

Punishment as Language

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I

A number of philosophers and legal scholars have pointed out a fact about punishment that had not been sufficiently appreciated by many traditional accounts, utilitarian, retributive, or 'mixed': that evil inflicted on the person punished is not an evil *simpliciter*, but rather the expression of an important social message—that punishment is a kind of language. The message which it is seen to communicate can broadly be described as condemnation by society of the crime committed. In what is still the only attempt at a general *and* critical discussion—Anthony Skillen's 'How to say Things with Walls'¹—this way of understanding punishment is termed 'expressionism'. In this paper I propose to sort out the main varieties of expressionism in the philosophy of punishment, and to discuss some of their pros and cons.

One variety of expressionism is represented by Joel Feinberg's influential paper on 'The Expressive Function of Punishment'. Feinberg's point of departure is an important deficiency he finds in the 'Flew–Benn–Hart' definition of punishment, which has been generally accepted in philosophical debates since the fifties. To define punishment as hard treatment intentionally inflicted on a person who has offended against a legal rule, by an authority constituted by the relevant legal system, is to miss an essential element of punishment as distinguished from a mere penalty such as a parking ticket. That element is its *symbolic significance*. Punishment proper is 'a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those "in whose name" the punishment is inflicted.'² The 'hard treatment' involved in punishment and its expressive aspect in reality go together—the unpleasant treatment itself expresses the condemnation, 'the very walls of his cell condemn him'³—but for purposes of analysis the two should be distinguished. Feinberg's

¹ A. J. Skillen, 'How to Say Things with Walls', *Philosophy* 55 (1980), 509–523.

² J. Feinberg, 'The Expressive Function of Punishment', *Doing and Deserving* (Princeton University Press, 1970), 98.

³ *Ibid.*, 100.

thesis is that a definition of punishment must include both. Otherwise it may be suitable for dealing with such purposes of punishment as deterrence, reform, or rehabilitation, but not with some of its other functions, which are possible only by virtue of the expressive nature of punishment. Feinberg distinguishes four such functions: authoritative disavowal of the crime committed, symbolic nonacquiescence in it, vindication of the law which has been broken, and placing blame squarely on the culprit and thereby absolving anyone else who might have been suspected.

Feinberg's analysis of the expressive aspect of punishment and the tasks it performs *qua* expressive is largely convincing and very helpful. Its main limitation is just that—that it is solely an analysis. Feinberg's concern is with the definition of punishment, not with its moral legitimacy; his expressionist account is offered as a contribution towards a more comprehensive understanding of the practice of punishment, and not as a justification (complete or partial) of that practice. Despite certain nods in the utilitarian direction, Feinberg's expressionism is ultimately neutral between competing ethical theories of punishment.

II

In the philosophy of punishment, an account such as Feinberg's is but a prolegomenon to the main part of the inquiry. Once the expressive character of punishment is acknowledged and its various potentialities specified, the question to ask is, What is the point—the justification—of expressing society's condemnation of crime by inflicting the evil of punishment? In the rest of this paper I shall be discussing the main varieties of expressionism as possible answers to this question, i.e. the main varieties of *normative* expressionism.

One of them is the theory of punishment of James Fitzjames Stephen. Stephen points out that moral indignation, vindictive feelings and hatred of the criminal are the usual response to crime in all societies we know of, and goes on to claim that they are also natural and healthy. They cannot be preached away by moralists who want us to learn to turn the other cheek instead, for they are too deeply rooted in human nature. They are also fully legitimate; the whole criminal law is based on the principle that it is morally right to hate criminals. The central function of punishment is to express these feelings in a regular, public, legal way.

More specifically, punishment embodies and emphatically expresses our moral indignation aroused by the crime, and the hatred and vindictiveness we feel towards its perpetrator. As these sentiments are

expressed in punishment, they are thereby given satisfaction as well. Furthermore, punishment ratifies these feelings; in Stephen's memorable words, 'the criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite.'⁴ (In this analogy, and in Stephen's insistence that indignation and vindictive sentiments of the public be given expression in a regular, public and legal manner, there is an implication that otherwise they are liable to be expressed in socially unregulated and disruptive ways.) Finally, punishment endows the indignation and vindictiveness it expresses with definite and lasting significance and impact: '. . . the sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment.'⁵

Punishment also aims at preventing crime. This is effected by its deterrent impact and by way of disabling the criminal from breaking the law again. But the expressive and deterrent functions of punishment are in no way inconsistent: the former reinforces the latter, disgrace deters. A thief is deterred by the prospect of six months in jail; would he be equally deterred by the prospect of catching an illness which causes the same amount of confinement, inconvenience and financial loss?

