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THE JUSTIFICATION OF PUNISHMENT

BY

SUE SHAPER

A THESIS SUBMITTED
IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

Thesis Director's signature:

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Houston, Texas

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INTRODUCTION

The practice of punishment is far older than many of our present institutions. Considerations of the justification of punishment are probably as old as punishment. This dissertation is not going to attempt to cover justifications of punishment from ancient times until today, however. It is going to address itself to certain salient points in the important works of this century about the justification of punishment.

These important works, in chronological order, are:

J. D. Mabbott's article, "Punishment" in Mind in 1959;
A. V. Quinton's article "On Punishment" in Analysis in June, 1954; Anthony Flew's article "The Justification of Punishment" in Philosophy in October 1954; J. D. Mabbott's "Professor Flew on Punishment" in Philosophy in 1955;
E. L. Pincoffs' book The Rationale of Legal Punishment in 1966; and S. I. Benn's article "Punishment" in the
Encyclopedia of Philosophy in 1967. References will be made to traditional moral views such as Kant's in his The Philosophy of Law; Hegel's in his Philosophy of Right; Bradley's in his Ethical Studies; William Paley's in The Principles of Moral and Political Philosophy; and Jeremy Bentham's in Introduction to the Principles of Morals and Legislation and The Theory of Legislation. The point of considering the justification of punishment is not to justify punishment, nor is it to show punishment unjustifiable. The point is to sort out and throw light upon some real and some spurious issues about justifications of punishment.
CHAPTER ONE

PUNISHMENT AND MORAL JUSTIFICATION

The task of this dissertation is to consider what progress is being made in understanding a particular moral problem: the "moral justification" of punishment. If I make reference simply to the "justification" of acts, it is the "moral justification" of acts that is intended.

There should be no disagreement about the following. The necessity of morally justifying an act exists when moral charges are made against the act, and moral charges are made against acts of punishment. In particular the charge is made that the act involves the intentional infliction of a hardship by a person upon a person. It is necessary to ask, "Are acts of punishment or is any act of punishment morally justified?" or, "Which acts of punishment, if any, are morally justified, and why?" or, more generally, "What system of punishment, if any, is morally justified, and why?" Morally justifying acts of punishment, assuming that the moral charges against the act are not mistaken, requires showing that in given circumstances such acts of punishment are preferable to the known feasible alternatives, including doing nothing. It can be said that an act is "morally justified" if the act is simply preferable to its
absence, or to doing nothing, even though better alternatives could be envisioned. That sense of "moral justification" is not sufficient for the issue of punishment. What people want to know with respect to punishment is which practice of punishment or which alternative to punishment is the most justifiable practice in given circumstances. Knowing that certain acts are more justified than any alternative requires 1) knowing what characteristics make acts right and wrong, 2) knowing what the feasible alternatives are, and 3) knowing that the acts in question contain a balance of right-making and wrong-making characteristics which is preferable to the balance of right-making and wrong-making characteristics belonging to the feasible alternatives. Morally justifying some act against which moral charges are brought involves more than pointing out that the act supports some "good." Obviously some of the worst acts in history have supported some "good."

In embarking upon a consideration of what people have said about which acts or systems of punishment are morally justified, and why, it is necessary to decide not only what is acceptable as a "moral justification" but also exactly what is to be taken as an act of "punishment."

Upon this issue there is disagreement. It might be thought that everyone knows what an act of punishment is. Before 1954, considerations of the justification of
punishment were carried on upon that assumption, and upon the correlative assumption that everyone knows what is not an act of punishment. The occasional disputes which arose with respect to the nature of punishment (for instance the dispute as to whether punishment could only take place because of moral guilt or merely required legal guilt)\(^1\) showed little dissatisfaction with the lack of explicit definitions of punishment. It was not until Anthony Quinton's article, "On Punishment" in Analysis, 1954\(^2\), that the importance of an explicit definition of punishment became recognized. Quinton proposed that what had previously been accepted as an important ethical claim about punishment was in reality only a correct logical remark about the use of the word "punishment." A consequence of this view is that certain controversial acts, which had hitherto generally been accepted as immoral acts of punishment, would actually be acts of "something else" other than punishment. As such it was held that they did not fall within the proper subject matter of a consideration of the justification of punishment and that their justification was another issue altogether.

After Quinton's article efforts were made to define exactly which acts were being considered as "punishment" in considering the justification of "punishment." These efforts turned up the fact that defining punishment is far from a
simple matter. Ironically, there may be as much difference of opinion as to which acts should count as the acts of punishment whose justification needs considering as there is difference of opinion as to whether and how punishment is justified. Regrettably, as that difference of opinion is, the first order of business in considering the moral justification of punishment is to decide which acts are the "punishment" whose moral justification is under consideration and to understand the implications of that decision.

In considering the appropriate definition of punishment, one discovers that the word "punishment" is commonly used to refer to a wide variety of loosely related acts. Consider the following:

This door is designed to take a great deal of punishment.

Hurricane Inez punished the South Texas Coast with 100 m.p.h. winds.

Cassius Clay began to take a great deal of punishment from Joe Frazier in the third round.

The Oilers were punished for being offsides.

The white mouse gets punished when he opens a red door and rewarded when he opens a blue door.

The mother cat punished her kittens for straying from their box.

The infant was punished for sticking his fingers into an electrical socket.
His punishment for excessive drinking
was an early death.

God punished him for his sins.

I took a lot of punishment in the
dentist's chair but I am beginning to
recover.

The child took the assignment to an
advanced reading class as a punishment.

The punishment given the three-time
offender was life imprisonment.

The whole class was punished because
some were making a noisy disturbance
while the teacher was out of the room.

The punishment for high treason and
desertion is the internment of the
family left behind.

ONE was punished that the sins of all
may be forgiven.

Bums take the punishment of twenty-
four hours in jail as a treat.

Punishment is suffered by inanimate objects,
animals, and people. Punishment is either an affliction,
of else punishment is inflicted by natural forces or by
God, animals, or people. Punishment is inflicted by those
trying to help, by those trying to train, by opponents
in a game, and by those trying to hurt. Punishment is
inflicted by accident, or on purpose with regrets, or on
purpose with no regrets. Punishment is inflicted for its
own sake or for the sake of other goals. Sometimes
punishment is even taken as a benefit.
The only thing in common among acts referred to as "punishments" is that there is involved an inflicted (or "afflicted" in the case of natural causes) hardship of some sort, or at least the infliction of what is intended to be a hardship or what is taken to be a hardship. It can be accepted as a truism that virtually any inflicted or afflicted hardship can be commonly referred to as "punishment."

No one is interested in a moral justification for every act of "inflicted hardship." For instance, it would be silly to ask for the moral justification for the punishment taken by an inanimate object, such as a busy door. It would be silly and fruitless to ask for the moral justification for hardship incurred as a natural consequence of the preceding action, e.g., the punishment of an early death for excessive drinking. We do not ask for a moral justification for hardships inflicted by animals, e.g., for the instance of the cat that punished her kittens. It would be beyond our province, and thus silly and fruitless, to ask for a moral justification of acts of Nature or acts of God, e.g., to ask why Hurricane Inez punished the South Texas Coast, or why God punished a man for his sins. There is no need to ask for a moral justification for hardships inflicted truly unintentionally or accidentally, e.g., for the advanced reading class which was intended as a benefit but
was received unfortunately as a punishment. We do not seriously ask for moral justification for actions whose intent was to benefit another, regardless of their outcome. Some argue that we do need a moral justification for the intentional infliction of a hardship by a human being upon an animal. However, animal cases form a class of their own, and will not be considered here.

I conclude that the acts which are commonly described as "punishment" and whose moral justification is important are all acts which involve "an infliction of an intentional hardship by a person upon a person." (The words "intentional hardship" are used to imply only that the act is inflicted with the full knowledge and expectation that the act will involve a hardship.) As can be seen, however, the consideration of the moral justification of all acts which could be described as "punishment" and whose moral justification is important is still far too diverse a class of actions to be uniformly of interest or uniformly feasible to consider at one time. This class of actions could include acts performed in the dentist's chair, under the surgeon's knife, and by the psychiatrist, not to mention acts performed by psychotic sadists and masochists, as well as acts performed by referees, umpires, officials, judges, and penal authorities, parents, teachers, and administrators.
It is often claimed that the interesting acts of punishment are limited to those acts which are punishments in a so-called "primary" or "standard" or "central" sense of the word "punishment." Many writers in the literature more or less agree with an article in *Philosophy*, 1954, by Anthony Flew, "The Justification of Punishment," which claims that punishment like many words has a "primary" or "standard" sense delineated by certain criteria and that other uses of the word are uses of the word in secondary, nonstandard, or metaphorical senses where only some of the criteria are met. The article claims that interest in the justification of punishment is interest in punishment only in this primary sense of the word.

Maintaining this claim of Flew's, however, involves one in a linguistic dispute which is not essential to the consideration of the justification of punishment. For instance, this claim of Flew's will be contested by those who hold that 1) "punishment" does not have a "primary" or "standard" sense, delineated by certain criteria, so that all other uses of the word are uses of it in a "secondary," "nonstandard," "metaphorical" sense, but rather that "punishment," like many other words, has many senses loosely related to each other and that no one set of criteria can contain them all; or that 2) punishment may have a "primary" or a "standard" sense but that, even
granting a full and complete knowledge of the common usage of the English language, no finite set of criteria can adequately capture that primary or standard sense, owing to the vagueness and open texture of the word and the vagaries of common usage; or 3) that there is no compelling reason to believe that the "standard" or "primary" acts of punishment (granting that they can be delineated satisfactorily) turn out to be exactly those acts of punishment whose moral justification is held to be of interest or importance.

Rather than debate these linguistic issues about the existence of a "standard" or a "primary" sense of a word and rather than argue that interest in the justification of punishment must be limited to punishment in the "standard" sense of the word, I appeal to a simpler and better approach.

H. L. A. Hart in "Prolegomenon to the Principles of Punishment" in 1959 makes a point slightly different from Flew's. Hart agrees that attention is predominantly directed towards certain acts of punishment in a "standard" or "central" sense of the word. That "standard" or "central" sense of the word punishment, as Hart defines it, is narrower and more specific than Flew's "standard" or "primary" sense of "punishment." Hart's "standard" or "central" sense of "punishment" is more like the definition
of a paradigm act of punishment, or the sort of act of punishment that typically comes to mind at the mention of the topic of the justification of punishment.

It is not Hart's intention, however, to limit interest in the justification of punishment to that "standard" or "central" sense, or that paradigm act, of punishment. Hart recognizes that, although attention is focused upon the standard or the central sense of the word punishment, this does not absolve one from the responsibility of also considering the moral justification of the "substandard" or "secondary" acts of punishment when such consideration becomes relevant. For these "substandard" or "secondary" acts of punishment Hart gives a few examples but does not attempt any exhaustive definition.

Hart's approach is on the right track. Its weakness is its lack of any explicit description for the "substandard" acts which, although not of central concern, might yet come under consideration. One can not leave the issue with the announcement that there are these secondary or substandard acts of punishment and with a few examples of them.

K. G. Armstrong in "The Retributivist Hits Back" in 1961 makes a point different from both Flew's and Hart's. Armstrong claims that the "definition" of
punishment is a problem concerning which one may hold a "theory." Armstrong points out that various theories about how punishment is justified include views about the proper "definition" of punishment.

With respect to Armstrong's comments, I say that the proper definition of "punishment" is not the issue. The only defining characteristic of punishment, as I consider it, is that it be an inflicted hardship, or what is taken as an inflicted hardship, or what is intended as an inflicted hardship. The problem is to select from all acts which could be referred to as "punishment" those acts of punishment of interest in a consideration of the justification of punishment. There is good reason to select those acts of interest independently of deciding how one is to justify those acts. To allow the method chosen for the moral justification of the acts to influence the specification of the acts which are of interest is to stack the deck of the discussion before it begins.

To summarize so far, arguing like Flew for the existence of a "standard" or "primary" sense of the word "punishment" is unnecessary, if not wrong. Proposing, like Hart, the distinction between standard acts of punishment and nonstandard acts of punishment is on the right track but must be made precise to be valuable. Announcing, like Armstrong, that different theories of the justification of
punishment maintain correspondingly different "theories" about the definition of the acts of punishment under consideration, may in fact be announcing the truth, but this only suggests the need to resolve the issue.

The strong point of Flew's position is that it offers an easy way to determine the acts of punishment which are of interest. If the distinction between the standard and nonstandard sense of the word "punishment" is not acceptable as providing a way to determine the acts of interest in a consideration of the justification of punishment, there are no other equally attractive alternative means of determining these acts. K. G. Armstrong does make some suggestions about a technique which should govern the delineation of the interesting acts of punishment.

We examine the way the word is used in ordinary language, the things to which it is applied, and try to produce some rule which covers all these cases and only these cases. Applying the same technique to many other words we would get a single unequivocal answer on which all users of the language would agree -- in short, the definition of the term -- but in the case of 'punishment' there is no such universally acceptable answer, and so we may speak of a 'theory of punishment' in the sense of a claim that a certain definition exactly marks out the correct use of the term. For such a theory to be wrong would be for it to mark out some range of things or activities not in
fact ordinarily referred to by the word 'punishment' or else to include only part of the proper range and/or more than the proper range. In this latter case we would probably say that the definition proposed was 'too narrow' or 'too wide'.

As I said before, however, rather than a "theory" of the correct "definition" of punishment being needed, as Armstrong holds, what is needed is merely a description of the acts of punishment of interest in a consideration of the justification of punishment. This is something different from a definition. What is desired is to delineate a subset of acts of punishment which is neither "too narrow" (including only part of the relevant acts) nor "too wide" (including more acts than are relevant to the discussion).

Getting no further help from Flew, Hart, and Armstrong, I suggest the following as the only rule which seems to be a proper guide for delineating this subset: Accept as interesting all acts which are commonly referred to as "punishment" and which need a moral justification, with the exception of those acts for which there is a more appropriate word and with the exception of those acts whose moral justification is neither of practical interest nor relevance.

I propose the following account of the proper subset of acts of punishment of interest in the consideration
of the justification of punishment. The subset is defined by three features which I hold to be necessary and sufficient conditions for those acts of punishment whose moral justification is important and interesting. 1) The act must be an infliction of an intentional and essential hardship by a person upon a person. 2) The hardship must be inflicted because of an offense or the possibility of an offense against some laws, rules or mores. 3) The hardship must be inflicted by an appropriate authority.

For the purpose of clarity and brevity in the further discussion, let it be stipulated that those acts which I here claim to be the acts of punishment of interest in a consideration of the justification of punishment be called "punitive acts." This title distinguishes them from the wider category of acts of "punishment." I will defend my proposal in the next chapter, because it does not agree fully with any previous proposal in the literature.
FOOTNOTES

1 The dispute over whether punishment takes place because of moral guilt or legal guilt is reflected in C. H. Whitely's "On Retribution," in *Philosophy*, 31, 117 (April, 1956), pp. 154-157, which is a reply to J. D. Mabbott's two articles on punishment in *Mind*, April, 1931, and *Philosophy*, July, 1955.


CHAPTER TWO

CHARACTERIZATION OF ACTS OF PUNISHMENT

The proposed features which characterize an act which is of interest in a consideration of the justification of punishment are 1) that the act be an infliction of an intentional and essential hardship by a person upon a person, and 2) that the hardship be inflicted because of an offense or the possibility of an offense against some laws, rules, or mores, and 3) that the hardship be inflicted by an appropriate authority. Before defending this proposal, it would be well first to state 1) Flew's commonly accepted definition of the "standard" or "primary" sense of the word "punishment," along with J. D. Mabbott's, Kurt Baier's, and S. I. Benn's modifications; 2) Hart's definition of the "central sense" of the word "punishment" with examples of "important noncentral senses"; and 3) Armstrong's three "theories" of the definition of punishment which he finds corresponding to three theories of the justification of punishment. First, Anthony Flew, in "The Justification of Punishment," has this to say:

I propose, therefore, that we take as parts of the meaning of 'punishment,' in the

18
primary sense, at least five elements.

First, it must be an evil, an unpleasantness, to the victim. . . .

Second, it must (at least be supposed to) be for an offense. . . .

Third, it must (at least be supposed to) be of the offender. The insistence on these first three elements can be supported by straightforward appeal to the Concise Oxford Dictionary, which defines 'punish' as 'cause (offender) to suffer for an offense.' Notice here that though it would be pedantic to insist in single cases that people (logically) can not be punished for what they have not done; still a system of inflicting unpleasantness on scapegoats - even if they are pretended to be offenders - could scarcely be called a system of punishment at all. Or rather - to put it more practically and more tolerantly - if the word 'punishment' is used in this way, as it constantly is, especially by anthropologists and psychoanalysts, we and they should be alert to the fact that it is then used in a metaphorical, secondary, or non-standard sense . . . a likely source of trouble and confusion.

Fourth, it must be the work of personal agencies. Evils accruing to people as a result of misbehaviour, but not by human agency, may be called penalties but not punishments: thus unwanted children and venereal disease may be the (frequently avoided) penalties of, but not the punishment for, sexual promiscuity. . . .

Fifth, in a standard case punishment has to (be at least supposed to) be imposed by virtue of some special authority, conferred through or by the institutions against the laws or rules of which the offense has been committed. . . . A parent, a Dean of a College, a court of Law, even perhaps an umpire or a referee, acting as such, can
be said to impose a punishment; but direct action by an aggrieved person with no pretensions to special authority is not properly called punishment but revenge . . . . Direct action by an unauthorized busy-body who takes it upon himself to punish might be called punishment. . . . though if so it would be a non-standard case of punishment. . . .

Besides these five positive criteria, I propose negatively that we should not insist: either that it is confined to either legal or moral offenses, but instead allow the use of the word in connection with any system of rules or laws - State, school, moral, trade union, trade association, etc.; or that it can not properly be applied to morally or legally questionable cases to which it would otherwise seem applicable.¹

J. D. Mabbott, in his 1955 article, "Professor Flew on Punishment,"² reviews Flew's definition of punishment and agrees with Flew, provided that "offense" and "offender" are taken to mean offense and offender against "laws" and not merely "sin" and "sinner." Mabbott takes Flew's fifth criterion—that the punishment must be inflicted by an authority whose rules have been broken—to justify the interpretation of offense and offender as offense and offender against laws, since for "antisocial action which breaks no rules laid down" (sin) there exists no authority to administer a punishment. In addition, Mabbott prefers the phrase "deprivation of a good" to "evil" or "unpleasantness." Mabbott finds that most
modern punishments are more oriented toward deprivation than toward the inflicting of positive harm.

K. Baier, in his 1955 article, "Is Punishment Retributive" also basically accepts Flew's proposed delineation of the acts of punishment of interest in a consideration of the justification of punishment, with the exception that Baier does not think that there could even occur single cases of the "punishment of the innocent" or of scapegoats. According to Baier,

If after the jury has found the accused 'not guilty,' the judge continues as if the jury had found him guilty, then his 'I sentence you to three years hard labor' is not the pronouncement of the sentence, but mere words. If, for some reason, the administration acts on these words, then what they do to the accused is not the infliction of punishment, but something for which (since it never happens) we do not even have a word.

. . . For 'punishment' is the name of a method, or system, of inflicting hardship, the aim of which is to hurt all and only those who are guilty of an offense . . . Hence inflicting hardship on a person who has been found 'not guilty' (logically) cannot be punishing. This is a conceptual point about punishment. . . . The very aim of inflicting hardship as punishment would be destroyed, if it were inflicted on someone who had been found 'not guilty.' But at the same time, someone may be punished, i.e., have hardship inflicted on him as punishment, although he was guilty of no offense, since he may have been found guilty without being guilty. For all judges and jurors are fallible and some are corrupt.
S. I. Benn, in his 1967 article, "Punishment,"\textsuperscript{5} is also in basic agreement with Flew's delineation of acts of punishment of interest in a consideration of the justification of punishment. However, Benn adds some interesting points of his own. According to Benn:

Characteristically, punishment is unpleasant. It is inflicted on an offender because of an offense he has committed; it is deliberately imposed, not just the natural consequence of a person's action (like a hangover), and the unpleasantness is essential to it, not an accidental accompaniment to some other treatment (like the pain of the dentist's drill). It is imposed by an agent authorized by the system of rules against which an offense has been committed; a lynching mob is not a standard case of punishment.\textsuperscript{6}

The central problem with Flew's account is that it is not clear that interest in the justification of punishment is interest in all and only acts of punishment in Flew's primary or standard sense of the word. To illustrate the problem, consider two instances of "punishment" for which there is no interest in their moral justification; "punishment" by natural causes and "punishment" by animals. Flew is forced by his analysis to claim that saying such a thing as, "He was punished for his drinking by an early death," is not a use of the word "punishment" in the "primary" or "standard" sense. Flew's rationale is that
"penalized" would be the more appropriate word to use in these cases. But, as a matter of fact, it seems far more appropriate to say that he was "punished" for his drinking by an early death than that he was "penalized" for his drinking by an early death. Moreover, Flew does not even attempt to argue that such usages as, "The cat punished her kittens," or "I punished my dog," are nonstandard or metaphorical usages of the word "punishment," and on the face of it they certainly do not seem to be. It seems that a consideration of the justification of punishment should be limited to instances of punishment of "people" by "people" simply because that is where the moral interest lies.

H. L. A. Hart notes difficulties with Flew's proposed consideration of only the "primary" or "standard" sense of the word punishment, and avoids those difficulties with his own approach. According to H. L. A. Hart in "Prolegomenon to the Principles of Punishment":

So with Mr. Benn and Professor Flew I shall define the standard or central case of 'punishment' in terms of five elements:

(i) It must involve pain or other consequences normally considered unpleasant.

(ii) It must be for an offense against legal rules.

(iii) It must be of an actual or supposed offender for his offense.
(iv) It must be intentionally administered by human beings (other than the offender).

(v) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

In calling this the standard or central case of punishment I shall relegate to the position of sub-standard or secondary cases the following among many other possibilities:

(a) Punishment for breaches of legal rules imposed or administered otherwise than by officials (decentralized sanctions).

(b) Punishment for breaches of non-legal rules or orders (punishments in a family or school).

(c) Vicarious or collective punishment of some member of a social group for actions done by others without the former's authorization, encouragement, control or permission.

(d) Punishment of persons (otherwise than under (c)) who are neither in fact nor supposed to be offenders.

Hart thinks that discussions of the justification of punishment should include "substandard" or "secondary" cases as well as Flew's "primary" cases of punishment. Hart criticizes all philosophers who make use of what he calls the "definitional stop." This is refusing to discuss the moral justification of "substandard" acts of punishment when such discussion is clearly relevant.

According to K. G. Armstrong in "The Retributivist
Hits Back" there are at least three viable definitions of punishment in operation.

When the problem is to define punishment these theories provide roughly the following answers:

1. **Retributive**: Punishment is the infliction of pain by an appropriate authority, on a person because he is guilty of a crime, i.e., for a crime that he committed... I use the word 'crime' deliberately, as it is ambiguous between an offense against a rule, the law, morality, or someone else's rights.

2. **Deterrent**: Punishment is the infliction of pain on a person in order to deter him from repeating a crime or to deter others from imitating a crime which they believe him to have committed...

3. **Reformatory**: Punishment is the infliction of pain on a person in order to reduce his tendency to want to commit crimes of a particular sort. Armstrong makes no attempt to select one of these three definitions as the most appropriate.

Against all of these proposals I want to defend the claim that the acts of punishment of moral interest in a consideration of the justification of punishment are those acts involving the intentional infliction of an essential hardship upon a person by an appropriate authority because of an offense or the possibility of an offense against some laws, rules, or mores. My defense of this claim will be
made in the light of the rule for deciding this issue which I stated at the end of Chapter Two.

The first criterion, the satisfaction of which is necessary to classify an act as "punitive," is a criterion that should raise little controversy. It is what enables an act to be called a "punishment" and is also what draws moral charges against punishment. This is the condition of being "an infliction of an intentional and essential hardship upon a person by a person." I want now to consider more closely the terminology in this first criterion.

