THE ETHICS OF PUNISHMENT

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THE question of punishment is one which has always interested and usually puzzled moralists, and which forms a crucial example for the testing of moral theories. A utilitarian theory, whether of the hedonistic or of the 'ideal' kind, if it justifies punishment at all, is bound to justify it solely on the ground of the effects it produces. The suffering of pain by the person who is punished is thought to be in itself a bad thing, and the bringing of this bad thing into the world is held to need justification, and to receive it only from the fact that the effects are likely to be so much better than those that would follow from his non-punishment as to outweigh the evil of his pain. The effects usually pointed to are those of deterrence and of reformation. In principle, then, the punishment of a guilty person is treated by utilitarians as not different in kind from the imposition of inconvenience, say, by quarantine regulations on individuals for the good of the community. Or, again, if a State found to be prevalent some injury to itself or to its members that had not been legislated against, and proceeded to punish the offenders, its action would in principle be justified by utilitarians in the same way as its punishment of offenders against the law is justified by them, viz. by the good of the community. No doubt the State would have greater difficulty in justifying its action, for such action would produce bad consequences which the punishment of law-breakers does not. But its task would differ only in degree. Nay more, a Government which found some offence against the law prevalent, and in its inability to find the offenders punished innocent people on the strength of manufactured evidence, would still be able to justify its action on the same general principle as before.

Plain men, and even perhaps most people who have reflected on moral questions, are likely to revolt against a theory which involves such consequences, and to exclaim that there is all the difference in the world between such action and the punishment of offenders against the law. They feel the injustice of such action by the State, and are ready to say, in the words imputed to them by Mr. Bradley: " Punishment is punishment only when 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." [1]

There is one form of utilitarian view which differs in an important respect from that above ascribed to utilitarians. Professor Moore admits the possibility, which follows from his doctrine of organic unities, that punishment may not need to be justified merely by its *after*-effects. He points out[2] that it may well be the case that though crime is one bad thing and pain another, the union of the two in the same person may be a less evil than crime unpunished, and might even be a positive good. And to this extent, while remaining perfectly consistent with his own type of utilitarianism, he joins hands with intuitionists, most of whom, at any rate, would probably hold that the combination of crime and punishment is a lesser evil than unpunished crime. It is, in fact, they that are deserting their true principle if they justify punishment on this ground, for they are making the rightness of an act (the act of punishment) depend on the amount of good it brings into being, which is not the true intuitionistic view. To justify punishment *solely* on the ground that the whole consisting of crime and the suffering of the criminal is a less evil than unpunished crime is a half-hearted view, which should be rejected by utilitarians because it ignores the *after*-effects of punishment, and by non-utilitarians because it makes what is right depend solely on the production of maximum good.

Again, to rest the justification of punishment on this immediate effect of punishment *along with its after-effects* fails, I think, to do justice to what we really think about the matter. For the immediate effect just referred to is only one of an infinite number of effects which the punishment produces (some good and some evil), and deserving of no more consideration than any other good effect that is equally good or any evil effect that is as evil as this is good; and righteous punishment becomes simply one of a variety of administrative acts, justified, when it is justified, exactly as the infliction of pain on the innocent would have to be, by its conduciveness to the general good. I believe that not only common sense but our reflective judgment rejects such a view and finds in just punishment a perfectly distinctive type of act, characterized by the fact that the guilty person has *deserved* to be punished.

[1] *Ethical Studies* 2, pp. 26–27.
[2] *Principia Ethica*, p. 214.

Yet to this view utilitarianism has a good deal that it can say in reply. It can point out that if the punishment of the guilty is an absolute duty, offenders should never be pardoned, while we all think that they sometimes should. It can point out that even if we hold that crime from its very nature deserves to be punished, we should find it very hard to detect any intuitively perceived reason for affixing any particular penalty to any particular crime. It can point out that historically the penalties for crime have, with the general approval of good and thoughtful people, been made more or less severe on grounds not of justice but of expediency. And there is, no doubt, much more to the same effect that it can properly say.

