

## Chapter 6

# Why Punish?

Many motives, sometimes contradictory, have prompted crime's punishment, and they have historically shifted in emphasis and focus. The fundamental philosophical dispute has pitted retribution and a hope of delivering justice for the wronged against a more utilitarian concern with diminishing crime that was willing to employ techniques that did not necessarily treat the harmed as they deserved. An innocent good-faith buyer of stolen property, for example, was usually considered its legal owner. The need to keep markets unencumbered by endless disputes over title took precedence over the original owner's absolute title: efficiency trumped fairness.<sup>1</sup> These opposing positions have been argued in largely all eras. Though the two are theoretically exclusive, in fact some combination of justice and usefulness has motivated almost all state actions.

The kin groups who once settled disputes among themselves typically sought revenge and retribution. Harm needed to be set right, an out-of-kilter moral balance reequilibrated. Compensation was demanded for damage to life and limb, to intangible property (the monetary value of men's sexual monopoly over women), or to reputation. Ancient and early medieval law listed precise values: for each particular mutilation or for the rape of other men's wives, daughters, or female slaves. But how to deal with losses that were hard or impossible to compensate? Taking revenge at least gave the satisfaction of equal damage, a negative compensation for a loss

that could never otherwise be made good. The talionic one-to-one logic of retribution sought to cap the otherwise potentially unbridled frenzy of revenge: an eye for an eye, death for death, amputations of the offending limb or member.<sup>2</sup> Even hell was imagined talionically: blasphemers hanging by their tongues, adulteresses by their hair.<sup>3</sup>

Beyond this logic, who sought to punish? That victims and their kin were keen on revenge is obvious. Less clear is why the state—concerned to maintain order and take a broader view—should also pursue retribution. When authority was the offended party, as with treason, then its motives were akin to kin's. For threats against the group as a whole—public harms—the group responded as a unit, as in the ancient Greek pollution theory of crime. But as the state assumed responsibility for regulating a group that was more variegated than kin, with multiple and contradictory interests, it necessarily became more concerned with order than with retribution. At that point, authorities were likely to have stepped back from avenging harm to considering instead their broader aims in prosecuting crime. Although vengeance might satisfy the individual or the kin, it also created disorder through ongoing feud that undermined social harmony. The state needed to be seen ensuring justice, but justice was more than retribution.

From a practical vantage, the state was as concerned to maintain order as to dispense individual justice. Ensuring justice was part of underwriting stability, but too narrow and individual a concept of justice, with no concern for social utility, undermined that order. Vengeance delivered a narrow form of justice for the harmed party, but the rest of society gained little and indeed suffered from continued mayhem in vengeance's wake. So was the answer a more utilitarian approach, which took the aggregate well-being of most citizens as its primary goal? That approach threw up problems, too. Social utility could be maximized only by violating primal notions of fairness and equity. Some offenders would be let off, some

innocents punished—if that promoted order. From a utilitarian vantage, what mattered was the damage caused by criminals, not why they had offended. Not criminals' motives or intent but the harm they inflicted should determine their punishment, the Enlightenment philosophe Cesare Beccaria argued in 1764.<sup>4</sup> From this vantage, punishing a successful assassin made sense, but punishing one who had overslept or missed the mark, killing no one, perhaps did not.<sup>5</sup> It could be socially efficient to punish only mildly or even not at all if it did not deter future crime. Why bother prosecuting the aged death-camp guard?<sup>6</sup> If punishment prevented no offenses, what was the point? Bentham asked. It would just be “adding one evil to another.” But if it did deter others, then the otherwise “base and repugnant” sanction was justified as “an indispensable sacrifice to the common safety.”<sup>7</sup>

