrong.

The amount or severity of punishment produces moral dilemmas. Morally similar conduct should be punished in similar ways. We all feel aggrieved when we suffer a larger fine than another person, though we both were caught speeding at the same speed down the same stretch of highway. The corollary of this proposition is that morally different offences ought to be treated differently. Euthanasia is very different from killing a defenceless old lady in the course of a robbery. They amount to the same crime, but yet they are habitually punished in a different way. There is more scope for the exercise of a moral judgement after conviction than before it.

[5] Lady Wootton, *Crime and the Criminal Law* (1963) expressed the view that *mens rea* was more important in the assessment of punishment than in the conviction of an accused. The result of the application of this view would be to create more offences of strict and absolute liability. She hoped that the distinctions between hospitals and prisons as institutions for the reduction of crime would disappear. Professor H. L. Hart, *The Morality of the Criminal Law* (1965), and *Punishment and Responsibility* (1968) could not accept this theory, with its attendant elimination of responsibility. He would prefer to leave *mens rea* as a condition to be satisfied before conviction, and also take into account the mental state of a convicted person as indicating the type of treatment appropriate for him. See also MacIntyre, "Problems of Punishment," *The Observer*, 4th February, 1968. Kneale, *The Responsibility of Criminals*, sheds some light on the notion of responsibility and comments further on the ramifications of Lady Wootton's proposals.

In conclusion, it may be said that it is morally right to punish those who have offended, where the offence was against the law and also a breach of the collective morality. Such punishment should be proportionate to the moral gravity of the offence. It should also only be inflicted on those who can truly be said to be responsible for what they did. (Aside from the cases where the treatment is purely preventive). It should be inflicted only on responsible persons because only then will it be of real value. If it is imposed on any other grounds at all the result will be a great sacrifice of liberty for an illusory advantage. This is not necessarily to perpetuate the retributive theory of punishment, but to substitute a just system based on a mixture of the justifications of reform and deterrence. Above all, it is necessary to reduce substantially the attitude that punishment is no more than a payment for past wickedness.

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WILLS—STATIONER'S PRINTED FORM—PART HOLOGRAPH. SIGNED BY TESTATOR—EFFECT OF DOCUMENT—WILLS ACT, R.S.A. 1955, c. 369, s. 5—*Re Austin.*

In the law of wills it is becoming more apparent that, just as nature abhors a vacuum, so do the courts abhor an intestacy. What may have been a leaning against intestacy seems to have become an aversion to it. The most recent example of such a situation in the Alberta courts is *Re Austin.*[1] In this case the testator used a stationer's printed will form on which he had filled in the blank spaces with his name, address and the date. Following this the testator, in the space provided, added in his own handwriting words disposing of his entire estate to certain named beneficiaries. Then in a blank space provided he inserted the name of his executor, followed by his signature. The will failed as a formal will because it was improperly witnessed[2] but was tendered for probate as a holograph will.[3]

The majority, Cairns J.A., Smith C.J.A. concurring (McDermid J.A. dissenting) held that the appointment of the executor was superfluous and that the part in the handwriting of the testator was his "will" and permitted probate. It was not the "document" presented for probate which had to be "wholly" in the testator's handwriting, it was the "will" of the testator.

Cairns J.A., speaking for the majority, was able to distinguish, on the facts, a former Alberta supreme court decision where Egbert J. stated:[4]

> If any part of the will, however small, is either typewritten or printed, it cannot be said to be wholly in the handwriting of the testator, and is accordingly not a holograph will within the meaning of sec. 5(b).

This distinction was "permissible" because the document under consideration in that case had as the first page a duly executed formal will where as the second and third pages were written after the attestation

1 (1967), 61 D.L.R. 582; also reported as *Sunrise Gospel Hour et al* v. *Twiss* (1967), 59 W.W.R. 321.
2 The Wills Act, R.S.A. 1955, c. 369, s. 5.
3 *Id.*, s.5(b).
4 *Re Brown* (1953-54), 10 W.W.R. (N.S.) 163, 170.