The Moral Basis of Punishment

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Example alone is the end of all public punishments and rewards. Laws never inflict disgrace in resentment, nor confer honour from gratitude. 'For it is very hard, my lord', said a convicted felon at the bar to the late excellent Judge Burnet, 'to hang a poor man for stealing a horse'. 'You are not to be hanged, sir', answered my ever-honoured and beloved friend, 'for stealing a horse, but you are to be hanged that horses may not be stolen'.

A Voyage to Lisbon, 1754.

Henry Fielding too, was honoured in his time as a just and humane magistrate, but few of us today would feel able to endorse the judge's action as he does. Even the severity of the sentence scarcely repels us so much as the callousness with which the judge scores a debating point at the expense of the condemned man. And is his point even valid? Put like this, the theory of pure deterrence appears crudely utilitarian, and difficult to justify morally, because it treats a human being as only an instrument of deterrence. Can we truly say that the man is not being hanged for stealing a horse? Would he have been hanged if he had not stolen the horse? Surely not. And in that case, can we say that penal justice is concerned only with the future effects of punishment, and that we need not consider what punishment the criminal has deserved?

In talking about punishment, there is a danger of a false antithesis arising through over-simplification. Retribution, deterrence and reformation are sometimes presented as if they were mutually exclusive—as if the adoption of one theory automatically excluded the other two. But it is misleading to think of three distinct theories in the abstract. If we consider human punishments in the concrete, we usually find that all three principles are involved. The question is really how retribution, deterrence and reformation are related to one another, rather than how they are opposed.

On the other hand, we ought to distinguish the principle by which a punishment is awarded from the effects which are aimed at. The basic principle of penal justice is retribution, since liability to penalties is the corollary of moral responsibility. Punishment is given only to those who are found to be guilty and morally responsible; and it should be

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Randall Davidson or Bishop Gore in the nineteen twenties. Reading again the letters and extracts from Portal's diaries on his first visit to England in 1894 one is struck by the extreme naivety with which the two friends regarded so favourably their polite reception by Archbishop Maclagan of York and Bishop Creighton of Peterborough. They were surprised and hurt on the other hand by the cold courtesy and caution of Archbishop Benson. There is a passage in the interview with Bishop Creighton which surely can only be understood as a reading into the Bishop's few and cautious words about infallibility what they wished to think he said, but which he certainly did not mean.

The same optimistic misjudgment may be observed in the assessment of the discussions at Malines. The very moderate concessions of the Anglicans in terms of a regard for the Pope as having a primacy of leadership or responsibility over the whole Church were seen by the two friends as being a considerable approach towards the achievement of their ideals; when in fact even that was an idea that would not have been tolerated in practice by any but very definite Anglo-Catholics, and they, as Bishop Gore is quoted as saying, though ready enough to accept Roman doctrine 'dislike or fear Roman authority'. Had the participants taken part in the Conversations with the same subjects of discussion, but in a modern ecumenical atmosphere, with the modern ideal before them, their dialogue would have been, and would be now, both remarkable and fruitful. As it was the whole atmosphere, though most courteous and friendly was bedevilled by the feeling always at least unconsciously present, that it was a round table negotiation of terms of corporate reunion at which they were assisting, a position which most of them on either side must have regarded as entirely unreal. They were always therefore over-cautious and unwilling to commit themselves; an attitude unfavourable to ecumenical exchanges.

It was the Abbé Portal and Lord Halifax who generated this feeling in the meetings since they themselves more than half believed in the possibility of corporate reunion being achieved in the not too distant future. In some measure they communicated this half-belief to Cardinal Mercier. Can anything else explain the unexpected reading by the Cardinal at the Fourth Conversation of Dom Beaudouin's paper, *The Anglican Church united not absorbed.* In this paper the conditions were laid down under which the Church of England could become a uniat Church preserving its autonomy as a Patriarchate under the Archbishop of Canterbury.

But though the approaches in 1895 and again at Malines in the nineteen twenties were abortive and resulted in something like a set back, through misjudgment of the situation, the spirit of Malines and its technique of approach were an example, the power of which has remained. It is now bearing fruit in the modern growth of Catholic ecumenism to which Pope John XXIII is giving such encouragement and impetus. The life-long eager devotion of Fernand Portal and of his friend in this cause commands our gratitude and will amply repay our study.

