

How to Say Things with Walls

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I want to discuss a view of punishment which stresses its 'expressive' character and seeks in that its justification. While I shall label this view 'expressionism', I should warn that most theorists who express an 'expressionist' view do not present it as an exhaustive account, but rather claim to be highlighting an aspect that tends to be neglected within the rationalist framework common to retributivism and utilitarianism. Among contemporary writings I shall focus on Joel Feinberg's article, 'The Expressive Function of Punishment' in *The Monist* 49, No. 4 (1965).¹ While I accept that 'expression' usefully sums up much of what underlies punitive practices, I shall urge that the term conceals a variety of more or less amalgamated ingredients which need to be disentangled for critical inspection. I shall argue that under those aspects, punishment's justification continues to be elusive.² I do not imagine that these arguments will deter my more punitive colleagues from continuing to seek such justification, but I hope they will search elsewhere. Feinberg writes:

Punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those 'in whose name' the punishment is inflicted. Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties.³

As Feinberg points out, judicial authorities, in contrast to academic punologists, have frequently stressed dimensions of punishment which do not easily fit a model of 'cold' legalism. In a famous passage James Fitzjames Stephen spoke of conviction as 'stamping the criminal with infamy' and urged that it was 'morally right to hate criminals':

¹ In Charles Fried's *An Anatomy of Values* (Cambridge, Mass.: Harvard University Press, 1970) and especially in Laurence H. Tribe's 'Trial by Mathematics, Precision and Ritual in the Legal Process', *Law* 84, No. 6 (1971), the 'expression' view is elaborated and used. Other modern discussions not referred to below are A. C. Ewing, *The Morality of Punishment* (London: Kegan Paul, 1929), Partick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965), H. L. A. Hart, *Law, Liberty and Morality* (Oxford University Press, 1963), 60–69, and Sir Walter Moberly, *The Ethics of Punishment* (London: Faber, 1968), Chapters 8, 9.

² I argue in *Ruling Illusions* (Sussex: Harvester, 1978) for a sceptical view of legal punishment.

³ Op. cit., 400.

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The sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax . . . the infliction of punishment by law gives definite expression and solemn ratification and justification to the hatred which is excited by the commission of the offence . . .⁴

More recently Lord Chief Justice J. W. Salmond has written:

Did we punish criminals merely from an intellectual appreciation of the expediency of so doing, and not because their crimes arouse in us the emotion of anger and the instinct of retribution, the criminal law would be but a feeble instrument. Indignation against injustice is, moreover, one of the chief constituents of the moral sense of the community . . . It is good, therefore, that such instincts and emotions should be encouraged and strengthened by their satisfaction . . . There can be little question that at the present day the sentiment of retributive indignation is deficient rather than excessive, and requires stimulation rather than restraint . . . We have too much forgotten that the mental attitude which best becomes us, when fitting justice is done upon the evildoer, is not pity, but solemn exultation.⁵

And Lord Denning has said, in the context of defending capital punishment:

The ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community of a crime.⁶

In *Moral Education*, Émile Durkheim elaborates an expressionist view of punishment. Insisting, in line with his overall normative-corporatist social theory, that to punish is 'to reproach, to disapprove', Durkheim claims that the material suffering inflicted on the delinquent

. . . is only a more or less incidental repercussion of the penalty, it is not the essential thing . . .

To punish is not to make others suffer in body or soul, it is to affirm, in the face of an offence, the rule that the offence would deny . . .

Punishment is only the palpable symbol through which an inner state is represented; it is a notation, a language, through which is expressed the feeling inspired by the disapproved behaviour.⁷

That there are differences of emphasis among these writers is obvious. Durkheim is focusing, in a context of 'education', as much on the expressive

⁴ *A History of the Criminal Law of England*, II, 81.

⁵ *Salmond on Jurisprudence*, 11th edn (1957), 121.

⁶ *Report of the Royal Commission on Capital Punishment* (London, 1953), Section 53.