Another major statement of expressionism is found in the writings of Emile Durkheim. The background of Durkheim's account of punishment, as of his discussion of other social practices, is his theory of collective conscience as the basis of social cohesion. This conscience is a set of collective beliefs and sentiments that, for a given social system, are found in all healthy individual consciences with a certain degree of definiteness and force. Crime is an act that shocks a deeply ingrained and clearly defined collective sentiment. Such a sentiment derives all its authority and force from the fact that it is shared by all; it is strong because it is uncontested. A crime challenges and thereby damages this unanimity. If it is to be defended, if it is to survive, this unanimity must be reasserted. Individual consciences offended by the crime must 'unite themselves to give mutual evidence of their communion . . . reinforce themselves by mutual assurances that they are always agreed' and that the act challenging this agreement is anomalous.⁶ This can be done only by common action: by passionate reaction of the outraged common

⁴ J. F. Stephen, *A General View of the Criminal Laws of England* (London: Macmillan, 1863), 99.

⁵ J. F. Stephen, *A History of the Criminal Law of England* (London: Macmillan, 1883), Vol. 2, 81.

⁶ E. Durkheim, *The Division of Labor in Society*, trans. by G. Simpson (New York: The Free Press, 1964), 103.

sentiments, of the shocked collective conscience, to the offending act. This reaction is punishment.

Punishment involves the infliction of suffering, but this is not its essential characteristic. Essentially, punishment is 'the palpable symbol' of an inner state, 'a notation, a language, through which is expressed the feeling inspired by the disapproved behaviour'.⁷ This feeling is 'unanimous aversion'; its expression through punishment signifies that the offended sentiments are and remain collective. Thus the main function of punishment is not so much to reform or deter, but rather to maintain social cohesion by safeguarding a vigorous collective conscience. Challenged by crime, the latter 'would necessarily lose its energy, if an emotional reaction of the community did not come to compensate its loss, and it would result in a breakdown of social solidarity'.⁸

But the most fully developed and philosophically the most interesting formulation of expressionism is Alfred Cyril Ewing's 'educative theory' of punishment. Its central claim is that punishment is 'a kind of language intended to express moral disapproval'.⁹ It is a language painful to listen to for the immediate addressee; but the pain has a moral significance and a moral function. It is both a symbol of the wickedness of his action and an expression of society's moral condemnation of it. And its aim is to help the criminal realize the wrongness of his action and mend his ways. For the criminal to be reformed, and not merely deterred,

he must realize the badness of what he has been doing, and since his previous actions make it very doubtful whether he will do so of his own accord, this badness must be 'brought home to him' and the consciousness of it stamped on his mind by suffering. The infliction of pain is society's way of impressing on him that he has done wrong.¹⁰

This is the distinctively moral influence of punishment. It also sends the same moral message and exerts a moralizing influence in another direction; that of the public at large. To be sure, people do not need the state to tell them that it is morally wrong to steal or kill by punishing those who do so. But we know that some are liable to commit such acts

⁷ E. Durkheim, *Moral Education*, E. K. Wilson (ed.), trans. by E. K. Wilson and H. Schnurer (Glencoe: The Free Press, 1961), 176.

⁸ E. Durkheim, *The Division of Labor in Society*, 108.

⁹ A. C. Ewing, 'Punishment as Viewed by the Philosopher', *The Canadian Bar Review* 21 (1943), 116.

¹⁰ A. C. Ewing, *The Morality of Punishment* (London: Kegan Paul, Trench, Trubner & Co., 1929), 84.

in the future, and that shows that not everybody realizes strongly and vividly enough just how very wrong such acts are. Those who do not are in need of the kind of moral education that is provided when thieves and murderers are punished. The theory of punishment need not take into account really upright people anyway, but rather their 'weaker brethren' who are 'hovering on the borderline of crime'.¹¹

These, then, are the main points in three expressionist accounts of punishment. The differences between them concern both the contents of the expression and the process of expressing these contents. According to Stephen and Durkheim, what are expressed through punishment are *feelings, sentiments* of the public; the expression *vents* these feelings. For Ewing, it is a moral *judgment* that is being *communicated* through punishment. Further differences have to do with the purpose and justification of using the language of punishment. Stephen offers a secularized version of the religious vision of the just rejoicing in heaven at the torments of sinners in hell: the aim of punishment is *gratification* of the vindictive feelings of the public. These feelings are natural, healthy and strong, and their satisfaction is good in itself. According to Durkheim, the purpose of giving vent to collective sentiments through punishment is to *reinforce* these sentiments, and thereby maintain *social solidarity* and *cohesion*. Ewing is more intellectualistic: punishment as expressive of society's moral condemnation *teaches* a moral lesson in order to *reform* the criminal and *educate* the public, thus contributing to the reduction of crime. The ethical diagnosis of the state of the public is also different in the three accounts. Neither Stephen nor Durkheim thinks that the public is in need of moral enlightenment. The former has no doubt that the public *knows* well enough what is right and what is wrong; its need to express and gratify its hatred of the criminal is supervenient on this knowledge. The latter would refuse to talk in terms of moral knowledge, for he holds that an act is wrong *in virtue of being disapproved* by society; what society needs is to vent its disapproval on appropriate occasions, and thereby reinforce it. Ewing, on the other hand, sees a significant part of the public *lacking in moral understanding* and in need of education; this is provided when punishment expresses the moral condemnation of crime by that part of society which has the right moral beliefs ingrained deeply enough.

