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## An Institution in Search of a Moral Grounding

As one reads history . . . one is absolutely sickened not by the crimes the wicked have committed, but by the punishments the good have inflicted.

—Oscar Wilde, “The Soul of Man under Socialism,” 1891

### *I. Introduction*

Punishment, at its core, is the deliberate infliction of harm in response to wrongdoing. As an institution, it is so deeply rooted in history that it is difficult even to imagine a society without it. We have grown up with it, and it seems natural and inevitable to us. At the same time, there is no denying that it is a human creation; we must accept responsibility, collectively and individually, for the harm that we do in punishing: the deprivation of life, liberty, or property, or the infliction of physical pain. We ought not to impose such harm on anyone unless we have a very good reason for doing so. This remark may seem trivially true, but the history of humankind is littered with examples of the deliberate infliction of harm by well-intentioned persons in the vain pursuit of ends which that harm did not further, or in the successful pursuit of questionable ends. These benefactors of humanity sacrificed their fellows to appease mythical gods and tortured them to save their souls from a mythical hell, broke and bound the feet of children to promote their eventual marriageability, beat slow schoolchildren to promote learning and respect for teachers, subjected the sick to leeches to rid them of excess blood, and put suspects to the rack and the thumbscrew in the service of truth. They schooled themselves to feel no pity—to renounce human compassion in the service of a higher end. The deliberate doing of harm in the mistaken belief that

it promotes some greater good is the essence of tragedy. We would do well to ask whether the goods we seek in harming offenders are worthwhile, and whether the means we choose will indeed secure them.

In the pages that follow, I shall be arguing for the abolition of punishment, insofar as it involves depriving people of things to which they have a right (typically, life, liberty, or property), either simply in order to deprive them of those things (as retribution), or in order to secure some further end (such as deterrence or incapacitation) to which the deprivation of these rights is essential. I shall distinguish punishment from other practices, such as blaming or formal condemnation (and collateral consequences such as difficulty in obtaining employment), which do not deprive the offender of anything to which he has a right; and from harm-shifting interventions that prevent (through direct intervention) or reverse (through compensation) harm to victims at the offender's expense. I begin with a brief description of the actual harms that are done by punishment.

## *II. Harms Done by Punishment*

Today, the most common punishments in the Western world are deprivation of liberty or property; only the United States still imposes the death penalty. The debate over the death penalty has made imprisonment look benign, but the harm done by incarceration is not trivial. Imprisonment means, at minimum, the loss of liberty and autonomy, as well as many material comforts, personal security, and access to heterosexual relations. These deprivations, according to Gresham Sykes (who first identified them) “together dealt ‘a profound hurt’ that went to ‘the very foundations of the prisoner’s being.’”<sup>1</sup> But these are only the minimum harms, suffered by the least vulnerable inmates in the best-run prisons. Most prisons are run badly, and in some, conditions are more squalid than in the worst of slums. In the District of Columbia jail, for example, inmates must wash their clothes and sheets in cell toilets because the laundry machines are broken. Vermin and insects infest the building, in which air vents are clogged with decades’ accumulation of dust and grime.<sup>2</sup> But even inmates in prisons where conditions are sanitary must still face the numbing boredom and emptiness of prison life—a vast desert of wasted days in which little in the way of meaningful activity is possible.

For the more vulnerable, and for those confined in worse prisons, imprisonment often means exposure to predators and an extreme loss of

personal security. The rate of victimization—assault, robbery, extortion—of prisoners is much higher than that of the general population. Some studies have reported that more than 10 percent of the prison population has suffered forcible rape, with a much larger number having succumbed to pressure to engage in sex.<sup>3</sup> Even more disturbingly, as the prevalence of this form of violence has made its way into the popular imagination, it has become common to hear it referred to as part of the punishment or as a deterrent factor. Although most jokes about rape are excluded from the public forum as in grossly bad taste, a soft drink company recently saw fit to make light of prison rape in a television commercial.<sup>4</sup>

In recent years, sentencing has become harsher, and more and more individuals have been imprisoned. Worldwide, some 8.5 million persons are incarcerated. After staying relatively constant since World War II, the number of persons imprisoned in the United States increased fourfold between 1980 and 2000. Most of this increase resulted from a crack-down on drug offenders. Today, the United States is second only to Russia in per capita incarceration rate (690 per 100,000 as compared to Russia's 730), while two-thirds of countries have rates below 150 per 100,000.<sup>5</sup>

Increased harshness has resulted in a new coterie of prisoners who began as juvenile offenders and have spent most of their lives in prison. It is no exaggeration to say that punishment has destroyed the souls of these offenders. Jack Abbott, physically beaten and sexually abused in a series of foster homes as a child, was first committed to a juvenile institution at the age of nine. After his release at eighteen he soon found himself back in prison for writing bad checks. He killed another inmate for informing on him and got more time. Later, he managed to escape, robbed a bank, and was sent back with another nineteen years to serve. At the age of forty-five, he described himself as follows:

