Punishment and Crime
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PUNISHMENT AND CRIME

Ross Harrison and R. A. Duff

I—Ross Harrison

PUNISHMENT NO CRIME

The big lie, the great false conjecture, is a potent creator of philosophy. Around us are unproblematic tables and chairs. Unproblematic, that is, until philosophy gets to work. Then we get memorable and massive simple claims such as that we might all be dreaming or that the tables are ideas in the mind of God. This is all highly unlikely. So also for punishment. It surrounds us like the tables and chairs. As social beings living in organised society under a government, our lives are controlled and bounded by punishment. Here again the philosophically memorable treatments are the large, simple, false conjectures. Perhaps, it is conjectured, the whole practice is completely unjustified. Moral judgements, it is supposed, rest on illusion, so that no social practice is justified. Or, although some practices are justified, punishment is not. Again, all highly unlikely. Most people engage in, or condone, the practice and think that it does make moral sense. Like the tables and chairs it was not problematic before the arrival of the philosophers.

So the next attempt is to produce a justification. More grand simple theories appear. Punishment, it is supposed, is right because of deterrence, or expression, or retribution, or the need to put people in touch with the good, or because it is actually the will of the criminal. Each of these when more fully examined again seems to be highly unlikely. A highly stipulative account of moral psychology is required before we discover that the normal punished criminal has actually willed his punishment. There are other ways of expressing things than with walls. A category mistake seems to be involved in the idea that the prisoner, in touch with the bars, is really in touch with the good. And the apparent absurdities of deterrence and retribution are a well-rehearsed route into a philosophical account of punishment.

After the large lies and the great philosophers come the smaller followers. Each of us hedges our bets and blends our own

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mixture from the various falsehoods. The standard method of producing an account of punishment is to show what is wrong with all the other theories. I shall not do this here, but restrict myself to examination of two accounts. One is utilitarianism. The other is the recent, striking (and anti-utilitarian) account of my co-symposiast, Antony Duff, in his book *Trials and Punishments*. With Duff, I think, we have another example of a memorable, striking error; an imaginative if false account from which a few bright threads might be woven into a more homespun if truer treatment. Or so it seems to me; Duff, of course, may have different views. We agree, however, that punishment requires justification. Punishment involves the intentional inflication of pain on others without their consent. Unless this can be specially justified, it must be wrong. If we cannot justify it we will have discovered that it is a crime against humanity, a crime which we should seek to prevent, if not of course to punish.

In utilitarianism, punishment is the device applied to men as they are to make them into men as they ought to be. Men are seekers of their own interest. What they ought to be is seekers of the general interest (the greatest happiness of the greatest number). So extra pains are artificially added to certain courses of action to make it not in their interest to engage in them. The theory is deterrent; people are deterred from such actions as rape or murder which are against the general interest by the belief that they are quite likely to hang (or whatever) if they do it. Viewed as another false simple theory, utilitarianism gets dismissed because the sums come out wrong. If the only motive is efficient calculation, posing the least threat that is needed to bring about the desired end, then it seems that we should end up with public disembowelling for parking on double yellow lines and a letter from the Secretary of State expressing disapproval for unpremeditated domestic murder. The psychology of the events is such that people are much more likely to be thinking of the implications of what they are doing when they are parking than when they are attacking their loved ones in a fit of anger. So the threatened disembowelling would deter practically everybody, achieving the desired effect at little cost, while, on the other hand, clogging up prisons with domestic murderers just causes everyone a lot of trouble with very little prospect of saving the life of any wife or husband.

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This objection is not one which would worry any hard-bitten utilitarian. For what is right or wrong is what follows from utilitarian theory and if the theory tells us to threaten disembowelment when we had not expected it, that is just one of the discoveries which one makes when one thinks about things. However, whatever we think of this objection, Duff has a more fundamental one which works against utilitarianism, however the sums come out. Utilitarianism recommends using one person for the good of someone else. On this theory of punishment, the criminal is sacrificed for the good of others; his punishment deters other potential criminals and so benefits those who would have suffered from the crimes. Yet this is to treat people as means and not as ends in themselves. Once we think that the essential nature of any justified trial and punishment is to treat people as rational and moral beings for their own sakes, then utilitarianism has to go. Duff does not end up with a simple theory, since his theory is a blend of retributive, expressive, and reformatory elements. But its central purpose is to find an account which respects the rationality and moral nature of the punished person. Punishment therefore is communication with a rational being for his own sake; to quote Duff 'it aims to communicate to a criminal a proper understanding of the nature and implications of his offence, and to persuade him to accept his punishment as an appropriate penance for that offence' (p. 278).

This is Duff's account, which I shall resist. However, matters are complicated by the fact that Duff recognises that this is an ideal account and could by no stretch of the imagination be regarded as an accurate description of our current penal practices. This is what punishment would have to be like to be justified; it does not justify the punishments currently handed out. At the end of his book, therefore, he considers the relation between the ideal and the actual. One would expect Duff at this point either to say that we actually should not have punishment, or that we should make actual punishments as like the ideal as possible. In fact he opts instead for a highly constrained form of utilitarianism which he had efficiently discredited earlier. I think, and shall now try to show, that on his own terms this is not the solution which he ought to adopt.

The problem of how an ideal account applies in the actual

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case is normally an example of the problem of ethical conflict. Ideally we would like everything; actually we cannot have it. So we have to choose which of the goods we should have, or which of the bads should be avoided. One solution is to have a way of balancing between the competing duties or moral imperatives. Utilitarianism is a solution of this sort. Arbitration is achieved by discovering how the competing duties contribute to some further value, or set of values. Another kind of solution is to think that no arbitration is possible. Conflict in duties is the inevitable, tragic, condition of man, arising directly from moral pluralism. In the ideal case these would cohere; in the actual case they do not, and we are provided no principle of selection, but just the certainty of moral error (for, whatever we do, some moral imperative will have been disobeyed). Duff denies that he has a solution, but he is not without resource. He says that he himself 'would act unjustly to prevent the heavens falling' (p. 298). So, although Duff denies that there can be any talk of trading or comparing, it seems to me that this remark means that justice has for him a price. Justice can be traded off against heavens falling so that we can, in principle, say how many heavens should fall before it is right to be unjust. And this is, of course, to treat it in a consequentialist style.

