

## COMMENT

### THE HUMANITARIAN THEORY OF PUNISHMENT

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I WISH to discuss one or two logical points which arise out of C. S. Lewis's article on "The Humanitarian Theory of Punishment"<sup>1</sup> and which were not brought out by Morris and Buckle in their admirable reply. Lewis has got at cross purposes with himself in a way very similar to that in which Intuitionists and Utilitarians in moral philosophy have often entangled themselves when arguing about the nature of obligation. Consider these two sorts of questions: (1) "Ought Smith to leave his wife?" "Ought I to return this book?" "Ought I to drive on this side of the road?" and (2) "Are our present marriage customs for the best?" "Is the institution of promise making a good one?" "Ought we to have a rule of the road and if so what?" I shall call the first sort of questions "first-order questions" and the second sort of questions "second-order questions". We can now say, roughly, that the Intuitionists were right when they dealt with the first-order questions, but hopelessly at sea when they dealt with the second-order questions, while the Utilitarians were able to talk a great deal of sense when they discussed the second-order questions but were most strained and unpalatable when they dealt with the first-order questions. The dispute in moral philosophy was so fruitless because each had (roughly) the right answer to one sort of question but not to the other. No one in his senses would weigh up the social consequences of returning a book he has borrowed: there is a moral rule that plainly covers the case and so he knows immediately what he should do. It is about *rules* and *social institutions* that we ask the Utilitarian type of question, not about individual actions. Of course in exceptional cases we have to think as Utilitarians about individual actions. This is either when rules conflict or when there is no rule that covers the case in question. But by and large we just "see" what to do in the individual cases (we have been brought up so to do): it is only when we consider the effect of certain rules or institutions on society as a whole, when we consider modifying or augmenting these rules and institutions, that the Utilitarian pattern of thought becomes appropriate. Philosophers like Butler and Kant are at their happiest when discussing how we deal

<sup>1</sup> 6 *Res Judicatae*, 224-30.

with the first-order type of question, those like Bentham and Mill when dealing with the second-order type of question. (Though note that Butler in one place<sup>2</sup> seems to say that God made our consciences as He did because *He* is a Utilitarian, even if we must not be. And I myself believe, rather heretically, that only a slight rephrasing of Kant is needed in order to turn him into a Utilitarian about *rules*.) Bentham's Utilitarian methods of argument work smoothly when he is considering rules (legislation) but he is quite silly where he tries to talk in the same way about individual actions. The point, then, is this, that it is not a question of intuitionism or utilitarianism but of *both* (in different places). The actions which we "see" to be right are those which come under rules we have been trained to obey: the justification of the rules, but not, in general, of the individual actions, is utilitarian.

I have sketched out the above theory of morals (which you can find more fully worked out in Toulmin's book *The Place of Reason in Ethics*) because it appears to me that theories of punishment have got at cross purposes in a precisely similar way to that in which the intuitionists and utilitarians get into cross purposes about right and wrong.

From the point of view of the legislator, we ask: "Is this the best punishment to assign for this type of offence?" It seems to me that the only way in which this question can be rationally discussed is the utilitarian way: that is by considering the consequences for society of adopting or not adopting the penal law in question. What other type of argument is relevant? Admittedly one could appeal to Scripture, but the New Testament was not intended as a text-book of penology, and some of the penal ideas of the Old Testament are barbarous. Certainly if we knew that God had said that such-and-such was the law we should adopt we should be foolish not to adopt it. But how does God know that it is the best law? God is rational and must have argued rationally to His decision. How else, then, than by arguing in the way *we* should, if we were rational, that is, in the Utilitarian way? (Cf. Butler again.) There is something else that Lewis might put in the place of Utilitarian argument: an appeal to the Law of Nature. I do not know what this is. But I think I know what the use of the expression "Law of Nature" is. It is this: "this is the Law of Nature" = "this is the rule that ought to be adopted", said by someone who wishes to disguise his own dogmatism and to conceal the fact that he is either unable or too lazy to search for a rational (i.e. a Utilitarian) justification of the proposed measure.

<sup>2</sup> *Dissertation upon the Nature of Virtue*, § 8.

From a Utilitarian point of view, then, we discuss a measure by asking "Will this measure or will some alternative one tend most to promote the well-being of society?" If the proposed measure is a penal law there seem to be only three ways in which it can be of value:

- (1) To deter people;
- (2) To protect society by eliminating or removing criminals;
- (3) To reform the criminal.

The first two of these are by far the most important. It is not always possible to reform the criminal. And I should say that (1) is of greater importance than (2). Lewis discusses (1) and (3) but ignores (2). There may be other ways in which the institution of punishment may benefit society and which could be cited to justify it. I do not know of any. It might be argued that punishment satisfies the desire of certain members of the society for revenge. However, the desire for revenge is something which is perhaps better left unsatisfied. It is difficult to believe that society would not be happier if it thought less about revenge. Moreover I do not see how the principle of revenge itself could possibly be justified. "If we adopt the principle 'An eye for an eye and a tooth for a tooth' we will make society happier." How?

We see then that Utilitarian considerations are relevant in discussing what penal legislation we should adopt. But just as in the case of rightness, analysed earlier in this paper, we find a totally different situation when we come to the individual action, the action of the judge or magistrate. The judge or magistrate must not argue as a Utilitarian, save *per accidens* where the law leaves some margin for choice, when deciding what punishment to impose. The just punishment for murder is death. That is, death is the punishment laid down by law. It is totally beside the point for the judge to argue about what action, in this particular instance, would promote the greatest general happiness.

I now make the following suggestion. A lot of what Lewis says is perfectly true. As judges or magistrates we must not think as Utilitarians. But this has not the slightest bearing on the question of whether *legislation* should or should not be governed by Utilitarian criteria. Lewis lays stress on the concept of Desert, and it is here, in the thinking of the judge or magistrate, that this concept comes in. The concept of Desert is quite inapplicable so far as the thinking of the legislator is concerned. Ordinarily we know what is meant by "the deserved punishment". It is that laid down by law. But how can "desert" have a meaning when we discuss what pun-

ishment the law ought to lay down? If we try to apply the idea of desert here we are either driven back on to Lewis's personal preferences ("I should like to see murderers hanged", say) or we have to fall back on some crude equation of punishment with amount of damage done: an eye for an eye. Why the damage-retribution equation should be thought a sound principle of legislation I do not know. I do not see how it could possibly be justified. Why should society be happier if we adopt this principle? Indeed it is quite easy to see that society will be happier if we do *not* adopt this principle.

To sum up: Lewis shows quite clearly that we do not always think about punishment in the Utilitarian way. My reply is that it is when we think of ourselves in the situation of magistrates that we are quite right not to think as Utilitarians. In this situation we are concerned with the first-order questions. But it is in considering the penal laws themselves, in considering the second-order questions, that we must think as Utilitarians. Lewis's argument derives a great deal of its plausibility from confusing the first-order and second-order questions.