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is there then for maintaining that punishment should be primarily retributive?

Fundamentally, it is rooted in the natural order of things: 'As a man sows, so shall he reap'. On the literal level, this states a fact of nature, something which we would be foolish to close our eyes to. So, too, on the metaphorical level, where it affirms that the universe is fundamentally moral, that sin inevitably entails guilt and punishment. Evil brings its own retribution in this life, in the form of deterioration of character; and in the ultimate issue God 'will render to every man according to his works'. (Rom 2, 6). This principle is not superseded by the New Law, as some people say: under the Christian dispensation we are invited to follow a higher law from a higher motive, but for those who do not respond to the invitation the natural law and its sanctions remain. St Paul indicates the place of judicial punishment under the New Law when he says that the prince does not carry the sword for nothing: he is the servant of God to administer justice and punish the evil-doer. (Rom 13, 4).

Human justice, then, is based on this divinely-ordained natural law, that sin entails retribution. Public authority, in punishing a man for an offence against society, is not just retaliating, but administering the penalty authorized by the natural law.[2] St Thomas defines justice (almost in the words of St Paul) as giving to every man what is due to him; and he makes it clear that this applies not only to commercial transactions, but also to just punishment.[3] His treatment of compensatory punishment (*contrapassum*) closely follows that of Aristotle, who holds that both kindnesses and injuries deserve to be repaid.[4] Reward and punishment may each be regarded as a form of recompense; but if we think of punishment as a kind of debt then it is something due to the offender, not from him to society. Aristotle further observes that this principle is necessary for social cohesion in a democracy: 'It is just the feeling that, as one does, so one will be done by, that keeps a political association in being'.

Judicial punishment thus vindicates the natural moral law and so

[2]'Même quand il s'agit de l'exécution d'un condamné à la mort, l'Etat ne dispose pas du droit de l'individu à la vie. Il est réservé alors au pouvoir public de priver le condamné du *bien* de la vie, en expiation de sa faute, après que, par son crime, il s'est déjà dépossédé de son *droit* à la vie'. Pope Pius XII, in an address to the first International Congress on the Histopathology of the Nervous System. *A.A.S.*, vol. xix (1952), p. 787.

[3]2a-2ae. 80, *c* and *ad* 1. 108, 2 *ad* 1.

[4]2a-2ae. 61, 4. *Ethics*, v, 5, 1132 b 22.

maintains the principle of rule of law in the life of the community. This is the primary purpose of punishment. Its social effects are imponderable, but very important. We in this country are tempted to take them for granted, since we have a long tradition of the rule of law. If we had lived through a period of lawlessness (such as that in the Congo) or under a tyrannical or corrupt regime, we really would desire the vindication of justice. We have come to expect the rule of law as a right, without thinking that it has to be maintained.

But for the Christian there is another motive for punishment: it is also required by charity towards the offender. St Augustine, speaking of fraternal correction, says in illustration that we should not be too squeamish about the natural feelings of the man who is afraid of the surgeon's knife. Similarly with punishment. The object is remedial—to reform the criminal and bring him back to his place in society—but this can only be achieved by imposing some punishment which will make clear his guilt and emphasize the claims of the moral law. The man may remain blind to the moral issue, and in that case the punishment will be no more than a deterrent, showing that crime does not pay. But if he recognizes, even grudgingly, that his punishment is just, this recognition may lead him to mend his ways. 'Crime does not pay' is a maxim of expediency, but 'crime deserves punishment' is a moral one. It forms the link between our natural tendency to seek pleasure and avoid pain and the principle that we should do good and avoid evil.