⁷ 1925 (Glencoe: Free Press, 1961), 176.

impact of punishment on the punished himself as on its place as an articulation of the collective sentiment. Our judges, with their concern to brand and condemn, are concerned, on the contrary, with punishment's relation to the community in whose name it is inflicted. The criminal whose hanging is being advocated might as well go to hell. This connects with the presence in their account of an emphasis on 'resentment' and 'revenge', whereas Durkheim's stress is on 'reproach' and 'disapproval' (Feinberg notes these two distinguishable elements, 'resentment' and 'disapproval', in his account). Some writers all the time and most writers some of the time move without apology from speaking of punishment as *venting* community feeling, almost like a safety valve, to speaking of punishment as '*symbolizing*' this feeling, almost as an arbitrary code. So there is a need for clarification. 'Expressionism' may turn out to be a farrago, with each ingredient having its own flavour, properties and uses.

If the meaning of 'expressionism' is unclear this is bound up with deep unclarity in its justificatory location. Indeed, there are styles of avowedly expressionist talk which seem to belong with retributivism or utilitarianism. It is worth a preliminary look at some of the problems. Consider first the retributivist ring of some of the passages I have already quoted—'righteous disapprobation', 'sentiment of retributive indignation'—and the deliberate contrast characteristically drawn between the 'real' basis of punishment and the more calculated rationales offered by utilitarian theorists. The problem lies in the apparent difference between the view of punishment as justified by its being deserved (retributivism) and the view of it as justified by its being the vehicle of condemnation, or even 'retributive instincts'. On one interpretation we are left with a retributive subjectivism, according to which a person should suffer, not because he deserves to but because people feel (believe) that he deserves to (what else could 'retributive passions' mean?). And then we are left with the old problem of justifying those passions (beliefs) and of justifying their official expression. Or, on the other hand, we could be being urged to see condemnation as itself the punishment deserved by the wrongdoer's action. In that case what we would have is a view of publicly instituted punishment as a way of bringing home to someone the condemnation he has earned, with all the pains bound up with that: isolation, rejection, contempt (all of which he may be, more or less successfully, encouraged or coerced into sharing in the form of shame and guilt). In that case 'expressionism' is a spiritual form of retributivism. As such it deserves considerable attention, the more so as, thus understood, it would not have the conformist implications of the populist subjectivism with which I have contrasted it above.

I mentioned that some expressions of expressionism have the ring of utilitarian deliberation (clearly, for example, if *condemnation* is focused on as punishment, its pains lend themselves to utilitarian treatment).

This should not be surprising in view of the problem that 'subjectivist populism' has in justifying itself. Might we justify it in terms of 'giving the people what they want' (the 'satisfaction' of 'such instincts and emotions') or in terms of necessary 'safety valves' (displacing aggressive and especially vengeful passions). Here we are back with notorious problems with utilitarian theory, with its ugly suggestion of public officials cynically pretending to moral passions the better to keep the masses in line. It is well to remember in this context that the crafty Bentham was by no means deaf to the need for expressive punitive rhetoric:

Render your punishments exemplary; give to the ceremonies which accompany them a mournful pomp; call to your assistance all the imitative arts; and let the representation of these important operations be among the first which strike the eyes of childhood.⁸

Bentham is stressing the 'expressive' aspects of punishment all right (he even recommended officials to rummage in the attics of the Inquisition the better to dress up their punitive rituals). But, quite obviously, he is concerned, for the best possible of reasons of course, to exploit the fund of prejudice, superstition, fear and sheer voyeuristic lust in the populace.

The import of all this is best summed up, I think, in Durkheim's *Moral Education*, to which I have already referred. He believed that people are brought to obey rules by being made to see them in a 'sacred' light—as 'inviolable and intangible' 'forces' with 'inherent authority'.⁹ Punishment, therefore, must 'express' and 'communicate' this sense of sacred inviolability through a secular analogue of divine retribution. The wrongdoer's pain is experienced as the vehicle of his sense of having done wrong in terms common to him, the punisher and the group. The prospect of this pain is, of course, deterring. Moreover, if punishment loses this connection with respect, even awe, if it is feared as a merely natural sanction, then, not only is moral education a hopeless cause, the bonds of 'collective sentiment' will be eroded and society tend to fall apart. (Thus Durkheim, like Kant, placed great stress on the significance of different forms of punishment and strongly condemned corporal punishment because it conveyed the opposite of the intended message—stressing sheer physical power at the expense of moral authority.) Durkheim, then, is focusing on the consequences that flow from the symbolic communication that punishment is. He does not appear to justify punishment simply *qua* expression. Rather, he stresses the usefulness of expressive punishment in maintaining the corporate ideology. That the group's members relate to the ritual as intrinsically valuable is a mark of its success,

