

# CRIME, GUILT, AND PUNISHMENT



C. L. TEN

# CRIME, GUILT, AND PUNISHMENT

*A Philosophical Introduction*

C. L. TEN

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## PREFACE

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THIS book is based on lectures given to first year philosophy students at Monash University. It is their continued interest which makes me think it worthwhile to develop the lectures for publication. Peter Singer read a very early version of Chapter 2 and gave me helpful comments. I also read parts of that chapter to a seminar in the Philosophy Department at the National University of Singapore, and received some useful comments. Most of Chapter 3 was read to a seminar in the Philosophy Department at Monash University, and I profited from the discussion, especially from points raised by Frank Jackson and Peter Singer. Conversations with Rusi Khan have helped me clarify some of the ideas in the book. John Finnis and Denis Galligan kindly made available to me some of their publications on punishment from which I have benefited. My greatest debt is to H. L. A. Hart. Even the numerous references in this book to his work do not fully reflect the extent of my debt. It was his seminal work on punishment which first aroused my interest in the subject and influenced my general approach as well as the details of many of my arguments. At very short notice he read through a draft of the book and saved me from a number of mistakes and stylistic infelicities. I am also very grateful to him for his constant encouragement and for many acts of kindness which he has shown me over the years. I am of course solely responsible for any remaining errors in the book. Monash University granted me leave in 1985 under its Outside Studies Programme and this was indispensable to the completion of the book. I am conscious of the sacrifices which my wife and daughter made to enable me to write under ideal conditions. Lesley Whitelaw and Lynette Carter efficiently typed up the final version of the manuscript amidst the numerous other demands on their time.

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# I

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## INTRODUCTION

OUR attention is often drawn to the manifestations and ramifications of crime and punishment. These are topics about which most people seem to have strong views, and many also have professional interests. Philosophers are among those who have debated issues about crime and punishment, and especially about the moral justification of punishment by the State. This is one area of philosophy which connects directly and obviously with the concerns of the general public. The problems of punishment are also related to other philosophical issues particularly in moral, legal, social, and political philosophy. For these reasons, a discussion of the nature and justification of punishment is a useful introduction to other related areas of philosophy, and to issues of interest to non-philosophers.

In this book, I offer such an introduction which begins mostly with rather abstract accounts of moral theories of punishment and the conflicts between them, and then proceeds to discuss some of the more practical implications of these theories. Punishment is a topic in which theory and practice should come together.

In what follows, I have not presupposed any knowledge of philosophy, or any other specialist knowledge. I have also not tried to give formal definitions of every technical term used, preferring instead to rely sometimes on the discussion and examples to make clear the sense of what is said. I have tried to indicate the connections between what is discussed and the broader issues relevant to the discussion. But I do not pursue these issues in great detail. To do so would risk losing the thread and continuity of my account of punishment. However, I hope that what I say, though brief, is sufficient to suggest the range of different issues which are linked to punishment. I do not write primarily for my fellow philosophers, but of course I hope that they too will find the book of some use, not

least perhaps as illustrative of arguments they wish to reject, or of positions to be repudiated.

Punishment is administered not just by the State but also by others such as teachers and parents. My concern is with punishment by the State as imposed through the operation of the criminal law. Here there is a system of prohibitions and requirements whose violation leads eventually, after apprehension, a trial, and conviction, to some form of punishment. Of course quite often some of those who commit crimes escape punishment for a number of reasons: they are not apprehended, there is insufficient evidence to charge them, they are wrongly acquitted, etc. Sometimes too an innocent person may be wrongly convicted. But in the central cases of punishment, the person punished has committed the offence for which he or she is punished. It is a matter of dispute, into which we will be entering later, as to whether the notion of punishment can be extended to cover cases in which someone, known by the legal authority to be innocent, is made to pay a penalty in order to prevent some harm to the community. There is also the moral issue of whether we are ever justified in imposing a penalty in this way on an innocent person. Punishment is administered by the legal authority and not by a private individual or group in society. For example, it is not administered by the victim or the victim's friends or family. Punishment involves the infliction of some unpleasantness on the offender, or it deprives the offender of something valued. A fine deprives a person of his or her property, and imprisonment is a deprivation of freedom. They are very different from rewards which confer benefits on a person. Even a suspended sentence or a probation order is not something which the offender welcomes in itself, although of course it is preferred to the harsher forms of punishment. But punishment is not just the imposition of something unpleasant on the offender: the imposition is made to express disapproval or condemnation of the offender's conduct which is a breach of what is regarded as a desirable and obligatory standard of conduct. The importance of some of these features of punishment will emerge in the next chapter when we see their relevance in distinguishing punishment from other activities which appear to be very similar.<sup>1</sup>

