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# WHY DO WE PUNISH? THE CASE FOR RETRIBUTIVE JUSTICE

JOSEPH M. P. WEILER†

## A. INTRODUCTION

The never-ending debate about the substantive and procedural rules in our criminal justice system rarely addresses itself to the most fundamental question — why do we punish at all? Tolstoy ably expressed this dilemma in the following passage:

He asked a very simple question: “Why and by what right, do some people lock up, torment, exile, flog, and kill others, while they are themselves just like those they torment, flog, and kill?” And in answer he got deliberations as to whether human beings had free-will or not; whether or not signs of criminality could be detected by measuring the skull; what part heredity played in crime; whether immorality could be inherited; and what madness is, what degeneration is, and what temperament is; how climate, food, ignorance, imitativeness, hypnotism, or passion affect crime; what society is, what its duties are — and so on . . . , but there was no answer on the chief point: “By what right do some people punish others?”<sup>1</sup>

The answer to this threshold question has traditionally taken one of two lines, retributionist or utilitarian. On the one hand, there is the view that punishment of the morally derelict is its own justification

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<sup>1</sup> Quoted at the beginning of E. L. Pincoffs, *THE RATIONALE OF PUNISHMENT* (1966). This issue was discussed admirably in a recent paper by Paul Weiler entitled *The Reform of Punishment*. Professor Weiler's paper appeared with a companion paper by Dr. John Hogarth, *Alternatives to the Adversary System*, in a book entitled *STUDIES ON SENTENCING*, published as *WORKING PAPER NO 3* of the *LAW REFORM COMMISSION OF CANADA* (1974). My paper will trace Professor Weiler's analysis of retribution as it is currently being revived by criminal law scholars. My indebtedness to Paul is obvious both for the inspiration for my paper as well as for a good deal of its direction. I would also like to thank Ms. Lorna Seppala who helped with the early research on punishment. Finally, I am grateful for the assistance of my colleague, Dr. John Hogarth, who made several significant suggestions for improving the final draft.

for it is right for the wicked to be punished. This imperative flows from a view of the very nature of man as a responsible moral agent to whom rewards or punishment should be assessed according to the morality of his choice of behavior. On the other hand, there is the teleological, utilitarian view that the only proper justification for punishment is the prevention or reduction of antisocial behavior. The critical questions which the latter theory asks about any social action, law or institution are to be answered in terms of how much good will it produce, at what cost, and is it worth it?

The history of this debate about the justification for punishment indicates that the retributionist rationale was replaced by the utilitarian as the dominant theory in the nineteenth century. The emergence of the popularity of the utilitarian theory of punishment was largely the result of the efforts of Jeremy Bentham. Bentham felt that since punishment entailed suffering which was per se an evil, there could be no justification for making people suffer unless some secular good could be seen to flow from this exercise. He believed that the justifying benefit that would result from the imposition of punishment was its propensity to modify future behavior, both of the offender and other potential offenders. It was assumed that through the operation of fear of the penalties threatened by the law, *i.e.* deterrence, there would be a reduction of crime. Unlike the retributionist view which was "backward-looking" in the sense that it focused on the conduct of the offender to determine the proper social response, the Benthamist theory of punishment was "forward-looking" since it concentrated on the effects of punishment on future conduct. Implicit in this utilitarian analysis was the assumption that man is a rational, pleasure-seeking creature who can be prevented from engaging in antisocial behavior by the prospect that the pain of punishment will outweigh the benefits of crime.

With the rise of the behavioral sciences in the last century, a variation of the classic utilitarian position appeared which altered the focus of the utilitarian justifying aim of punishment by positing a new "good" with which we must be primarily concerned in the imposition of criminal punishment, *i.e.* the rehabilitation of the "offender". This behavioral model was attractive from the utilitarian standpoint because it alleviated the moral and empirical stumbling blocks that had plagued the classic utilitarians who in attempting to maximize the amount of good or happiness in the world, were deliberately inflicting suffering which they viewed as an evil. They attempted to circumnavigate this sore spot by positing the gains of crime prevention through the operation of deterrence. Yet the posi-

tivist behavioral studies showed that the Benthamite confidence in the role of deterrence was based on an exaggerated view of the part played by this rational calculation of pleasure and pain. The "rehabilitative ideal" sought to achieve the same utilitarian gains of crime prevention by redesigning the institutions of the criminal law so that the criminal as well as the society would benefit.

The utilitarian justification for punishment and the popularity of the behavioral model reached its zenith in the 1960s. This attitude is displayed in the conclusions of the Ouimet Report which stated confidently that "the Committee regards the protection of society not merely as the basic purpose but as the *only* justifiable purpose of the criminal law in contemporary Canada" and "that the rehabilitation of the individual offender offers the *best* long-term protection for society."<sup>2</sup>

The widespread support for the rehabilitative ideal crossed political and ideological boundaries. The reasons for the enthusiasm in which this theory was embraced is explained in the following passage:

Its conceptual simplicity and scientific aura appeal to the pragmatism of a society confident that American know-how can reduce any social problem to manageable proportions. Its professed repudiation or retribution adds moral uplift and an inspirational aura. At the same time, the treatment model is sufficiently vague in concept and flexible in practice to accommodate both the traditional and utilitarian objectives of criminal law administration.<sup>3</sup>

While the "rehabilitative ideal" basked in the favour of the behavioralist dominated schools of penal reform, retribution was sharply disparaged as, at best, a "disguised form of vengeance"<sup>4</sup> or, at worst, "the merest savagery."<sup>5</sup> The concept of punishment was thought to have "no place in enlightened criminology."<sup>6</sup> Retribution is dismissed as a justifying aim of the criminal sanction since it expresses "nothing more than dogma, unverifiable and on its face

<sup>2</sup> Emphasis added; REPORT OF THE CANADIAN COMMITTEE ON CORRECTIONS, TOWARD UNITY: CRIMINAL JUSTICE AND CORRECTIONS (1969) 11 and 15, as quoted in Weiler, *id.*, at 95.

<sup>3</sup> STRUGGLE FOR JUSTICE, A REPORT ON CRIME AND PUNISHMENT IN AMERICA, prepared for the American Friends Service Committee (1971) 39, cited in JUSTICE, PUNISHMENT, TREATMENT, THE CORRECTIONAL PROCESS (1973) 198.

<sup>4</sup> J. Hall, *Justice in the 20th Century* (1971) 59 CAL.L.REV. 743.

<sup>5</sup> H. L. Packer, *THE LIMITS OF THE CRIMINAL SANCTION* (1968) 66.