I may here be making too much of the very last page of Duff's book. But it is unclear how this part of his account differs from a sophisticated consequentialist one. For when he says that, in the ideal case, no type of consequentialist reasoning would be appropriate, his claim is that punishment which treated people as means would be evil. Yet it is also part of a utilitarian account that punishment is, in itself, an evil. Why it is evil of course differs. In one case it is simply because it is painful, in the other it is because it involves treating people as means. However, what you do with this evil when you have got it is very similar. Instead of treating it as a complete block to action, you decide whether this bit of evil is justified by some further good which it would provide. In both cases the ideal tells what is good or bad, and the actual poses the problem of finding the best mix of these things subject to empirical constraints.

So I think that Duff's solution of the ideal and the actual is contrary to the spirit of the rest of his account. He should rather have said that in the actual case we should not punish at all. Of

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course, greed might lead us to, but this would just be another example of sin. However, whatever is the truth about this, let me now turn to the more important question of whether Duff's central account is itself adequate. That is, even as an ideal, should our account of punishment be one in which it is held that punishment aims to communicate to a criminal an understanding of his offence, and to persuade him to accept that punishment as an appropriate penance, so that, as Duff puts it, 'the pain and suffering which begins as a coercive attempt to attract and direct the unrepentant criminal's attention should become the penitential pain which the repentant criminal accepts for himself' (p. 261).

Many of the aspects which Duff concentrates on, such as communication, expression, or reformation, also fit perfectly happily into a utilitarian account. Any method which gets the desired results will serve in utilitarianism and it is a fairly well-attested fact that expression and communication are efficient. The openness of Bentham's panopticon, for example, was not just an efficient means of guarding the prisoners but also an efficient way of letting the general public see what was happening; and Bentham also devoted attention to how the device above its door could express the horror within. Communication is a central element in a mature deterrent theory and this communication is an appeal to rationality. People are understood to be rational men, in the economist's sense; that is, self-interested maximisers. They are told about the horrible consequences of certain courses of action and so given, as the saying is, an argument that they cannot refuse. Rational, prudential people are addressed by laws. This was part of Bentham's argument in favour of statute law and against common law. Common law, he says, treats people like dogs, punishing people retrospectively for actions already performed; but statute law warns them in advance, enabling them to frame their actions so as to avoid trouble.

In utilitarianism, punishment is a message. The message, that 'this does not pay' is a different message from Duff's 'we find this morally reprehensible', but it is none the less a message. Reform of the criminal is also part of a utilitarian account, since the punishment is supposed to influence his future actions. Yet Duff's point no doubt would be that these are just extras; that in

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utilitarianism the central justification lies elsewhere. Punishment must be something which essentially performs these tasks and no others; not just something which manages to perform these tasks as a by-product of more central ones. Nor do all aspects of Duff's account have a utilitarian analogy. Utilitarianism does not have much use for penance, even as a by-product; the 'monkish virtues' and asceticism are generally not highly regarded. So Duff's account cannot just be mapped into a utilitarian one and I shall therefore now try to evaluate the rival accounts.

Suppose we start with the idea of natural punishments—cases where people suffer because of the natural probable consequences of their acts. People engage in conduct which they know to be imprudent and are, as we say, punished for it. There is an implicit valuation here; we say that they are punished because we think that they have been imprudent or otherwise acted irrationally. Courage is a virtue, but people get punished for temerity; temperance is a virtue, but people get punished for over-indulgence; and so on. I take it that the mistakes that we think that people are making here, and for which they get punished, are mistakes in foresight. We would not say that they were punished if they were doing something wrong and then subject to an unpredictable natural disaster. So, someone being gluttonous or lecherous in a house that falls down is not being naturally punished for gluttony or lechery, even though the unhappy result is a causal consequence of their engaging in the disapproved activity (if they hadn't been eating or whatever, they wouldn't have been in the house). What AIDS punishes is unsafe sex, not fornication. This, surely, is the only way to describe it on the hypothesis of an indifferent and morally neutral nature.

Someone might try to start with the idea of natural punishment and find there the core of a complete account which extends to the more complicated cases. However, I think that these cases are penumbral and that the idea of punishment used is metaphorical. We certainly use the language of punishment ('one day he'll be punished for his carelessness'), but I think that is because we see an analogy between these and central cases which permits a metaphorical extension of the language. In any case, if the central problem in the justification of punishment is to understand how we could be permitted to inflict pain

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intentionally on other rational human beings against their will, then these entirely unintentional operations of nature do not help.

Let us therefore move to cases where the pain follows from human rather than natural activity, but where the victim can still regard this human activity in a similar spirit to nature. That is, instead of supposing that the man is playing a game against blind nature, calculating payoffs and risks, we can suppose him playing against other human players. Two people, two countries, may attempt to influence each other's behaviour by sending painful signals. For example, they could be playing tit for tat in which one does back to the other what the first one does to him. In certain cases this can be mutually beneficial, ensuring that they remain on a mutually co-operative course. Again, player A, giving a tit for B's tat, could be thought of (or think of himself) as punishing B for divergence from the co-operative norm. But, again, this seems inappropriate. What has happened here is that an artificial unpleasant outcome has been substituted for a natural one. However, if the game goes on long enough, this becomes as certain and as predictable as a natural outcome. Someone to whom the unpleasant thing happens has miscalculated; again it would seem that if he is being punished for anything, he is being punished for imprudence. He knows the rules and his pain is a 'natural' (i.e. predictable) consequence of departure from them.

