Some Remarks on Punishment and Freewill In Legal Theory & Classical Christian Theology[♦]

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Abstract: This paper contends that both theological and jurisprudential considerations support the claim that criminals ought to be treated as free agents who are responsible for their actions. The essay is conducted in the spirit of C. S. Lewis and Kant, among others, who shared non-utilitarian views on punishment for the criminal--that this is truly the most 'humanitarian' approach society can possibly take.

Can—and should—societal punishment operate in the absence of freewill on the criminal's part? Should punishment exist only if rehabilitation can be achieved? In this paper, we contend (1) that Christian theology answers these questions in the negative, and (2) that a proper jurisprudence does likewise.

The Criminological Scene

Utilitarian theories of punishment, so popular in the latter half of the 20th century, do not rely for their justification on the freewill of the criminal. Just as social philosophies such as Marxism and Environmentalism believe that altering the physical or natural climate will change human behaviour, rehabilitative theories of punishment maintain that an enlightened punitive system can per se lead to positive change in the criminal.

Retributive theories, however, are based squarely on the reality of freewill. Classically, Immanuel Kant argued:

> Juridical punishment (*poena forensis*) . . . can never be administered merely as a means for promoting another Good either with regard to the Criminal himself or to Civil Society, but must in all cases be imposed only because the individual has committed a Crime. . . . The Penal Law is a Categorical Imperative; and woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment, or even from the due measure of it, according to the Pharisaic maxim: 'It is better that one man should die than that the whole people should perish.'[1]

Fleischacker comments:

> Retributive punishment serves a moral function for Kant by making the criminal live under the law he implicitly sets up in his criminal act. The criminal acts on a maxim that he would not will as a universal law; we apply the law of that maxim to

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[1] Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence As the Science of Right* [The Metaphysics of Morals, Pt. II, 6:331], trans. William Hastie (Edinburgh: T. & T. Clark, 1887).

> him, as thought he had willed it universally. . . . We are merely following out the rational interpretation of his irrational act, and he should have no reason to complain.[2]

Even though there are serious problems with the logic of Kant's categorical imperative,[3] a steady movement away from utilitarian to retributive approaches to punishment can be observed in contemporary criminology. Easton and Piper describe this shift in the following terms:

> In the UK and the USA criticism [of the utilitarian approach] focused on the 'inequities' and ineffectiveness of rehabilitation, and on wide judicial discretion. . . . The leading voice for modern retributivist theory . . . was von Hirsch who argued that fairness and justice should be the key elements of a coherent penal theory. In *Doing Justice* (1976), he maintained that the aim of the penal system should, then, be to 'do justice' rather than to maximise utility. In other words he construed justice—in line with classical retributivism—as giving offenders punishments in proportion to their crimes *and, in doing so, recognising them as moral agents possessing autonomy.*[4]

Necessarily, a retributivist view of punishment requires as its justification the belief that the criminal is an autonomous entity, possessing a freewill that he or she has employed in a socially deleterious manner. Retributivism thus presupposes that the criminal has knowingly or recklessly committed a serious fault and thus deserves an appropriate and proportional punishment.

In point of fact, when one analyzes the modern penal law of any civilised nation, the retributive basis of the legislation is clearly seen.[5] Take, as a single but typical example, the French criminal law of intentional harm to others ("wilful attacks on the integrity of the person"), as set out in Articles 222-1 through 222-5 of the new (1994) *Code pénal:*

Art. 222-1 Subjecting a person to torture or barbarous acts is punishable by fifteen years of imprisonment.

Art. 222-2 The offense in Article 222-1 is punishable by imprisonment for life when it precedes, accompanies, or follows a felony other than murder or rape. [Murder and rape carry their own severe penalties, set out elsewhere in the *Code pénal.*]

Art. 222-3 The offense in Article 222-1 is punishable by twenty years imprisonment when it is committed:

1. On a minor less than fifteen years old;

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[2] Samuel Fleischacker, "Kant's Theory of Punishment," 79/4 *Kant-Studien* (1988), 442.
[3] Montgomery, *Tractatus Logico-Theologicus* (Bonn, Germany: Verlag fuer Kultur und Wissenschaft, 2002), sec. 5.5-5.6.
[4] Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (2d ed.; Oxford: Oxford University Press, 2008), p. 63; italics ours.
[5] It should not be necessary to point out that a retributivist philosophy does not necessarily entail acceptance of capital punishment. "Just deserts" must be determined in a proportionate manner, taking into account all factors relative to the given case and the perpetrator. Cf. Montgomery, "Capital Punishment," in his *Christ As Centre and Circumference* (Bonn, Germany: Verlag fuer Kultur und Wissenschaft [forthcoming]).

