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POLITICAL DIALOGUE: THEORIES AND PRACTICES

Edited by
Stephen L. Esquith

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Aleksandar Fatić

RETRIBUTION IN DEMOCRACY

*The idea of justice created by a veil of ignorance
as opposed to justice created through the knowledge
that one would have to live with the consequence of
the decision for a long time to come*

Nils Christie¹

ABSTRACT. How should punishment be justified and carried out in emerging democratic societies as well as their established models? I argue that liberal theorists have not been able to reconcile their attraction to retributivist theories of punishment with an otherwise strategic conception of social cooperation and control. As one aspect of a more general functionalist understanding of politics, I advocate a trust-based approach to crime handling. At least in the case of the practice of punishment, democratic politics cannot be morally grounded in a participatory and dialogical way. Democracy, like any other political system, must function to control human nature. A democratic system of crime handling that inculcates trust, not one that Quixotically attempts to separate politics from criminal justice, is most likely to avoid the deliberate infliction of pain. In a society caught in the difficult transition to democracy, punishment should aim at building trust and avoiding the infliction of pain, not at retribution. Dialogues about who is responsible for past crimes inevitably are turned into strategic, self-serving contests.

Most liberal democratic theories these days advocate a law-and-order type of society and a retributive conception of punishment. This conception implies that punishment ought to be administered according to the offenders' 'desert', rather than to the results which could be achieved by punishing them or letting them go, as the case might be. Contemporary retributivists imply that punishment according to 'desert' is 'retrospective', and that it is independently morally justified as such. They argue that respect for the offender as a human being requires that he be treated in accordance with his guilt and responsibility, rather than with any 'external' criterion, such as deterrence of other potential offenders.

¹ Nils Christie, *Limits to Pain* (Oslo: Iniversitetsforlaget and Oxford: Martin Robertson, 1981), pp. 97-8.

In the last few decades, the retributive theory of punishment has largely grown from John Rawls' epochal *A Theory of Justice*, and from its paramount idea of justice as fairness.² According to Rawls, fair social arrangements are those which would be agreed upon by an imaginary congress of men and women who are denied morally arbitrary knowledge about their own social positions and characteristics. Their social agreement would not be affected by any particular interests connected to their social positions, and as such ought to be considered as the paradigm of fairness for social arrangements.

In this article, I will not argue the positive and negative aspects of Rawls' general theory of justice. Many a masterly study of Rawls exists, and simply adding to the collection is not my aim here.³ I shall rather concentrate on the Rawls-inspired theory of desert in recent years, in particular on the puzzling fact that, contrary to Rawls himself, this theory vigorously advocates retributive punishment, while adopting the general layout of Rawlsian theory of justice. I shall argue that, first, the linguistics of desert as used by those theories are deceitful and obscure, and that they suggest that a theoretically solid account of punishment must dispense with desert-terminology. Secondly, I shall argue that desert theory is hardly defensible at all in the context of democracy, because democracies are societies operating on an essentially liberal conception of a social agreement, and as such cannot sustain the criterion of moral rationality as opposed to strategic rationality, which is what a defensible desert theory would require. Thirdly, in the concluding section, I shall suggest a direction in which the discourse about punishment in democracies could be further developed.

1. 'To deserve'

When one says that 'the murderer deserves to be punished', what one suggests is the following:

- (i) the offender (in this case, the murderer) is the subject of 'to deserve',

² Perhaps amongst the most interesting works are Wojciech Sadurski, *Giving Desert Its Due: Social Justice and Legal Theory* (Dordrecht: Reidel, 1985) and Tom Campbell, *Justice* (London: Macmillan, 1988).

³ For a recent and original study, see Bonnie Honig, *Political Theory and the Displacement of Politics* (Ithaca: Cornell University Press, 1993).

- (ii) there is something importantly 'independent' about the ensuing punishment, which 'the offender has' somehow 'brought onto himself' and
- (iii) ill the offender's 'desert' of reprimand and punishment the significant implicit 'we', the public, the rest of society, are basically outside the picture.