When I walk past a glass window in the corridor and happen to see my reflection, I get angry on impulse. I feel shame and hatred at such times. When I'm forced by circumstances to be in a crowd of prisoners, it's all I can do to refrain from attack. I feel such hostility, such hatred, I can't help this anger. All these years I have felt it. Paranoid. I can control it. I never seek a confrontation. I have to intentionally gauge my voice in a conversation to cover up the anger I feel, the chaos and pain just beneath the surface of what we commonly recognize as reality.<sup>6</sup>

Of his relations with fellow prisoners, he wrote:

You don't comfort one another; you humor one another. You extend that confusion about this reality of one another by lying to one another. You can't stand the sight of each other and yet you are doomed to stand and face one another every moment of every day for years without end. You must bathe together, defecate and urinate together, eat and sleep together, talk together, work together.<sup>7</sup>

After his release, Abbott killed a waiter in a restaurant for insulting him and was sent back to prison, where he committed suicide in 2002.<sup>8</sup> He was an irredeemably violent and destructive man, filled with hate and fear—much of which must be attributed to his almost lifelong imprisonment. Today, there are more such prisoners than ever.<sup>9</sup>

Those we punish have by and large failed to meet the challenges that life has presented them. It is not surprising that they include a large proportion of those who have faced more significant obstacles to success. The probability that a black man born in the United States will be imprisoned at some time in his life is more than five times that for a white man. Prisoners are overwhelmingly drawn from the lower rungs of the socioeconomic ladder. Throughout the world, it is those in marginalized groups who find themselves imprisoned. Also overrepresented in the prison population are persons with little education, mental illness or retardation, and a history of abuse as a child. In punishing, then, we tend to harm those who already bear great burdens.

### *III. Justifying the Harm of Punishment*

These harms, one might think, though regrettable, are not inflicted for no reason; they are necessary, just, right, and proper. At least, this must be true of the minimum harms, if not of the uglier real ones. Philosophers have made many sophisticated arguments to show that this is so. For the most part, these arguments fall under one of three broad positions: that the harm of punishment is outweighed by some greater good; that harming offenders is good in itself; and that punishment is not properly considered a harm to the offender.

Three basic purposes correspond to these three basic forms of justification. To the idea that harming the offender is good corresponds the pur-

pose of giving offenders what they deserve. To the idea that punishment does more good than harm corresponds the purpose of preventing crime. And to the idea that punishment benefits the offender corresponds the purpose of making the offender a better person. Optimists see a happy confluence of these purposes in an institution that simultaneously serves all three. But the appropriateness of punishment to each of these ends has been called into serious question at some period during the history of the institution. If punishment had been thought to serve only one of these ends—no matter which—doubts about its appropriateness would probably have been sufficient to topple the institution. The survival of punishment as a legitimate institution has been facilitated because the continuous defense of any one purpose has not been necessary; when doubts became too strong, it has always been possible to turn attention to one of the other purposes instead. In this chapter I present a brief account of the intellectual history of punishment and suggest that we would do well to give more attention to our uneasiness with each of these purposes—to ask forthrightly whether any of them, seen in light of its weaknesses, is sufficient to support an institution that does so much harm.

The idea that harming offenders is good in itself may be the oldest idea associated with punishment. If this had been thought to be the only underpinning of the institution, it might have been eliminated by Christians, who thought that vengeance was best left to God, or in the early twentieth century, when the consensus among philosophers was that retribution was barbaric and pointless. If instead punishment had been consistently seen simply as a regrettable necessity to promote the good of society, it would have had difficulty withstanding the late twentieth century recognition both of the practical elusiveness of deterrent and rehabilitative goals and of the questionable morality of using individuals to promote social ends. And if we had consistently thought of punishment as something we do to benefit offenders, the stark reality that it typically does the opposite would eventually have forced itself on our attention. Instead, as successive generations have inherited the institution of punishment and found the old rationale wanting, they have found new reasons—or revived older ones—for continuing it.

How did punishment begin? Although it is more prominent in some early civilizations than in others, the idea of justice as served by punishment appears to be as old as civilization itself. Correspondingly, though, the development of civilization is also correlated both with questioning of how and whether justice is so served and with a sense that there must be

limits on the scope of punishment. The history of punishment is in some respects like the history of war; it seems to accompany the human condition almost universally, to enjoy periods of glorification, to be commonly regarded as justified in many instances, and yet to run counter to our ultimate vision of what human society should be.

Indeed, it appears likely that punishment in its earliest forms was not distinguishable from warfare. Both, perhaps, arose from the instinct to strike out at those seen as injuring one's interests, either from simple anger or from a desire for self-protection. Blood feuds, in which the family of the aggrieved person inflicts an equivalent or greater injury on the offender and his family, are found in a number of early societies; it is hard to know whether these are better described as punishment or as warfare. Later societies found cause to reflect on the justification and limits of harm to enemies, on both the individual and the social scale.

In the *Iliad* (c. 800 B.C.), justice is presented as pure vengeance, as when Agamemnon urges Menelaus not to take pity on his Trojan captives:

This is no time for giving quarter. Has, then, your house fared so well at the hands of the Trojans? Let us not spare a single one of them—not even the child unborn and in its mother's womb; let not a man of them be left alive, but let all in Ilius perish, unheeded and forgotten.