⁸ 'Indirect means of preventing crimes.' 'Principles of Penal Law', *Works*, I, 549.

⁹ *Op. cit.*, 175.

a success that the theorist can note without himself subscribing to the ritual. All of which raises as many questions of justification as it settles. At any rate, it should be obvious that any substantial theory of punishment, whether its philosophy be utilitarian or retributive, would have to be elaborated in the context of an overall social and psychological theory.

By this time anyone pondering on the issues raised by 'expressionism' may well be wondering whether it amounts to a single doctrine at all, let alone a coherent one. Such doubts are confirmed by reflection, not only on the slipperiness of the term 'expression', but on the way that slipperiness functions in preventing a firm critical grip from being maintained on its justifying role in punishment theory. Without pretending to an exhaustive or even adequate principle of classification, I propose now to discuss three relevantly different senses of 'expression', senses which expressionist theorists tend to run together

I. Expression as Manifestation

It seems trivial to say that any conduct is expressive in the general sense that it manifests some state or frame of mind—more generally, that there is some state of affairs that it reveals, some 'reality' of which it is the 'appearance'. Any action issues from desires and beliefs (attitudes, feelings, etc.). Deterrence theory could, in this sense, be trivially formulated as the theory that punishment 'expresses' the desire to minimize crime; retributivism by a similar move becomes: 'punishment expresses the desire to repay'. Two points: first, as we have already seen, this latter formulation is very close to a characteristic way of putting expressionism. Secondly, the 'triviality' of this way of understanding expressionism is deceptive. For what it does is to pose this simple question: what do these punitive practices *actually show* about people and about societies? What priorities do they manifest? Consider these concluding remarks of Stephen Preclossman and Stephanie Wallach to their article "The Crime of Precocious Sexuality: Female Juvenile Delinquency in the Progressive Era":

We do believe that there is an intimate relation between a society's correctional system and its deepest values and beliefs. And without doubt the values and beliefs that shaped a discriminatory system of juvenile justice in the Victorian and Progressive eras still dominate the administration of female juvenile justice today.¹⁰

Such an objective focus, one which is prepared to go behind declared intentions to ask what laws and punishments 'betray', to ask of what they are symptomatic, transforms a concern with 'expressions' from an apologetic to a critical one. However that may be, to the extent that a

¹⁰ *Harvard Educational Review* 48, No. 1 (February 1978), 92.

philosophy of punishment trades on this general sense of 'expression' it cannot claim to conceptual distinctiveness.