It is usually argued that the offender knew what he/she was doing, that he/she knew that the act intended was prohibited by law, that he/she could have chosen to act otherwise, and he/she still chose to break the law. This is considered to be a sufficient moral ground for retribution. In this picture, the offender has *caused* punishment by deserving it. He/she engaged in deserving punishment by engaging in committing the prohibited act. In this sense, the offender him/herself is responsible for the offence, and is the only one to blame for the ensuing punishment. Punishment as such is independent of anyone else because it was 'present' to the offender, through law before he/she committed the offence, as a consequence of which he/she could have chosen either to risk being punished or not. Everything works almost automatically. The relevant 'we', the good citizens, the public and the rest of society are there merely as observers of justice, which makes us feel good, because it works and we like it, but for which 'we' 'ourselves' are in no way directly responsible. 'We' are responsible for the setting up of the mechanism of 'fairness', 'justice' and 'proportionality', and for its theoretical justification. For the workings and effects of it, in any particular situation, the responsibility lies solely with the offender. This is the ideal picture of retributive justice as fairness. In the context of retributive theories based on fairness (H. Morris, W. Sadurski), this perspective is adopted as an adaptation of Rawlsian procedural justice to cases of what he calls 'partial compliance'.

In reality, all these assumptions are wrong. They are assumed by the use of the meritocratic term 'to deserve', but in the practice of punishment they completely misrepresent the real situation.

First, the offender is the subject of 'to offend' ('to murder' in the above case), but not of 'to deserve'. One does not engage in 'deserving' anything by committing a murder. 'Desert' is an assessment not an action, and it ought to be used as an adverb, not as a verb; as an adjective, not as a predicate. This assessment is attached to offences after the offence has taken place. 'Desert' is a qualification made *about* the offence and the offender, and from aside, from the 'us', the public, the rest of society. To say that the offender 'deserves' to be punished, in moral discourse, is the same as to say that he acted unfairly and that 'we', or the authorities who act with 'our', 'good citizens' authorization and on 'our' behalf, *ought* to punish him. Hence, the offender is not really the subject, but rather the

object of the assessment of desert; he *does not* 'deserve', but *is being* charged with 'desert'.

Secondly, and relatedly, there is nothing 'independently moral' about punishment; nothing that would justify saying that 'the offender has brought the punishment on him/herself. The justification of punishment and criminal law itself is based on the values which society holds dear. The more dangerous the offence is to those values, the more 'serious' it is, and the more 'deserving' of punishment the offender is. Hence, the criterion for desert does not ensue from any form of universal and independent morality, but rather from a particular set of values adopted by a community. This is obvious from the fact that the same offences carry a different amount of 'desert' in different communities. This fact has caused a great deal of trouble to both the traditional and modern retributive theories of desert, so much so that some of the modern retributive theories concede that what they have in mind is not the traditional, universal Kantian morality, but rather a 'culture-relative' one.⁴ In other words, and this is a common assumption of all contemporary retributive accounts, morality ensues from the values which the relevant community adopts. In Kleinig's account, the concept of justice as fairness requires that the local conceptions of the mildest and harshest punishments which can be justifiable under any conditions in the given 'culture' be viewed against the local conceptions of the least and the most serious crimes. In most 'western' societies, the gravest conceivable crime is usually a serial murder or an equivalent, while the debate about the harshest justifiable punishment revolves around capital punishment and life imprisonment.

The problem with this idea is that there is nothing particularly moral about the fact that a certain community adopts certain values, or that a certain community shares certain 'moral' evaluations. The community can be 'wrong', and the punishment ensuing from its values can be completely immoral. A Nazi 'culture' might entail that those who have a habit of going to the synagogue 'deserve' to be executed, because being a Jew is immoral and perceived as seriously damaging for the local culture. One could not deny that this assessment indeed follows from the particular stock of values, as we know them from recent history. Still, there is hardly anything moral about this sort of culture-based 'morality'.

