The Metaphysics of Punishment—
An Exercise in Futility

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... If I were having a philosophical talk with the man I was going to have hanged (or electrocuted) I should say, I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises.... Letter from Oliver Wendell Holmes, in HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935, at 806 (M. Howe ed. 1953).

INTRODUCTION

This Article is written from a utilitarian point of view. In other words, I assume that the ultimate goal of society is to achieve the greatest total human happiness.¹ The thesis of this Article is that the criminal law is hopelessly arbitrary.

It is relatively easy to establish the arbitrariness of the criminal process as it actually exists in America. Most entering law students

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¹ See A. Ewing, Ethics 35-36 (1953). In the calculation of total happiness, increases in happiness are offset by both decreases in happiness and increases in unhappiness.
have naive and unclear notions about the workings of the so-called system of criminal justice in the United States. They are surprised to learn that the pressures of congested court calendars and strained police resources have forced both the judiciary and the prosecution to penalize defendants for pleading not guilty and reward them for pleading guilty. Not surprisingly, almost 90 percent of accused individuals plead guilty after a bargaining session with the prosecutor. The system has come to operate as an expedient and well-oiled “ministry of justice,” with few of the trappings that most laymen associate with due process.

The more one studies the criminal process as it actually functions, the more he becomes convinced that the system is chaotic and arbitrary throughout—from the discretionary arrest by the police officer to the haphazard sentence imposed by a judge to the granting

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2. It is proper for the court to grant charge and sentence concessions to defendants who enter a plea of guilty or nolo contendere when the interest of the public in the effective administration of criminal justice would thereby be served. Advisory Committee on the Criminal Trial of the ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty 36 (Approved Draft, 1968).

For general discussion of the plea-bargaining system, see Comment, The Influence of the Defendant's Plea on Judicial Determination of Sentence, 66 Yale L.J. 204 (1956). The case of Scott v. United States, 419 F.2d 264, 276-77 (D.C. Cir. 1969), contains an argument that, due to the possibility of not being convicted, the reduced sentence given the defendant who pleads guilty roughly equals the expected sentence of the defendant who pleads not guilty. See also Alschuler, The Defense Attorney's Role in Plea Bargaining, 84 Yale L.J. 1179 (1970).


or rescission of parole by a quasi-judicial board.\textsuperscript{6} It is relatively simple, however, to criticize the existing law enforcement system. This paper has a more ambitious goal. It attacks the very philosophical foundation of the criminal process by demonstrating the impossibility of devising any system of criminal justice which is not hopelessly arbitrary.

**Traditional Justifications of Punishment**

*The Six Commonly Advanced Reasons for Punishment*

There are six reasons generally advanced to explain why society imposes penalties on law breakers: retribution, incapacitation, rehabilitation, specific deterrence, general deterrence and moralizing.

Retribution

Retribution, traditionally one of the most important goals of punishment,\textsuperscript{7} has two possible forms—revenge and expiation of moral guilt.\textsuperscript{8} Revenge gives pleasure to those seeking to punish the criminal.\textsuperscript{9} Expiation of moral guilt is a benefit to the criminal, whose moral guilt is supposedly purged through the suffering produced by punishment.\textsuperscript{10} Under some definitions of “moral guilt,” the “expiation” and the “revenge” views of retribution might lead to different results.

To illustrate, suppose individual A throws a bomb into a crowd, and the explosion kills some people and injures others. Individual B throws a bomb into another crowd under virtually identical circumstances, but, through no virtue of B’s, the bomb is a dud. There are many who believe that individuals A and B are equally morally evil and should be punished identically.\textsuperscript{11} If both remain unrepent-
ant, their souls would receive the same treatment at the hands of God. Under a theory of pure revenge, however, B's punishment would probably be much less severe than A's. Society's desire for revenge is unlikely to be as great when no harm has been caused.

Even if A were a raving lunatic, he might still be punished under a pure revenge theory of retribution, even though many might feel that he was free from all moral guilt.

Some individuals who believe in an afterlife feel that man should not take it upon himself to expiate moral guilt. This should be left to God. Yet these individuals may or may not believe in revenge. If they believe that man should turn the other cheek and be merciful, these ultra-religious people may find themselves in complete opposition to retributive punishment by society.

It is often alleged that retribution depends on a belief in "free will." If there is no "free will," it does seem impossible for "moral guilt" to exist. But the "free will" debate does not necessarily have any bearing on the "revenge" aspect of retribution. It is possible for those who believe in "free will" to oppose retribution and even for those who reject the notion of free will to believe in retribution.

The distinction between "revenge" and "expiation of moral guilt" will be important when I later discuss the validity of retribution as an objective of the criminal process.

Incapacitation

A second possible reason for punishment is to physically restrain the criminal, so as to make it impossible for him to commit further crimes. This goal of the penal system is often called incapacita-

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12. See, e.g., John 8:7: "He that is without sin among you, let him first cast a stone.


14. Revenge, which is based on the pleasure created in others by the punishment of an offender, is not affected by the culpability of the offender.

15. See text accompanying note 20 infra.
In common-law England, virtually all felonies were punishable by death, a somewhat extreme example of incapacitation.\textsuperscript{17}

Rehabilitation

Because most societies have moved away from drastic forms of incapacitation like capital punishment or life imprisonment, another important goal of punishment is rehabilitation.\textsuperscript{18} Reluctant to incapacitate the offender indefinitely and equally unwilling to turn him loose unreconstructed, society attempts to reform his character so that he will no longer be inclined to commit crimes.