III

But the differences of detail are not important for the point I want to make. The important things are two basic features common to these

¹¹ A. C. Ewing, 'Punishment as Moral Agency', *Mind* 36 (1927), 297.

statements of expressionism. Punishment is seen as valuable not in itself, but as a means. And the end which it serves is social not only in the sense that it is an end *of* society, but also in that it is achieved by directly *affecting* society (or part of it) in a certain way. Stephen and Durkheim have hardly anything to say about the individual punished; whatever is done to him is significant and justified primarily in terms of what this does for others. The latter expressly says that punishment is designed above all to act on decent, law-abiding citizens: as it is meant to heal the wounds inflicted on collective sentiments, it can be effective only where these sentiments exist. Ewing takes into account the reformative effects of punishment on the individual punished, but makes it clear that its main object and primary justification is its educative influence on the public. The ultimate concern in punishing is to reduce crime; therefore education comes first and reform second, both for the obvious reason that the actual criminal is but one while there are many potential criminals in the public, and because punishment is much more efficient in promoting the former objective than in achieving the latter.

There is another major theory of punishment that has both these features: the deterrent theory. Because it sees the *sole* justification of punishment in its contribution to crime control through its deterrent effects, the theory is exposed to the criticism that it severs the connection between punishment and considerations of justice and desert, and is liable to legitimize various unjust punishments whenever these turn out to be efficient *and* economical means of deterrence. The list of types of injustice which may prove socially expedient and therefore also morally right from the point of view of the deterrent theory is long; here I want to mention only two: punishment of the innocent and the merely apparent punishment of the guilty. While the argument on punishment of the innocent has been in the focus of confrontations between utilitarians and retributivists for quite some time now, the one on punishing the guilty in appearance only should perhaps be explicated. Within the context of the deterrent theory one must distinguish, with Bentham, between real and apparent punishment—punishment actually inflicted on someone, and the idea of that punishment formed in the minds of others—and acknowledge that it is apparent punishment that secures the desired deterrent effects on the public, which is the principal target. In this respect, real punishment is merely an expense, necessary for the sake of appearance. Therefore the proportion between the two should be as much as possible in favour of appearance as against reality. And the ultimate achievement of efficiency *and* economy in punishing would be to reap the fruits of apparent punishment without paying for them at all in the currency of human suffering of which real punishment consists: ‘If hanging a man *in effigy* would produce the

same salutary impression of terror upon the minds of the people, it would be folly or cruelty ever to hang a man *in person*.¹²

Both Stephen and Durkheim criticize the deterrent theory for its unacceptable implications regarding the severity of punishment, and offer their own accounts as an alternative. Both seem to take it for granted that punishment as expressive will always be addressed to the guilty and only the guilty. Ewing is more cautious in this matter. He subjects the deterrent view to detailed critical analysis, marshalling against it the punishment-of-the-innocent argument, among others. He then presents his own educative theory as an alternative—as a theory that effects a reconciliation of utilitarianism and retributivism by taking into account both the social utility of punishment and considerations of justice and desert. If punishment is to be socially useful—if it is to reform the criminal and educate the public by communicating society's condemnation of the crime—the communication must be true and delivered to the right address, i.e. meted out for a wrong act and to its perpetrator. If it is inflicted on an innocent person, it can have no desirable effects, neither on him nor on the public; it can only confuse, embitter and corrupt both the person punished and everyone else. If it is to be socially useful in the relevant sense, punishment must be deserved and just.

Nevertheless, the kind of expressionism advanced by these authors is exposed to the arguments on punishing the innocent and punishing the guilty in appearance only no less than the deterrent theory. For the vindictive feelings of the public to be vented and gratified, or for the collective sentiments to be given expression and thus reinforced, the person punished need not *be* guilty; it is enough that he be *believed* to be guilty by the public. For the moral lesson taught by punishment to be successful, the person punished need not *be* guilty; it is enough that the public should *think* that he is. (This is true only with respect to the educative effects of punishment; but on Ewing's theory achieving these effects is the primary aim of punishment and its main justification.)

Again, it is apparent punishment that gratifies the vindictive feelings of the public, or gives vent to, and thereby reinforces, collective sentiments. It is apparent punishment that helps educate the public about the true moral standing of crime. Real punishment is needed only for the sake of producing appearance. So whenever we can secure the desired effects of apparent punishment without paying the price in terms of real punishment, and no considerations of special prevention apply—no effects in this direction by way of deterrence, disablement, or reform can, or need, be achieved—we should stage a show of

¹² J. Bentham, *Principles of Penal Law, Works*, J. Bowring (ed.) (New York: Russell & Russell, 1962), Vol. I, 398.

punishment without actually inflicting it. In such cases it would be both stupid and cruel not to hang an effigy and let the murderer off.

These unattractive implications are the result of two basic traits of expressionism of the kind advanced by Stephen, Durkheim and Ewing: the view of punishment as valuable as a means only, and as social in the sense that its immediate effects on society are what count most. So the way to defend expressionism would be to try to modify it with regard to one or both of these traits.