An act that does not involve an inflicted (or afflicted in the case of natural causes) "hardship," or at least the intention to inflict a hardship, is not an act of punishment in any common sense of the word "punishment." Pleasure or benefit that is provided and that is not intended to be other than benefit can never be called a punishment, unless one is speaking ironically. By "hardships" I mean such things as physical pain, psychological pain, confinement, deprivation of privileges, monetary loss, loss of life or limb, and loss of a loved one. There are, of course, actions which may be a hardship to some people and may not be a hardship to others. Being able successfully to predict the effects of an act in specific cases is acknowledged as a valuable practical skill.

I insist upon the qualification "upon a person by a
person" in order to exclude cases of animals punishing animals, cases of humans punishing animals and other non-human beings and inanimate objects, acts which are causal consequence of other acts, "acts of Nature," and "acts of God." These are all acts whose moral justification is either not of interest or is of decidedly lesser interest.

"Person" as it occurs in the phrase "upon a person by a person" must be understood to mean also groups of persons. Groups are punished as well as individuals, and the punisher can be one person or can be a group of people.

The qualification that an "intentional" hardship be inflicted limits punitive acts to acts inflicted with the expectation that they will involve hardship. It is necessary to say intentional hardship in order to rule out acts where a hardship is inflicted accidentally or unintentionally. For such acts as those one does not sensibly ask for a moral justification. The criterion also rules out cases where an intended benefit to a person is "taken as" a hardship. For such acts as these one also does not sensibly ask for a moral justification. I want to include acts where what is intended to be a hardship upon a person turns out by chance to be a benefit. If one intends to impose a hardship upon a person, then even though chance turns that hardship into a benefit, the onus of providing a moral justification for the intention to impose that hardship has not been removed.
I use the word "essential" in the sense of "not to be done without." An act involving an "essential" hardship is an act where the hardship itself is the intended end of the act or where the hardship as such is the chosen means to reach the intended end of the act and is not merely an unfortunate accompaniment. The qualification of "essential" hardship is important. It excludes from "punitive acts" the hardship incurred in the dentist's chair, or under the surgeon's knife, as well as most hardships incurred in psychiatric treatment and educational processes. These are all cases in which hardship is inevitably involved and thus is "intended," but where the hardship as such is not the end of the act or the chosen means to reach the end of the act, but is rather an unfortunate accompaniment to the act. (If there are cases in which pain itself or hardship as such is essential to the psychiatric treatment or to the educational process, then these cases have not been excluded by my qualification.) Of course, acts involving intended but "non-essential" hardships upon a person by a person do need a moral justification, just as do punitive acts. Also it is true that nonessential hardships may be referred to as "punishment." The criterion that excludes "nonessential" hardships from the class of punitive acts mirrors the fact that there are always more appropriate words to describe such acts, such as "treatment" or "education" or "reform."
To include nonessential hardships in the class of punitive acts would be to mislead. Moral consideration of such acts as "treatment" or "education" or "reform," which involve intended but purely nonessential hardships upon a person by a person, should certainly be undertaken but only as a consideration of viable alternatives to punitive acts.

Before proceeding to consider the second criterion of "punitive acts," I want to correlate the first criterion with similar criteria that other authors have used to delimit the acts of punishment that they are considering. Anthony Flew chooses the words "evil or unpleasantness" when he speaks of hardship. J. D. Mabbot in his early seminal article simply uses the word "pain," but in his later reply to Flew chooses to speak of something "disliked" or of "a deprivation of a good." H. L. A. Hart speaks of "pain or other consequences normally considered unpleasant." K. G. Armstrong speaks of the "infliction of pain." S. I. Benn speaks of "unpleasantness." There is little disagreement here. By and large "inflicted hardship" seems an appropriate choice of words.

In Flew's definition of the acts of punishment whose moral justification he proposes to consider (and which are supposedly acts of punishment in the "primary" or "standard" sense of the word), he limits interest to hardships which are the works of "personal agencies." S. I. Benn concurs.
H. L. A. Hart agrees that the hardships must be administered by "human beings." K. Baier limits interest to "someone" punishing a "someone." K. G. Armstrong mentions that the hardship must be inflicted "on a person." By and large, my phrase, "upon a person by a person," seems as good a choice of words as any to express the restrictions all these authors agree upon.

S. I. Benn and H. L. A. Hart are the only authors who hold that the "inflicted hardship" must be "deliberately imposed" or "intended," and Benn is the only author who maintains that the unpleasantness must be "essential" to the act and not an accidental accompaniment to some other treatment (like the pain of the dentist's drill). Benn does not consider what to say about the case of a deliberately imposed unpleasantness or hardship which turns out not to be an unpleasantness to the victim. I assume that Benn would agree that an imposed intentional unpleasantness or hardship needs justification regardless of how the act turns out in the end, and thus should be included among interesting acts of punishment. I do not agree with Benn's calling the pain of the dentist's drill an "accidental" accompaniment to some other treatment. The pain of the dentist's drill is not "essential" to the treatment for the pain itself does not accomplish the fixing of our teeth. The pain is an unavoidable accompaniment to the fixing of the teeth. The
pain, however, is not accidental. It is "knowingly" inflicted and thus intentional in the sense of "intentional" already defined. The feature that excludes an act like the dentist's drilling from being a punitive act is the hardship's being "nonessential." Flew and others, without making these distinctions between "intended" and "essential to the purpose of the act" can not separate accidental hardships occurring in the certain circumstances from acts of punishment whose moral justification is important. Nor can they separate "treatment" from "punishment," since both involve inflicted hardships. Moreover, Flew and others, according to their own definition, must exclude possible moral criticism of any act of inflicted hardship, however gross, if it turns out to work for the benefit of the victim. They must also see as morally criticizable any intended benefit, however well intended, if it happens to turn out to work as a hardship. That is clearly wrong.

The second criterion of "punitive acts" is the necessity of the hardship's being inflicted because of an offense, or the possibility of an offense, against some law, rules, or mores. This second criterion rules out from consideration hardships inflicted in order to help or heal or inform or improve, to play a game, or merely to satisfy sadistic instincts.

When offenses against laws, rules, or mores are
mentioned, one thinks of "crime" as the issue of paramount importance, of offenses against governmentally instituted systems of law. The justification of criminal punishment is of paramount importance in the consideration of the justification of punishment, but there is no need to exclude from consideration offenses against other sorts of organizations such as families, social groups, or automatically ruled societies. Nor is there any need to exclude failures to conform to the standards of certain activities, even games. It seems correct to say that children are punished for doing that which, as it is commonly put, they should have known better than to do, in other words, for violating tacitly assumed rules of behavior. And people under a tyrant's regime might be punished merely for incurring the tyrant's wrath. (Never incur the tyrant's wrath is a tacit rule of common sense to be observed by those living under an absolute tyrant's rule.) There exists no crying need to consider the moral justification of punishment of children by their parents or of players by a referee. Nor is there a pressing need to argue that the punishing of subjects in a tyrant's regime is often immoral. Still, considering how and why such cases are or are not justified might throw light upon the more urgent general issue of the moral justification of any punishment of any individuals by any agents of society. Limiting the
consideration of the justification of punishment solely to offenses against law might so severely limit the perspective on the notion and history of punishment as to preclude reaching any balanced solution to the question of the moral justification of punishment.

Laws, rules, and mores usually prohibit harming others or putting others at a disadvantage. Sometimes laws, rules, and mores prohibit evil intent, criminal tendencies, or simply bad character. These conditions are held to imply the likelihood of harm to others in the future. Thus an offense against laws, rules, or mores need not necessarily cause harm to others. It might only be indicative of impending harm. Accurately determining evil intent, criminal tendency, or bad character is difficult; and given evil intent, criminal tendency, or bad character, harm to others need not follow. Thus, to punish for evil intent, criminal tendencies, or bad character risks punishing those who might never harm others.

In order for the infliction of an intentional and essential hardship to be a punitive act, the hardship must be inflicted because of an offense or the possibility of an offense. To say that a hardship is inflicted "because of" an offense or the possibility of an offense is to say that if it could be shown that there were no offense, or possible offense, then the reason offered for inflicting the hardship
would be inapplicable. The occurrence, or the possible occurrence, of an offense must be connected with the inflicted hardship by showing that something is to be gained by inflicting such a hardship. If an intentional and essential hardship is not inflicted because of an offense, such as is the case with a sadistic act, an act of aggression, or a play in a game, or perhaps even an educational act or a medical treatment, then the act is not a punitive act. Admittedly, some hardships might be inflicted in the name of punishment, under the guise of being "because of an offense," when the real motivation for the act is something else, like sadism or personal envy. Acts of hidden motivation have problems of their own. They need separate consideration and are not the acts whose moral justification I am considering.

The phrase "an offense or the possibility of an offense" allows for situations where a punitive act takes place because of an offense that happened or that possibly happened. It might sound strange to speak of punishing because of offenses that possibly happened, but no one can be expected to wait for absolute certainty about past events. Our society requires a high degree of certainty that an offense has happened before inflicting punishment, that clearly reflects a value judgment. Not all societies do require or have required that high degree of certainty.
There is quite a divergence of opinion among authors in the literature about requirements which my second criterion places upon punitive acts. For some the specification "laws, rules, or mores" is too broad. J. D. Mabbott wishes to restrict attention to acts which are hardships inflicted because of offenses against explicit rules and laws, and specifically not to include among offenses, "sin" or "antisocial action which breaks no rule laid down." Anthony Flew requires that an act of punishment be a hardship imposed because of an offense against some "law or rule," or "any system of laws and rules, State, school, moral, trade union, trade association, etc.," in particular including "retrospective and immoral laws." S. I. Benn requires that an act of punishment be a hardship imposed because of an offense against "a system of rules." K. G. Armstrong requires that an act of punishment be a hardship inflicted because a "crime" has been committed or because of "the tendency to want to commit crimes." Armstrong intends "crime" to be "ambiguous between an offense against a rule, the law, morality, or someone else's rights." H. L. A. Hart requires that an act of punishment in the "standard" or "central" sense of the word be a hardship inflicted because of an offense against "legal rules," but Hart does not believe that one is thereby relieved of the responsibility for morally justifying acts of punishment in
the nonstandard, noncentral senses which include hardships inflicted because of offenses against "nonlegal rules" or "orders."

Of these authors, J. D. Mabbott is the only one who clearly wishes to exclude from consideration offenses against tacitly assumed rules of behavior, in other words, "sins" or "antisocial acts which break no rules laid down."

At one point Mabbott gave his reasoning for taking this position as "it takes two to make a punishment and for a moral or social wrong I can find no punisher."

To the extent that this is true, Mabbott is correct in excluding "antisocial acts which break no rules laid down" from the list of offenses which could cause a punitive act. Mabbott is anticipating my third criterion of punitive acts, that of the act's being inflicted by an appropriate authority. It does take an appropriate authority and a victim to make a punitive act. On the other hand, quite often an authority appropriate to administer punishment is not lacking in the cases Mabbott excludes. Sometimes peer groups function, and quite effectively, for the purpose of inflicting hardships because of such offenses as antisocial acts. Sometimes groups or mobs are formed which function as an authority which inflict a hardship in the case of antisocial acts for which there is no existent law. Sometimes an already existent authority for other explicit offenses
assumes the role of authority in the case of an "anti-social act which breaks no rule laid down." C. H. Whitely elegantly pointed out, in 1958, in response to Mabbott's articles, how this commonly works.

In less formalized systems of authority there is always the right to punish evident misdeemors, whether or not they have been explicitly forbidden. I don't suppose there is any school which has a rule forbidding the smearing of the classroom seats with glue; but any boy in any ordinary school who did it would certainly be punished, and with ample justification. Even the most elaborately codified systems of law have vague offenses like 'committing a nuisance' which could be made to cover plenty of anti-social actions which the legislators did not think of beforehand.¹³

Granting that an authority exists to administer the hardship, there appears little reason to limit offenses to "rules laid down" and to exclude tacitly assumed rules of behavior. Historically, it is almost a certainty that "anti-social acts which break no rules laid down" were recognized and punished before the existence of any such "rules laid down."

K. G. Armstrong is the only author to point out explicitly, at least according to one theory, that "offense" may indicate crimes or the tendency to commit crimes. Everyone else's use of the word "offense" is ambiguous enough to be interpreted to cover offenses involving real
harm or potential harm to others, although whether such an interpretation is intended is difficult to tell. Consider an example Flew offers of a child sent for a spell to an old-fashioned school which is far less agreeable than a modern prison. According to Flew, the child might be sent to the school for the educational value and not as a punishment. Also, the child might be sent to the school for his disobedience at home, as a punishment for an offense. Both of these situations Flew envisions. The child also might be sent to the school because of an apprehension that he would commit an offense if left at home, a situation which Flew does not envision. As a matter of fact, this latter act could be called "punishing," because of something which it was felt would inevitably occur. In the same way the habitual criminal is "punished" for what is felt to be his inevitable criminal tendency. There exists no verbal distinction between the offenses of causing others harm and the offenses of intending to cause others harm. The latter one is more difficult to detect. Flew specifies that for an inflicted hardship to be an act of punishment, in a sense of the word in which there is interest in the moral justification, the act "must (at least be supposed to) be for an offense." As was said, Flew illustrates his point with the example that, "A term in an old-fashioned public school, though doubtless far less agreeable than a spell in
a modern prison, can not be called a punishment, unless it was for an offense (unless perhaps the victim was dispatched there for disobedience at home)."14 S. I. Benn says that for a hardship to be an act of punishment it must be inflicted "because of an offense committed." J. D. Mabbott and H. L. A. Hart say that the inflicted hardship should simply be "for an offense." K. Baier says that the hardship must be inflicted because one is "found guilty" of an offense. K. G. Armstrong, as has been said, reports finding in the literature three different "theories" of the definition of punishment, which correspond to three different approaches to the justification of punishment. According to these three theories, an act of punishment could be either a hardship inflicted "for a crime committed," or "for a crime believed to have been committed," or "for the tendency to want to commit crimes."15

Flew's usage of the word "supposed" in "(at least supposed to) be for an offense" is ambiguous concerning whether "supposed" applies to offenses or to the motive for inflicting the hardship. A hardship "supposedly inflicted" for an offense but not really inflicted for an offense covers, say, acts of sadism disguised under the ruse of an act of punishment, disguised, say, even to the agent of the act himself. As has been said, there is no interest in considering the moral justification of hardships inflicted
under the disguise of being "because of an offense." On the other hand, Flew is quite right that a hardship inflicted by an appropriate authority for a "supposed offense" is a punishment and nothing else.

S. I. Benn is unrealistic in specifying that only hardships inflicted because of an "offense committed" can be acts of punishment, since human judgment is known to be quite fallible and no one is expected to wait for absolute certainty before acting. Moreover, a man who is punished by mistake, when no offense is committed, is still punished, even if undeservedly and unjustly.

K. Baier, nearer to the truth than Benn, specifies that a hardship is a punishment if it is inflicted because of a "belief" in "wrong-doing" or because one is "found guilty." Thus Baier calls hardships "punishments" even if they are inflicted because of an erroneous belief that an offense occurred. (Mabbott and Hart would do well to modify their terminology of "for an offense" to "for a supposed offense.")

Determining which of Armstrong's three theories is correct should be made by answering the question of what people commonly call "hardships inflicted for a crime committed," and "hardships inflicted for a crime believed to have been committed," and "hardships inflicted for the tendency to want to commit crimes." If, as seems
to be the case, hardships inflicted "for a crime committed" and "for a crime believed to have been committed" and "for the tendency to want to commit crimes" would all most appropriately be called acts of "punishment," then that issue is settled.

The third and last criterion of a punitive act is that the act be a hardship inflicted by "an appropriate authority." This last criterion is necessary because there is a more appropriate word, "revenge," for hardships inflicted because of offenses by others than an appropriate authority. An act of revenge could be referred to as a "punishment," but it is less misleading to recognize revenge as a specific alternative to a punitive act. My decision that it is more appropriate to call revenge an alternative to punishment than a form of punishment is based upon considerations of the common usage of English and the desire not to mislead.

In general, an "appropriate authority" for administering punishment is an individual or set of individuals with the desire and the power to inflict hardships because of acts held to be offenses. The word "appropriate" is used not with the intent of implying "right or proper" in a moral sense. It is used to indicate that the authority being referred to is the previously accepted authority relevant to a given set of people and to a given
type of offense; authorities are not authorities in general but only with respect to given types of offenses and given groups of people. For instance, parents are generally thought to be appropriate authorities for their children, teachers and administrators for their students, umpires and referees for players in games. The appropriate authority and the victim may be one and the same person, as in the case of self-punishment. In this case the law, rule, or more violated is often a personal standard. In our own legal system the appropriate authority is a complex judicial and penal system. A previously accepted authority must have the power and the will to inflict the punishment and must be generally considered to be the proper person to inflict it. Hardships inflicted by self-appointed authorities on busybodies is revenge.

An individual or a group may be explicitly invested with power by the consent of certain people involved. Such explicit investment of power by the people will in all likelihood be limited and tightly regulated. This is the case with most governments, most organizations, umpires, teachers, and the United Nations. Parents, however, receive their authority more or less by custom, although it may be limited by society. Tyrants seize and impose their authority without the consent of their subjects. A tyrant is generally albeit regretfully accepted as an authority.
Occasionally, some very loose organizations such as peer groups or even mobs can receive their powers and acceptance not by explicit investment but by the tacit consent of the people.

Again, there is a diversity of opinion in the literature as to what constitutes an appropriate authority. Flew requires that for an act to be an act of punishment the hardship must be imposed "by virtue of some special authority conferred through or by the institution against the laws or rules of which the offense has been committed." Flew includes "a parent, a Dean of a College, a court of law, even perhaps an umpire or referee," in his inventory of authorities. S. I. Benn requires that for an act to be an act of punishment the hardship must be imposed by "an agent authorized by the system of rules against which the offense has been committed." H. L. A. Hart requires that for an act to be an act of punishment in the "standard" and "central" sense of the word the hardship must be "imposed and administered by an authority constituted by a legal system against which the offense is committed." Still one must not ignore the issue of the moral justification of acts of punishment in the "substandard" and "noncentral" senses of the word like "punishments for breaches of legal and nonlegal orders imposed and administered otherwise than by officials (decentralized
sanctions)." K. G. Armstrong requires that for an act to be an act of punishment the hardship must be inflicted by "an appropriate authority."

Most of the cited authors specify that the authority in question is to be understood to be an authority with respect to the specific offense in question. This is the purpose of the use of the word "appropriate." Most authors assume that the power is explicitly conferred, as in legal cases or games, or that its existence is taken for granted, as that of parents. Flew states that the power is conferred through or by an "institution," but this only raises the question of how broadly "institution" is to be interpreted. For instance, what is to be taken as the "institution" conferring power in acts of self-punishment, or in punishment by an absolute tyrant, or in punishment by organized peer groups, or in punishment by parents? The conferring of power by an institution is not the best choice of words. In most cases the power conferred upon an authority to inflict hardships is only as explicit as are the rules of conduct which are violated. In the case of offenses against tacit rules of behavior, the authority, if one exists, must be tacitly authorized.

Flew and Baier both give examples of what should not count as hardships inflicted by authorities, but rather
as unilateral actions of revenge. Flew believes it proper
to exclude self-appointed busybodies from consideration
as authorities, and he notes that direct action by an
aggrieved person with no pretension to special authority is
not properly called punishment but revenge. K. Baier ex-
presses the view that a lynching mob does not constitute an
authority. Flew is correct that self-appointed busybodies,
regardless of their powers, are not generally accepted
authorities, by virtue of their being self-appointed. Lynch
mobs, however, can be a generally accepted means of ad-
ministering punishment in a society, and in certain
societies their actions could appropriately be called
punishment.

These criteria taken together—the infliction of an
intentional and essential hardship by an appropriate
authority upon a person because of an offense or the
possibility of an offense against some laws, rules, or
mores—are necessary and also sufficient to classify an act
as punitive. What is excluded from the list of criteria
for punitive acts is a feature often required by others.
That feature is the requirement that the hardship should
be inflicted upon the offender or the supposed offender.
Flew states that for an act to be an act of punishment, it
must (at least supposed to) be the act of inflicting
hardship on the offender, and Flew cites the
Concise Oxford Dictionary which defines "punish" as "cause (offender) to suffer for an offense." Flew continues that though it would be pedantic to insist in single cases that people (logically) can not be punished for what they have not done; still a system of inflicting unpleasantness on scapegoats — even if they are pretended to be offenders — could scarcely be called a system of punishment at all. Or rather if the word 'punishment' is used in this way, as it constantly is, especially by anthropologists and psychologists (footnoted with a relevant quote by J. C. Flugel in Population, Psychology and Peace talking about vicarious punishment), we and they should be alert to the fact that it is then used in a metaphorical, secondary or nonstandard sense . . . a likely source of trouble and confusion.20

J. D. Mabbott agrees with Flew that "when it is not an offender but an innocent man who is punished, and this is done systematically, punishment is used in a secondary and metaphorical sense."21 (For Flew and Mabbott there is no interest in the moral justification of acts of punishment when punishment is used in a secondary and metaphorical sense.) S. I. Benn also requires an act of punishment to be "inflicted on an offender because of an offense he has committed."22 K. Baier holds that for an act to be an act of punishment the hardship must be inflicted upon one "found guilty," and that there can be (logically) neither systems nor single cases of punishment of those not "found
guilty." Baier holds that "'punishment' is the name of a method or system of inflicting hardship, the aim of which is to hurt all and only those who are guilty of an offense. . . . Inflicting hardship upon a person who has been found 'not guilty' (logically) can not be punishing." K. G. Armstrong sees that an act can be an act of punishment only if it is inflicted "upon a person because he is guilty," or because others "believe him to have committed" a crime, or "upon a person to reduce his tendency to want to commit crimes." H. L. A. Hart finds the central or standard case of punishment to be a hardship inflicted "upon an actual or supposed offender," but Hart also sees the necessity of morally justifying nonstandard acts of punishment such as "vicarious or collective punishment of some member of a social group for actions done by others without the former's authorization, encouragement, control or permission," and punishment of "a person who is neither in fact nor supposed to be an offender."26

It can be granted that most acts of punishment are inflicted upon the offender, or at least the supposed offender. It is not beyond the realm of possibility, however, and it certainly has occurred historically, that acts called "punishment" are inflicted upon possible offenders in order to insure punishing the real offenders. Nor are such acts as punishing a pretended offender, the
innocent family or associates of the offender, or out-and-out scapegoats impossible or unknown. All of this may be done systematically. For instance, it is not at all unusual for a teacher to punish a whole class because some unknown few, without the authority or permission or even the knowledge of the others, performed some mischief while the teacher was out of the room. And, as has been touched upon previously, it can be argued that it is beneficial to go ahead and do so.

There is no real basis for Flew's claim that the constant (and documented) use of the word "punishment" to refer to hardships inflicted upon people other than offenders by scientists, anthropologists, and psychiatrists, not to mention common folk, is likely to be a source of "trouble and confusion." Flew himself helps to document the case against him when he states how, as a matter of fact, anthropologists and psychiatrists do constantly use the word punishment to apply to cases of hardships inflicted upon persons other than offenders. There is no apparent trouble and confusion caused by constantly using the most appropriate word in a given situation. It can be granted that "systems of inflicting unpleasantness on scapegoats" could be things other than systems of punishment but not just because the victim is a scapegoat. "Systems of inflicting intentional and essential" hardships by an
"appropriate authority" upon a scapegoat "because of an offense or the possibility of an offense against some law, rule, or more" are systems of punishment, although probably immoral systems. In like manner, a system of vicarious punishment is a system of vicarious "punishment" and nothing else, though one might wonder how anyone could possibly justify such a system to themselves or find it useful. A system which punishes a traitor's family is a system of "punishment." A system of punishing all possible offenders is a system of "punishment." Little is resolved by the appeal to the authority of dictionaries. Although the Oxford New English Dictionary does define "punish" as "to cause (an offender) to suffer for an offense,"27 one should note that "offender" is put in parentheses, as if it were not really necessary, and Webster's Complete Dictionary28 as well as Funk and Wagnalls Standard Dictionary29 omit any reference to the offender as being the victim. Flew's restricting of punishment whose moral justification is important and interesting to hardships inflicted only upon supposed offenders is unnecessarily limiting.

