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ESSAY

THE PARADOX OF PUNISHMENT

PAUL CAMPOS*

Retribution demands reciprocity. In this Essay, Professor Campos contends that classic retributive theory encounters a logical paradox when it attempts to equalize the status of criminal and victim through the institution of punishment. This paradox arises out of a clash between the deontological requirements of equality and justice. He concludes by speculating on the historical relationship between rationalist justifications for vengeance and the elimination of punishment as public spectacle.

My aim in this Essay is to clarify, and then to criticize, the concept of punishment. I will begin by covering some well-worn ground for the purpose of establishing definitional clarity; I will then discuss what I believe to be a fundamental paradox at the core of modern theories of retribution. This paradox suggests that contemporary societies still lack a coherent deontological justification for the social practices that go by the name of punishment.

Most people who have any acquaintance with the subject are aware that arguments about punishment tend to devolve into two broad camps: the retributive and the consequentialist.¹ The retributive view is founded on the idea of desert—we punish the criminal because the blameworthiness he has incurred through his actions makes it morally fitting (perhaps imperative) that we do so. The consequentialist position is essentially utilitarian: Punishment is justifiable to the extent that the good results that flow from it (primarily deterring future violations of the law) outweigh the evil consequences that result from inflicting pain on the individuals who are punished.

Now it can be seen that, strictly speaking, the retributivist and the utilitarian are defending two distinct practices, for which each uses the term “punishment.” This point is illustrated by comparing a boarding school with a minimum security prison. To the proverbial observer from Mars, these institutions might seem essentially identical. The inmates of both establishments have their freedom of movement restricted by a set

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1. A third view—that the purpose of punishment is to rehabilitate the offender—is usually considered a subclass within the utilitarian sphere. It can, however, be conceptualized as a necessary attribute of retribution, properly understood. See *infra* note 13 and accompanying text.

of coercive rules, and their day-to-day itinerary is likewise subject to a routine that is mostly decided for them. And a utilitarian would agree, while a retributivist would deny, that in an important sense the school and the prison *are* alike. The utilitarian would characterize the involuntary confinement associated with both institutions as an unfortunate incursion on individual freedom necessary for the collective good.

Retributivists would resist this sort of equivalence. For them, the core distinction between prisons and other institutions of involuntary confinement (such as schools, military bases, mental hospitals, etc.) is captured by the fact that prisoners cannot be confined *as prisoners* for the purpose of social utility. Their confinement, in the eyes of the retributivist, can only be justified by what H.L.A. Hart has called the "mysterious moral alchemy" of desert. Retributivists can therefore make a claim that is unavailable to utilitarians: They may point to this fundamental qualitative distinction between punishment and other social practices that superficially resemble punishment.

These points are worth emphasizing for the sake of terminological clarity. Although retributivists and utilitarians both speak of justifying "punishment," it would be more accurate to translate that term as, respectively, "suffering imposed by the state on the blameworthy" and "one of many types of coercive social engineering." My comments here are directed at the former institution.

Modern retributive theory generally derives from the foundations laid down by Kant and Hegel nearly 200 years ago. Kant argued that when a rational person acts in a particular fashion toward other persons, he implicitly authorizes those persons to treat him in a similar manner.² According to Kant, the essential nature of reason is that reasoned action assumes *reciprocity* of action on the part of other reasonable beings. It follows that to treat a person as he has treated others is simply to accord him the respect that is due a person whose choices are rationally willed.³ As Herbert Morris pointed out in his celebrated essay "Persons and Punishment,"⁴ such an account of rational personhood leads to the conclusion that in some sense, a criminal has a *right* to be punished. That is, only through inflicting on criminals the pain that they have chosen to inflict on others can we properly acknowledge the freedom of their rational choice, and hence their personhood.

2. "[A]ny undeserved evil that you inflict on someone else among the people is one that you do to yourself. If you vilify him, you vilify yourself; if you steal from him, you steal from yourself; if you kill him, you kill yourself." IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 101 (John Ladd trans., 1965).

3. *Id.* at 102.

4. Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475-94 (1968).