Thus did he speak, and his brother was persuaded by him, for his words were just.<sup>10</sup>

Justice is not limited by personal responsibility or proportionality to the original offense; it is enough that the person on whom vengeance is taken is on the side of the enemy. Agamemnon explicitly rejects any bounds to his vengeance; the wrong done by the Trojans, in his eyes, justifies their annihilation.<sup>11</sup>

In contrast, in Aeschylus's fifth-century retelling of Agamemnon's story in *The Oresteia*, the Furies, representing the ancient demand for vengeance, seek the death of Orestes for the murder of his mother. Orestes, following the demands of honor as urged by Apollo, had killed his mother to avenge her murdering his father, Agamemnon. The Furies are eventually soothed and persuaded to let him live. The taming of the Furies—following a process in which Orestes is judged by the citizens of Athens—can be seen as representing the sublimation of vengeful emotions into the service of the social ends of justice. Rather than glorifying vengeance, Aeschylus presents it as tragic when carried to extremes. The

Furies are brought under control, promised respect, but forced to recognize mitigating factors and to bow to the judgment of the citizens.

In *The Oresteia*, the value of deterrence is also made explicit, as the Furies appeal to the necessity to punish wrongdoers so that the innocent can live without fear:

So when a terrible disaster strikes  
let no one make the old appeal,  
“Justice, you Furies—hear me,  
you powers on your thrones!”  
It may well happen soon—  
a father in despair, a mother  
in some new catastrophe,  
may scream out for pity,  
now the house of justice falls.

Sometimes what’s terrible can work  
to bring about what’s good.  
Such terror needs to sit on guard,  
to check the passionate heart.  
There is a benefit for men  
to learn control through suffering.  
For where is there a man or city—  
both alike in this regard—  
who still respects what’s just  
without a heart attuned to fear?<sup>12</sup>

Up to this point, we have seen the infliction of harm in response to wrongdoing as an expression of vengeance, followed by the idea that there should be limits to vengeance, and a hint of deterrent purposes. Harming wrongdoers is justified (to the extent that it is seen as requiring justification) by ideas roughly corresponding to desert and deterrence. But the first sophisticated philosophical defense of punishment rejects the idea that punishment harms the wrongdoer. Plato takes the novel position that the just man should harm no one, thus immediately raising the issue of how punishment is to be justified. His solution to this problem is that punishment is not a harm, but a good, for the person who suffers it.<sup>13</sup> Plato’s argument for this surprising proposition is simple: the good of the soul is more important than the good of the body; the commission of

crimes indicates disorder in the soul; and the infliction of just punishment imparts justice to the soul. Comparing punishment to medical treatment, Plato argues that the most wretched of men is he who does wrong and is not punished.<sup>14</sup> Thus, punishment is imposed primarily for the sake of the wrongdoer.<sup>15</sup> The “incurable” wrongdoer, however, should be executed as an example to others.<sup>16</sup>

Thus, by 400 B.C., the basic ideas of punishment as vengeance, as deterrence, and as a benefit to the offender are already in place. Precursors of these ideas can be found even earlier. The idea of a disrupted cosmic order is reflected in the Egyptian concept of *ma’at* and in the Hebrew concept of blood guilt; in both cases, order is to be restored through punishment. These two cultures also share the idea of a vengeful God, although that idea is much more prominent for the Hebrews. Explicit references to punishment as deterring and as instructive for the offender are found in the literature of ancient Egypt. Although there is little in the way of formal justification for punishment practices in antiquity, recognition of the value of limiting punishment is already present.

Neither the Egyptians nor the Hebrews saw themselves as merely containing vengeance, however. Harming offenders was part and parcel of an ongoing effort to maintain a cosmic balance and prevent the coming of chaos. The Egyptians’ worldview was shaped by their dependence on the annual flooding of the Nile.<sup>17</sup> As the river flooded, washing the rich alluvial soil over the riverbanks, one could be confident that the crops would grow and life would continue for another year. Those who lived on its banks asked no more than that life should continue as before, continually returning to the point of renewal. They feared only that some untoward event would disrupt the orderly sequence of life and plunge Egypt into the primeval chaos that, according to legend, had existed before the coming of order. One part of the preservation of this order was to live one’s life according to the principles of *ma’at*, or justice.<sup>18</sup> Illustrations in the Egyptian Coffin Texts, dating back to the end of the Old Kingdom (2800–2200 B.C.)<sup>19</sup> show the heart of the deceased being weighed against a feather representing *Ma’at*, the goddess of justice. Transgressions against *ma’at*—ranging from being overly talkative to murder and blasphemy—would make the heart heavy. The monster Ammut waits nearby to consume the heart found wanting; but if the heart passes the test, the dead person is admitted to a pleasant afterlife. Death—the loss of the afterlife—is the consequence of failing to live a good life. In that the Egyptians of that period saw punishment as the natural and expected response to

wrongdoing, it may be that they saw punishment as restoring the cosmic order that it disrupted.

