

PROLEGOMENON TO THE PRINCIPLES OF PUNISHMENT

I. INTRODUCTORY

The main object of this paper is to provide a framework for the discussion of the mounting perplexities which now surround the institution of criminal punishment, and to show that any morally tolerable account of this institution must exhibit it as a compromise between distinct and partly conflicting principles.

General interest in the topic of punishment has never been greater than it is at present and I doubt if the public discussion of it has ever been more confused. The interest and the confusion are both in part due to relatively modern scepticism about two elements which have figured as essential parts of the traditionally opposed 'theories' of punishment. On the one hand, the old Benthamite confidence in fear of the penalties threatened by the law as a powerful deterrent, has waned with the growing realization that the part played by calculation of any sort in anti-social behaviour has been exaggerated. On the other hand a cloud of doubt has settled over the keystone of 'retributive' theory. Its advocates can no longer speak with the old confidence that statements of the form 'This man who has broken the law could have kept it' had a univocal or agreed meaning; or where scepticism does not attach to the *meaning* of this form of statement, it has shaken the confidence that we are generally able to distinguish the cases where a statement of this form is true from those where it is not.¹

Yet quite apart from the uncertainty engendered by these fundamental doubts, which seem to call in question the accounts given of the efficacy, and the morality of punishment by all the old competing theories, the public utterances of those who conceive themselves to be expounding, as plain men for other plain men, orthodox or common-sense principles (untouched by modern psychological doubts) are uneasy. Their words often sound as if the authors had not fully grasped their meaning or did not intend the words to be taken quite literally. A glance at the parliamentary debates or the *Report of the Royal Commission on Capital Punishment*² shows that many are now troubled by the suspicion that the view that there is just one supreme value or objective (e.g. Deterrence, Retribution or Reform) in terms of which *all* questions about the justification of punishment are to be answered, is somehow wrong; yet, from what is said on such occasions no clear account of what the different values or objectives are, or how they fit together in the justification of punishment, can be extracted.³

No one expects judges or statesmen occupied in the business of sending people to the gallows or prison, or in making (or unmaking) laws which enable this to be done, to have much time for philosophical discussion of the principles which make it morally tolerable to do these things. A judicial bench is not and should not be a professorial chair. Yet what is said in public debates about punishment by those specially concerned with it as judges or legislators is important. Few are likely to be more circumspect, and if what they say seems, as it often does, unclear, one-sided and easily refutable by pointing to some aspect of things

¹ See Barbara Wootton *Social Science and Social Pathology* (1959) for a comprehensive modern statement of these doubts.

² (1953) Cmd. 8932.

³ In the Lords' debate in July 1956 the Lord Chancellor agreed with Lord Denning that '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' yet also said that 'the real crux' of the question at issue is whether capital punishment is a uniquely effective deterrent. See 198 *H. L. Deb* (5th July) 576, 577, 596 (1956). In his article, 'An Approach to the Problems of Punishment', *Philosophy* (1958), Mr. S. I. Benn rightly observes of Lord Denning's view that denunciation does not imply the deliberate imposition of suffering which is the feature needing justification (p. 328, n.I).

which they have overlooked, it is likely that in our inherited ways of talking or thinking about punishment there is some persistent drive towards an over-simplification of multiple issues which require separate consideration. To counter this drive what is most needed is *not* the simple admission that instead of a single value or aim (Deterrence, Retribution, Reform or any other) a plurality of different values and aims should be given as a conjunctive answer to some *single* question concerning the justification of punishment. What is needed is the realization that different principles (each of which may in a sense be called a ‘justification’) are relevant at different points in any morally acceptable account of punishment. What we should look for are answers to a number of different questions such as: What justifies the general practice of punishment? To whom may punishment be applied? How severely may we punish? In dealing with these and other questions concerning punishment we should bear in mind that in this, as in most other social institutions, the pursuit of one aim may be qualified by or provide an opportunity, not to be missed, for the pursuit of others. Till we have developed this sense of the complexity of punishment (and this prolegomenon aims only to do this) we shall be in no fit state to assess the extent to which the whole institution has been eroded by, or needs to be adapted to, new beliefs about the human mind.

2. JUSTIFYING AIMS AND PRINCIPLES OF DISTRIBUTION

There is, I think, an analogy worth considering between the concept of punishment and that of property. In both cases we have to do with a social institution of which the centrally important form is a structure of *legal* rules, even if it would be dogmatic to deny the names of punishment or property to the similar though more rudimentary rule-regulated practices within groups such as a family, or a school, or in customary societies whose customs may lack some of the standard or salient features of law (e.g. legislation, organized sanctions, courts). In both cases we are confronted by a complex institution presenting different inter-related features calling for separate explanation; or, if the morality of the institution is challenged, for separate justification. In both cases failure to distinguish separate questions or attempting to answer them all by reference to a single principle ends in confusion. Thus in the case of property we should distinguish between the question of the *definition* of property, the question why and in what circumstance it is a *good* institution to maintain, and the questions in what ways individuals may become *entitled* to acquire property and *how much* they should be allowed to acquire. These we may call questions of *Definition*, *General Justifying Aim*, and *Distribution* with the last subdivided into questions of *Title* and *Amount*. It is salutary to take some classical exposition of the idea of property, say Locke’s chapter ‘Of Property’ in the *Second Treatise*,⁴ and to observe how much darkness is spread by the use of a single notion (in this case ‘the labour of (a man’s) body and the work of his hands’) to answer all these different questions which press upon us when we reflect on the institution of property. In the case of punishment the beginning of wisdom (though by no means its end) is to distinguish similar questions and confront them separately.