Hegel approached the same question from the opposite direction, from the perspective of the criminal's victim. For Hegel, the purpose of punishment is to restore the proper relation of equality between sovereign persons whom the criminal's act had destroyed. Because the criminal had intentionally willed injury to the victim in an unjustified manner, justice requires that this injury be annulled or cancelled out by intentionally inflicting a similar injury on the criminal:

Hence, to injure (or penalize) this particular [criminal's] will as a will determinately existent is to annul the crime, which otherwise would have been held valid, and to restore the right.⁵

Hegel saw the unpunished criminal as standing in an unjust position of superiority to the criminal's victim. By punishing the criminal, the state (as the victim's representative) humbles the criminal's will to the same degree that the criminal exalted his will over that of his victim. The proper equality of persons is thereby restored.

We can see that the equality of persons is crucial to both Kant's and Hegel's view of punishment. Retribution works by eliminating the imbalance between persons that the criminal act has created. It does so by means of a theory of *reciprocal suffering*: We give to the criminal what he has given to his victim(s) in order to restore all parties to an equal moral status. This idea of punishment as reciprocity remains the central feature of modern retributive theory:

To inflict on a wrongdoer something comparable to what he inflicted on the victim is to master him in the way that he mastered the victim. The score is even. Whatever mastery he can claim, she can also claim. If her victimization is taken as evidence of her inferiority relative to the wrongdoer, then his defeat at her hands negates that evidence. Hence the *lex talionis* calls for a wrongdoer to be subjugated in a way that symbolizes his being the victim's equal.⁶

5. GEORG W.F. HEGEL, *THE PHILOSOPHY OF RIGHT* 69 (T.M. Knox trans., 1962).

6. Jean Hampton, *The Retributive Idea*, in *FORGIVENESS AND MERCY* 128 (1988). Attempts are sometimes made (usually by non-retributivists) to characterize retribution in such a way as to minimize or eliminate the role of reciprocity in a retributive scheme of punishment. See, e.g., H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in *PUNISHMENT AND RESPONSIBILITY* 1 (1968) and John Rawls, *Two Concepts of Rules*, in *64 THE PHILOSOPHICAL REVIEW* 3 (1955). As ingenious as their arguments undeniably are, these authors seem so fundamentally opposed to the retributive view that they can attempt to rehabilitate retributivism only by eviscerating it. For example, Rawls gives us

Many difficulties have been noted with this concept of punishment. Kant pointed out that since we must punish intentions rather than acts, the punisher must acquire information that is, strictly speaking, unavailable:

In and through experience we can observe actions contrary to law, and we can observe (at least in ourselves) that they are performed in the consciousness that they are unlawful; but a man's maxims, sometimes even his own, are not thus observable; consequently the judgment that the agent is an evil man cannot be made with certainty if grounded on experience.⁷

Kant also questioned whether human beings (who are always morally flawed) have the necessary moral status to punish other wrongdoers.⁸

Hegel puzzled over how we could inflict a properly reciprocal punishment on someone who lacked the necessary attributes for such punishment. For instance, how could one justly punish a blind man who blinded others.⁹ Retributive theorists still struggle with similar questions. How, they ask, can one know with sufficient certainty how much punishment is called for in a particular case, in order to achieve the reciprocal effect that justice demands? And how can we adequately punish crimes that are so heinous that they either literally exhaust our capacities for reciprocity, or for which the proper punishment would be so terrible that it would in some way demean the dignity of the punisher if carried out?

These are difficult questions, and I do not propose to try to answer any of them. Instead, I will suggest the following thought experiment. Suppose that all these concerns about retribution have been successfully answered. Imagine that we have perfect information regarding the criminal's past and present psychological state, and that we are equally certain what sort of punishment will replicate the suffering of the criminal's victim. Imagine further that our retributive techniques have become sufficiently advanced so as to allow us to always inflict the

a succinct definition of retribution which inadvertently indicates that he considers the whole idea rather absurd: "Does a person who advocates the retributive view necessarily advocate, as an *institution*, legal machinery whose essential purpose is to set up and preserve a correspondence between moral turpitude and suffering? Surely not." *Id.* at 7. Unfortunately for Rawls, this is *exactly* what retributivists advocate. The idea of reciprocity cannot be removed from a retributive theory without the loss of retribution's foundational features.