<sup>6</sup> A. Lelyveld, in *PUNISHMENT: FOR AND AGAINST* (H. Hart ed. 1971) 57, at 81.

implausible.”<sup>7</sup> The unequivocal acceptance of the rehabilitative ideal in the “modern” view of the criminal justice system is captured in the 1966 Manual of Correctional Standards published by the American Correctional Association:

Punishment as retribution belongs to a penal philosophy that is archaic and discredited by history. . . . Penologists in the United States today are generally agreed that the prison serves most effectively for the protection of society against crime when its major emphasis is on rehabilitation. They accept this as a fact that no longer needs to be debated.<sup>8</sup>

The behavioral view is in complete opposition to the retributivist for it views man not as a moral agent exercising free will, but as the mere object of causal forces which determine human conduct. According to the behaviorists these causal influences can be scientifically studied and controlled. Thus the function of the criminal law should be to bring into play process for modifying the personality and hence the behavior of people who commit antisocial acts so that they will not commit them in the future. Or, if all else fails, the criminal law must be employed to restrain people from committing offenses by the use of external compulsion (*e.g.* incarceration). Concepts such as responsibility, blame and guilt are scientifically meaningless. Accordingly, our notions of crime and punishment must be redefined to exclude any naive, moralistic implications which these words traditionally had connoted. The commission of a crime is not in itself a reason for social intervention, but merely a signal that a person needs to be “treated.”

As attractive as these ideas appeared to their proponents, the force of the rehabilitative ideal on the philosophy of punishment diminished as the empirical reality of this brave new world came into focus. In short, the bloom came off the scientific rose and we now realize that “a sociologist or cultural anthropologist cannot solve all human problems.”<sup>9</sup> The prophetic words of an early critic express the disenchantment that has been experienced with the behavioral model:

To be taken without consent from my home and friends; to lose my liberty; to undergo all those assaults on my personality which modern psychotherapy knows how to deliver; to be remade after some pattern of “normality” hatched in a Viennese laboratory to which I never pro-

<sup>7</sup> *Supra*, note 5, at 38-9.

<sup>8</sup> As quoted in N. Carlson, *The Future of Prisons* (1976) 12:3 TRIAL 27, at 29.

<sup>9</sup> R. J. Gerber and P. D. McAnany, *Punishment: Current Survey of Philosophy and Law* (1967) 11 ST. LOUIS L. REV. 491, at 531.

fessed allegiance; to know this process will never end until either my captors have succeeded or I have grown wise enough to cheat them with apparent success — who cares whether this is called Punishment or not? That it includes most of the elements for which any punishment is feared — shame, exile, bondage, and years eaten by the locust — is obvious.<sup>10</sup>

As the decline of the behavioral model as the sole justification for “punishment” gathered momentum, some prominent criminal law scholars (including H. L. Packer and H. L. A. Hart) have attempted to present an “integrated rationale” for punishment. While retaining utilitarianism as the “justifying aim” of criminal law, they have re-introduced retribution to deal with the moral soft spots of utilitarian theory. Other criminal law theorists, particularly Professors Paul Weiler and Norval Morris have been more candid about recognizing retribution as “a” or even “the” justifying aim of criminal punishment.<sup>11</sup>

This paper will examine the reasons for the displacement of the “rehabilitative ideal” as the dominant theory of correctional philosophy and will assess the revival of the retributive rationale in its new form in the justification of punishment.

## B. THE DEBASEMENT OF THE REHABILITATIVE IDEAL IN PRACTICE

The utilitarian view of the philosophy of punishment was pioneered by Jeremy Bentham who noted that punishment is “a capital hazarded in the expectation of profit.” The profit which Bentham had in mind consisted of the reduction of anti-social behavior. As noted above, two theories have been proposed as the most efficient mechanisms to achieve this goal, deterrence and rehabilitation. The latter has received more support in recent years since it focuses on the benefits to be derived from the imposition of sanctions, both for the individual offender as well as society in general. It attempts to effect

<sup>10</sup> C. S. Lewis, *The Humanitarian Theory of Punishment*, in 6 *Res Judicatae* 224, at 227. For an interesting analysis of the logical implications of a full-blown rehabilitative system, particularly the problems of when the therapeutic machine should spring into action, see S. H. Kadish, *The Decline of Innocence* (1965) 26 *CAMB. L.J.* 273.

<sup>11</sup> See Weiler, *supra*, note 1; N. Morris, *Persons and Punishment* (1968) 52 *THE MONIST* 475; N. Morris, *The Future of Imprisonment: Toward a Punitive Philosophy* (1974) 72 *MICH. L.REV.* 1161; J. G. Murphy, *Three Mistakes about Retributivism* (1971) 31 *ANALYSIS* 166; J. Finnis, *The Restoration of Retribution* (1972) 31 *ANALYSIS* 131; A. Von Hirsh, *DOING JUSTICE* (1976); and M. R. Gardner, *The Renaissance of Retribution — An Examination of Doing Justice* (1976) *WISC. L.REV.* 781.

a change in the personality problems which lead a person into crime. The behaviorists use a medical treatment analogy to support their thesis. Under this model, the behaviorists point out that while the experience of surgery is painful, after the patient recuperates, he is much better off than if the operation had not been performed. On the same vein, society has the right to compel "treatment" of the criminal law offender, for unlike other "diseases", to leave the offender untouched by rehabilitative measures is to risk recidivism which it is in the interest of society to avoid. This seems to make good sense, yet the rehabilitative ideal in operation has engendered much recent criticism. What fallacies in the behavioral theory can explain its demise?

There seems to be no doubt that the means of rehabilitating offenders has not yet been discovered, much less put into practice. The more the roots of criminal behavior are studied, the more it becomes evident that they are "non-specific and that the social and psychic spring lies deep within the human condition." While it is possible to use prisons to educate the illiterate or teach a useful trade to an unskilled, there is:

... very little reason to suppose that there is a general connection between these measures and the prevention of future criminal behavior. What is involved primarily is a leap of faith, by which we suppose that people who have certain social advantages will be less likely to commit certain kinds of crimes.<sup>12</sup>

The treatment model assumes that the causes of crime, which inhere either in the offender or his environment are "pathological". To be more specific, offenders are considered abnormal in a way which makes them "socially unhealthy." Yet recent evidence has persuaded criminologists that criminal behavior is a normal experience within any society. As one scholar noted:

A crime is simply a legal standard, enacted at a particular point of time in a society, which prohibits a certain form of conduct on pain of a sanction.<sup>13</sup>

Those among us who have not been tempted or have not actually broken some rule are the abnormal ones. Criminal behavior is not necessarily evidence of pathology or individual unhealthiness. For the same factors of the human condition which make crime possible also make human achievement and progress possible.<sup>14</sup> The critical

<sup>12</sup> Packer, *supra*, note 5, at 56.

<sup>13</sup> Weiler, *supra*, note 1, at 125.

<sup>14</sup> *Id.*

point here, however, is that even if we could discover all the causes of crime, it is just not feasible to attempt to remake the human condition through the coercive operation of the criminal law in individual cases. This is a task far beyond the competence of the criminal law.