II. Expression as the Natural Sign of Feelings

Expressionism, in punishment as in aesthetic theory, characteristically stresses the emotional dimension of these activities and characteristically emphasizes the 'natural' connection between physical behaviour or public conduct and spiritual state. In this sense a specific point is being stressed by expressionists in that they are denying that punishment, for example, merely expresses an 'intellectual conviction' in our first sense of 'expression'. Rather it expresses 'hatred', 'resentment', 'indignation', 'condemnation', 'anger' or even, as Dostoyevsky brings home in *Crime and Punishment*, *remorse* in the wrongdoer ('the need for punishment'). Not that 'emotional expressions' fall into a homogeneous category. A flushed face expresses anger, as does an attack on its 'natural target'. The former does not *vent* the anger. Yet both show how the person feels. 'Targeted' actions (hurting, giving, hiding, fleeing) remain 'naturally', even conceptually, linked with the emotions they express, however twisted or even symbolic (in a Freudian way, for example) the path taken. Clearly punishment could plausibly be argued to be a natural expression, in this sense, of anger, or indignation. Indeed the impression given by the judges quoted above and in Feinberg's article is that this is where punishment belongs. If one accepted this, one might say: given that these actions arouse our anger and indignation, given that we are not indifferent to them, and given that punishment is the way such feelings get expressed, we punish those who, by doing these things, arouse us in this way. This is a 'the most natural-thing-in-the-world' justification. And like many of its kind, it works in part by pretending that specific forms of punishment, for example capital punishment, are the natural expressions of condemnation; by shifting our focus away from the emotions themselves (these it treats as given) on to the naturalness of their expression. But apart from questions of complexity and ambivalence (the wrongdoer may properly be an object of sorrow or pity), the whole issue of the relation of our feelings towards actions to the way we *see* them and hence of the relation between how we ought to feel and how we ought to see them is buried. I am talking about issues such as determinism and more specifically about the determinants of crimes and of public reactions to crimes. It is a daily occurrence for the popular media to single out some 'villain' or 'brute' to bear the burden of community outrage, as if he or she were a pure agent descending from the sky. The process may well destroy them, their families and even, with sufficient journalistic luck, the crime's victim and his or her family too.

III. Expression as Symbolic Communication

Whereas in our second sense, an emotion may 'express itself' in private (you throw a book at the wall, or sigh—or even seek secret revenge), punishment of the kind we are concerned with is more a public activity.¹¹ Moreover, it is often a quite elaborate and formalized one. In this context it is worth stressing a third 'sense' of expression which plays a major part in expressionist literature. A *symbol* can express something in the sense of being a semantic vehicle for communicating it. Expression in this sense is 'linguistic', where the linguistic is understood in a broad sense to include gestures, decorations and other convention-constituted conduct that is intended to have this sort of meaning and can be so understood. Punishment on this view, then, is the communication of a message.

We have seen Durkheim speaking of punishment as a 'palpable symbol', 'a notion, a language' for 'representing' attitudes. And, while he does not refer to Durkheim, Feinberg speaks, as we saw, of punishment as 'a conventional device', a thing of 'symbolic significance'. And so, while both of these writers place themselves within the expressionist framework, and while they are certainly concerned with emotional expression and sometimes use 'expression' in the way outlined earlier, they tend to locate the relation of expression to expressed in a different place from the more outburst-orientated spokesmen of the judiciary. With Feinberg and Durkheim, then, the stress is on 'conventional' symbols rather than on 'natural' signs. Feinberg notes by way of analogy that:

. . . certain words have become the conventional vehicles in our language for the expression of certain attitudes . . . champagne is the alcoholic beverage traditionally used in celebration of great events . . . black is the colour of mourning.¹²

It is worth noting an ambiguity here, in Feinberg's as in Durkheim's words. The question is: is it *punishment* that is said to be the 'conventional symbol' of disapproval, or is it the material embodiment or '*form*' of punishment that is supposed to stand in this conventional relation to disapproval? We have seen that Feinberg speaks of punishment as a 'conventional device'. But he also speaks of what he calls the 'hard treatment' or material form of punishment—hanging, shooting, imprisonment, bread-and-water diet or whatever as standing 'symbolically' to disapproval—'the very walls of his cell condemn him' (402). In either case there are problems lurking behind the insight.

¹¹ Any theory of modern punishment, though, would have to recognize the sense in which the sentence, as distinct from the sentencing is, unlike the stocks, *not* public. Among other things this throws light on the 'expressive' role of prison officers—'society's' proxies.

¹² Op. cit., 402.

A. *Punishment as Symbol*

Since the emotions and attitudes referred to are so 'moralistic', it is difficult to see punishment as anything but their 'natural' (even 'logically proper') expression (our second sense). It seems simply wrong to treat punishment as a 'conventional device' for expressing indignant reprobation. Punishment surely stands to indignant reprobation more as mourning stands to grief than as wearing black stands to grief. This is not to say, to take up a theme from the previous section, that the emotions and attitudes which punishment can express are themselves simply 'natural'. It is arguable that there are societies and there have been times in which what we think of as 'punishment' hardly exists. But that is surely because the more or less specific matrix of beliefs and practices bound up with ideas of individual responsibility and with religious notions of divine retribution is not universal or inevitable. (When people write today of the 'crime of punishment' they are attacking these beliefs and practices.)