Factually, Baier, like Flew, is mistaken. There can be, are, have been, and probably will be, single cases and systems of inflicting intentional and essential hardships by the appropriate authority upon those other
than a supposed offender, which cases and systems are properly called cases of and systems of "punishment." What else? There can be and are, (although whether there should be is another question) many systems of punishment whose aim is not to hurt "all and only those who are found guilty of an offense," as Baier says in one place. Many systems of punishment regularly pardon some (first offenders) who are found guilty of an offense. And some systems of punishment admittedly are very likely to punish some who are not guilty of an offense, such as any system that sanctions the punishing of a group for the offenses of some members of the group, even when it is conceded that the nonguilty members of the group could have no knowledge of who the guilty members are.

With respect to Armstrong's comments, it bears repeating that Armstrong's technique of offering a threefold definition of punishment which coincides with how one chooses to justify punishment is not proper. Armstrong would do well to say that punishment could take place upon a person who is guilty of an offense or who is believed to be guilty of an offense or who is believed to have a tendency to commit offenses, and he would still leave out punishing the scapegoat or the pretended offender.

Hart's including in the cases of punishment whose moral justification is important and interesting the
punishment imposed upon actual or supposed offenders
(imposed vicariously or collectively, or imposed upon a
scapegoat), is correct. Hart, however, fails to mention
the case of punishing possible offenders.

To summarize the foregoing discussions, the three
criteria which I claim are definitive of an act of punish-
ment whose moral justification is important and interest-
ing in a consideration of the justification of punishment, are

1) that the act be an infliction of an
   intentional and essential hardship
   by a person upon a person;

2) that the hardship be inflicted because
   of an offense or the possibility of
   an offense against some laws, rules,
   or mores; and

3) that the hardship be inflicted by an
   appropriate authority.

These are, it will be recalled, the criteria of what I am
calling 'punitive acts.' Each qualification within the
above three criteria has been discussed and related to the
criteria and qualifications suggested by other authors. The
sufficiency of the three criteria together have been con-
sidered. My "punitive acts" include most acts thought to
be interesting by any other author, without being so broad
as to include within it what should properly be considered
as alternatives to punishment. The class of punitive acts is sufficiently broad so as not to exclude any interesting acts of punishment whose moral justification might come up for consideration. Appealing to the notion of punitive acts has the advantage of not stacking the deck of the discussion before it begins.

As I said previously, it is necessary to have some idea of the acts of punishment of interest before commencing a consideration of their justification. I have now defined what I claim is the subset of interesting acts of punishment and have defended that definition. I will now consider the implications of adopting this definition.
FOOTNOTES


4 Ibid., p. 27.


6 Ibid., p. 29.


17 Benn, "Punishment," p. 29.


19 Ibid., p. 5.


22 Benn, "Punishment," p. 29.

23 Baier, "Is Punishment Retributive?", p. 25.

24 Ibid., p. 27.


26 Hart, "Prolegomenon to the Principles of Punishment," pp. 4-5.

27 Oxford New English Dictionary

28 Webster's Complete Dictionary

29 Funk and Wagnall's Standard Dictionary

30 Baier, "Is Punishment Retributive?", p. 27.
CHAPTER THREE

PROBLEMS OF DEFINITION

Having proposed and defended a view of the proper scope of acts best called "punishment" whose moral justification is important and interesting, I now want to consider the implications of this view and of other definitions of "punishment."

In "Prolegomenon to the Principles of Punishment" the first question which Hart says needs to be "distinguished" and "confronted separately" in a consideration of the justification of punishment is the question of "definition."\(^1\) The first "problem" for a "theory of punishment," according to Armstrong in "The Retributivist Hits Back," is "the problem of the meaning of the word 'punishment' and is a definitional or logical issue."\(^2\) Hart and Armstrong are not just pointing out the commonplace that having clear definitions of terms and distinguishing between the logical and the ethical issues is always important, independent of the subject matter. They are attempting to draw attention to some claims of special importance that may turn on the definition of "punishment" and the logical points consequent upon that.
definition.

Quinton, in 1954, thought that he detected a logical/ethical confusion which would be the key to reconciling some apparently conflicting views about the justification of punishment. The key role of this logical/ethical confusion in talk about the justification of punishment was later recognized by Anthony Flew, Kurt Baier, and others. A crux in discussions of the justification of punishment has often been the question of the punishment of the innocent. "Retributivists" with respect to punishment have often argued that their opponents, the "utilitarians," were committed to permitting the punishment of the innocent, and the retributivists hold that the punishment of the innocent is morally wrong. Quinton, as a member of the "utilitarian" camp opposing the "retributivists," proposed that the peculiar persuasive force of the statement that "only the guilty are to be punished" was due to the fact that this statement followed from the definition of punishment and was not true by virtue of any ethical arguments. It appeared to Quinton that some "retributivists," in arguing for a particular justification of punishment, were really basing their arguments upon a logical point about the use of the word "punishment," and not upon ethical claims, although they did not appreciate that fact. In Quinton's words:
The necessity of not punishing the innocent is not moral but logical. It is not, as some retributivists think, that we may not punish the innocent and ought only to punish the guilty, but that we cannot punish the innocent and must only punish the guilty. Of course, the suffering or harm in which punishment consists can be and is inflicted upon innocent people, but this is not punishment, it is judicial error or terrorism, or, in Bradley's characteristically repellent phrase, 'social surgery.' The infliction of suffering on a person is only properly described as punishment if that person is guilty. The retributivist's thesis, therefore, is not a moral doctrine, but an account of the meaning of the word 'punishment.'

(Quinton qualifies his position by asserting that at least the use of the verb "punish" in the first person singular requires that the one who is punishing must believe, or pretend to believe, possibly, that the one he is punishing is guilty.) In general, the purpose of Quinton's remarks is to support the claim that "the peculiar persuasive force" of the assertion that "only the guilty are to be punished" is attributable to the fact that the assertion makes a correct logical point about the meaning of the word "punishment."

Six months later, in 1954, Anthony Flew agreed with Quinton's definition of punishment and in turn argued that some persuasive arguments by J. D. Mabbot and F. H. Bradley owed their persuasiveness to the fact that
they were not ethical arguments at all but rather
"necessary truths drawn from and elucidating the meaning
of 'punishment.'" According to Flew

(Mabbott) formulated his problem as
'Under what circumstances is the
punishment of some particular person
justified, and why?' and gave the
answer 'The only justification for
punishing any man is that he has
broken a law.' . . . It does seem as
if his answer to his main question is
intended to depend upon the very
meaning of the word 'punishment.'
Yet insofar as this is so he is not
really offering a justification,
based upon retributive ethical
claims; but a necessary truth drawn
from, and elucidating the meaning of,
'punishment.'

It is interesting to compare here
the position of F. H. Bradley:
'Punishment is punishment only where
it is deserved. We pay the penalty
because we owe it and for no other
reason. If punishment is inflicted
for any other reason whatever then be-
cause it is merited by a wrong, it is
a gross immorality, a crying injustice,
an abominable crime.' (Ethical Studies,
pp. 26-27) . . . Both are confusing
necessary truths with ethical claims:
if Bradley's first and second sentences
express necessary truths then the
ethical claims made in the third are
out of place; for if this is so, then
however gross the immorality, crying
the injustice and abominable the crime
it cannot be punishment at all if it
is not both deserved and paid because
owed.
Kurt Baier, in 1955, joined Quinton and Flew:

If after the jury has found the accused 'not guilty,' the judge continues as if the jury had found him guilty, then his 'I sentence you to three years' hard labor' is not the pronouncement of the sentence, but mere words. If, for some reason, the administration acts on these words, then what they do to the accused is not the infliction of punishment, but something for which (since it never happens) we do not even have a word . . . . Inflicting hardship on a person who has been found 'not guilty' (logically) cannot be punishing. This is a conceptual point about punishment. . . . At the same time, someone may be punished, i.e., have hardship inflicted upon him as punishment, although he was guilty of no offense, since he may have been found guilty without being guilty. For all judges and jurymen are fallible and some are corrupt."

Quinton, Flew, and Baier all claim to have uncovered the fact that certain logical truths masquerade as important, persuasive, ethical claims. According to Quinton's, Flew's, and Baier's definition of punishment, the claims, "Only the guilty are to be punished," "The only justification for punishing any man is that he has broken the law," "Punishment is punishment only where deserved," and "We pay the penalty because we owe it and for no other reason," are all true by definition. They are logical points which merely appear to be ethical claims. With the recognition of this masquerade certain apparently conflicting ethical claims about the justification
of punishment can be reconciled as non-conflicting ethical and logical claims.

Quinton, Flew, and Baier all agree that "only the guilty are to be punished" has a "peculiar persuasive force." For the purpose of understanding the ramifications of the definition of punitive acts, grant that Quinton's, Flew's, and Baier's definition of punishment is acceptable. Grant that the fact that one can not logically punish the innocent does not show that "the peculiar persuasive force" of the assertion that "only the guilty are to be punished" is attributable solely to that logical point. The complete move to clearly expose whether a claim is a logical point and not a moral doctrine is to restate the claim in other words (which can always be done) as an actual ethical claim and see whether there is an immediate loss of "persuasive force."

The claims referred to by Quinton, Flew, and Baier could be restated as, "Only the guilty are to be inflicted with hardships by the appropriate authority because of an offense," "The only justification for inflicting any man with a hardship because of an offense is that he has broken the law," and "Inflicting hardships because of offenses is acceptable only where it is deserved. We accept an inflicted hardship because we owe it and for no other reason." These claims should be recognized as genuine
ethical claims and not as logical claims. Quinton, Flew, and Baier could never call it illogical to assert the contrary of any of these restated claims. For instance, the contrary of the claim discussed by Quinton, when reformulated, would be, "Sometimes, persons other than guilty ones, should be inflicted with a hardship because of an offense."

It would be difficult to argue that the claim, "Only the guilty are to be inflicted with hardships by the appropriate authority because of offenses" is void of persuasive force. If, as appears evident, the persuasive force of these restated claims seem to remain intact, then Quinton, Flew, and Baier have not exposed the claim to be a logical point and not a moral doctrine. Quinton, Flew, and Baier, by restating these claims, have merely removed a double meaning from these claims which is liable to lead to confusions. This latter is, however, a valuable contribution.

It is wrong to claim that the persuasive force of the statement, "Only the guilty are to be inflicted with hardships by the appropriate authority because of offenses," need not be considered in a consideration of the justification of punishment because "inflicting hardships upon the nonguilty" could never be called "punishment." This is to make what Hart calls the "definition stop." It is relevant
to the discussion to point out the fact, when it is a fact, that a line of reasoning offered for justifying punishment would also justify some other acts widely recognized as immoral. If a line of reasoning clearly justifies some acts widely accepted as immoral then that line of reasoning is suspect and anything justified merely by that line of reasoning should not be readily accepted.

Thus, the implications of the decision about what is to be taken as punitive acts have been shown not to have the significance that Quinton, Flew, and Baier hope for. Such a decision about definition will certainly affect what claims about punitive acts are logically true, but the persuasive force of ethical claims about the rightness and wrongness of certain acts, will remain to be evaluated separately. Even granting Quinton, Flew, and Baier their particular definition of punishment, no ethical issues have been avoided or solved, and no viewpoints have been reconciled.

This discussion began by granting Quinton, Flew, and Baier their definitions of punishment for the purpose of the discussion. However, according to the breadth of the common usage of the word "punishment," as recognized in the preceding chapter and as recognized by Hart and Armstrong, the original claims of the retributivists, Mabbott and Bradley, are not true by "definition." Quinton,
Flew, and Baier are defining "punishment" far too narrowly to suit the common usage of the word. Quinton, Flew, and Baier may, if they wish, restrict their own attention to certain sorts of acts of punishment. But there is no reason to insist that others do so. There is only one logical point that can correctly be called true by virtue of the definition of punishment: "Only hardships may be inflicted as punishment." This is logically true because inflicting pleasure for whatever reason would never be called "punishing."

To summarize, Quinton, Flew, and Baier have not really effected any reconciliation between apparently conflicting viewpoints about the justification of punishment. And there is no reason to suspect "some retributivists" or Mabbott or Bradley of desiring to make logical instead of ethical points when they insist that only the guilty are to be punished. If "some retributivists" or Mabbott or Bradley should choose to agree with Quinton's, Flew's, and Baier's narrow definition of punishment, then their claim "only the guilty are to be punished" should be restated to be sensible, but as restated the claim need lose none of its persuasive force.

Regardless of the fact that Quinton, Flew, and Baier did not, after all, effect, by distinguishing between logical and ethical claims, any reconciliation between
apparently conflicting views about how punishment is justified; and regardless of the fact that they did not uncover logical truths masquerading as ethical claims; and regardless of the fact that their particular definition of punishment is not the definition of punishment that coincides with common usage; Quinton, Flew, and Baier have at least illustrated by example the importance of establishing a clear definition of "punishment."
FOOTNOTES


CHAPTER FOUR

SORTING OUT OF ISSUES

S. I. Benn in "An Approach to the Problems of Punishment" offers the following distinctions as essential to make when embarking upon a consideration of the justification of punishment.

I make three key distinctions:

(1) Between justifying punishment in general (i.e., as an institution) and justifying particular penal decisions or applications of it;

(2) Between what is implied in postulating guilt as a necessary, and as a sufficient, condition for punishment;

(3) Between postulating guilt in law and guilt in morals, as a condition for punishment;

I distinguish, further, four philosophical questions, to which a complete and coherent approach to punishment would have to provide answers:

(1) Punishment is general, i.e., as an institution

(2) Any particular operation of the institution

(3) The degrees of punishment attached to different classes of offenses?

(4) The particular penalty awarded to a given offender?
The second and third distinctions listed by Benn pose important questions to be answered about punishment. We need to ask when punishment should be applied (only in the event of guilt in law, or only in the event of guilt in morals, or only in the event of both?) and whether punishment should always be inflicted in one of these situations. Recognition of these distinctions is important. To blur these distinctions would be confusing. No conflicting viewpoints are reconciled by recognizing these distinctions, but then none are claimed to be by Benn.

This is not true of Benn's first distinction, the distinction between "justifying punishment in general, i.e., as an institution" and "justifying particular penal decisions as applications of it." This distinction determines the difference between Benn's first and second, and third and fourth "philosophical questions" to which, as Benn says, "a complete and coherent approach to punishment would have to provide answers." The second and fourth questions represent a particularization of the first and third questions, respectively. For example, the question of the justification of "any particular operation of the institution" of punishment represents a particularization of the question of the justification of "punishment in general, i.e., as an institution"; the
question of the justification of "the particular penalty awarded to a given offender" represents a particularization of the question of the justification of "the degree of punishment attached to different classes of offenses."

The importance of the distinction between the justification of particular cases and the justification of general rules can always be granted, independently of the subject matter. Benn, however, is attempting to point out some special importance which he feels is possessed by this distinction when it concerns the justification of punishment. He also wants to point out some special role this first key distinction might have in reconciling conflicting viewpoints about punishment. Benn is deriving this special importance from what he feels was a correct and important point made by J. D. Mabbott in 1939. Mabbott thought that some basic disagreements about how punishment is justified could be resolved by noting the distinction between particular cases and general rules. The basic disagreement which Mabbott, and Benn with him, thought could be resolved by noting this distinction was the disagreement between those who wanted to justify punishment solely by "forward-looking" considerations, and those who wanted to justify punishment solely by "backward-looking" considerations. Forward-looking considerations are considerations of the consequences of punishment,
such as reform, education of the criminal, prevention of crime, or maximization of happiness. Forward-looking considerations are supposed to be used by utilitarians to justify punishment. Backward-looking considerations are considerations about a past offence and how and why it took place. Backward-looking considerations are supposed to be used by retributivists to justify punishment.

In his 1955 article, which is a summary of and a reply to Flew's 1954 analysis of Mabbott's 1939 article, Mabbott states his position:

Flew commends my article for drawing a distinction between systems and particular cases within systems (p. 302). This indeed is the distinction on which my whole theory turns. It is this vital distinction between saying:

(a) this action will have better results than any possible alternative action; and

(b) this action is the following of a rule, which, if it were generally adopted, would have better results than any alternative rule, or system, would have.

In its application of punishment, it is the distinction between saying the punishment of a particular person on a particular occasion is right if that particular punishment will reform the criminal and/or deter others; and saying this punishment is right because it is the application of a rule whose general adoption would be in the general interest. Consequences are the primary concern of legislators, not of
judges or juries. The question whether to make a law against murder with a penalty attached is a question of consequences - a utilitarian question; the question whether an individual criminal should be punished is not.²

Mabbott's point in 1939 and again in 1955 was that a proper justification for a single case of punishment is not the same sort of thing as a proper justification for a general system of punishment. Once societies have adopted general rules to govern their actions in various situations it is inappropriate to seek to rejustify each application of the general rule. The only justification needed for a particular act in this situation is to show that the act is dictated by the general rules. The decision to be a society ruled by "law" is a decision made by the society's "legislators" and is justified by considerations of desired consequences, or forward-looking considerations. The subsequent decision to punish any man is a decision made by the "administrators" within society and to quote Mabbott's famous phrase, "the only justification for punishing any man is that he has broken a law," which is a backward-looking consideration.

Several things can be said about the value of Mabbott's comments. In the first place, Mabbott is assuming that with respect to punishment it is better to follow a "rule, which if adopted would have better results
than any alternative rule," than it is to seek to justify from "scratch," so to speak, each and every possible act of punishment. This is not the place to get into the relative evaluation of the policy of following general rules versus the policy of acting "spontaneously." It can be assumed that in the case of punishment most people do in fact have the policy of following general rules.

In the second place, Mabbott ignores in the above quote the fact that particular cases will arise for which genuine exceptional status can be claimed with respect to the general rule. Such exceptional cases would require one to re-examine the merits of following the specific general rule to which the exceptional case is an exception. Re-examining the merits of following a general rule involves forward-looking consideration. Later in his 1955 article Mabbott admits that sometimes exceptions should be made to general rules. Thus, contrary to what Mabbott implies, it is not certain that those who follow general rules must use only backward-looking considerations in the justification of particular cases of punishment.

Thirdly, it must be pointed out that the general rule appealed to by Mabbott to support the claim, "The only justification for punishing any man is that he has broken the law," is not adequate for the job. Mabbott apparently assumes as analytic the derivation of the justification
for punishing a law-breaker from the status of being a society ruled by law. Mabbott here is on the right track but is carrying the point too far. We have seen that Flew thought that the force of the statement that, "The only justification for punishing any man is that he has broken the law," depended upon a conceptual point about "punishment," that by definition of punishment only the guilty could be punished. We saw that Flew was mistaken about the breadth of the common usage of the word "punishment." However, Mabbott, as a matter of fact, is basing the statement that "the only justification for punishing any man is that he has broken the law," upon a conceptual point, not a conceptual point about "punishment" but a conceptual point about "law." It is true that law, by definition, somehow involves punishment. It is not true that law by definition entails the general rule that all those who break laws ought to be punished. The only entailment between laws and punishment is that a society which disavows any intent to punish at all cannot have laws. Instead of laws the society may have voluntary arbitration, advice, suggestions, guidelines, standards or ideals. A society which adopts rules of law proclaims the intent, somehow, to enforce the rules, and enforcement will, somehow, involve punishment, at least as a potential. Mabbott is making a correct conceptual point about law only when he restricts himself to
saying

Should there be laws. . . . The choice which is the essential prius of punishment is the choice that there should be law. . . . Other methods may be considered.

Punishment is a corollary of law-breaking by a member of society whose law is broken. 3

The choice that there should be law may be the essential prius of punishment but it does not entail the punishment of all law-breakers. More important, however, than Mabbott's assumption that all will follow general rules about punishment, than Mabbott's neglect of the exceptional status to the general rule which may always be claimed, and than Mabbott's assumption that the choice to have laws entails the general rule of punishing all law-breakers, is the fact that Mabbott is trivializing the comments of most of those who want to offer "backward-looking" considerations for the justification of punishment. Mabbott is trivializing those comments by applying them to the wrong issue. The "backward-looking" considerations usually offered by philosophers in justification of punishment are not offered in most cases as justifications of particular instances of punishment, which justifications are based on morally acceptable general rules of punishment. In most cases they are offered as the justification for the general rules of
punishment themselves. Those who consider the justification of punishment philosophically are usually not considering the detailed problems of the application of general rules to specific cases. Serious philosophical considerations of the justification of punishment are carried out on what Mabbott termed the "legislative" level. Interestingly enough, Mabbott (a self-proclaimed "retributivist") does not even recognize the application of so-called "backward-looking" considerations upon the "legislative" level.

To relate this point to Benn's four philosophical questions, "to which a complete and coherent approach to punishment would have to provide answers," there is considerably less philosophical interest in knowing what formal criteria must be satisfied in justifying "particular operations of" the institution of punishment than there is in knowing what formal criteria must be satisfied in justifying "punishment in general." In like manner, there is considerably less philosophical interest in knowing what formal criteria must be satisfied in justifying the degrees of punishment to be given to different offenses. So, Benn could reduce his list of important philosophical questions from four to two. If, like Mabbott, Benn does not recognize the application of backward-looking considerations to these two questions, then Benn is in effect ruling against backward-looking considerations altogether for justifying
punishment. It is inappropriate and incorrect to relegate the backward-looking considerations offered by retributivists to the sole position of answering the question whether a particular case of punishment fits the adopted general rules. Harmony and reconciliation between viewpoints is not reached by such misunderstanding.

To be said in Mabbott's favor is this: he may be making explicit all that some philosophers have in mind when they speak of "backward-looking" considerations. It may be that certain general rules for punishment have been accepted as undoubted for so long that they have begun to appear obviously true and to appear to need no further justification. If one thinks this way, then to show how a particular case fits a general rule for punishment is to completely justify punishment. Some who say that, "The only justification for punishing any man is that he has broken the law," are saying no more than that. Contrary to Mabbott's and Benn's position, recognition of the distinction between justifying particular cases and justifying general rules is important for the very purpose of emphasizing that it is the general rules for punishment themselves whose justification is under consideration. No reconciliation between apparently conflicting views about how punishment is justified is effected by emphasizing this distinction. Assigning the comments of the "retributivist's" viewpoint
to the relatively less important issue of justifying particular cases from general rules, and allowing the whole field of the justification of the general rules to the utilitarian viewpoint is misinterpreting the retributivist's comments.

Making certain distinctions between questions concerning the justification of punishment has been recommended by more authors than just S. I. Benn. H. Morris, H. L. A. Hart, and K. G. Armstrong also urge their distinctions upon anyone studying the subject of the justification of punishment. They regard their distinctions as particularly important to establish at the outset of any "morally acceptable account" of the justification of punishment. The recognition of these distinctions is claimed to clarify the problem of the justification of punishment in two ways: 1) by preventing confusions, and 2) by offering a fruitful approach to the problem. Perhaps most importantly, it is commonly thought that via one or the other of the particular distinctions between questions noted above a reconciliation can be effected between apparently conflicting views about how punishment is justified.

In order to begin considering the distinctions in question, I will simply list them. I begin with the distinctions made by Herbert Morris in his chapter "Punishment":
Three questions in particular must be kept separate, for they may be answered in different ways. First, ought one to punish people at all? Second, whom should we punish? Third, what is the proper measure of punishment?4

Next, there are the distinctions made by H. L. A. Hart in "Prolegomenon to the Principles of Punishment." Hart distinguishes between the "questions" which are "needed" and the "questions" which are "not needed."

What is most needed is not the simple admission that instead of a single value or aim a plurality of different values and aims should be given as a conjunctive answer to some single question concerning the justification of punishment. What is needed is the realization that different principles (each of which may in a sense be called a "justification") are relevant at different points in any morally acceptable account of punishment. What we should look for are answers to a number of different questions such as: What justifies the general practice of punishment? To whom may punishment be applied? How severely may we punish? . . . Failure to distinguish separate questions or attempting to answer them all by reference to a single principle ends in confusion.5

In another place Hart says that "in the case of punishment the beginning of wisdom (though by no means its end) is to distinguish . . . and confront separately . . . questions of Definition, General Justifying Aim, and Distribution with the last subdivided into questions of Title and Amount."6 Elsewhere Hart speaks of the need to develop the "sense of the
complexity of punishment" and to avoid "some persistent
drive towards over-simplification of multiple issues which
require separate consideration." In "The Retributivist
Hits Back," K. G. Armstrong distinguishes between separate
"problems" for a "theory of punishment," problems the
separation of which is often unacknowledged:

Usually a theory ((of punishment)) sets
out to resolve one or more of three main
problems, although all too often the
reader is not told which of them is
being tackled. Indeed, one is often
forced to the conclusion that the writers
are not clear on the point themselves,
which has led to a great deal of con-
fusion and many false oppositions between
theories which are not simply different
but which are attempting to solve
different problems.