7. IMMANUEL KANT, *RELIGION WITHIN THE LIMITS OF REASON ALONE* 16 (Theodore M. Greene & Hoyt H. Hudson trans., 1960).

8. IMMANUEL KANT, *Universal Practical Philosophy*, in *LECTURES ON ETHICS* 55, 67-68 (1978).

9. See generally HEGEL, *supra* note 5.

necessary quantum of suffering upon the offender, and that our choice to undertake this particular infliction of pain has been rendered morally unproblematic.

I contend that even under such conditions it would still be impossible to go forward with the practice of retributive punishment in a coherent fashion. This is because any theory of retribution that depends on the idea of reciprocity remains fundamentally paradoxical.

A powerful evocation of this paradox is presented in Tadeusz Borowski's story, "The People Who Walked On." Borowski was imprisoned in Auschwitz and Dachau from 1943 to 1945. He drew upon his experiences to write a series of stories that explore, among other things, the concept of punishment in light of the world of radical evil that was the Nazi concentration camp. The following interchange takes place between the narrator, who is a relatively "privileged" inmate (he is a political prisoner and a non-Jew, and will therefore escape the gas chamber as long as he remains healthy enough to work), and a Block Elder, a woman in charge of a barracks of female prisoners, all of whom are scheduled for eventual extermination.

"But if a man does evil, he'll be punished, won't he?"

"I suppose so, unless there are some criteria of justice other than the man-made criteria. You know . . . the kind that explain causes and motivations, and erase guilt by making it appear insignificant in the light of the overall harmony of the universe. Can a crime committed on one level be punishable on a different one?"

"But I mean in a normal, human sense!" she exclaimed.

"It ought to be punished. No question about it . . ."

"But do you think that they," she pointed with her chin in an indefinite direction, "can go unpunished?"

"I think that for those who have suffered unjustly, justice alone is not enough. They want the guilty to suffer unjustly too. Only this will they understand as justice."

"You're a pretty smart fellow! But you wouldn't have the slightest idea how to divide bread justly, without giving more to your own mistress!" she said bitterly . . .¹⁰

The woman asks a seemingly simple question: Will her tormentors be punished? The man tries to answer by retreating into a world of lofty

10. TADEUSZ BOROWSKI, *The People Who Walked On*, in *THIS WAY FOR THE GAS, LADIES AND GENTLEMEN* 90-91 (Barbara Vedder trans., 1976).

abstractions, but is pulled back by the woman's insistence—"I mean in a normal, human sense!" He then makes an extremely astute observation about what the psychology of retribution, and the concept of punishment "in a normal, human sense," may actually demand. It is this demand that creates the paradox of punishment.

Retributive punishment demands a reciprocity of suffering. Let us explore the implications of this idea in light of a concrete example. Suppose Smith assaults Jones and robs him of \$100. How should we, in Kantian terms, punish Smith so as to give to him what he gave to Jones; or, as Hegel would have it, what punishment will inflict on Smith the suffering necessary to annul his crime and once more place him in a position of equality with his victim? According to the terms of our thought experiment, we can know with exactitude how much Jones has suffered from the assault—what it has and will cost him in both purely economic and broadly emotional terms¹¹—and we also know everything about Smith's psychological state with respect to the crime. We can therefore calculate Smith's guilt with ideal accuracy, and thereby determine (at least in theory) what sort of suffering will equalize the situation between the criminal and his victim.

Let us say that Jones has incurred fifty units of suffering as a result of Smith's actions, and that Smith is fully responsible for having caused this suffering. Let us further stipulate that three months of imprisonment will cause Smith himself to incur fifty units of suffering. Does sending Smith to jail for three months properly balance the scales between offender and victim? Jones could well argue that such a punishment is not truly reciprocal.

If Jones undergoes surgery for a life-threatening illness, the surgeon who performs the operation might inflict considerably more suffering on Jones than Smith's attack caused. The surgeon may cause Jones much greater physical and emotional pain, and she will probably relieve him of more than \$100. Nevertheless, no retributivist would argue that the surgeon should therefore be punished. As Kant pointed out, punishment is directed at the wrongdoer's evil intentions as they are manifested in his actions, not at the actions themselves. The retributivist demands that we punish those who *wrongfully* inflict suffering, not those who inflict suffering *per se*.