Even to say that punishment is the 'natural' expression of indignant reprobation is in my view to understate the intimacy of the relation between emotion and expression. At least since Aristotle's *Rhetoric* it has been orthodox to define emotions as including feeling 'together with' dispositions or urges to act in certain ways; as if, when these various 'elements' come together, they constitute fully fledged passions of various kinds. But I would want to say, for example, that the anger which has its natural expression in physical attack and the anger which has its natural expression in a declamation are different 'specific' feelings. Our feelings 'express themselves'. Our emotional range is not captured by a list of the names of emotions. And the point here is that 'punitiveness' is perhaps a quite specific emotional attitude that is susceptible of indefinite elaboration and refinement. Thus our attention should perhaps be focused on the nature of 'retributive instincts', on the way of seeing things they entail. Otherwise we shall be in danger of thinking 'Well, we've got these feelings. How shall we express them?' Feelings can be as socially, even 'conventionally' structured as conduct. If we see this, I think, we can see that the emotional complex whose natural expression is punishment is different from that whose natural expression is a passionate statement of critical disapproval.

B. *'Hard Treatment' as Symbol*

As Feinberg points out, there are indefinitely various forms which punishment can take. For example:

- Temporal spans in prison
- Removal of parts of the body

Fines
Pillories, stocks
Brandings
Being sent to Coventry
Hangings

And it might be argued that *these* are the expressive symbols. As Feinberg says: 'the hard treatment itself expresses the condemnation'.¹³ So we can distinguish 'Punishing expresses disapproval' and 'Loss of freedom expresses disapproval'.

Even in the latter case, however, the relation between the so-called 'symbol' and the attitude expressed is, however much it may approach it, hardly purely conventional. (Even 'losing your stripes' is punishment only in the context of a loss of position.) Whereas black is arguably neutral in itself and only contextually and conventionally constituted as mourning wear (of, it should be stressed, a rather special and formal sort in our culture) it is pretty clear that losing money, years of liberty, or parts of one's body is hardly neutral in that way. This suggests a radical inadequacy in Feinberg's account. Feinberg vastly underrates the natural appropriateness, the non-arbitrariness, of certain forms of hard treatment to be the expression or communication of moralistic and punitive attitudes. Such practices *embody* punitive hostility, they do not merely 'symbolize' it. Thus the insight into the communicative dimension of punishment, into the way punitive suffering is experienced as an expression of the punisher's view of the agent and his action, is lost in the clouds. This is not to deny a measure of 'symbolism', of 'conventionality'; consider, by way of analogy, the stylization of gifts as tokens of affection and the different degrees to which gifts can be valued, on the one hand 'in themselves', on the other hand *as* tokens. ('It's the thought that counts.' Really? How much thought goes into a useless or unattractive gift?) But it is to insist on a serious misplacement of emphasis, comparable with idealist views of industrial strikes as 'symbolic rituals'.

The difficulties in Feinberg's account emerge, I think, when he comes to discuss the way his theory of punishment is supposed to give a distinctive framework for justifying punishment. Feinberg asks in passing whether, since punishment is a conventional symbol, it might be possible to alter the symbolism so that the destructive consequences of the currently prevailing 'symbols', especially imprisonment, are avoided:

Isn't there a way to stigmatize without inflicting further (pointless) pain to the body, to family, to creative capacity? . . . The problem of justifying punishment may really be that of justifying our particular symbols of infamy.¹⁴

¹³ *Ibid.*, 402.

¹⁴ *Ibid.*, 420–421.

The critical thrust of these questions is welcome, as is the implicit reminder that imprisonment, in so far as it stigmatizes the convict, ensures him a second punishment on his release. But Feinberg's question may largely be a reflection of his own mode of analysis. For *if* punishment is predominantly a 'conventional' symbol, the 'intrinsic' horrors of incarceration, beatings, hanging or whatever *must* appear almost gratuitous.