(a) *Definition*

Here I shall simply draw upon the recent admirable work scattered through English

⁴ Chapter V.

philosophical⁵ journals and add to it only an admonition of my own against the abuse of definition in the philosophical discussion of punishment. So with Mr. Benn and Professor Flew I shall define the standard or central case of 'punishment' in terms of five elements:

- (i) It must involve pain or other consequences normally considered unpleasant.
- (ii) It must be for an offence against legal rules.
- (iii) It must be of an actual or supposed offender for his offence.
- (iv) It must be intentionally administered by human beings other than the offender.
- (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

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

- (a) Punishments for breaches of legal rules imposed or administered otherwise than by officials (decentralised sanctions).
- (b) Punishments for breaches of non-legal rules or orders (punishments in a family or school).
- (c) Vicarious or collective punishment of some member of a social group for actions done by others without the former's authorization, encouragement, control or permission.
- (d) Punishment of persons (otherwise than under (c)) who neither are in fact nor supposed to be offenders.

The chief importance of listing these sub-standard cases is to prevent the use of what I shall call the 'definitional stop' in discussions of punishment. This is an abuse of definition especially tempting when use is made of conditions (ii) and (iii) of the standard case in arguing against the utilitarian claim that the practice of punishment is justified by the beneficial consequences resulting from the observance of the laws which it secures. Here the stock 'retributive' argument⁶ is: If *this* is the justification of punishment, why not apply it, when it pays to do so, to those innocent of any crime, chosen at random, or to the wife and children of the offender? And here the wrong reply is: *That*, by definition, would not be 'punishment' and it is the justification of punishment which is in issue.⁷ Not only will this definitional stop fail to satisfy the advocate of 'Retribution', it would prevent us from investigating the very thing which modern scepticism most calls in question: namely the rational and moral status of our preference for a system of punishment under which measures painful to individuals are to be taken against them only when they have committed an offence. Why do we prefer this to other forms of social hygiene which we might employ to prevent anti-social behaviour and which we do employ in special circumstances, sometimes with reluctance? No account of punishment can afford to dismiss this question with a definition.

(b) The nature of an offence

Before we reach any question of justification we must identify a preliminary question to

⁵ K. Baier, 'Is Punishment Retributive?', *Analysis* (1955) p. 25. A. Flew, 'The Justification of Punishment', *Philosophy* (1954), p. 291. S. I. Benn, *op. cit.*, pp. 325-6.

⁶ A. C. Ewing, *The Morality of Punishment*, D. J. B. Hawkins, *Punishment and Moral Responsibility* (The King's Good Servant, p. 92), J. D. Mabbott, 'Punishment', *Mind* (1939), p. 152.

⁷ Mr. Benn seemed to succumb at times to the temptation to give 'The short answer to the critics of utilitarian theories of punishment—that they are theories of *punishment* not of any sort of technique involving suffering' (*op. cit.*, p. 332). He has since told me that he does not now rely on the definitional stop.

which the answer is so simple that the question may not appear worth asking; yet it is clear that some curious ‘theories’ of punishment gain their only plausibility from ignoring it, and others from confusing it with other questions. This question is: Why are certain kinds of action forbidden by law and so made crimes or offences? The answer is: To announce to society that these actions are not to be done and to secure that fewer of them are done. These are the common immediate aims of making any conduct a criminal offence and until we have laws made with these primary aims we shall lack the notion of a ‘crime’ and so of a ‘criminal’. Without recourse to the simple idea that the criminal law sets up, in its rules, standards of behaviour to encourage certain types of conduct and discourage others we cannot distinguish a punishment in the form of a fine from a tax on a course of conduct.⁸ This indeed is one grave objection to those theories of law which in the interests of simplicity or uniformity obscure the distinction between primary laws setting standards for behaviour and secondary laws specifying what officials must or may do when they are broken. Such theories insist that all legal rules are ‘really’ directions to officials to exact ‘sanctions’ under certain conditions, e.g. if people kill.⁹ Yet only if we keep alive the distinction (which such theories thus obscure) between the primary objective of the law in encouraging or discouraging certain kinds of behaviour, and its merely ancillary sanction or remedial steps, can we give sense to the notion of a crime or offence.

It is important however to stress the fact that in thus identifying the immediate aims of the criminal law we have not reached the stage of justification. There are indeed many forms of undesirable behaviour which it would be foolish (because ineffective or too costly) to attempt to inhibit by use of the law and some of these may be better left to educators, trades unions, churches, marriage guidance councils or other non-legal agencies. Conversely there are some forms of conduct which we believe cannot be effectively inhibited without use of the law. But it is only too plain that in fact the law may make activities criminal which it is morally important to promote and the suppression of these may be quite unjustifiable. Yet confusion between the simple immediate aim of any criminal legislation and the justification of punishment seems to be the most charitable explanation of the claim that punishment is *justified* as an ‘emphatic denunciation by the community of a crime’. Lord Denning’s dictum that this is the ultimate justification of punishment¹⁰ can be saved from Mr. Benn’s criticism, noted above, only if it is treated as a blurred statement of the truth that the aim not of punishment, but of criminal legislation is indeed to denounce certain types of conduct as something not to be practised. Conversely the immediate aim of criminal legislation cannot be any of the things which are usually mentioned as justifying punishment: for until it is settled what conduct is to be legally denounced and discouraged we have not settled from what we are to *deter* people, or who are to be considered *criminals* from whom we are to exact *retribution*, or on whom we are to wreak *vengeance*, or whom we are to *reform*.