Specific Deterrence

While the emphasis of rehabilitation is on education and the healing powers of psychiatry, specific deterrence aims at making the consequences of wrongdoing so unpleasant that the criminal will become reluctant to risk engaging in illegal conduct again. Rehabilitation attempts to purge the criminal of any propensity to engage in criminal conduct; specific deterrence attempts to counter his criminal inclinations by impressing him with the consequences of getting caught.\textsuperscript{19}

General Deterrence

While specific deterrence is directed toward the person punished, general deterrence attempts to discourage others from committing similar wrongs by punishing one individual as an example. As with specific deterrence, emphasis is placed on the unpleasantness of the consequences of breaking the law.\textsuperscript{20}

Moralizing

It is also possible to view punishment as an expression of society's disapproval of certain behavior. Hopefully, the members of

\textsuperscript{16} The incapacitation justification presumes that the person physically restrained has a high probability of committing crimes in the future. See H.L. Packer, The Limits of the Criminal Sanction 48-53 (1968).

\textsuperscript{17} One estimate has put the number of capital crimes in England in 1889 as high as 223. J.A. McCafferty, Capital Punishment 8 (1972).


\textsuperscript{19} J. Andenaes, Punishment and Deterrence 175-76 (1974).

\textsuperscript{20} Specific deterrence is usually more effective than general deterrence. A criminal who has actually been punished is more likely to refrain from criminal conduct than those who are merely threatened with punishment if caught.
society will internalize this disappprobation, and their moral inhibitions will be strengthened. If this effect exists, it might be called the moralizing or educational function of punishment.21

Both the "moralizing" and the "general deterrence" theories of punishment focus on the general prevention of crime and the effect of sanctions on persons other than the individual punished.

Retributive Punishment

Of all six justifications of punishment, by far the most controversial is retribution. Each side of the debate regards the position of the other side as outrageous.22

Expiation of Moral Guilt

As stated earlier, there are two different kinds of retribution—revenge and expiation of moral guilt. The existence of moral guilt depends on the existence of "free will." A person cannot be morally condemned for behavior that is completely a result of forces outside his control.

Before it is possible to discuss whether "free will" exists, it is necessary to define it. Unfortunately, this is not an easy task. To find a meaning for the term "free will," it is necessary to examine human decision-making and determine whether any factor in that process could conceivably be labelled "free will."

Human decisions are made by changes in the brain, which is composed of matter. A person's mind can be thought of as a kind of sealed chamber—with some entrances (the senses) but no exits. What is contained in this chamber when a person is "born" or conceived is a result of heredity. What enters the chamber after "birth" (or conception) is a result of environment. At any given moment in time, what is contained in the chamber is entirely the product of what was in the chamber to begin with (heredity) and what has since entered the chamber (environment). Any decision a person makes is completely determined by what is contained in the sealed chamber.


22. For a sample of this debate, see Armstrong, The Retributiveist Hits Back, 70 Minn 471, 471-72 (1961).
Of course, an individual can decide to change his environment, but the decision to do so would be entirely a result of what is already in the sealed chamber—which in turn is wholly determined by heredity and previous environment. It seems impossible to escape from the fact that human behavior is completely determined by heredity and environment and the interaction between the two.

If "free will" exists, it must be a factor other than heredity and environment which influences decision-making. The following hypothetical exhausts all factors besides heredity and environment which might affect human decisions.

Suppose there are two universes which have identical past histories and appear to be identical in every respect. Assume further that in each of these universes there is a man standing next to a cliff. The contents of the two men's minds are, at this point, identical. Nevertheless, individual A "jumps" off the cliff, while individual B remains stationary. From this point on, the two universes will no longer be identical.

There are a number of conceivable explanations why individual A "jumped" and B did not. The first possibility is that because of some random occurrence within A's (or B's) mind, the contents of their minds became no longer completely identical. Thus, two different decisions were made by two dissimilar minds. This might be considered "random will," but certainly not "free will."

The second possibility might be called a "superatomic first cause."23 If there were no atomic or subatomic "explanation" of the phenomenon called "gravity," this phenomenon would be an example of a "superatomic first cause." Although bodies with mass had a tendency to move toward each other as if there were a "gravitational force," there would be no such force in reality. If a child asked; "why does a stick fall to the ground?", the answer "because of a force called 'gravity'" would be both circular and extremely misleading. Better answers might be; "the stick's falling is a first cause," "I do not know why" or "there is no explanation." If two bodies with mass were discovered which had no propensity to move toward each other, similar explanations would be offered.

Individual A's "jumping" off the cliff might also be a "superatomic first cause." While this would signify defeat for the de-

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23. A "first cause" is an event for which there is no causal explanation. Thus, asking what causes a "first cause" would make no sense. Superatomic first causes are those that occur above the atomic level; subatomic or atomic first causes are those that occur at the atomic level or below.
terminist,\textsuperscript{24} the movement of A's body off the cliff would not involve any decision on his part and could not be considered an example of exercise of "will," much less "free will."

Many people might object that the best explanation to the child of why a stick falls to the ground would be "it is God's will." Certainly, a third possible explanation of A's "jumping" off the cliff would be superatomic Divine Intervention. God might have "moved" A off the cliff. Again, this would involve no "will" on A's part.