Here we have intentional activity and so this, it seems, forms a more promising model for punishment in the central cases. If tit for tat is like punishment, and people are justified in playing tit for tat, then perhaps they are justified in punishment. Yet this models the kind of case where Duff would not think the action to be justified. Each player is playing in a completely manipulative fashion, merely using the other player as a means to satisfying his own desires. There is no rational communication; the players, for example, do not need a word of language in common. And, certainly, if this is thought to be a model of normal punishment, there again seems to be the problem that people are punished for the wrong things. The only mistake would be imprudence, the only commandment 'thou shalt not be found out', and the only crime getting caught.

Suppose therefore we add communication, so that instead of

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being mere intelligences playing against each other, they agree and co-operate, speak the same language, and live in a perceived community having shared values. This is the stuff of Duff's account, a necessary condition for his ideal treatment. If they completely agree with each other, then it might seem at first that we would have nothing to punish. However we can suppose that there is weakness of will (a lack of fit between belief and action) and that people make errors which they can come, on reflection, to correct (a lack of fit between initial and final belief). So there would be what everyone could recognise to be wrong action. Hence there would be something for punishment to do, if it could only be justified. But now it seems unimportant that there are many people involved. Everything goes through just the same if there is only one person talking to himself, giving himself reasons, correcting his judgements, berating himself for weakness of will, and so on. It is as if the Hegelian geist of the community was conversing with itself, developing the idea.

So when we have the many, we have manipulation; the injection of rationality introduces the one. Indeed it might be thought to be a theoretical truth that we can only understand other people as having beliefs, intentions, and meanings if they do, by and large, agree with us; that radical divergence is impossible. (Either we are playing games against intelligent green insects or else everyone really speaks English.) So suppose that there is a community of agreement and that we can model this by a single rational individual thinking to himself. However, the problem would now seem to be that, although there might be space in which punishment could operate, there would be no justification for having it. For it means that we could only make sense of punishment if we could make sense of people punishing themselves; and, it looks at first sight doubtful whether they could, or, if they could, why they should. Now, accounts like Duff's do in fact incorporate the sense and point of self-punishment. This follows for him from the idea of penance. The coercive authority, in his ideal account, coerces the criminal's attention. It forcibly suggests the appropriate penance for what it hopes will be recognised as an evil act. (Even on Duff's ideal account, the criminal cannot choose not to undergo the action which might form the penance; he can only choose whether or not to regard it as a penance.) With the penance we

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get self-punishment. So self-punishment is clearly part of Duff's account; the difficulty is to make sense of it.

The problem here is not that of the person doing things to himself which are painful. We can have an individual, first-person analogue of all the stages travelled so far. Obviously the 'punishment' for natural improvidence works for the single person; Robinson Crusoe also gets his fingers burnt. But a person can also play a purely manipulative game against himself (against his future self). Assurance in carrying out the threat can be secured by external causation. Someone now doesn't want that he will be tempted to do something in future. So he now secures that this would have a consequence which he hopes will be sufficient to deter him when the time comes. So the purely manipulative and natural cases have first person analogues and, if they count as punishment, then people are punished and (in the manipulative case) punish themselves. However, in the kind of case that is needed for Duff's account to work, I find this more difficult. All we seem to need here is pure judgement. The person judges that he has erred. He therefore repents. There seems to be no space, though, between judgement and the desired result, a space which needs to be filled by pain.

For Duff the pain seems to be needed to underpin the expressive aspect of his theory of punishment. The person punished must take his backsliding or initial error seriously. He expresses to himself solemnly the idea that he is wrong. Nevertheless, I still find it difficult to accept that he needs to inflict further pain on himself to show that this is his understanding, or to show that he does take it seriously, or to express the importance of what he has done. I do not see how the extra pain could do any of these things. Of course, if he really has judged, and he really is serious, this must influence his future belief and action. So he is constrained (he constrains himself) to act differently in future. And if, as would normally be the case, his wrong has caused harm to others, then he would feel himself to be under a duty to give compensation. But this, again, is not punishment. We are trying to justify the painful things extracted in criminal law by the state and community such as imprisonment, fines, or capital punishment (all discussed by Duff), not the payments of recompense to individuals enforced by the civil law. Here I think that the lack of intrinsic connection with the

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action works against Duff. Recompense to the victim seems appropriate, as is repentance and apology. All these are no doubt painful, in the sense that people do not like doing them. But it is the recompense or apology which is central, the pain incidental. I do not see why people, seriously convinced of their errors, should inflict pain on themselves for its own sake; or why they should undergo a pain wholly separate from recompense or apology, such as a fine paid to the state, or imprisonment, or corporal or capital punishment. Yet if we cannot make sense of this, then the central part of Duff's account (connected as it is with penance) falls away.

It may be that what is lacking here is the public dimension. So far I have been supposing a person in a public context (to give him more scope for wrong action) but merely inflicting pain on himself for his own purposes. But it might be thought that although he does not have to inflict pain on himself to show himself that he is serious, he does have to, to show others. The community, it might be thought, shows that it takes the matter seriously by engaging in the expensive business of detection and trial. So perhaps in turn a bit of expense on his part is needed to show that he also is serious. However, again it is important not that the person does something difficult or painful but what it is that he does. The best way someone can express his seriousness is by acting differently in future or by trying to undo, so far as is possible, the effects of his crime. To put the point another way, the difference which the social dimension might be thought to make is that, while no more than judgement might be needed to reconcile someone with himself, more needs to be done to reconcile someone with the community. Someone separates themselves by sinning, and public penance is needed as a way of demonstrating the seriousness of their repentance and so regaining their place in the community. Now strength of belief can certainly be measured by cost. So, perhaps, in some circumstances the willing of something painful on oneself could be used as a measure of strength of belief (although, more plausibly, it measures the strength of one's desire to be believed). However what has to be shown is not just the strength of belief but that it has an appropriate content. What the person wants to regain is the esteem of his fellows. He has been thought less than worthy as a person and now he wants again to be thought

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worthy. The best way of regaining esteem is to do those things which directly, in themselves, gain esteem. That is, if working for the poor or powerless, for example, is a way of gaining esteem for one's concern for others, then someone who had lost esteem because of his cavalier treatment of others might seek to regain it in this way. And, of course, he might find this difficult or painful; and, of course, it might be something imposed on him or suggested to him as a penalty for what he had done. However, it wouldn't be because of its painful nature that it gained him esteem, but because it was something which would naturally gain esteem, whether painful or not. The esteem is independent of the pain. Conversely, doing something which was painful, such as serving a prison sentence, would not by itself gain esteem. So if a person wishes to show his seriousness about being restored to the good books of the community, he will not just engage in things because they are difficult or painful for him. So this cannot be the justification of punishment.