Even those who look upon human law as a mere instrument for enforcing ‘morality as such’ (itself conceived as the law of God or Nature) and who at the stage of justifying punishment wish to appeal not to socially beneficial consequences but simply to the intrinsic value of inflicting suffering on wrong-doers who have disturbed by their offence the moral order, would not deny that the aim of criminal legislation is to set up types of behaviour (in

⁸ This generally clear distinction may be blurred. Taxes may be imposed to discourage the activities taxed though the law does not announce this as it does when it makes them criminal. Conversely fines payable for some criminal offences because of a depreciation of currency become so small that they are cheerfully paid and offence, are frequent. They are then felt to be mere taxes because the sense is lost that the rule is meant to be taken seriously as a standard of behaviour.

⁹ cf. Kelsen, *General Theory of Law and State* (1945), pp. 30—33, 33—34, 143-4. ‘Law is the primary norm, which stipulates the sanction....’ (ibid. 61).

¹⁰ In evidence to the Royal Commission on Capital Punishment, Cmd. 8932, para. 53 (1953). *Supra*, p. 2, fl 3.

this case conformity with a pre-existing moral law) as legal standards of behaviour and to secure conformity with them. No doubt in all communities certain moral offences, e.g. killing, will always be selected for suppression as crimes and it is conceivable that this may be done not to protect human beings from being killed but to save the potential murderer from sin; but it would be paradoxical to look upon the law as designed not to discourage murder at all (even conceived as sin rather than harm) but simply to extract the penalty from the murderer.

(c) *General Justifying Aim*

I shall not here criticize the intelligibility or consistency or adequacy of those theories that are united in denying that the practice of a system of punishment is justified by its beneficial consequences and claim instead that the main justification of the practice lies in the fact that when breach of the law involves moral guilt the application to the offender of the pain of punishment is itself a thing of value. A great variety of claims of this character, designating 'Retribution' or 'Expiation' or 'Reprobation' as the justifying aim, fall in spite of differences under this rough general description. Though in fact I agree with Mr. Ben¹¹ in thinking that these all either avoid the question of justification altogether or are in spite of their protestations disguised forms of Utilitarianism, I shall assume that Retribution, defined simply as the application of the pains of punishment to an offender who is morally guilty, may figure among the conceivable justifying aims of a system of punishment. Here I shall merely insist that it is one thing to use the word Retribution *at this point* in an account of the principle of punishment in order to designate the General Justifying Aim of the system, and quite another to use it to secure that to the question 'To whom may punishment be applied?' (the question of Distribution), the answer given is 'Only to an offender for an offence'. Failure to distinguish Retribution as a General Justifying Aim from retribution as the simple insistence that only those who have broken the law—and voluntarily broken it—may be punished, may be traced in many writers: even perhaps in Mr. J. D. Mabbott's¹² otherwise most illuminating essay. We shall distinguish the latter from Retribution in General Aim as 'retribution in Distribution'. Much confusing shadow-fighting between utilitarians and their opponents may be avoided if it is recognized that it is perfectly consistent to assert *both* that the General Justifying Aim of the practice of punishment is its beneficial consequences *and* that the pursuit of this General Aim should be qualified or restricted out of deference to principles of Distribution which require that punishment should be only of an offender for an offence. Conversely it does not in the least follow from the admission of the latter principle of retribution in Distribution that the General Justifying Aim of punishment is Retribution though of course Retribution in General Aim entails retribution in Distribution.

We shall consider later the principles of justice lying at the root of retribution in Distribution. Meanwhile it is worth observing that both the old fashioned Retributionist (in General Aim) and the most modern sceptic often make the same (and, I think, wholly mistaken) assumption that sense can only be made of the restrictive principle that punishment be applied only to an offender for an offence if the General Justifying Aim of the practice of punishment is Retribution. The sceptic consequently imputes to all systems of punishment (when they are restricted by the principle of retribution in Distribution) all the irrationality he finds in the idea of Retribution as a General Justifying Aim; conversely the advocates of the latter think the admission of retribution in Distribution is a refutation of the utilitarian claim that the social consequences of punishment are its Justifying Aim.

¹¹ Op. cit., pp. 326-35.

¹² Op. cit. *supra* p. 5, n. 6. It is not always quite clear what he considers a 'retributive' theory to be.

The most general lesson to be learnt from this extends beyond the topic of punishment. It is, that in relation to any social institution, after stating what general aim or value its maintenance fosters we should enquire whether there are any and if so what principles limiting the unqualified pursuit of that aim or value. Just because the pursuit of any single social aim always has its restrictive qualifier, our main social institutions always possess a plurality of features which can only be understood as a compromise between partly discrepant principles. This is true even of relatively minor legal institutions like that of a contract. In general this is designed to enable individuals to give effect to their wishes to create structures of legal rights and duties, and so to change, in certain ways, their legal position. Yet at the same time there is need to protect those who, in good faith, understand a verbal offer made to them to mean what it would ordinarily mean, accept it, and then act on the footing that a valid contract has been concluded. As against them, it would be unfair to allow the other party to say that the words he used in his verbal offer or the interpretation put on them did not express his real wishes or intention. Hence principles of ‘estoppel’ or doctrines of the ‘objective sense’ of a contract are introduced to prevent this and to qualify the principle that the law enforces contracts in order to give effect to the joint wishes of the contracting parties.