The first problem is over the meaning
of the word 'punishment,' and is a
definitional or logical issue. . . .

The second problem that a theory of
punishment may be trying to solve is
'What, if anything, is the moral justifi-
cation of punishment as such?' . . .

The third problem is this: which
method or system of determining penalties
for crimes is best? A theory of
punishment dealing with this problem
might better be called a theory of punish-
ments, or a theory of penalties. . . .

Of these three problems then, one is
definitional, one is concerned with ethics,
and one is largely practical, but with
important moral overtones. The last two
are commonly dealt with as one, but the
distinction is important.
If I say that punishment has a moral justification, I do not thereby resign my right to apply moral criticism to any system of fixing penalties. I might, for instance, hold that the practice of punishing is morally justifiable, yet at the same time say that the Nazi system of partly determining penalties according to the race of the criminal was immoral.\textsuperscript{9}

This list of recommended distinct questions is not complete without a reiteration of Benn's "four philosophical questions, to which a complete and coherent approach to punishment would have to provide answers":

What formal criteria must be satisfied in justifying:

(1) Punishment in general, i.e., as an institution?

(2) Any particular operation of the institution?

(3) The degrees of punishment attached to different classes of offenses?

(4) The particular penalty awarded to a given offender?\textsuperscript{10}

The distinctions between questions recommended as essential by Morris, Hart, Armstrong, and Benn exhibit a striking similarity. In summary form, Morris presents three "questions":

(1) Ought we to punish people at all?
(2) Whom ought we to punish?

(3) What is the proper measure of punishment?

Hart presents three similar "questions":

(1) What justifies the general practice of punishment? (This question Hart assimilates to the issue of the General Justifying Aims of punishment.)

(2) To whom may punishment be applied? (This question Hart assimilates to the issue of the Distribution of punishment, with respect to Title.)

(3) How severely should we punish? (This question Hart assimilates to the issue of the Distribution of punishment, with respect to Amount.)

Armstrong presents two similar questions (Armstrong's first question having been that of definition).

(2) What, if anything, is the moral justification of punishment as such?

(3) Which method or system of determining penalties is best?

Benn presents two similar questions. (The value of Benn's second and fourth questions, being questions about particular cases falling within the general rules of his first and third questions, has already been discussed under the topic of Benn's first distinction between particular cases and
general rules.)

(1) What formal criteria must be satisfied in justifying punishment in general, i.e., as an institution?

(2) What formal criteria must be satisfied in justifying the degree of punishment attached to different classes of offenses?

Morris says that these questions must be kept "separate" because they may be answered in "different ways." Hart warns that his three questions may each be answerable by reference to different "principles." Hart warns that failure to see that different principles are relevant to different questions results in "confusion" and does not yield "a morally acceptable account" of punishment.

Armstrong claims that many writers are not clear about which question about the justification of punishment they are addressing, and that this results in "confusions" and "many false oppositions." Benn claims that his questions are the questions to be answered by a "complete and coherent approach to punishment." All of these claims must be evaluated.

In order to evaluate these claims it will be helpful to review and clarify what is involved in justifying punishment. Since moral charges are brought against acts of punishment, as has been said, the natural question
to ask is, "What practice of punishment, if any, is morally justified, and why?" By "justified" I mean more justified than any feasible alternative, punitive or non-punitive, including doing nothing. This question is really two questions, the question of "Which practice of punishment is justified?" and the question of "Why that practice of punishment is justified?" The first essential step in answering the "which" part of the question is to clarify what it is that one is attempting to justify, namely a "practice of punishment." To completely specify a practice of punishment, one must answer three (or four) questions: 1) When, under what conditions, should there be punishment? 2) Who should be punished? 3) How severe should the punishment be? (A fourth question could be added: Who should administer the punishment?) Insofar as the appropriate authority in various cases is a point of little contention in current discussions, it shall be assumed here that an unambiguous appropriate authority to administer punishment exists for every case.) To determine which practice of punishment, if any, is morally justified one must, as a second step, tackle the "why" problem. One must provide General Justifying Aims (to borrow a useful phrase from Hart) of the practice of punishment, along with the relative weights of those aims. The General Justifying Aims of a practice are the goods that the practice can secure. These
General Justifying Aims were earlier called "right-making characteristics." In addition to General Justifying Aims one must list Limiting Principles (to borrow another useful phrase from Hart) of the practice of punishment, along with the relative weights of those principles. The Limiting Principles of punishment address themselves to all of the other values and aims we hold for human life which might be transgressed by a practice of punishment. These Limiting Principles were earlier called "wrong-making characteristics." In knowing what are valid weighted General Justifying Aims and Limiting Principles for punishment one knows "why" a practice of punishment is justified. The third and last step in answering the question, "What practice of punishment, if any, is morally justified, and why?" is to show how some general practice of punishment, or of something else if not punishment, is the procedure that is best in line with these weighted General Justifying Aims and these weighted Limiting Principles. This last step was earlier called showing that a practice of punishment contains a balance of "right-making and wrong-making characteristics" which is preferable to the balance of right-making and wrong-making characteristics of the known feasible alternatives.

There is a difference between there being General Justifying Aims of punishment and there being a morally
justified practice of punishment. For there may exist valid General Justifying Aims of punishment while no morally justified practice of punishment exists. This situation can be due to the weight given to the Limiting Principles of punishment as well as due to the feasible non-punitive alternatives available. It is possible that the practice of punishment which best satisfies certain General Justifying Aims of punishment is not a morally justified practice of punishment. For instance, the punitive practice which best serves the aim of deterring crime might be to annihilate most of the population. No one would accept annihilating most of the population as an acceptable course of action for solving the problem of crime. It was earlier stated that morally justifying a practice involves more than showing that the practice supports some "good."

We are now in a position to evaluate the claims made for the questions distinguished by Morris, Hart, Armstrong, and Benn. An obvious similarity exists between the first questions listed by each author: "Ought we to punish people at all?" "What justifies the general practice of punishment?" "What, if anything, is the moral justification of punishment as such?" "What formal criteria must be satisfied in justifying punishment in general?"

One thing that these first questions have in common is that they suggest that one can determine whether, and
why, "punishing as such," or "punishing in general," or "punishing at all," is morally justified before determining whether some particular practice of punishment is justified. As a matter of fact, punishment does not stand or fall as an integrated whole. Punishment is not either all justified or all unjustified. Before determining whether and why any system of punishment is justified, it should be easy to conclude that there are some systems of punishment, real or imaginary, that are so horrible that they could never be justified under any circumstances. The question is never whether and why all practices of punishment are morally justified. Moreover, clear and strong moral arguments exist against any act of punishment. These arguments force a defense of punishment to be specific. Thus, the question can only be whether and why some practice of punishment is morally justified. Considering these facts, it is misleading to ask whether and why punishment "as such," or "in general" or "at all" is justified. All that can sensibly be asked is whether and why some particular practice of punishment is justified.

Answering the question of whether some particular practice of punishment is morally justified, presupposes having some definite ideas about which sorts of practices of punishment are morally justified. Thus, whether some particular practice of punishment is morally justified (or
whether "we ought to punish people at all") is not the first question one can answer in the course of answering the general question about the justification of punishment.

Hart in his article\(^1\) seems to equate his first question, "What justifies the general practice of punishment," with the question, "What are the General Justifying Aims of Punishment?" The "why" question, that is, the question of "what justifies" or "what is the moral justification of" or "what formal criteria must be satisfied in justifying" some practice of punishment, is a significant question. It forms half of the two-fold question, "Which practice of punishment, if any, is morally justified, and why?" This is the natural question to ask in the face of any moral charges against punishment. The answer to the question why any particular practice of punishment is morally justified should lie in the weighted General Justifying Aims for punishment and the weighted Limiting Principles for punishment. In equating "What justifies the general practice of punishment?" with "What are the General Justifying Aims of punishment?" however, Hart makes the overly simple move of suggesting that the justification for a practice turns on the list of goods which it might serve. Often in practice one does justify an activity simply by listing the goods it might serve, leaving it to the opposition to point out the evils that the practice might also bring
about. If one is attempting to determine from an unbiased point of view which practices of punishment are morally justified then the full justification for a practice should turn on the goods it secures as well as the evils it either prevents or minimizes.

The second, or second-and-third, questions listed above also bare striking similarities. "Whom ought we to punish?" and "To whom may punishment be applied?" are interchangeable. "What is the proper measure of punishment?" "How severely should we punish?" "Which method or system of determining penalties is best?" and "What formal criteria must be satisfied in justifying the degree of punishment attached to different classes of offenses?" are essentially interchangeable as well. All of these questions are directed toward determining "which" practice of punishment is morally justified. It is interesting that no one seems to ask, "When, under what conditions, should punishment be applied?" This question is also directed toward determining "which" practice of punishment is morally justified. The failure to ask this question might be attributable to the assumption that "when" is determined analytically from the definition of punishment, but this is an unwarranted assumption. The question when should punishment be applied asks which acts should be made, or taken as, offenses in less formalized systems. The three questions--When? To
whom? and How severely?--jointly ask the question, "Which practice of punishment is morally justified?" (Let us expect that an answer to the question By whom? is assumed.)

Now to consider the claims made by Mabbott, Hart, Armstrong, and Benn about the above questions. If Benn had extended his third question to cover not only the degree of punishment attached to different offenses, but also the person punished and the circumstances warranting that punishment, then I would agree with Benn's claim that he does list the questions to be answered in a complete and coherent account of punishment, namely the "which" and the "why" questions. If Armstrong's third problem were not merely which system of setting penalties is best, but also which system of punishment is best (i.e., the full "which" question) then I would also agree to some extent with Armstrong's claim. It is not just that some writers fail to distinguish between the question "why" a practice of punishment is justified and the question "which" practice of punishment is justified. It is also that they often miss the distinction between claims to know primarily "which" practice of punishment is the morally justified one and claims to know primarily "why" any practice of punishment is justified.

Since Morris does not elaborate upon his recommendation that the distinctions between his three
questions must be "kept separate" because they can be answered in "different ways," he must be presumed to be following Hart's line of thought. Hart claims that one must be careful to realize that different questions are answered by reference to different principles, and elaborates that claim. Hart's claim, even in its elaborated form, is unfounded and in fact wrong.

Hart's interest in distinguishing separate questions about the justification of punishment is not an analytic interest in distinguishing all of the important questions to be asked, as was Benn's interest. Hart's interest is motivated by a desire to reconcile some apparently conflicting justifications offered for punishment, the "retributivist" and the "utilitarian." It is in order to make this reconciliation that Hart distinguished between General Justifying Aims of punishment and Limiting Principles of punishment.

Hart reduces the retributivist viewpoint to one General Justifying Aim and two Limiting Principles. The retributive General Justifying Aim recognized by Hart is contained in the principle of applying "the pains of punishment to an offender who is morally guilty," considering this principle as a theory of value in itself. The retributive Limiting Principles recognized by Hart are the principle of applying punishment "only to an
offender for an offense" and "only of an amount pro-
portional to the crime" without having to hold the
principle "the application of the pains of punishment to
an offender who is morally guilty," as a theory of value
in itself. (Ironically, Hart held that the retributive
General Justifying Aim did entail the other two retributive
Limiting Principles. This is not true. Although that
specific General Justifying Aim and those specific Limiting
Principles are frequently held in conjunction with each
other, there is no logical entailment between the two
either way.)

I am not interested now in whether Hart has correctly
stated the retributivist position. I am interested in Hart's
claim. For instance, along with the retributive General
Justifying Aim one could hold that "the application of the
pains of punishment to some who are not guilty" is also good.
This latter principle would directly conflict with, and
would rule out holding, the two Retributive Limiting Principles
of Distribution.

By showing how viewpoints about the justification of
punishment can be separated into independent General Justify-
ing Aims and Limiting Principles, Hart has opened the door
for various ways of reconciling conflicting viewpoints. One
can accept as valid at least some principles and aims from
each viewpoint. So far Hart's analysis is commendable, but
Hart is not satisfied with moving only so far. For unstated reasons Hart insists that what is not possible is a plurality of values and aims offered in answer to some given general question about punishment. He insists that each aim or principle must be accepted as an answer to only one specific question about punishment. This point reveals the value, as Hart sees it, of distinguishing specific pertinent questions about punishment. Their value lies not in their analytic comprehensiveness, but rather in their being just the questions which Hart feels may be answered by some particular Limiting Principle or General Justifying Aim that he recognizes. This is an unnecessary constraint upon considerations about the justification of punishment, and it does not work.

There is no reason to believe that only one General Justifying Aim could, or should, be offered in answer to the question, "What is the General Justifying Aim of punishment?" If one sublimes all feasible aims of punishment into one super-aim, then this super-aim will necessarily be so general that it will offer very little aid in determining morally justified concrete actions. Moreover, the correctness of such an aim will approach analytic truth. The recognition of more than one General Justifying Aim for punishment will, acknowledgedly, lead to situations when two or more aims will conflict, a "contra-
determined" situation," as Mabbott pointed out. It can also lead to situations when two or more aims will coincide, an "over-determined" situation, as Flew pointed out. In order to resolve "contra-determined" situations it is necessary that the General Justifying Aims and Limiting Principles be relatively weighted (which, of course, is the whole problem of the justification of punishment, succinctly stated.)

Hart holds that the question, "To whom may punishment be applied?" is valuable because the Retributive Limiting Principle, "Only to an offender for an offense," answers it. Although it is true that this Retributive Limiting Principle is relevant to the question, "To whom may punishment be applied?" this Retributive Limiting Principle does not answer the question, "To whom may punishment be applied?" and it may be relevant to at least one other important question: "When should punishment be applied?"

The Retributive Principle of Distribution, as a Limiting Principle, takes a position with respect to whom not to punish, but does not take a position with respect to whom to punish. In order to answer the question, "To whom may punishment be applied?" one would have to insist upon the rightness of at least two principles, not only, "Only to an offender for an offense" but also something like "Always to an offender for an offense." Hart has taken
notice of this latter principle and has termed it the Retributive General Justifying Aim of Punishment, but Hart does not want to accept both the Retributive Principle of Distribution and the Retributive General Justifying Aim.

Although Hart does not explicitly go into the similar situation of the Retributive Limiting Principle with respect to Amount, "Only in an amount equal to the crime," he gives the impression that he expects the Principle to answer the question, "How severely may we punish?" Hart is wrong here for the very same reasons: The Retributive Limiting Principle with respect to Amount does not by itself answer the question, "How severely may we punish?" since it does not say always to punish in that amount. Moreover, the Retributive Limiting Principle with respect to Amount is also related to the question, "When should we punish?"

Hart does not substantiate his claim that what is not possible is a plurality of values and aims offered in answer to some single general question but that what is rather necessary is that separate questions are to be answered by reference to separate "principles." Hart has not forged any reconciliation between the retributivist's position and other positions. The consideration of Hart's claim is valuable because it does emphasize the importance of distinguishing the important questions to be asked about
the justification of punishment and of clarifying their relationship to each other.

None of the distinctions recommended by the above authors has afforded a reconciliation between conflicting viewpoints about how punishment is to be justified. However, considering the distinctions is important, because of the gain in clarity that it affords, and because attention to the distinction can keep one from accepting simplistic solutions to the problem of punishment.
FOOTNOTES


3Ibid.


6Ibid., p. 4.

7Ibid., p. 2.


9Ibid., p. 482.


CHAPTER FIVE

RETRIBUTIVIST JUSTIFICATIONS OF PUNISHMENT

Reference has been made several times to the supposedly conflicting views of retributivists and utilitarians about how punishment is justified. Most of the issues considered up to this point have arisen through various attempts to reconcile these supposedly conflicting viewpoints. It is obviously relevant and important in a consideration of the justification of punishment to set forth these views and to consider whether there is really a basis for conflict.

Traditionally, those who speak to the question of the justification of punishment are considered to belong to one of the two camps, the "retributivist" camp or the "utilitarian" camp. These camps supposedly represent the two opposing positions about how punishment is justified. Occasionally one or the other camp is subdivided, or a third or a fourth camp is proposed by some author or another; but these further qualifications have never yet met with any widespread acceptance. Traditionally, in considerations of the justification of punishment the retributivist position is presented first. It is,
historically, supposed to be the oldest position. It is also supposed to be, at present, philosophically indefensible, unacceptable, or out of date.

It is worth repeating that any position about the justification of punishment should advocate some specific practice of punishment, that is, rules prescribing whom should be punished, as well as when they should be punished, and how much punishment there should be. The position should then defend that practice of punishment by appealing to certain General Justifying Aims and Limiting Principles, and should argue that these are the relevant and important Aims and Principles involved. The defense should show how these Aims and Principles demand that particular practice of punishment.

Unfortunately, of all those who speak to the issue of the justification of punishment, no one presents a satisfactory comprehensive statement of the retributivist position. A satisfactory comprehensive statement of the mainstream retributivist position must be compiled from many diverse statements presented in the literature on the subject. Such a study can best begin with and center around the comments of Kant, Hegel, and Bradley, traditional moralists who are usually taken as the spokesmen par excellence of the retributivist position.

First, there are Kant's statements in The Philosophy of Law:
Juridical punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another. . . . He must first be found guilty and punishable before there can be any thought of drawing from his punishment any benefit for himself or his fellow-citizens. The penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even from the due measure of it, according to the Pharisaic maxim: 'It is better that one man should die than the whole people should perish.' For if justice and righteousness perish, human life would no longer have any value in the world. . . .

But what is the mode and measure of punishment which public justice takes as its principle and standard? It is just the principle of equality, by which the pointer of the scale of justice is made to incline no more to the one side than the other. It may be rendered by saying that the undeserved evil which anyone commits on another, is to be regarded as perpetrated upon himself. Hence it may be said: 'If you slander another, you slander yourself; if you steal from another, you steal from yourself; if you strike another, you strike yourself; if you kill another, you kill yourself.' This is the Right of RETALIATION (jus talionis); and properly understood it is the only principle which in regulating a public court, as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a just penalty. All other standards are wavering and uncertain; and on account of other
considerations involved in them, they contain no principle conformable to the sentence of pure and strict justice... Even if a civil society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world—the last murderer lying in prison ought to be executed before the resolution was carried out. This ought to be done in order that everyone may realize the dessert of his deeds, and that blood-guiltiness may not remain upon the people; for otherwise they will all be regarded as participators in the murder as a public violation of justice.

Second, there are Hegel's statements in Philosophy of Right:

If crime and its annulment...are treated as if they were unqualified evils, it must, of course, seem quite unreasonable to will an evil merely because 'another evil is there already...'. But it is not merely a question of an evil or of this, that, of the other good; the precise point at issue is wrong, and the righting of it... In discussing this matter the only important things are, first, that crime is to be annulled, not because it is the producing of an evil, but because it is the infringing of the right, and secondly, the question of what that positive existence is which crime possesses and which must be annulled; it is this existence which is the real evil to be removed, and the essential point is the question of where it lies.

The injury (the penalty) which falls on the criminal is not merely implicitly just—
as just, it is eo ipso his implicit will, an embodiment of his freedom, his right; on the contrary, it is also a right established within the criminal himself, i.e., in his objectively embodied will, in his action.

Punishment is regarded as containing the criminal's right and hence by being punished he is honored as a rational being. He does not receive this due of honor unless the concept and measure of his punishment are derived from his own act. Still less does he receive it if he is treated as a harmful animal who has to be made harmless, or with a view to deterring and reforming him.²

Thirdly, there are Bradley's comments in Ethical Studies:

Punishment is punishment only where it is deserved. We pay the penalty because we owe it, and for no other reason; and if punishment is inflicted for any other reason whatever than because it is merited by wrong, it is a gross immorality, a crying injustice, an abominable crime, and not what it pretends to be. We may have regard for whatever considerations we please—our own convenience, the good of society, the benefit of the offender; we are fools, and worse, if we fail to do so. Having once the right to punish, we may modify the punishment according to the useful and the pleasant; but these are external to the matter, they cannot give us a right to punish, and nothing can do that but criminal desert.³

Kant offers the most in the way of a general
statement of the retributivist position on punishment. He proposes a more or less specific practice of punishment, and this is the practice of inflicting a hardship always and only upon individuals who commit crimes. The hardship must be in accordance with a principle of "equality." Kant remarks that the nature of the hardship might in addition depend on whether its infliction promotes some other goods at the same time. According to Kant's principle of "equality" the undeserved evil which anyone commits on another is to be regarded as perpetrated upon himself, in the sense that "If you strike another, you strike yourself. If you steal from another, you steal from yourself." These remarks are interpreted as saying that the principle of "equality" recommends inflicting hardship on an offender equivalent to the hardship which the offender inflicted on another who did not deserve it. Kant recognizes that there are practical problems involved in determining and meting out the "equal" punishment for particular offenses. Kant's comments in *The Philosophy of Law* show that he is not unaware of the difficulties.

It may appear, however, that difference of social status would not admit the application of the Principle of Retaliation, which is that of 'Like with Like.' But although the application may not in all cases be possible according to the letter, yet as regards the effect it may always be attained in practice, by due regard
being given to the disposition and the sentiment of the parties in the higher social sphere. Thus a pecuniary penalty, on account of a verbal injury, may have no direct proportion to the injustices of the slander; for one who is wealthy may be able to indulge himself in this offense for his own gratification. Yet the attack committed on the honor of the party aggrieved may have its equivalent in the pain inflicted upon the pride of the aggressor, especially if he is condemned by the judgment of the Court, not only to retract and apologize, but to submit to some meaner ordeal, as kissing the hand of the injured person. In like manner, if a man of the highest rank has violently assaulted an innocent citizen of the lower orders, he may be condemned not only to apologize but to undergo a solitary and painful imprisonment, whereby, in addition to the discomfort endured, the vanity of the offender would be painfully affected, and the very shame of his position would constitute an adequate Retaliation after the principle of 'Like with Like.'

The important phrase in the above quote is, "although the application may not in all cases be possible according to the letter, yet as regards the effect, it may always be attained in practice." It can be seen that Kant recognized that the effect of punishments may vary greatly between people of different ages, as well as of different cultural, social, and economic backgrounds. Thus, a literal eye for an eye might rarely if ever turn out to be the "equal" punishment.

Since Kant shows himself sensitive to the fact that the same punishment could have different effects upon
people of different ages, and of different cultural, social, and economic backgrounds, it must be presumed that Kant is equally sensitive to the fact that the same offense committed in different circumstances may cause varying amounts of evil. It may be presumed that Kant would recognize a difference between evil inflicted on the one hand by accident and on the other hand by intent. Kant does not explicitly comment on such things as excusing conditions with respect to the crime itself (such as being under the threat of personal harm or in an epileptic fit), or mitigating circumstances with respect to the crime itself (such as extreme provocation or dire circumstances), both of which might affect the degree of guilt involved, as well as the moral gravity of the crime. It may be presumed that Kant would also consider these matters in determining the "equal" punishment.

With regard to the General Justifying Aims and Limiting Principles which can alone substantiate any practice of punishment, Kant accepts the value of human life as the highest ranking Aim. He considers the value of human life as being dependent on the maintenance of strict and pure justice and righteousness. An implication of Kant's remarks is that maintaining justice helps maintain righteousness. This is a plausible view, for justice helps insure that no individuals profit materially or
psychologically from their contemporaries by committing acts of unrighteousness. Kant has not ruled out the possibility, however, that punishment could support righteousness in ways other than by supporting justice. Kant does not say that only maintaining justice helps maintain righteousness.