This illustrates that there are serious reasons for doubting the judgments of the community can convey any form of moral justification on public policies, and on punishment as a public policy. Similarly, ascriptions of 'desert' do not confer any kind of moral neutrality on punishment. Accordingly, in any but in a strictly causal sense, it is totally

⁴ For example, John Kleinig, *Punishment and Desert* (The Hague: Martinus Nijhoff, 1973).

inappropriate to claim that 'the offender has brought the punishment on him/herself. The offender might be responsible for the offence, but he is certainly not responsible for the ensuing punishment. He who is responsible is the subject of action. In the case of the offence, the offender is the subject. In the case of punishment, 'we', the society, and our agents in the government, are the subjects, whereas the offender is the object of punishment. The moral responsibility for punishment, unfortunately for the retributive idea of justice, lies solely with 'the rest of society', and the mere fact that a particular society shares certain values in itself does not confer any moral status on its policy of punishment. Hence, finally, the puzzling absence of the significant 'us', the rest of society, from the language of desert is clearly unwarranted. The rest of society, the implicit 'us', the satisfied onlookers, are in fact the real subjects of desert-charges and of punishment. For desert, as Kleinig points out, is nothing beyond 'desert claims': it is a word designating nothing more than the community's evaluations of the offender's actions.

Another obscurity of desert-language is related to the use of the moral and legal point of view interchangeably. The moral point of view is inevitably universally human; as R. Berki points out, the law is an institutional idea of morality as human nature, and any other account of morality is inevitably flawed.⁵ Accounting for punishment in terms of its conformity to criminal law is an empirical matter, and a fairly uncontroversial one. I am not entirely convinced that this is justifiably uncontroversial in recent literature, but it is normally considered that only legal punishment of criminals can be morally justified. From the retributive, law-and-order point of view, the first step in morally justifying any punishment is to establish that it has been executed in accordance with the criminal law. The second step is more controversial and more difficult: it is to prove that a particular criminal law is morally justified. It is to prove that, in Berki's terms, a particular criminal law conforms to the idea of the moral law; that it is the accurate expression of the moral principles presumably constitutive of human nature. Although this concept of morality, in light of the intuitive unacceptability of the idea of culture-relative morality, appears to be the only plausible one, it is still riddled with difficulties. Yet from the methodological point of view it is clearly insufficient to prove that a punishment has been executed in accordance with a particular law. In order for its moral status to be established, it must be shown that the law is morally justified itself. Hence, the legal and moral points of view must not be swapped at any stage in the argument.

⁵ R.N. Berki, *Security and Society: Reflections on Law, Order and Politics* (London and Melbourne: J.M. Dent and Sons Ltd., 1986).

The moral and legal points of view are reflected in the language of criminal justice mainly through four terms:

- moral responsibility
- legal responsibility or liability
- moral guilt, and
- legal guilt, or culpability.

Legal responsibility, or liability is defined by the law, and ought to correspond to the concept of moral responsibility as applied to all sorts of situations to which the law applies. Similarly, legal guilt, or culpability, ought in its definition to accord with the concept of moral guilt. The first step in justifying punishment is to show that it has been executed in accordance with the legal provisions of liability and culpability. The second step is to show that the particular definitions of liability and culpability can be justified from the moral point of view. In the criminal laws of the former South Africa, Soviet Union, or Nazi Germany, numerous punishments of black South Africans, political adversaries or nations designated for genocide might have been quite legal, and might have conformed to the particular racist, communist, or genocidal criminal laws; yet those punishments would not have been morality justified, because the laws themselves were immoral.