A similar concept is evident in the ancient Hebrew belief that the “blood guilt” resulting from homicide could be expiated only by the shedding of the blood of the offender: “For blood pollutes the land, and no expiation can be made for the land, for the blood that is shed in it, except by the blood of him who shed it.”<sup>20</sup> The Hebrews feared that wrongfully spilled blood would collect in the altar of God, creating a point of entry for demons. Animal sacrifices could wash out the guilt of lesser offenses, but only human blood could wash out that of murder. Like the Egyptians, the Hebrews believed that the sacrifice of the offender would restore the lost order and protect them from chaos.

For both systems of thought, the vengeful impulse is closely tied to justice. The Old Testament presents God as vengeful and his vengeance as justified. Sinners, such as those of Sodom and Gomorrah, are justly destroyed; Lot’s wife is turned into a pillar of salt merely for looking back in contravention of God’s instructions; most of the human race is wiped out in the Great Flood. *The Teaching for Merikare* (a pharaoh of the First Intermediate Kingdom) admonishes:

Do justice, that you may live long on earth. Calm the weeper, do not oppress the widow, do not oust a man from his father’s property, do not degrade magnates from their seats. Beware of punishing wrongfully; do not kill, for it will not profit you, but punish with beatings and with imprisonment, for thus this land will be set in order, excepting only the rebel who has conspired, for God knows those who are disaffected, and God will smite down his evil doing with blood.<sup>21</sup>

Evil for evil is clearly a well-established idea in the earliest civilizations. Note, however, that neither the Egyptian nor the Hebrew tradition prescribes the kind of limitless vengeance urged in the *Iliad*. The famous passage from Leviticus, “breach for breach, eye for eye, tooth for tooth; as he has caused a blemish in a man, so shall it be rendered unto him,”<sup>22</sup> often quoted as an example of barbaric harshness, may actually represent an attempt to limit the consequences of wrongdoing.<sup>23</sup> The earlier blood feud knew no limits; clans simply retaliated against each other, inflicting what injury they could.<sup>24</sup> The same desire for limits may have motivated the best-known provisions of the Code of Hammurabi (c. 1800 B.C.), in which matching retaliatory harm is exacted.<sup>25</sup>

The first glimmerings of concern for the harm inflicted on offenders by punishment and its analogues can thus be found in antiquity. While there is little indication in any of these contexts that punishment itself was regarded as problematic, there is the idea that there must be a limit to what can be done in response to wrongdoing, and that the limit is in some way related to the nature of the wrong. The wrongdoer is not merely an enemy, to be harmed in any way possible, but a person whose own interests must be considered.

At this early point in the history of punishment theory, we have seen punishment presented as benefiting the cosmic order, the victim (or the victim's family), society, and the wrongdoer. While the subsequent history offers many refinements and variations of these views (and formidable objections to each), these early portrayals contain the seeds of everything that is to follow.

The question of how it can be right to harm another has particular significance for Christians, who believe, with Plato, that the good man inflicts no suffering, even on his enemies, and who set great store in the idea of forgiveness. The New Testament preaches the reserving of retribution to God: "Beloved, never avenge yourselves, but leave it to the wrath of God; for it is written, 'Vengeance is mine, I will repay, saith the Lord';"<sup>26</sup> "Judge not, lest ye be judged."<sup>27</sup> Moreover, this passage from Matthew explicitly rejects the "like for like" version of punishment of Leviticus:

38: Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth:

39: But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also.

40: And if any man will sue thee at the law, and take away thy coat, let him have thy cloak also.

41: And whosoever shall compel thee to go a mile, go with him twain.

42: Give to him that asketh thee, and from him that would borrow of thee turn not thou away.

43: Ye have heard that it hath been said, Thou shalt love thy neighbour, and hate thine enemy.

44: But I say unto you, Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you;

45: That ye may be the children of your Father which is in heaven: for he maketh his sun to rise on the evil and on the good, and sendeth rain on the just and on the unjust.<sup>28</sup>

The infliction of retributive punishment by human beings is rejected here; if the institution had been founded on retribution as its sole basis, the rise of Christianity might have seen its end. But Christians had other purposes in mind for secular punishment. Augustine squarely rejects revenge and retribution, but argues that secular punishment is necessary both to provide an example to others, and to induce repentance so that the offender may be spared divine punishment.<sup>29</sup> Aquinas argues that secular punishment is necessary for two reasons: to restrain the wicked from evil by force and fear, and to compel the evilly disposed to learn virtue.<sup>30</sup> Vengeance and retribution may be left to God, but secular punishment is justified for the good of society and for the good of the offender.

