

# THE HUMANITARIAN THEORY OF PUNISHMENT<sup>1</sup>

## A REPLY TO C. S. LEWIS

By NORVAL MORRIS and DONALD BUCKLE

THE University of Melbourne has recently established a Department of Criminology. Our Chairman is a Judge of the Supreme Court, and our Board includes specialists in Medicine, Psychology, Sociology, Psychiatry, and Criminology. Already it is clear that we all adhere, to a greater or less degree, to what C. S. Lewis in his entirely delightful article called a "Humanitarian Theory of Punishment".

His thesis is so profoundly opposed to our work as participants in this new Department that it is incumbent upon us to state our position; though we face this task with trepidation, seeing ourselves as Davids with literary slings incapable of delivering a series of blows as incisive as even one phrase from the armoury of Goliath Lewis.

Lewis' vital contention is that the Humanitarian Theory gives to the supposed expert an unwarranted and unjustified power over other men's lives. It is, of course, undeniable that to put a man in a white coat, or to give him a degree in psychology or sociology, does not diminish his sadistic potentialities or the disrupting effects of power on him. Such specialists must be regarded with that healthy scepticism of which Lewis is a fine champion; but scepticism should not lead us to deny their usefulness entirely, and insist—as does Lewis—on purely condign punishment, linked, as he phrases it, to the criminal's "desert". As we shall show, the use of the expert does not involve any abandonment of control over him. He can be kept on tap and yet not on top.

Let us attempt a reply to Lewis' article by advancing two propositions contrary to his thesis. First, the possibility of linking with the Humanitarian Theory of Punishment a just consideration of the interest of society and of the criminal. Secondly, the impossibility of his suggested return to the Retributive Theory of Punishment. If these propositions be demonstrated, there is little left of Lewis' argument; though its great worth as a warning against the uncontrolled allocation of powers remains.

Lewis rests his case on a suggested dichotomy in which a contrast is drawn between the "deserved" or "just" punishment on the one hand, and therapy or treatment on the other—the latter being the

<sup>1</sup>This article, a reply to the previous one, is reprinted from *Twentieth Century* with the kind permission of the editor.

significant purpose of those upholding the Humanitarian Theory of Punishment. To us, this seems an unreal distinction. Whatever the punishment inflicted as a "just" punishment, whatever theory of punishment one may espouse, it cannot be denied that reformation procured in association with it is a desirable thing. To an extent, therefore, some concept of therapy is involved in every desirable theory of punishment. What Lewis opposes is that therapy should be procured through punishment (not in association with it but by means of it), arguing that if treatment be elevated to a purpose as distinct from a mere subsidiary part of a punishment we shall have been delivered over to omnipotent moral busybodies who will work cruelty without end.

Herein then lies the kernel of the discussion—Lewis regards reformation and deterrence as subsidiary and never as a justification of punishment and suggests that the Humanitarian Theory of Punishment has erected them into its vital aims. This, we believe, is a perversion of the Humanitarian theory. To us, the vital purpose of the criminal law is the *protection of the community*, always limiting and conditioning its punishments in the light of two other factors, namely, a determination by its actions never to deny the fundamental humanity of even the most depraved criminal, and secondly, a critical appraisal of the limits of our understanding of the springs of human conduct and our ability to predict its course. There is a third limitation imposed by the community's expectations of penal sanctions which we shall later consider.

Lewis' article omits any reference to the protection of the community as a valid aim of penal sanctions. He stresses the human personality of each individual criminal, and with this we agree. One human personality he overlooks, however, is the individual humanity of the potential *victim* of the criminal. It is this humanity we defend; the humanity of those whose only likely connection with the criminal law is the law's failure to protect them from clearly dangerous people.

There is, surely, a parallel in the medical sphere. None of us shrinks from imposing considerable limitations on the freedom of action of those suffering from an infectious disease, and it is perfectly clear that over a wide area we have a Humanitarian Theory of Social Medicine. By suggesting this, we do not mean to take up the completely determinist position, and do not argue that criminal actions are as inaccessible to the actor's control as are the germs that may infect him. Crime is not a personal disease; it cannot be equated to personal disease; it is, however, a social disease. Looked at from the point of view of society, crime is a disease of an integral part of that

society. And it is a virus from which society must seek protection. Thus, Lewis' suggestion that the humanitarians think "all crime is more or less pathological" is untrue if he means by it that crime is regarded as individually pathological. No responsible authority would accept that crime is an individually pathological phenomenon; but it is quite clearly a socially pathological phenomenon. From the point of view of a society, therefore, the prime function of punishment must clearly be the protection of that society.

