PUNISH-MENT

Philip Bean

Punishment

A Philosophical and Criminological Inquiry

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Preface

In 1976 I wrote *Rehabilitation and Deviance* as an intended polemic against the then prevailing view that rehabilitation was the only acceptable and humanitarian means of dealing with offenders. It brought forth from those who supported rehabilitation a considerable amount of hostility but no real debate. It was almost as if rehabilitation had become a belief system which was open to challenge only from the non-believers. However, in the last four years the subject matter has moved on a great deal, and it seems now as if the time is right to produce a less polemical and wider view of the issues involved in punishment. What follows therefore is an attempt to examine the major arguments relating to punishment, to show how those arguments relate to justice, and to show how a penal system would operate if any of those arguments dominated. There is also a concluding chapter on the punishment of children — an area neglected by traditional forms of philosophical inquiry but now assuming increasing importance. The book is written mainly from a philosophical standpoint, for it seemed to me that criminology must draw on its philosophical foundations if it is to continue its development. It also seemed as if the argument about punishment was a moral one requiring constant justification.

The most pleasurable part of the whole exercise is to thank those who gave their time to read the drafts and make comments, I would like to thank Professor John Smith at the University of Nottingham and Sister Patricia C.S.J., at the Good Shepherd School for the care taken to read the drafts and for the comments they made, all of which were considered and warmly appreciated. To Professor David Marsh and to my colleagues in the Department of Applied Social Science, University of Nottingham, I wish to record sincere thanks, and particularly to Stewart MacPherson, who bore the brunt of the discussions. As too did my wife Valerie and son Ian.

Ann Hodson typed the drafts in her usual efficient manner. To all

who assisted I acknowledge their help. Needless to say, the errors that remain are mine.

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Overview and Definition

In 1974 Nils Christie said an air of coolness pervaded the concept and practice of punishment. He thought that punishment was not the type of activity that fitted the spirit of the times (Christie, 1974). He also noted that there were subtle attempts to conceal the nature of punishment by substituting terms such as 'sanctions', 'treatment' or perhaps 'training'. He could have added that attempts at disguise are seldom wholly successful particularly from those at the receiving end, yet disguises remain none the less.

It is not my intention here to examine the forms of those disguises, except and in so far as they affect the central issue, which is the nature and justification for punishment. Contrary to some accepted views, I do not believe we punish less than before. We may punish in different ways, and occasionally be more humane in our application, but we still punish. We punish offenders in the courts, we punish our children, and we punish countless others who break social rules. I do not think a great deal can be achieved by ignoring these simple facts. Few of us would, I think, be opposed to all forms of punishment for all people at all times. There may be a small number who can honestly claim that they have never punished their children (nor would never) and an equally small number who oppose the punishment of all offenders. Most of us find that the desire to punish is deeply ingrained within us and accept it as such. We may, like Bentham, say it is regrettable; and like Bentham we may regard other means that secure compliance as being more to our liking, yet accept punishment as a measure of last resort. For most of us it would be dishonest to say otherwise. Again with Bentham, we might say that all punishment is evil and ought to be admitted only in as far as it promises to exclude some greater evil (Bentham, 1948, p. 281). I do not want to suggest that most of us are, or should be, utilitarians; I only wish to extract from Bentham the sentiments that punishment may be regrettable.

The essence of punishment is that it involves suffering, or, in Grotius's terms, 'The infliction of an ill suffered for an ill done'. The suffering created by punishment is not incidental but the deliberate work of persons who claim the right to inflict it. Perhaps this explains why coolness surrounds the debate and why Nils Christie did not think punishment fitted the spirit of the times, for few of us may wish to be associated with the deliberate infliction of suffering. Inevitably strong emotions tend to be aroused by the nature of the subject matter. We cannot escape these, nor should we try; for they are integral to our inquiry and occasionally they provide the major thrust behind the debate. The aim here is to understand that debate and in later chapters to try to point to areas that are likely to assume importance in the immediate future.