In fact, once we reach the community, and how someone's punishment fits into his own and others' perceptions, then we should take seriously that the community is a political community. This is the element, I think, normally suppressed or treated lightly in accounts of punishment. It is supposed that the natural or central locus of punishment is an activity between individuals, moralised individuals no doubt and ones sharing communal values, but still between individuals. Yet the natural context of punishment is where there is already political authority. Because there is government, there are laws; and because there are laws, there is punishment. The original apple is the creation of government and once that has been bitten, all else follows. If government or political authority can be justified, then punishment follows naturally and necessarily. It needs no further justification. A monopoly of force, designed to coerce people against their will, has already been allowed. With the granting of the force comes the right to punish; this is the instrument to be used. As Bentham says, 'the business of government is to promote the happiness of society, by punishing and rewarding' (IPML p. 74). The central question here is whether government is morally permissible at all; that is the question of the moral legitimacy of the state. If the state is legitimate, and after all nearly everyone, even if for different

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reasons, thinks that it is, then it is legitimate to use force to coerce the actions of unwilling people. The right to make and to enforce law has already been granted. This is a permissive right, and so the state is thus allowed to use it as it will, subject to not interfering with other rights. That is, we may have a view about the right way that this force should be used, including the right way in which to punish people. But this is just a view about how the state should proceed, a view which we might be able to express and have a small influence on its being put into law. What the law is, though, is what the state says it is, and this may or may not be what we think it ought to be. The state still has a right to enforce its law, even if we do not think that it has got the law right; this follows from its legitimacy as a state.

The only way a theory of punishment can be applied, therefore, once we allow the entitlement of states to make and enforce laws, is by means of individual rights which work as side constraints on such enforcement. Obviously, these cannot be too extensive, otherwise the state could not be legitimate in the first place. It is notorious that philosophers with starting points similar to Duff's find it hard to see how any state could be legitimate. Conversely, if we have a legitimate state, the right to coerce others has already been granted. The most we can have, therefore, are moral side constraints on the way such coercion operates: principles such that justice demands that only the guilty are punished, that people should have fair notice of the law, the right to defend themselves and put their point of view, and so on. However, subject to these constraints, the state has the right to select any of the many permissible answers. It might well select a utilitarian approach. That is, subject to these constraints, the levels of punishment would be calculated by their efficiency as threats and in the interest of maximising values such as liberty or security.

I noted above that Duff resolves his problem of the ideal and the actual by adopting a form of constrained utilitarianism. Here the same solution emerges, only not now as a reprehensible evil. It is just that we have principles of fairness and justice, which bound our treatment of individuals. We find that it is not inconsistent with these, and it brings great benefits, to have states (or other sources of law) which coerce individuals for the common interest. So we permit such coercion, and take the

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benefits, constraining it by these principles of justice. We are not essentially trying to reform people, although, obviously, we would be glad if we could. We are not trying to exact retribution for past wrongs, although obviously the idea of retribution constrains the field in which we may justly operate. We are not, essentially, trying to express things to people, although we naturally wish to express things to them if we think they are wrong. So in a particular case where we can suppose in advance that we are going to have no success with reform or moral communication, we may still be entitled to threaten punishment in a naked appeal to the self-interest of a prospective offender. Of course punishment is nasty. That is its point. But, as Bentham said in a manuscript, pain is 'that instrument to which the law itself owes all its powers' (UC 69.47). We have taken the good things and this is the point at which we pay up. It may still be the best of all possible worlds; it is just not ideal in every respect.

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PUNISHMENT AND CRIME

Ross Harrison and R. A. Duff

II—R. A. Duff

PUNISHMENT AND PENANCE—A REPLY TO HARRISON

I will focus on two of Ross Harrison's claims: that my account of criminal punishment in *Trials and Punishments* fails *ab initio*, since we cannot make sense of self-punishment; and that criminal punishment is better justified as a side-constrained deterrent, by showing it to be a necessary implication of the legitimacy of the state. Harrison also argues that my response to the gap between the ideal and the actual shows me to be, when it comes to the crunch, not a strikingly mistaken anti-utilitarian, but a familiar kind of side-constrained consequentialist. Though this raises important and difficult issues about the impact of theoretical ideals on practical actualities, I will not have space to discuss it here.

I

Punishment and the Legitimacy of the State

I begin with Harrison's own account of punishment, since my concern with self-punishment is partly motivated by a dissatisfaction with even a side-constrained account of punishment as a deterrent.

'If government or political authority can be justified', writes Harrison, 'then punishment follows naturally and necessarily' (p. 149). His argument is, I think, roughly this. Part of what distinguishes a state from an anarchistic community in which the state either never existed or has withered away, and thus part of what we justify if we justify the state, is the existence of an authority with a monopoly of organised force, and with the right to decide just how that force is to be used. That right is not the unlimited right of a Hobbesian sovereign; individual rights set limits on how the state may use its coercive power. But within those limits it must be free to use that power 'as it will'. The state presumably will (must?) use its coercive power to protect its

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members against both external and internal attack, and punishment is one of the means by which it will do this.[1] But it is for the state to decide just how punishment is to be used, within the constraints set by individual rights; and Harrison thinks it likely (inevitable?) that it will use punishment as a side-constrained deterrent.