(d) Distribution

This as in the case of property has two aspects (i) Liability (Who may be punished?) and (ii) Amount. In this section I shall chiefly be concerned with the first of these.¹³

From the foregoing discussions two things emerge. First, though we may be clear as to what value the practice of punishment is to promote, we have still to answer as a question of Distribution ‘Who may be punished?’ Secondly, if in answer to this question we say ‘only an offender for an offence’ this admission of retribution in Distribution is not a principle from which anything follows as to the severity or amount of punishment; in particular it neither licenses nor requires, as Retribution in General Aim does, more severe punishments than deterrence or other utilitarian criteria would require.

The root question to be considered is, however, why we attach the moral importance which we do to retribution in Distribution. Here I shall consider the efforts made to show that restriction of punishment to offenders is a simple consequence of whatever principles (Retributive or Utilitarian) constitute the Justifying Aim of punishment.

The standard example used by philosophers to bring out the importance of retribution in Distribution is that of a wholly innocent person who has not even unintentionally done anything which the law punishes if done intentionally. It is supposed that in order to avert some social catastrophe officials of the system fabricate evidence on which he is charged, tried, convicted and sent to prison or death. Or it is supposed that without resort to any fraud more persons may be deterred from crime if wives and children of offenders were punished vicariously for their crimes. In some forms this kind of thing may be ruled out by a consistent sufficiently comprehensive utilitarianism.¹⁴ Certainly expedients involving fraud or faked charges might be very difficult to justify on utilitarian grounds. We can of course imagine that a negro might be sent to prison or executed on a false charge of rape in order to avoid widespread lynching of many others; but a *system* which openly empowered authorities to do this kind of thing, even if it succeeded in averting specific evils like lynching, would awaken such apprehension and insecurity that any gain from the exercise of these powers would by any utilitarian calculation be offset by the misery caused by their existence. But official resort

¹³ Amount is considered below in Section III (in connexion with Mitigation) and Section V.

¹⁴ See J. Rawls, ‘Two Concepts of Rules’, *Philosophical Review* (1955), pp. 4—13.

to this kind of fraud on a particular occasion in breach of the rules and the subsequent indemnification of the officials responsible might save many lives and so be thought to yield a clear surplus of value. Certainly vicarious punishment of an offender's family might do so and legal systems have occasionally though exceptionally resorted to this. An example of it is the Roman *Lex Quisquis* providing for the punishment of the children of those guilty of *majestas*.¹⁵ In extreme cases many might still think it right to resort to these expedients but we should do so with the sense of sacrificing an important principle. We should be conscious of choosing the lesser of two evils, and this would be inexplicable if the principle sacrificed to utility were itself only a requirement of utility.

Similarly the moral importance of the restriction of punishment to the offender cannot be explained as merely a consequence of the principle that the General Justifying Aim is Retribution for immorality involved in breaking the law. Retribution in the Distribution of punishment has a value quite independent of Retribution as Justifying Aim. This is shown by the fact that we attach importance to the restrictive principle that only offenders may be punished, even where breach of this law might not be thought immoral. Indeed even where the laws themselves are hideously immoral as in Nazi Germany, e.g. forbidding activities (helping the sick or destitute of some racial group) which might be thought morally obligatory, the absence of the principle restricting punishment to the offender would be a further *special* iniquity; whereas admission of this principle would represent some residual respect for justice shown in the administration of morally bad laws.

3. JUSTIFICATION, EXCUSE AND MITIGATION

What is morally at stake in the restrictive principle of Distribution cannot, however, be made clear by these isolated examples of its violation by faked charges or vicarious punishment. To make it clear we must allot to their place the appeals to matters of Justification, Excuse and Mitigation made in answer to the claim that someone should be punished. The first of these depends on the General Justifying Aim; the last two are different aspects of the principles of Distribution of punishment.

(a) *Justification and Excuse*

English lawyers once distinguished between 'excusable' homicide (e.g. accidental non-negligent killing) and 'justifiable homicide' (e.g. killing in self-defence or in the arrest of a felon) and different legal consequences once attached to these two forms of homicide. To the modern lawyer this distinction has no longer any legal importance: he would simply consider both kinds of homicide to be cases where some element, negative or positive, required in the full definition of criminal homicide (murder or manslaughter) was lacking. But the distinction between these two different ways in which actions may fail to constitute a criminal offence is still of great moral importance. Killing in self-defence is an exception to a general rule making killing punishable; it is admitted because the policy or aims which in general justify the punishment of killing (e.g. protection of human life) do not include cases such as this. In the case of 'justification' what is done is regarded as something which the law does not condemn, or even welcomes.¹⁶ But where killing (e.g. accidental) is excused, criminal

¹⁵ Constitution of emperors Arcadius and Honorius (A.D. 397).

¹⁶ In 1811 Mr. Purcell of Co. Cork, a septuagenarian, was knighted for killing four burglars with a carving knife. Kenny, *Outlines of Criminal Law*, 5th edn., p. 103, n. 3.

responsibility is excluded on a different footing. What has been done is something which is deplored, but the psychological state of the agent when he did it exemplified one or more of a variety of conditions which are held to rule out the public condemnation and punishment of individuals. This is a requirement of fairness or of justice to individuals independent of whatever the General Aim of punishment is, and remains a value whether the laws are good, morally indifferent or iniquitous.

The most prominent of these excusing conditions are those forms of lack of knowledge which make action unintentional: lack of muscular control which makes it involuntary, subjection to gross forms of coercion by threats, and types of mental abnormality, which are believed to render the agent incapable of choice or of carrying out what he has chosen to do. Not all these excusing conditions are admitted by all legal systems for all offenders. Nearly all penal systems, as we shall see, make some compromise at this point with other principles; but most of them are admitted to some considerable extent in the case of the most serious crimes. Actions done under these excusing conditions are in the misleading terminology of Anglo-American law done without *mens rea*,¹⁷ and most people would say of them that they were not 'voluntary' or 'not wholly voluntary'.

