

Contents

| | |
|--|-----|
| <i>Introduction</i> | xi |
| 1. Crime and Impunity | i |
| 2. Sufficiently Good Reason | 7 |
| 3. Taking Human Rights Seriously | 18 |
| 4. Crimes as Pretexts for Improvement | 28 |
| 5. Crimes as Demands for a Remedy | 37 |
| 6. Punishment and Injustice | 47 |
| 7. Crime, Harm, and Moral Wrong | 55 |
| 8. Criminal Conduct and its Culpability | 71 |
| 9. More about Culpability | 85 |
| 10. Psychoculpability | 99 |
| 11. Persons and Choices | 113 |
| 12. Consoling Fictions | 128 |
| 13. Guilt and Convictability | 145 |
| 14. The Decline of Punishment | 161 |
| Postscript: Reconceiving Response to Crime | 174 |
| <i>Notes</i> | 177 |
| <i>Some Further References</i> | 197 |
| <i>Index</i> | 217 |

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Introduction

Like the weather, crime and punishment is ever present and a topic of universal interest. Everyone is intrigued by crimes that make the news, and still more by those artful renditions of crime and its consequences that supply the publishing and entertainment industries with many of their best products. No one is immune to the fascination produced by serious departures from the straight and narrow, while truly bizarre excursions are likely to cast a magic spell. There are, as well, crimes of ingenuity and daring to seduce an envious audience that secretly longs for release from the safe and tedious life of good people who abide by the law.

When crimes are no more than recreational material, paying attention to the rights and wrongs that lie beneath the surface would spoil the fun. The imagination has been let off the leash, and a tiresome and tendentious lesson in morality is the last thing it wants. But when real crimes are still fresh, something more than passive interest is in evidence. Bringing whoever did it to justice is part of the story, but so is the audience's insistence that this must be done. Getting hold of whoever is guilty is the first order of business, and punishing him for what he has done must follow. The fun and the fascination have not entirely disappeared, but a darker mood creeps in, putting a more serious and more urgent complexion on what has happened and what must now be done.

When the wheels of criminal justice begin to turn, a new set of concerns emerge from the shadows. Guilt or innocence poses questions that go beyond whodunit. Crimes do not come ready-made for purposes of law enforcement, and in deciding what crime, if any, might have been committed, police and prosecutors must pay close attention to exactly what was done, in what circumstances, and with what outcome. In court, judges and juries examine the evidence not only to judge its reliability, but to consider just what its significance might be for the ultimate question of guilt or innocence. And for those who are found guilty, there is the question of what sort of sentence to pass, what its extent should be, and how it is to be served. Questions that seem to have something of a moral element in them now dominate crime and punishment. And while the public retains an interest

in the highlights—apprehension, conviction, and punishment—it is bored, and often irritated, by the niceties that now must occupy the system.

How are these questions with a moral tinge to be dealt with? Mainly by resort to intuitions that we all share, but now guided by the conventions of the criminal process. It is the ability to make everyday assessments of those items of right and wrong conduct that transcend everyday matters of right and wrong, but with those assessments harnessed to a procedural system that does not permit arbitrary or idiosyncratic decisions to go unchallenged. The vast discretion at the heart of criminal justice depends on this arrangement to allow it the latitude it needs, while at the same time keeping its decisions in harmony with the conclusions that any reasonable person might be expected to reach.

However, far removed from the practical demands of police stations, courts, and prisons, more detached and more critical projects are carried on in universities, where ideas are valued mainly for their own sake and theories aim above all else to achieve the sort of intellectual merit that attracts recognition in the academic community. Fundamental questions that need never bother those who make and enforce the law are pursued, not for any practical benefit, but because they are regarded as important in their own right. It is not that influencing affairs in the great world is in any way despised. On the contrary, any suggestion of such a possibility is most welcome, and media opportunities do provide a kind of consolation for the meager influence that this sort of work exerts in the outside world. In the hermetic world of the academy, the principal vocational concern is development of theories that please the restive intellect, and so it is no surprise that they exert so little influence in meeting the practical needs of lawmakers and law enforcers. In academic work of this sort actual cases are much in evidence, though seldom to tie down and test theories in any rigorous way. And especially in America, there is the complementary phenomenon of distinguished academic works being cited in judicial opinions to provide intellectual ornamentation.

Law reviews now devote a great deal of space to articles by philosophers or lawyers with philosophical inclinations who discuss various issues of criminal jurisprudence that otherwise lie quietly at the foundations of a system of criminal law. At the same time, many articles of the same sort, though shorter and without voluminous footnotes, appear in philosophy journals. Part of the attraction for philosophers is the wealth of opportunities for conceptual analysis in contexts that seem

truly momentous. Traditional philosophical concerns about responsibility and punishment can be discussed in a more concrete form by reference to the goings-on in a legal system. In America work of this sort is encouraged by the presence of philosophers on law faculties, where they add intellectual scope to conventional legal education by discussing policy issues and conceptual problems in a less parochial way. Crime and punishment appears in much of this work as a moral concern, with an assumption that many of the difficulties at the roots of criminal justice are to be resolved by a better understanding of the correct moral position. As I hope to make clear, this results in fundamental misconceptions about crime and punishment, and has the unfortunate effect of giving support to regressive tendencies in the public domain by encouraging the belief that criminal justice is some sort of exercise in righteousness.