2. On a person whose special vulnerability, due to age, sickness, infirmity, physical or mental deficiency, or pregnancy, is apparent or known to the perpetrator;
3. On an ascendant, either legitimate or natural, or on a father or mother by adoption;
4. When the status of the victim is apparent or known to the perpetrator, on a magistrate, juror, lawyer, public or ministerial officer, officer of the gendarmerie, agent of the national police force, customs official, prison administration official, or any other person exercising governmental authority or entrusted with a mission of public service, in the performance or on the occasion of performing his or her duties or mission;
5. On a witness, victim, or civil party [in a legal action];
   5b. On a victim who is thought to belong, or not to belong, to a given race, nationality, ethnic group, or religion—whether he or she does in fact so belong;
6. By the spouse or concubine of the victim;
7. By a person exercising governmental authority or entrusted with a mission in the public service, in the performance or on the occasion of performing his or her duties or mission;
8. By several persons acting as perpetrators or accessories;
9. With premeditation;
10. By using or threatening to use a weapon.

Art. 222-4 The offense in Article 222-1 is punishable by thirty years imprisonment when it is committed habitually on a minor less than fifteen years old or on a person of special vulnerability.

Art. 222-5 The offense in Article 222-1 is punishable by thirty years imprisonment when it results in a mutilation or permanent infirmity.

It will be observed that an effort is made here to relate penalties directly to the actual harm caused, i.e., to give the perpetrator a sentence proportionately reflecting the seriousness of his or her volitional act. Granted, the judge may as a general rule reduce a given sentence in light of mitigating circumstances, but even that discretion is being continually circumscribed—as in the 10 August 2007 "*Peines-plancher*" law, incorporated into the *Code pénal* as Articles 132-18-1 and 132-19-1, which largely eliminates sentence reductions and mandates jail time for repeat offenders.

Apart from the assumption of freewill exercisable and exercised by the criminal, such penalties would be meaningless at best and immoral at worst. Indeed, the *Code pénal* expressly declares as a principle underlying all of its provisions: "A person is criminally responsible only for his or her own conduct" (Article 121-1).

A Theological Perspective

What is the biblical view of punishment and freewill and the connections between them?

Holy Scripture—the formal basis of all Christian theology—presents God's human creation as morally responsible and subject to punishment for violations of the Creator's revealed will. From the fall of mankind's first parents in the Garden of Eden to the

casting of Satan into the Lake of Fire at the end of time, God holds his creatures responsible for their acts. Jesus weeps over Jerusalem: "O Jerusalem, Jerusalem, thou that killest the prophets, and stonest them which are sent unto thee, how often would I have gathered thy children together, even as a hen gathereth her chickens under her wings, *and ye would not!* Behold, your house is left unto you desolate" (Matthew 23:37-38; italics ours).

The Apostle Paul begins his Epistle to the Romans with a sad description of the fallen human race: Gentile peoples volitionally chose to violate the moral law written on their hearts, committing idolatry and engaging in unnatural practices such as homosexuality, and the Jews volitionally broke the revealed law given to them by God in the Old Testament (Romans 1-2); in sum, "All have sinned, and come short of the glory of God" (Romans 3:23). The consequence follows inexorably: "Be not deceived; God is not mocked: for whatsoever a man soweth, that shall he also reap" (Galatians 6:7).

Throughout the Bible, human freewill and moral choice are asserted, and the violation of God's will leads inevitably to proportionate punishment—if not in this life then at the Last Assize when all evils will be judged and all wrongs righted.[6]

To be sure, this theology has met with strong objection ever since the rise of modern secularism during the 18th century Enlightenment. "An eye for an eye and a tooth for a tooth" has been condemned as barbaric, and 20th century liberal theological ethicists such as Joseph Fletcher have attempted to replace the alleged "prescriptive legalism" of biblical revelation with forms of "situation ethics" which rely not on principle but on existential decision-making and ill-defined notions of "love."[7] But such efforts have devolved into relativism and subjectivism, leaving Christian believers with no ethical moorings in the face of more and more agonising moral dilemmas (stem cell research on embryos, gun control, capital punishment, etc.).