Penal justice takes account only of external offences against society, but it aims to have an effect on the offender himself. All sin, says St Thomas, is an offence against the three orders which govern man—his own conscience, the laws of society, and the law of God—and entails punishment from each of these.[5] Judicial punishment belongs to the second of these: it is intended to bring home to the offender that there is a moral order in society which cannot be violated with impunity. But in doing this, and in bearing directly on his own culpability, it helps to arouse his conscience: this is the reformative aim of punishment, as it applies to the individual. And if his conscience is awakened and the man is a Christian (or at least a theist) he may come to see that his punishment is an opportunity for expiating his sin against the law of God. This, said Pope Pius XII in his speech to the Sixth International Congress on Penal Law in 1953, is the most important aspect, and the

[5] 2a-2ae. 87, 1.

ultimate meaning of punishment.[6]

This then is the principle of retribution, rightly understood: that the punishment should be related to the degree of culpability, and so vindicate the law. This is the essential basis of penal justice, but it is not the whole of penal justice. The judge must also look to the effect of the punishment; and here the object is that the criminal should be reformed, or at least deterred. The form of punishment has to be decided with these objects in mind, taking account of what is known about the individual offender.

The tendency today is to give more attention to the social effects of punishment than to the principle of justice. In part this is due to a more humane spirit, in part to the positivism and pragmatism which permeate so much of our thinking. The principle of retribution becomes obscured, and is sometimes consciously rejected, for a number of reasons.

First of all, the word *retribution* has acquired a pejorative sense: it is often used (inaccurately) in the sense of a repressive punishment, given in a spirit of retaliation. So some would say that there is no need to invoke the principle of retribution, since the establishment of legal and moral guilt is sufficient to justify punishment. All true punishment is just, they argue; if it were not just, we should not, properly speaking, call it punishment. But this is in fact just a change of terminology, since the argument admits that the *principle* of retribution is in fact essential to punishment properly so called.

The chief objection to the principle itself, on the ground that it is inflexible and out-dated, comes from those who see moral standards only in terms of reciprocal rights and duties, as something purely human and relative. Retribution implies a natural moral law, and ultimately a divine lawgiver. These premises were generally admitted when our law developed, and the law was designed, in the ultimate issue, to safeguard and emphasize them. But the sense of any absolute moral standards has diminished rapidly in recent years. Academic philosophy for the past century has been generally hostile, and popular opinion has now followed suit. (Richard Hoggart has traced the change in the last generation or two from 'Right's right and wrong's wrong, when all's done and said' to 'It wouldn't do for us all to think alike' and 'It doesn't matter what y' believe, so long as yer 'eart's in the right place'.) And the concept of objective moral guilt has been further obscured by popularizations of Freudian psychology. The psychologist

[6] *A.A.S.*, vol. xx (1953), pp. 730–744. cf. 1a-2ae. 87, 6.

commonly uses the word *guilt* to mean feelings of guilt as a psychological phenomenon. These guilt-feelings need not be rational. Very often the psychologist is concerned just because they are not: because guilt-feeling is excessive, or deficient, or bears no direct relationship to the person's conscious moral conduct. And the popularization of the word *guilt* in this sense has caused many people to lose sight altogether of the primary meaning of *guilt* as an objective moral fact, inevitably attached to the conscious transgression of the moral law. In this matter the legal principle of a just retribution is a buttress to the moral law, and one which should not be easily surrendered.

Thirdly, there is the objection that crime is a disease, and the whole conception of punishment should be replaced by one of treatment. It is certainly true that a great deal more is known today than in the past about the psychological causes of crime, and every effort must be made to take account of totally or partially diminished responsibility. But it is only the thorough-going determinist who would say that all crime is pathological in origin. The principle of retribution implies responsibility; and conversely the policy of replacing it by treatment implies a denial of responsibility. But responsibility is immensely important, for two reasons in particular. First, as the foundation of morality. The loss of a consciousness of absolute standards, and confusion about guilt, already referred to, have attenuated the concept of moral responsibility. (One example of this was a recent letter in the *Spectator* from a man who was honestly puzzled because Catholics are unanimously opposed to artificial abortion, but not necessarily opposed to capital punishment.) Secondly, there is a close correlation between responsibility and freedom. We can see this in the case of children growing up: as they become more responsible, so they can and should have more freedom. Similarly, political freedom obliges us to responsibility for its right use. And so the transition from a policy of punishing people, as being responsible, to one of giving them treatment, because they are not fully responsible, is *eo ipso* a transition from freedom to paternalism. It may be a justifiable change, to some extent, particularly in dealing with the young, but it is not to be taken lightly. The thin end of this wedge is already here in the indeterminate sentences given to youths who are sent to approved schools and borstals. The transition to paternalism may be gradual and imperceptible, but the natural outcome if this policy is pushed to its conclusion is the totalitarian state which sends men to concentration camps for 're-education'.