In addition to the "good" of human life having value, which is supported by maintaining pure and strict justice and righteousness, Kant speaks of everyone getting the desert of his deeds as if this were a "good" in itself, needing no further justification. This is a common fault justly attributable to most retributivists. The good of "seeing that each gets the desert of his deeds" and also of "maintaining justice" needs to be argued for. Strictly speaking, acting justly is a specific way of acting, no more and no less. Justice is a descriptive term. Similarly, "giving each the desert of his deeds" is a specific way of acting, no more no less. The "just act," or the act that ensures that "each gets his desert," is often considered to be the good and the right act, needing no further justification. (Similarly, as was previously mentioned, the fact that "he broke the law" is often accepted as a complete justification for punishing a man.) In considering the philosophical justification for punishment, no such presuppositions about the goodness and rightness of justice and
desert can be allowed. To say that an act is just, or is deserved, is simply to describe the act, not to justify it. Kant and many others do not always recognize this. The questions, "Why is justice always good?" of "Why should each get the desert of his deeds?" are legitimate questions and need to be faced.

Kant suggests an answer to the question why maintaining justice is good, but he does not offer any justification for "seeing that each gets the desert of his deeds." It would be an error to believe that maintaining justice and seeing that each gets the desert of his deeds are identical. Justice implies some sort of balancing between two or more parties. Seeing that each gets the desert of his deeds does not imply the necessary existence of another party with whom anything needs to be balanced. Possibly, Kant would want to argue, as he does about justice, that "seeing that each gets the desert of his deeds" (at least the desert of his criminal deeds) is necessary to support righteousness in the world.

Kant also says things which suggest that he recognizes a further (although lower ranking) General Justifying Aim of promoting some good for an individual or for his fellow citizens. If he does recognize this Aim, then his account is confusing, for it is not clear how the principle of "equality" leaves room for any further consideration of the goods for an individual or for his fellow citizens. There seems to be one
and only one "equal" punishment in a given case, and thus there seems to be no room to consider any additional goods. Kant does not give the impression that he expects promoting some good for an individual or for his fellow citizens and maintaining strict and pure justice to conflict. Kant should explain why he does not expect these two Aims to conflict (e.g., because both demand the same punishment or because one is sufficiently vague to leave room to satisfy the other), or else he should suggest the relative weight to be given to each Aim when they do conflict.

For a Limiting Principle upon the practice of punishment, Kant appeals to the evil of dealing with a man merely as a means for another's good or even for his own good. Dealing with a man merely as a means for another's good is generally recognized as an immoral practice, but it is more difficult to place such a stigma upon dealing with a man merely as a means for his own good. Dealing with a man merely as a means for his own good must be supposed to be acting as if the man at the time does not know what is best for himself, so that others must intervene in his life and force him for a time to do what is best for himself. This is often the practice of parents with children and of society with the suicidal or the insane. Certainly it is sometimes right so to treat some individuals. The important issue is the criteria by which one decides that taking such action is
correct. Kant should argue that committing a crime is not a sufficient condition for treating an individual as a child. It is easy to understand and accept the maxim of not dealing with a man merely as a means for another's good, but it is more difficult to see how society can avoid breaking such a maxim in practice. Virtually any restriction of liberty, and thus virtually any regulation, can be viewed as a restriction of ourselves or others, and as a means for promoting the good of all. A society's self-regulating acts can thus be seen as society's treating itself as a means to its own good. If the driver for the evening restricts his alcoholic intake, he is treating himself as a means to another's good; if his spouse so encourages him, she is treating him as a means to another's good. It may be thought that the term "merely" is the important term to be emphasized in Kant's maxim, but then any small token offered for the benefit of the one dealt with as a means for the good of others would prove that the person so dealt with was not really being treated merely as a means for another's good. To make matters more confusing, Kant himself seems to hold that once a man has been found guilty and thus "punishable," the man is then to be dealt with as a means to the benefit of his fellow citizens. This doctrine can only be viewed as inconsistent with the rest of Kant's remarks. In any event, it is doubtful that the maxim of not dealing with a man merely as a means for his own
or for another's good gives a useful criterion for ruling out activities as unjustified.

Kant has two further Limiting Principles for a practice of punishment, the Principle of not letting blood-guiltiness remain on the people is a poetic way of expressing participation in a violation of justice for certain types of crimes, e.g., murder. Becoming a participator in a violation of justice admits of two interpretations. On the one hand it could be interpreted as merely the other side of the coin of maintaining strict and pure justice. To refuse to maintain strict and pure justice is to become a participator in a violation of justice. On the other hand, becoming a participator in a violation of justice could be interpreted as sanctioning a criminal's principles. The community's reaction to the crime can be viewed as the expression of a pro or con attitude about the criminal's principles.

Kant makes several claims about these Justifying Aims and Limiting Principles. First of all, Kant implies that the practice of punishment which only punishes him who has committed a crime is the only practice of punishment which does not deal with a man merely as a means for another's good or for his own good. (The implication is that to punish a man who has not committed a crime is to deal with a man as a means for another's good or for his own good.) By this
claim, Kant feels that he establishes guilt of a crime as a necessary condition for punishment. It was seen, however, that not dealing with a man as a means for his own good or for another's good is a difficult limiting principle to apply. Also, it is not clear that punishing (only) the guilty is not dealing with a man as a means for the good of all. Kant would be on firmer ground if he criticized the punishing of those who have not committed a crime as being an action that discredits those who have been righteous, and thus as being an action that tends to diminish righteousness and to cheapen human values. Punishing a man who has not committed a crime may be dealing with a man as a means for one's own purposes. It certainly is ignoring his righteousness.

Secondly, Kant claims that the principle of equality is the only principle for determining the "just" mode and measure of punishment. Any other principle would be wavering and uncertain and unjust. I have several comments on this claim of Kant's.

First of all, acceptance of the principle of inflicting upon anyone the equivalent of the undeserved evil he inflicted upon another as the "just" way of acting depends on a broad interpretation of the sense of "equivalent" and "the nature of the evil perpetrated." For instance, in order to treat an agent justly, his intent and whatever mitigating and excusing circumstances attend his deed should be taken into
account, and his ill-gotten gains and the harm he does to others. Unfortunately, Kant does not trouble to distinguish these points in describing the principle of equality.

Secondly, the notion of justice suggests a scale balanced, or a bargain reached between two or more parties. In order to be just, the "equal" penalty must represent a balance between the offender's position with respect to the offended one and the offender's position with respect to the other law-abiding citizens. The just penalty should guarantee material and psychological restitution to the victim of the crime (or should insure that the offender cannot subsequently gloat over his crime to the victim) and should annul the gain the criminal obtained from his crime against the rest of the community (should insure that the criminal does not profit from his crime), thus balancing both scales. Inflicting on the offender the equivalent of the undeserved evil done to the victim is probably a good way to insure adequate material and psychological restitution to victims of crime. The principle of equality is not as appropriate a way to annul the gain obtained by the criminal from his crime, especially if for some reason the gain is high but the personal evil inflicted on any one victim happens to be slight. Moreover, Kant does not comment on the fact that the principle of equality in certain circumstances requires more than justice. There may be instances when justice
per se, as a balance between two parties makes little demand owing to some sort of default. To make this clearer, I want to discuss Kant's example of the "last murderer." Assume that there is a murder in which the victim had no relatives or associates to whom material or psychological restitution could be made. Assume that the victim is a hermit. In addition, assume that the murderer got no material or psychological gain from his crime. Assume that the murderer operated upon the false assumption that the hermit lined his cave with gold. Moreover, assume that the psychological advantage of having attempted to get the gold is immaterial since the community is disbanding and gold will be of no use. Justice involves the balancing of the scales between two individuals or two parties, and in the case of the last murder there is no one by whom justice needs to be done. Kant's principle of equality does not take this lack of a second party into account, as does his requirement of justice. The reason Kant gives for the punishment of the last murderer is "seeing that each gets the desert of his deeds" which reason does not, as the reason of "seeing that justice is done" does, require a second party. It is not clear to me, however, that the principle of equality is the principle to determine the mode and measure of the desert of one's deeds in such cases. The requirements of desert in such cases when there is no justice to be done could be said by retributivists to be
twofold: the act of murder at least deserves emphatic
denunciation by the community as an act that offends its
sensitivities, and the last murderer deserves to have the
gravity of his deed brought home to him.

A third claim Kant makes is that guilt is a sufficient
condition for punishment. I am willing to admit that, if
human life is to have value in the world, then to some extent
righteousness is necessary. Kant's line of argument in jus-
tifying guilt as a sufficient condition for punishment must
be that every violation of strict and pure justice, by not
punishing the guilty, discourages righteousness in the future
and is one example of uncensured unrighteousness in the pre-
sent.

Kant offers far more comprehensive comments about the
justification of punishment than do Hegel and Bradley.
Hegel's and Bradley's comments above may be best taken as
some specific insights into the subject.

All that Hegel says by way of providing rules for a
specific practice of punishment is that the concept and the
measure of a man's punishment is to be derived from the man's
own act and is to be just. Hegel apparently recommends the
same practice of punishment as Kant, i.e., always and only
the "equal" punishment for the offender. One exception is
that Hegel specifically rules out from consideration questions
about what mode and measure of punishment brings benefits to
society. One weakness in Hegel's position is the same weakness as one already found in Kant's position, namely that there are sophisticated problems in determining the just punishment for an offense that Hegel, like Kant, does not touch upon. Hegel's stance upon issues of excuses and mitigating circumstances, is unknown.

Hegel offers in his comments three General Justifying Aims and one Limiting Principle of acceptable punishment. The General Justifying Aims are the goods of "righting a wrong" or "annulling an infringement upon the right," of fulfilling the criminal's right or will, and of honoring the criminal as a rational being; the Limiting Principle is the evil of not treating a man as a harmful animal who needs to be made harmless. Hegel makes the claim that just punishment fulfills the criminal's right and will, and honors him as a rational being. It may be noted that if punishing the criminal in a certain way is abiding by the criminal's "right" and "will" then one can establish that one is not treating the criminal as a means but rather as an end, to link Hegel's comments with Kant's.

Concerning the General Justifying Aims of "righting a wrong" or "annulling an infringement upon the right," Hegel maintains that crimes and punishment should not be considered as two evils but rather that crime should be considered as an evil which to some extent can be repaired by the just
punishment (one sense of annulling). Unrepaired evil is worse than evil repaired. Moreover, Hegel appears to hold that crime is an infringement upon right acting, an infringement that can also be cancelled out by just punishment (another sense of annuling). The situation of uncanned wrong acting is worse than the situation of wrong acting cancelled out. It may be mentioned that G. E. Moore in *Principia Ethica* reasons that although moral badness and the pain of punishment are both evils, the two combined might conceivably be a lesser evil than the first one alone. Hegel and Moore avoid saying that "the guilty suffering fitting pain" is a "good" in itself; they rather say that "the guilty suffering fitting pain" is a lesser evil than "the guilty not suffering fitting pain." This Hegelian point makes it clear that a commonly held conception about retributivists is wrong. They do propose a system of punishment which they describe as "just" and as the system that sees that "the guilty suffer fitting pain"; but they do not necessarily argue that "justice" or "the guilty suffering fitting pain" is a good in itself. Hegel's point, and the similar point of Moore, can be seen to be in line with the Kantian point that failure to impose a just penalty sanctions unrighteousness. Sanctioning unrighteousness is both bad in itself and bad in its consequences, and is worse than the offender suffering the fitting pain.
The repairing of the evil done to the victim of the crime may be (and has been) interpreted as "restitution" and adequate restitution must take into account both material and psychological harm done by the evil-doer. (A word needs to be said about material restitution. Strictly speaking, material restitution is a non-punitive act, for it may involve no hardship; anyway hardship is not the point of the act nor essential to the act. Material restitution is a non-punitive act which, in the name of justice, should be insisted on by retributivists.) What is spoken of in terms of "the cancelling out of wrong action" may be assimilated to the act of "emphatically denouncing wrong action." Lord Justice Denning, in evidence to the Royal Commission on Capital Punishment, is frequently quoted by others for suggesting that the ultimate justification for any punishment is the "emphatic denunciation by the community of a crime."⁵ "Emphatic denunciation by the community of a crime" coincides with the Kantian claim that punishment is refusing to sanction unrighteousness.

Since discussing the justification of punishment questions the justification of positive law and its means of enforcement, the only sort of "right" that Hegel can be referring to as the criminal's right to be punished is an "innate right." The existence of innate rights are extremely difficult to establish in general, let alone in the particular
case of an "innate right" to "a just punishment." Thus, it is not particularly useful in considering the justification of punishment philosophically to ask oneself whether one has a "right" to punish the criminal, since this begs the question. The "rights" one wants to appeal to are the very things in question. Now for the point about the criminal's "will." A criminal perhaps would "will" his own just punishment over a more severe treatment, but it is difficult to prove that the criminal would "will" his own just punishment over more lenient treatment. A criminal could "will" the just punishment of others but not his own, for understandable if not admirable reasons. Thus, it is not clear that appealing to the criminal's "will" helps the discussion much at all. To claim that one is treating the criminal according to his "implicit will," as distinct from his "explicit will," seems a dubious approach since isolation of "implicit wills" is as difficult as isolation of "innate rights." Thus, it is not clear that punishing a criminal "justly" is abiding by the criminal's "right and will."

Hegel makes a point about treating a man as a harmful animal and not honoring him as a rational being. Now, it is quite true that to put a man in a cage and feed him raw meat would be to treat him as a harmful animal and not to honor him as a rational being. To treat a man as "deterrable" and "reformable," like some animals are, is not to treat a man
merely as a harmful animal and not a rational being. Obviously, both rational beings and animals learn by conditioning and by trial and error, just as both rational beings and animals eat and drink. Thus, Hegel does not clearly establish that only the "just" system of punishment honors a man as a rational being and refuses to treat him as a harmful animal.

What Hegel probably has in mind with his General Justifying Aims of "not treating the criminal as a harmful animal" and "honoring the criminal as a rational being" is that the criminal is to be treated as a peer, a moral and intellectual and mental equal, not as an inferior or as a child. To make a good case, Hegel should present criteria to determine peership and should show that most criminals meet the criteria, or should at least show that being a criminal does not rule out the appropriateness of being treated as an equal. To tie Hegel's comments in with Kant's comments, treating the criminal as a peer, a moral and intellectual and mental equal, may be the gist of Kant's admonition not to treat the criminal as a means for his own good, or for others good, also. Brand Blanshard in "Retribution Revisited" interprets Hegel's remarks about honoring man as a rational being and fulfilling his will and right to mean that the goal of punishment is to produce in the wrong-doer the attitude of repentance, to make him see
himself as he is. This interpretation assigns a certain educational task to punishment. It is consistent with the General Justifying Aim of annuling an infringement on someone's right, and with the Aim of emphatically denouncing crime.

Bradley's comments quoted above require more interpretation than either Kant or Hegel. Bradley is proposing three General Justifying Aims for punishment. Two of these are primary. The two primary General Justifying Aims are the goods of providing the criminal with his just desert and seeing that debts are paid. The one secondary General Justifying Aim is the good of securing the useful, the pleasant, the convenient, the good of society, and the benefit of the offender. Bradley claims that only the primary General Justifying Aims can justify a practice of punishment. All other Aims, taken together, are insufficient. Giving the criminal his just desert and seeing that debts are paid together spell out a more or less specific practice of punishment, and it can be called the retributive practice of punishment. A weakness in Bradley's view is the implication that giving the criminal his just desert and seeing that debts are paid are self-evidently good, for Bradley does not go on to establish the claim that those are the only Aims which can justify punishment. With respect to Bradley's lesser General Justifying Aim, that of promoting some sorts
of goods for the community, the same comments apply as applied to Kant. It is not clear that insuring that criminals get their just desert and paying debts leave any room for secondary aims of promoting some additional goods. Of course, Hegel would add that even if they did leave such room, to consider such secondary aims would be wrong.

Contemporary authors have added their own comments about the nature of the retributive system of punishment and its justification. These comments need to be considered.

Brand Blanshard in "Retribution Revisited" holds that the retributivist system of punishment is simply the perpetration of the doctrine of "revenge on a wrong-doer." In my previous discussion of the definition of punishment, I held that revenge was the infliction by the offended one or someone who identified with the offended one of an intentional and essential hardship upon the offender because of his offenses. I said that punishment differed from revenge by virtue of the fact that punishment is administered by the appropriate authority and not by the offended one or someone identifying with the offended one. Thus, punishment and revenge are similar activities. Since Blanshard holds that retributive punishment is only "revenge by authority," the specific Aims of revenge need to be assessed.

I suggest that the Aims of revenge are, first of all, stopping and deterring the offender from committing offenses
on the victim. (This aim is most clearly exemplified in the impulse to strike back immediately and ward off someone who has attacked you.) Secondly, revenge has the aim of effecting psychological restitution plus whatever material restitution is possible.

Given these Aims of revenge, it is probably an accurate historical observation to say that punishment grew out of and replaced revenge as a form of action. It is easy to see how "seeing that justice is done" is expected to put an end to the wanton infringement upon the rights of others and to rectify the relation between the offended person and the offender. What needs to be pointed out, however, is that revenge is not the only forerunner of systems of punishment nor the only forerunner of the retributive system of punishment. There seems to be three such forerunners of punishment. There is indeed the policy of taking "revenge." But there is also the ancient activity of "parental discipline," and there is also what might best be called "religious censure." Whereas revenge takes place between two equals or peers, parental discipline takes place between a "parent," with a developed moral sense, and a "child," whose moral sense requires further formation. The point of parental discipline is not to see that "justice is done" (although, of course, the offended one is sometimes helped). Restitution for the damage done, in its own right, is a secondary
consideration if a consideration at all. The purpose of parental discipline is character development and the development of the child's moral sense. The child's past wrongs are forgotten; they are expected and accepted as a symptom of the child's need for further moral development. Increasing the probability of correct actions in the future and developing a moral sense is the primary aim. Parental discipline goes against the retributivist aim mentioned by Hegel of honoring and treating the criminal as an intellectual and moral and mental peer. Hegel, according to Blanshard's interpretation, does expect a type of moral education from the retributive punishment, but Hegel expects the education to be of the type that one peer could receive from another, not the type that a child receives from a parent. It should, therefore, be clear that parental discipline is not a forerunner of retributive punishment, even if it is of other types of punishment.

The activity which the term "religious censure" indicates is the ancient practice of punishing those who violate tribal taboos. One who violates tribal taboos offends the sensitivities of the tribe, offends their sense of the sacred, and that offense demands censure. Even if no one will ever commit that violation again, there is still a felt need to condemn the offense. All peoples, not just ancient peoples, have their taboos, their sensitivities, their senses
of the sacred. The retributivist demand to denounce the unrighteousness of the crime and to give the criminal what he deserves, even if the world should end tomorrow, does seem to hail back to this practice of religious censure which seeks appropriate expression for offended sensitivities of the sacred. Thus, it could be said that not only revenge but also religious censure is a forerunner of the retributive system of punishment.

Now those who claim that retributive punishment is "revenge on a wrong-doer" are not just trying to make an historical point. They intend that claim as a derogatory remark. They think that revenge is widely accepted as an immoral practice. But there is no basis for a claim that revenge is obviously an immoral practice and no arguments are offered to that effect by those who expect revenge to be considered immoral. It can be readily admitted that revenge commonly offers an excuse for human beings to work off hidden aggression and sadistic impulses. That is one drawback of a system of revenge. A second drawback is that revenge is often "over-extracted" and leads to endless vendettas. However, if there is good reason to believe that revenge lends itself to purposes which are not admirable, revenge is not unique in that respect. So might any system of punishment. As a matter of fact, revenge has one advantage over punishment in general. In a system of punishment
personally uninvolved penal officials are forced to inflict hardships upon individuals whom the officials do not know to have done anything to deserve such hardships. It is no wonder that the most efficient and content penal officials are those who use their duties as an outlet for their own personal aggression and sadistic tendencies. At least in a system of revenge the avenger does not feel himself becoming morally insensitive by inflicting a hardship on the one he knows to be the offender. Blanshard's point that the retributive system of punishment is revenge on the wrong-doer is an accurate observation historically, but is not necessarily an acceptable moral criticism. We could also offer the additional historical observation that the retributivist system of punishment embodies some aspects of religious censure.

K. G. Armstrong in "The Retributivist Hits Back" notes the important fact that the retributive idea makes mercy possible, because to be merciful is to let someone off from all or part of a penalty which he is recognized as having "deserved." This is an interesting insight, and an important addition to the retributivists' position, it does not have the consequence that non-retributivists are necessarily merci- less. There is no place for the concepts of being merciful or of being merciless in a system that does not recognize certain consequences of actions as being "deserved." Those
who refuse to admit that any penalty is owed cannot logically speak of mercy. It also is not the case that to recognize some evil as "deserved" makes one a retributivist. There may be many positions that opt, for reasons which are unacceptable to retributivists, for automatic mercy. It can only be said that to be merciful one must recognize a penalty as deserved. Mercy, practically speaking, has probably always been an accompaniment to retributive systems of punishment.

Anthony Quinton in "On Punishment" describes a retributive system of punishment as any system where punishment can be justified without regard for consequences. A. C. Ewing in his important book The Morality of Punishment claims that the hallmark of a retributive system of punishment is the acceptance of the doctrine that "it is an end-in-itself that the guilty should suffer pain." But it is not correct to allege that retributivists always justify the retributive system of punishment without regard to any consequences. And it is false that retributivists always hold that "it is an end-in-itself that the guilty should suffer pain." Kant, for instance, justifies the retributive system of punishment by reference to its consequences for the existence of righteousness and the value of human life. Hegel refers to whether the criminal was honored as a rational being or treated as a harmful animal as consequences of punishment. A retributivist who argues with Hegel and G. E. Moore that
the guilty suffering fitting pain is better than the guilty suffering less than fitting pain is justifying punishment in terms of consequences. He is arguing that the consequence of not inflicting a fitting hardship is worse than the consequence of inflicting a fitting hardship. A more appropriate comment for Quinton and Ewing to make is that there may be consequences that retributivists are failing to take into consideration or to give their just due. The issue is then to decide what are the important and relevant consequences to consider in deciding whether to inflict a punishment. To allege that the retributivists ignore certain important consequences of inflicting punishment is one thing. To allege that the retributivists always ignore all consequences of inflicting punishment is something different and false. It is quite true that retributivists emphasize suiting the punishment to the past deed while, in contrast, utilitarians give the impression that the past deed is irrelevant to determining the best punishment. Retributivists and utilitarians at least reflect a difference in emphasis here. It is wrong, however, to mistake emphasis on the past deed in determining the best punishment for a neglect of considering the consequences of punishment.

The difficulty of summarizing what should be held as the mainstream retributivist position on punishment should not be minimized. It is not clear that Kant, Hegel, and
Bradley, the traditional retributivists, are all in complete agreement. What I propose as "the retributive position with respect to punishment" is the result of interpretation, compilation, and some deletion. It may represent no single philosopher's viewpoint, but it is true to what is generally considered as the mainstream retributivist position.

I propose that a retributive system of punishment is, with respect to whom should be punished and when, a system that punishes only and always the morally guilty with possible allowances being made for the sake of mercy. The retributivist says that the proper amount of punishment is to be the "just" amount, the "deserved" amount, and amount "equal" to the crime, the amount that "annuls" and "denounces" the crime. A retributivist would determine that amount of punishment from the amount of undeserved evil inflicted upon others, the degree of moral guilt for the act, the possibility of material restitution, the need for psychological restitution, the gain of the criminal from the crime, the community's need to denounce the crime, and the criminal's need to see the crime denounced. If there is any latitude for further choice among punishments, some retributivists maintain that consideration be given to what might benefit the criminal or his fellow citizens.

The General Justifying Aims and Limiting Principles offered in support of the retributive system of punishment are
of various value. Some of the Aims offered are of lesser value. Retributivists often offer as "goods" in themselves "the guilty suffering fitting pain," "maintaining strict and pure justice," and "everyone getting the desert of his deeds." These Aims are insufficient by themselves to justify the retributive system of punishment because the questions, "Why be just?" or "Why should everyone get the desert of his deeds?" or "What is good about the guilty suffering fitting pain?" are legitimate questions. Hegel's General Justifying Aims of "fulfilling the criminal's right and will" and "honoring the criminal as a rational being," are also of little value. For it is more difficult to get agreement about the existence of "innate rights" and "implicit will" and about their goodness than it is to get agreement about the justification of punishment. It is not clear that the criminal's "actual will" is worth taking into account at all. It seems clear that the retributive system of punishment is not the only system of punishment which could honor the criminal as a rational being.