How is the state *constrained* by individual rights, and *free* to operate 'as it will' within those constraints? A state might not in fact respect the rights which we think ought to constrain it. To call such rights 'moral side constraints' (p. 150) is perhaps to say that we can nonetheless *demand* that they be respected; and what makes this a demand, not just a view 'about how the state should proceed' (p. 150), is perhaps that we can properly withhold obedience if the state does not respect them. Our views about how the state should operate within such constraints, however, including our view about the proper uses of punishment, are views which we may express, but may not insist upon: we may suggest, but not demand, that the state should use its penal powers in this way or in that. For in allowing legitimacy to the state we allow that such decisions are for the state to make, and must accept those decisions unless they infringe individual rights.

This argument seems intended to silence retributivists and other anti-consequentialists. But I do not see why it should.

First, Harrison allows that we may have views about how the state should use its penal powers within the constraints set by individual rights. Suppose I agree that a side-constrained system of deterrence is consistent with those constraints, and thus that the state *has the right* to use punishment in that way, but believe that it *should* use punishment purely as retribution. My view might not prevail; nor can I *demand* that it prevail, or withhold obedience if it does not. But why should this stop me asserting and arguing for my view that this is 'the right way in which to punish people'?

Second, we should look more critically at the rights which are to constrain the state's freedom, and at the ends which it is to pursue. (We can presumably demand that it pursue certain general ends as well as that it respect certain rights; its discretion

[1] We need, however, more argument than Harrison provides here to show why the state will or should have a system of *punishment* at all; see *Trials and Punishments* ch. 6.3.

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concerns the means to be used, within the limits set by those rights, in pursuit of those ends.) For a retributivist might argue, not merely that punishment *should* be retributive, but that it *must* be retributive if it is to respect individual rights; and that even a side-constrained system of deterrence infringes rights which ought to be respected. Of course if 'the business of government' is simply 'to promote the happiness of society' (p. 149), subject only to the modest rights-based constraints which Harrison mentions (p. 150), we will naturally end up with a side-constrained system of deterrence; the end and constraints have been so specified that no other account could plausibly emerge. But why just that end; why just those constraints?

Suppose we take seriously the Kantian demand that we should treat each other as ends, not as means; that, we may say, individuals have a *right* to be respected as rational and autonomous beings. This will make a difference both to the ends which the state should pursue and to the means by which it may pursue them. We might still say that the business of government is to promote 'the happiness of society', but that 'happiness' must now involve the flourishing of rational and autonomous lives; and the means to be used must be appropriate to the end as thus conceived, and consistent with the respect which is owed to each citizen. We can flesh this slogan out by indicating its implications for the criminal law.

This Kantian requirement explains the importance of the rule of law—it shows why a state should govern its citizens' conduct by a system of law rather than by other, possibly more effective, methods of social control. For the law addresses the citizen as a rational agent: it seeks not merely her obedience to demands which it imposes on her (I am talking here of ideals rather than actualities), but her assent to obligations which are justified to her in terms of the good of the community; it aims to guide her conduct not by any means which may be economically effective, but by offering her good and relevant reasons for accepting its requirements. We can similarly explain the significance of a system of criminal trials as the appropriate method for dealing with alleged breaches of the law. A trial does not aim merely to reach a decision on a defendant's past conduct and future disposal; it calls him to answer a charge of wrong-doing. It aims to engage him in a rational process of critical

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argument, and to justify to him, if he is convicted, the condemnation which his conviction expresses. The proper aim of the criminal law and the criminal trial is rational communication and persuasion; they are appropriate ways of trying to guide the conduct, and of responding to the alleged misconduct, of rational agents.[2]

What of punishment? A side-constrained system of deterrence, such as Harrison favours, does to an extent treat its citizens as rational agents. It reserves punishment for the guilty, and thus respects the requirement that we should be free from the law's coercive attentions until we wilfully breach its justified demands. It gives defendants a fair trial; it can justify their punishment to those who are punished, by reference to their guilt and to the common good. It thus respects the requirement that the law should both hear the citizen and justify its demands and impositions to her. It seeks to guide the citizens' conduct by reasons, giving those who are not sufficiently impressed by the moral considerations which underpin the law prudential reason to obey the law. It thus respects the requirement that we should try to modify the conduct of others only by giving them reason to modify their own conduct. These requirements are aspects of the demand that the state should treat its citizens as rational agents; and a side-constrained system of deterrent punishments can, unlike a system which simply seeks the most economically effective means of preventing crime, claim to respect them.[3]

But it does not fully respect that Kantian demand. Harrison notes the objection to utilitarianism that it sanctions using the criminal as a means to the good of others.[4] Now a system of side-constrained deterrence does not treat the criminal *merely* as a means: he is given fair warning that he will be punished if he breaks the law, and he is punished only if he breaks it.[5] The deeper objection to such a system is, however, that it seeks to manipulate, and thus fails to respect, not only those who are

[2] See *Trials and Punishments* chs. 3-4.

[3] See, for instance, J. R. Lucas, 'Or Else', *Proceedings of the Aristotelian Society Supplementary Volume*, 1969, p. 207.

[4] Harrison p. 141; see J. G. Murphy, 'Marxism and Retribution', *Philosophy and Public Affairs*, 1973, p. 217.

[5] See S. I. Benn, 'An Approach to the Problems of Punishment' *Philosophy* 1958, p. 325; N. Walker, *Punishment, Danger and Stigma* (Blackwell 1980) pp. 80-85.

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punished, but *all* those whose obedience is sought or secured by the threat of punishment.

To be autonomous is to be self-determining, in the sense that my actions and beliefs must be *mine*, reflecting my own understanding of what I see to be good reasons for action or belief. Now a respect for another person as an autonomous agent does not preclude an attempt to persuade her to think or act differently; but it constrains both the end I may seek and the means I may use to achieve it. My aim must not be just to change her actions or beliefs, but to persuade her to see for herself that she should think or act differently; and I must try to do this only by giving her reasons to think or act differently. I must also give her what I regard as *good and relevant* reasons. If I try to persuade her by what I regard as bad or irrelevant reasons, I cease to treat her with the honesty and respect which are due to her as someone who should determine her own actions and beliefs in the light of her own best understanding; I treat her instead as someone whom I may try to control or manipulate as a means to my own ends.