Fourthly, there is the argument that punishment is fundamentally

motivated by aggression, and that this is also at the root of crime. In other words, the drive to punish and to be punished is not primarily moral, but psychological. Granted that there are a few pathological cases of criminals who get themselves punished, are we to agree that aggression underlies all punishment? And if so, is all punishment thereby vitiated?

St Thomas seems almost to have anticipated this modern objection in his theory—at first sight rather disconcerting—that *vindicatio* is a distinct virtue, the opposite of gratitude, and one of the virtues related to justice.[7] To understand this, we have to remember that there are two traditions in Christian morals—the Greek tradition, chiefly derived from Aristotle, which considers man from a psychological point of view, in terms of virtues and vices (that is, good and bad moral habits); and the Jewish tradition, which is juridical, in terms of law and actual sin. Both approaches are legitimate and important: to a large extent they are complementary ways of talking about the same thing. So in penal justice we are normally talking of a specific action contrary to the law, and we try to think of guilt and punishment as unemotionally as possible; and in his treatise on law St Thomas writes in terms of *peccatum*, *culpa* and *poena*. But when he comes to speak of the virtues of the individual, he says that we have a natural tendency to repel and punish violence, injustice and anything which would do us harm; and this is a virtue provided it is rightly directed. The violence we deplore may be directed against law and order, as in the case of an armed robbery, or it may be an abuse of power by the forces of authority, as at Sharpeville. In both cases, indignation may be aroused and public opinion demand punishment—and rightly so, provided that the object is not personal vengeance, but the remedying of the injustice and the vindicating of the rule of law. Here, as elsewhere, it is important that we should be aware of our emotions, but we should not necessarily distrust them. An explanation of the genesis of guilt, punishment, reparation and the like, in terms of more or less unconscious emotional tensions may be quite valid so far as it goes: but an explanation which is restricted to those terms will be a distorted one because it implies that guilt, punishment and the rest are never rational and moral. Similarly the evidence from animal psychology (rats in mazes, and so on) is of limited value here.

Finally there is the objection that retribution is unconstructive. This objection arises chiefly from the error of thinking of retribution, reformation and deterrence as opposing principles, instead of inter-

[7] 2a-2ae. 108.

penetrating elements in penal justice. However much it is directed towards education and treatment, a penalty which is imposed on a man against his will by a judicial authority has an element of retribution in it. And similarly all retributive punishment has some deterrent effect, even if it is not reformative. This complaint of its unconstructive character is particularly brought against corporal punishment. In fact, research in education shows that most children regard corporal punishment from parents and teachers as effective in a remedial and educative way.[8] The reason for this seems to be the very fact that it is unconstructive: it is clearly punitive and nothing else. It is not just physical coercion, because it is an action which has moral significance. And if the child recognizes it as a just punishment, then it brings home to him very clearly the principle that good is to be done and evil avoided. But we should beware of transferring this conclusion to judicial corporal punishment, which is concerned not with the average child, but with the older boy or young man who is already something of a rebel against society, and might very well fail to see an official birching, several weeks after the offence, as a just punishment. For this reason the new detention centres —recommended when corporal punishment was abolished in 1948, but only beginning to be available—will perhaps be a more suitable form of 'punitive' punishment.

To sum up the principles involved: punishment normally includes elements of retribution, remedy and deterrence. The emphasis may be placed on one or other of these as the case requires, but the essential principle is that of retribution, which means proportioning the severity of the punishment both to the seriousness of the crime and to the culpability of the criminal. This principle forbids excessive severity as well as too great leniency. It was recently reported in the newspapers that a man had been sentenced to ten years' imprisonment for stealing two bags of mail. No doubt there were special circumstances we do not know, but our immediate reaction to that simple statement is that the punishment was unjust, precisely because it is contrary to the principle of retribution. If we were working on the principle of deterrence pure and simple, there could be no objection to such a punishment: in fact, it would be an exemplary sentence—like hanging a man that horses may not be stolen. Similarly we have to be very careful about making remedial treatment the object, if it is divorced from the principle of retribution. The use of the indeterminate sentence, and of the recently-

[8]'Children and Punishment', *Durham Research Rev.*, vol. 3, no. 11 (1960), pp. 12–26.

given power to commit a man for psychiatric treatment, may be good on occasion, but it could easily lead to paternalism. It transfers the power to detain a man away from the judiciary, and may give rise to questionable cases like that of Ezra Pound.