Since punishment involves suffering it has led to strenuous attempts to justify it. In general terms some would justify punishment as being deserved for an offence, that is, as retribution; others would regard it as a means of controlling action, that is as deterrence or prevention. Still others would see it as a means of producing some form of moral or psycho-social regeneration, that is, as reform or rehabilitation. Within these general areas there are numerous divisions and subdivisions depending on the positions adopted by various writers. A supporter of rehabilitation, for example, may have little in common with a Hegelian, yet both in their way could be said to support a reformist position. Furthermore, supporters of one theory are committed by their theory not to the support of the practice of punishment generally, but only to aspects that satisfy requirements that they stipulate. Neither would supporters of one theory be necessarily influenced by the empirical evidence that was produced to promote their position. It may be satisfying to know that empirical studies show the effectiveness of (say) deterrence over (say) reform, but that of itself cannot provide the justification for the theory. Justifications have to be found in the quality of the argument, which in this case is a moral one, and we cannot derive a moral position from empirical data. The position adopted depends therefore on the type of questions to be asked. "How can punishment be justified?' is a moral question. 'How effective are punishments?' is a different question altogether. Here we shall be concerned primarily with the moral question.

To the practitioner, such as the judge or magistrate, these distinctions may not matter; or, rather, they may matter less than to

the theoretician engaged in evaluating the merits of the theory. The judge or magistrate is faced with different demands, some of which are dictated by law, some of which are dictated by the conventions appropriate to his office. The judge may sentence the first person for retributive reasons, the second for deterrence and the third for reform, believing that his duty in the latter case is to help the offender rather than (say) to protect society. We accept these apparent inconsistencies as a feature of modern life, knowing that institutions such as the courts or the penal system are rarely theoretically pure or devoted to one theory to the exclusion of others. And perhaps it ought not to be otherwise, for the domination of a single theory may stultify development in the penal system and lead to a position where the purity of the theory becomes the prime consideration. Yet while the theoretician claims to support only those practices that satisfy his theory, the practitioner, in this case the judge or magistrate, has less opportunity to be selective.

When we talk therefore of punishment within the penal system we are often talking about questions of emphasis. We can ask if a magistrate or judge is more of a retributivist than a reformist or is more committed to deterrence than to retribution. We can also talk of a question of emphasis at the institutional level. In juvenile justice, for example, we can note that the juvenile courts place emphasis on the value of rehabilitation. They do not do so to the exclusion of retribution or deterrence — the emphasis means that juvenile courts are more likely to pass reformist sentences than others. Often our assessments of sentencing practices or legal punishments are derived from trends in sentencing, or from the emphasis placed on one punishment rather than another. Inevitably we must operate within the limits of these generalizations.

I am not suggesting that the practitioner has a limited role, merely that he has a different one. The theoretician's task is to evaluate the merits of the arguments and examine competing claims. In doing so he ought not forget the restrictions imposed on the practitioner, some of which lie outside the merits of any theoretical argument. For example, the decision to send an offender to a detention centre may be frustrated by a shortage of places, so instead of passing a retributive sentence the court decides to place the offender on probation. Or the court may substitute a probation order for a fine if the judge is persuaded that the probation service is over-worked and unable to cope with an additional case. The judge's decision may

appear to lack consistency, but without knowing the limitations placed upon him we may be too quick to condemn. Justifications that are practical sometimes have to be assessed in a different way from those that are theoretical.

In one sense, of course, most of us resemble practitioners. Like the judges, although for different reasons, we may operate according to one theory and change when circumstances change. We may be committed to reformist measures with our children but are retributive occasionally and sometimes act for deterrent reasons. We may also punish our children for reasons largely to do with our inability to reason further with them, perhaps because they have reduced us to the position where we have become exasperated. It is a matter neither of pride nor of condemnation to recognize this; nor is it of help to be told that other societies have a more 'positive' approach to children than our own. It is only necessary to recognize that there are parallels with the practitioners in the courts, and that, while non-theoretical considerations ought not to be overwhelming, they can at least reduce our fanaticism and point to our shortcomings.