There are also General Justifying Aims of the retributive system of punishment which are of greater value. There is Kant's General Justifying Aim of preserving the existence of righteousness and the value of human life which requires maintaining strict and pure justice and the giving to each the desert of his deeds. Hegel offers the General
Justifying Aims of "annulling an infringement upon the right" or "righting a wrong." These can be interpreted as supporting restitution, the annulling of the gain of the criminal, and the denunciation of the unrighteousness. Hegel is also thought by Blanshard to hold that punishment is supposed to bring the criminal to a proper moral consciousness. Hegel's desire to honor the criminal as a rational being and Kant's desire not to treat the criminal as a means for his own good can be interpreted as a desire to treat the criminal as a peer and not as an inferior.

There are two Limiting Principles of my proposed retributivist system of punishment. All retributivist positions grant them. There is the evil of intentionally harming another human being, and there is the burden upon society of having to impose a system of punishment. Both of these Limiting Principles may be used to argue against having any system of punishment at all. In addition to these two Principles, there are some less valuable Limiting Principles offered in support of the retributive system of punishment. To begin with, there is what Kant claims to be the evil of dealing with a man merely as a means for another's good or for his own good. It was not clear that the retributive system of punishment was any more free of the charge of dealing with a man as a means to another's good than were other systems, and it was not clear that dealing with a man
as a means to his own good should always be avoided. Hegel offers as a Limiting Principle the doctrine that it is evil to treat a man as a harmful animal that needs to be made harmless. This is indeed evil but it is evil that many non-retributivist systems of punishment could avoid.

Kant maintains a more valuable Limiting Principle: what could be broadly called the Principle of not sanctioning the criminal's principles or becoming a participator in a violation of justice. Hegel and G. E. Moore base their Limiting Principles for a practice of punishment upon the evil of the guilty not suffering, and upon the evil of the guilty prospering at the expense of the virtuous.

The central question that needs answering by retributivists is, specifically, how one knows when an evil of one sort, a punishment, has "equalled" an evil of another sort, a crime. A usual assumption made about retributivists is that they operate by taking the principle of an eye for an eye literally. As a matter of fact it would be rare for "an eye" to be exactly the "equal" punishment for taking an eye. Justice and desert require considering many factors other than the physical description of the material loss caused by the offense. There may be an unwelcome rigidity associated with "systems" to promote justice, but that rigidity is a necessity of having systems and general rules, not of promoting justice, desert, and equality. Retributivists
are theoretically as flexible as utilitarians in considering each case on its own merits.

My answer to the question how the retributivist determines what is "equal" is that the evil of the crime and the evil of the punishment are "equal" when the amount of the punishment is just sufficient so that 1) the criminal could not say that over all he got a good deal from his crime, 2) the criminal could not gloat that he got the better of the offended one even after punishment, and 3) the evilness of the act has not gone without appropriate denunciation by the community. This answer seems to be in accord with many retributive doctrines, and in particular with Kant's doctrine that the "just" punishment supports righteousness and does not allow society to become a participant in a violation of justice, with Hegel's doctrine that the "just" punishment should annul the crime, and with Lord Denning's doctrine that punishment should express emphatic denunciation of the crime by the community.

Making sure that the offender cannot subsequently gloat over his victim might be called ensuring psychological restitution to the victim. Psychological restitution attempts to restore the psychological balance between the victim and the offender, the status between the two that existed before the crime. If psychological restitution between the offender and the offended is neglected then the righteousness of the
offended one has not been supported, and thus to that extent righteousness in general has not been supported. Material restitution *per se*, the return or the restoration of damaged or stolen property, is not a punitive act. Material restoration need not involve a hardship upon the criminal (e.g., the return of stolen jewels might be quite easily done; if it does involve hardship, still the hardship is not essential to the act.) The point of the act of material restitution is to restore the status of the victim to that level which existed before the crime. This seems to be a just practice and a non-punitive measure that retributivists would condone. Any hardship that is involved in the act of material restitution should be taken into account, however, in the subsequent levy of the "equal" punishment. It should be noted that material restitution is not always possible or feasible. Sometimes the damage done by the offense is irreparable, e.g., loss of life, limb, reputation, or destruction of irreplaceable objects. Sometimes the loss technically admits of restitution but the particular offender involved is incapable of making such restitution, even if he devoted his whole life to the project. In societies where there is a great disparity between the possessions and earning power of individuals, retributivists should probably accept the position that in such cases where material restitution is practically unfeasible, the offended one must be satisfied
with psychological restitution. Psychological restitution should ensure among other things that the criminal does not gloat over his ability to destroy irreplaceable items.

After feasible material restitution is considered, retributivists should consider, in setting the "equal" penalty, not only whether psychological restitution to the victim of the crime is ensured but also whether the criminal's gain from his crime is nullified. It would be unjust to the rest of society to allow the criminal to gain from his crime. It would go against the retributivists' desire to support righteousness if criminals could feel that their crime yielded a net profit for themselves, even after they satisfied the requirements of material restitution and the restoration of the psychological balance between themselves and the victim of the crime. Righteousness would not be supported because unrighteousness would be rewarded in these cases.

In addition to requiring whatever material restitution is possible, ensuring psychological restitution to the victim of the crime, and nullifying the criminal's gain, retributivists, in setting the equal penalty, should also ensure that by the punishment the crime is sufficiently denounced by the community. If the punishment in the eyes of society does not sufficiently denounce the crime, and, in proportion to the evil of other crimes, then the crime will appear to have been sanctioned. If the punishment does not sufficiently
denounce the crime in the eyes of the criminal, then the
criminal can learn nothing about the values of his society.
In sanctioning a crime, society becomes a participator in
past and future violations of justice.

It needs to be seen how the above retributivist
rationale in figuring the "equal" penalty applies to such
things as excusing conditions, mitigating circumstances,
mercy, and the likelihood of being caught.

Given the perpetration of undeserved evil, excusing
conditions argue against any moral guilt for the perpe-
trator. These conditions include conditions such as that the
crime was committed in an epileptic fit, at gunpoint, under
threat of harm, or by accident. Retributivists should take
into account excusing conditions in deciding to delete
punishment because the retributivist's interest in supporting
righteousness is to punish unrighteousness or moral guilt.
If the one who perpetrated undeserved evil upon another did
so without intent or malice, then there is no necessity for
psychological restitution to the victim of the crime, no
question of gain by the one who committed the evil, and no
moral evil to denounce. The perpetrator of the evil took no
joy or profit from the evil. Not to punish such a person
would not constitute a failure to support righteousness.
Material restitution, a non-punitive act, might well be re-
quired in these cases, even for an accident, while excusing
the guilt of the offender.

Given an offender and moral guilt, mitigating circumstances are circumstances that lessen the degree of guilt. They include circumstances such as being under great provocation, being in desperate straits, or being without other reasonable options. Retributivists should be expected to take mitigating circumstances into account by reducing punishment because mitigating circumstances tend to reduce the hardship needed to restore the offender's psychological relation with the offended one (for instance, if the offended one provoked the crime) and perhaps also to reduce the gain of the criminal. (If the criminal were in such desperate straits as to have few other options, no one would wish to reduce him to such a position again.) It should be said that there is less evil to denounce also in the case of provoked crime or crime committed in desperate circumstances.

Considerations of mercy should reduce the measure of a penalty for retributivists if the criminal suffers genuine remorse, regret, and self-punishment. Assuming that genuine remorse, regret, and self-punishment can be distinguished from deceit; remorse, regret, and self-punishment would themselves cancel the gain of the crime and make additional psychological restitution to the victim of the crime unnecessary. It should be assumed that a genuinely repentant offender would voluntarily make whatever material restitution
was possible. Society's approval of appropriate self-inflicted punishment would count as supporting righteousness.

One of the obvious ways of failing to support righteousness is to make an inadequate attempt to apprehend the guilty. If it frequently happens that offenders go undetected, then there will be many instances of unrighteousness undenounced and thus condoned and there will be many instances of the righteous suffering without any material or psychological restitution. To the extent that society could do otherwise, society has become a "participator" in the unrighteousness. There is little chance that those few caught will have been guilty exactly of the total number of crimes, and thus there is little chance that making those caught suffer the punishment for all of the crimes would even approximate justice. An effective means of apprehending the guilty should obviously be another non-punitive requirement of the retributive position. Given an effective system for apprehending the guilty, it may be admitted that there will always be some few who escape and thus there will always be those who offend with the expectation of escaping. In calculating the "equal" penalty it appears reasonable for the retributivist to add an increment of punishment to offset gain of the criminal from escaping one in x number of times when x is a fairly large number. In these cases the slight increment of punishment is designed to offset any expectation
by a criminal of gain from one undetected crime in a series of crimes.

To summarize: in the equal penalty which supports righteousness, annuls the crime, prevents society from becoming a participator in unrighteousness, denounces the evil of the crime, and aids in forming the moral consciousness of the criminal, the retributivist should (after discovering whatever material restitution is feasible) discover the minimum punishment sufficient to restore the psychological balance between the offender and the offended one, sufficient to make the crime not to have been advantageous to the criminal, and sufficient to denounce the crime. The retributivist should be concerned that the unrighteous get caught.
FOOTNOTES


4I. Kant, *Kant's Philosophy of Law*, pp. 197-98.


CHAPTER SIX

UTILITARIAN JUSTIFICATIONS OF PUNISHMENT

The utilitarian position on punishment is more popular at present than the retributive position and is easier to present in general terms. The traditional advocates of the utilitarian position are William Paley and Jeremy Bentham.

William Paley's formulation of the utilitarian theory of punishment was enormously influential. "The proper end of punishment is no-," Paley tells us, "the satisfaction of justice, but the prevention of crimes."¹ And since the prevention of crimes is the "sole consideration which authorizes the infliction of punishment by human laws,"² punishment must be proportioned to prevention, not to guilt. "The crime must be prevented by some means or other; and consequently, whatever means appear necessary to this end, whether they be proportionable to the guilt of the criminal or not, are adopted rightly, because they are adopted upon the principle which alone justifies the infliction of punishment at all."³ Since punishment is itself an evil, it should be resorted to only when a greater evil can be prevented. "The uncertainty of punishment must be compensated by the severity. The ease with which crimes are committed or concealed, must be counter-acted by additional penalties and increased terrors."⁴
In other words, the facility with which a crime can be
committed constitutes a ground for more severe punishment.
To give an often quoted example, the stealing of cloth from
bleaching grounds must be punished more severely than most
other simple felonies, not because this crime is in its
"own nature more heinous," but because the property is more
exposed.

Jeremy Bentham undoubtedly offers the most compre-
hensive and detailed utilitarian theory of punishment.
According to Bentham, the end of punishment is "to augment
the total happiness of the community; and therefore, in the
first place, to exclude, as far as may be, everything that
tends to subtract from happiness: in other words to exclude
mischief." 5 Bentham agrees with Paley that punishment is
itself an evil and should, if used, be used as sparingly as
possible: "Upon the principle of utility, if it ought at
all to be admitted, it ought only to be admitted in as far as
it promises to exclude some greater evil." 6 Bentham en-
courages finding all kinds of means for dealing with the
mischief of crime, like admonitions, threats, the seizure of
arms, the removal of temptations to crimes (like easily
concealed arms and the tools for the counterfeiting of money),
substituting innocuous for dangerous desires and inclinations,
and putting people on guard against certain types of offenses.
Bentham also recognizes the necessity that the suffering of
the victim must somehow be compensated, that things should be made as if the crime had never occurred. Reparations or indemnities secured for those who have suffered from offenses have the purpose of removing all or part of the mischief caused. However, Bentham recognizes that "in many cases it is impossible to redress the evil that is done; but it is always possible to take away the will to repeat it; for however great may be the advantage of the offense, the evil of the punishment may be always made out to outweigh it."\(^7\) Bentham believes this may be done in three ways, by taking away from the offender the physical power of repeating his offense, by taking away his desire to offend (reformation), or by making him afraid of offending (intimidation). Bentham believes, however, that the real end, and the chief justification of punishment lies in the prevention of crime by the threat of the punishment which will be suffered by an offender.

Bentham recognizes as limitations upon punishment that it ought not to be inflicted where it is groundless, inefficacious, unprofitable, or needless. The burden of proof is upon him who would inflict the punishment, even though it is known that a crime has been committed. (Punishment is groundless when there is no mischief for it to prevent. Punishment is inefficacious when it cannot prevent mischief. Punishment is unprofitable when the
punishment produces more evil than the offense it is meant to prevent. Punishment is needless when the mischief can be prevented at a "cheaper rate." Bentham holds that penalties are to be set so that when a person is tempted to commit one of two crimes he will commit the lesser, so that the mischief of crime will be minimized even if crime is committed. He also holds that the least possible amount of punishment should be used for the prevention of a given crime.

The comments of S. I. Benn may be added to the comments of William Paley and Jeremy Bentham as an interesting approach to the utilitarian problem of how severely to punish. According to Benn:

For the utilitarian, arguing in deterrent terms, it is the threat rather than the punishment itself which is primary. Could we rely on the threat being completely effective, there could be no objection to the death penalty for every offense, since ex hypothesi it would never be inflicted. Unhappily, we must reckon to inflict some penalties, for there will always be some offenders no matter what the threatened punishment. We must suppose, then, for every class of crime, a scale of possible penalties, to each of which corresponds a probable number of offenses, and therefore of occasions for punishment, the number probably diminishing as the severity increases. Ultimately, however, we should almost certainly arrive at a hard core of undeterrables. We should then choose, for each class of offense, that penalty at which the marginal increment of mischief inflicted on offenders would be just preferable to the extra mischief from which the community is protected by this increment
of punishment. To inflict any heavier penalty would do more harm than it would prevent. (This is Bentham's principle of 'frugality.')

This involves not a quasi-quantitative comparison of suffering by the community and the offender, but only a preference. We might say something like this: To increase the penalty for parking offenses to life imprisonment would reduce congestion on the roads; nevertheless, the inconvenience of a large number of offenses would not be serious enough to justify disregarding in so great a measure the prima facie case for liberty, even of a very few offenders. With blackmail, or murder, the possibility of averting further instances defeats to a far greater extent the claims of the offender. One parking offense more or less is not of great moment; one murder more or less is.  

Paley did not precisely spell out the elements of the system of punishment which is required by his Aims. That system must be described in general as the punishing of whomever, whenever, and however much is required to achieve the prevention of crime, as long as doing so does not produce a greater evil than it prevents. Paley offers two rules of thumb which determines how severely to punish. According to Paley, the severity of the punishment should increase both with the uncertainty of the offender's being caught and with the ease with which the crime may be committed. Paley is quite certain that there is only one General Justifying Aim and one Limiting Principle involved in the justification of punishment and that they are, respectively, the good of
preventing crime and the principle that it is evil to inflict a hardship upon a person.

It is difficult to disagree with the value of either Paley's General Justifying Aim or his Limiting Principle. Paley, however, with his rule of thumb, is making the implicit assumptions that an increase in the severity of punishment will reduce the number of crimes, especially in the cases where the uncertainty of being detected is great and where the ease with which the crime can be committed is great. These implicit assumptions are disputable. It has been frequently pointed out that in the days when pickpockets were hung in England pockets were picked in the crowds gathered to watch the hanging of a pickpocket. If the uncertainty of being caught is large, human beings do not count on being caught, whatever the penalty. Moreover, M. R. Glover points out that juries have refused to bring in a verdict of guilty in cases of sheep-stealing simply because sheep-stealers were hung. If the penalty for a crime becomes out of proportion to the harm done, juries are often reluctant to convict the guilty. As a matter of fact, if the uncertainty of being caught is large, then greatly increasing the severity of the penalty does not appear to have the desired effect of greatly decreasing the number of crimes. Increasing the severity of the punishment does not appear to be a substitute for reducing the uncertainty of being caught. As an increase in one kind
of evil, it does not produce a greater decrease in another kind of evil. Great ease in committing a crime should increase the number of crimes committed by those who can not resist temptation or by those who commit the crime upon impulse. The impulsive cannot be expected to give great thought to consequences, and they are not particularly susceptible to being deterred by thoughts of personal consequences. To those who give a moment's thought, the certainty of being caught should deter them, however tempting the crime. If the uncertainty of being caught is large, the probability is that most human beings will count upon not being caught. All in all, the evil of greatly increasing the punishment for offenses which are irresistible would appear to outweigh the evil prevented by the increase.

Bentham recognizes the same Limiting Principle of punishment as Paley, the evil of the punishment itself. He also recognizes the same General Justifying Aim as Paley, that of preventing crime. But Bentham puts them both within the framework of a higher General Justifying Aim, that of contributing to the total happiness of the community. Bentham puts forth a wider variety of rules of thumb than Paley. First of all, consistent with Bentham's General Justifying Aim of preventing crime and Limiting Principle of avoiding mischief of any kind, Bentham gives examples of times when punishment should not be inflicted. It should
not be when there is no mischief for it to prevent, or when it could not prevent mischief anyway, or when it would cause more mischief than it would prevent, or when the mischief could be prevented at a "cheaper rate." Bentham also suggests many before-the-fact-of-crime measures as non-punitive measures for the prevention of crime. All of Bentham's before-the-fact measures, admonitions, threats, seizure of arms, removal of temptation, substitution of desires, and putting people on guard, can be considered as hardships of some sort inflicted upon the populace. They are also administered by appropriate authorities and because of offenses (that might happen otherwise), and they require moral justification. These before-the-fact-of-crime measures fail to qualify as punitive acts by the criteria mentioned in my second chapter, because the hardship of these measures is not essential to the purpose of the measure. The hardship is simply unavoidable and regrettable. (Not all people speak of such restrictive measures as non-punitive, however. Opponents of gun control say, "Why punish us because some people can not possess guns without harming people?") Bentham's advocating reparations and indemnities for the victims of offenses is an addition to Paley's system of punishment. Reparations and indemnities can be justified by utilitarians because they can contribute toward increasing the happiness of the victim of the crime.
Bentham agrees with Paley in the relative weighting between the General Justifying Aim of preventing crime and the Limiting Principle of the mischief involved in the punishing. Bentham's relative weighting is quite consistent with the utilitarian General Justifying Aim, namely the simple minimization of the overall mischief. Bentham's rule of thumb, that the greater the mischief of the crime the greater the punishment, goes directly against Paley's rules of thumb that the greater the uncertainty of being caught and the greater the ease of the crime, the greater the severity of the punishment, for there is no reason to expect the mischief of the crime to be directly proportionate to the uncertainty of being caught or to the ease of committing the crime. However, it was pointed out that the supposed advantages of Paley's rules of thumb are suspect, while Bentham's justification of his rule of thumb by the rationale of encouraging the performance of the lesser of two evils seems acceptable. Bentham's claim that it is always possible to take away the will to repeat the crime by increasing the severity of the punishment is quite a large claim. Bentham can claim that the capacity to repeat a crime can always be removed by means of continuous physical restraint and confinement. Beyond that, it would be difficult to prove that the will to repeat a crime can always be removed. More importantly, the will to repeat a
crime depends on the uncertainty of being caught, the penalty when caught, and the criminal's attitude with respect to his surroundings. Bentham should make the more humble claim that normally those who commit crimes and are caught should be able to be made to regret their actions. In ordinary circumstances this can be expected to go a long way toward removing the will to repeat the crime.

S. I. Benn presents as the utilitarian General Justifying Aim for punishment the deterrence of crime. Benn recognizes that no crime can be completely deterred. Some criminals are hard-core undeterrables, or at least undeterrable by the thought of any penalty. Benn offers an explicit formula for determining how much to punish offenders. This formula is clear when stated in symbolic fashion. Such symbolic expression seems appropriate to the utilitarian position. Utilitarians are content with the approach that manipulates variables to get the desired results. (Benn does not suggest and justify any specific rules for determining whom to punish and when to punish in this article. In a later article he modifies his utilitarian position and accepts rules of justice which help him to determine whom to punish and when.) Benn's formula for determining penalties turns out to be an explication of Bentham's less explicit recommendations. According to Bentham the total unhappiness for each class of crime is to be minimized. The total un-
happiness is defined as the sum of the evil of the offense times the number of offenses plus the amount of the punishment times the number of times it is inflicted. According to both Benn and Bentham, the number of offenses above the number of those committed by hard-core undeterrables, is inversely proportional to the severity of the punishment. To express the above symbolically,

\[
\text{If } N = \text{ the number of offenders,} \\
\text{x = the fraction of offenders caught,} \\
\text{P = the severity of the punishment,} \\
\text{E = the evil of the offense,}
\]

then, according to Bentham, for each class of offense, \(xNP + NE\), the total unhappiness surrounding the offense, is to be minimized by the appropriate choice of \(P\). The appropriate choice of \(P\) will be such as to make \(-N \Delta P = \Delta N (xP + E)\), (the assumption is always that if \(\Delta P\) is positive, \(\Delta N\) is negative). This formula expresses what Benn means when he says that he wants to choose, for each class of offense, that penalty at which the marginal increment of mischief inflicted on the offenders \(N \Delta P\) is just preferable to the extra mischief from which the community is protected by this increment of punishment \(\Delta N (xP + E)\). What neither Benn nor Bentham take into account is that for their formula to work they need to
make some more explicit assumptions about the relationship of $N$, the number of offenses over the hard-core number, with $P$, the severity of the punishment, above and beyond the assumption that $N$ increases as $P$ decreases. $xNP + NE$ could have several minima, or more interestingly, need not have a minimum at all. $xNP + NE$ might easily be a constant. That would mean that $N$ was a hyperbolic function of $P$, which is not at all an unlikely curve. If $N \times (xP + E) = K$, a constant, then any degree of punishment is equally preferable according to Bentham's and Benn's rule. As a matter of fact, Benn belies his affinity with Bentham's position in his earlier quoted remarks about the parking offense and the death penalty. Benn is of the opinion that he would be able to choose the proper penalty for parking offenses, even if $xNP + NE = a$ constant. When Benn says that if "one parking offense more or less is not of great moment; one murder more or less is," Benn is making a choice of the proper penalty by a direct comparison of the severity of the punishment $P$ and $E$ the evil of the offense. Benn is not comparing $NxP$ with $N(P + E)$ because he is ignoring whatever value $N$ might have. Benn is saying, in effect, that no number of $E$'s (the evil of a parking offense), however large, could total up to even one $P$, the death penalty. Benn presents no good utilitarian reason why this should be so.
The utilitarian position on the justification of punishment, to the extent that it admits of summarization, may be summarized as follows. In their system, utilitarians often omit altogether mention of, and justification for, who is to be punished and when. Often utilitarians simply assume that only the guilty are to be punished. This assumption is rarely put forth as following from good utilitarian Aims or Principles. The basis for the assumption is often either the assuming of an unwarrantedly narrow definition of "punishment," or the adoption of some ad hoc "principles of justice," the necessity of which is not further justified by utilitarian Aims or Principles. This allows the assumption that punishing the non-guilty or the not-yet-guilty might have a place in a utilitarian system of punishment. (Note that as a complement to punitive measures Bentham also encourages non-punitive hardships inflicted upon the whole population to curb crime.) Utilitarians offer a variety of rules of thumb for determining how much to punish, based upon conflicting opinions of the expected consequences of such measures. Paley, Bentham, and Benn agree that punishment for a class of offenses should be picked so that the total amount of mischief associated with that particular class of offense is minimized. Utilitarians are not unanimous upon the answer to the question of what punishment
minimizes the total amount of mischief. Palsey believes, probably wrongly, that the severity of the punishment should increase with the uncertainty of being caught and with the ease of committing the crime. Bentham believes, probably correctly, that the severity of the punishments for different types of offenses should reflect the relative seriousness of the offenses, so as always to encourage the performance of a lesser crime. All utilitarians believe that the number of offenses will decrease in inverse proportion to the increase in the severity of the punishment. Benn qualifies that belief with the observation that there is probably some minimal number of offenses which could never be deterred by any thought of penalty. This minimum number represents the hard-core undeterrables.

