ON PUNISHMENT: A REPLY

By C. S. LEWIS*

I HAVE to thank the Editor for this opportunity of replying to two most interesting critiques of my article on the Humanitarian Theory of Punishment *(Res Judicatae* (1953), vi, 2), one by Professor J.J.C. Smart and the other by Drs N. Morris and D. Buckle.

Professor Smart makes a distinction between questions of the First and of the Second Order. "First" are questions like "Ought I to return this book?"; Second, like "Is promise-making a good institution?" He claims that these two Orders of question require different methods of treatment. The first can be answered by Intuition (in the sense which moral philosophers sometimes give that word). We "see" what is "right" at once, because the proposed action falls under a rule. But second-order questions can be answered only on "utilitarian" principles. Since "right" means "agreeable to the rules" it is senseless to ask if the rules themselves are "right"; we can only ask if they are useful. A parallel would be this; granted a fixed spelling we may ask whether a word is spelled correctly, but cannot ask whether the spelling system is correct, only if it is consistent or convenient. Or again, a form may be grammatically right, but the grammar of a whole language cannot be right or wrong.

Professor Smart is here, of course, treating in a new way a very ancient distinction. It was realised by all the thinkers of the past that you could consider either (a) Whether an act was "just" in the sense of conforming to a law or custom, or (b) Whether a law or custom was itself "just". To the ancients and medievals, however, the distinction was one between (a) Justice by law or convention *nomo(i)* and (b) Justice "simply" or "by nature", *haplôs* or *physei,* or between (a) Positive Law, and (b) Natural Law. Both inquiries were about justice, but the distinction between them was acknowledged. The novelty of Professor Smart's system consists in confining the concept of justice to the First-order questions.

It is claimed that the new system (1) avoids a *petitio* inherent in any appeal to the Law of Nature or the "simply" just; for "to say that this is the Law of Nature is only to say that this is the rule we should adopt"; and (2) gets rid of dogmatic subjectivism. For the idea of desert in my article may be only "Lewis's personal preference."

* Fellow of Magdalen College, Oxford.

I am not convinced, however, that Professor Smart's system does avoid these inconveniences.

Those rules are to be accepted which are useful to the community, utility being (I think) what will make that community "happier".[1] Does this mean that the happiness of the community is to be pursued *at all costs*, or only to be pursued in so far as this pursuit is compatible with certain degrees of mercy, human dignity, and veracity? (I must not add "of justice" because, in Professor Smart's view, the rules themselves cannot be either just or unjust). If we take the second alternative, if we admit that there are some things, or even any one thing, which a community ought not to do however much it will increase its happiness, then we have really given up the position. We are now judging the useful by some other standard (whether we call it Conscience, or Practical Reason, or Law of Nature or Personal Preference). Suppose then, we take the first alternative: the happiness of the community is to be pursued at all costs. In certain circumstances the costs may be very heavy. In war, in some not improbable future when the world's food runs short, during some threat of revolution, very shocking things may be likely to make the community happier or to preserve its existence. We cannot be sure that frame-ups, witch-hunts, even cannibalism, would never be in this sense "useful". Let us suppose (what, I am very sure, is false) that Professor Smart is prepared to go the whole hog. It then remains to ask him why he does so or why he thinks we should agree with him. He of all men cannot reply that *salus populi suprema lex* is the Law of Nature; firstly, because he "does not know what the Law of Nature is", and secondly, because we others know that "the people should be preserved" is not the Law of Nature but only one clause in that Law. What then could a pursuit of the community's happiness at all costs be based on if not on Professor Smart's "personal preference?" The real difference between him and me would then be simply that we have different desires. Or, rather, that I have one more desire than he. For, like him, I desire the continuance and happiness of my country (and species),[2] but then I also desire that they should be people of a certain sort, behaving in a certain way. The second desire is the stronger of the two. If I cannot have both, I had rather that the human race, having a certain quality in their lives, should continue

[1] See the penultimate paragraph of Professor Smart's article.

[2] I am not sure whether for Professor Smart the "community" means the nation or the species. If the former, difficulties arise about international morality, in discussing which I think Professor Smart would have to come to the species sooner or later.

for only a few centuries than that, losing freedom, friendship, dignity, and mercy, and learning to be quite content without them, they should continue for millions of millenia. If it is merely a matter of wishes, there is really no further question for discussion. Lots of people feel like me, and lots feel the other way. I believe that it is in our age being decided which kind of man will win.

And that is why, if I may say so without discourtesy, Professor Smart and I both matter so little compared with Drs Morris and Buckle. We are only dons; they are criminologists, a lawyer and a psychiatrist respectively. And the only thing which leads me so far off my own beat as to write about "Penology" at all is my intense anxiety as to which side in this immensely important conflict will have the Law for its ally. This leads me to the only serious disagreement between my two critics and myself.