Now, does the infliction of a reciprocal amount of suffering on Smith more closely resemble the kind of pain Jones endured on Smith's account,

11. The analysis of this situation would remain essentially unchanged if we were to further stipulate that Smith's crime harmed not just Jones, but society as well. Such an assumption would no doubt incline us to increase the suffering visited on Smith, but it would not alter the question of whether this increased suffering represented a sufficient or excessive punishment of the criminal.

or is it more like the pain Jones receives at the hands of the surgeon? Let us stipulate for clarity's sake that the amount of suffering endured by the sufferer in all three cases (Jones as victim, Jones as patient, Smith as prisoner) is quantitatively equivalent to what we have called fifty units of suffering. Jones could plausibly claim that it is more like the pain associated with the surgery. It is, if the retributive account of punishment is right, a *justified* infliction of pain on the sufferer. Afterwards, Smith will have no more grounds to complain against the jailer than Jones has against the surgeon. Indeed, Kant's and Hegel's accounts of punishment suggest that a rational criminal should be grateful to the state for having inflicted such suffering, just as Jones should properly be grateful to his surgeon. For Kant, punishing the criminal accords him the respect due a rational being. As Morris's essay memorably illustrates, intentionally refusing to punish (or forgive) the lawbreaker casts the criminal out of the sphere of equal citizens and lowers him to the status of those who are less than full persons, such as infants, lunatics, and others whom we condescend to pity.¹²

Hegel's whole philosophy emphasizes the emptiness of an individual's existence outside the legitimating structures provided by the state. His thought embodies Cicero's belief that "a man without a country is a corpse without a grave." Punishment restores the right relation of equality between criminal and victim, and thereby benefits both persons by reintegrating them into their proper roles within a just state. Punishment allows the former criminal to regain his place within that social order which alone makes his life worth living; it is therefore no exaggeration to say that, for both Kant and Hegel, the unpunished criminal who correctly understood his situation would *demand to be punished*.¹³

We can begin to see why Jones may claim that the infliction of an equal amount of suffering on Smith would not represent a properly reciprocal punishment. For although the quantity of the pain that Smith would endure would be equivalent to that suffered by Jones at Smith's hands, the quality of that pain would be altogether different. The suffering Jones endured stung all the more because it was wrongfully inflicted; no one can doubt that the pain derived from the surgeon's actions was much easier to bear. Furthermore, Smith's suffering, like

12. "The common law has recognized certain classes of persons who may be kept in pupillage, viz. infants, lunatics, married women; but it has held that sane grown men must look out for themselves . . ." JOHN C. GRAY, *RESTRAINTS ON THE ALIENATION OF PROPERTY* 243 (2d ed. 1895).

13. This suggests that the contrasts drawn by Herbert Morris and others between *therapy* and *punishment* may be overstated. See Morris, *supra* note 4; KARL MENNINGER, *THE CRIME OF PUNISHMENT* (1968).

Jones's surgical discomforts, results in a positive benefit to the sufferer. Conversely, the pain endured by the victim of the criminal act will always be an unmitigated evil that can perhaps be annulled, but never erased.

How can retributivists deal with this incongruity? If the reciprocity problem arises because of a *qualitative* difference between the suffering of the victim and that of the criminal, it seems that the solution must involve the eradication of this difference. This transformation of the punishment might take place along either of two paths: by an indirect method, involving a quantitative increase in the criminal's suffering, or by a direct route, whereby the same quantum of pain is altered so as to make it more congruent with the victim's experience.

If we were to follow the first path, how would we proceed? Returning to our example, suppose we double the suffering imposed on Smith in an attempt to make the punishment a true reciprocation of what Smith inflicted on Jones. Can this "surplus" of pain solve the equalization dilemma? I think we can see that such a solution only exacerbates the paradox at the heart of desert-based theories of punishment. Clearly, the intentional causation of pain in and of itself does not constitute *grounds* for punishment; neither is such an infliction necessarily an *imposition* of punishment. After all, the surgery Jones endures might result in the same (or a greater) surplus of pain, in relation to the crime, as that pain which we are now imposing on the criminal in our attempt to achieve a qualitative equality of suffering. The critical issue remains the same: How do we characterize this surplus?