Still another possibility would be an atomic or subatomic "first cause.\textsuperscript{25} This might involve the spontaneous creation or destruction of particles within A's brain causing the contents of his mind to become different from B's. This creation or destruction of matter would be a phenomenon of the same order as the original creation of matter in a given universe.

Since the spontaneous change within A's brain would have caused A's mind to differ from B's, it is easy to understand why A would make a different decision from that made by B. Because A's mind actually decided to jump off the cliff, A's leaping might be considered an act of will; but it could not be considered "free will."

Closely related to the atomic or subatomic first cause explanation is the atomic or subatomic Divine Intervention hypothesis. The change within A's mind could have been created by a direct act of God. This change would have caused A to make a different decision from that of B. Again, although A's action might be considered willful, it could not be regarded as an act of "free will."

This seems to exhaust the list of "conceivable explanations" of A's jumping off the cliff and B's standing still. Yet not one of these "causes" could be described as an exercise of "free will." Thus, it seems impossible even to conceive of the concept of "free will." I happen to feel, however, that there are degrees of "inconceivability." It is therefore meaningful to discuss the degree to which "free will" is conceivable.

\textsuperscript{24} Determinists believe that "all human actions (events performed by human beings) are preceded by other events which are causally sufficient for them." R. Garner & B. Rosen, Moral Philosophy 189 (1967).

\textsuperscript{25} See note 23 supra.
If someone asked me if I could conceive of the relativity of time or of a "circular" universe, I would reply that I could not conceive of these things, but nevertheless entertained a belief in them due to a rather simplistic faith in the utterances of Albert Einstein. Although I cannot conceive of God, I nevertheless grant the possibility that He exists. It would be foolish for me to insist that everything which I found inconceivable was impossible, since I find equally inconceivable the beginning of a universe and a universe with no beginning.

Yet it seems paradoxical for me to state that I could not conceive of these things at all. If I could not conceive of them, how could I believe that they existed or possibly existed? Indeed, it would seem that it would be necessary to have some understanding of something before one could state that he found it "inconceivable."

Regardless of the solution of this paradox, "free will" appears to me to be in an entirely different class of "conceivability." If someone asked me, "can you conceive of gluck will?," my response would be "what was that you said?" If the person then repeated "can you conceive of gluck will?," I might impolitely reply, "what are you babbling about?"

Perhaps it would be useful to distinguish between "inconceivability" and "nonsensicality," the latter term being reserved for concepts totally devoid of meaning. I think that the term "free will" might come under the latter classification.

"Moral guilt" is said to be dependent on "free will." I think that both these terms should be permanently discarded into the refuse heap of nonsensical concepts. The theory that society should "expiate moral guilt" should similarly be discarded.

Revenge

As stated at the beginning of this paper, another kind of retribution is punishment for revenge. Many contemporary philosophers regard this reason for punishment as cruel and inhumane. The misdeed has already been committed. To persecute the wrongdoer accomplishes nothing and is merely sadistic.

On the other hand, some philosophers maintain that the desire for retributive revenge is a widespread and deep-seated emotional...
drive which should be gratified. It is difficult to evaluate this argument unless one assumes that the ultimate goal of society is to maximize human welfare, i.e., to achieve the greatest total human happiness. The pro-revenge view can then be understood as concluding that the satisfaction which the general public derives from witnessing the punishment of wrongdoers outweighs the suffering which the punished must endure.

It is difficult to understand how one could ever verify this hypothesis. Economists have long been stymied by the so-called "interpersonal comparison" problem: "A and B are better off; C is worse off. Is total welfare increased or decreased?" Some economists question whether one individual's happiness is even comparable to another's. If happiness is not homogeneous, then the concepts "total welfare" and "maximization of total welfare" become meaningless.

Nevertheless, in order to formulate any sort of social policy it is necessary to suppress the "interpersonal comparison problem" and make some judgment as to whether it is desirable to punish for the purpose of revenge. Even if one disregards the "interpersonal comparison" problem, however, it is still extremely difficult to determine whether or not total happiness is increased or decreased by punishing a few for the satisfaction of the many.

An argument similar to that in favor of retribution can be made for any sort of persecution which is justified solely because it gratifies the majority. Racial and religious oppression, as well as genocide, immediately come to mind. The arguments for and against persecution involve extremely difficult philosophical issues.


29. Indeed, in certain situations, a very strong utilitarian argument can be made for genocide. If the majority race is already persecuting the minority and the races detest and fear each other, a quick and efficient implementation of a policy of genocide may gratify the majority race and put the minority race out of its misery. ("Premature" death is always ambiguous because it is difficult to determine whether on balance the individual would have been happy or unhappy for the rest of his life.) Once the minority race has been exterminated, there will be no more racial oppression and tension.

30. At some points in the discussion of moral guilt and revenge, this Ar
one decides it is impossible to measure whether or not a certain kind of persecution will increase human welfare, the debate over retributive revenge can only be conducted on a level of moral exhortation.