Retribution is thus the essential and primary principle of judicial punishment, though as an end it is only intermediate and subordinate. We must not leave it out, because either reformation or deterrence alone opens the way to tyranny, by treating a man as less than fully human.

When children transgress the law there are two important differences, both stemming from their imperfectly-developed responsibility. The first is one of practical jurisdiction. The adult is presumed to be responsible for his actions unless there is clear evidence to the contrary. But children under eight can never be charged with a criminal offence, and those under fourteen are presumed to be incapable of criminal intention (*doli incapax*) unless the contrary is shown.

The second difference is one of general principle. Public authority has the right and the duty to take a more direct interest in the welfare of the child than in that of the responsible adult, and to foresee and prevent delinquency wherever possible. This follows from the rights and duties of the State in education, to supplement the work of the parents, and to replace them if they fail in their duties. It has been recognized for many years that in dealing with delinquent children the main emphasis should be on moral education and training rather than punishment.

In the case of children therefore, remedial treatment may be an acceptable alternative to retribution, and may be justified even if the child has not committed an offence. Two rival principles are thus involved: punishment and education. The conflict between them runs through all the penal practice relating to children. At present children may be dealt with in two ways: either criminal proceedings, leading to punishment, or 'care and protection' proceedings, based on personal need. And if a charge is made, the child is tried on one ground (the offence committed), but dealt with on another (his future welfare): this means that there is no necessary proportion between offence and punishment. Again, although a child cannot be'punished' unless he is found guilty of an offence, 'care and protection' proceedings can lead to committal to an approved school—generally regarded as the severest sentence which may be given as a punishment.

Because of these anomalies, and because of the practical difficulty of administering the *doli incapax* provision, the Ingleby Committee has

suggested that all younger children (under twelve) should be dealt with on the ground of need. It therefore proposed that the minimum age of responsibility should be raised from eight to twelve (perhaps later to thirteen or fourteen). This would mean that children under that age could not be charged with an offence, but would be brought before the court as 'being in need of protection and discipline'.

The advantages of this proposal are obvious and important, but it has met with a good deal of criticism on the ground that it would further undermine the sense of responsibility. Children may be often irresponsible, the argument goes, but to treat them as if they are incapable of responsibility will only make things worse. And of course one fact which Catholics have in mind is that children begin to go to confession on reaching 'the age of reason', usually about seven. If they are capable of sin, surely they are morally responsible?

Two questions are really involved here. When do children become morally responsible? And, will the proposed change in the law undermine the sense of responsibility in the community?

The first question is a complex one, and we cannot simply make a hard and fast rule. There are different degrees of responsibility, and big differences between individuals. The criterion for first confession is a simple knowledge of right and wrong, with the capacity to choose between them. It does not presuppose a very well developed ability to distinguish what is sinful from what is not. Is this 'use of reason' sufficient for criminal responsibility?

It would not, it seems have sufficed for St Thomas, or for the jurists of earlier times[9]. Children should not be allowed to take the vows of religion, says St Thomas, until they have 'a due use of reason'; that is, until they are *capaces doli*. This use of reason, he says, is usually reached about the beginning of puberty, which he puts at about twelve for girls and fourteen for boys.[10] (He is careful to allow for individual differences in both physical and mental maturation.)

English law seems to have followed the same ancient tradition as St Thomas, in that a child under fourteen is presumed to be *doli incapax* unless the contrary is shown. In practice, the interpretation seems to have become stricter. But there is no certainty about the standard to be

[9]A.-M. Henry, O.P., *Initiation Théologique*, tome 3, p. 946.