Other disagreements there are, but they mainly turn on misunderstandings for which I am probably to blame. Thus:

(1) There was certainly too little, if there was anything, in my article about the protection of the community. I am afraid I took it for granted. But the distinction in my mind would not be, as my critics suppose *(ibid* p. 232), one between "subsidiary" and "vital" elements in punishment. I call the act of taking a packet of cigarettes off a counter and slipping it into one's pocket "purchase" or "theft" acording as one does or does not pay for it. This does not mean that I consider the taking away of the goods as "subsidiary" in an act of purchase. It means that what legitimises it, what makes it purchase at all, is the paying. I call the sexual act chaste or unchaste according as the parties are or are not married to one another. This does not mean that I consider it as "subsidiary" to marriage, but that what legitimises it, what makes it a specimen of conjugal behaviour at all, is marriage. In the same way, I am ready to make both the protection of society and the "cure" of the criminal as important as you please in punishment, but only on a certain condition; namely, that the initial act of thus interfering with a man's liberty be justified on grounds of desert. Like payment in purchase, or marriage as regards the sexual act, it is this, and (I believe) this alone, which legitimises our proceeding and makes it an instance of punishment at all, instead of an instance of tyranny—or, perhaps, of war.

(2) I agree about criminal *children* (see *ibid,* Morris & Buckle, p. 234). There has been progress in this matter. Very primitive societies will "try" and "punish" an axe or a spear in cases of unintentional homicide. Somewhere (I think, in the Empire) during the later Middle Ages a pig was solemnly tried for a murder. Till quite

recently, we may (I don't know) have tried children as if they had adult responsibility. These things have rightly been abolished. But the whole question is whether you want the process to be carried further: whether you want us all to be simultaneously deprived of the protection and released from the responsibilities of adult citizenship and reduced to the level of the child, the pig, and the axe. I don't want this because I don't think there are in fact any people who stand to the rest of us as adult to child, man to beast, or animate to inanimate.[3] I think the laws which laid down a "desertless" theory of punishment would in reality be made and administered by people just like the rest of us.

But the real disagreement is this. Drs Morris and Buckle, fully alive to dangers of the sort I dread and reprobating them no less than I, believe that we have a safeguard. It lies in the Courts, in their incorruptible judges, their excellent techniques, and "the controls of natural justice which the law has built up" (p. 233). Yes; if the whole tradition of natural justice which the law has for so long incorporated, will survive the completion of that change in our attitude to punishment which we are now discussing. But that for me is precisely the question. Our Courts, I agree, "have traditionally represented the common man and the common man's view of morality" *(Ibid)*. It is true that we must here extend the term "common man" to cover Locke, Grotius, Hooker, Poynet, Aquinas, Justinian, the Stoics, and Aristotle, but I have no objection to that; in one most important, and to me glorious, sense they were all common men.[4] But that whole tradition is tied up with ideas of free-will, responsibility, rights, and the law of nature. Can it survive in Courts whose penal practice daily subordinates "desert" to therapy and the protection of society? Can the Law assume one philosophy in practice and continue to enjoy the safeguards of a different philosophy?

I write as the son of one lawyer and the lifelong friend of another, to two criminologists one of whom is a lawyer. I believe an approximation between their view and mine is not to be despaired of, for we have the same ends at heart. I wish society to be protected and I should be very glad if all punishments were also cures. All I plead for is the *prior* condition of ill desert; loss of liberty justified on retributive grounds *before* we begin considering the other factors. After that, as you please. Till that, there is really no question of

[3] This is really the same objection as that which I would make to Aristotle's theory of slavery *(Pol.* 1254A *et sq.)*. We can all recognise the "natural" slaves (I am perhaps one myself) but where are the "natural" masters"?

[4] See also Lewis: *Abolition of Man* (1947), especially the Appendix.

"punishment". We are not such poltroons that we want to be protected unconditionally, though when a man has deserved punishment we shall very properly look to our protection in devising it. We are not such busybodies that we want to improve all our neighbours by force; but when one of our neighbours has justly forfeited his right not to be interfered with, we shall charitably try to make his punishment improve him. But we will not presume to teach him (who, after all, are we?) till he has merited that we should "larn him". Will Dr Morris and Dr Buckle come so far to meet me as that? On their decision and on that of others in similar important offices, depends, I believe, the continued dignity and beneficence of that great discipline the Law, but also much more. For, if I am not deceived, we are all at this moment helping to decide whether humanity shall retain all that has hitherto made humanity worth preserving, or whether we must slide down into the sub-humanity imagined by Mr Aldous Huxley and George Orwell and partially realised in Hitler's Germany. For the extermination of the Jews really would have been "useful" if the racial theories had been correct; there is no foretelling what may come to seem, or even to be, "useful", and "necessity" was always "the tyrant's plea."