Not only is the rehabilitative ideal excessive in its ambitions, it is abusive in its operation. Nowhere is this better illustrated than in the California prison system. Dr. Karl Menninger, less than a decade ago, in *The Crime of Punishment* praised this system as:

... far out in the lead among states, with excellent programs of work, education, vocational training, medical services, group counselling, and other rehabilitative activities. A notable feature is the combination of diagnosis, evaluation, treatment, and classification. . . . This constitutes a systematic effort along scientific principles, to ascertain from collected case history data and from first-hand examination just what the assets and liabilities of the floundering individual are.<sup>15</sup>

More recently, in a study entitled *The Effect of Criminal Sanctions*, the California State Assembly Committee on Criminal Procedure flatly declared that the prisons are meeting *none* of their proclaimed goals. The public is not being protected (although arguably this is not the fault of the failure of the prison system) because most crimes are either unreported, undetected or unprosecuted and thus "the great majority of criminals are in the community, not in prison." Long prison terms not only do not deter, they have the opposite effect; numerous studies show that the longer a man stays in prison, the more likely he is to return to crime when released.<sup>16</sup> Thus, it is not surprising that the Committee concluded that "rehabilitation is a delusion". Moreover, the Committee pointed out that "what is often neglected in official statements is not that prisons fail to rehabilitate but the *active* nature of the destruction that occurs in prison." The Committee found that the Adult Authority, which has broad discretion in determining the length of a prisoner's incarceration, "operates without a clear and rationally justified policy", is "legally and scientifically unequipped" for its responsibilities. "As a result,

<sup>15</sup> K. Menninger, *THE CRIME OF PUNISHMENT* (1968) 231-32. See also *THE OUMET REPORT*, *supra*, note 2, at 216-17, where the committee reported that they were "impressed by the thoroughness with which hearing of the parole applications were conducted as well as with the exhaustive social references and information contained in their respective files."

<sup>16</sup> E.g. C. J. Eichman, *THE IMPACT OF THE GIDEON DECISION UPON CRIME AND SENTENCING IN FLORIDA: A STUDY OF RECIDIVISM AND SOCIO-CULTURAL CHANGE* (1965). See also J. Wilson, *THINKING ABOUT CRIME* (1975) 169.



California general parole policy, reflecting emotion, not facts, has become increasingly conservative, punitive and expensive."<sup>17</sup>

While "rehabilitation is a delusion", the "therapeutic measures which are carried out in the name of rehabilitation are anything but delusions to the inmates to whom such programs are directed. One factor which has helped divert attention from the reality of the essentially punitive programs that are conducted under the guise of rehabilitation is the jargon used by correctional authorities: prison is called "correctional facility", prisoner — "inmate", guard — "correctional officer", initial lockup — "Reception and Guidance Centre", solitary confinement — "adjustment center", or better yet, "administrative segregation" or "meditation cell."

The "treatment model" used by the behavioralists requires maximum flexibility to achieve the model's goal, *i.e.* treating each individual offender according to his unique needs, so the system's administrators are granted broad discretionary powers. Perhaps no other device has received more criticism from inmates than the indeterminate sentence and the discretionary powers wielded by the Adult Authority. As conceived by the behavioralists, the indeterminate sentence is an integral part of rehabilitation. The rationale of rehabilitation is to focus on the offender not the offence, and the idea of the indeterminate sentence is to allow earlier discharge to those inmates who have demonstrated a readiness to return to the community, than would be possible under a determinate sentence. Sentencing power was accordingly placed in the hands of a panel of "skilled experts in human behavior", the Adult Authority.

The problem with the treatment model in practice, however, is that it tends to be all things to all people. Thus the indeterminate sentence was soon recognized to be a potent instrument for inmate control. As one sociologist commented:

It's a hell of a lot more effective for maintaining discipline than the whip. In effect the message to the prisoners is: "Keep the joint running smoothly and we'll let you out earlier." Conversely, they can keep the really "dangerous" criminal in almost indefinitely. For who is to decide which is the "dangerous" man? This category is elastic enough to embrace political nonconformists, inmate leaders of ethnic groups, or prison troublemakers. From the vindictive guard who sets out to build a record against some individual, to the parole board, the indeterminate sentence grants Corrections the power to play God with the lives of inmates.<sup>18</sup>

<sup>17</sup> J. Mitford, *Kind and Unusual Punishment in California* (1971) 227 THE ATLANTIC MONTHLY 45, at 50.

<sup>18</sup> *Id.*, at 46.

Thus, while the indeterminate sentence was designed to allow for an early release for the rehabilitated offender, it can also be used to incarcerate a "troublesome" inmate for a period much longer than the offence might warrant from the retributive point of view,<sup>19</sup> and all under the benevolent guise of "treatment."<sup>20</sup> It is no surprise that, in the face of all the wretched conditions of prison life, the indeterminate sentence combined with the broad discretion (spelled arbitrariness) of the "skilled experts in human behavior" is considered to be the most vile feature of the correctional system. As one former inmate put it: "Don't give us steak and eggs; get rid of the Adult Authority! Don't put in a shiny modern hospital; free us from the tyranny of the indeterminate sentence!"<sup>21</sup>

Certainly the annual parole application hearing would not suggest that the inmate is receiving the benefit of individualized treatment by experts. The hearings average seventeen minutes during which one panel member interviews the prisoner and the other reads the next prisoner's file. The decision usually is made on the basis of the file content with the interview operating as a mere formality that might change the panel members' minds in exceptional cases. Most discussion is merely a sham to disguise the real basis of the Adult Authority disposition. One commentator describes the scenario in these terms:

Nostrums for his rehabilitation vary, depending on the idiosyncracies of the individual panel members. Panel Member A may be hipped on religion, and tell the prisoner to go to church every week. . . . But fifty-two Sundays later, he comes before Panel Member Y, whose bag is Alcoholics Anonymous, and even if the prisoner doesn't happen to have a drinking problem he'll be told 'Attend the AA for a year and then we'll see about a parole date.' This can go on indefinitely, as long as they haven't set his sentence. If he shows his true feelings and says, 'You're arbitrary and unjust,' they will say he's not ready for parole. If he says he has benefitted enormously from the rehabilitation pro-

<sup>19</sup> The divergence between the retributive and the rehabilitative theory of punishment is evident in the Adult Authority's official orientation bulletin which states: "The offense for which a man is committed is only one of the factors that the Adult Authority considers when making a decision." Other factors may include alleged or unproven crimes for which the prisoner was arrested but perhaps never brought to trial, or charges which were stayed by the prosecution as part of a plea bargain, or of which he was tried and acquitted. The prisoner's file contains letters from both the prosecutor and the trial judge which are considered to be of prime importance by the Adult Authority in assessing the prisoner's "background."