It seems that if the extra fifty units of pain inflicted on Smith are justified by the demands of retribution, then we have made no progress toward achieving qualitative reciprocity between the experiences of Smith and Jones. The suffering Smith endures remains irreducibly distinct from the wrongful harm he inflicted on Jones; furthermore, the surplus acts like a surgeon's scalpel that cuts deep enough to cure, for it is, on this view, precisely this surplus that bestows the ultimate retributive benefit of social reintegration on the criminal.

If, on the other hand, the surplus pain visited on Smith is deemed to be *unjustified* in relation to the misfortune he inflicted on Jones, the qualitative distinction between the sufferings of the criminal and the victim is eliminated and the problem of retributive reciprocity is solved, but at considerable cost. From a retributive point of view, such a solution can only create an Aeschylean cycle of crime and punishment in which victim and victimizer continually change roles in a protean drama of unending vengeance. To properly put the criminal in the place of his victim would seem to require that radical reversal of roles which Borowski's narrator so acutely identified as essential to the consummation of a truly satisfactory punishment.

If we attempt to achieve the same result in a direct manner, that is, through the quality of the punishment itself rather than through a quantitative surplus, we confront essentially the same paradox. Suppose that we inflict fifty units of pain on Smith, but that we do so in a particularly humiliating fashion: We force him to stand in a public square for three days holding a sign that describes his misdeeds; or we require that he be branded with some mark of infamy for an appropriate period. If this humiliation achieves the qualitative reciprocity that retributive theory demands—if Smith really does switch places with Jones—then we again have achieved an equalization of suffering through the creation of a new victim. Indeed, we have fashioned a paradoxical mirror in which we may see a reflection of that original position in which Jones's unjustified suffering cried out for a fitting reprisal.

We now can see, I think, the paradox that lies at the heart of any theory that conceptualizes just punishment as a form of reciprocation. Such a theory must produce a punishment that is either an essentially inadequate response to the victim's suffering, or one whose rigor achieves equalization at the price of systematic circularity. Put plainly, to respond to the undeserved with the deserved is not equal, while to meet unmerited suffering with more of the same is not just. It therefore seems impossible for a retributive theory of punishment to adequately respond to both the criminal's guilt and the victim's suffering in a non-paradoxical manner.

In his eloquent and disturbing book *Discipline and Punish*, Michel Foucault traces the evolution of our modern systems of punishment.¹⁴ It is the story of a movement from an episodic theater of public cruelty, to a bureaucratized system of visible shaming (the trial) followed by an invisible punishment conceptualized as quasi-therapy (the prison). Foucault notes that this shift took place quite rapidly in Europe and America at the end of the eighteenth and the beginning of the nineteenth centuries. It replaced the old system of punishment as spectacle with a new regime of punishment as rational intervention. Although public execution continued for a time, its fundamental character was altered:

[W]hatever theatrical elements it still retained were now downgraded, as if the functions of the penal ceremony were gradually ceasing to be understood, as if this rite that "concluded the crime" was suspected of being in some undesirable way linked with it. It was as if the punishment was thought to equal, if not to exceed, in savagery the crime itself . . . to make the executioner resemble a criminal, judges,

14. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1979).

murderers, to reverse roles at the last moment, to make the tortured criminal an object of pity [I]n punishment-as-spectacle a confused horror spread from the scaffold; it enveloped both executioner and condemned; and, although it was always ready to invert the shame inflicted on the victim into pity or glory, it often turned the legal violence of the executioner into shame.¹⁵

If Foucault is correct, then the spectacle of public violence, which marked the most characteristic forms of pre-modern punishment, began to elicit in those who witnessed it the paradoxical quality of state-sponsored vengeance. It remains only to note that the modern retributive theory of punishment as reciprocal suffering was formulated by Kant and Hegel at the very same historical moment at which the embodiment of this paradox was being hidden away behind the walls of the modern prison. The contemporary discourse of retribution has seen the bloodless rationalisms of philosophers replace the ferocity of the naked scaffold, and it is perhaps no coincidence that in the course of this process the paradox of punishment has become hidden, like the criminal himself, from our view.

15. *Id.* at 9.