<sup>1</sup> For useful discussions of the definition of punishment, see: Antony Flew, 'The



We are not normally justified in depriving people of the things which they value, such as their liberty or their property. So why is punishment justified? Philosophical theories of punishment try to provide the moral basis for justifying punishment. But given that in any society there are at least some criminal laws which are bad and should not have been enacted, it is impossible for any theory of punishment to justify the punishment of every person who is convicted of a criminal offence. Theories of punishment specify the type of considerations which, if satisfied, will justify punishment. These considerations are not always satisfied.

The philosophical debate on punishment has been dominated by two main types of theories of punishment, the utilitarian theory and the retributive theory. The utilitarian theory justifies punishment solely in terms of its beneficial effects or consequences. It is in that sense a consequentialist theory, sharing with all consequentialist theories the belief that ultimately the only morally significant features of an act are the good and bad consequences produced by it. A right act is that which, among the available alternatives, produces the best consequences.<sup>2</sup> Such an act is described as *optimific*. Utilitarians are distinguished from other consequentialists by their account of what constitutes the relevant consequences of an act. They believe that the right act is that which produces the greatest utility, or is most conducive to the welfare of all those affected by the act. There are different accounts of utility or welfare, and two such versions of utilitarianism have been particularly prominent. The classical utilitarians, like Jeremy Bentham, interpret utility or welfare in terms of the mental state of happiness, and thus believe that the right or *optimific* act is that which maximizes, or produces the most, happiness. The second version of utilitarianism, popular among some contemporary philosophers, thinks of the promotion of welfare

Justification of Punishment', in H. B. Acton (ed.), *The Philosophy of Punishment* (London, 1969), pp. 83-7; H. L. A. Hart, *Punishment and Responsibility* (Oxford, 1968), pp. 4-6; Joel Feinberg, 'The Expressive Function of Punishment', in Hyman Gross and Andrew von Hirsh (eds.), *Sentencing* (New York & Oxford, 1981); and Richard Wasserstrom, 'Capital Punishment as Punishment: Some Theoretical Issues and Objections', in *Midwest Studies in Philosophy*, 7 (1982), pp. 475-8.

<sup>2</sup> More accurately, a right act is that which produces at least as good consequences as all alternative acts, since two or more acts may produce equally good consequences.

in terms of maximizing the satisfaction of desires.<sup>3</sup> In the area of punishment, the differences between these two versions of utilitarianism do not generally bear on the issues that I shall be discussing. Both see the main benefits of punishment in terms of its contribution to the reduction of crime, and not in terms of giving offenders what they deserve if what is deserved is independent of, and conflicts with, the promotion of the general welfare. So I concentrate here on the view of classical, or what is sometimes called hedonistic, utilitarianism. Happiness is maximized by an act when the act produces the greatest balance of pleasure over pain, or when it minimizes pain if it should turn out that all available courses of action each produces pain. So for the utilitarian, since punishment is itself an unpleasant experience for the offender who is punished, the infliction of punishment can only be justified if it prevents greater suffering. It is never right to punish if the good consequences of punishment are less than the suffering caused by punishment.

Utilitarians believe that each person's happiness or welfare counts for the same amount of happiness or welfare of another person, and that it is possible to add up the individual amounts into a total amount of general happiness or general welfare. In choosing a course of conduct, one must therefore take into account its effects on everyone, and consider the interests of all impartially. The suffering of the wrongdoer, taken on its own, makes no less a claim on us than the similar suffering of the virtuous. But if this is so, then why should punishment be confined to wrongdoers? (Critics have argued that utilitarians are committed to punishing an innocent person if such punishment maximises happiness. In Chapter 2, I consider various utilitarian responses to this argument, and relate the discussion to the more general issues of the role of examples in moral argument and the nature of moral disagreements.

In their attitude towards the suffering of the wrongdoer utilitarians disagree with retributivists, as those who subscribe to the retributive theory of punishment are called.

<sup>3</sup> For a brief account of some of the differences between these two versions of utilitarianism, see C. L. Ten, *Mill on Liberty* (Oxford, 1980), pp. 4-5, 52-5. J. J. C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge, 1973) is a useful general discussion of the disagreements between utilitarians and non-utilitarians.