The good of the offender as a reason to punish turned out to be a particularly pernicious factor when combined with the Christian emphasis on the importance of salvation. The excesses of the Inquisition are familiar to everyone. But they are rooted in a much earlier belief that, in compelling the conversion of heretics, the Church did them a service. Augustine, having overcome his earlier compunctions on the subject, writes:

When . . . wholesome instruction is added to means of inspiring salutary fear, so that not only the light of truth may dispel the darkness of error, but the force of fear may at the same time break the bonds of evil custom, we are made glad, as I have said, by the salvation of many, who with us bless God, and render thanks to Him.<sup>31</sup>

The Middle Ages were dominated by such thinking. Every evil in the world, from crop failure to the Black Death, was attributed to the sinful nature of man, who could never be chaste enough or humble enough to satisfy God. Under the strain of these beliefs, many people imposed extreme suffering on themselves in an attempt to appease God, from the hair shirts of penitents to the iron-tipped whips of the flagellants. Imposing punishment on those most exposed to moral condemnation was all too naturally seen as an appropriate measure to induce the repentance that would save their everlasting souls. It was not an age that encouraged doubts about the roots of crime in moral wickedness or the efficacy of violence as a route to moral improvement.<sup>32</sup> The emphasis in penal practice

was on the infliction of pain and humiliation in public, through measures such as the pillory, branding, flogging, and drawing and quartering—death being an insufficient punishment for some crimes.<sup>33</sup>

Enlightenment thinkers, in keeping with Christianity, repudiated retribution, but also saw more clearly the broader question of the justifiability of punishment for other purposes. Hobbes asks directly “by what door the right or authority of punishing . . . came in?”<sup>34</sup> His answer is that in the state of nature everyone has the right to kill or hurt others for his own preservation (or indeed to obtain anything he wants, as “every man has the right to everything”); with the forming of the social contract, the citizens lay down their own right to punish, leaving the sovereign alone with that right. Interestingly, Hobbes seeks to limit the sovereign’s right to punish to acts that are against previously announced laws and to punishment proportional to the crime, although no such limits are present in the state of nature.<sup>35</sup> The aim of punishment, he says, “is not revenge, but terror”; consequently, punishment requires both the intention and the possibility “of disposing the delinquent (or, by his example, other men) to obey the laws.”<sup>36</sup>

Locke, too, grounds the right to punish in the social contract, beginning from the right of all to punish in the state of nature, which is entrusted to the sovereign upon the making of the social contract. Punishment, he says, must be limited to the purposes of “reparation and restraint.”<sup>37</sup> Further, “Each transgression may be punished to that degree and with so much severity as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like.”<sup>38</sup>

Beccaria (1764) similarly blended individual rights and utilitarian reasoning to conclude that punishments must be limited to those that served useful social ends:

The purpose of punishment . . . is nothing other than to dissuade the criminal from doing fresh harm to his compatriots and to keep other people from doing the same. Therefore, punishments and the method of inflicting them should be chosen that, mindful of the proportion between crime and punishment, will make the most effective and lasting impression on men’s minds and inflict the least torment on the body of the criminal.<sup>39</sup>

All of these writers recognized that the social good could not be promoted by random or excessive punishment. Thus, the ideal punishment

was the one that produced the most social benefit at the least cost to the offender. This articulation of the reasoning supporting limits on punishment invalidated in principle any punishment that did not provide a favorable balance of benefit over cost. Each squarely rejected the idea that harming the offender is good in itself.

This line of reasoning is made more explicit by Jeremy Bentham (1789), who begins his discussion of punishment with the observation that “all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.”<sup>40</sup> He goes on to list specific instances in which punishment fails to be justified, that is, where it is groundless, unprofitable, ineffective, or unnecessary. Bentham sought, in practice as well as in theory, to eliminate those punishments that were predicated simply on harming the offender. In his lifetime, repugnance against harm for harm’s sake obtained some popular hold; efforts were made to institute punishments that could be justified by their good effects rather than their bad ones.

The eighteenth-century British prison was rife with disease and hunger, especially bad for those who, with their families in tow, were imprisoned for debt and could not pay for food. Following the end of transportation to the American colonies after 1776, excess prisoners were confined to ships moored at the docks. Prison reform in the late eighteenth and early nineteenth centuries, spurred by John Howard’s 1777 report on scandalous conditions in the prisons of England, was in large part an effort to bring rationality to prison practice in order to direct it more effectively to the goals of reform and deterrence. In the United States, punishment before 1800 still relied for the most part on beatings, public humiliation, and the gallows. A wave of criminal law reform after independence resulted in the wholesale replacement of capital punishment with long prison terms. But the newly built prisons were as disorderly and ill-run as their British counterparts, and hopes that democracy and legal reform would eliminate crime were soon seen to be ill-founded. By the 1850’s the efficacy of reform was widely doubted, though some still hoped for deterrent effects.<sup>41</sup>

Meanwhile, retributivism had found new advocates in Europe in Kant and Hegel. Although Kant wrote little specifically on the issue of punishment, his views are of enduring significance in punishment theory, most especially because of his unequivocal rejection of the serving of social ends as a justification for punishment:

Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else.<sup>42</sup>

The grounding of this rejection in his powerful conception of persons as equal rational beings whose autonomy must be respected has made it one of the most formidable obstacles to any persuasive justification of punishment.