The utilitarian General Justifying Aims for punishment are quite clear. The primary Aim recognized by all is the prevention of crime by discouraging the criminal from repeating his offense, and also by deterring others from copying his offense. This General Justifying Aim is, of course, presented as subordinate to the higher General Justifying Aim of contributing to the total happiness of the community or the survival of the human race. The specific Aim of compensation, reparation, and indemnity to the victim of the crime is sometimes added by utilitarians and is justified by its ability to contribute to the
happiness of the victim. The generally recognized utilitarian Limiting Principle upon punishment is simply that punishment causes mischief in itself.
FOOTNOTES


CHAPTER SEVEN

MUTUAL COMPATIBILITY OF RETRIBUTIVISTS AND UTILITARIANS

Anthony Quinton begins "On Punishment" with the following:

There is a prevailing antinomy about the philosophical justification of punishment. The two great theories--retributive and utilitarian--seem, and at least are understood by their defenders, to stand in open and flagrant contradiction.¹

Reconciling this "flagrant contradiction" was the point of Quinton's making his logical-ethical distinction, as well as that of Mabbott's making his particular case-general rule distinction, and that of Hart's segmenting the problem into questions which one or the other position was supposed to be designed to answer. None of these techniques has resolved any antinomy.

Having presented what can be taken from the traditional literature as the two main positions about punishment, I will now argue that Quinton's "prevailing antinomy" is only apparent. The claim that the two camps are mutually exclusive is unfounded. Both camps are making ethical claims about punishment. Both camps address the same questions. Although their approaches to the problem and
their emphases are different, both camps reach the same answers. A good case can be made for the claim that the two camps are in fact harmonious. The potentialities for harmony between the retributivist and the utilitarian position need to be explored.

E. L. Pincoffs in his book, The Rationale of Punishment, offers a typical example of how the retributivist and the utilitarian positions are presented as direct opposites. Pincoffs summarizes the traditional retributive position as consisting of the following three propositions:

i. The only acceptable reason for punishing a man is that he has committed a crime.

ii. The only acceptable reason for punishing a man in a given manner and degree is that the punishment is 'equal' to the crime.

iii. Whoever commits a crime must be punished in accordance with his desert.²

Pincoffs summarizes the utilitarian position in the following three propositions:

i. The only acceptable reason for punishing a man is that punishing him will serve the end of the prevention of crimes.

ii. The only acceptable reason for punishing a man in a given manner and degree is that this
manner and degree of punishment is most likely to prevent the crime.

iii. Whether or not a man should be punished depends upon the possibility of preventing the crime in question by non-punitive means. 3

According to Pincoffs the retributivists and the utilitarians appear to be at what Pincoffs calls an "impasse." But, as a matter of fact, according to Pincoffs' summarization the retributivists and the utilitarians are at an impasse only if "only and always punishing him who has committed a crime in a manner and degree 'equal' to the crime" is not "the best means for preventing crime," or better, "for maximizing human happiness." It is not obvious that "only and always punishing him who has committed a crime in a manner and degree 'equal' to the crime" is not in fact the best means for "promoting human happiness."

There may be good reason to believe that "only and always punishing the guilty in a manner and degree equal to the crime" is the best means for "maximizing human happiness" in the majority of instances.

Retributivists are convinced that they know the morally justified system of punishment, namely, "always and only punishing the guilty in a manner and degree 'equal' to the crime." Utilitarians are positive that they know the reason why punishment should be inflicted, namely, to
achieve the aim of the "maximization of human happiness." That which is retributivist is a particular way of acting. What is peculiarly utilitarian is any way of acting that is designed to achieve a particular goal. Thus, although retributivists and utilitarians have different focuses of interest, these need not result in disharmony. It would not be contradictory for the retributivist system of punishment to be exactly the system of punishment demanded by the utilitarian aim. In fact, J. D. Mabbott, in proposing that the retributivist system of punishment is justified upon the legislative level solely by utilitarian concerns, is in fact proposing a view which harmonizes the utilitarian and retributivist positions. 4

In Chapter Five, I explicitly defined who, when, and how much the retributivist punishes. Here I wish to consider the question whether a utilitarian has reason to punish persons different from those whom a retributivist would punish. Also, I wish to consider whether the retributivist will punish under circumstances different from those under which a utilitarianist would punish, and whether he would select any different measure of punishment.

It is frequently thought that utilitarians would be far more kind than retributivists, that they would punish only when absolutely necessary and never simply to satisfy
vicious, revengeful, or primitive urges, as the retributivists are often thought to do. The first question is, then, will a utilitarian punish the guilty less than my previously defined "equal" amount?

To summarize the utilitarian position as it was described in Chapter Six, utilitarians want to choose a punishment that minimizes $xNP + NE$, where $N$ is the number of offenses over the hard-core number, $x$ is the fraction of offenders caught, $P$ is the amount of the punishment, and $E$ is the evil of the crime. (It can be assumed that utilitarians agree with retributivists that $E$, the evil of the crime, is the unfair gain of the criminal plus the material and psychological harm done to the victim, plus the harm done by an example of a crime.) $N$ is supposed by utilitarians to be a function of $P$ which increases as $P$ decreases.

In terms of the utilitarian formula, the "equal" punishment of the retributivists is the punishment when $xP = E$, or when the punishment equals the evil of the crime plus a small increment to offset a small chance that wrong-doers occasionally escape. If the amount of punishment is decreased below this "equal" amount, then the punishment would be inadequate to completely annul the gain of the criminal from his crime, plus the material or psychological advantage the criminal gained over his victim, plus the
harm done by the example of the crime. Utilitarians should accept the fact that if \( P \) is such that a criminal can commit an offense and emerge after his punishment in a more advantageous position than his victim or than the rest of society, then the crime in a sense has a reward; crime is profitable even after punishment. In this event the number of those who can be expected to adopt crime as a means of profit should be relatively high. Moreover, if the amount of punishment is set below the "equal" amount, then criminals can gloat over society and their victims that they are profiting from their immoral or unfair deeds, even after punishment. This would reduce the moral compunction which is deterring the rest of society from seeking profit by immoral or unfair means. Consequently, the number of those committing crimes should increase sharply as the amount of punishment is reduced to a level which makes crime profitable. This is a point about the relationship of \( N \) and \( P \) that utilitarians should grant. (Some people, of course, will adopt crime as a means of profit even when the punishment when caught annuls the benefits from the crime, because some will always gamble that they will not be caught.)

To relate this point to the quantity to be minimized (i.e., \( xNP + NE \)), the value of \( xNP + NE \) when \( xP = E \) (i.e., when the punishment is the "equal" punishment), is
\[ N(xP + E) = N(E + E) = 2NE. \] When \( xP \) is assigned a value less than \( E \), say, \( xP \) is decreased by some fraction \( y \) of \( E \), then the value of \( N \) has to increase only by a fraction slightly more than one half of \( y \), for small values of \( y \), or slightly more than \( y \) for large values of \( y \), in order for the value of \( xNP + NE \) to be greater than its value when \( xP = E \). In other words, if the number of those committing crimes increases at a little more than half the rate that the amount of punishment is decreased below the "equal" amount, for small decreases, or if the number of those committing crimes increases at a little more than equal the rate at which the amount of punishment is decreased below the "equal" amount, for large decreases, then the total unhappiness associated with the crime will be higher for the decreased amount of punishment than it is when the punishment inflicted is the "equal" amount. Thus, there is no necessity for \( N \) to take even a "sharp" upturn if \( xP \) passes below the value of \( E \), in order for the value of \( xNP + NE \) to increase above its value when \( xP = E \). And as we argued a really sharp upturn in \( N \) is to be expected in case \( xP \) decreases to below \( E \). Therefore, utilitarians should not expect to minimize \( xNP + NE \) by reducing the value of \( xP \) below \( E \), i.e., by reducing the amount of punishment below the "equal" amount.

If one were reluctant to make any assumption at all
about the relationship between N and P, beyond their inverse proportionality, a simple inspection of the function \( xNP + NE \) would strongly suggest that the way to minimize \( xNP + NE \) is to drive N down. The value of \( xNP + NE \) is determined by the two terms \( xNP \) and \( NE \). One can do nothing about the value of \( E \). It is always there, constant. Reducing N would definitely reduce \( NE \). Since increasing P reduces N and reducing P increases N, for all one knows the value of \( xNP \) might remain fairly constant for all values of N and P. Thus, without making assumptions about the relationship of N and P beyond their inverse proportionality, it is sensible to attempt to minimize \( xNP + NE \) by driving N down. And N is driven down by raising P high. So, in general, the utilitarian desire to minimize \( xNP + NE \) commits the utilitarian to argue for punishments greater than the "equal" amount and not to argue for lesser ones. All in all, it is remarkable that it is claimed that utilitarians would differ from retributivists by being interested in reducing the amount of punishment below the "equal" amount.

However, utilitarians, when arguing that they would be more lenient with punishment than retributivists, are not usually arguing that in general they would punish less than retributivists. Rather they are arguing that in some certain cases the utilitarian by seeking to minimize \( xNP + NE \) would see fit to punish lightly or not at all where
the retributivist by comparison would be harsh, cruel, and pointless. These are cases where in the utilitarian opinion the retributivist would inflict an "equal" punishment even though it was groundless, inefficacious, unprofitable, and needless. The cases in mind are cases like Kant's "last murderer" (who Kant feels should be put to death before the community scatters to inhabit foreign lands), or the young delinquent case described by Pincoffs:

Suppose a person commits a crime, and the commission of the crime is a relatively minor moral offense. Say, he is Paul, a fifteen-year-old, and he takes an automobile for a 'joy ride,' intending to return it. Suppose also that Paul has mental difficulties and is under the care of a psychiatrist. Suppose the psychiatrist is reasonably sure that if he is allowed to continue the treatment of Paul for only six months longer he will be completely readjusted to normal life; and that if he is sent to a reformatory for his crime he will suffer a severe set-back and will become permanently mentally disabled. Does one have a moral right to send Paul to a reformatory? But would not a retributivist who thinks that the reformatory term is 'equal' to the crime have to approve of sending Paul to the reformatory?

Pincoffs leaves unspecified whether Paul's mental difficulties had anything to do with his stealing the automobile. If Paul was insane when he stole the automobile, that fact should excuse Paul's offense for the retributivist, although it would not argue for letting Paul remain at
large. Assume, however, that Paul should be considered morally responsible for automobile stealing. For the retributivist, becoming permanently disabled is too great a punishment for the evil of stealing a car. There is no basis for any implication that retributivists would be less cognizant than utilitarians of the differences in effect of the same punishment upon different people in different situations. On the other hand, doing nothing to Paul does not effect any restitution, material or psychological, to the victim of Paul's crime. Nor does it nullify Paul's gain from his crime. Furthermore, it would sanction the crime and encourage similar crimes. Some reasonable punishment should be reached which would neither permanently disable Paul nor ignore the crime and should be endorsed both by the retributivist and the utilitarian. The false assumption made here, and which is commonly but needlessly made about the retributivist, is that the retributivist would apply the same punishment to various offenders for the same crime irrespective of the situations of the victim of the crime or of the offender.

Kant's "last murderer" example presents a more telling instance of a possible difference between retributivists and utilitarians. With respect to Kant's "last murderer" there are two questions which need answering. Were there any relatives or associates of the victim of the murder to
whom psychological restitution and some sort of material restitution could be made? And did the murderer secure any tangible gain from the crime? To make the example interesting, let it be assumed that there are no relatives or associates of the victim of the murder to whom personal restitution could be made. (Assume that the victim was a hermit.) Assume also that the murderer secured no tangible gain from the murder. (Assume that the murderer operated upon the false assumption that the hermit lined his cave with gold.) In addition, assume that the society is totally composed of moral, intelligent, sensitive individuals who are morally repelled by the crime and who would not be tempted to any equivalent heinous act. Moreover, they would not be in any position to accomplish it. They are to scatter and explore a foreign land. This includes the "last murderer," who should not be expected to be in a position to repeat his crime. The utilitarian is right when he claims that the retributivist should still be expected to punish the last murderer. For the retributivist, to fail to punish the last murderer is to sanction in the community's eyes, and even in the criminal's eyes, his horrible act. The element of religious censure in retributive punishment comes out here. The murderer has offended the sensitivity of the society, has offended their sense of the sacredness of human life. Society must either
defend its sensitivity by emphatically denouncing the offense or suffer its sensitivity to diminish. The retributivist should argue, in addition, that if the community fails to express its sense of moral repugnance to the last murderer by inflicting a hardship upon him, then the last murderer will be deprived of the chance to understand morality. So he will be deprived of the chance to become a full human being.

It may be said that execution, which Kant demanded for the last murderer, is an inappropriate means for expressing the society's denunciation of unrighteousness. The only real values of execution as a punishment are that it is cheap, certain, easy to carry out, and that it is the ultimate in physical restraint. In ordinary circumstances there are innumerable sorts of hardships which function better than execution and which do not have execution's drawbacks. The drawbacks of execution are that it dulls the moral sensitivity of society and, because it takes place so quickly, that its value as psychological restitution and as expressing the denunciation of the evil of the crime is not great. Most importantly, execution cannot develop any moral sense in the criminal. Moreover, the value of execution as a threat is probably exaggerated. There certainly are hardships equal to or worse than execution, just as there certainly are conditions of living
equal to or worse than death. An appropriate "equal" punishment in the instance of Kant's last murderer would appear to be something like the Biblical Mark of Cain, or an Albatross around the neck, or Oedipus's self-inflicted torture. It would be some punishment which sufficiently expresses the community's feeling of moral repugnance. It should, if possible, bring the last murderer to see himself as others see him.

It must be admitted that some utilitarians who want to maximize physical pleasure and minimize physical pain would disagree with the retributivists here. These utilitarians value the murderer's physical and mental pleasure more than they value society's satisfaction in its expression of moral repugnance and more than they value last murderer's grasping the value of human life. Clearly a value judgment is called for. The important point is that there is nothing within utilitarian Aims per se which rules out Kant's position. Some utilitarians should be expected to agree with a modified Kantian viewpoint. For instance, consider the remarks of Bland Blanshard, a self-proclaimed utilitarian:

We must grant the retributivists several things. First the repulsion against moral evil as such is plainly legitimate. It is not enough to recognize evil intellectually; cruelty, for example, is hateful and properly hated, even if causally inevitable.
The French murderer Lacenaire, who had taken many lives, said he felt nothing more when he took a human life than when he took the life of a fly. Such a man is probably a congenital moral moron, but whether he can help himself or not, that attitude toward his fellow man is one toward which horror and repulsion are the only appropriate feelings.  

Blanshard continues to quote F. L. Lucas who writes, "There are times when it is good to be angry; there are things it is feeble not to loathe...there is no place for good humour in front of Belsen and Buchenwald." Thus it would be wrong to say, even in the case of Kant's last murderer, that the utilitarian *per se* would be bound to punish the guilty less than the retributivist.

Consideration of how the utilitarian might well agree with the retributivist about punishing the "last murderer" serves to point up the fact that the utilitarian goal of choosing P to minimize $xNP + NE$ is not completely adequate to express true utilitarian aims. The utilitarian goal of minimizing $xNP + NE$ expresses an expectation that all of the benefits of punishing, or of not punishing, will be reflected in N, the total number of offenders. In general, this expectation is reasonable. In unusual circumstances—when the choice of P can not affect future N—other more subtle effects of punishing need to be considered and should not be ignored. These more subtle effects, e.g., the effect of punishing or not punishing
on the existence of moral sensitivity and respect for human values in the community, are reflected in the rise and fall of N in ordinary circumstances. In truth, moral sensitivity and respect for human values are also goods in themselves.

There is one other situation in which it is claimed that it would be right to punish less than the "equal" amount and that utilitarians would do so. This is the situation in which a "pretended punishment" can be effected. The claim goes that if it is generally believed that the offender is receiving a just and deserved punishment, then all of the goods of punishing have been achieved, regardless of whether the offender is being punished or not. If this belief were maintained while punishing the offender little or not at all, then the additional mischief of the actual punishment could and should be avoided.

The goods of punishing that I have mentioned are the psychological restitution to the victim of the crime, after whatever material restitution possible has been made, the annulment of the gain of the criminal from his crime, and the emphatic denunciation by the community of the criminal act. Belief that punishment took place cannot satisfy the requirements of material restitution, but in some situations there is no need for material restitution and, as has been mentioned, requiring material restitution is not essentially
a punitive act anyway. The belief of the victim of the crime that punishment is taking place satisfies the requirements of psychological restitution to the victim. Annulling the gain of the criminal from the crime is a goal of punishment, not because criminals should never have gains (fate might reward them anyway; they might win a lottery) but because it should never be thought that one has gotten gain and can get gain by criminal acts. Thus, belief that punishment is taking place does satisfy the essential element of the requirement of annulling the gain of the criminal from his crime for those who believe. Belief that punishment is taking place also satisfies the requirements of denouncing the unrighteousness of the crime, again so far as those who believe are concerned.

If the punishment is a pretense then those who are not deceived by the pretense should apparently include at the least the offender and the authority. Keeping the secret of a pretended punishment from spreading beyond these few seems a practical impossibility but the situation can be analyzed in order to cover all bizarre situations. Incurring any one of the following three evils by a pretense to punish would be creating more evil than is saved by the pretense to punish and would warrant a real punishment. Evil 1: The offender and anyone else who knows of the pretense are encouraged to commit offenses since they
see that crime can be profitable. Evil 2: The moral sensitivity of the offender remains unimproved since he does not learn of society's true feeling toward his act, and the moral sensitivities of all who know of the pretense are dulled by the pretended denunciation. Evil 3: Most importantly, learning of the pretense will destroy, among the community that had been deceived, the credibility of and respect for the rules and the authorities. It would be a strange quirk if these three evils were all avoided. The offender himself would have to be deceived (an odd situation) or would have to be in a position where he could not repeat offenses which he might be encouraged to repeat. In addition, the offender would have to be unable to have derived any moral lesson from society's inflicting a hardship on him for his offense. (If he had already learned his lesson there might be an honest argument for mercy.) The authorities and any others who knew would themselves either have to be deceived (an odd situation) or would have to be unable to commit any similar offenses. In addition, the authorities and any others who knew would have to be unable to understand the moral denunciation implied in the act of punishment, or would have to be beyond the point of temptation and beyond the point where their sensitivities could be dulled.

The first point that is clear is that such set of
circumstances is not the type of thing that one recommends. One cannot recommend that authorities deceive themselves and the offender or that they be of impeccable morals and sensitivities or that they themselves be removed from society so as to be unable to commit offenses and to care about offenses being committed. If by chance such unusual circumstances were to obtain, there is no reason to see why retributivists should not agree then with utilitarians that, given such a strange turn of events, the actual punishment of the offender would be only additional mischief which would accomplish no additional good. In such bizarre circumstances the "equal" punishment might well be the pretended punishment. It satisfies all of the retributivist's aims. That would not change at all the retributivist's standpoint about recommending systems of punishment in general or the necessity to see justice and desert done in less than bizarre circumstances. Thus, even in the circumstances of pretended punishment, the utilitarian should not recommend punishing in any amount less than the retributivist.

I now want to consider whether a utilitarian must punish the guilty in an amount greater than the previously defined "equal" amount. It appeared from the previous discussion and consideration of the function xNP + PE that it is extremely likely that a utilitarian would choose a
punishment P more severe than the equal amount, in order to drive N, the number of offenses, down. Some utilitarians, Hart and Benn to name two, simply accept this as true and proclaim, therefore, the necessity for utilitarian principles to be "supplemented" by principles of justice. These utilitarians intend to hold principles of justice as limiting principles upon whom to punish and the mode and measure of punishment. The principles are meant to set "upper bounds" which utilitarian punishment must not exceed. This rationale of Hart and Benn for adopting supplementary principles of justice as limiting principles has the appearance of being ad hoc. Also, as a matter of fact, principles of justice do not just set upper bounds upon actions. I will now consider whether and why it is necessary to "supplement" utilitarian principles. But to answer this question I must make more assumptions about the relationship between N and P.

First, consider the situation when the likelihood of being caught is great. If P is known to be such that the victim gets complete psychological restitution and whatever material restitution is feasible, and if the criminal's gain from the crime is completely nullified, then crime is not profitable. So those who commit crimes in such circumstances must either be gambling on not being caught, must not be thinking of the consequences upon their own life at all, or must desire punishment. Increasing the punishment will
certainly not affect the number of crimes committed by those who do not consider consequences at all, and thus in these instances would do pointless harm. It is generally conceded that those who want to be punished need psychiatric help, and not punishment. To punish them greater than the "equal" amount should not reduce their number. Those who continue to commit crimes, while recognizing the unprofitable consequences, are not being very rational and must be counting on luck to beat the odds of being caught. Increasing the amount of the punishment would not substantially affect a potential criminal's expectation of not being caught and would punish the criminals caught in an extra amount for their poor logic or dependence on luck.

If the likelihood of being caught is small, virtually no increase in the amount of punishment can effectively offset the criminal's assumption that he will not be caught. As far as the criminal's calculation goes, favorable odds exist for each single crime. No reduction in the crime rate will be accomplished if the few caught are punished for all of the crimes. It is false that a large amount of punishment compensates for a small likelihood of being caught. Moreover, history has indicated that it is difficult to get compliance in applying punishment in an amount much larger than is "deserved," for individuals
in society are reluctant to make a scapegoat of the few criminals caught.\textsuperscript{10} There appears to be no good substitute for a great likelihood of being caught, either for utilitarians or for retributivists. Given a great likelihood of being caught, it was seen that the number of crimes should be relatively insensitive to a raise in the level of punishment above the amount that insures that crime does not pay and that crime is denounced. Given a small likelihood of being caught, the number of crimes should be insensitive to any level of punishment.

Like the retributivists, I now ask whether utilitarians should take into account excusing conditions, mitigating circumstances, and factors that argue for mercy. The threat of punishment should be expected to have no effect in decreasing the number of crimes, when excusing conditions are present—conditions such as the crime's having been committed in an epileptic fit, by accident, at gun point, or under extreme threat. From the utilitarian standpoint, as from the retributivist standpoint, punishment might as well be deleted. The utilitarian like the retributivist might well insist nonetheless on reasonable material restitution to the victim. When mitigating circumstances are present, circumstances like being provoked or tempted on being in desperate straits, it has been suggested that utilitarians favor
high penalties whereas the retributivists favor low penalties. It is thought that utilitarians would regard crimes with mitigating circumstances the way Paley suggested regarding crimes of great temptation: the stronger the temptation to crime the stronger the threat of penalty needed to deter the crime. It is questionable, however, whether those who are provoked or are desperate will consider the consequences of their acts. Moreover, provocation to a crime and circumstances which make people desperate add to the general unhappiness of the world, regardless of whether actual crime ensues. The correct means to minimize human unhappiness and reduce the rate of provoked or desperate crimes is to remove the provocation or the cause of desperation. Raising the penalty for provoked and desperate crimes is to encourage provocations and to perpetuate the existence of some persons in desperate straits. Lowering the penalty for provoked and desperate crimes will discourage provocation and will encourage society to remove the causes for the desperate acts. Thus, lowering the penalty for provoked and desperate crimes should help minimize human unhappiness by minimizing the number of provoked or desperate situations, thus minimizing the number of crimes as a result of provoked or desperate situations and minimizing the suffering of the punishment which results from the crimes. Now
let's consider conditions which argue for mercy, conditions such as genuine remorse, repentance, and self-punishment. The utilitarian, like the retributivist, should argue that remorse, repentance, and self-punishment have already performed the function of formal punishment, so that formal punishment may be omitted with no loss. Thus, when excusing conditions, mitigating circumstances, or conditions which argue for mercy are present, the utilitarian like the retributivist should be willing to punish less than when they are not present.