What I propose to undertake in the pages that follow is a voyage of discovery, or perhaps more accurately, of rediscovery. It is *the obvious* that I endeavor to rediscover. With the field of crime and punishment more accurately charted, so that fictive moral elements are eliminated and genuine moral elements are given the prominence they deserve, the morally important issues in criminal jurisprudence can be dealt with in a way that is genuinely enlightened from a moral point of view. It is a matter of freeing theory from the constraints of the moral mindset to allow a more civilized political morality to exert its influence over the business of crime and punishment.

In the first three chapters I consider again the most widely and most thoroughly discussed issue in criminal jurisprudence, viz the justification of punishment. I am unhappy about the easy ride that theorists of various stripes give themselves in their attempts at justification, and especially their disregard of the violation of basic human rights that serious criminal punishment inevitably involves. My conclusion about what is justified and why is a kind of *practical* existential imperative, a theory with a distinctly conservative complexion and a thoroughly unambitious outlook.

In the two chapters that follow I consider other positions that seek to justify the institution of punishment. All of them fail to satisfy the requirement of indispensability that I argue for in the preceding chapters. Moreover, all of these theories—retributive as well as utilitarian—turn out to be consequentialist, or forward-looking theories in which punishment seeks either to improve or to remedy some state of affairs. This is in contrast to the theory I argue for, in which punishment seeks to do neither.

The next chapter is devoted to the basic principles of injustice that must be guarded against in the criminal process. In opposition to the moralistic approach, I argue that a claim that punishment is deserved does not have the positive spin that it is thought to have, and that just desert is also only a protective principle that seeks to ensure respect for innocence. Proportionality between crime and punishment is another favorite of the moralist, but again its importance lies not in striving to match to moral perfection but rather in avoidance of the kind of gross mismatch that is easily recognizable as injustice. Disparity of sentences is the next moral hazard. It is universally recognized as a form of serious injustice, but its moral failing lies in its arbitrary or idiosyncratic treatment of cases, not in failing to follow some morally endorsed formula for assessing and matching the criminal conduct in two cases that are said to be candidates for similar treatment. And finally, there is a minimalist principle that seeks to limit punishment to what is necessary to keep the law credible, even when there is a good case that more than that is deserved.

In the next chapter I consider what a crime is, and particularly with reference to the harm that seems always to hover in the vicinity and often to occupy the limelight. The notion that there is always a moral wrong at the heart of the matter turns out to be very misleading. There are, in fact, five different categories of crimes whose difference lies in their different relationships to the harm that gives them their criminal character. And there are three different reasons why crimes may be morally wrong, all of them related to harm. Although many crimes are morally wrong, it is never the case that there is, or ought to be, criminal liability for them because they are morally wrong. Moreover, there are many crimes that are simply not morally wrong, though since there are good and sufficient reasons for having them on the books, imposing criminal liability for committing them is not wrong from a moral point of view.

The next three chapters go to the heart of the crime: the conduct that constitutes the crime, and the culpability that on the moralist's account is the essence of the conduct's criminality. But culpable conduct turns out not to be activity masterminded by a malign or morally indifferent inner self, and in itself culpability tells us nothing about the person whose conduct it is. Criminal culpability has an altogether different role to play, and it is a role that gives no support to the moralist.

Not surprisingly, some theorists, especially those with a moralist bent, would like to give persons and their character, rather than their conduct, the

more intense scrutiny. After all, the crime is committed by a person, and it is punishing the person for his crime that is the point of criminal justice. In this next chapter I examine that idea and point out what is wrong with making the person the star attraction. I also look more closely at the troubling notion of a choice, troubling because the moralist wants to attach moral weight to the fact that what the actor did was a matter of choice.

In the next chapter I examine four consoling fictions which make it easier for people of moral sensibility to accept the awful business of crime and punishment. The first of these seeks to soften the idea of punishment and make it easier to evade what is really going on. Then there is the consoling ideal of punishment that fits the crime, a perfect match that comforts us by ensuring that justice is done. After that I consider the difficulty of cases in which what seems wrong now quite understandably seemed right at the time, and the fiction the law must employ in order to punish what is morally innocent. Finally, there is the dilemma of sympathetic or even empathetic engagement with those who commit a crime and the antidote to such moral engagements provided by the notion of evil.

In the last two chapters I consider two great issues of political morality that overshadow criminal justice. The first concerns the radical moral deficiency that permeates the way the law is enforced. The second queries the institution of criminal punishment when seen in historical perspective as one among several social institutions with which it shares certain morally reprehensible features, as well as a certain respectability. Viewed in this perspective, progress toward a more civilized response to crime appears to be a moral imperative.

I like to think that in some small measure the book will help create a new moral environment for crime and punishment, an environment in which incidents of human failing that are public business are seen for what they truly are, and are dealt with in ways that avoid as much as possible compounding the quantum of injury that must be suffered. Morality as the guardian of genuine well-being needs our whole-hearted support, while morality as the crusader against evil needs to be eased into retirement. Nowhere is this more important than in criminal justice.

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