Suppose there was a society in which Feinberg's symbolic stigma perspective appeared right. We would have to imagine it as one in which wrongdoing was 'punished' through a mode of conventional labelling; say, after a denunciatory speech the 'convicted' had to wear clothes of a certain colour, or badges. (We should not think of this attire as inherently inferior or less attractive than that of the others.) Clearly the symbolism could be elaborately calibrated. We could imagine the convict shunned, scorned and ostracized. Such imaginary sketches are notoriously unreliable and indeterminate. But what they bring out, I think, apart from the inadequacy of a 'symbolic interactionist' model to our own 'materialist' culture, is that in such societies, the 'punishment' and the 'deterrent' are the condemnation and ostracism. The 'conventional device' is merely a symbolic instrument of the punishment, a replaceable code. (For someone in such societies to develop a fear of green stripes 'as such' would be for him to be in the grip of a kind of phobia.) Unlike prison in our society, green stripes would not *be* the punishment.

In fact, Feinberg sets aside his doubts and questions without resolving them. Rather, he advances to his conclusion: that expressionism provides a more adequate framework for justifying punishment than does orthodox retributivism which, he claims, offers no coherent principle for apportioning punishment to desert. As I regard Feinberg's own symbolic view as inadequate and incoherent, I shall quote his conclusion in full:

What justice requires is that the *condemnatory aspect* of the punishment suit the crime, that the crime be of a kind that is truly worthy of reprobation. Further, the degree of disapproval expressed by the crime should 'fit' the crime only in the unproblematic sense that the more serious crimes should receive stronger disapproval than the less serious ones, the seriousness of the crime being determined by the amount of harm it generally causes and the degrees to which people are disposed to commit it. That is quite another thing than requiring that the hard treatment component, considered apart from its symbolic function, should 'fit' the moral quality of a specific criminal act, assessed quite independently of its relation to social harm. Given our conventions, of course, condemnation is expressed by hard treatment, and the degree of harshness of the latter expresses the degree of reprobation of the former; still this should not blind us to the fact that it is social disapproval and its appropriate expression that should fit the crime, and

not hard treatment (pain) as such. Pain should match guilt only in so far as its infliction is the symbolic vehicle of public condemnation.¹⁵

Against this I would urge:

1. That combining the moralism of 'condemnation' with a utilitarianism that assesses crimes, not in terms of culpability but in terms of harmfulness and degree of temptation makes for a mish-mash. However much the utilitarian view of crime may appear to provide a needed ballast to Feinberg's conventionalist and subjectivist doctrine, it simply does not belong there. You cannot combine a utilitarian view of crime with an anti-utilitarian view of punishment. Like the judges he quotes, Feinberg has tied his view to the fact of punishment's connection with public outrage, to public moralism. Yet in a way of which William Paley would have approved (he thought that the poor, being more disposed to steal, out of necessity, should be punished more severely than the rich), Feinberg offers a straightforwardly utilitarian criterion of seriousness. Yet it was the vagaries of public feeling that utilitarianism was meant to supplant. And, on the other hand, it was precisely the frigid rationalism of utilitarian calculation that the expression theory was meant to counter. And in all consistency, it should offer the idea that calling something a crime 'expresses' the community's values—whatever they are. You cannot legislate that indignant condemnations will give the same reading as cold calculations.

2. That, by justifying punitive sanctions, not as deserts or as deterrents but as 'vehicles for public condemnation', Feinberg puts forward a social-relativist view that adjusts proper punishment to the temperature of 'public opinion', or the most powerful pretenders to speak in its name. Would you rather get what you deserve or what 'public opinion' 'cries out for'? How do their feelings justify your persecution?

3. That, by treating punitive sanctions as 'conventional' expressions of disapproval, Feinberg adds a double arbitrariness to that entailed by his subjectivism. Given, for example, that hanging has been and threatens to become again the 'conventional' expression of the condemnation of murder, a hanging is, by Feinberg's concluding criteria, justified *qua* 'the way we signify this condemnation'. Despite Feinberg's earlier qualms we are given no conceptual space here for the criticism or justification of these conventions—'This game is played'?