(b) *Mitigation*

Justification and Excuse though different from each other are alike in that if either is made out then conviction and punishment are excluded. In this they differ from the idea of Mitigation which presupposes that someone is convicted and liable to be punished and the question of the severity of his punishment is to be decided. It is therefore relevant to that aspect of Distribution which we have termed amount. Certainly the severity of punishment is in part determined by the General Justifying Aim. A utilitarian will for example exclude in principle punishments the infliction of which is held to cause more suffering than the offence unchecked, and will hold that if one kind of crime causes greater suffering than another then a greater penalty may be used, if necessary, to repress it. He will also exclude degrees of severity which are useless in the sense that they do no more to secure or maintain a higher level of law-observance or any other valued result than less severe penalties. But in addition to restrictions on the severity of punishment which follow from the aim of punishing, special limitations are imported by the idea of Mitigation. These, like the principle of Distribution restricting liability to punishment to offenders, have a status which is independent of the general Aim. The special features of Mitigation are that a good reason for administering a less severe penalty is made out if the situation or mental state of the convicted criminal is such that he was exposed to an unusual or specially great temptation, or his ability to control his actions is thought to have been impaired or weakened otherwise than by his own action, so that conformity to the law which he has broken was a matter of special difficulty for him as compared with normal persons normally placed.

The special features of the idea of Mitigation are however often concealed by the various legal techniques which make it necessary to distinguish between what may be termed 'informal' and 'formal' Mitigation. In the first case the law fixes a maximum penalty and leaves it to the judge to give such weight as he thinks proper, in selecting the punishment to be applied to a particular offender, to (among other considerations) mitigating factors. It is here that the barrister makes his 'plea in mitigation'. Sometimes however legal rules provide that the presence of a mitigating factor shall always remove the offence into a separate category carrying a lower maximum penalty. This is 'formal' mitigation and the most

¹⁷ Misleading because it suggests moral guilt is a necessary condition of criminal responsibility.

prominent example of it is Provocation which in English law is operative only in relation to homicide. Provocation is not a matter of Justification or Excuse for it does not exclude conviction or punishment; but 'reduces' the charges from murder to manslaughter and the possible maximum penalty from death to life imprisonment. It is worth stressing that not every provision reducing the maximum penalty can be thought of as 'Mitigation': the very peculiar provisions of s. 5 of the Homicide Act 1957 which (*inter alia*) restricted the death penalty to types of murder not including, for example, murder by poisoning, did not in doing this recognize the use of poison as a 'mitigating circumstance'. Only a reduction of penalty made in view of the individual criminal's special difficulties in keeping the law which he has broken is so conceived.

Though the central cases are distinct enough the border lines between Justification, Excuse and Mitigation are not. There are many features of conduct which can be and are thought of in more than one of these ways. Thus, though little is heard of it, duress (coercion by threat of serious harm) is in English law in relation to some crimes an Excuse excluding responsibility. Where it is so treated the conception is that since *B* has committed a crime only because *A* has threatened him with gross violence or other harm, *B*'s action is not the outcome of a 'free' or independent choice; *B* is merely an instrument of *A* who has 'made him do it'. Nonetheless *B* is not an instrument in the same sense that he would have been had he been pushed by *A* against a window and broken it: unless he is literally paralysed by fear of the threat, we may believe that *B* could have refused to comply. If he complies we may say '*coactus voluit*' and treat the situation not as one making it intolerable to punish at all, but as one calling for mitigation of the penalty as gross provocation does. On the other hand if the crime which *A* requires *B* to commit is a petty one compared with the serious harm threatened (e.g. death) by *A* there would be no absurdity in treating *A*'s threat as a justification for *B*'s conduct though few legal systems overtly do this. If this line is taken coercion merges into the idea of 'necessity'¹⁸ which appears on the margin of most systems of criminal law as an exculpating factor.

In view of the character of modern sceptical doubts about criminal punishment it is worth observing that, even in English law, the relevance of mental disease to criminal punishment is not always as a matter of Excuse though exclusive concentration on the M'Naghten rules relating to the criminal responsibility of the mentally diseased encourages the belief that it is. Even before the Homicide Act 1957 a statute¹⁹ provided that if a mother murdered her child under the age of twelve months while 'the balance of her mind was disturbed' by the processes of birth or lactation she should be guilty only of the felony of infanticide carrying a maximum penalty of life imprisonment. This is to treat mental abnormality as a matter of (formal) Mitigation. Similarly in other cases of homicide the M'Naghten rules relating to certain types of insanity as an Excuse no longer stand alone; now such abnormality of mind as 'substantially impaired [the] mental responsibility'²⁰ of the accused is a matter of formal mitigation, which like provocation reduces the homicide to the category of manslaughter.

4. THE RATIONALE OF EXCUSES

The admission of excusing conditions is a feature of the Distribution of punishment and it is required by distinct principles of Justice which restrict the extent to which general social

¹⁸ i.e. when breaking the law is held justified as the lesser of two evils.

¹⁹ Infanticide Act, 1938.

²⁰ Homicide Act, 1957, s. 2.

aims may be pursued at the cost of individuals. The moral importance attached to these in punishment distinguishes it from other measures which pursue similar aims (e.g. the protection of life, wealth or property) by methods which like punishment are also often unpleasant to the individuals to whom they are applied, e.g. the detention of persons of hostile origin or association in war time, or of the insane, or the Compulsory quarantine of persons suffering from infectious disease. To these we resort to avoid damage of a catastrophic character.