Retributivists regard the offender's wrongdoing as deserving of punishment, and the amount of punishment should be proportionate to the extent of the wrongdoing. The offender's desert, and not the beneficial consequences of punishment, is what justifies punishment. Retributivists differ in the details of their explanation of how punishment is supposed to give the moral wrongdoer what he or she deserves. Some of them regard the punishment of wrongdoers as derivative from a fundamental axiom of justice that wrongdoers deserve to suffer. Other retributivists try to connect punishment with broader issues of distributive justice, or justice in the distribution of the benefits and burdens of social life. The offender is viewed as someone who has taken an unfair advantage of others in society, and punishment restores fairness. These and other retributive justifications of punishment are discussed in Chapter 3.

Are retributive and utilitarian theories of punishment irreconcilable? They would be if retributivists insisted on punishing the wrongdoer irrespective of the consequences of such punishment, or if the utilitarian required that an innocent person should be punished whenever this would produce the best consequences. But attempts have been made to effect a compromise between them by, for example, confining their respective applications to different levels of conduct, or by reducing the weight to be attached to both retributive and utilitarian reasons for punishment so that each type of reason on its own would be insufficient to justify punishment. I examine compromise theories in Chapter 4.

It is an important feature of the practice of punishment that offenders are not punished simply because they have committed prohibited acts. The law recognizes various excuses like accident, duress, and reasonable mistake. Thus a person who deliberately kills is guilty of murder, but if the killing was purely accidental then the offender is not punished. In Chapter 5 I discuss the rationale of excuses, and consider whether there is an adequate utilitarian defence of legal excuses. The various excuses which exempt some offenders from punishment in spite of the social harm caused by their acts have been regarded by some as major hindrances to the prevention of socially harmful conduct. Thus Lady Wootton maintains that the only

reason why we retain excuses in the criminal law is in order to confine punishment to the wicked, as those who cause harm when they have an excuse are not wicked. But Wootton herself rejects this view and sees the aim of the criminal law differently as seeking to prevent socially harmful acts. Such acts are often committed not by those who deliberately harm others, but by those who, though not wicked, are serious social nuisances. She recommends the abolition of legal excuses, and the replacement of punishment by a new system of treatment in which persons are convicted if they have committed prohibited acts irrespective of their mental states at the time, or of whether they are morally culpable. Convicted offenders should be sentenced in accordance with what form of treatment would best prevent them from repeating their harmful acts in future. I critically examine Wootton's view in Chapter 5 and also in Chapter 6 which is devoted to a discussion of mentally ill offenders. The excuse of mental illness has generated much controversy. I discuss some aspects of this controversy, and examine the case for the protective sentencing of offenders who are considered dangerous. Mentally ill offenders are often included in this category.

Finally, even when it is agreed that a particular offender should be punished, there is still the issue of the amount of punishment to be meted out to him or her. In Chapter 7, I examine utilitarian and retributive principles for determining the appropriate degree of punishment, and make some brief comments about sentencing practice.

I adopt a pluralist approach to punishment, believing that in the practice of punishment we are often confronted with a number of different considerations, each not reducible to the others, and each having a contribution to make. My main target therefore is any theory of punishment, whether it be utilitarian or retributive, which seeks to justify punishment in terms of just one ultimate value. At the same time I think that both these types of theories embody valuable insights, and I try to show how these can be accommodated within a pluralist approach.

---

## THE UTILITARIAN THEORY

### 2.1. *The Effects of Punishment*

THE utilitarian theory justifies punishment solely in terms of the good consequences produced. There are disagreements among utilitarians about the nature of the good consequences which punishment is supposed to produce. Some utilitarians may even believe that the harm done by punishment outweighs the good, and hence punishment is not justified. But many utilitarians see the main beneficial effects of punishment in terms of the reduction of crime, and believe that punishing offenders will have at least some, if not all, of the following good effects. First, punishment acts as a deterrent to crime. The deterrent effects can be both individual and general. Punishment deters the offender who is punished from committing similar offences in future, and it also deters potential offenders. The offender who is punished is supposed to be deterred by his experience of punishment and the threat of being punished again if he re-offends and is convicted. This is the individual deterrent effect. The general deterrent effect of punishment on potential offenders works through the threat of their being subjected to the same kind of punishment that was meted out to the convicted offender.