If preventing crime could be achieved by other means, then a utilitarian approach considered punishment unnecessary. If hanging someone in effigy deterred, Bentham argued, then actually stringing up offenders would be cruel.<sup>8</sup> But the same logic might equally dictate punishing even the innocent in pursuit of useful outcomes. What if hanging every ten-thousandth passer-by reduced crime? Either way, in this view punishment was set not in relation to the crime already committed (what was just and deserved) but in terms of what would prevent future offenses (what was useful). The two extremes of these divergent approaches—retribution and social usefulness—can be nicely juxtaposed thus: Why punish a prisoner who was certain not to offend again? the utilitarians asked.<sup>9</sup> In contrast, Kant famously argued that even in a society that had agreed to dissolve itself, the last capital offender should nonetheless be executed in order to square the moral accounts, however little consequence or effect this killing might have.<sup>10</sup>

Retributionists were concerned with desert, utilitarians with danger. But desert and dangerousness unfortunately often pointed in different directions. Some deserved punishment, though they no

longer posed a threat. Others were real dangers, though they had yet to commit a crime. Did that mean sentencing on the basis of predicted offending—leniency for the now toothless monster but lengthy terms for those with vividly sadistic imaginations? Or, more mundanely, did it mean longer sentences for the recently unemployed, who were revealed by statistical analysis to be more likely to offend?<sup>11</sup> Once the tie between offense and its punishment was cut, seeking instead some socially beneficial outcome, all bets were off. Why punish attempted murder less than completed homicide when the would-be killer was as morally culpable and dangerous as the one who succeeded?<sup>12</sup> However, a desert-based approach struggled to explain why a particular crime merited precisely this or that punishment. Did an eye balance the moral books for an eye? Why death for theft? For that matter, why death for any of the other two hundred capital crimes in eighteenth-century England?

Treating criminals as they supposedly deserved also produced dysfunctional outcomes. Branding criminals on the cheek in eighteenth-century England prevented them from resuming normal life.<sup>13</sup> Torturing to extract confessions crippled suspects who later proved to be innocent. The law requiring that forgers be executed, London bankers complained in 1830, encouraged juries to let them off, thus endangering the property rights the law sought to protect. When arrests for domestic violence were mandated, reporting the crime dropped off.<sup>14</sup> Overly harsh punishments could spur more crime, not deter it. In Russia, Montesquieu observed, where both robbery and murder were punished by death, thieves killed their victims. Why spare a witness?<sup>15</sup> In Qin era China (third century BCE), rain delayed a group of convicts en route to a military camp. Since the punishment for arriving late was death, there was no downside to the revolt they decided to stage instead.<sup>16</sup> The recent intense scrutiny of pedophilia, it has been argued, has ironically helped sexualize childhood, thus perhaps exacerbating the crimes it seeks to avoid.<sup>17</sup>

The dispute between justice and utility has been ongoing, tipping one way or the other. The polarities have been presented here abstractly and ahistorically. But the themes are discernable in almost every epoch. Just deserts or socially useful goals? Justinian's sixth-century Digest focused on desert, defining justice as "a steady and enduring will to render everyone his right."<sup>18</sup> Kant amplified this central principle of Roman law, insisting that punishment should pursue no goal other than meting out what is deserved.<sup>19</sup> Contemporary retributionists resist the utilitarian neglect of desert, insisting that punishment instead articulate society's moral outrage.<sup>20</sup> Utilitarians in turn not only have promised beneficial outcomes from punishment but have also sought to conquer their own moral high ground. The state has no more right to inflict pain and death, they have insisted, than do its citizens. Only the pursuit of a broader social goal—less crime—could justify sanctions. Mere retribution, without seeking to reduce crime, Hobbes argued, is but an act of hostility by the sovereign.<sup>21</sup> Locke considered punishment justified only insofar as it makes repairs or seeks to avoid future crime.<sup>22</sup> All punishment is evil, Bentham agreed, and allowable only if it prevents some larger harm.<sup>23</sup>

Merely imposing just deserts could lead to pointless retribution, unconcerned with actual effect—Did crime increase afterward, did offenders transgress again? Sheer utilitarianism, at the other extreme, could tinker amorally, punishing without fairness or justice so long as the outcomes were desirable. In practice, most punishments have evaluated both the damage done as well as the intent behind the act. We do not punish for just the harm caused (otherwise accidental damages would be penalized as harshly as intentional ones) and only rarely for the intent alone (otherwise the would-be killer or even the sadistic fantasist would be jailed for as long as the actual murderer). Evil intent has generally prompted harsher punishments for the actions it motivated and sometimes, as we will see, has been penalized by itself. Conversely, harms caused accidentally or

inadvertently have been punished less severely or not at all (except under strict liability in the common law world, where intent and negligence are irrelevant).