<sup>20</sup> A noted victim of this "benign" atrocity is the late George Jackson. See also A. M. Dershowitz, *Indeterminate Confinement: Letting the Therapy fit the Harm* (1974) 123 U. PA. L. REV. 297, at 303.

<sup>21</sup> *Supra*, note 17, at 47. See also A. Von Hirsh, *supra*, note 11, at 31.

grams, they may put him down as a smoothie and deny parole anyway. The prisoner is totally in the dark; he has no way of knowing on what they base their decision. Is it any wonder that when he eventually comes out he's bitter and full of revenge?<sup>22</sup>

Yet a re-constitution of the Adult Authority, or the implementation of more rights of due process at the parole application hearings will not solve these problems. George Bernard Shaw pointed out the fundamental incompatibilities of the proclaimed goals of prison officialdom. In his words, reformation is "a false excuse for wickedness . . . if you are to punish a man you must injure him. If you are to reform him, you must improve him. And men are not improved by injuries."

Critics of the so-called rehabilitative mechanism referred to by Dr. Menninger, *supra*, describe these as the "Catch-22 of modern prison life"; and "a grand hypocrisy in which custodial concerns, administrative exigencies and punishment are all disguised as treatment." While most inmates describe these programs as "phony", and consider "therapy" and "treatment" mere "games", to decline to play may be dangerous. For if he doesn't "play" the prisoner may be labeled "defiant", "hostile", "unco-operative", and he may be placed in maximum-security, not for "punishment" but as the next logical step in his "treatment". Of course, the parole board also considers the need for these treatment measures as evidence of lack of rehabilitation. This phenomenon lead the California Legislative Committee to conclude "[m]ost cons know how to walk that walk, talk that talk and give the counselor what he wants to hear."<sup>23</sup>

The cumulative effect of these therapy programs, according to the critics, is counter-productive, for rather than producing an individual who can fit into a constructive role once released into the community, the system destroys the prisoner's self-respect by a program of systematic humiliation. As one ex-convict describes it:

The whole point of the psychological diagnosis is to get the prisoner to go for the fact that he's "sick," yet the statement he's sick deprives him of his integrity as a person. Most prisoners I know would rather be thought bad than mad. They say society may have a right to punish them, but not a hunting license to remold them in its own sick image.<sup>24</sup>

<sup>22</sup> *Id.*, at 50.

<sup>23</sup> *Id.*, at 47-8.

<sup>24</sup> *Id.*, at 48. The manner in which the treatment rationale, with its implicit paternalistic view can foster practices which are demeaning and may violate a prisoner's rights as a person is discussed admirably in N. Morris, *Persons and Punishment*, in *PHILOSOPHY OF LAW* (J. Feinberg & H. Gross eds. 1975) 572.

In view of the recent studies in criminology which indicate that criminal behavior is not necessarily evidence of pathology or sickness, these institutionalized and officially sanctioned programs of behavior modification can properly be described as vicious and attritional. Thomas S. Szasz, a noted specialist in the field of law and psychiatry concurs:

Most of the legal and social applications of psychiatry, undertaken in the name of psychiatric liberalism, are actually instances of despotism. The thesis that the criminal is a sick individual in need for a treatment — which is promoted today as if it were a recent psychiatric discovery — is false. Indeed it is hardly more than a refurbishing, with new terms, of the main ideas and techniques of the inquisitorial process . . . [the deviant] is first discredited as a self-responsible human being, and then subjected to a humiliating punishment defined and disguised as treatment.<sup>25</sup>

In view of the foregoing, it is not surprising that those intimately associated with the California Correctional System have changed their views on the viability of rehabilitation as the prime mechanism to achieve a reduction in crime. All of the psychiatrists, prison lawyers, ex-convicts and law professors who are currently studying the Adult Authority and even the Deputy Warden of San Quentin have publically admitted that there was little or no rehabilitation taking place in the system. The last mentioned official viewed his most important duty as processing thousands of inmates in and out of San Quentin with the minimum of loss of life or limb of guards and especially prisoners. A recent study of the Correctional System in British Columbia has concluded that "there was little or no rehabilitation taking place within the system." The authors of this study summarized their findings in the following statement:

Frank discussions with doctors, chaplains and deputy wardens in these institutions revealed that in the opinion of these people, the programs and facilities that presently exist in the B.C. Correctional System cannot possibly be viewed as embodying the individualized treatment model and fulfilling the task of rehabilitating prisoners. At best, these programs constitute a system of diversions, assist a prisoner in passing the time, and militate against an increase in anti-social criminal or other deviant tendencies in the inmate that often occur in correctional institutions. In short, these programs can only be expected to "hold the line" against an increase in "criminality", or at best to afford a setting whereby extra-institutional factors can affect the inmate in rehabilitating himself.<sup>26</sup>

<sup>25</sup> *Id.*

<sup>26</sup> W. W. Black, J. M. Weiler, BRITISH COLUMBIA CORRECTIONAL INSTITUTIONS REPORT, Office of the Attorney General of British Columbia (1975). For

To date, the ironical yet most favourable effects that can be said of the experience with the treatment model in prison is that the atrocities that take place in the name of rehabilitation may have a deterrent effect on those who have had the "benefits of therapy." Moreover, the retributivist pressure for longer sentences, previously denied entry through the front door, became accommodated within the treatment model as long as they were rationalized in terms of public protection or the need for more treatment. It is not surprising in view of this phenomenon that retribution is now being considered by criminal law professors as a candidate, if not for the front door, at least for the side entry into the justification for punishment.

### C. FROM DESERT TO DETERRENCE AND BACK — THE HAZY BORDER BETWEEN RETRIBUTION AND REDUCTIONISM

The Benthamite notion of deterrence as the mechanism of the utilitarian justification of punishment seems not only internally coherent but empirically valid. Yet it is also apparent that deterrence in the sense of "pure threat" of punishment is more operative in affecting choice of conduct in the area of the crimes that are often described as *mala prohibita* than for *mala in se* offences. The Benthamite "economic man", weighing the costs or risks of punishment against the gains to be derived from the commission of the offence is more empirically valid, for example, when describing the scenario of a potential violator of driving, income tax or regulatory offences, than, one "contemplating" murder or rape.<sup>27</sup> The vast majority of citizens who refrain from committing these latter crimes are less

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similar skeptical views regarding the rehabilitative model of confinement, see A. Von Hirsh, *supra*, note 11; STRUGGLE FOR JUSTICE, *supra*, note 3; J. Wilson, *supra*, note 16; E. Van den Haag, PUNISHING CRIMINALS (1975); A. Dershowitz, background paper in FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING (1976).