It might seem that a very recent statement of expressionism, Jean Hampton's 'moral education theory of punishment', is not open to these objections. According to this theory, punishment should be seen as a sort of electrified fence marking a moral boundary. The pain this fence inflicts on those who try to cross it communicates a moral message to beings who are capable of reflecting on the reasons for the fence's standing where it does: the message that there is a barrier fencing off certain ways of acting *because* they are morally wrong. Thus punishment teaches both the criminal and the public that the crime is prohibited because it is morally wrong, and must not be perpetrated for this reason. By teaching this lesson, punishment helps prevent crimes.

Hampton takes up the question whether this theory might not imply that under certain circumstances an innocent person should be punished in order to teach the public the required lesson, and gives two arguments for denying this. First, educating the public and educating the criminal are 'inextricably linked': 'if the state aims to convey a moral lesson to the community about how other human beings should be treated, it will completely fail to do so if it inflicts pain on someone innocent of any wrongdoing—indeed, it would send a message exactly contrary to the one it had intended.'¹³ Hampton's theory is rather like Ewing's in its main points, and here she makes the same mistaken move as Ewing made, assuming that the public knows that the person punished is innocent. This is a surprising assumption, considering that in that case punishment could hardly serve even as a means of deterrence. Of course, no matter against which particular theory it is marshalled, the argument on punishing the innocent assumes just the opposite—that the public can be deceived into believing the accused to be guilty.

Second, Hampton claims that we can preserve the connection of punishment with guilt by making moral education of the criminal lexically prior to that of the public; for we know that the criminal is in need of it, while we are 'less sure' about the public. This does not seem convincing either. In view of what we know about human beings and

¹³ J. Hampton, 'The Moral Education Theory of Punishment', *Philosophy and Public Affairs* 13 (1984), 230.

crime in general, and about crime in our own society in particular (from criminal statistics, for instance), it is a safe bet that most of the more usual crimes will be committed in no small numbers in the future. The difference on which Hampton builds her case is not so much in the degree of reliability of our knowledge that there is a need for a moral lesson to be taught by punishment, but only in that in one case we know the name of the individual who could profit by such a lesson, while in the other case we only know that there are quite a few persons whom we cannot identify at present who are also in need of the same piece of education. Furthermore, if the principal concern in punishing is the prevention of crimes—as Hampton herself repeatedly says it is—then it is clear that we cannot in consistency assign lexical priority to exerting moral influence on the criminal. On the contrary, educating the public must be more important.

One might try to rebut at least the argument on staging shows of punishment without actually inflicting it, by granting that there may be cases in which reasons of special deterrence or disablement do not apply, but refusing to admit that there can ever be a case in which there is no hope of moral reform of the criminal. This is the view of another recent expressionist, Antony Duff. To refuse to punish a criminal on the ground that he is a hopeless case, says Duff,

is to give up any respect or hope for him as a moral agent; and this we may not do. The point here is not that we can never have empirically adequate grounds for believing that punishment will not in fact bring a criminal to repentance: it is rather that we can never have *morally* adequate grounds—nothing could count as morally adequate grounds—for treating a person as being beyond redemption. We owe it to every moral agent to treat him as one who can be brought to reform and redeem himself—to keep trying, however vainly, to reach the good that is in him, and to appeal to his capacity for moral understanding and concern.¹⁴

This way of securing actual punishment of the guilty strikes me as far-fetched. In view of the degree which wilful, unrepentant wickedness has reached in some criminals, claims such as these seem almost other-worldly. To take just two very recent examples, is it plausible to say of Klaus Barbie or Andrija Artuković, that we must not think of them as morally hopeless, but ought to respect them as moral agents? Do we really owe it to them to keep trying to reach the good that is in them? It seems obvious to me that to Barbie, Artuković, and the likes of them, we owe nothing of the sort.

¹⁴ R. A. Duff, *Trials and Punishments* (Cambridge University Press, 1986), 266. (Duff's version of expressionism is not of the extrinsic type.)

Therefore the two objections to extrinsic expressionism stand. If this theory is the truth about punishment—if the primary purpose of punishment is to affect the public in a certain way, and if it is morally justified in so far as it achieves this purpose—then we must say that sometimes it will be morally right to punish the innocent, while at other times the morally right thing to do will be to refrain from actually inflicting punishment on the guilty, and to stage shows of their being punished instead.

IV

The view of punishment as expressive of society's emphatic moral condemnation of crime can be construed in a very different way. It can be claimed that punishment, so conceived, need not serve a purpose external to it and be justified in terms of its instrumental value, because it is *intrinsically* appropriate, justified and called for.¹⁵

One might be tempted to see this claim, with H. L. A. Hart, as 'representing as a value to be pursued at the cost of human suffering the *bare* expression of moral condemnation', and to ask whether 'the *mere* expression of moral condemnation [is] a thing of value in itself to be pursued at this cost'.¹⁶ The reply to this is that to disconnect punishment as expressive of society's condemnation of crime from all those forward-looking, consequentialist considerations referred to in various versions of extrinsic expressionism is not tantamount to reducing it to a *bare* or *mere* expression. For in expressing emphatic condemnation of the crime committed, punishment *vindicates* the law which has been broken, *reaffirms* the right which has been violated, and *demonstrates* that the misdeed was indeed a crime.