One should not I think be pessimistic about such limitations. Recently a committee of American Friends attempted to review modern methods of punishment and make recommendations (von Hirsch, 1976). One committee member found himself agreeing with a report that criticized rehabilitation and supported deterrence. He said he could not, or rather he would not, accept it as a declaration of desirable policy: it was merely less unacceptable than others considered at that time (p. 187). I do not see why he should have been led to such pessimism, but that is because I do not believe that any approach can do more than recognize the strength of competing claims. Neither do I believe that there are definite answers to the problems surrounding the justifications for punishment. The most that can be done is to assess the arguments.

A WORKING DEFINITION OF PUNISHMENT

Grotius defined punishment as 'The infliction of an ill suffered for an ill done'. His definition encapsulates some essential features which provide a useful starting point for our inquiry, although the definition itself is not entirely adequate. This does not matter at this stage, for we are concerned only with the broad outline.

First, Grotius wishes to see punishment as an inflicted ill, and by doing so he makes a link between the punishment and the deed. (In all remaining aspects of this and other definitions the terms are used in a neutral sense; the link between punishment and crime does not imply retribution, for example.) Second, he shows that punishment is intentionally inflicted, and not a random imposition of pain. Third, Grotius implies, although he does not say so, that punishment is given to someone who is supposedly answerable for his wrongdoings, that is as opposed to someone not fully in possession of his reason. Finally, Grotius implies that punishment is a social act produced by those claiming the right to punish and imposed on those deemed to deserve it. Punishment is therefore the work of personal agencies and not an act of Providence or imposed by a Deity.

Grotius's definition needs enlarging and refining. That provided by Professor Flew (1954) is much more comprehensive. Punishment in Flew's terms consists of five criteria.

(1) It must involve an evil, an unpleasantness to the victim. This is self-explanatory, although Flew, following Hobbes, prefers terms like 'evil' and 'unpleasantness' to the more stark words such as 'pain'; the former avoids suggestion of flogging or forms of torture.

(2) It must be for an offence, actual or supposed. This too is self-explanatory, although Flew is careful to tie down his definition by emphasizing the offence. So, for example, he says that a term spent in an old-fashioned public school, although doubtless far less agreeable than a spell in a modern prison, is not punishment — unless, of course, the child was sent there as a result of his offending behaviour.

(3) It must be of an offender, actual or supposed. By insisting that punishment is directed to an offender, Flew makes a logical connection between the evil, the offence and the sufferer. In his view we cannot then logically punish the innocent; for this would suggest a logical shift in syntax, in that the word would carry different implications from that which it would convey in a standard case of its primary sense.

(4) It must be the work of personal agencies. Put another way, punishment must not be the natural consequences of an action, for Flew wants to argue that evils occurring to people as the result of misbehaviour but not by human actions are not punishments but penalties. Thus unwanted children and venereal disease are penalties of, but not the punishment for, sexual promiscuity.

(5) It must be imposed by authority conferred through or by the institutions against the rules of which the offence has been committed. Here Flew is following Hobbes, who argued that evil inflicted by anyone, even a public authority acting without preceding condemnation, is not to be styled by the name of punishment but as a hostile act (Hobbes, 1973,* pp. 224-5). Similarly, direct action by an aggrieved person with no pretentions to special authority is not properly called punishment. It may be revenge, as in vendetta, or it may, in Hobbes's terms, be an act of hostility, but it is not punishment.

To these five criteria Benn and Peters (1959) add another: that the unpleasantness should be an essential part of what is intended and not merely coincidental to some other area. This additional criterion adds tightness to the definition by fixing punishments to the intentions of the work of the personal agencies who impose it.

Defined in this way, punishment as used in its primary sense precludes self-imposed forms of unpleasantness as suggested in psychoanalysis, and the punishment of scapegoats. So, for example, when the National Socialists issued a decree that, for distributing illegal pamphlets or for actions abroad that damaged Germany's reputation, and for which the perpetrators could not be arrested, certain people in concentration camps were 'punished', this was a use of the term in its secondary sense (Moberly, 1968, p. 79). Furthermore, while it may not be a misuse of the term to talk of sportsmen having a 'punishing game', this usage disregards one or more of the criteria listed above and should be treated as an extended use of the term.