<sup>27</sup> Confidence in punishment operating as a "pure threat" may be an effective general deterrent but has never been universal. For example, studies which support the conclusion that the death penalty does not measurably reduce homicide rates by comparison with long prison terms include K. Schuessler, *The Deterrent Effect of the Death Penalty* (1952) 284 ANNALS 54; and T. Sellin, CAPITAL PUNISHMENT (1967). However, the economist I. Ehrlich, in a recent much disputed study has argued that the death penalty does have substantial deterrent effect (I. Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death* [1975] AM. ECON. REV. 397). In support of Ehrlich's conclusion see H. Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faiths*, [1976] SUP. CT. REV. 317. And see generally, E. A. Fattah, *Deterrence: A Review of the Literature*, in FEAR OF PUNISHMENT; DETERRENCE, LAW REFORM COMMISSION OF CANADA (1976) 1.

affected by the threat of punishment than a perception that such conduct is morally "wrong". In this way, the criminal law has a general preventive effect on the incidence of crime simply because it embodies the positive morality of the community.<sup>28</sup>

The criminal law serves to maintain and transmit the demands of social morality. First, the very *enactment* of the criminal law in itself identifies in an authoritative manner what the state feels is moral or immoral, beneficial or harmful conduct. Second, through the *application* of the criminal law in individual cases, the state denounces violations of these standards and thereby reaffirms its authoritative judgment. Finally, the *effect* of the criminal law is to provide an environment in which alternative or "deviant" conduct is made less attractive to those who witness the treatment of persons who violate these standards.<sup>29</sup> The impact of this morally instructive character of the criminal law should not be ignored by those concerned about securing adherence to its dictates:

Pure coercion can be effective only for a minority and requires the willing compliance of the majority to give it leverage. If not intellectually, then at least emotionally, most of the members of the majority require an authoritative statement of the standards of conduct which are expected of them. With the decline of religion and the disintegration of small communities and groups, the main public source which is left is the state and its primary instrument is the criminal law.<sup>30</sup>

It is the recognition of these factors governing social morality that has prompted renewed interest in those "retributivist urges" that focused on man as a moral agent. But this interest has been incorporated into a utilitarian, teleological theory of punishment which sees its justifying aim as the reduction of crime ("reductionism"), without acknowledging the retributive basis of the theory. Thus the lines between strict reductionism and pure retributivism have become blurred.

Some theorists who recognize the "denunciatory" function of the criminal law, reject the necessity for the application of further sanctions since they feel that the society can express its condemnation of certain conduct through the mere fact of a criminal conviction. The imposition of more deliberate or formal deprivation is dismissed as not only unnecessary but degrading. It is disparaged as but a sophisticated disguise for "vengeance" which they feel is mere savagery, a

<sup>28</sup> See A. Von Hirsh, *supra*, note 11, at 37 ff.

<sup>29</sup> Weiler, *supra*, note 1, at 130.

<sup>30</sup> *Id.*, at 131.

primal urge that has no place in civilized man. The utilitarian critic sees no logic in adding a second evil (institutionalized punishment) to a harm that has already been inflicted and which cannot be undone by the infliction of more pain. But how valid is this argument?

The desire to retaliate is no doubt a deeply-imbedded source of our impulse to punish one who has caused us harm. A theory of punishment based on the "eye for an eye" maxim reflects these primitive, unanalyzable emotions that lay deep in the human psyche. While these emotions in themselves may not be able to support an acceptable theory of punishment, should they be summarily rejected as irrelevant? Simply because these natural attitudes are morally dubious, should they be ruled out *a priori* as independent justification for punishment? For these factors of human experience to be dismissed outright is to place the justification of punishment on an abstract moral plane. Moreover, from a utilitarian perspective, to ignore these urges is to fail to answer the contention that an institutionalized vengeance may have utilitarian value in the sense that it might contribute to the reduction of crime.

Sir James Stephen, the famed Victorian jurist and historian of criminal law once said, "[t]he criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite." He believed that authoritative punishment of criminals was a desirable institution because it provided an orderly outlet for emotions that would otherwise express themselves in socially less acceptable ways. If the state did nothing about punishing an offender, the natural and potentially destructive feelings of resentment aroused in victims of the offence or other interested parties would no doubt result in attempts at private vengeance.

Experience with vigilante groups illustrates that private vengeance is carried on by the commission of further crimes against person and property and is rarely calibrated to the actual situation and motivation of the offender. Thus state-institutionalized punishment, while in one sense satisfies the Talmudic maxim "an eye for an eye", also eliminates the practice of "ten eyes for one eye."<sup>81</sup> Moreover, it provides the occasion for society to achieve other objectives of punishment, in particular the reaffirmation of the values underlying the criminal law through the "morality-play" of accusation, trial, conviction and condemnation through the application of sanctions, which, as we noted earlier, was the primary influence governing the majority's decision to exercise restraint rather than pursue self-

<sup>81</sup> *Supra*, note 6, at 66-7, as discussed in Weiler, *id.*, at 133-34. See also A. Von Hirsh, *supra*, note 11, at 52.

interest through criminal behavior. In addition, this officially sponsored channel of retaliation serves to reassure the law-abiding that this sacrifice is not in vain.<sup>32</sup> It stands as visible evidence that the state will not countenance criminal behavior of some citizens at the expense of others, but rather will perform the guarantee it has made to protect those who obey its laws. Together with the moral acceptability of the substance of laws this is a key factor in public acceptance of the authority of a legal system.

'Sanctions' are therefore required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall.<sup>33</sup>

In summary, the instance of criminal behavior evokes a variety of public reactions. We may feel indignation and resentment towards the offender who is flouting community endorsed standards of conduct, as well as uneasiness about the fragility of the social bond, which is based on the reliance that our neighbours will exercise self-restraint. The morality play of punishment of the offender reinforces community standards of behavior and publicizes the message that "crime doesn't pay". At the same time authoritative punishment repairs the wound to the social fabric by reassuring the general public that the state is willing and able to react effectively to the crime problem, so their willingness to abide by the law continues to be a good bet.<sup>34</sup>

The criminal law thus responds to the natural urge for vengeance by sublimating it into a constructive role. The primal urge to retaliate, which has traditionally been one of the most criticized elements in the retributionist case for punishment turns out to be not only utilitarian in its ethical underpinning, but reductionist in its strategic impact.<sup>35</sup> But the point is, that the way the criminal law operates is to rely on and reinforce the popular view that because the offender committed a crime, it is *right* that he should be punished. While the aim of punishment may be to reduce crime, the strategy of the criminal law includes the recognition that "crime evokes a *sense of injustice* and that the state must act in ways its supporters *feel* are

<sup>32</sup> M. Atkinson, *Punishment as Assurance* (1972) 4 UNIV. OF TASMANIA L.REV. 45.

<sup>33</sup> H. L. A. Hart, *THE CONCEPT OF LAW* (1961) 193.

<sup>34</sup> Weiler, *supra*, note 1, at 159.