In view of these conflicting arguments we are apt to be puzzled and to feel that neither the utilitarian nor the intuitionistic view can be right. One is disposed to think there is some truth in each view, but it is not easy to assign the precise part that each should occupy in a satisfactory theory. We can, I think, help ourselves towards an understanding of the problem by distinguishing two stages which are not usually kept apart in discussions of it. The infliction of punishment by the State, or by any individual, does not, or should not, come like a bolt from the blue. It is preceded by the making of a law in which a penalty is affixed to a crime; or by the decisions of judges a common law gradually grows up in which a penalty is so affixed. We must, I think, distinguish this stage, that of the affixing of the penalty, from that of its infliction, and we may ask on what principles the State or its officials should act at each stage. At the earlier stage a large place must be left for considerations of expediency. We do not claim that laws should be made against all moral offences, or even against all offences by men against their neighbours. Legislation should be guided to a great extent by such matters as the possibility of enforcing a given law if it were made, the question whether a certain type of offence is important enough to make it worth while to put the elaborate machinery of the law at work against it, or is better left to be punished by the injured person or by public opinion; and by other similar considerations. But even at this stage there is one respect in which the notion of justice, as something quite distinct from expediency, plays a part in our thoughts about the matter. We feel sure that if a law is framed against a certain type of offence the punishment should be proportional to the offence. Thus, for instance, however strong the temptation to commit a certain type of offence may be, and however severe the punishment will therefore have to be in order to be a successful deterrent, we feel certain that it is unjust that very severe penalties should be affixed to very slight offences. It is difficult, no doubt, to define the nature of the

relation which the punishment should bear to the crime. We do not see any *direct* moral relation to exist between guilt and suffering so that we may say directly, so much guilt deserves so much suffering, neither more nor less. But we do think that the suffering to be inflicted on the guilty should be roughly equal to that he has inflicted on others. Ideally, from the point of view of justice, it should be exactly equal. But laws must be stated in general terms, to cover a variety of cases, and they cannot in advance affix punishments which shall be precisely adequate to the gravity of each individual injury. We are therefore content with an approach to adequacy. At the same time we recognize that justice, while it is a *prima facie* duty, is not the only *prima facie* duty of the legislator; and that, as in the selection of offences to be legislated against, so in the fixing of the penalty, he must consider expediency, and may make the penalty more or less severe as it dictates. His action should, in fact, be guided by regard to the *prima facie* duty of justice, and also to the *prima facie* duty of considering the general interest. And I think that we quite clearly recognize these as distinct and specifically different elements in the moral situation.

Two different accounts are, however, possible for one who believes that punishment is not a thing to be regulated solely by the consequences it will have. Some would say that there is a distinct duty of retribution for retribution's sake. But for my own part I am not convinced that there is such a duty resting on the State. In offences coming within my own jurisdiction I have no sense of a duty to affix penalties which may be supposed to balance the offence. I find myself regarding the question from the very points of view (with one other, to be mentioned presently) from which a utilitarian would regard it, those of the good of the offender and the good of the community. I have no clear conviction that vice punished is in itself, apart from all consequences, a better state of affairs than vice unpunished; still less that it is my duty to bring it into existence. And if this is what I think about offences within my own jurisdiction, I have no right to say that the State has a duty to inflict retributive punishment for offences that fall within *its* jurisdiction. I quite recognize that in view of the principle of organic unities the whole state of affairs that includes the two evils, sin and the pain of punishment, may be a lesser evil than the one without the other, but I have no conviction that it is so. It appears clear that a total state of the universe in which people are happy in proportion to their merit is better than one in which the good are miserable and the bad happy. But any attempt to bring about such a state of affairs should take account of the whole character of the various persons involved and not of their breach of some particular regulation, and in inflicting punishment for the breach of a particular

regulation I, or the State, might well be helping to produce a more and not a less unjust proportionment of suffering to moral guilt. The criminals that a theory of retribution for retribution's sake would call on us to punish for the sake of doing so may well be more sinned against than sinning, and may in any case be more hardly treated by fortune than others who break no human law. This is how I should feel about their crime and their punishment if the matter ended there. Of course, the matter does not end there. Unpunished crime produces results dangerous to society and to the criminal's own character, and these may be diminished by his being punished. But if we bring in these considerations we are deserting the supposed duty of retribution for retribution's sake, and falling back on punishment for the sake of deterrence and reformation.

It is, I believe, the absence in many people's minds of any sense of a duty of retribution for retribution's sake that makes them inclined to accept the utilitarian view of punishment. No such consequence, however, need follow. It seems possible to give an account of the matter which retains elements in punishment other than that of expediency without asserting a duty of punishment for punishment's sake. What I suggest is that I in my jurisdiction, and the officials of the State in theirs, have not a *prima facie* duty, but a *prima facie* right, to punish. There is a distinction in kind between the punishment of a person who has invaded the rights of others and the infliction of pain on one who has not. This arises from the fact that rights are in a definite sense correlative to duties incumbent on the owner of rights, and to rights in those against whom he has rights, and that the main element in anyone's right, say, to life or to property is extinguished by his failure to respect the corresponding right in others. If a man has taken the life of another, the community is freed from the greater part of its *prima facie* obligation to respect *his* life, and is at liberty, morally, to take his life, or to inflict some lesser penalty on him, or to spare him, exactly as the interest of the community and his own good require. If, on the other hand, a man has respected the rights of others, there is a strong and distinctive objection to the State's inflicting any penalty on him with a view to the good of the community or even to his own good. The interests of the society may perhaps be so deeply involved as to make it right to punish an innocent man 'that the whole nation perish not.' But then the *prima facie* duty of consulting the general interest has proved more obligatory than the perfectly distinct *prima facie* duty of justice.