The motives prompting punishment have often been classified as to whether they look backward, to atoning for crimes already committed, or forward, to avoiding future offenses.<sup>24</sup> Thus, revenge, restitution, and other measures to reestablish moral balance sought to rectify past injustice. They were concerned primarily with the individual criminal and with society only insofar as they aimed to restore its overall ethical equilibrium. Incapacitation, deterrence, rehabilitation, and prevention, in turn, aimed to improve the future. They were concerned more with bettering society than with making offenders pay. Individual criminals were reformed or incapacitated. Those incapable of reform had to be incapacitated, at the extreme by death. If they were used as examples, others' behavior might be affected. Incapacitation aimed less to punish than to render offenders harmless, halting any further predations.

Deterrence looked forward, but it affected the future only insofar as making criminals' present circumstances publicly miserable did in fact discourage others from emulation. Its logic was that even if offenders were not capable of rehabilitation and only suffered by being punished, others contemplating their fates might be reformed and avoid crime—a second-order rehabilitation.<sup>25</sup> Rehabilitation, in turn, acted on present criminals, expecting to improve their future conduct. Finally, prevention most actively shaped the future by intervening, not just to reform today's transgressors or merely to make the environment less prone to crime but to anticipate future acts and discourage potential criminals or punish them beforehand by laws on inchoate offenses.

The dividing line between backward- and forward-oriented punishments has been imprecise both conceptually and historically. Already Plato discussed punishment in terms of learning virtue and deterring future acts rather than just in terms of taking vengeance

for the past, which he dismissed as a primitive, animalistic motive.<sup>26</sup> Yet retribution has remained a motive in the modern world. Indeed, it enjoyed a renaissance in the twentieth century, with desert weighing heavily in determining punishment.<sup>27</sup> Conversely, even when administering just deserts retributively, punishment can deter if potential offenders understand that they are likely to be caught and sanctioned. All human punishments, “in a large and extended view,” the English jurist William Blackstone wrote in the eighteenth century, are more intended to prevent future crimes than to expiate past ones.<sup>28</sup> Whatever its immediate motives, a well-functioning system of justice deters.

Any given punishment could be motivated in different ways. Largely all punishments could be retributive, except in cases where offenders actively welcomed the outcome—as with murders intended to prompt capital punishment, thus disguising a suicide. In religions where killing could be forgiven but self-killing could not, suicide by murder followed logically—at least if God were thought too obtuse to see through the ruse. Swedes, especially women, killed others to achieve suicide without eternal damnation. Theirs was the predominant form of homicide in Stockholm in the late seventeenth century. The victims often were children, innocents who did not have to repent their sins before death. Muslims in the Philippines have masked their desire for death in jihadist attacks that lead to their killing. Suicide by cop is a short-cut variant.<sup>29</sup>

If suffering were required, then retributive punishment of masochists was definitionally impossible. Indeed, exoneration would be the only feasible sanction. That logic cropped up as the authorities sought to deal with suicidal murderers of the sort just mentioned. Paul Johann von Feuerbach’s draft of the Bavarian penal code in 1810 commuted execution to lifelong labor in chains if the offender was aiming to commit suicide.<sup>30</sup> In Denmark, torture was first added to the death penalty in hopes of deterring would-be suicides. When that did not work, capital punishment for those who

sought death through murder was abolished altogether in 1767—a penal enactment of the old joke where when the masochist says, “Hurt me, hurt me,” the sadist says, “No.”