Individuals reared in one society may approve of both genocide and retribution for revenge. Those brought up in another society may strongly disapprove of both these practices and may not see much difference between the average Nazi and the average American who believes in retribution. Oddly enough, Americans do not find it inconsistent to advocate retributive punishment and simultaneously condemn genocide with great self-righteousness. Perhaps Americans would be opposed to punishment for retributive purposes if they came to appreciate the similarities between retributive revenge and other forms of persecution.31


Even those individuals who resist these conclusions, however, will have difficulty with the arrest and conviction of an automobile driver who carefully looks both ways at an intersection, sees that the street is completely deserted, and crosses against a red light. The action is completely harmless and yet is punished.

Thus, in at least some instances, retribution is not a goal of punishment.
Nonretributive Punishment

As already mentioned, in addition to retribution, there are five other possible functions of the criminal process: incapacitation, rehabilitation, specific deterrence, general deterrence and moralizing. All these justifications of punishment have the ultimate aim of reducing the level of crime rather than of satisfying the sadistic urges of the general population.

Although these five theoretical goals of punishment seem worthwhile, it is not easy to determine the penal system's success in achieving them. In an article entitled "The Purposes of Criminal Punishment," Gerald Gardiner describes the deportation of the Danish police by the Germans in 1944 and the consequence of depriving Denmark of a police force:

The result was that there was a considerable increase in offences against property, but, significantly, no comparable increase either in murder or sexual crimes. This appears to confirm other evidence that greater certainty of detection and of punishment does deter many potential offenders, but that where strong passions or deep psychological motives are involved, the prospect of detection and punishment have relatively little effect. 32

Although the Danish experience during the Nazi occupation is enlightening, it is impossible to know whether the same results would

The nonretributive goals of the criminal law are discussed in the following section.

For similar examples (used by supporters and critics of utilitarianism) see R. Garner & B. Rosen, Moral Philosophy 70 (1967) (tax evasion); H.J. McCloskey, Meta-Ethics and Normative Ethics 182 (1969) (lying, cheating and breaking promises); Ewing, What Would Happen if Everyone Acted Like Me, 28 Mind 16, 17-24 (1953) (lying, tax evasion, not enlisting during wartime and not voting); Harrison, Utilitarianism, Universalization, and Our Duty to Be Just, in Ethics 76, 78 (J. Thompson & G. Dworkin eds. 1968) (walking on the grass and not voting); Singer, Generalization in Ethics, 64 Mind 361, 365-66 (1955) (failure to vote, avoiding military service during wartime and lying); Smart, Extreme and Restricted Utilitarianism, in Ethics, supra 136, 146 (secretly watering one's garden in violation of an edict designed to conserve water); Stout, But Suppose Everyone Did the Same, 32 Australian J. Phil. 1, 4, 16-17 (1954) (promise-keeping, tax evasion, failing to vote and frivolously using water or power during a shortage); Strang, What if Everyone Did That, in Ethics, supra 151, 151-52, 156 (income tax evasion, not voting, and not volunteering for the armed service in a time of crisis); Sullivan, Rules, Fairness and Formal Justice, 85 Ethics 322, 324-25 (1975) (walking on the grass).

occur in the United States or even in Denmark today. Furthermore, the continued presence of a system of successfully enforced criminal law may inculcate a habitual respect for the law which takes some time to wear off. If there were no police force in a country for an entire generation, the incidence of nonproperty crimes might increase.

It is virtually impossible for society to conduct controlled experiments to test the effect of punishment. While it is easy to recognize the incapacitative effect of the penal system, it is quite difficult to test the exact rehabilitative and special deterrent effects and virtually impossible to determine the general deterrent and moralizing effects.

Since the same act of punishment theoretically serves to lower recidivism in two different ways (rehabilitation and specific deterrence) and to lower the general level of crime by another two means (general deterrence and moralizing), it is difficult to separate one effect from the other. For example, American penal systems have generally been increasing their attempts to rehabilitate criminals, with the result that parole and probation are more liberally granted and many minimum-security prisons are much more pleasant.33 Although this may increase the probability that criminals will be rehabilitated, it may decrease the general and specific deterrence effect of a prison sentence.

Not only is it difficult to determine whether the penal system is effective in achieving its various goals, it is also virtually impossible to run a nonretributive criminal process which is not incredibly arbitrary. Perhaps it would be best for me to demonstrate this point through the use of an allegory.

AN ENLIGHTENED UTILITARIAN NONRETRIBUTIVE SYSTEM OF PUNITMENT

Once upon a time there was an enlightened nobleman who gained absolute control of a small country and proclaimed himself the philosopher-king. One of the goals which this king set for himself was to set up a rational and just system of criminal punishment.

The new monarch was a kind man who disapproved of the harsh and brutal rule of the former king. Under the old regime the sole

goal of punishment was retribution. The previous king set punishments which he felt were appropriate for the wickedness of the criminal act. Torture, disfigurement, execution, and imprisonment were liberally utilized.

One of the first acts of the new king was to abolish the government agency in charge of this retributive punishment. Expiation of guilt was declared to be a meaningless goal, and punishment for revenge was rejected as cruel and inhumane. The philosopher-king then set out plans for five new agencies with the power to punish or incarcerate individuals—the Departments of Incapacitation, Rehabilitation, Specific Deterrence, General Deterrence, and Moralizing.