Every penal system in the name of some other social value Compromises over the admission of excusing conditions and no system goes as far (particularly in cases of mental disease) as many would wish. But it is important (if we are to avoid a superficial but tempting answer to modern scepticism about the meaning or truth of the statement that a criminal could have kept the law which he has broken) to see that our moral preference for a system which does recognize such excuses cannot, any more than our reluctance to engage in the cruder business of false charges or vicarious punishment, be explained by reference to the General Aim which we take to justify the practice of punishment. Here, too, even where the laws appear to us morally iniquitous or where we are uncertain as to their moral character so that breach of law does not entail moral guilt, punishment of those who break the law unintentionally would be an added wrong and refusal to do this some sign of grace.

Retributionists (in General Aim) have not paid much attention to the rationale of this aspect of punishment; they have usually (wrongly) assumed that it has no status except as a corollary of Retribution in General Aim. But Utilitarians have made strenuous, detailed efforts to show that restriction of the use of punishment to those who have voluntarily broken the law is explicable on purely utilitarian lines. Bentham's efforts are the most complete and their failure is an instructive warning to contemporaries.

Bentham's argument was a reply to Blackstone who, in expounding the main excusing conditions recognized in the criminal law of his day,²¹ claimed that 'all the several pleas and excuses which protect the committer of a forbidden act from punishment which is otherwise annexed thereto may be reduced to this single consideration: the want or defect of *will*' ... [and to the principle] 'that to constitute a crime ... there must be first, a vitious will' In his Introduction to the Principles of Morals and Legislation²² under the heading 'Cases unmeet for punishment' Bentham sets out a list of the main excusing conditions similar to Blackstone's; he then undertakes to show that the infliction of punishment on those who have done, while in any of these conditions, what the law forbids 'must be inefficacious: it cannot act so as to prevent the mischief'. All the common talk about want or defect of will or lack of a 'vitious' will is, he says, 'nothing to the purpose', except so far as it implies the reason (inefficacy of punishment) which he himself gives for recognising these excuses.

Bentham's argument is in fact a spectacular *non sequitur*. He sets out to prove that to *punish* the mad, the infant child or those who break the law unintentionally or under duress or even under 'necessity' must be inefficacious; but all that he proves (at the most) is the quite different proposition that the *threat* of punishment will be ineffective so far as the class of persons who suffer from these conditions is concerned. Plainly it is possible that though (as Bentham says) the *threat* of punishment could not have operated on them, the actual *infliction* of punishment on those persons, may secure a higher measure of conformity to law on the part of normal persons than is secured by the admission of excusing conditions. If this is so and if Utilitarian principles only were at stake, we should, without any sense that we were sacrificing any principle of value or were choosing the lesser of two evils, drop from the law the restriction on punishment entailed by the admission of excuses: unless, of course, we

²¹ *Commentaries*, Book IV, Chap. II.

²² Chap. XIII esp. para. 9, n. I.

believed that the terror or insecurity or misery produced by the operation of laws so Draconic was worse than the lower measure of obedience to law secured by the law which admits excuses.

This objection to Bentham's rationale of excuses is not merely a fanciful one. Any increase in the number of conditions required to establish criminal liability increases the opportunity for deceiving courts or juries by the pretence that some condition is not satisfied. When the condition is a psychological factor the chances of such pretence succeeding are considerable. Quite apart from the provision made for mental disease, the cases where an accused person pleads that he killed in his sleep or accidentally or in some temporary abnormal state of unconsciousness show that deception is certainly feasible. From the Utilitarian point of view this may lead to two sorts of "losses". The belief that such deception is feasible may embolden persons who would not otherwise risk punishment to take their chance of deceiving a jury in this way. Secondly, a criminal who actually succeeds in this deception will be left at large, though belonging to the class which the law is concerned to incapacitate. Developments in Anglo-American law since Bentham's day have given more concrete form to this objection to his argument. There are now offences (known as offences of 'strict liability') where it is not necessary for conviction to show that the accused either intentionally did what the law forbids or could have avoided doing it by use of care: selling liquor to an intoxicated person, possessing an altered passport, selling adulterated milk²³ are examples out of a range of 'strict liability' offences where it is no defence that the accused did not offend intentionally, or through negligence, e.g., that he was under some mistake against which he had no opportunity to guard. Two things should be noted about them. First, the common justification of this form of criminal liability is that if proof of intention or lack of care were required guilty persons would escape. Secondly, 'strict liability' is generally viewed with great odium and admitted as an exception to the general rule, with the sense that an important principle has been sacrificed to secure a higher measure of conformity and conviction of offenders. Thus Bentham's argument curiously ignores both the two possibilities which have been realized. First, actual punishment of these who act unintentionally or in some other normally excusing manner may have a utilitarian value in its effects on others; and secondly, when because of this probability, strict liability is admitted and the normal excuses are excluded, this may be done with the sense that some other principle has been overridden.