In the modern retributive fairness-based theory, in particular in Wojciech Sadurski's influential 'equilibrium' theory of criminal justice, some of these four terms are used in a confusing way. Sadurski argues: "Retributivism is based upon the principle that criminal guilt justifies punishment, both in terms of determining a class of persons who should be punished and in the measurement of punishment. Guilt deserves punishment for the sake of justice."⁶

This is clearly untrue; criminal guilt does not justify punishment without moral guilt. The only concept of 'guilt' of which one might say, if one were a retributivist, that it 'deserves punishment for the sake of justice' is moral guilt, and not culpability. The problem here is obviously that, when one discusses the problem of retribution in relation to ordinary crimes, such as robbery, murder or rape, and in ordinary, democratic societies, which are generally considered morally acceptable, one is in less clear water than when one discusses punishments in relation to political disagreement, belonging to a different race or to a nation targeted for genocide, as in a racist, a communist, or a genocidal regime. The problem of justification is the same, but the intuitions are less unequivocal, and one does not quite know how to distinguish the moral from the legal point of

⁶ Wojciech Sadurski, *Giving Desert...*, *op. cit.*, p. 233.

view; universal moral values from the ones shared in one's community, and so on. One does not quite know how to account for the law independently of its democratic social purpose in advancing the values which are *de facto* shared in a particular community.⁷ This is because the law is made in democracies (even if only indirectly) by the community, by the people who share certain values, and who, let us face it, do not necessarily harbour any interest in, or concern for, anything like universal morality. In democracies, dominated by an essentially liberal ideology, every individual is considered to be equally politically important, and the genesis of laws is basically political. Legislation, ideally and ultimately, stems from the democratic support and from the values firmly and widely embedded in a particular democracy. In addition, liberal ideology implies that, in expressing their choices, the individuals are not to be constrained in any way in regard to the quality or the content of these choices, their moral status or genesis. The only constraint results from the chances for the particular value to succeed as measured against the background of the *de facto* values of others. Practically no value is suppressed from expression and political impact according to its independent, universal moral value. Here, perhaps more than anywhere else, the basic assumption of morality is challenged: the intrinsic morality of human nature. Democratic communities are concerned with their interest, not with that of other individuals and communities, and importantly, in liberal society they are entitled to do so and are considered 'free' as long as they are entitled to do so. As Vaclav Havel says: "A liberal market economy? Yes, but only for

⁷ In Sadurski's own opinion, not much hinges on the distinction between the moral and legal point of view in this particular instance. He believes that the concept of criminal guilt is sufficient for a working theory of criminal justice, because any such theory would have to assume that the criminal law is morally justified. In his particular account, the moral status of the law could be tested according to whether the offender in any particular case has received undue benefit resulting from the lack of self-restraint, as exhibited in the commission of crime. I am inclined to doubt very strongly both that a criminal justice theory can safely assume that the law corresponds to the 'moral law', and that one can at any stage take a step back and test the particular law. I think that punishment is a deliberate infliction of suffering and that this fact makes it necessary for a theorist of criminal justice to demand a successful justification of it on both criminal (legal) and moral grounds in every particular instance. This is tied to the fact that criteria for the moral 'testing' of criminal laws are notoriously unreliable and vague, due to the lack of a clear idea of morality or 'the moral law'. Sadurski's own moral criterion (undue benefit from the lack of self-restraint) is not independent from law, because the structure of self-restraint is determined by law, and not just any form of self-restraint is required by the moral law (such as, for example, self-restraint from going to a synagogue). In order for a 'moral' test to be successful, it would have to be based on a more substantial claim than self-restraint, and on a more independent one from what the law says.

us. Security? Yes, but only for us. National interests? Yes, but only our own."⁸

The will of the majority, not the morality, is the bottom level of any justification, as well as legitimation. One cannot tell the difference between the popular will and moral law, because one cannot clearly delineate moral law as opposed to what one witnesses as an exhibition of unconstrained human nature. The amount of concern shown in this perspective for marginal groups is proportional to the degree to which the majority can identify with the particular group. As the social transparency between the majority and the particular marginal group decreases, the concern for the interests of that group decreases accordingly. Freedom of movement of people, goods, services and ideas, for example, is a great 'humane and enlightened' idea in the European Union, it is considered to mark a progress in humanity and the realisation of a 'natural' state of human affairs. But this does not apply to everyone; just to the ones with which the affluent populations of western Europe can identify. East Europeans, or the majority of them, cannot travel freely in the 'enlightened and human', 'natural' societies, and they have no rights in them, because this would damage the interest of the west European populations. Similarly, in Australia, and in America, freedom of movement of people is considered to be a right and a basic freedom, and yet this applies only to 'us', not to others, or at least not when they intend to travel to our country. Discrimination of this sort does not strike one as such because it is common. It increases as the level of identifiability with a particular group decreases, and this is obviously relevant for the question of punishment. The average 'good citizen' fears crime, and finds it difficult to identify him/herself with a murderer, a mugger, or a rapist. Hence, political pressure in democracies is for penalisation of offenders, as long as this is supposed to 'prevent crime'. Yet, curiously, in liberal democracies, so prone to all sorts of instrumentalised discrimination, so obviously governed by utilitarian concerns, there is a strong remnant of the 'moral law' sentiment, a remnant important for self esteem, fertile for the 'retributive' justification of punishment.