Next, it should be considered whether the utilitarian would punish persons other than the guilty, and, if so, under what conditions and in what amount. The greatest complaint against utilitarians, and a complaint accepted by many utilitarians, is that utilitarians would sometimes punish the innocent in order to maximize good. There are two kinds of innocence. One may be innocent of doing anyone any harm while guilty of committing an offense or one may be innocent of harming anyone and of committing an offense. First of all, it is true that utilitarians would be likely to support legislation against certain actions, which are not in themselves wicked, if these actions are conducive to crime or violence or offenses. Examples would be carrying concealed weapons, driving while drunk, and possessing firearms. In defense of utilitarians, it is
fair to say that anyone who commits such actions is at least guilty of negligence with respect to the possible consequences of his actions. Even retributivists might agree to support such legislation. Since there is no victim per se for this type of crime, there is no question of material or psychological restitution. The offender, however, does effect a gain by such action, either his own convenience or the luxury of not taking precautions. Retributivists could well hold that the proper penalty for such actions is the amount of punishment necessary to annul the offender's gain. Since this amount of punishment should be just enough to discourage the offender, utilitarians should also find this penalty proper.

Utilitarians would also be likely to support legislation against certain other actions, actions again, which in themselves are morally acceptable, if these actions should be closely associated with certain genuine moral offenses. Such actions might be the possession of marijuana, possession of a firearm, or conspiracy to commit a crime. The primary purpose of making such actions illegal is to facilitate the conviction and detection of genuine moral offenders. Although such actions themselves are not morally culpable, anyone committing such actions is probably guilty of an immoral intent. Having an immoral intent is a sort of moral offense, though not one
usually punished because of the uncertainty of its presence. If the probability of immoral intentions is high, retributivists should agree with utilitarians in supporting legislation against such actions. Again there is no victim for this type of offense, so in setting the penalty there is no question for the retributivist of material or psychological restitution. Moreover, if such "actions" are not brought to fruition they secure for the potential criminal little actual gain. The only measure left for determining the penalty for the retributivist is the degree of the moral repugnance of the community toward the immoral intention and the educational effect that an expression of such moral repugnance is likely to have upon the offender.

For determining the proper penalty for such actions the utilitarian should appeal to his formula of choosing $P$ to minimize $xNP + NE$. This time the formula has additions. The utilitarian now wishes to choose $P$ and $P'$ to minimize $(wN + M)P' + x(N - wN)P + (N - wN)E$, where $w$ is the percentage of crimes caught at the preliminary stages, $M$ is the number of mistakes made or the number of those caught at the preliminary stages who really would have committed no crime, and $P'$ is the punishment for intending to commit a crime. Probably $M$ is low, for retributivists and utilitarians should both agree that punishing the innocent
is usually devastating to the maintenance of human righteousness and is not an activity which tends to maximize human happiness in the long run. The punishment $P'$ for the intent to commit a crime, should certainly be less than the punishment $P$ for actually committing the crime, or else there would be an incentive to commit the intended crime. And it should not take more punishment effectively to deter the intent to commit a crime than it takes effectively to deter the crime itself. Thus, utilitarians should recognize $P$ as an upper limit upon the punishment $P'$ for intending to commit a crime. There is no a priori reason to expect that upon this difficult issue of setting the penalty $P'$, the utilitarian and the retributivist will decide much differently. That which is sufficient to impress upon the potential criminal the moral repugnance of the community for the intended crime should be sufficient to deter some crime without being excessive and causing more mischief than it prevents.

Those innocent of harming anyone and of committing any offense may be punished in three ways: 1) as a member of a group where either some are known to be guilty or where all are thought to have some small possibility of being guilty, 2) as a means of hurting the guilty relatives or associates of the innocent one when they cannot be punished directly, and 3) as a scapegoat, either acknowledged or unacknowledged. The only way to consider the
question of the punishment of the innocent is to list the goods it might achieve and the evils it might achieve. The goods it might achieve are: 1) affording material and psychological restitution to the victim of the crime, 2) annulling the gain of the crime, 3) expressing the community's denunciation of the evil of the crime, and 4) incapacitation of the guilty for a time. All of these goods contribute to the deterrence of crime. The evils that punishing the innocent might achieve are: 1) causing additional suffering in the world, 2) encouraging lawlessness by the failure to support or reward righteousness, 3) contributing toward a general state of insecurity in life since luck is given a chance to disrupt a life, and 4) furthering evil purposes by giving authorities the chance to misuse the practice to serve their personal power, anger or grievances. The important point here is that the retributivist and the utilitarian alike must recognize all of these possible goods and evils and justify or refuse to justify the punishment of the innocent upon this basis. Saying that punishing the innocent is unjust adds nothing to the discussion. Punishing the innocent is unjust but so is failing to punish the guilty. Sometimes there is no just choice.

The practice of punishing a group which includes some innocent and some guilty insures punishing the guilty and
should achieve all four goods and cause all four evils listed above. The alternative of not punishing the group is bad because allowing the guilty to remain at large supports crime and discourages righteousness. There is no pat retributive or utilitarian solution to this dilemma. There is no just solution. Neither alternative gives everyone what he deserves. Neither alternative has a clean-cut advantage in discouraging crime. In general, if the majority in the society are righteous and innocent it is best not to punish groups in order to ensure that some few guilty get punished. If the majority are unrighteous, it might well be best to punish groups in order to establish the principle that unrighteousness is not going to be tolerated. Life among an unrighteous majority is insecure and affected by evil purposes and rarely rewarded for its righteousness anyway.

The practice of punishing the innocent family or associates of the guilty when the guilty cannot be reached to be punished in person achieves the first three goods listed above to a diminished degree. To a small extent crime is deterred. All of the evils associated with punishing the innocent are caused. It should be difficult for either a retributivist or a utilitarian to imagine a situation in which achieving such a small amount of good outweighs such great evil.
Punishing a scapegoat generally acknowledged as such to the populace in our society which stresses the worth of the individual, should achieve no goods and should actualize all of the evils listed. It is inconceivable that a retributivist or a utilitarian would punish an acknowledged scapegoat. Punishing an innocent person when he is put forth as guilty, a generally unacknowledged scapegoat, is another matter. For all of those who do not know of the innocence all of the above listed goods are achieved, save the prevention of crime achieved by the confinement of the true guilty one, and only the first evil, that of causing additional suffering in the world, is actualized. For those who do know of the innocence of the one punished, and this includes at least the innocent one, the guilty one, and the authorities, none of the goods are achieved and all of the evils are actualized. And, of course, the degree to which the whole affair can be kept secret over a long course of time, given the guilty one's propensity to brag or confess, is highly questionable. It is doubtful that, if the secret is confined to the innocent one, the guilty one, and the judge, then any goods achieved could outweigh the destruction in those three individuals of the values held for human life. However, extenuating circumstances are always added to examples of the punishment of the innocent. It can be questioned whether one
individual, known to the authorities as innocent but believed by the masses to be guilty, should be found guilty and punished for a crime he did not commit in order to stave off imminent rioting, pillaging, and killing by the aroused masses. One important thing to say about this moral question of undeserved human sacrifice is that the dilemma is not restricted to the issue of the justification of punishment. The question of innocent human sacrifice can arise in wartime, with respect to choosing people to be sent upon a suicide mission to save the lives of a great many more. It can arise in medicine, with respect to whether to refuse helpful treatment to one individual when it is believed that enough would be learned from watching an untreated case to develop far more effective measures to help others. There is no easy solution to the question of undeserved human sacrifice. Everyone would approve such an action as imposing an undeserved ten dollar fine to save a life. Where the line is drawn is probably quite an individual matter. The point is that not only utilitarians but also retributivists would approve of undeserved punishment under some conditions, so that the retributivists are not substantially different from the utilitarians in this matter.

To summarize, there is no reason to expect a utilitarian to punish any persons other than those whom
a retributivist would punish. Nor is there reason to expect a utilitarian to punish in either a greater or lesser amount than a retributivist. There is good reason to expect a utilitarian to take excusing conditions, mitigating circumstances, and factors that argue for mercy into account to a greater or lesser degree than a retributivist. There is no good reason for a retributivist, any more than there is for a utilitarian, to refuse to punish those guilty of acts which are not morally culpable in themselves but are closely associated with or conducive to morally culpable acts. Punishment of the out-and-out innocent is as detrimental to utilitarian aims as it is to those of the retributivist. In short, maintaining justice, expressing an appropriate sense of moral repugnance, supporting human righteousness, and endorsing the value of human life can be seen as essential for the utilitarian aim of maximizing human happiness and minimizing human mischief. It would be unfair to say of Pincoffs in The Rationale of Legal Punishment that he did not appreciate the possibilities for harmony between the retributivist and the utilitarian positions, but it is fair to say that Pincoffs did not give these possibilities sufficient emphasis. It would be wrong to imply that one could not adopt some utilitarian position which would be diametrically opposed to some retributivist position. For instance, a
utilitarian position which valued only human pleasure would be at odds with a retributivist position which looked only to the physical crime and stuck rigidly by a literal eye-for-an-eye rule of thumb. However, it is just as possible for two utilitarian positions to be at odds. For instance, they can disagree about the relative value of short-term versus long-term benefits, or of pleasure versus self-realization. Retributivists can also disagree with one another, for instance, on what is required for psychological restitution to the victim of the crime, or in order to express moral repugnance. The point that needs to be made is that retributivists and utilitarians are not by nature opposed to each other. Those utilitarians who announce the necessity of "supplementing" in an ad hoc fashion utilitarian principles with "limiting principles" of justice need to appreciate how their own utilitarian position is served by full fledged principles of justice.
FOOTNOTES


4 Not in the compartmentalized way Mabbott envisioned harmonizing theories, however. Refer back to Chapter Four.

5 $x$, the fraction of offenders caught, can be written as $a/b$ where $a$ is the number of apprehensions for $b$ crimes. Saying $xP = E$ is saying that $(a/b)P = E$ or $aP = bE$. If one fellow commits an evil $E$ $b$ times, then making $aP = bE$ means that his punishment $a$ times should equal the total evil he committed in $b$ crimes. $aP = bE$ is the same as $P = (b/a)E = E + E(b/a - 1)$. If $a/b$ is a fraction slightly less than one then $b/a$ is a fraction slightly greater than one and $(b/a - 1)$ is a small fraction. Thus, when $x$ is close to one it is true to say that $P = E$ plus a small fraction of $E$ or a small increment. If $x$ is closer to zero than one, adding an increment of punishment to cover the chance of escaping is no longer appropriate. It would distribute the punishment for
crimes unjustly. The increment would begin to exceed the evil of the crime and the few caught would be punished for the crimes of many never caught. If \( x \) is closer to zero than one, \( P = E \) is best, although when \( x \) is closer to zero than one crimes will probably be rampant and the precise choice of \( P \) is the least of one's worries.

If \( z \) is the fraction of \( N \) that \( N \) increases as \( xP \) decreases from \( E \) to \( E - yE \), then the difference between the value of \( xNP + NE \) when \( xP = E \) and \( xP = E - yE \) is \( N(E + E) - (N + zN)(E - yE + E) \), or \( 2NE - (N + zN)(2E - yE) \), or \( 2NE - (2NE + 2zNE - yNE - zyNE) \), or \( 2NE - 2NE - (2zNE - yNE - zyNE) \), or \( -NE(2z - y - zy) \). If the value of \( xNP + NE \) when \( xP = E \) is negative then \( xNP + NE \) is increasing (i.e., not being minimized) as the value of \( xP \) is being decreased below \( E \).

For the value of \( xNP + NE \) when \( xP = E \) minus the value of \( xNP + NE \) when \( xP = (E - yE) \) to be negative, \(-NE(2z - y - zy)\) must be negative, or \((2z - y - zy)\) must be positive, or \(z(2 - y) - y\) must be positive, or \(z(2 - y) > y\), or \(z > y / (2 - y)\). The range of \( y \), the fraction of \( E \) that \( xP \) is reduced, is from zero to one. When \( y \) is close to zero, this means \( z > y / 2 \) for the value of \( xNP + NE \) to be greater than its value when \( xP = E \). When \( y \) is close to one, \( z > y \) for the value of \( xNP + NE \) to be greater than its value when \( xP = E \).
7. E. L. Pincoffs, *The Rationale of Legal Punishment*, p. 44.


CHAPTER EIGHT

SUMMARY AND SOME NEW CONSIDERATIONS

The previous chapter has attempted to show the unfounded nature of the assumption that an antinomy exists between the retributivist and utilitarian positions about punishment. The retributivist and utilitarian positions reflect different emphases and different approaches to the problem of punishment, but both arrive at essentially the same system of punishment. That each justifies punishment in terms of different aims and principles does not mean that their systems are incompatible. Differences of opinion about the morally justified system of punishment which remain among the traditional retributivist and utilitarian stem from differences of opinion about the relative importance of different values, such as personal pleasure, self-realization, or the amount of psychological damage resulting from a crime.

This conclusion has implications about the demand that one label oneself a retributivist or a utilitarian when he talks about the justification of punishment. Such a demand is artificial and unnecessary. It is extraordinarily difficult to extract from the literature a clear
retributivist and a clear utilitarian position. Some self-proclaimed retributivists say what one would expect a utilitarian to say, and vice-versa. For instance, J. D. Mabott, a self-proclaimed retributivist, says that, "I say that punishment is a corollary of law and we decide whether to have laws and which laws to have on utilitarian grounds."\(^1\) Brand Blanshard, a self-proclaimed utilitarian, says, "...the repulsion against moral evil as such is plainly legitimate. It is not enough to recognize evil intellectually; cruelty, for example, is hateful and properly hated, even if causally inevitable."\(^2\)

Differences of opinion are as likely to exist between two retributivists or between two utilitarians as they are between retributivists and utilitarians. Traditional retributivists disagree with one another. For instance, Kant, Hegel, and Bradley disagree about whether attention should be paid to which punishment would benefit society and the criminal. Traditional utilitarians also disagree with one another. Paley and Bentham disagree about whether punishment should increase with the uncertainty of being caught. Merely defining the retributivist and the utilitarian positions involves so much deletion and interpretation that this fact alone suggests the artificiality of the labels.

There is a third position about punishment emerging
in this century that exhibits a far clearer contrast both to the retributivist and the utilitarian positions than these positions ever did to each other. The problem is how to label this new position. Some want to call it the "treatment" position, but that label is too narrow. It would be better to say that the new position emerging about punishment is a position that is based upon a "parental discipline" model as opposed to a "revenge upon wrong-doers" or a "religious censure" model.

Those who approach punishment from the "revenge upon wrong-doer" and the "religious censure" models advocate treating the wrong-doer as a peer or as an equal. They have concern for justice, for each getting the desert of his deeds, for the discouragement of crime, and for the community's expressing its emphatic denunciation of the wrong-doer. Those who advocate treating the wrong-doer as a peer assume that the infliction of a hardship on the wrong-doer is the most effective means for discouraging the wrong-doer from repeating his crime, discouraging others from repeating the crime, achieving the annulment of the material and psychological gain of the criminal, and impressing upon the community and the wrong-doer that such actions are offensive. It is assumed that the infliction of hardship on the wrong-doer is appropriate since peers must assume responsibility for their actions.
In contrast, those who approach punishment from the "parental discipline" model advocate treating the wrong-doer as a "child." The word "child" is used metaphorically to stand for anyone whose mental, moral, intellectual or social competence is regarded as undeveloped or impaired. A "child" might be a juvenile or a mentally ill person, or might be a so-called culturally, economically and socially deprived person. Those who advocate treating the wrong-doer as a "child" have concern for the development of the intellectual, moral, mental, and social competence of the wrong-doer. Those who advocate the "parental discipline" approach to wrong-doing advocate society's assuming the "parental" role in the situation. The focus of the "parents" concern is not the material and psychological harm done to the offended one or to the rest of the community. Nor are "parents" especially concerned for their need for emphatically denouncing the wrong-doing. Those who advocate the "parental discipline" approach to wrong-doing often do not view inflicting hardship as the best way to develop undeveloped intellectual, moral, mental, and social capabilities. Thus, those who advocate a "parental discipline" approach to wrong-doing may be recommending a non-punitive alternative to punishment altogether, which could best be called "treatment."
There are several other significant differences to be noted between the systems of dealing with wrong-doers proposed by those who advocate a "parental discipline" model and those who advocate a "restitution and censure" model. The attitudes of compassion and sympathy characterize the disciplinary attitude, but often condescension is present too, stemming from the sense of aloofness of the "parent." The goal of disciplinary action is considered to be a benefit to the wrong-doer, so it is likely that the punishment or the treatment applied will be proportional to the beneficial result desired rather than to the gravity of the offense. This could have some bizarre consequences, as Herbert Morris points out. Someone who commits a murder might be merely given a pill, while someone who has simply broken dishes and exhibited an accident-proneness might be treated for a lifetime in an institution. Since on the "parental discipline" model the wrong-doer is considered to have in some ways a child's status, and since the discipline or treatment applied to the wrong-doer is viewed as a benefit to him, disciplining or treating an innocent person would be viewed as far less of an evil than punishing him would. The incidence of "parents" disciplining or treating innocent "children" should be expected to be higher than the incidence of people punishing their innocent peers.
Moreover, the possibility of conscientiously objecting to a rule of society and thereby getting the rule changed is significantly diminished in a system based on the "parental discipline" model. For conscientious objection to a rule is likely to be indistinguishable from a symptom of the need for intellectual, moral, mental, or social development. The conscientious objector might have only the options of "growing up" or remaining under permanent supervision.

It might be pointed out that advocating the "parental discipline" model is not the same as advocating the doctrine of "turning the other cheek." The maxim of "turning the other cheek" respects the offender as an adult or a peer. Those who are capable of "turning the other cheek" as a non-punitive response to an offense simply recognize no psychological loss because of the offense. They place no value on their material loss or the criminal's material gain. Like those who advocate a response to wrong-doing based upon the "parental discipline" model, the non-punitive response of "turning the other cheek" is supposed to bring about moral development in the wrong-doer, the type of moral development that can take place within an adult understanding, however.

It should also be pointed out that advocating the parental-discipline model of punishment is not the same
as advocating a superior-inferior division of status as in society. This sort of division might be based on racial or economic or ideological lines. It might be based on the sheer possession of power. Those who advocate a superior-inferior division of statuses in society find people to be of different moral worth and their happiness to be of different values. A premise of most modern discussions of punishment is, however, the equal moral worth of all individuals. The superior-inferior division of status is generally considered to be immoral. One problem with the parental discipline model of punishment, more than with the "revenge and censure" models is that it can more easily become the basis of a superior-inferior division of status among people.

Those who argue that the treatment of wrong-doers should reflect the type of thinking and acting that is appropriate to parental discipline need to establish three facts. The first fact that they need to establish is that by some identifiable criteria the treatment of the wrong-doer as a "child" or as intellectually, morally, socially, or mentally undeveloped can be shown to be right. These criteria must include something other than the mere fact that a crime has been committed. Spelling out the criteria for deciding whether someone should be treated as a child rather than as a peer is an extraordinarily
difficult job. Nonetheless, spelling out such criteria and showing that criminals usually fit the child profile, is the first job.

The second fact that those who use a parental discipline model need to establish is that the rule-abiding community is willing to assume the role of parent. This implies that the rule-abiding community is willing to expect, and to tolerate, and to quickly forget (with resignation, no antipathy, and no emphasis upon restitution), offenses against itself, and to do so out of concern for the offender and a sense of responsibility toward him. This is no small requirement, and probably society will have to be convinced of the idea.

The third fact that needs to be established is that the members of the community themselves are willing to take the chance of being judged a "child." Since the decision about who exhibits the behavior of a "child" might well have to be made by those who are deemed to have "expertise" in the field; since challenging the criteria might only have the effect of marking oneself as a "child"; and since much of the compunction about disciplining or treating the innocent is removed because the discipline or treatment of children is supposed to be a benefit; then this choice by the community would be a brave one.

Without doubt some criminals are insane and some
should be viewed as "children." It is equally obvious that a Senator taking bribes or a businessman embezzling money is typically neither insane nor a "child." The difference of opinion between those who advocate treatment for wrong-doers and those who advocate a just and deserved punishment for wrong-doers must really be about where to draw the line between those to be treated as equals and those to be treated as "children." Where the line is drawn depends upon the acceptability of the criteria for actions which are symptomatic of immaturity, and upon the willingness of the community to accept a parental role in the system.

I have argued that there is no good reason to argue that the traditional retributivists and the traditional utilitarians must have different systems of punishment. Although the retributivists and the utilitarians accept different aims of punishment, those aims are quite harmonious. But those who advocate a parent-to-child attitude towards wrong-doers will find morally justified a system of dealing with wrong-doers different from that of both the retributivists and the utilitarians. The possibility of harmony on the topic of punishment still remains, however, since there is no obvious difference of opinion either about how to treat peers or about how to treat children. But there is a difference of opinion about which
category wrong-doers fit into. The issue may be considerably difficult to settle, but it is an issue upon which study and fact should throw light.

At the beginning of this dissertation I claimed that its point was to see what progress is being made in the understanding of a moral problem and to sort out the real from the spurious issues. Reaching agreement on the explicit definition of the acts of punishment whose moral justification is important and interesting is progress in defining the problem. To the extent that Flew's, Benn's, Baier's, Mabbott's, Hart's, and Armstrong's efforts are directed toward this goal, they are valuable. I do not agree with any of their definitions; nor did they agree with each other. Reaching agreement about the acts of punishment that are important and interesting does not resolve or avoid any ethical issues. Quinton is in error when he claims that it does. The source of many spurious issues about punishment has been the assumption that the two traditional doctrines about punishment, the retributivist and the utilitarian, are in essential conflict. The assumption that there is such a conflict has led to various attempts to divide up the problem of the justification of punishment so that each traditional doctrine may be said to have its area of applicability. The logical-ethical distinction of Quinton is one such attempt to
segment the problem of punishment. However, there is only one logical claim to be made about punishment per se, namely that it involves a necessary hardship, or what is intended to be or is taken to be a hardship. Relegating the retributivist doctrine about the justification of punishment to the position of explaining a logical point about the meaning of the word "punishment" is wrong and is to misunderstand the retributivist position. The general rule particular case distinction proposed by Mabbott and Benn and the Limiting Principle Justifying Aim distinction proposed by Hart and accepted by Armstrong are other attempts to segment the problem of punishment. All of these distinctions are valid distinctions, but attempting to relegate the retributivists' and the utilitarians' doctrines about punishment solely to one or the other segment of the problem by virtue of these distinctions does not work.

Progress will be made in understanding the justification of punishment when it is recognized that the traditional doctrines about punishment are not in essential conflict. The truth of both positions may be accepted without contradiction. What the two different positions reflect is different approaches to the problem. The retributivists' position evolves out of the past. Its approach to punishment is based on the models of "revenge
on the wrong-doer" and "religious censure." This retributivist position has developed rules of thumb about punishment which have been accepted as commonplace. These rules of thumb are supposed to see to it that justice is done and that each gets the desert of his deeds. The problem of punishment for the retributivist has been the conscientious and exact application of these rules of thumb. The utilitarian position emerges with the desire to re-evaluate existing institutions by some ultimate criteria, eschewing hallowed rules of thumb. According to the utilitarian, if punishment does not contribute to the maximization of happiness and the minimization of mischief then something is wrong. Of course, the retributivist should admit that too. (Justice and desert became hallowed values because of their role in maximizing human happiness and minimizing human mischief.) Theoretically, there is no reason for the utilitarian and the retributivist to disagree on the morally justified system of punishment. If it is claimed that human happiness is not being maximized by present systems, the question should be whether the error is in the measurement of the level of human happiness actually being achieved or whether the goals of justice and desert have been distorted. The retributivist, taking the defensive, would be expected to claim the former is the error, the utilitarian the latter.
This is a real but practical issue. Progress will be made by scrutinizing both the schema for measuring performance and the details of the notions of justice and desert.

A new approach for formal systems of punishment is currently being seriously proposed. It is an approach based on the ancient model of "parental discipline." Again, this approach is not in essential conflict with the retributivist and the utilitarian approaches to punishment. Retributivists and utilitarians have always recognized the relevance of the parental discipline attitude, but they believe it is relevant only to exceptional cases. The proponents of the parental discipline system wish to argue that it is appropriate for large segments of the criminal community. This has raised a new practical problem for punishment, the problem of defining peership and the status of mature responsibility. Progress will again be made in understanding punishment with the development of viable criteria for identifying peership. The real issues about punishment now require practical effort and clarification of facts. Attempting to resolve supposed conflicts between retributivists, utilitarians, and disciplinarians is wasting effort.
FOOTNOTES


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