Rules that state standards of behaviour and command categorically imply that actions violating them are wrong, and that such actions are to be condemned, denounced, repudiated. Expressions of this condemnation and repudiation are the index of the validity of the rules and of the acceptance of the conviction that their breaches are wrong in society. If actions of a certain kind can be done without bringing about such a response from society, this indicates that no rule prohibiting such actions is accepted as a valid and binding standard of behaviour.

¹⁵ In this section and at the beginning of the next I draw on section VI of my 'The Middle Way in the Philosophy of Punishment', R. Gavison (ed.), *Issues in Contemporary Legal Philosophy: The Influence of H. L. A. Hart* (Oxford University Press, 1987).

¹⁶ H. L. A. Hart, *Law, Liberty and Morality* (Oxford University Press, 1963), 65 (emphasis added).

Moral standards, expressed by moral rules, evolve in society in a diffuse, non-institutional way, rely on the moral authority of society and conscience of its members, and are used as criteria of moral judgment by any and all of its members without any special authorization or qualification. Thus the question whether a certain kind of action is considered to be morally wrong in a society, whether a society adheres to standard prohibiting that kind of action, will be settled by finding out whether ordinary members of that society condemn actions of that sort. Their condemnation vindicates the standard, and demonstrates that its violations are indeed held to be morally wrong.

Criminal laws are similar to moral rules in that they also state standards of behaviour. But these are standards of society organized into a state with its legal order; they presuppose the authority of the state and its legal order. They are authoritatively formulated and applied solely through formalized procedures in appropriate institutions. Legislative institutions of the state pass criminal laws which determine some of our most important legal rights, and turn their infringements into crimes. It is then up to criminal courts and institutions that carry out sentences passed in these courts to condemn actions that violate such laws and infringe the rights determined by them. This condemnation is expressed by punishment. By giving expression to it, punishment vindicates the law broken, reaffirms the right violated, and demonstrates that its violation was indeed a crime. Thus, if there are to be rights sanctioned by the criminal law, if some actions are to be crimes, if there is to be criminal law at all, there must be punishment as well. Where there is no punishment, there are no crimes, no criminal law, no rights determined and sanctioned by such law.

To be sure, if a thief who has stolen from me is never caught, tried in court and punished, this will not *in itself* show that what he did was not a crime, and that I actually had no right sanctioned by criminal law to the piece of property stolen. But if the state and the legal order did not even try to apprehend and punish him and other thieves, if thieves *as a rule* were not prosecuted and punished, the conclusion would have to be drawn that theft is not really a crime, and that property rights do not really obtain, at least in the sense of rights determined and guaranteed by the criminal law.

This kind of expressionism might easily be misunderstood. In order to avoid that, let me emphasize that the connection between the expression of condemnation of the crime through punishment, and the notions of crime, a right determined by the criminal law, and the criminal law itself, is not predicated on the function of this condemnation as a means of prevention of crimes. The prevention of crime is something distinct from punishment, something that may stand in a certain causal, i.e. contingent, relation to it, something that may be

achieved in the future *by means* of it. The understanding and justification of punishment presented above is entirely backward-looking. If by punishing we prevent the commission of crimes in the future, so much the better; but neither such effects, nor the intention to bring them about, are *inherent* to the enterprise. The vindication of law, reaffirmation of right and demonstration that the action was a crime, on the other hand, *are* inherent to punishment: they are not things distinguished from punishment and achieved by means of it, but rather tasks accomplished *in* punishing. We shall have demonstrated that an action was a crime, and reaffirmed the right infringed and the law broken by it, even if the condemnation expressed through punishment proves inefficient in preventing future crimes of the same kind.

This means that, *if* the state has a right to pass criminal laws, to determine certain rights by such laws, and to proclaim that certain actions are crimes, it has also a right to punish. It has a duty to punish as well; for its failure to do so would be incompatible with the law it promulgates and the rights it proclaims, and would belie its professed conviction that their violation is a crime.

V

There are several objections which might be brought up against this version of expressionism.