The Department of Incapacitation was given the duty of anticipating when people were about to commit crimes, arresting these dangerous individuals, and rendering them incapable of committing the crime. This department, the first to be organized, quickly decided on the policy of executing every individual with a strong propensity to break the law. Other government officials objected, however, and the philosopher-king not only vetoed this policy but abolished the entire department. The Departments of Incapacitation, Rehabilitation, and Specific Deterrence were merged into one superdepartment called the Department of Special Prevention of Crime (also referred to as the Special Department). For the sake of symmetry, the Department of General Deterrence and Moralizing were combined to form the Department of General Prevention of Crime.

The Department of Special Prevention assumed the responsibility of determining when people were about to commit crimes, arresting and incarcerating these individuals, and attempting to convert them into law-abiding citizens.

34. Obviously, those favoring rehabilitative punishment would object. But even those who accept deterrence as the prime function of criminal punishment might reject the death penalty on utilitarian grounds. Several empirical studies fail to show that the death penalty produces any increase in deterrent effect over long-term imprisonment. See Furman v. Georgia, 408 U.S. 238, 353-54 n.124 (1972) (Marshall, J., concurring); H. Bedau, The Question of Deterrence, in The Death Penalty in America 258-332 (H. Bedau ed. 1964). If these studies are valid, a utilitarian would reject the death penalty because it inflicts greater harm on the criminal than other forms of punishment without any counterbalancing benefit.
Since the king rejected the goal of retribution, there was no reason to distinguish between those who had actually committed crimes and those who had a high propensity for breaking the law, except insofar as actual criminal conduct indicated a willingness to again violate the law. Often, however, if an individual committed a crime and was not apprehended, the probability of his recommitting a crime became incredibly great. At this point, the Special Department would arrest this socially dangerous individual—not because he had committed a crime but because he was so likely to commit another crime. On the other hand, if an individual broke the law but was no more likely than the average member of the population to again engage in the illegal conduct, he would not be bothered by the Special Department.

Since such a large number of psychiatrists and psychologists were employed in the Special Department, its “prisons” were much like schools and hospitals and very unlike the torture chambers of the old regime. Some of the king’s advisers complained about the mildness of the punishment meted out by the Department of Special Prevention. The officials of the Special Department responded by arguing that the unpleasantness suffered by a prisoner must be considered a cost to society and that when this factor was considered, rehabilitation was more “efficient” than harsh punishment.

Unable to evaluate the validity of this argument, the king turned to his trusted adviser, the Wise Sage, who, after consulting the movements of the stars, decided that rehabilitation was indeed more efficient than brutal punishment. (In any case, the director of the Department of Special Punishment was his brother-in-law.)

35. The pure utilitarian would accept incarceration or other punishment of an individual if the social benefit gained thereby outweighed the social harm. The societal gain of decreased crime includes avoidance of harm to victims (and indirect harm to their families), decreased fear of crime in the community, and avoidance of outrage at the very fact that a crime is committed. The outrage factor is most easily identifiable in the case of victimless crimes, like pornography and homosexuality, but is present to some degree with all crimes. Even if they do not know the victim, for example, most members of society are upset by robbery because of the unjust enrichment of the robber and impoverishment of the victim.

Included in the calculation of social detriment would be the cost of operating the detention system, the loss of income and unhappiness of the individual incarcerated, the grief of his friends and family, and the happiness the incarcerated individual would have enjoyed if free (including, from a strict utilitarian point of view, the enjoyment of committing crimes).

Although the Department of Special Prevention prevailed over its critics in this debate, the agency was soon wracked by internal dissension. There was acrimonious disagreement as to exactly how great a criminal propensity was required before an arrest was justified. A similar controversy raged over the extent of "cure" required before a prisoner could be released.

The philosopher-king decided to intervene lest the efficiency of the department be impaired. A special advisory commission was appointed to investigate the matter. Unfortunately, the advisory commission concluded that the problem was insoluble. First of all, the commission reported that the psychiatrists could not evaluate with any degree of accuracy the propensity of individuals to commit crimes. Second, it decided that since the harm to the person punished must be balanced against the resulting social benefit, the minimum "probability of committing a crime" necessary for arrest and the minimum probability necessary for continued incarceration should vary with the harmfulness of the potential crime. The commission, however, felt completely unqualified to evaluate the relative harmfulness of antisocial acts.

The entire problem was again turned over to the Wise Sage, who was growing increasingly fond of astrology. After requesting a complete list of crimes, the Sage studied the heavens and assigned minimum probability figures for arrest and for continued incarceration to each kind of criminal conduct. A royal decree established these figures as the official guidelines of the Special Department.

It was not long before two more attacks on the Special Department were instituted. The first attack came from the same pro-deterrent officials who earlier criticized the overemphasis on rehabilitation in the agency. These critics now advocated that minimum detention periods be set for each crime so that the sentences would be of unpleasant length even if they could not be of unpleasant character. The Special Department responded by arguing that its discretion to release prisoners was already constrained by the requi-

36. For example, an individual with a 40% or greater probability of committing shoplifting might be arrested and incarcerated until his probability of committing that crime decreased below 30%. On the other hand, an individual with a 20% or greater chance of committing robbery might be arrested and incarcerated until his probability of committing that crime decreased below 10%.
site minimum probability figures set by the Wise Sage. In evaluating the probability that an individual would commit a crime, the agency would take into consideration both the rehabilitative and the specific deterrent effects of the punishment which the prisoner had received. A minimum sentence would lead to arbitrary and unequal treatment of prisoners, since one prisoner might be released while another individual with the same propensity to commit crime might remain in prison because he had not finished his minimum sentence.