To illustrate. In a philosophical dispute you remain unpersuaded by the arguments which, I think, justify my view. If my aim is simply to get you to accept my view, I might (if I think I can get away with it) resort to bullying, and try to *force* you into accepting my view; or I offer you what I take to be bad or fallacious arguments, which I think may in fact persuade you. Such tactics are not unknown in philosophical discussion, and they might bring you to accept my view. But they are objectionable for two reasons. First, they abandon the proper aim of philosophical discussion. For such discussion must, if it is to remain true to the discipline's own values, aim not at securing agreement by whatever means may be effective, but at truth or rational agreement; and *that* aim cannot be achieved by bullying or by fraudulent argument. Second, in using such tactics I manipulate you. Instead of appealing to you as a rational agent whom I should try to persuade only by good and relevant arguments (and by whom I should be ready to be persuaded myself), I treat you as someone whose beliefs I will try to change by whatever means I can.[6]

[6] Compare Plato, *Gorgias* 457–8, 472.

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As with philosophy, so with morality. If I believe that you ought to change your ways, I may try to persuade you to do so. But if I am to respect you as I should, my aim must not just be so to modify your beliefs or attitudes that you come to behave, externally, as I think you should—an aim which might be achieved by bullying, threatening or deceiving you. It must be to persuade you to see for yourself that you should change your ways, in the light of the values which I think should guide you; and the only way to do this is to give you reasons for changing your ways which embody those values. That is why it is an objection to utilitarianism that it sanctions moral deceit—that a utilitarian who gives me moral advice may urge on me, not what she takes to be the truth that I should act so as to maximise happiness, but whatever considerations she thinks will in fact get me to behave in the most useful way.[7] For she then treats me, not as a rational moral agent, but simply as a mechanism for maximising happiness.

As with morality, so with law. The proper aim of a system of law is to secure not merely obedience, but the citizen's acceptance of obligations which are justified to him by relevant reasons which show the law to serve the common good. This is part of the idea of law, as a system which claims not just power but authority, and a condition which must be met if the law is to treat the citizen as an autonomous agent. Now a system of deterrent punishment abandons that ideal aim. It seeks prudential obedience to the law, rather than obedience which reflects an acceptance of the law's demands as being appropriately justified. It thus manipulates all those whose obedience it tries to secure by the threat of punishment. Instead of appealing to the relevant reasons which justify the law's demands, it offers new and irrelevant (because unrelated to the reasons which supposedly justify the law's demands) prudential reasons for obedience. It thus uses those whom it threatens as means to the 'happiness of society'.

One who believes that citizens have the right to be respected as autonomous agents could thus argue that this moral side-constraint on the state's use of its coercive power forbids even a

[7] See, for example, J. J. C. Smart, 'An Outline of a System of Utilitarian Ethics' in J. J. C. Smart & B. Williams, *Utilitarianism: For and Against* (CUP 1973) pp. 49–52.

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side-constrained system of deterrent punishment. In using punishment thus, the state does not merely use its legitimate discretion in a way which we might think misguided; it infringes the rights which limit that discretion. Harrison might argue that such a constraint would be so restrictive that 'the state could not be legitimate in the first place' (p. 150). Whether this is so depends on whether coercion can ever be compatible with a due respect for autonomy. Such a respect does, I think, permit the state to use force in defence against both external and internal attack. But can we provide a rationale for punishment which shows the imposition of punishment to be consistent with a proper respect for the citizen? Part of my aim in *Trials and Punishments* was to show that such a rationale can be provided, at least at the level of ideal theory. But Harrison finds that rationale unpersuasive, insofar as it depends on what he sees as the nonsensical idea of self-punishment.

II

Penance and Self-Punishment

Criminal punishment, I argued, should ideally aim to become self-punishment; the proper aim of inflicting punishment on a criminal is to persuade her to accept her punishment, to will it for herself, as a penance for her crime. The idea of penance, as punishment which is voluntarily undertaken, is crucial to this account. But why should I found an account of criminal punishment, which is typically *imposed* by others, on the idea of self-punishment, which precisely lacks the coercive character that makes imposed punishment morally problematic? One who thinks that criminal punishment requires a consequentialist justification, or doubts that it can respect the criminal's autonomy, might allow that those who wish to 'punish' themselves should be able to do so, but deny that this can help to justify the *infliction* by others of punishment on those who do not wish to be punished.

Making sense of self-punishment does not yet, admittedly, justify imposed punishments; and the justificatory story which connects them is not a simple one. But, for several reasons, it is worth beginning with self-punishment nonetheless.

First, I think that self-punishment reveals an essential part of the *meaning* of punishment, and thus shows what must be

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justified if we are to justify imposed punishments. For a utilitarian, punishment consists essentially in the infliction of pain on alleged offenders. It is this intrinsic evil which must be justified, by its beneficial effects. For some retributivists, punishment consists in imposing on a criminal a burden to match the fair burden of self-restraint which he refused to accept.[8] To justify criminal punishment we would then need to show how the state has the right or duty thus to deprive the criminal of his unfair advantage. I argued that what is essential to punishment is an outward or manifest suffering which gives symbolic expression to the pain of remorse. This meaning is most easily seen in the case of self-punishment; and to justify criminal punishment we must then show how imposed punishments can come to have this meaning, and how a state or community can properly take this kind of interest in the moral well-being of its members.

Second, I have argued that if the law's demands and the criminal trial are to show a due respect for the citizen's autonomy, they must be understood not merely in terms of what is *done to*, or *imposed on*, the citizen, but in terms of a *dialogue* between state and citizen. I believe that self-punishment provides a model of punishment which, if we can translate it to the context of criminal punishment, will help us to find there too the communicative purposes which are crucial to the law and the criminal trial; and this will help us to show that imposed punishments can also respect the criminal's autonomy.