And serious philosophical and jurisprudential defences of "eye for an eye" retributive punishment have come on the scene. Thus University of Michigan law professor William Ian Miller argues:

> The deuteronomic talion adds the notion of "teaching a lesson" to the notion of "getting even" that characterizes the formulations in Exodus and Leviticus, just as

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[6] Indeed, the source of the legal concept of *mens rea* is a sermon by St Augustine. "Coke, Third Inst. 6, gives '*Et actus non facit reum nisi mens sit rea.'* Coke knew the Red Book of the Exchequer which contains the Leges Henrici where the maxim stands '*Reum non facit nisi mens rea.'* The original source is S. Augustinus, Sermones, No. 180, c. 2 (Migne, Patrol. vol. 38, col. 974): '*Ream linguam non facit nisi mens rea.'* This passes into the Decretum, c. 3, C. 22, qu. 2. The author of the Leges took it from some intermediate book": Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (2 vols., 2d ed.; Washington, D.C.: Lawyers' Literary Club, 1959), II, 476.

[7] Cf. Joseph Fletcher and John Warwick Montgomery, *Situation Ethics: Is It Sometimes Right to Do Wrong? A Debate* (2d ed.; Calgary, Alberta: Canadian Institute for Law, Theology and Public Policy, 1999).

> in our own speech we will often find both idioms—getting even and teaching a lesson—to be equally appropriate to explain the ministering of justice.[8]

But are there not serious theological objections to position here described? Let us briefly consider three such problem areas.

Firstly, does not the transmission of original sin from Adam to his descendants rule out the principle of personal responsibility and therefore the legitimacy of individualised punishment? True, according to clear biblical teaching, the sin of Adam passed to all his descendents (Romans 5), but this simply means, as Augustine put it in his phrase, *non posse non peccari,* that human beings in this fallen world never reach perfection (1 John 1:8); it does not mean that one is forced by one's humanity to commit any particular sin. If one does choose to commit a sin or do an illegal act, one's personal responsibility for it remains.

Secondly, did not Jesus replace the Old Testament lex talionis *by a new, loving, constructive, forgiving approach to punishment? Did he not say to the judgmental crowd ready to stone an adulteress, "He who is without sin, cast the first stone" and to the adulteress, "Go and sin no more"(John 8)?* But the fact that Jesus condemns mob justice and offers a new way of life to a fallen woman does not in any way suggest that he is discarding the Old Testament law or its standards of justice. He plainly stated in the Sermon on the Mount: "Think not that I am come to destroy the law, or the prophets: I am not come to destroy, but to fulfil. For verily I say unto you, Till heaven and earth pass, one jot or one tittle shall in no wise pass from the law, till all be fulfilled. Whosoever therefore shall break one of these least commandments, and shall teach men so, he shall be called the least in the kingdom of heaven: but whosoever shall do and teach them, the same shall be called great in the kingdom of heaven. For I say unto you, That except your righteousness shall exceed the righteousness of the scribes and Pharisees, ye shall in no case enter into the kingdom of heaven" (Matthew 5:17-20).

The point is well made by the late American theologian Carl F. H. Henry:

> The specific references make it apparent that Jesus is not changing the Law, but rather unveiling its inner requirements. The prohibition against murder ([5:]21ff.) and adultery ([5:]27ff.) apply to the life of thought as well as of deed; the moral obligation they impose is spiritual, and not merely external. Jesus does not set forth a higher law of his own to discredit the Old Testament law, but declares that the requirement of Old Testament law was more exacting than the current tradition taught.[9]

Thirdly, does not the atoning death of Christ for the sins of the world unjustly shift the subject of punishment from the deserving sinner to a sinless victim—thus countermanding the principle of proper retribution? In biblical perspective, one here encounters Grace as the fulfilment of the Law: the Creator God, in his infinite mercy, comes down from heaven and takes the sins of the fallen world on himself, expiating them and saving all those who do not reject his gift. Anselm, in *Cur Deus Homo?,* persuasively argued that