Kant explicitly rejects practicality in favor of the maintaining of cosmic order; if a society disbands, it must first execute “the last murderer remaining in prison” to avoid complicity in his crime.<sup>43</sup> “If legal justice perishes,” he claims, “it is no longer worth while for men to remain alive on this earth.”<sup>44</sup> The apparent basis of this claim is that legal justice (*Gerechtigkeit*) represents the ability of men to be, and to treat others as, ends in themselves, and thus to transcend the purpose of animals. Because, on Kant’s view, rationality requires that we act justly, our failure to do so puts us on a level with nonrational animals, so that there is no (special) purpose in our continued existence. Kant, too, grounds the justice of punishment in the social contract, arguing that, though we punish the offender against his will, he has consented to the punishment because he has (or may be deemed as a rational being to have) consented to the laws. On Kant’s view, personal autonomy is achieved only when one is ruled by reason; he sees desires as “external” influences that prevent us from acting according to the dictates of rationality. Only the person who is able to ignore these influences and to act from purely rational motives achieves full autonomy. A rational being considers the interests of all rational beings as deserving of equal consideration; thus, no person may be used merely as a means to accomplish the ends of another. Compassion for the wrongdoer is ruled out of order along with the desire for vengeance: the rational (and thus the moral) person strictly ignores emotional motivations. The theme of retribution, long muted by the willingness of Christians to leave the meting out of just deserts to God, again became a significant strand of the justification of punishment.

In contrast, the first arguments for the abolition of punishment entirely rejected the retributive idea. Robert Owen argued in 1813 that bad moral character was formed by circumstances, not by the offender, and that for

society to punish the thieves it had manufactured was unjust. He argues, in words not inapposite today:

Can we for a moment hesitate to decide, that if some of those men whom the laws dispensed by the present Judges have doomed to suffer capital punishments, had been born, trained and circumstanced as these Judges were born, trained and circumstanced, that some of those who had so suffered would have been the identical individuals who would have passed the same awful sentences on the present highly esteemed dignitaries of the law.<sup>45</sup>

Others who continued to accept punishment also questioned retributivism in the strongest terms. Bentham's intellectual successor, John Stuart Mill, wrote in 1867:

If, indeed, punishment is inflicted for any other reason than in order to operate on the will; if its purpose be other than that of improving the culprit himself, or securing the just rights of others against unjust violation, then, I admit, the case is totally altered. If any one thinks that there is justice in the infliction of purposeless suffering; that there is a natural affinity between the two ideas of guilt and punishment, which makes it intrinsically fitting that wherever there has been guilt, pain should be inflicted by way of retribution; I acknowledge that I can find no argument to justify punishment inflicted on this principle.<sup>46</sup>

By this time, then, not only the principal strands of the justification of punishment but also the principal objections to each had already been laid out. Punishment might be defended on either retributive or utilitarian grounds; correspondingly, it might be criticized from the other point of view. While one set of criticisms required the elimination of all punishments that did not further the social good, the other set required the elimination of all punishments that furthered the social good at the expense of individual autonomy. To the extent that these developments had any effect on policy, however, it was on the question of how, rather than whether, to punish; the institution of punishment itself lumbered on unscathed.

A new wave of prison reform in the nineteenth century focused on isolating the prisoner from the influence of his fellows while requiring him to work. The emphasis was on reform of moral character. In the United

States, efforts to reform prisoners through silent penitence resulted in the pitiless infliction of physical and mental suffering. A rule of total silence was enforced in many prisons, driving many of the prisoners insane. The rule was enforced through such methods as flogging, the ball and chain, or an iron gag held in place by twisting the arms behind the back and tying it to the wrists with a few inches of rope.<sup>47</sup> Similar ideas were implemented in Britain, where the regime of penal servitude was so strict that it drove many to insanity or suicide. Particularly pernicious was the substitution of grueling, unproductive work—such as the treadmill, the crank, or the capstan—for meaningful tasks. These Sisyphean labors were often such as to leave the prisoner in constant pain, if not to kill him outright. The prison diet was itself punitive: not merely pathetically inadequate, but deliberately prepared to be as repulsive as possible. Ironically, the rejection of harm for harm’s sake seemed only to make colder the cruelties of the penal system. Nor did it achieve its aims; the Wines and Dwight report on prisons in the United States and Canada spurred the National Congress on Penitential and Reformatory Discipline to declare in 1870 that “neither in the United States nor in Europe . . . has the problem of reforming the criminal yet been resolved.”<sup>48</sup>

But such practical failures were of little concern to retributivists such as F. H. Bradley and James Fitzjames Stephen, who urged the attention of their countrymen to the ideas of Kant and Hegel, then current in Europe. Bradley argued that the retributivist view was more in accord with the view of “the vulgar man,” and attributed to that man a view strikingly similar to Hegel’s well-known, if little-understood, position that punishment “annuls the crime”:<sup>49</sup>

Punishment is the denial of wrong by the assertion of right, and the wrong exists in the self, or will, of the criminal; . . . he has asserted . . . his wrongful will, the incarnate denial of right; and in denying that assertion, and annihilating, whether wholly or partially, that incarnation by fine, imprisonment, or even by death, we annihilate the wrong and manifest the right; and since this . . . was an end in itself, so punishment is also an end in itself.<sup>50</sup>