Third, the claim that criminal punishment ideally aims to *become* self-punishment captures, I believe, the truth which is distorted by those who try to show that the criminal *does* rationally will her own punishment.[9] Such attempts must fail. But they are also unnecessary, since they mistakenly suppose that coercion infringes autonomy unless it accords with the rational will of the person coerced. Certainly we must be able to justify coercion to the person whom we coerce, as an appropriate response to her own voluntary conduct; and, if our aim is to modify her conduct, we must do this only by offering her relevant reasons to modify her own conduct. But this does not

[8] See, for instance, J. G. Murphy, *op. cit.* (n. 4 above).
[9] See Murphy, *op. cit.*; *Trials and Punishments* ch. 8.

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rule out every kind of coercion to which the person coerced does not consent.

One paradigm of justified coercion is the use of force to defeat an unjustified attack. Another, perhaps, is the forcible exaction of a debt which the debtor refuses to pay. Such force is justified only if rational persuasion has failed, and must if possible be justified to the person who is coerced; but it neither requires nor presupposes their consent. What makes it consistent with a due respect for their autonomy is that it is a defensive response to their wilful conduct. It does not aim to make them *do* anything, but rather to prevent them carrying through a wrong on which they have embarked. This is obvious in the case of defence against an attack, but it also applies to the exaction of a debt, if we can say that refusing to pay a debt amounts to trying to keep what belongs to another. For we can then say that in exacting the debt we are simply preventing the recalcitrant debtor from carrying through his wrongful detention of another's property.[10]

If we could portray punishment as something other than an attempt to modify the criminal's future behaviour—as, perhaps, a matter of defence against attack or of exacting a debt—self-punishment would not be crucial. Although we would need to justify her punishment to the criminal as an appropriate response to her crime, and hope that she would accept that justification, neither that justification nor its acceptance would be internal to the punishment. But we cannot portray punishment in either of these ways.

As to defence, we cannot just say that punishment prevents the criminal from committing future crimes; for if defensive coercion is to be consistent with a due respect for the person coerced, it must be a response to an attack in which he is *now* engaged. A pre-emptive strike to prevent an attack on which he *might* embark infringes his autonomy, by pre-empting his choices. Preventive punishments likewise infringe the autonomy of those who are punished.

As to exacting a debt, a monetary debt can be paid without the debtor's consent—her creditor simply takes what is his. So

[10] Compare Devlin's suggestion that returning his property to another person does not in law amount to a 'positive' act, but only to a 'negative' act of 'refraining from detinue'; *NCB v Gamble* (1958) 3 All ER 203, at 207.

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too, were punishment a burden of restraint which a criminal owed to those over whom he had taken an unfair advantage, that debt would be paid if he suffered the burden, with or without his consent. But this is not, I think, what punishment means.[11] The criminal does, in a sense, owe a debt to his fellow citizens, of repentance, apology and self-reform. But *this* debt cannot simply be exacted from him; for it is paid only if *he* repents, apologises, and reforms himself.

How then can the imposition of punishment respect the criminal's autonomy? We must show it to be an appropriate response to her past crime which aims to modify her future conduct only by giving her good and relevant reasons to modify her own conduct; and we can do this by emphasising its communicative purpose. Punishment aims to persuade the criminal to accept the justified condemnation of her past crime, and the understanding of the nature and implications of that crime, which it expresses. It also aims to affect her future conduct: by persuading her of the wrongness of her past crime we persuade her that she ought not to behave thus in future. But its aim is not to coerce or manipulate her into obeying the law, since it seeks to persuade her of the good and relevant reasons which justify the claim that she ought to obey the law. It seeks, but does not coerce, her understanding and her assent.

But we could pursue this communicative aim by a system of purely symbolic punishments. Why should we add 'hard treatment' punishments (imprisonment, fines etc.), which are painful independently of their punitive meaning, if not to add a prudential (and thus manipulative) deterrent to the law's moral appeal? Because, first, hard treatment aims to make the inattentive criminal hear the message it expresses—to force his attention onto his crime; and, second, it is a penance through which he can, if he comes to accept his punishment, express and reinforce his repentant understanding of his crime. Such punishment can be justified even if the criminal will not accept it, as an attempt to persuade him to accept it. But it must, in two ways, seek his assent. It aims to persuade him to accept it retroactively, as a proper way of expressing to him what he now sees to be a proper condemnation of his past crime, and of

[11] See *Trials and Punishments* ch. 8.2.

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persuading him to accept that condemnation; and to accept it concurrently, as a penance which he should now undergo for his crime. In accepting it as a penance, he accepts it as a punishment which he should impose on himself. But it is this idea of self-punishment that Harrison finds senseless, when it involves inflicting on oneself something which is essentially, rather than merely incidentally, painful.

Harrison discusses various implications of a recognition that I have done wrong. None, he thinks, allows room for the kind of punitive pain of which I need to make sense if I am to ascribe a penitential meaning to hard-treatment criminal punishments. My judgment that I have done wrong leads to repentance and self-reform; but there is 'no space' between judgment and repentance 'which needs to be filled by pain'. 'Extra pain' is not needed to express to myself the sincerity of my repentance; nor is it the appropriate way to express this to others. I can do that best by apology and compensation; and while these 'are no doubt painful, in the sense that people do not like doing them', that pain is 'incidental'. So too, if I want to 'regain the esteem' of my fellows, I can best do this by doing 'things which directly, in themselves, gain esteem', and which are painful, if at all, only incidentally. There is no reason to inflict on myself some 'wholly separate' pain of punishment 'for its own sake' (pp. 147-149).

Penance, like hard-treatment punishment, involves 'separate' or 'extra' pain in that it involves some imposition, or deprivation, or burden, which is painful quite apart from its penitential meaning. To make sense of penance as self-punishment, we need to see how the pain it involves is expressively related to the pain which is essential to repentance: This will involve showing that Harrison is wrong to take pain to be only 'incidental' to apology and compensation; and that he is also wrong to see the pain involved in self-punishment as being inflicted merely 'for its own sake', or as being 'wholly separate' from repentance, apology, and reconciliation.