The complete absence of any regard for the potential victim of the criminal which runs through Lewis' article is to us somewhat shocking. His insistence on the individual personality of the criminal to the extent that the punishment must in some way be regarded by the community as deserved, as capable of being measured by an efficient punishment system, carries with it a total disregard for the essential personality of the potential victims of the criminal. *Per contra*, it seems to us that an argument for this aim of the criminal law—the protection of the community—is conclusive provided it does not carry with it any serious disadvantages. And the disadvantage Lewis sees, and which is undoubtedly a threat, is the possibility of the abuse of power necessarily given to those aiming to fulfil this purpose. *Can* the expert be kept on tap and not on top?

This risk of administrative abuse of power runs throughout the whole social pattern as we increasingly come to rely on the expert—in economics, in town planning, in many aspects of social organization, indeed in every sphere of our corporate life, including that of the detection and punishment of crime. One of the basic problems of our age is to erect effective controls by which we can make use of the services of experts and yet guard ourselves from their potential authoritarian danger. In the field of penal sanctions, because of our traditional awareness of this danger, this protection can fairly easily be guaranteed.

The Criminal Courts have traditionally represented the common man and the common man's view of morality. The Judges have earned the confidence of the people as unbiased and incorruptible men. The Courts have to hand excellent techniques for controlling the exuberance of the expert in criminology or penology. Let the ultimate control always reside in the Courts, let the expert always be accountable to them, let the criminal always have access to the Court, let the controls of natural justice which the law has built up be applicable, and, it is suggested, the tyranny which Lewis fore-shadows will not eventuate. This type of protection of the individual citizen is surely not beyond the wit of a Nation that has built up the concept of a Parliament and the idea of a Jury.

A test case is given by one of the basic demands of those adhering to the Humanitarian theory: for certain types of criminals the Humanitarians wish to substitute for definite sentences some degree of indeterminacy as to the period those criminals will spend in prison. As Lewis points out, herein lies a real risk of tyranny. The answer is again to be found in the existing courts. These should require the expert to give evidence publicly and, subject to cross-examination, to substantiate the reasons for his decision concerning the release of the criminal. The prisoner should have the power to initiate this type of enquiry at regular intervals, and the onus of proof should never shift from the expert.

An example of wise techniques of judicial control of the indeterminate sentence is to be found in the recent Tasmanian Sexual Offences Act 1951, which allows the courts to impose several forms of indeterminate sentence accompanied by re-educative measures on certain sexual offenders. One of these sentences is called a Treatment Order, and section 13 (2) of the Act protects the convicted criminal against the tyranny of the expert by providing that:

"A person against whom a treatment order has been made may petition the court to discharge the order upon the ground—

- (a) that the treatment is unreasonable;
  - (b) that the treatment is ineffective;
  - (c) that the treatment is not being given or is unduly protracted;
- or
- (d) that the ... petitioner is cured of the indisposition which the order was made to cure."

The use of "indisposition" is infelicitous, and there may well be other grounds on which the criminal should be allowed to petition the court; but the need to avoid the abuse of power and the establishment of means of achieving this is clearly recognized in this Act as it is throughout Anglo-American jurisprudence. This recognition constitutes a complete rebuttal of Lewis' worst fears.

We therefore submit that we have demonstrated the practical possibility of a Humanitarian theory carrying with it a due regard for the interests both of society and of the individual criminal. Now let us suggest the impossibility of a return, as Lewis recommends, to the Retributive Theory of Punishment.

For certain types of criminals, given our present moral conscience, a return to a pure Retributive Theory is unthinkable. At both ends of the scale of punishment practically every civilized society has abandoned the Retributive Theory. With child criminals we have abandoned it quite explicitly, holding that the welfare of the child

must frequently be regarded as a major consideration motivating courts charged with sentencing juvenile delinquents. The cost to the community of rewarding the larceny of a few sweets by a child with a punishment exactly equated to that social harm, has proved too expensive to be tolerated. It has been calculated that an incurable schizophrenic costs the community some £20,000 throughout his life, and it is clear that the adult criminal costs the community a great deal more. Therefore, both for the child's sake and for the community's, it is frequently necessary to reward the delinquent child with a punishment not "justly related", in the sense in which Lewis uses the phrase, to the offence he has committed. The emphasis must be on therapy. We suggest that there would be no responsible opinion reversing this development.

And at the other end of the scale of punishment the community has likewise abandoned any hint of a Retributive Theory. With habitual criminals every civilized society has abandoned any attempt to equate the punishment to the latest crime that that criminal committed. There are various techniques adopted all over the world. By some the habitual criminal is first punished for the crime he has committed and then held in prison for a protracted period on account of his being an habitual criminal. Others add together the man's dangerousness to the community and his latest offence, and impose a sentence on him as an habitual criminal which is clearly unrelated to that offence only. Here again nobody could tolerate the thought of abandoning this Humanitarian approach to punishment and reverting to a purely Retributive one.