The direction of the above criticism of Feinberg's 'conventionalism' is toward a view of the expressiveness of punishment as lying in what

¹⁵ *Ibid.*, 423.

might be called its 'communicative embodiment' of values. Through publicly embodying these values in forms which more or less naturally represent them, the punitive agent seeks to impress them on those who are witnesses to his action. We might compare this with ritual, in which, through appropriate gestures, the participants make *explicit* precisely that certain values and assumptions are *implicit* for them and hence can be 'represented' without requiring to be asserted or argued for. This idea, implicit in Durkheim, is found in Fried and Tribe. Fried writes: '... the discrete actions in the criminal process make concrete the relations of trust and justice they express'.¹⁶ Tribe writes: '... much of what matters about expressive rules, procedural or otherwise, is that they *embody* and do not merely *implement* the values of the community that follows them'.¹⁷ On this view a *change* of expressive practice may not merely be a change in notation (which could lead to temporary misunderstanding and communication lapse). It may constitute a change in values expressed.

Suppose this is broadly right at least to the extent of getting at a genuine and important dimension of social practice. Where does that leave questions of criticism and justification? It needs to be asked: 'Who is expressing what, through what, to whom?' Despite his qualms, Feinberg tends to write as if we had around us a cohesive community whose values were to be accepted and from whose ways only a few were inclined to slide. But if you think of the Ku-Klux-Klan, or the group anger and contempt that drives a teenage girl to suicide or, for that matter, of the periodic press baying after the blood of the perpetrator of some spectacularly awful crime, it becomes obvious that there are some questions to be asked—who is expressing what, through what, to whom?

What Values?

Expressionists tend to write as if 'expressiveness' tended *eo ipso* to justify certain laws. Fried and Tribe, for example, claim that such laws as those which place the burden of proof on the prosecution are justified, not out of utility, but because they are 'expressive' of the value placed on the citizen's liberties. But the advocates of 'removing the accused's privileges', police spokesmen, for example, in England, can equally 'justify' their demand in terms of the need for the state to 'emphatically declare' its concern for law and order, to show that it is on the insecure populace's side. Many urge the censorship of pornography because censorship is a 'declaration' of revulsion and contempt. But the opponent of censorship can reply with equal *a priori* weight that the refusal to censor 'expresses' the authori-

¹⁶ *Anatomy of Values*, 30.

¹⁷ 'Trial by Mathematics', *op. cit.*, 1392.

ties' overriding respect for individual choice.¹⁸ Similarly, when capital punishment's advocates bring out 'expressiveness' as their justification, the reply is appropriate that refusal to kill judicially expresses and promotes an overriding respect for life. Feinberg says that the expressive function of punishment explains revulsion at the Texan law by which 'paramour killings' are held 'justifiable'.¹⁹ But the Texan law can itself be seen as 'expressive' of Texan conjugal ideology. In each case we are left with the (old) question: which value *should* have acceptance and priority and therefore be expressed? 'Expression' itself is no adequate ethic, any more than is sincerity. Some of the worst deeds have been, no doubt, sincere expressions.

Expressed by Whom?

If a person or institution represents itself, through punishment, as holding to certain values, then the question arises as to whether this is *true*. In other words, questions of sham and hypocrisy can arise, and this possibility is *internal* to the expressionist view in so far as it stresses a communicated content, a 'propositional' dimension. What can represent can misrepresent. It is worth, then, asking with what legitimacy authorities, including judges, parents and teachers, present themselves as *expressing* (their) values. Nor is this a matter of personal sincerity alone. When punishment is held up as *the* expression of the value authoritative institutions place on human life, security of property, privacy, freedom or decency, the question arises internally whether this expression truly embodies the institutions' values. And, to the extent that killing, expropriation, destruction, prying, coercion and indecency characterize the normal 'legitimate' business of everyday life, the expression is (and is seen to be) phoney.

Through What Expression?