On this issue modern extended forms of Utilitarianism fare no better than Bentham's whose main criterion here of 'effective' punishment was deterrence of the offender or of others by example. Sometimes the principle that punishment should be restricted to those who have voluntarily broken the law is defended not as a principle which is rational or morally important in itself but as something so engrained in popular conceptions of justice²⁴ in certain societies, including our own, that not to recognize it would lead to disturbances, or to the nullification of the criminal law since officials or juries might refuse to co-operate in such a system. Hence to punish in these circumstances would either be impracticable or would create more harm than could possibly be offset by any superior deterrent force gained by such a system. On this footing, a system should admit excuses much as, in order to prevent disorder or lynching, concessions might be made to popular demands for more savage punishment than could be defended on other grounds. Two objections confront this wider pragmatic form of Utilitarianism. The first is the factual observation that even if a system of strict liability for all or very serious crime would be unworkable, a system which admits it on its periphery for relatively minor offences is not only workable but an actuality

²³ See Glanville Williams, *Criminal Law*, 2nd edn., Chap. VI, for a discussion of the protest against 'strict responsibility'.

²⁴ Michael and Wechsler, 'A Rationale of the Law of Homicide' (1937), 37 *C.L.R.*, 701, esp. pp. 752—7, and Rawls, *op. cit.*

which we have, though many object to it or admit it with reluctance. The second objection is simply that we do not dissociate ourselves from the principle that it is wrong to punish the hopelessly insane or those who act unintentionally, etc., by treating it as something merely embodied in popular *mores* to which concessions must be made sometimes. We condemn legal systems where they disregard this principle; whereas we try to educate people out of their preference for savage penalties even if we might in extreme cases of threatened disorder concede them.

It is therefore impossible to exhibit the principle by which punishment is excluded for those who act under the excusing conditions merely as a corollary of the general Aim—Retributive or Utilitarian—justifying the practice of punishment. Can anything positive be said about this principle except that it is one to which we attach moral importance as a restriction on the pursuit of any aim we have in punishing?

It is clear that like all principles of Justice it is concerned with the adjustment of claims between a multiplicity of persons. It incorporates the idea that each individual person is to be protected against the claim of the rest for the highest possible measure of security, happiness or welfare which could be got at his expense by condemning him for a breach of the rules and punishing him. For this a moral licence is required in the form of proof that the person punished broke the law by an action which was the outcome of his free choice, and the recognition of excuses is the most we can do to ensure that the terms of the licence are observed. Here perhaps, the elucidation of this restrictive principle should stop. Perhaps we (or I) ought simply to say that it is a requirement of Justice, and Justice simply consists of principles to be observed in adjusting the competing claims of human beings which (i) treat all alike as persons by attaching special significance to human voluntary action and (ii) forbid the use of one human being for the benefit of others except in return for his voluntary actions against them. I confess however to an itch to go further; though what I have to say may not add to these principles of Justice. There are, however, three points which even if they are restatements from different points of view of the principles already stated, may help us to identify what we now think of as values in the practice of punishment and what we may have to reconsider in the light of modern scepticism.

(a) We may look upon the principle that punishment must be reserved for voluntary offences from two different points of view. The first is that of the rest of society considered as *harmed* by the offence (either because one of its members has been injured or because the authority of the law essential to its existence has been challenged or both). The principle then appears as one securing that the suffering involved in punishment falls upon those who have voluntarily harmed others: this is valued, not as the Aim of punishment, but as the only fair terms on which the General Aim (protection of society, maintenance of respect for law, etc.) may be pursued.

(b) The second point of view is that of society concerned not as harmed by the crime but as *offering* individuals including the criminal the protection of the laws on terms which are fair, because they not only consist of a framework of reciprocal rights and duties, but because within this framework each individual is given a *fair* opportunity to choose between keeping the law required for society's protection or paying the penalty. From the first point of view the actual punishment of a criminal appears not merely as something useful to society (General Aim) but as justly extracted from the criminal who has voluntarily done harm; from the second it appears as a price justly extracted because the criminal had a fair opportunity beforehand to avoid liability to pay.

(c) Criminal punishment as an attempt to secure desired behaviour differs from the manipulative techniques of the Brave New World (conditioning, propaganda, etc.) or the simple incapacitation of those with anti-social tendencies, by taking a risk. It defers action till harm has been done; its primary operation consists simply in announcing certain standards of

behaviour and attaching penalties for deviation, making it less eligible, and then leaving individuals to choose. This is a method of social control which maximizes individual freedom within the coercive framework of law in a number of different ways, or perhaps, different senses. First, the individual has an option between obeying or paying. The worse the laws are, the more valuable the possibility of exercising this choice becomes in enabling an individual to decide how he shall live. Secondly, this system not only enables individuals to exercise this choice but increases the power of individuals to identify beforehand periods when the law's punishments will not interfere with them and to plan their lives accordingly. This very obvious point is often overshadowed by the other merits of restricting punishment to offences voluntarily committed, but is worth separate attention. Where punishment is not so restricted individuals will be liable to have their plans frustrated by punishments for what they do unintentionally, in ignorance, by accident or mistake. Such a system of strict liability for all offences, if logically possible,²⁵ would not only vastly increase the number of punishments, but would diminish the individual's power to identify beforehand particular periods during which he will be free from them. This is so because we can have very little ground for confidence that during a particular period we will not do something unintentionally, accidentally, etc.; whereas from their own knowledge of themselves many can say with justified confidence that for some period ahead they are not likely to engage intentionally in crime and can plan their lives from point to point in confidence that they will be left free during that period. Of course the confidence thus justified, though drawn from knowledge of ourselves, does not amount to certainty. My confidence that I will not during the next twelve months intentionally engage in any crime and will be free from punishment, may turn out to be misplaced; but it is both greater and better justified than my belief that I will not do unintentionally any of the things which our system punishes if done intentionally.