The value of Flew's definition over Grotius's is that Flew forces us to see punishment in terms of a system of rules. So a parent, a principal of a college — even perhaps an umpire — can be said to impose punishment in the same way as a court of law. Punishment is not the prerogative of the judiciary, although we tend often to use the term as if it were. Parents punish their children and do so by conforming to the criteria mentioned above, although unlike the courts parental punishment involves different methods of determining guilt and has different aims. We shall concentrate mainly on judicial punishment here, but reference will be made to other forms,

* References will be based on the edition used and not necessarily the original edition.

albeit obliquely, on some occasions. When parents punish children we can, following Bradley (1927, p. 31), call this pedagogic punishment.

Definitions provide a boundary and shape to the subject matter. They do not provide arguments about justifications, for these involve normative relationships which require separate analysis. None the less, some philosophers have wanted to show that the justification for punishment rests on its definition. For example, some retributionists suggest that definitions of punishments imply desserts (Mabbott, 1939). Others view punishment as implying unpleasantness based on a certain fitness and propriety in the nature of things that renders suffering a suitable concomitant of vice (Godwin, 1971). Retributionists are not alone in arguing that definitions of punishment relate to the justification. Utilitarians* such as Rawls have argued on similar lines (Rawls, 1955). We shall deal with these arguments in much greater detail in the following chapter. For these purposes the definition provided by Flew is reasonably satisfactory because it provides the right emphasis by concentrating on the nature of rules and the actions resulting from breaking those rules. It is not complete; offences of strict and vicarious liability present obvious difficulties (i.e. offences of strict liability that occur where, say, a shop owner unintentionally sells adulterated goods, and of vicarious liability, where, say, a shop owner is legally responsible for certain activities of his employees). Even if it is possible to show that certain types of punishments fit uneasily into our definition, nothing of a substantial nature follows this. All that is needed at this stage is to delineate the emphasis of our inquiry.

THE SPECIAL RELATIONSHIPS IN PUNISHMENT

We tend to speak of punishment in a generalized way, perhaps forgetting that there are certain groups exempt from punishment and others where the method of punishment is less severe. The former are governed by legal requirements, the latter by social conventions.

* The term 'utilitarian' will be used throughout to describe all who support a deterrent position. It is used as a shorthand way of describing one philosophical approach to punishment, and may or may not be connected to the wider requirements of utility.

In law children (or 'infants', to use the legal term) under the prosecutable age are exempt from legal punishment; those over the prosecutable age (now 10 years) are divided into age categories where punishment is dependent on the fulfilment of certain conditions; for example, for children over 10 and under 14 years they are exempt from punishment unless it is proved not only that they caused an *actus reus* with *mens rea* but did so with 'mischievous discretion'.[1] The insane are similarly placed, being able to claim the insanity defence, which may operate at one of two stages: either before the trial or before the verdict. We shall be concerned with the punishment of children in Chapter 4 but not with the insane or with other legal requirements relating to this particular defence.[2]

Social conventions affect the methods of punishment although not of course the justifications. As a general rule, girls are punished less severely than boys and probably less often. The sentencing practices of the courts and the penal system reflects these assumptions. While it is true that there are fewer female offenders than males (about 8 per cent of boys in the 14- 18-year age bracket come before the courts in England and Wales compared with 2 per cent of girls), there are correspondingly fewer provisions for the female offenders. There are no detention centres for girls (one was started but quickly closed); there is only one closed borstal, and here the range of training activities is severely restricted. There are only three districts in England and Wales where a girl may be ordered to spend twelve or up to twenty-four hours, usually on Saturday afternoons at an attendance centre[3] (*The Times*, 9 July 1980). To some extent the lack of provisions reflects the lower numbers of offenders, but there is, I suggest, a marked reluctance by the courts to punish women or girls as severely as men, or to punish them in the same manner. Girls in schools are rarely given corporal punishment, nor is there any debate or any proposals that suggest it should be otherwise. The impression created by most writers, philosophers and criminologists alike is that punishment is given by males to males. Little or no discussion exists that attempts to discuss punishment in relation to gender. I think this would be a worthwhile area of study for social science generally and criminology in particular, although I would expect to see this rectified in the near future anyway. Unfortunately, a discussion of this nature requires much more than could be achieved within the scope of this book, although some references will be made throughout.