A certain kind of pain is essential, not merely incidental, to a repentant recognition of wrong-doing, and to expressing my repentance to others—not just because this is something that people do not like doing, but because what is done must, if it is sincere, be painful. If I recognise and repent the wrong I have done you, I am necessarily pained by it—by my own guilt and

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wickedness, by the harm I have done to you and to my relationship to you. Such pain is essential in that if I did not suffer it, I would not have sincerely repented my wrong-doing, or fully understood its nature and implications. If I repent my offence, I will also want to try to remedy the harm I have done, and to repair the relationships I have damaged. This will involve apology and compensation, which are essentially painful in that they aim to express to others my pained recognition of what I have done. What could an apology for a serious wrong be, other than empty words, if it did not express my painful remorse? What could compensation (as distinct from help to someone who has suffered a natural misfortune) amount to if it did not express my sorrowful repentance?

To repent and apologise is to make myself suffer, or find that I cannot help but suffer, for the wrong I have done. This pain might be called a kind of punishment, but it is neither imposed 'for its own sake', nor separate from repentance. What, however, of the 'extra' pain which I might impose on myself as a penance? I have seriously wronged a friend. For the sake of material gain I betrayed her trust, and thus caused her serious financial and emotional harm. Why should my repentant recognition of my wrong-doing involve any more pain than that which is intrinsic to it?

First, it will prevent me from enjoying what I would otherwise enjoy. If I truly recognise and repent what I have done, I will not be able to enjoy, for instance, my usual social pleasures. I do not *decide* to deprive myself of them as a punishment; but I *cannot* enjoy them, any more than I could enjoy them whilst mourning the death of a friend. I cannot enjoy them because my attention and my concern are dominated by the wrong I have done. Why did I do it? How could I have betrayed her like that? What is she suffering? How can I show my remorse, or make restitution to her? What does my behaviour show about my moral character, and about the extent of my concern for others? How can I begin to reform myself? Such concerns, which are an essential part of my repentant recognition of what I have done, are not compatible with continuing to enjoy my life as if nothing had happened.

Second, I may see the need to *impose* some 'extra' pain on myself. We can imagine beings, as Harrison seems to (p. 146),

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who might have no need for this—who might do wrong, but whose concern for the good is such that they recognise and fully repent such wrongs as soon as they are done. Such beings would indeed find no space between judgment and repentance—and thus no need for deliberately imposed penances or punishments, as distinct from the pain which belongs with repentance. They would suffer when they do do wrong, but would not need to impose 'extra' pain on themselves. We, however, are not such beings. We are depressingly and familiarly unwilling to face up to our wrong-doings. My initial judgment that I have done wrong might well not be fully authentic. At worst it may pay mere lip service to the values I have flouted; or it may mark an as yet incomplete and shallow recognition of the nature of what I have done. There is often a gap between such judgment and repentance, created by the common possibility of self-deceptive attempts at self-justification or excuse, or of turning my attention away from my offence to pleasanter topics. Repentance is anyway not something which is done in a moment. It requires a proper understanding of what I have done, which both owns the wrong as mine and disowns it as something I condemn—a determination to improve myself, and to make such apology and restitution as I can. Repentance is achieved through time and only with difficulty; and the difficulty flows from our unwillingness to confront our wrong-doings.

These familiar facts create space for penance or self-punishment. I realise that I need something which will focus my attention where it should be focused—something to remind me of what I have done, and of the need to respond appropriately to it; and this need can be met by a penance which I impose on myself. Penances are various kinds of hair shirt which, being essentially uncomfortable, provide an ever-present reminder of my wrong-doing. A penance must be painful, since what is pleasant cannot serve to focus my attention on my guilt; and I may choose a penance which has a particular symbolic relation to my wrong-doing. If I did wrong for the sake of material gain, my penance might take the form of a material deprivation. This would express and reinforce my condemnation of the excessive concern for material goods which my action manifested. If I betrayed a friendship, my penance might involve depriving myself of social intercourse. I have broken the bonds of

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friendship, and rendered myself unfit for it. If my wrong-doing involved arrogant self-assertion, my penance might take the form of humbling myself; and so on.

Thus far penance is a private matter between me and my conscience (or between me and God). It serves not so much to express an already complete repentance as to help me repent, or reinforce an otherwise uncertain repentance. But we can also see how penance can help me to express my repentance to others. Beings less imperfect than us might not need this—they would know of each other that their repentance was genuine and their apologies fully sincere; but if I am to assure others like myself of the sincerity of my repentance, I may do this by undertaking a penance. This might take the form of repairing the material harm I have done, or of 'working for the poor and powerless' (p. 149). But as penances these serve to express my penitence; and as such they have the essential character of something painful which I impose on myself, as an outward and public expression of my painful remorse. The pain which they involve is 'extra', in that they are painful or burdensome quite apart from their penitential meaning. But it is not imposed 'for its own sake', as something 'wholly separate' from repentance; for it is through such pain that I both express and reinforce my repentance.

This, I hope, answers Harrison's objection, by showing the sense that penance or self-punishment can make as both a vehicle for and an expression of a repentant understanding of one's wrong-doing. It does not yet, of course, justify the imposition of criminal punishments as penances, even at the level of ideal theory. To do that we would need to show how, just as a self-imposed penance can assist repentance, so punishment which is imposed by others can help to bring a wrong-doer to repentance (and can thus become a penance); and how a state or a community can claim the right to try in this way to bring wrong-doers to repentance. I believe that this can be done, though I cannot do it here;[12] but doing it will show us just how distant the ideal is from the actual. That gap between the ideal and the actual creates a serious moral problem, not just because it is wide—were that all, we should simply do all we can to bridge it—but because, on the one hand, I believe that a direct

[12] See *Trials and Punishments* chs. 9-10.

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attempt to make our penal practices approach the ideal would actually be destructive of the ideal itself; whilst, on the other hand, simply to say that we must not punish unless and until punishment can be what it ideally ought to be, seems to me to be a recipe for letting the heavens fall. We face a conflict between moral demands which are, I think, neither commensurable nor reconcilable—between the categorical demand that we refrain from injustice, and the consequential demand that we prevent the heavens falling. And while we must respond to this conflict, I do not think we can talk of a 'solution' to it.

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