This is, I believe, how most thoughtful people feel about the affixing of penalties to the invasion of the rights of others. They have lost any sense they or their ancestors may have had of a duty

of retributive punishment for its own sake, but they feel that there is nevertheless a difference of kind between the community's right to punish people for offences against others and any right it may have to inconvenience or injure innocent people in the public interest. This arises simply from the fact that the State has a *prima facie* duty not to do the latter and no such duty not to do the former.

When the law has been promulgated and an offence against it committed a new set of considerations emerge. The administrator of the law has not to consider what is the just punishment for the offence, nor what is the expedient punishment, except when the law has allowed a scale of penalties for a given offence within which he can choose. When that is the case, he has still to have regard to the *prima facie* duties of justice and of consideration for the general interest. But that, when the penalty fixed by law is determinate, this and no other be inflicted, and that, when a scale of penalties is allowed, no penalty above or below the scale be inflicted, depends on a *prima facie* duty that did not come in at the earlier stage, viz. that of fidelity to promise. Directly, the law is not a promise: it is a threat to the guilty, and a threat is not a promise. The one is an undertaking to do or give to the promisee something mutually understood to be advantageous to him; the other, an announcement of intention to do to him something mutually understood to be disadvantageous to him. Punishment is sometimes justified on the ground that to fail to punish is to break faith with the offender. It is said that he has a right to be punished, and that not to punish him is not to treat him with due respect as a moral agent responsible for his actions, but as if he could not have helped doing them. This is, however, not a point of view likely to be adopted by a criminal who escapes punishment, and seems to be a somewhat artificial way of looking at the matter, and to ignore the difference between a threat and a promise.

But while the law is not a promise to the criminal, it is a promise to the injured person and his friends, and to society. It promises to the former, in certain cases, compensation, and always the satisfaction of knowing that the offender has not gone scot-free, and it promises to the latter this satisfaction and the degree of protection against further offences which punishment gives. At the same time, the whole system of law is a promise to the members of the community that if they do not commit any of the prohibited acts they will not be punished.

Thus to our sense that *prima facie* the State has a right to punish the guilty, over and above the right which it has, in the last resort, of inflicting injury on any of its members when the public interest sufficiently demands it, there is added the sense that promises

should *prima facie* be kept; and it is the combination of these considerations that accounts for the moral satisfaction that is felt by the community when the guilty are punished, and the moral indignation that is felt when the guilty are not punished, and still more when the innocent are. There may be cases in which the *prima facie* duty of punishing the guilty, and even that of not punishing the innocent, may have to give way to that of considering the public interest. But these are not cases of a wider expediency overriding a narrower, but of one *prima facie* duty being more obligatory than two others different in kind from it and from one another.

It must, I think, be admitted that moral indignation (or, at least, that of people whose views on morals deserve respect) is much less surely aroused by the non-punishment of those who have broken the law than by the punishment of those who have not. This is perfectly intelligible, and is due partly, I think, to two reasons: (1) The law may be too severe. When the legal penalty for sheep-stealing was death, the penalty was so much more severe than the offence deserved that there was a less serious miscarriage of justice when a sheep-stealer escaped scot-free than when one was hanged.[1] (2) Even when the law is in general just there may be extenuating circumstances (such as the almost irresistible temptation which a starving man has to steal, or the evil chance of a hopelessly non-moral or immoral education) which assure us that the guilt of the offender has been less than that which the offence usually implies. On the other hand, there can be *no* ground in *justice* for punishing a man for an act which is not illegal, or for an illegal act he has not committed. But deeper than these two reasons is (3) the fact that while we think we have a *prima facie* duty not to punish the innocent, we do not think we have a *prima facie* duty to punish the guilty (apart from considerations of deterrence and reformation), but only no *prima facie* duty to leave him unpunished; or, in other words, that, while we have a duty not to punish the innocent, we have only a right (apart, again, from deterrence and reformation) to punish the guilty.

[1] Even in our present system of law there are certain forms of offence against property which (owing probably to the influence of the propertied class in making and administering the law) are over-punished in comparison with certain offences against the person.