[10]'Et eadem est ratio de pueris qui nondum habent debitum usum rationis, per quem sint doli capaces; quem quidem pueri habent, ut frequentius, circa quartumdecimum annum, puellae vero circa duodecimum, qui dicuntur anni pubertatis. In quibusdam tamen anticipatur, et in quibusdam tardatur, secundum diversam dispositionem naturae'. 2a-2ae. 189, 5.

applied, says the Ingleby Report, and some courts are more conscientious than others in giving the child the benefit. This, it would seem, is where psychology should come in. But in fact modern empirical psychology has not produced much evidence about moral responsibility, since the subject has received relatively little attention until quite recent years.[11] The concept is a complex one, and includes affective maturity and personal autonomy as well as moral judgment. The capacity for moral judgment, the intellectual factor in moral responsibility, is developed by upbringing and experience, but the individual's intelligence sets an upper limit. Now one of the best-established findings of modern psychology concerns the scatter of individual intelligence: a child of ten may have a mental age anywhere between seven and fourteen, and still be what we call 'normal'. (Or, to put it the other way round, an intelligent child of eight will have developed a mental capacity which the dull child will not reach until thirteen or fourteen.) Since many of the children who get into trouble are of less than average intelligence, and have very often had a defective upbringing as well, we may expect the moral judgment of delinquent children to be below average, sometimes well below average. The magistrate's clerk who wrote to the *Times* saying that his own children all knew right from wrong at the age of eight and that other children should know too, obviously had little idea of why social scientists have developed sampling techniques: but there are plenty of people who would argue along similar lines. Besides, what is required for true moral judgment is not just that the child should 'know right from wrong', but that he should know whether this particular action in these particular circumstances is right or wrong—a much more difficult matter. We certainly cannot *presume* that the child will have developed any real moral responsibility before puberty. To try to assess it earlier is not at all easy, since there are no objective psychological tests for estimating the capacity for moral judgment, let alone moral responsibility.

Would the proposed change, then, tend to undermine the sense of responsibility in the community? The principal objection—represented by a minority report of one member of the committee—is that the

[11]Cf. the symposium, 'The Development of Children's Moral Values', *Brit. J. Educ. Psychol.*, 1957-60. There is useful survey of earlier work in the first two papers: I, J. Hemming, 'Some Aspects of Moral Development in a Changing Society' (vol. 27, June 1957, pp. 77-88); II, J. F. Morris, 'The Development of Adolescent Value-Judgments' (vol. 28, Feb. 1958, pp. 1-14).

terminology is dangerous, because it suggests that children are being exempted from blame. Certainly the proposed wording ('in need of protection or discipline') implies that it is the parents who are to blame rather than the child. Very often they are, and the change might be an excellent thing for that reason. So far as the child is concerned, an action such as stealing would still be a ground for proceedings, but not for a criminal charge. In effect, a child under twelve would always be regarded as *doli incapax*. Since this is already the presumption, the proposed innovation is not so startling as some people have suggested. The Ingleby Report says (para. 93) that 'it is largely a matter of terminology whether we say that he has committed an offence and is therefore in need of discipline, or whether we say that he is in need of discipline because he has done something that would be an offence if he were older'. It is not a distinction which would readily occur to a child, certainly, but it is rather more than a verbal quibble. It means that an 'offence' would be an occasion for welfare proceedings, not a cause of punishment. This is already the actual situation, so far as most judicial punishments of children are concerned. In parental punishments, as in judicial punishments of adults, it is important to keep a proportion between culpability and punishment (that is, the principle of retribution). But this is not possible in judicial punishments of children, which are already determined by the need of the child. Committal to an approved school, for example, is always for an indefinite period, and cannot therefore be proportioned to guilt. In any case, loss of liberty for a year or more may be excessive as a penalty for the particular offence, even though it is the best thing for the child. It is best to recognize this for what it is—training rather than punishment. If we wish to uphold retribution, with its emphasis on moral responsibility, as the essential principle of penal justice, then we must also make allowance for any serious lack of responsibility, whether this is due to mental illness, low intelligence, or the youth of the offender. Morally, this is a matter of obligation. Politically, it would be a mistake to insist on responsibility if it is not truly there: this only encourages people to reject the whole concept.