<sup>35</sup> *Id.*, at 137.



just in order to preserve their morals and support."<sup>36</sup> This suggests that a theory of justification for punishment must recognize that both utilitarian and retributive factors may enter into its constitution. What is required then, is an integrated theory of punishment.

Yet the staunch utilitarian might refuse to acknowledge that there is any rational or moral content to the popular reaction to crime and might simply incorporate these natural feelings into his utilitarian scheme without seeing the necessity to grapple with concepts such as "justice" or "fairness" which underlie these actual feelings or demands of society. Admittedly, while the fundamental notion of retributive justice is the tying together of these attitudes, the question arises: "are there really any principles of justice which underlie our *sense* of justice, which give it moral content independent of any future good or evil? Can retributive justice conflict with utilitarianism in such a manner that the latter must give way?"

#### D. THE MEANING OF RETRIBUTIVE JUSTICE — A CONCEPT WHOSE TIME HAS ARRIVED?

Up to this point, we have been analyzing general philosophical arguments on whether or why members of society might want a system of criminal punishment. But the crux of the moral dilemma of punishment is the problem of distribution, *i.e.* choice of victims and quantum of criminal sanctions. The retributive view of punishment has received renewed vitality from modern theorists primarily concerned with the problem of fairness in the distribution rather than the justifying aim of punishment. Yet the theoretical background for this renewed concern is the same, the notion of justice.

The utilitarian and retributive theories of punishment, since they stem from different philosophical backgrounds (utility as opposed to justice), may reach different concrete results in their application to given situations. The utilitarian is concerned only to achieve the greatest "good" or "pleasure" or "satisfaction" within the community. While the claims of the offender enter into his calculus, the actual distribution of the total pleasures and pains among the law-abiding or law-breakers has no independent value for him, except insofar as it contributes to the whole.<sup>37</sup> For the retributivist, on the other hand, the purpose of criminal punishment is to inflict *deserved* suffering for the commission of an *offence*. Only in these circum-

<sup>36</sup> *Id.*

<sup>37</sup> Gardner, *supra*, note 11, at 796.

stances will it be *just* to punish that person, apart from any utility that such punishment would produce. To be more specific, utilitarian considerations are simply not addressed in the retributivist analysis. For the retributivist, the expression of public condemnation to crime through the imposition of punishment by the state is valid not solely because it may sublimate public aggression or prevent lynchings. Rather the concern is "backward-looking"; the effort is to do "justice" by giving the offender what he "deserves" in reference to his past conduct. As Kant once cautioned:

Juridical punishment can never be administered merely as a means for promoting another Good either with regard to the Criminal himself or to Civil Society, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a Crime*. For one man ought never to be dealt with merely as a means subservient to the purpose of another . . . woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment, or even from the due measure of it. . . .<sup>38</sup>

The classic retributivist theory provides that criminal responsibility is not only a *necessary* condition which permits society to inflict punishment for utilitarian gains but is a *sufficient* condition that *obligates* society to punish. In other words, not only is punishment of the guilty permissible, it is required if justice is to be done. Witness Kant's famous example:

Even if a Civil Society resolved to dissolve itself with the consent of all its members — as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves throughout the whole world — the last Murderer lying in prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds.<sup>39</sup>

The leading members of the recent revival of the retributive theory of punishment do not agree with the second tenet of the classic retributivist theory.<sup>40</sup> They exclude retribution as a "general

<sup>38</sup> I. Kant, *THE PHILOSOPHY OF LAW* (1887) 195.

<sup>39</sup> *Id.*, at 198.

<sup>40</sup> I would consider H. L. A. Hart and H. L. Packer to be the most influential members of this revival. For a discussion of their views on the *limited* role of retribution in a theory of punishment see Hart, *PUNISHMENT AND RESPONSIBILITY* (1968) 8-13; H. L. Packer, *supra*, note 5, at 66-7. Other members of the retributivist revival, more properly called "neo-retributivist" are more closely aligned with Kant and Hegel in adhering to the role of retributivism in "a" or "the" justifying aim of punishment. See Weiler, *supra*, note 1 and Morris, *supra*, note 11; K. G. Armstrong, *The Retributivist Hits Back*, in *THE PHILOSOPHY OF PUNISHMENT* (H. Acton ed. 1969) 138; and J. Kleinig, *PUNISHMENT AND DESERT* (1973).

justifying aim" (to use H. L. A. Hart's terminology) of punishment (which they reserve for utilitarianism) and limit its application to the distribution of punishment. Professor Packer expresses this position in these two principles:

- (1) It is necessary but not a sufficient condition for punishment that it is designed to prevent the commission of offences.
- (2) It is a necessary but not a sufficient condition of punishment that the person on whom it is imposed is found to have committed an offense under circumstances that permit his conduct to be characterized as blameworthy.<sup>41</sup>

Both the "pure" classic and the Hart-Packer "mixed" version of retributivist theory would place an independent value on the *right* of an individual to equal treatment from the law. This value is expressed in principles of justice which operate to limit the pursuit of utilitarian gains. The difficult moral issue for the retributivist is how can the state in the name of justice inflict punishment on an offender when to do so is to require that person to shoulder an *unequal* share of the pains that are required to support a system of criminal punishment? The answer to this question lies in the recognition that justice does not require total equality, but instead permits inequalities "if they contribute to the well-being of those who are worst off and if the positions to which they are attached are open to all."<sup>42</sup>

The retributivist conceives of the criminal law as consisting essentially of a set of rules which define and protect a zone of freedom for each member of society. Violation of these rules amounts to an unlawful invasion into the sphere of interest of a neighbour. He has gained an unfair advantage over the law-abiding members of society who have exercised self-restraint. He has become unjustly enriched since he has benefitted from his neighbour's forbearance in not interfering with his "zone of freedom". The offender has thereby advanced his own interest but only at the expense of his neighbour whom he has used as a means to his end. If the offender has had a fair opportunity to avoid the harms threatened by the criminal law then he can fairly be said to have "forfeited his immunity from criminal punishment." He cannot complain of an arbitrary denial of his rights when society now decides to use him as a means to advance the utilitarian objectives of criminal punishment, for he has

<sup>41</sup> Packer, *supra*, note 5, at 62.