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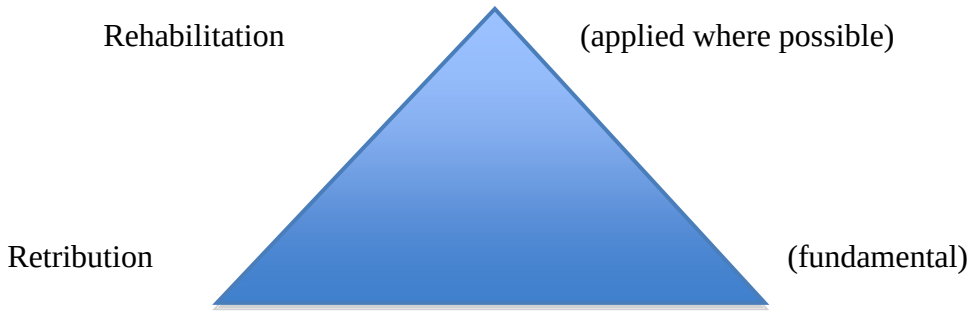
[8] William Ian Miller, *Eye for an Eye* (Cambridge: Cambridge University Press, 2006), p. 68.

[9] Carl F. H. Henry, *Christian Personal Ethics* (Grand Rapids, Mich.: Eerdmans, 1957), p. 307.

this was in fact not an abrogation but a cosmic illustration of proper retribution, Christ being both God and man: as a human being, he could represent the entire race (as Adam had done), whilst, as God, he had the capacity to cancel out the penalty of sin for all mankind through his sacrificial death—thereby fulfilling the legal condition that "without shedding of blood is no remission" (Hebrews 9:22).[10] Personal responsibility and freewill remain, for the effectiveness of redemption for the individual depends on his or her not rejecting God's grace: "Without faith it is impossible to please him [God]: for he that cometh to God must believe that he is, and that he is a rewarder of them that diligently seek him" (Hebrews 11:6).

These difficulties bring us quite naturally to a more profound comment relating to the theology of punishment—specifically, a word about the relationship between Law and Gospel. The lex talionis functions as an aspect of the *Schöpfungsordnungen*, or "Orders of Creation" imbedded in our world by God to permit human survival in our fallen state of radical self-centredness.[11] The politico-legal order requires proportionate, retributive justice; otherwise, pragmatism and naked power prevail. But on the model of God's redemptive order, there is place for mercy and forgiveness. This is the foundation for Equity in the Anglo-American common law tradition, and the basis in the criminal law in all civilised nations for the employment of mitigation in sentencing, judicial discretion, amnesty, and the fitting of the punishment to the condition of the offender (individualisation of penalty).[12]

Central to all this, however, is *the relationship of the utilitarian/rehabilitative factor to the retributive.* It is the biblical view—and, in our judgment, the necessary jurisprudential approach—to make retribution the foundation and rehabilitation the second-, *not* the first-, storey of the punitive structure:



[10] Cf. Montgomery, *Chytraeus on Sacrifice* (2d ed.; Malone, Texas: Repristination Press, 2000), especially pp. 139-46; also, Milton S. Terry, *The Mediation of Jesus Christ* (New York: Eaton & Mains, 1903), *passim.*

[11] See especially, Werner Elert, *The Christian Ethos*, trans. Carl J. Schindler (Philadelphia: Muhlenberg Press, 1957), pp. 101 ff.

[12] In marked contrast, we have the recent example of the application of Shari'a law in Saudi Arabia: A 75-year-old widow has been condemned to forty lashes and four months in prison followed by expulsion from the country for having allowed two young men not of her immediate family to visit her in her home (they were doing shopping for her). A local lawyer offered as justification of the penalty that the Shari'a is the Shari'a and even though a women of 75 years of age is "not normally regarded as seductive, nevertheless age is not a sufficient condition for acquittal" (*Figaro*, 18 March 2009).

The chief reasons why one must not make utilitarian/rehabilitative considerations primary in a justice system are:

(1) Without clear evidence that justice is done through "making the punishment fit the crime," the society loses its moral foundation and there will inevitably be more and more creative attempts to circumvent the law through utilitarian techniques.[13]

(2) Rehabilitative theories invariably reduce the level of personal responsibility for wrongdoing by deemphasising the importance of freewill in the performance of criminal acts.

(3) Rehabilitation simply does not work in the majority of cases, the root cause being that the self-centredness of the criminal can only be changed by a radical, spiritual conversion. Only the gospel of the grace of God in Jesus Christ—not any human system of punishment—has proven capable of achieving this.

[13] It will be noted that our position agrees in its essentials with that of C. S. Lewis, as presented in his essay, "The Humanitarian Theory of Punishment" and "On Punishment: A Reply to Criticism," included in Lewis's *God in the Dock*, ed. Walter Hooper (Grand Rapids, Michigan: Eerdmans, 1970), pp. 287-300. Concludes Lewis: "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."