It is, we agree, possible to gather some support for a return to the Retributive Theory of Punishment for the graver and more professional type of criminal who has not yet developed into the habitual criminal. It is possible to do this simply because we do not know very much about the causes of crime. It is not possible, however, to find support for such a retrograde step in regard to those people who are at present put on probation. These are asked to atone for their crimes by being good citizens. And the Courts, advised by those who have studied problems of punishment and by those probation officers who are working in society, have decided that the people they put on probation are good risks, that is to say, they are not likely to offend again. A Retributive Theory could not tolerate such an approach to the punishment of these more minor offenders. Agreed, there is room for mercy in a Retributive Theory, but it could not be a universally applied mercy for certain types of crimes or criminals—if so, it would no longer be Retributive.

Thus for child delinquents, for habitual criminals, and for those

on probation—to take only a few—the punishments accepted by all civilized societies as suitable are not “deserved” punishments in any expiatory talionic sense. This concept of “desert” is really the lynch-pin of Lewis’ article. As he sees it, the idea of the “deserved” or “just” punishment is an acceptance that for each offence, calculated in the light both of the crime committed and the history of crimes perpetuated by that individual, there is a price of punishment known fairly widely throughout the community—that there is, in other words, a price-list of deserved punishments. This may well be a true picture of what is in many men’s minds; but it is only true for those people who consider a static situation in crime, who consider only two parties to any crime—the criminal and his victim. Now the contrast with this is the Humanitarian Theory which sees crime as a dynamic situation, not involving two parties, but involving many parties: not only a criminal and his victim, but a whole list of future potential victims who, unless they are protected with the best means at our disposal, are likely to suffer hardship. In arranging this protection, however, the Humanitarian must always remember that it should be related to the extent of current knowledge, and to the fact that the community must be expected to bear some risk for its dangerous and pathological elements.

We do not go to the extreme of denying importance to the community’s conception of a “deserved” punishment. The punishments imposed on criminals serve purposes other than those we have canvassed—they constitute society’s official pronouncement of the gravity with which any criminal action is viewed, and therefore assist in reinforcing that community’s sense of right. This sense of right, this group super-ego, must never be exacerbated either by the too great leniency or the extreme severity of any punishment imposed. In other words, the community’s sense of a just punishment will create the polarities of leniency and severity between which the criminal law may work out its other purposes.

Where we do deny the validity of this concept of the just or deserved punishment is where it is advanced as a basic philosophic justification of punishment, and not merely as a limiting factor. Kant and Hegel built theories of punishment round this concept which had no more connection with the day-to-day realities of our criminal law than with the pieces on the chess board. It is a similar erection of an emotional sense of right, not applied to the factual exigencies of the task faced by those imposing penal sanctions, that leads to such impossibilities as Lewis’ suggested return to the Retributive Theory of Punishment.

By constantly making the experts justify to judges and to juries

their actions in relation to criminals, punishment may be kept linked to the social conscience of the community. This, we submit, is a more truly comprehended "just" or "deserved" punishment than is the entirely emotional, atavistic approach which Lewis advocates.

It must not be assumed that Lewis' version of the Retributive Theory is itself completely satisfactory. Indeed, arguing from no less an authority than St. Thomas Aquinas, we may describe "retribution" as a deprivation or limitation of the individual's powers to continue to exercise his choice between good and evil acts in the area where his delinquency has occurred. (See Dr. Hawkins' article "Punishment and Moral Responsibility" at page 92 of *The King's Good Servant*—Papers read to the Thomas More Society of London, 1948.) In most cases, therefore, the punishment which will take the form of removal from society is itself the retribution, and should logically continue until the prisoner reaches a sufficient state of grace that he no longer intends to transgress. To us, there is no lack of conformity between theories derived from the Scholastic and Humanitarian philosophies.

Lewis may have been led to his conclusion by what appears to us an over-simplified view of the aetiology of crime. He appears to regard any crime solely as the result of a wrong choice between doing good or doing ill. We do not propose to wander into the morass of the free will-determinism argument, for we agree with Lewis that this is a cause of crime. We do not, however, regard it as the only cause of crime which is to us an extremely complicated moral, physical, psychological, and sociological phenomenon in which the totality of the criminal's inheritance and environment, together with his area of free will, will have causal connection with the crime he commits. To relate punishment to but one aetiological factor is to minimize the difficulty of fixing a rational sentence.

Our argument thus leads to a rejection of the Retributive Theory, not only on philosophical but also on purely practical political grounds, and to an acceptance of a morally just Humanitarian approach to punishment. It may be that a vital cause of our different view of punishment from that accepted by Lewis lies in our lower estimation of the efficacy of law as a means of social control. Law stands below Custom and well below Religion as a means of guiding men to the Good Life. It is a relatively blunt instrument of moral control, and should not be thought of as a means of achieving expiation of sin or completely just retribution for evil-doing.