<sup>42</sup> Weiler, *supra*, note 1, at 141; see also, Hart, *supra*, note 40, at 244; and J. Rawls, *A THEORY OF JUSTICE* (1971).

singled himself out as the proper candidate for the distribution of punishment.<sup>43</sup>

Within the Hart-Packer theory of punishment the retributive rationale stops here. The offender “deserves” punishment only in the sense that he has “removed the moral roadblock” to the infliction of that punishment by the state. While the natural corollary of the conception of just distribution (limiting the quantum of punishment) also fits into their theory, they believe that the decision whether to punish the offender must be made exclusively on utilitarian grounds. Since punishment is *prima facie* evil, some greater good must result from its imposition. In this manner, Hart and Packer incorporate both utilitarianism and retribution into a “mixed” or “integrated” theory of punishment by having each respond to different fundamental issues (to use Hart’s terms) — the “general aim” and the “distribution” of punishment.<sup>44</sup>

This limited use of the retributive rationale for punishment, while an improvement on the myopic perspective of the strict utilitarian, leaves some modern theorists with the uneasy feeling that the exclusion of retribution from *any* role in the “justifying aim” is an illogical and therefore unwarranted restriction on the scope of its application. H. L. A. Hart rejected retribution as a “justifying aim” because he could not understand the “mysterious piece of moral alchemy in which the combination of the two evils of moral wickedness and suffering are transmuted into good.”<sup>45</sup> But the modern retributivists are not content to leave unresolved the challenge that the theory poses to the exclusive domain of utilitarianism on the question of the justifying aim. As Professor Paul Weiler mused:

If we hold that punishment without an offence is unjust because it is not deserved, this must be by virtue of a rationale which shows why punishment which does follow an offence and which is deserved is just. But if to punish someone who does not deserve it is unjust, then why is not the failure to punish someone who has committed an offence equally unjust?<sup>46</sup>

The retributivist, as we mentioned earlier, views the criminal law as defining a zone of freedom for each citizen. This zone of freedom involves both the benefits of noninterference by others with what that citizen values, as well as the burden of self-restraint over that

<sup>43</sup> Weiler, *id.*, at 142.

<sup>44</sup> Weiler, *id.*, at 145.

<sup>45</sup> Hart, *supra*, note 40, at 234-35.

<sup>46</sup> Weiler, *supra*, note 1, at 145.

person's inclinations which would, if satisfied, directly interfere or create a risk of interference with others in proscribed ways. According to this model, when a person commits a crime he has renounced the burden which others have voluntarily assumed and thus gains an advantage which others who have restrained themselves do not possess.<sup>47</sup>

To punish publically the violators of these zones of freedom for their behavior is both reasonable and just in the opinion of the retributivist. For it is only reasonable that those who exercise self-restraint will be provided with some assurance that they are not assuming burdens which others can renounce with impunity, else the fabric of social life will dissipate with the decline of the sense of mutual trust. Fairness dictates that a system in which benefits and burdens are to be equally distributed, have a mechanism to prevent maldistribution or restore the "equilibrium". This mechanism is the criminal justice system. And, it is just to punish those who have caused an unfair distribution of benefits and burdens through their lack of self-restraint, for they have acquired an unfair advantage.

Matters are not even until this advantage is in some way erased. Another way of putting it is that he owes something to others, for he has something that does not rightfully belong to him. Justice — that is punishing such individuals — restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt.<sup>48</sup>

A corollary of this retributive view of the criminal justice system is that provision must be made for a variety of *mens rea* defences. The principle of *mens rea* is designed to absolve a person from criminal liability in the absence of subjective culpability. Or stated another way, a person who causes proscribed harms or takes unlawful risks may from an objective standpoint be said to have infringed on the zone of freedom of another and thereby selected himself as a candidate for an official "resetting of the balance" through the imposition of criminal punishment. Yet in circumstances where the accused could not have restrained himself or where it is unreasonable to expect him to behave otherwise he cannot properly be said to have taken an unfair advantage of his neighbour warranting criminal punishment.<sup>49</sup> Crucial to the retributive position is that the state has a moral license to punish the offender, since the latter has in one

<sup>47</sup> Morris, *supra*, note 11, at 477.

<sup>48</sup> *Id.*, at 478.

<sup>49</sup> *Id.*

sense rationally willed or chosen to be punished through his voluntary taking of an unfair advantage over his neighbour. This rationale does not hold water unless the offender can be properly described as having wilfully and purposefully infringed the zone of freedom of his neighbour thereby acquiring a disproportionate advantage. The role of the *mens rea* defence, then, is to insure that the offender's behavior is indeed morally culpable or blameworthy and thus deserving of punishment.<sup>50</sup>

The retributivist urge is not simply an intuitive moral sense but is based on a quasi-contractual theory of political obligation based on reciprocity. If the law is to remain just, it must serve to prevent some people from taking unfair advantage of others. The core of the retributive argument (which illuminates, rather than submerges our intuitive judgments), is that to maintain a just society, it is important that no man profit from his own criminal wrongdoing. It is assumed that a certain kind of "profit" (*i.e.*, not bearing the burden of self-restraint) is intrinsic to criminal wrongdoing. Thus once an offender has "prospered" by acting illegally, *i.e.* by taking advantage of a situation where others have restrained themselves, the state has an *obligation* to take away this "illegitimate windfall profit" from the offender, and thereby restore the proper balance between benefit and obedience. For these reasons, its proponents argue that retribution properly considered, can be "a" or even "the" justifying aim of punishment. For if it is unfair to arbitrarily deprive a citizen of his rights in order to secure a net social advantage in which he may or may not participate, by the same token it is unfair to allow an offender to retain the extra, illegitimate advantage that he has obtained by deliberately infringing upon the rights of his neighbour.<sup>51</sup>

The Kantian or "pure" retributive theory posed retribution as "the" justifying aim of punishment. Under this view the state *must* punish the offender to achieve the proper balance (to allow him to repay his debt to his neighbour). The Hart-Packer "mixed" retributive theory of punishment suggests that retribution tells us only that we *may* punish.<sup>52</sup> Yet it is possible to take the middle road between

<sup>50</sup> Application of a thorough going theory of desert would thus require considerable discretion and individualized penalties selected in each case to fit the offender's uniquely personal guilt and vulnerability. Fixed penalties for various crimes would seem to be inconsistent with a desert-oriented system. Gardner, *supra*, note 11, at 805.

<sup>51</sup> Weiler, *supra*, note 1, at 168-71; See also A. Von Hirsh, *supra*, note 11, at 66-76.

<sup>52</sup> Or to be more specific the "mixed" theory of punishment tells us *who* we *may* punish, and what quantum of punishment is fair.

these two retributive camps and argue that the retributive concern for justice says that we *should* punish.<sup>53</sup> According to this theory, it is not inconsistent or illogical to argue that retribution, while not “*the*” justifying aim of punishment, is “*a*” justifying aim. Rather than dismiss the retributive urge as merely an irrational feeling which the administrators of the criminal law must tolerate and manipulate for utilitarian ends, it is preferable to frankly recognize the popular sense of justice as not only the emotive source of the subtler versions of general prevention that we discussed earlier, but also as the basis for a complex intellectual view of the social world.