After consulting with the Sage (who supported his brother-in-law), the king upheld the Special Department.

A second attack on the Department by another group was more successful. This second group of critics advocated a maximum sentence for each crime. They quoted the earlier statements of the Special Department that the unpleasantness suffered by a prisoner must be considered an important social cost. If a prisoner were obdurate, he might never be released.

The philosopher-king was impressed with this argument and asked the Sage to calculate a formula which would decrease the extent of “cure” necessary for release as the length of detention increased. The Wise Sage chose a simple rate of increase of five percent per annum in the minimum probability figure required for continued imprisonment.\textsuperscript{37}

Despite the activities of the Department of Special Prevention, there was still a fair amount of crime in the Kingdom. This was due partly to the inefficiency of the Department and partially to the commission of illegal acts by those low-risk individuals which the Department had no power to arrest or continue to detain. Responsibility for further decreasing the Kingdom's general level of crime was placed with the Department of General Prevention of Crime, which consisted of two divisions—the Office of General Deterrence (O.G.D.) and the Office of Moralizing.

In pursuing its goal of discouraging lawbreaking, the Office of General Deterrence was given considerable discretion in making ex-

\textsuperscript{37} For example, if in the first year of detention an individual would only be released if his probability of committing shoplifting was less than 30%; during his second year of incarceration, he would be released if his probability of committing shoplifting was less than 31.5% \( (30\% \times 1.05) \); during his third year of imprisonment he would be released if his probability for committing that crime was less than 33.075\% \( (30\% \times 1.05^2) \); etc.

The Sage could have argued that in making his prior calculations he had already considered the possibility that some individuals might remain incarcerated indefinitely and that he should therefore be allowed to revise upwards slightly the previous minimum probability figures necessary for continued detention.
amples of violators. This office promptly converted itself into a top-secret agency and began to stage sham trials and punishments which the population at large believed were real. The agency pretended to catch and execute large numbers of criminals each month. It was hoped that individuals contemplating a crime would be suitably impressed with the efficiency of the state's criminal detection process and the dire consequences of engaging in illegal conduct.

Unfortunately, the people of the kingdom became suspicious of this deception. It was then decided to abandon sham punishment. Instead the O.G.D. would secretly pick individuals at random from the general population, frame them, and inflict actual punishment. Since no one in the agency believed in "moral guilt" or retribution, they were just as willing to punish an innocent person as a guilty one. There was no reluctance to frame individuals who had committed no crime.

Of course, the Office of General Deterrence was immediately confronted with the serious problem of deciding the length and character of prison terms for each crime and choosing the number of individuals per month to punish for a given crime. The O.G.D. found it virtually impossible to balance the social benefits and costs of its activities, largely because of the difficulty of measuring the general deterrent effect of its punishment and the cost of punishing an innocent individual. It is not easy to decide whether society should execute one human being to prevent five or ten other murders from being committed, but it is even more difficult to decide whether it is worth punishing an innocent individual to somewhat decrease the level of embezzling.


John Rawls argues that a general policy of framing the innocent is non-utilitarian because of the possible abuse of discretion by the officials in charge of the framing program. Rawls, Two Concepts of Rules, 64 PHILOSOPHICAL REV. 3, 10-14 (1955). On the other hand, H.J. McCloskey has questioned Rawls' conclusion and suggested that under certain circumstances framing the innocent can be justified on utilitarian grounds. McCloskey, An Examination of Restricted Utilitarianism, in CONTEMPORARY UTILITARIANISM 127-28 (M. Bayles ed. 1968).

39. The difficulty of determining the deterrent effect of punishment has been discussed at pp. 317-18 supra. Even if it were possible to precisely determine the amount of crime deterred by punishing an innocent individual, the calculation of the net social benefit gained thereby would involve weighing the immeasurable factors discussed in note 35 supra.
As usual the Wise Sage was requested to "solve" the problem. After a period of intense observation of the heavens, the Sage determined for each kind of criminal conduct the "optimal" combinations of the crucial variables—number of individuals per month to be framed, length of punishment, and character of punishment.

The new policy of framing individuals worked fairly smoothly. Secret agents of the O.G.D. would study the habits and activities of the person to be framed, plant incriminating evidence among his possessions, and make thorough preparations for the frameup. Often the work of the O.G.D. agents would be so effective that the accused himself came to believe that he committed the crime while insane and would plead insanity as a defense.

Oddly enough, although no one in the Office of General Deterrence believed in retribution, the insanity defense was still theoretically allowed at "trial." The officials of the O.G.D. hoped to create among the socially dangerous the sense of being part of a group of sane criminals. If most criminals came to identify themselves with this group, then it would seem to them that a larger proportion of their group was being apprehended and punished.40

Since the O.G.D. secretly controlled the proceedings of the trials, they practically never allowed the insanity defense to succeed and nearly always chose relatively normal individuals for framing. Once in a while to keep alive the myth of the insanity defense, the division would frame a truly insane individual, allow the defense to prevail, and have the fellow committed.