Secondly, punishment is supposed to have reformatory or rehabilitative effects.<sup>1</sup> This is confined to the offender who is punished. He is reformed in the sense that the effect of

<sup>1</sup> Jack P. Gibbs distinguishes between 'rehabilitation' and 'reformation'. An offender is 'rehabilitated' if he ceases to violate the law as a result of non-punitive means, whereas he is 'reformed' if he ceases to violate the law as a result of punishment, but for reasons independent of the fear of punishment. See *Crime, Punishment, and Deterrence* (New York, 1975), p. 72. I use the two terms interchangeably and broadly to refer to cases in which the offender, after serving a sentence, no longer commits crimes because he believes that criminal behaviour is wrong and not because he fears punishment. His changed values can be brought about by punishment itself or by non-punitive means. Jean Hampton develops a sophisticated version of the moral education



punishment is to change his values so that he will not commit similar offences in future because he believes such offences to be wrong. But if he abstains from criminal acts simply because he is afraid of being caught and punished again, then he is deterred rather than reformed and rehabilitated by punishment. So the effects of individual deterrence and rehabilitation are the same. What distinguishes them is the difference in motivation.

The third good consequence of punishment is its incapacitative effect. When an offender is serving his sentence in prison, he is taken out of general social circulation and is therefore prevented from committing a variety of offences, even though he may neither be deterred nor reformed by punishment. Of course punishment would not have an overall incapacitative effect if the offender would not have re-offended even if he were free, or if his incarceration led someone else, who would not otherwise have done so, to engage in criminal activity, perhaps as his replacement in a gang. While in prison, the offender might still commit certain offences: he might assault a fellow prisoner or a prison guard. But his opportunities are generally reduced. In some cases, however, his contacts with other prisoners would create opportunities for further involvement in crime when he is released. The incapacitative effect, though perhaps most likely in the case of imprisonment, may also be present in other forms of punishment. For example, parole may have some incapacitative effect in that although the offender is free, the fact that he is under supervision may restrict his opportunities for criminal activities.

The empirical evidence of the effects of punishment is very complex, but a brief survey will be of some use.

It looks as if the present state of our knowledge provides no basis for claiming that punishment by imprisonment reforms or rehabilitates the criminal, or that it is an individual deterrent. The position is well summed up by the Report of the

view of punishment according to which punishment communicates a moral message aimed at educating both the wrongdoer and the rest of society about the immorality of the offence. She is eager to distinguish her view from rehabilitative theories of punishment both in terms of the different ends to be achieved and the methods used to attain those ends. According to her, the aim of rehabilitation is to make the offender accept society's mores and operate successfully in society, and the pursuit of these goals is not constrained by respect for the autonomy of the wrongdoer. See 'The Moral Education Theory of Punishment', *Philosophy & Public Affairs*, 13 (1984).



Panel of the National Research Council in the United States on Research on Deterrent and Incapacitative Effects, hereafter referred to as the Panel:

The available research on the impact of various treatment strategies both in and out of prison seems to indicate that, after controlling for initial selection differences, there are generally no statistically significant differences between the subsequent recidivism of offenders, regardless of the form of 'treatment'. This suggests that neither rehabilitative nor criminogenic effects operate very strongly. Therefore, at an aggregate level, these confounding effects are probably safely ignored.<sup>2</sup>

By 'criminogenic effects' the Panel refers to the undesirable effects of imprisonment in either increasing the criminal's propensity to commit crimes or to extend the duration of his criminal career. ~~Such effects are the opposite of the rehabilitative effects.~~ So the present evidence seems to suggest that in general the effect of imprisonment, or of the various programmes for rehabilitation which accompany imprisonment, is neither to make the criminal a better nor a worse person with respect to the standards of behaviour set by the criminal law.

The evidence also suggests that in general punishment has no individual deterrent effect. Daniel Nagin points out that at the observational level it is difficult to distinguish between individual (or what he calls special) deterrence and rehabilitation. He concludes that, 'The figures suggest that recidivism rates cannot be affected by varying the severity of the punishment, at least within acceptable limits.'<sup>3</sup> But Nagin cautiously adds that the evidence is only preliminary.

In a few specific cases there is indeed some evidence of the individual deterrent effect of punishment. Thus Johannes Andenaes draws attention to a study of amateur shoplifters which shows that detection and arrest, even without prosecution, produces serious shock. There is little or no recidivism among those who are apprehended and interrogated by the

<sup>2</sup> Alfred Blumstein, Jacqueline Cohen, and Daniel Nagin (eds), *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*, National Academy of Sciences, Panel on Research on Deterrent and Incapacitative Effects (Washington, 1978), p. 66. Hereafter this book will be referred to as *The Panel*.