5. REFORM AND THE INDIVIDUALIZATION OF PUNISHMENT

The idea of Mitigation incorporates the conviction that though the amount or severity of punishment is primarily to be determined by reference to the General Aim, yet Justice requires that those who have special difficulties to face in keeping the law which they have broken should be punished less. Principles of Justice however are also widely taken to bear on the amount of punishment in at least two further ways. The first is the somewhat hazy requirement that 'like cases be treated alike'. This is certainly felt to be infringed at least when the ground for different punishment for those guilty of the same crime is neither some personal characteristic of the offender connected with the commission of the crime nor the effect of punishment on him. If a certain offence is specially prevalent at a given time and a judge passes heavier sentences than on previous offenders ('as a warning') some sacrifice of justice to the safety of society is involved though it is often acceptable to many as the lesser of two evils.

The further principle that different kinds of offence of different gravity (however that is assessed) should not be punished with equal severity is one which like other principles of Distribution may qualify the pursuit of our General Aim and is not deducible from it. Long sentences of imprisonment might effectually stamp out car parking offences, yet we think it

²⁵ Some crimes, e.g. demanding money by menaces, cannot (logically) be committed unintentionally.

wrong to employ them; *not* because there is for each crime a penalty ‘naturally’ fitted to its degree of iniquity (as some Retributionists in General Aim might think); not because we are convinced that the misery caused by such sentences (which might indeed be slight because they would rarely need to be applied) would be greater than that caused by the offences unchecked (as a Utilitarian might argue). The guiding principle is that of a proportion within a system of penalties between those imposed for different offences where these have a distinct place in a commonsense scale of gravity. This scale itself no doubt consists of very broad judgements both of relative moral iniquity and harmfulness of different types of offence: it draws rough distinctions like that between parking offences and homicide, or between ‘mercy killing’ and murder for gain, but cannot cope with any precise assessment of an individual’s wickedness in committing a crime (Who can?) Yet maintenance of proportion of this kind may be important: for where the legal gradation of crimes expressed in the relative severity of penalties diverges sharply from this rough scale, there is a risk of either confusing common morality or flouting it and bringing the law into contempt.

The ideals of Reform and Individualization of punishment (e.g. corrective training, preventive detention) which have been increasingly accepted in English penal practice since 1900 plainly run counter to the second if not to both of these principles of Justice or proportion. Some fear, and others hope, that the further intrusion of these ideals will end with the substitution of ‘treatment’ by experts for judicial punishment. It is, however, important to see precisely what the relation of Reform to punishment is because its advocates too often misstate it. ‘Reform’ as an objective is no doubt very vague; it now embraces any strengthening of the offender’s disposition and capacity to keep within the law, which is intentionally brought about by human effort otherwise than through fear of punishment. Reforming methods include the inducement of states of repentance, or recognition of moral guilt, or greater awareness of the character and demands of society, the provision of education in a broad sense, vocational training and psychological treatment. Many seeing the futility and indeed harmful character of much traditional punishment speak as if Reform could and should be the General Aim of the whole practice of punishment or the dominant objective of the criminal law:

‘The *corrective theory* based upon a conception of multiple causation and curative-rehabilitative treatment, should clearly predominate in legislation and in judicial and administrative practices.’²⁶

Of course this is a possible ideal but is not an ideal for punishment. Reform can only have a place within a system of punishment as an exploitation of the opportunities presented by the conviction or compulsory detention of offenders. It is not an alternative General Justifying Aim of the practice of punishment but something the pursuit of which within a system of punishment qualifies or displaces altogether recourse to principles of justice or proportion in determining the amount of punishment. This is where both Reform and individualized punishment have run counter to the customary morality of punishment.

There is indeed a paradox in asserting that Reform should ‘predominate’ in a system of Criminal Law, as if the main purpose of providing punishment for murder was to reform the murderer not to prevent murder; and the paradox is greater where the legal offence is not a serious moral one: e.g. infringing a state monopoly of transport. The objection to assigning to Reform this place in punishment is not merely that punishment entails suffering and Reform does not; but that Reform is essentially a remedial step for which *ex hypothesi* there is an opportunity only at the point where the criminal law has failed in its primary task of securing

²⁶ Hall and Glueck, *Cases on Criminal Law and its Enforcement* (1951) p. 14.

society from the evil which breach of the law involves. Society is divisible at any moment into two classes (i) those who have actually broken a given law and (ii) those who have not yet broken it but may. To take Reform as the dominant objective would be to forgo the hope of influencing the second and—in relation to the more serious offences—numerically much greater class. We should thus subordinate the prevention of first offences to the prevention of recidivism.

Consideration of what conditions or beliefs would make this appear a reasonable policy brings us to the topic to which this paper is a mere prolegomenon: modern sceptical doubt about the whole institution of punishment. If we believed that nothing was achieved by announcing penalties or by the example of their infliction, either because those who do not commit crimes would not commit them in any event or because the penalties announced or inflicted on others are not among the factors which influence them in keeping the law, then some dramatic change concentrating wholly on actual offenders, would be necessary. Just because at present we do not entirely believe this, we have a dilemma and an uneasy compromise. Penalties which we believe are required as a threat to maintain conformity to law at its maximum may convert the offender to whom they are applied into a hardened enemy of society; while the use of measures of Reform may lower the efficacy and example of punishment on others. At present we compromise on this relatively new aspect of punishment as we do over its main elements. What makes this compromise seem tolerable is the belief that the influence which the threat and example of punishment extracts is often independent of the severity of the punishment, and is due more to the disgrace attached to conviction for crime or to the deprivation of freedom which many reforming measures at present used in any case involve.