The only classes of individuals other than the insane who were exempt from framing were employees of the O.G.D. itself. It was not long, however, before this policy of random selection came under criticism. Some royal advisers felt that the Office of General Deterrence should grant exemptions to college students, doctors, teachers, and other valuable members of society.41 Other advisors

40. To illustrate, suppose there were one hundred murders in a given month, but it appeared that half of these were probably committed by sociopathic or insane individuals (who were unapprehended). If the fifty other murders identified themselves as sane and if the O.G.D. framed and convicted thirty so-called "sane" murderers, it would seem to the sane group that sixty percent of their number had been punished. (The insane group might notice that none of their number had been caught, but all the members of this group are presumably nondeterrable anyway.) On the other hand, if the insanity defense were not even allowed in theory, it would appear to potential lawbreakers that only thirty percent of a homogeneous group called "murderers" had been apprehended. For an excellent general discussion of insanity defense problems and proposed solutions, see G. Morris, The Insanity Defense: A Blueprint for Legislative Reform (1975) (justifications for the defense discussed at 1-8).

41. Arguably, social welfare would be increased if only the less productive members of society were framed and incarcerated.
felt that the Office should make an attempt to discover which members of the population would find the punishment most bearable. Poor, unemployed individuals would presumably suffer less than members of the upper class. Alienated and disaffected members of society might also be preferred candidates for framing because they are already fairly unhappy. Such individuals might also have a tendency to be subversive.

Some egalitarian critics of these proposals argued that the poor and disaffected were already disproportionately represented in the populations of the prisons maintained by the Department of Special Deterrence. If there should be any discrimination, it should be towards punishing the rich, so that the burden of being punished could be spread more evenly.

The philosopher-king had some difficulty understanding why egalitarianism should be applied to the area of punishment. After all, every previous decision by these agencies had been based on a comparison of social costs and social benefits, and it would seem sensible to attempt to minimize the social cost of punishment.

The Wise Sage, however, was rather weary of gazing at the stars and recommended that the random selection process be continued, except for exemptions to the insane, to high government officials, and to all employees of the Office of General Deterrence. The Sage also warned that he would refuse to aid in setting any further exemption guidelines. After some deliberation, the king accepted the Sage's advice.

Before long, another controversy arose over a new proposal called the dice-system of sentencing. All the sentences previously recommended by the Sage to the O.G.D. would be decreased, but after a (framed) defendant had been convicted of a certain crime, the judge would throw two dice. If the dice totalled seven or eleven, the defendant's sentence would be doubled. Since criminals were a superstitious lot, they would overvalue the probability that they would receive a double sentence. Thus, the same deterrent effect could be obtained with less punishment.

Opponents of this proposal advanced a number of arguments. First, they questioned the extent of the so-called "superstitiousness

42. See p. 324 supra.
of criminals." Second, potential lawbreakers might assume that they would have good luck with the dice. Finally, the critics argued that the people of the Kingdom would be offended at the arbitrariness of such a system.

Supporters of the dice-system restated their former arguments; and in response to their opponents' third contention, they pointed out that the United States Supreme Court was very concerned with "equal protection" but had virtually never attempted to eliminate the randomness of sentencing within the American judicial system.43 Furthermore, randomness of punishment also pervaded the substantive criminal law in the United States. For example, many, if not most, American jurisdictions punish attempted crimes less seriously than completed crimes, although, ignoring retribution for revenge, there is no reason to distinguish the two.44

The critics of the dice-system attacked the latter argument by pointing out that the Americans believed in retribution. The dice-system supporters responded by quoting opinions of the United States Supreme Court which omitted retribution from a list of the goals of punishment.45

To prevent internal dissension from impeding the efficiency of the Office of General Deterrence, the king forcefully halted the entire debate by rejecting the dice-system by royal fiat. After this decree, the debate subsided.

The Moralizing Division of the Department of General Prevention of Crime was a great deal less active and less controversial than


the General Deterrence Division. Since the activities of all the other punishment agencies probably had some sort of moralizing effect, the Moralizing Division voluntarily yielded up its power to incarcerate and punish people and contented itself with influencing the curriculum of the school system and with public relations campaigns urging citizens to obey the law.

The various punishment agencies of the government were functioning relatively smoothly when it suddenly occurred to the king that the Departments of Special Prevention and General Prevention might cooperate with each other. The Office of General Deterrence could secretly frame individuals that the Special Prevention Department had already decided to incarcerate. This would kill two birds with one stone, so to speak. Furthermore, the Office of General Deterrence would no longer need to pick its candidates for framing at random. If the total supply of antisocial individuals from the Special Department was insufficient for the O.G.D. to meet its quotas, the Special Department could be requested to lower its minimum probability figures and supply more names. Not only would the kingdom be relieved of the burden of running two prison systems, but there would be a drastic reduction in the number of individuals that the state would be forced to punish.

Despite these obvious advantages, the Department of Special Prevention put up tremendous opposition to the proposal. First of all, the psychiatrists and psychologists in the Department felt that the arrest, frame-up, and conviction would be such a traumatic and embittering experience for most people that they could never be rehabilitated. Secondly, the O.G.D.'s prisons were rather unpleasant and placed practically no emphasis on rehabilitation. Finally, the sentences imposed by the courts of the O.G.D. were sometimes longer than the periods of detention which would have been imposed by the Special Department. (Of course, they were also sometimes shorter.)