(1) It might be said that the above argument at most exhibits a connection between standards of behaviour stated by criminal laws and *condemnation* by society of breaches of these standards. But this does not amount to a justification of *punishment*, for we still do not see why society's condemnation has to be punitive. As H. L. A. Hart put it, the 'normal way' of expressing moral condemnation is by words, 'and it is not clear, if denunciation is really what is required, why a solemn public statement of disapproval would not be the most "appropriate" or "emphatic" means of expressing this. Why should a denunciation take the form of punishment?'¹⁷

Before I take up this criticism squarely, two minor points should be made. What Hart says is not completely accurate even with regard to moral condemnation pure and simple. True, we convey moral condemnation verbally most of the time—but not always; there are non-verbal ways of expressing it, and they are no less normal for it. We also express condemnation by adopting a cool, formal demeanour; by reducing the scope and intensity of our relations with the person concerned; by failing to render help or support in situations in which, were it not for

¹⁷ *Ibid.*, 66.

the moral offence committed, these would be forthcoming without ado; in the most extreme cases, by breaking off all contact and communication. A community may resort to boycott or ostracism as the ultimate expressions of moral repugnance. All these are actions, not words; and they are used to express moral condemnation when mere words do not seem up to the task.

Moreover, the connection between society's condemnation of crime and punishment as its expression may be somewhat less arbitrary than is often suggested. When characterizing punishment as expressive, some authors tend to use the word 'symbol'. Feinberg, in particular, repeatedly emphasizes the conventional nature of the relation between the condemnation and hard treatment of which punishment consists. According to him, certain forms of hard treatment are 'conventional symbols' of public reprobation in the same way that the drinking of champagne is a conventional symbol of celebration, and black clothes are symbolic of mourning. It seems to me that Skillen is right in saying that punishment is a natural expression of condemnation, repudiation, and similar feelings and attitudes, rather than a conventional device for expressing them:

Whereas black is arguably neutral in itself and only contextually and conventionally constituted as mourning wear . . . it is pretty clear that losing money, years of liberty, or parts of one's body is hardly neutral in that way. [. . .] Feinberg vastly underrates the natural appropriateness, the non-arbitrariness, of certain forms of hard treatment to be the expression or communication of moralistic and punitive attitudes. Such practices *embody* punitive hostility, they do not merely 'symbolize' it.¹⁸

But even if it is granted that the connection between society's condemnation of crime and punishment is stronger than that of mere convention, that it is somehow natural and appropriate to express condemnation of crime by punishment, the question remains: Why not express it verbally nevertheless? Even if this is a less 'natural' and 'appropriate' way, it is a possibility. Is it not the possibility to be preferred, in view of the evil inflicted by expressing it in the most 'natural' and 'appropriate' manner?

The answer to this is that merely verbal condemnation is not likely to reach its immediate addressee and to be fully understood by him. Regrettably, although perhaps not surprisingly, many criminals are oblivious to mere words. They do not care for the standards of society; otherwise they would not be committing crimes. They are lacking in respect for others; otherwise they would not be violating their rights.

¹⁸ A. J. Skillen, *op. cit.*, 517.

They are deficient in human sympathy; otherwise they would not be harming others. But they are endowed with as lively an appreciation of their own interest as is everyone else. So if society's condemnation of their misdeeds is really to reach them, if they are really to understand how wrong their actions are, it will have to be translated into the one language they are sure to understand: the language of self-interest. This translation is accomplished by punishment.

Moreover, punishment is not like a private letter; it is rather like a poster put up on a billboard on a busy street. The immediate addressee of the message punishment conveys, the criminal punished, is not the only one for whom the message is meant; it is also meant for the victim of the crime and for the public at large. Now *they* would surely see purely verbal condemnation of crime, however public and solemn, as half-hearted and unconvincing. The state would be seen as promulgating laws which determine some of our most important rights—to life, bodily integrity, property—and pronouncing their violations to be crimes, and then responding to their violations only by issuing verbal statements of disapproval. It would be seen as desisting from activating its apparatus of force and coercion, which is surely one of its essential, defining features.¹⁹ And there would be a striking dissimilarity and disproportion between crimes, which normally affect their victims very palpably, and the merely verbal response to them on the part of the state and the legal order, which might not reach the person to whom it is addressed at all, let alone impress or affect him. In view of all this, it seems to me that both those whose rights were being violated and those violating them, and everyone else for that matter, could not fail to draw the conclusion that those rights were not valid after all, were not really recognized, at least as rights defined and guaranteed by the criminal law, in any serious manner. The notion 'taking X seriously' in this kind of context seems to preclude radical dissimilarity and disproportion between X and whatever is done by way of responding to it. An action cannot be shown to be a crime, the right infringed and the law broken by it cannot be reasserted and vindicated, if the response supposed to do this is by its nature so dissimilar to the action, and so disproportionate to it in weight, as a mere verbal condemnation, however public and solemn, would be. The necessary seriousness and weight can be secured only by punishment.

(2) Another objection that might be advanced against intrinsic expressionism is that it fails to accommodate considerations of justice and desert, and accordingly could legitimize, no less than the extrinsic

¹⁹ Cf. e.g. M. Weber, 'Politics as a Vocation', H. H. Gerth and C. Wright Mills (eds), *From Max Weber: Essays in Sociology* (London: Routledge & Kegan Paul, 1967), 77–78.

variety of the theory, punishment of the innocent or merely apparent punishment of the guilty.