In spite of these conventions, the debate about punishment has always been concerned with the justifications for imposing suffering — and I suppose it always will. But while the arguments may not change, at least in their essential features, the way in which they are approached and the emphasis placed on certain aspects of the discussion need to be sifted over. Criminology has tended to ignore punishment, being somewhat over-concerned with the social and personal characteristics of the offenders, and more recently with the nature of penal institutions or the nature of the methods of control. My reasons for resurrecting the arguments are this: that punishment is central to the criminologists' subject matter, and without a close examination of punishment we shall ignore this simple but important point; second, that unless we recognize this we shall no longer be aware of its influence. (For the fact remains that punishment continues irrespective of the attention given to it by criminologists.)

A re-examination of the argument allows us to keep pace with events and hopefully to point to new areas of interest and doubt. That is to be the main aim throughout. In the next chapter the major arguments will be examined in order to show the boundaries of the subject matter. These boundaries have been called 'the great debate', if only to imply that certain areas are strongly disputed. Here the three major theories of punishment, retribution deterrence and rehabilitation will be examined, and their strengths and weaknesses determined. In the remaining chapters questions relating to justice, a justice decision, the punishment of juveniles, and trends in the modern penal system will be asked in respect of these theories in order to show that each has its own unique contribution to make. While I have tried to represent the merits of each theory, I have also tried to show that retribution has more merits than it is usually credited with — a somewhat unfashionable position to adopt.

NOTES

1. An excellent review of the law relating to children can be found in Smith, and Hogan, (1978), Chapter 9, entitled 'General Defences'. Smith and Hogan say that, where D has caused an *actus reus* with the appropriate *mens rea*, he will generally be held liable. But this is not invariably so, for there are certain defences that may still be available even in this situation. As well as special defences that apply in the case of particular crimes, there are certain defences that apply in the case of crimes generally (p. 155). Infancy and insanity are those discussed in detail by the authors.

2. The insanity defence and the issues surrounding it are complex. For a review and some recent proposals see HMSO (1975a).
3. Those not familiar with terms such as 'detention centre', 'borstal' or 'attendance centre' are advised to consult HMSO (1969) or Cross (1975). Briefly, detention centres are custodial centres, mainly for three months, for young people under the age of 21 where the regime is 'brisk and firm'. Borstals are medium-term training sentences for a similar age group, and attendance centres are non-custodial sentences for young offenders which operate on Saturday afternoons for periods of three hours at a time.

2

The Great Debate

The great theories of punishment, retribution, deterrence and reform stand in open and flagrant contradiction. Each side has arguments that are used to demonstrate the consequences of the rival theories. Supporters of retribution accuse the utilitarians of opportunism and the reformists of vicious paternalism. The utilitarians accuse the retributivists of vindictiveness and the reformists of failing to justify punishment by an insistence on treatment. The reformists see the retributivists as cruel, and utilitarians as inadequate when they attempt to control action. To complicate matters further, each theory has splinter groups offering rival or amended arguments. It is no easy task to pick one's way through the variety of positions adopted in this debate.

And yet the debate is important because it involves grave consequences for penal policy, for penal reform, and for all offenders who are punished each day in the courts. Although we may know or think we know more about the causes of crime, punishment is no less important now than hitherto. We may one day be able to use our knowledge of 'causes' to eradicate crime or to direct antisocial people into more socially approved activities, but that day is still far off. Nor do I know if the use of such knowledge would be desirable. In the meantime, punishment remains with us and requires justification.

In this and the following chapter the discussion on punishment will be confined to those areas that have direct relevance to the penal system. It is not therefore the intention to make an exhaustive review of punishment *per se*, for this has been done numerous times elsewhere. For these purposes the overall aim is to confine attention to the study of punishment in order that a greater understanding can be gained of the penal system generally.