Nevertheless, the king refused to change his mind. The sentences of the O.G.D. courts were now converted into minimum periods of incarceration. However, the king did make one concession. Only the first half of the new, minimum court sentence would be spent in O.G.D. prisons (which were made somewhat more pleasant). The second half of the minimum detention period plus the rest of the total imprisonment period would be spent in Special Department
prisons. (Prisoners would not be released until their criminal propensities were below the minimum probability figures for continued detention previously recommended to the Special Department by the Wise Sage.\textsuperscript{46})

Because a great many of the people declared dangerous by the Special Department were sociopathic or insane, the O.G.D. was forced to reevaluate its position on the insanity defense. The agency was tempted to simply quash the defense whenever it was raised by the accused, but this would be so blatantly unjust in most cases that society's respect for the O.G.D. judicial system might be undermined.

On the other hand, if a greater number of individuals successfully pleaded the defense and then were civilly committed, sane criminals might be tempted to believe that they also could get away with the defense.

The king submitted the matter to the Sage who decided that it would be simpler if the insanity defense were eliminated. The king readily agreed, especially since the insanity defense had always been inconsistent with the royal policy condemning retribution.\textsuperscript{47}

Since some of the individuals referred to the O.G.D. by the Special Department had only attracted the latter agency's attention after engaging in illegal conduct, the O.G.D. would often decide to "frame" such persons for the crime they had actually committed. It was only in situations like these that the kingdom ever resembled the criminal process in a system of retributive punishment.

**Retribution As A Consideration**

In the mythical kingdom just described, the ruler condemned retribution as cruel and inhumane. What if the monarch had taken a less rigid attitude toward retributive punishment?

The Wise Sage might have been ordered to take into consideration the retributive feelings of the populace when determining for each kind of criminal conduct his directions to the O.G.D.---number of individuals per month to be framed, length of punishment, and character of punishment. For example, if a large number of the king's subjects would be displeased for retributive reasons with

\textsuperscript{46} See p. 321 supra.

\textsuperscript{47} Unless retribution is a goal of punishment, moral guilt is irrelevant except to the extent that punishment of the guilty produces greater social benefit (at the same or less cost) than punishing the innocent. See note 35 supra.
only a twenty-five-year prison sentence for kidnapping, the Sage would tend to lengthen the sentence. On the other hand, if other members of society thought (because of retributive considerations) that twenty-five years was too harsh a sentence for kidnapping, the Sage would weigh the feelings of those who wanted a stiffer sentence against those who wanted a lighter sentence. These factors would then be considered along with all the other social costs and benefits of punishment in order to arrive at the final official guidelines for the Office of General Deterrence.

The Impossibility of Reform

Most political systems are not run by an enlightened philosopher-king, but the dilemmas faced by the ruler of the mythical kingdom must be confronted by anyone who wishes to devise a nonretributive, utilitarian system of criminal law. The many problems referred to the Astrologer-Sage must be solved arbitrarily.

Once retribution is abandoned as a goal of punishment, there is no longer any reason to distinguish between persons who have in fact committed crimes and those who merely have a propensity to do so. In order to maximize social welfare, the harm to the person punished must be balanced against the social benefit produced by punishment. Regardless of which of the possible nonretributive goals of punishment is accepted, a schedule must be adopted matching punishment with crimes and/or propensities to commit crimes. Absent omniscience, it is impossible to draft a nonarbitrary schedule.

Furthermore, it is impossible to know how to improve the present system, since it is impossible to know the relationship between the results of our current system and the results of the system which would be adopted by an omniscient punisher. One arbitrary factor in the present system may well be offsetting another arbitrary factor. For this reason it is impossible to tell whether or not any change in the system will be beneficial. The following analogy illustrates this principle.

Suppose there exists a magic box with a large number of vertical grooves in its bottom surface. Each of the grooves contains a marble which was once set at a specific spot. As long as the marbles were in these exact positions, fortune would smile on the entire
country. Furthermore, the further the marbles were moved from their original positions, the worse conditions will be for the residents of the land. Unfortunately, the box has been vigorously shaken hundreds of times so that none of the marbles are in their original positions. Assuming that no one knows where the marbles were originally, it would be impossible to tell if moving the marbles would be beneficial or harmful.

A more legal illustration would be the determination of damages in tort suits. Many of the factors which the jury must consider in deciding awards require clairvoyance (e.g., compensation for future loss of income) or omniscience (e.g., compensation for pain and suffering).\(^48\) It is unlikely that the amount awarded by the jury would even be close to the amount which an omniscient person would grant. Assume the judge mistakenly instructs the jury that the injured party is not entitled to compensation for hospital expenses—an incredibly blatant error.\(^49\) Is there any point in retrying the case? If the jury had a tendency to undercompensate, the error increased the unfairness of the award; but if the jury had a propensity toward overcompensation, the error led to a more equitable decision. Since new trials are an expense to society and legal fees are exorbitant, a strong argument can be made for letting the case stand.

Those who run a law enforcement system must make a large number of fantastically difficult decisions. Obviously, the decisions made by confused human officials will deviate from those which would be made by an omniscient and just god. Unfortunately, there is no way of knowing anything about the extent and quality of the deviations. Thus, there is no way of learning how to improve the system. Piecemeal reforms are futile, because one arbitrary aspect of the system may be cancelling out another.

An omniscient god might be able to devise and operate a system of criminal law which was not hopelessly arbitrary. Mere mortals would be foolish to even attempt to duplicate such a feat.

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49. Id. at 543.