Durkheim, following Kant, argued that corporal punishment was an inappropriate expression of condemnation because it addressed itself to the child as an animal, a thing of flesh to be tamed. Hence it reinforced the child's 'animalism'.²⁰ This shows a depth of insight into 'expressiveness' that Feinberg's conventionalism, for example, denies him. It is all very well to say that punishment affirms community values, but this piece of

¹⁸ See *Censorship: Peter Coleman versus Wendy Bacon* (Australia: Heinemann, 1975).

¹⁹ *Op. cit.*, 402.

²⁰ *Op. cit.*, 182.

apriorism tends to shut out questions as to the material nature of the punishment and its relation to what it is *supposed* to be expressing. What if the punishment form, the medium, is cruel, degrading, corrupting, wasteful and divisive? What if its actual communication is in direct contradiction to the putative message? '(Whack!) Don't hit children smaller than you!'; 'Execute him! We must show the value we place on human life.'

Philosophers have looked on the mode of punishment, for example imprisonment, as a *mere* vehicle of officially proclaimed intentions (retribution, deterrence or the expression of community disapproval) without asking questions about the 'philosophy' of the specific institution. The '*medium*' has its own message.²¹

It is not just punishment *form* that should be at issue here, but punishment itself. What, after all, is the appropriate communicative response to wrongdoing? I have urged earlier that what punishment expresses is primarily 'punitiveness'. Yet 'punishment' as such is presented, *a priori*, as the embodiment of community concern for life, liberty and the pursuit of happiness. But how are such values expressed? Obviously and centrally, in everyday practices. No specialized expression can make up for *their* shortcomings. How, for example, do we express the value we put on old people's living without fear or despair? By practising a protective and supportive mode of life in relation to them. Only in that case would specialized and ritualized activities lose their character as fetishistic surrogates for values whose 'expression' (manifestation) is missing in everyday life. Is there not a kind of grotesqueness in a culture in which high drama is made of crime, and punishment is heaped upon the criminal, but in which victims are treated as stage-props (or as choruses applauding as vengeance is wrought) and in which the everyday conditions which promote crime are ignored? If we take 'expressivity' seriously, then we have to ask how values are expressed. And that leads to the thought that the *way* proclaimed values are expressed, including the way wrongdoers are dealt with, exhibits something deep about the values that really are at work.

Trials are sometimes likened to pedagogic morality plays, where the evil are punished and the virtuous rewarded, sometimes supernaturally. The comparison points up the dramatization of isolated individual responsibility that is so central to punishment as we know it. Of concern here is, not only the quasi-mythical nature of this 'production', but the curious and often 'counter-productive' nature of the outcome in the person punished. Punishment tends to focus attention on the person who has done wrong at the expense of the deed and its upshot—somebody

²¹ For a useful study see, Michael Ignatieff's *A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1750–1850* (London: Macmillan, 1978).

harmed. As such, it 'expresses' a distorted sense of what is important. As far as the person punished is concerned, the 'hard treatment' rapidly becomes itself the focus of attention, an object of resentment and hostility. Remorse, which is pain at the wrong done, is overridden by pain at the treatment being received. What 'gets across', then, is a demoralizing sense of isolation, however this may 'work' as a deterrent. Whether a form of 'retributive suffering' which *can* express and promote human responsibility can be conceived and practically developed is a further question.

To Whom?

Expressionism, as we noted earlier, points the message of punishment in two directions; in the direction of 'the community' (of law-abiders *and* of potential law-breakers) and in the direction of the criminal. A number of issues arise. Expressionists often write, even in these days, as if punishment represented 'the community', a cohesive entity disturbed only by 'the current rash of thuggery'. But are there such 'communities', or is the 'expression' part of a bid to establish them? What is the relation of the person punished to these values? Does he share them? Or is the ritual, in that case, empty or merely hostile to him. What is communicated then? There seems to be a problem here: if the punished respects the rules and the punishing agent, punishment is expressively redundant; criticism or admonition would do. But if these conditions are *absent* the punishment merely expresses alien hostility—merely functions as a demonstration of strength. Then again, crime has an 'expressive' dimension too—the whole thing is getting out of hand.

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