Retributivists of this period were concerned to disassociate themselves from the discredited thirst for private vengeance and retaliation, yet offered little beyond such appeals to intuition to establish that punishment was indeed good in itself. Their emphasis on guilt as a necessary precon-

dition for punishment, though, brought attention to a weakness of utilitarian theory: that under the right empirical conditions, it would justify punishment of the innocent. Bradley sarcastically observes:

We need not ask how it is that, if 99 men are of opinion that it is more convenient, for both the 99 and the 100th, or for the 100th without the 99, or the 99 without the 100th, that he, the 100th, should cease to exist—that *therefore* it is right for their opinion to be conveyed to him by the hanging of him, whatever may be his opinion on the subject. The discussion of this question we leave to utilitarian philosophers.<sup>51</sup>

Interestingly, Bradley was later among the advocates of social Darwinism, and suggested that criminals, whom he described as “diseased” and “unfit,” and even their children, should be put to death under a principle of “moral surgery”; while declining to abandon retribution, he argued that it must be “secondary and subject to the chief end of the general welfare.”<sup>52</sup> This was the apogee of the idea that the harm done by punishment is counterbalanced by the good that it does.

In 1918, Bosanquet writes of “the growing repugnance to punishment,” citing as causes of that repugnance ill-treatment of prisoners and the idea that moral badness is a disease that should be subject to curative treatment, while retribution is “a survival from primitive retaliation.” Bosanquet, like Bradley, urged the “annulment of the crime” as the proper basis of punishment, criticizing the reformatory model as leading to excesses:

You want to annul the bad will, and in doing so, to help the offender against it so far as within reasonable limits you can. But to bind a man under the jurisdiction of some official expert in morals—say a gaol chaplain—till the latter should be satisfied of his reformation, would be a tyranny to which I find it hard to conceive a parallel.<sup>53</sup>

Nevertheless, Bosanquet did not base his views on the idea that harming offenders was good. Rather, he thought that the significant function of punishment was the emphatic expression of disapproval, and even suggested that, for the educated, punishment lay primarily in public trial and condemnation.<sup>54</sup> Although he rejected both reform and deterrence as the principal aim of punishment, demanding that the limits of punishment must be set by the nature of the crime, he too saw punishment as

promoting the social good. Mabbott, the only other prominent proponent of retributivism in the first half of the twentieth century, also declined to advocate evil for evil: instead, he argued that the concept of a rule required that its violation be punished, quite apart from any consideration of whether the act was morally wrong.<sup>55</sup> For this he was aptly criticized by M. R. Glover, who pointed out that he was confusing logic with morality.<sup>56</sup>

Distaste for retributive sentiments and the perception that they were philosophically ill-founded would have made it difficult for a system of punishment based entirely in retribution to survive the first half of the twentieth century. Attitudes at midcentury were typified by Barbara Wootton, who argued that moral responsibility for crime was illusory, and Karl Menninger, who wrote, “The great secret, the deeply buried mystery of the apparent public apathy to crime and to proposals for better controlling crime, lies in the persistent, intrusive wish for vengeance.”<sup>57</sup>

But critics of retribution like Menninger and Wootton sought, not to abolish the penal system, but to remodel it along rehabilitative lines. The hope of providing humane and constructive treatment for offenders had a powerful hold on the public imagination. After World War II, the rehabilitative model became the dominant public policy in the United States. Treatment personnel were added to the prison staff; efforts were made to ameliorate prison conditions; and successful rehabilitation became a basis for early parole.<sup>58</sup>

As attention turned to rehabilitation, the Kantian concern about using persons as mere means had not been forgotten. Both John Rawls<sup>59</sup> and H. L. A. Hart<sup>60</sup> endeavored to escape these difficulties by proposing to separate the question of the overall aim of the institution from that of the particular purpose to be served by punishment in a specific case. They suggested that, while the institution of punishment might be justified on utilitarian grounds, punishment of a specific individual could be justified only on the ground of personal guilt. Retributivists and utilitarians could be seen as answering different questions, rather than as disagreeing on the answer to the single question, “Why punish?” Although this approach avoided the principal criticism of utilitarianism (that it was consistent with punishing the innocent) as well as the principal criticism of retributivism (that it required the pointless infliction of pain), it had the disadvantage of requiring it to be true both that harming the offender is good and that the good done by the overall institution outweighs the harm.

But a hundred years after the Wines and Dwight report, Robert Marntinson's famous study again concluded that, despite advances in scientific knowledge, prisons by and large did not successfully rehabilitate offenders, even in the rare instances in which the institution fully conformed to the therapeutic model, and did not serve deterrent ends either.<sup>61</sup> With this new evidence, it became increasingly difficult for proponents to claim that punishment was either a good for the offender or that it did more good than harm. As most philosophers had already rejected as indefensible the idea that harming the offender was good in itself, this second round of disillusionment with rehabilitation and deterrence might logically have led to a rejection of the institution of punishment in all its forms. Instead, utilitarian justifications fell into the background, and the old idea of retribution was revived.