Extrinsic expressionism is liable to justify such courses of action because it sees moral condemnation expressed by punishment solely as a means to an end. If condemnation is merely a means, we shall condemn an action, refrain from condemning it, or even praise it, depending on how that end is best served under the circumstances. Intrinsic expressionism, on the other hand, does not construe the expression of moral condemnation that is punishment as a means to an end external to it, but as intrinsically right and proper. The right violated by the crime is reaffirmed, the law broken by it is vindicated, and the deed itself is shown to be a crime, *in* punishment as expressive of condemnation, and not *by means* of it. So the conditions punishment has to satisfy are not dictated by an extrinsic end it is made to serve and the ever-changing circumstances in which it does so; they are determined solely by the nature of moral condemnation. It has to be appropriate *as* moral condemnation. It has to be truthful, just and deserved, and to be seen as such, by everyone involved: by those conveying it, and by all those to whom it is being conveyed.

In this respect, punishment of the innocent as a communicative enterprise would be radically morally flawed at two crucial points. The expression of moral condemnation would be morally polluted at its very source: the judge, who is supposed to embody the moral authority of the law when acting in its name, would be knowingly and deliberately faking the moral condemnation of its violation—the condemnation which is the index of the law's acceptance in society, the condition of its presence in the life of society as a valid and binding standard of conduct. And it would be morally stained in a deep, irreparable manner in the eyes of the innocent person punished. It would be seen by him, if by no one else, for the lie that it is; it would be experienced by him, as Bradley put it in a different context, as 'a gross immorality, a crying injustice, an abominable crime, and not what it pretends to be'.²⁰

It seems to me that if we knew of a case of deliberate punishment of the innocent in which the public was deceived into believing that the person punished was the culprit, we would not say that the law broken had been vindicated, the right infringed reasserted, and the misdeed shown to be a crime. We would rather say that the public *mistakenly believed* that all this took place, while what really happened was something quite different: that the condemnation expressed by the punishment was a lie and an injustice; that punishment as expressive of society's moral condemnation of crime was not properly applied, but

²⁰ F. H. Bradley, *Ethical Studies*, 2nd edn (London: Oxford University Press, 1962), 26.

rather abused; that the law broken was not vindicated, that the right violated was not reasserted, but rather insulted and made a mockery of yet one more time; that the action which had occasioned the whole proceedings was not properly shown to be a crime, but a new crime was committed instead.

What I have just said refers to the way punishment of the innocent would have to be judged from the standpoint of intrinsic expressionism; the argument on staging shows of punishing the guilty instead of actually punishing them could be refuted along the same lines.

(3) It was clear from the beginning that the distinction between the two types of expressionism is similar to that between the two traditional approaches to punishment, the utilitarian and the retributive: that extrinsic expressionism is a variety of utilitarianism, while intrinsic expressionism has a certain affinity with retributivism, at least in that both justify punishment in terms of backward-looking considerations. My discussion of the punishment-of-the-innocent argument advanced as an objection to intrinsic expressionism shows that this affinity is much stronger: that in claiming that punishment is *intrinsically* right and called for *qua* expressive of moral condemnation of crime, the adherent of intrinsic expressionism commits himself to just those considerations of justice and desert on which the retributivist insists. So it would seem that the two varieties of expressionism are just as mutually opposed as the traditional utilitarian and retributive accounts of punishment.

However, it has been claimed that this is not so, since intrinsic expressionism actually presupposes the validity of extrinsic expressionism and would be meaningless if it turned out that the claims of the latter concerning the instrumental value of punishment as expressive of society's condemnation of crime were false. This is the argument put forward by John Charvet, who construes punishment as a sort of criticism—the sort appropriate to the breaking of legal rules:

The purpose of having a rule is to secure the general realization of the conduct it prescribes. Therefore the existence of rules presupposes the possibility of affecting people's future actions. It is in this context that criticism operates, for it would indeed be meaningless and futile to criticize people for their actions, if such criticism never did or ever could have an effect on their future conduct. But since criticism is only relevant where rules exist, and since rules exist only where it is possible to affect people's actions by means of the rules, criticism is assured of having such general effects. Thus criticism does always in part look forward to the future actions of the rule-breaker and the other members of the community, as the Utilitarians have always insisted that punishment must.²¹

²¹ J. Charvet, 'Criticism and Punishment', *Mind* 75 (1966), 578.