<sup>3</sup> Daniel Nagin, 'General Deterrence: A Review of the Empirical Evidence', in *The Panel*, p. 96.

store police and then set free without being formally charged.<sup>4</sup> A study of drunk driving in Sweden also shows that those drivers who had been arrested estimated the risk of being arrested as many times higher than other drivers.<sup>5</sup>

There is disagreement about the general deterrent effects of punishment. Johannes Andenaes believes that, 'In general terms it can only be stated that general deterrence works well in some fields and works poorly or not at all in other fields.'<sup>6</sup> But in 1974 Gordon Tullock published an article, 'Does Punishment Deter Crime?', in which he surveyed the work done by economists and sociologists.<sup>7</sup> Tullock points out that economists began their work under the impression that punishment would deter crime because demand curves slope downwards showing that if the cost of a good is increased then less of it will be consumed. So if the cost of committing crime is increased by more severe punishment, then there will be fewer crimes. Sociologists, on the other hand, started out with the intention of confirming what was then the accepted view in their discipline that punishment would not deter crime. But Tullock argues that, although their starting points and assumptions were radically different, both economists and sociologists, after analysing the evidence, came to the same conclusion that punishment did indeed deter crime. After surveying their studies Tullock himself is convinced that 'the empirical evidence is clear', and he states his conclusion unequivocally: 'Even granting the fact that most potential criminals have only a rough idea as to the frequency and severity of punishment, multiple regression studies show that increasing the frequency or severity of the punishment does reduce the likelihood that a given crime will be committed.'<sup>8</sup>

However, Tullock's confidence about the clarity of the empirical evidence is not shared by the Panel. The Panel argues that although the evidence consistently establishes a negative association between crime rates and sanctions (as

<sup>4</sup> Johannes Andenaes, 'Does Punishment Deter Crime?', in Gertrude Ezorsky (ed.), *Philosophical Perspectives on Punishment* (Albany, 1972), p. 354.

<sup>5</sup> Ibid., p. 354.

<sup>6</sup> Ibid., p. 346.

<sup>7</sup> Gordon Tullock, 'Does Punishment Deter Crime?', *The Public Interest* (1974), pp. 103-11.

<sup>8</sup> Ibid., p. 109.

measured by the risks of apprehension, conviction, or imprisonment), that is higher crime rates are associated with lower sanctions and vice versa, this does not necessarily show the general deterrent effect of sanctions. The negative association may be partly or wholly explained in terms of lower sanctions being the effect rather than the cause of higher crime rates. Higher crime rates may so overburden the resources of the criminal justice system that they reduce its ability to deal with new offenders. Overburdened judges and prosecutors may use their discretion to dismiss or reduce charges, or to offer attractive plea bargains.<sup>9</sup> Overcrowding of prisons may lead to a reduction in the time served in prison as more prisoners are released early on parole. The sanctions imposed on certain crimes may be reduced. So unless one can separate out the effect of higher crime rates on sanctions from the deterrent effect of sanctions on crime, one cannot interpret the evidence as establishing the presence of the general deterrent effect of punishment. The Panel's cautious assessment of the evidence is summed up in its remark that 'we cannot yet assert that the evidence warrants an affirmative conclusion regarding deterrence', but the Panel adds that 'the evidence certainly favours a proposition supporting deterrence more than it favours one asserting that deterrence is absent'.<sup>10</sup> On the other hand, the Panel believes that the evidence does not even show a significant negative association between crime rates and the severity of punishment as measured by the time served in prison, but suggests that this may partly be accounted for in terms of various distortions.<sup>11</sup>

Moving from the analysis of statistics to the experimental evidence, the Panel identifies three studies which are not methodologically flawed. Of these, two show that the level of crime decreased significantly with increases in the level of sanctions, while one showed that the removal of criminal sanctions for abortions in Hawaii did not affect the incidence of abortions.<sup>12</sup> So it looks as if the present experimental evidence does not permit the drawing of general conclusions. But much

<sup>9</sup> *The Panel*, p. 39.

<sup>10</sup> *Ibid.*, p. 7.

<sup>11</sup> *Ibid.*, pp. 37-8.

<sup>12</sup> *Ibid.*, p. 55.