The contemporary debate began to take shape with the publication of Herbert Morris's "Persons and Punishment." Sharply criticizing the logic of "therapy" for criminal offenders, Morris breathed new life into the concept of retribution by suggesting that punishment could be viewed as respecting the choices of offenders, given a fair set of rules and a voluntary decision to break them. He argued that, unlike rehabilitation, which seeks to mold a person to the liking of society, retributive punishment respects the offender's choice to disobey and leaves him free to make the same choice again, with the understanding that he will again pay the consequences. Holding people responsible for their acts—viewing them as the product of choices that could have been otherwise—is essential if we are to treat offenders as persons rather than as objects to be manipulated. The purpose of punishment, on this view, is to restore the proper balance of benefits and burdens disrupted by the criminal offense. This appeal to Kantian autonomy revived the notion that punishment could be justified even though it harmed the offender and had no (separate) good consequences; harm to the offender could be seen as restoring the social order and as an appropriate, respectful response to his conduct.

But, given the already greater weight of social burdens borne by the typical criminal offender—poverty, substandard schooling, inadequate medical care, and so on—the idea that he must be punished to "restore the balance" or to "pay his debt to society" can seem farcical. In "Marxism and Retribution," Jeffrie Murphy details the ironies of a society that, while everywhere praising the merits of acquisitiveness and the prestige of material wealth, makes plain to certain segments of society that there is no legitimate path for them to that destination. Murphy goes on to

argue that, given the social situation of most criminal offenders, “it is hard to see what these persons are supposed to reciprocate for.”<sup>62</sup> Others have questioned whether, for most of us, refraining from most kinds of crime could appropriately be characterized as a “burden” at all.<sup>63</sup> Most of us, after all, do not daily restrain ourselves from murder, mayhem, or even armed robbery; rather, we would find it a crushing burden to be required to carry out such acts. Certainly, if application of the theory were limited to those cases in which the rules are fair, the burdens of compliance are evenly distributed, and the choice to break them is truly voluntary, the prison population would take on an entirely different character.

While some writers, particularly those advocating an economic analysis of law, continued to defend utilitarian views,<sup>64</sup> the combination of Morris’s attack and Rawls’s Kantian critique of utilitarianism in his influential *Theory of Justice* pushed utilitarian views decisively into the background. A spate of followers picked up on Morris’s theme, and the idea of desert, not merely as a limit, but as a complete justification for harming the offender, found its way into the public forum under the rubric of “just deserts.”<sup>65</sup> Concerns about the fairness of the rules and the voluntariness of violation were, of course, lost in the translation to political rhetoric. The political appeal of just deserts was supplemented by a new focus on what punishment of offenders could do for victims. Among philosophers, the long-held aversion to vengeful emotions received new attention, and it was suggested that the satisfaction of victims’ anger might be a legitimate purpose of retributive punishment.<sup>66</sup>

Interestingly, Herbert Morris, in later work, turned away from the idea of harm for harm’s sake, favoring instead a “paternalistic” view of punishment. His and other theories of the early 1980’s sought to justify punishment on the ground that it was for the moral good (though immediate harm) of the offender.<sup>67</sup> This move, while it did not avoid the overriding issue of the fairness of the rules, combined the attractions of rehabilitative theory with the attractions of respect for the offender. Because punishment is for the moral good of the offender, it is not necessary to show that it is for the overall benefit of society; indeed, it need not actually accomplish moral change as long as it is “directed at” such change. The central problem with these theories is that they have to show, not merely that moral change is desirable, nor that punishment is a way of achieving it, but both that punishment is a necessary path to moral change and that its imposition is justified even when such change is not forthcoming.

We see the germ of a move back to the idea that punishment benefits society in the self-defense theories proposed by Philip Montague<sup>68</sup> and Daniel Farrell.<sup>69</sup> These theories seek to establish that deterrence does not impermissibly use offenders as means to the greater good of society, but instead counts as self-defense, shifting harms from innocents to those who have made harm inevitable. True self-defense consists of harm to an attacker that is necessary to avert an attack not yet completed. Punishment, if it prevents any harms at all, cannot be said to prevent the harm for which it is inflicted; thus, the challenge for these theories is to show that we are defending ourselves against the persons punished, rather than using them to deter others.

Thus, today, each of the principal strands of the justification of punishment has its adherents, and each its bitter opponents. Too often, the question of justification is phrased as one of which of them is correct, rather than whether any of them is. The indefinite prolongation of the debate over the theoretical grounding of punishment in a sense permits an indefinite suspension of judgment that enables the institution to persist and to expand, amid confusion over what it is supposed to be doing. We are building, from the crushed spirits of society's despised, a bridge of dubious quality to a disputed destination.

In the chapters that follow, I shall examine the weaknesses of the most influential justifications and suggest that it is time to end our suspension of judgment and adopt instead a course of action based on the assumption that punishment cannot, after all, be justified.