This, however, is too quick. It is true that criticism of any kind makes sense only against a background of rules. It is also true that rules are forward-looking. Finally, it is true that rules make sense only where there is a possibility that they will influence people's actions. But from all this it does not follow that criticism in general, or the particular kind of criticism that is punishment, must be forward-looking and efficient in affecting people's actions, or capable of doing so. Criticism that did not satisfy these conditions would be futile, and analytically so. But it would not necessarily be meaningless—no more so than an act of gratitude, performed although there are no good utilitarian reasons for performing it, would thereby be made meaningless. Let me bring up once again the cases of Klaus Barbie and Andrija Artuković. The facts in these two cases are such that no considerations of particular prevention apply: the men are beyond moral reform, while at the same time too old, feeble and isolated to need to be deterred from committing the same crimes again. As for the effects on society at large, be it in terms of deterrence, as Charvet would have it, moral education of the public, as in Ewing and Hampton, reinforcement of collective sentiments, as in Durkheim, or gratification of hatred and indignation, as in Stephen—any and all of these might be achieved by hanging the effigies instead of the men themselves. So what is the point of actually punishing in these cases, instead of securing the desired effects by apparent punishment, and sending the two to some far-away places to live out the remaining years of their natural lives in peace and comfort, after having grown beards and been provided with new names and passports? If the point of punishment is identified with its end, i.e. with a state of affairs distinct from it, which is to be attained in the future *by means of it*, actually punishing Barbie or Artuković *is* pointless. But the point of doing something is not necessarily the end to be achieved by doing it, and it seems to me that there is no great difficulty in seeing the point here. *In* condemning their misdeeds in the serious way appropriate to their moral status, i.e. *in* punishing them, we shall vindicate the laws they broke, reaffirm the rights of their victims which they violated, and demonstrate to any and all, as well as bring home in no uncertain terms to the two men themselves, that their deeds were indeed crimes.

(4) The preceding criticisms are of the immanent type. But intrinsic expressionism might also be questioned by questioning the background of the theory: the social morality which is in part codified in the criminal law, and whose condemnation of crime punishment is taken to express. One might have doubts as to its validity, its homogeneity, and the consistency and authenticity of the judgment it passes on crime through punishment.

The expressionist might be taken to believe uncritically that the positive morality of society—any society—is self-authenticating, that

its principles are moral axioms, and that punishment is conclusively justified once it is shown to express the emphatic moral condemnation of actions offending against these principles. But what if that morality itself is morally flawed? If the social morality of a multi-racial society sees 'separate development' of races as a moral requirement, and the majority of people feel badly enough about the immorality of mixed marriages to prohibit them by law, are we to accept punishments based on that law as morally legitimate in virtue of expressing such attitudes? As Anthony Skillen has remarked, "expression" itself is no adequate ethic, any more than is sincerity. Some of the worst deeds have been, no doubt, sincere expressions.²²

It might be thought that the expressionist is assuming that social morality is a much more homogeneous set of beliefs and attitudes than the reality of most contemporary societies would warrant. Contemporary society is as typically pluralistic and conflict-ridden in the field of morals as in other areas. On many moral issues we are likely to find not one generally accepted stand, but two or more different and even mutually opposed views, espoused by significant sections of society. Which of them is to be expressed in law and in punishments for offending against it?²³

There may also be problems of authenticity of the condemnation conveyed through punishment. It may well be that it is only capital punishment that expresses emphatically enough the moral condemnation of murder. Now murder is presumably so very wrong because human life is such a paramount value. But what are we to say of a society which provides for the death penalty as the appropriate punishment for murder, and at the same time, for instance, does not bother very much about those social and economic conditions which are known to breed crime, including the crime of murder? Or does not testify very convincingly to its high regard for the value of human life in fields such as medical care, or traffic regulations and the maintenance of roads? Or is given to using unadvisedly its armed forces in promoting its foreign policy and foreign trade objectives? In such cases, as Skillen says, 'questions of sham and hypocrisy can arise', and one might suspect that punishment is not much more than a 'fetishistic surrogate' for a value which is not given expression in other areas of life.²⁴

Some statements of expressionism are certainly exposed to criticism along these lines. Authors such as Stephen and Durkheim seem to espouse an uncritical view of social morality, both in the sense of not

²² A. J. Skillen, *op. cit.*, 521.

²³ Cf. H. L. A. Hart, *The Morality of the Criminal Law* (Jerusalem: The Magnes Press, 1964), 39–41.

²⁴ A. J. Skillen, *op. cit.*, 521–522.

being alive to the possibility that the moral outlook of a society may itself be morally questionable, and with respect to the degree of internal consistency they assume for it. But these are faults of specific formulations of expressionism, not its inherent flaws. The criticism is not damaging to expressionism as such, but rather points out the conditions of its proper applications. Therefore it should be welcome to a critical adherent of the theory. Such an adherent should say that this view will provide the justification of punishment in a society whose morals—or that part of its morals which is coextensive with its criminal law—are basically sound. If we cannot accept the moral outlook of a society, we shall withhold moral support when it expresses moral condemnation through punishment.

Similarly, intrinsic expressionism offers an account of punishment which assumes that there is a measure of moral consensus in society. It will justify those punishments that are based on this consensus (provided that its contents are sound), and refuse justification to those that go beyond it. Society may legitimately express moral condemnation by punishment only when its conscience speaks strongly and unequivocally, with one voice.

Finally, the theory will legitimize punishment on further condition that it is not 'sham' in the sense of expressing allegiance to certain values in a specific, narrow context, while these same values are disregarded or flouted in other fields of social life. In these matters, as elsewhere, sincerity is not enough; but it is surely necessary.²⁵

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²⁵ An earlier, much shorter version of this paper was read at the 12th International Wittgenstein Symposium in Kirchberg am Wechsel, Austria, in August 1987.