While it is fair to say that the “general aim” of the *enactment* of criminal law is clearly utilitarian, there is an extra dimension to the justification of criminal punishment. A crucial aim of punishment is to restore the equilibrium of benefits and burdens that the criminal law is designed to define and maintain. As one theorist concluded:

We should make that an aim of the criminal sanction not simply because it may help produce a more secure and happier society (though we may do so for that reason as well). We do so as well because it may help produce a more just society. . . .<sup>54</sup>

In this sense, retribution can properly be said to be “*a*” justifying aim of criminal punishment for a just society is an end in itself. While there may always be sufficient utilitarian reasons for the imposition of punishment, that is no sufficient reason to deny or ignore the demands of retributive justice. Simply because we can approach the dilemma of the justification for punishment by asking the question “will punishment make members of society happier?”, this does not render irrelevant the question “is it fair that society may punish?”

## E. THE IMPLICATIONS OF A RETRIBUTIVE THEORY OF PUNISHMENT

Assuming that the foregoing argument in favor of retribution as “*a*” justifying aim of punishment is convincing, we are still left with two fundamental problems — one strikes at the retributivist view of the human condition, the other asks how can utility and justice live together comfortably as justifying aims of criminal punishment.

The first challenge to the retributive position may admit that

<sup>53</sup> Weiler, *supra*, note 1, at 148.

<sup>54</sup> Weiler, *id.*, at 151.

retribution is the only morally defensible theory of punishment yet social conditions that exist in modern society render this theory inapplicable. Moreover, according to the Marxist theorists, if retributivism were to be adopted in modern Western society, it would function in such a way as to provide a "transcendental sanction" for the status quo.<sup>55</sup> According to this critique, the retributivist theory really presupposes the existence of what might be called a "gentlemen's club" picture of the relation between members of our society, *i.e.* men are viewed as being part of a community of shared values and rules which benefit all and thereby exact from each beneficiary a debt of obedience. This picture of the human condition and the function of criminal law might accurately describe certain types of crimes (*e.g.*, corporate tax fraud) but to suggest that it applies to the typical criminal from the poorer classes is to "live in a world of social and political fantasy."<sup>56</sup> On the contrary:

Criminals typically are not members of a shared community of values with their jailers; they suffer from what Marx calls alienation. And they certainly would be hard-pressed to name the benefits for which they are supposed to owe obedience. If justice, as both Kant and Rawls suggest, is based on reciprocity, it is hard to see what these persons are supposed to reciprocate for.<sup>57</sup>

In essence, the Marxist critic of the retributivist theory can point to an urban slum area and suggest that the inhabitants should more aptly be described as the victims of a society of lawlessness rather than the beneficiaries of a just legal system.

It can be seriously doubted whether a ghetto youth resorting to bank robbery really gains an "advantage" over the law abiding members of a society whose overwhelming majority are more "advantaged" than he before the robbery. Perhaps it is the *robbery* and not its punishment which has the greater tendency to effect "equilibrium."<sup>58</sup>

Yet this Marxist critique of retributivism would seem to apply only to those offences involving property, not infringements on personal bodily security. No doubt there is excessive and unfair disparity of distribution of material wealth in our society, and the criminal law serves to protect this unequal distribution. How then can one justify punishing an impoverished thief who steals from wealthy members

<sup>55</sup> See generally, J. Murphy, *Marxism and Retribution* (1973) 2 PHILOSOPHY AND PUBLIC AFFAIRS 217.

<sup>56</sup> *Id.*, at 240.

<sup>57</sup> *Id.*

<sup>58</sup> Gardner, *supra*, note 11, at 804.



of society? There is no question that the thief has committed a crime and is legally liable to criminal sanctions. Yet to punish this offender may only aggregate an existing injustice and inequality in society. When this issue is put squarely to the retributionist, he must answer that punishment in this situation is unjust and thereby also unjustified. But "that implication is no argument against retribution; indeed it should be a primary source of the theory's appeal."<sup>59</sup> For retributivism, in answer to the Marxist fear, need not breed moral complacency, need not be a transcendental sanction of the rules of society as they currently exist. In other words, the impact of retributive analysis is felt not only at the sentencing stage but all through the criminal justice system. The implications of retributive theory require that the lawmakers review the content of our criminal prescriptions in order to assess whether the criminal sanction contributes to or protects an unjustified distribution of wealth and/or a denial of social opportunities. Retributive theory may be an important factor in the exercise of discretion by those entrusted with the investigation and prosecution of the criminal law. While it is true that the criminal law is a crude instrument in the pursuit of justice, this is not a sufficient reason why the enactment and administration of criminal law should ignore that objective.

The point of a retributive theory of justification is to bring that question out into the open and to put it at the forefront of the enquiry. Properly understood it does not entail moral complacency; it should be morally subversive of the existing criminal law system.<sup>60</sup>

While the retributive theory of punishment may serve to assist in the reform of society by providing a new factor to be considered in the enactment and administration of the criminal law, it is not "self-sufficient"; there are other considerations to take into account. "A

<sup>59</sup> Weiler, *supra*, note 1, at 153. I do not mean to suggest that the "disadvantaged" offender must in all these circumstances completely escape the criminal sanction. While not as culpable as non-disadvantaged offenders, a socially deprived offender may nevertheless pose significant danger to society. Hence it is unlikely that he will be allowed to "roam freely". Yet this does not detract from the retributive justification for punishment but merely supports the need for an integrated or mixed theory along the lines suggested by Professors Hart and Packer. It may also serve to highlight the deficiencies of our current sentencing options and serve as a catalyst to develop non-criminal modes of control to deal with socially deprived offenders. Restitution of the loss to the victim through diversion programs may be a more fitting manner of restoring equilibrium than the kinds of sanctions currently employed in our criminal justice system. See generally, Hogarth, *supra*, note 1, at 35-81. As Professor Morris cautioned: "The criminal law must keep its retributive promises, although it need not be precipitous in moving to its heavy weaponry." *Supra*, note 11, 72 MICH. L.REV. 1161, at 1176.

<sup>60</sup> Weiler, *id.*

criminal law must be effective and economic, as well as fair."<sup>61</sup> Since we agree that our criminal law must respond to these potentially conflicting goals, it is submitted that retribution should be only *one* of the justifying aims of punishment.

The retributive analysis of punishment doesn't simplify the problems of justification. On the contrary, it adds a new value to the utilitarian concerns and thus further complicates the issue. The retributive analysis asks new questions and provides no ready answers to the problems of "real world" application of its dictates. It challenges the judge and legislator to examine these real life contexts and to determine which reason, retributive or utilitarian, is significant, and to establish some set of priorities for adjudicating between them when they conflict. What the retributivist entreats us to recognize as the first and ultimately over-riding question in the justification of punishment is not whether the measure will be effective but rather whether it will be just. Even where the utilitarian interests outweigh conflicting retributive concerns, the morally sensitive man who opts for utility will have to regretfully realize that he is sacrificing an important principle.

<sup>61</sup> Weiler, *id.*, at 154.