If rehabilitation were painful or unpleasant, even it could be retributive—as is often true of prisons.<sup>31</sup> Carried out in secret, many punishments merely incapacitated, while when carried out in public they also deterred—both the offender (except when executed) and others. Shaming punishments definitionally had to be public and were both retributive and deterrent. Besides being retributive, death and banishment could also be both incapacitating and deterrent. So could certain kinds of mutilation, especially the so-called sympathetic talionic punishments: amputating thieves’ hands, pederasts’ testicles, rapists’ penises, or blasphemers’ and slanderers’ tongues.<sup>32</sup>

Death could be retributive and deterrent but never rehabilitative. Nor could a true life sentence in prison—or at least it did not matter even if it were.<sup>33</sup> Fines, depending on their level, could be retributive, deterrent, or compensatory or all three, but unlikely rehabilitative.<sup>34</sup> Prison could be retributive, deterrent, incapacitating, preventive, and perhaps even rehabilitative. Forced labor could be compensatory, deterrent (and even better than execution since it lasted longer), and possibly rehabilitative.<sup>35</sup> Banishment has been understood both as incapacitating and—by the ancient Greeks—as rehabilitative because part of a purification ritual. In the British penal colony of New South Wales, banishment also rehabilitated the many convicts, who subsequently became useful citizens.<sup>36</sup> And retributive punishments implemented fairly and firmly could have deterrent and thus utilitarian effects by demonstrating that the justice system worked and would punish miscreants.<sup>37</sup> Looking just at the punishment did not always reveal the motives behind it.

Nevertheless, the broad historical trend has been from retrospective to prospective approaches, from retribution to rehabilitation. Blips mar the smooth curve of any long-term evolution. It is always difficult to date developments precisely, nor do they occur



everywhere simultaneously. But we can discern a rough outline. Starting in the sixteenth century, the newly powerful and effective core European states enforced the law more harshly than ever before as they refined their own powers of imposing justice. But having rattled its sabers, the state needed less to demonstrate its ferocity as its prowess improved. That trend toward greater moderation has continued largely into the present. A detailed study of any subperiod will naturally unveil many variations in this large-scale development. Physical mutilation, rare in the late Middle Ages in England, revived under the Tudors.<sup>38</sup> Having faded with the Enlightenment philosophes, a retributive justice was revived by Kant and then Hegel in the nineteenth century. From the early nineteenth century, US prisons pursued rehabilitation. Overcrowding in the post-Civil War period ended such efforts. Rehabilitation returned in the twentieth century but again was abandoned by penal theorists and practitioners in the mid-1960s.<sup>39</sup>

Starting in the 1970s, retribution made a comeback, both among reformers who thought that punishment's social utility had been overemphasized at the expense of basic notions of justice as well as in penal practice. Now came mandatory minimum sentences, enhanced sanctions for habitual offenders, reduction of parole, and, above all, the late twentieth century's massive expansion of incarceration.<sup>40</sup> In the Islamic world, punishments have become notably harsher in recent decades, with executions, stonings, and merciless lashings. Criminals are still executed in public in China, Pakistan, and the Middle East.<sup>41</sup> Compensation and restitution have also enjoyed second lives in the form of "restorative" justice, focusing more attention on victims than did retribution or social utility. Community-service requirements, too, have offered a mild form of restitution to society as a whole.<sup>42</sup>

Nonetheless, in a long historical trajectory it is hard to overlook two fundamental developments. Most obviously, though punishment had long been civil society's task, it finally became the state's

largely exclusive province. Less undeniably but nonetheless true, the state has been more concerned with society's overall functioning than with individual justice—except insofar as a fair judiciary is necessary for a well-run system. The state's attention has turned evermore to punishment's social utility. Preventing future offenses has become more pressing than atoning for past acts. That has meant a shift from retributive justice to the prevention of crime. A moderation of the ferocious inflictions of the past has, in turn, been one welcome outcome.

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# Command and Persuade

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