I suspect that this sentiment, this precondition for self-esteem, may explain the unwarranted use of retributivist terminology in modern desert-theories, based on the democratic background of Rawlsian theory of justice. This charge does not apply to Rawls himself, who did not endorse the idea of desert and retribution. His theory may be challenged for lack of realism, for he thought that in a fair society punishment will not be necessary; this idealism was, however, to a certain degree inevitable, if one was to be

⁸ Vaclav Havel, "A call for sacrifice", *Foreign Affairs*, 1994, p. 5.

consistent in a theory based on the idea of an independent, impartial morality. An impartial morality which would also be independent from any particular cultural values is necessarily the universal sort of morality envisaged by Kant and Hegel. Perhaps the most natural way of conceiving it is as the moral law ensuing from human nature.⁹

2. Democratic dialogue: political or moral

In his most recent political essay Vaclav Havel wrote:

The pragmatism of politicians who want to win the next election, for whom the highest authority is therefore the will and the mood of a rather spoiled consumer society, makes it impossible for them to be aware of the moral, metaphysical and tragic dimensions of their own program.¹⁰

This sort of pragmatism, unfortunately, is not unessential for democracies, because in them the virtually unconstrained popular will is the sole source of authorization of power. The popular will, *de facto*, is the sole source of the moral justification of the use of force by the authorities. This fully applies to the legislation of criminal laws. The most controversial provisions for punishment, for example, the death penalty, are not only made by people's elected representatives and governments; they are directly and widely discussed in modern democracies. They form a public agenda. They are the result of the democratic mathematics of individual choices. They are, in their essence, political, and not moral. This can be easily seen if one pays attention to the fact that moral reasons tend to be substantive rather than procedural. Substantive are those reasons that are based on the content of decisions to be made – for example, a substantive reason for the death penalty would be that the offender is a moral being, and that as such he is obligated to receive a proportional payoff for his deeds from society. (This reason may be methodologically bad, and I think that it indeed is, but this is what a substantive moral reason should look like.) Procedural are the reasons referring not to the content (substance) of the decision, but rather to its genesis. These reasons are characteristic for political discourse, where a decision is considered justified or legitimate if it is taken in accordance with a procedure that conforms to a certain standard. (In democracies, this standard is popular support and formal legality of the decision-making process.) Most moral reasons are substantive, while most political ones are procedural. When one looks at the way punishment operates in democratic societies, one sees that it is completely political. There are no independent standards which are obeyed

⁹ This point was eloquently elaborated by R.N. Berki in *Berki Security and... op. cit.*

¹⁰ Havel, "A call for...", *op. cit.*, p. 4.

because the norms they form are as such categorical (i.e. that hold unconditionally, even when they are totally contrary to the public perception). The dialogue about criminal justice in democracies is a bargaining process; it fluctuates according to what the majority thinks about human rights, their content and scope, what crime rates are, and in general what the dominant political pressures are. Although punishment is often explicitly on the public agenda in democracies, this is by no means essential for my claim that it is essentially political. Even when provisions for punishment are not publicly debated, the same principle applies, because they are provided by governments, and governments are in democracies, again ideally, authorised and, *de facto*, justified in doing so by the popular will. The checks on the government are not based on moral reasons, but directly on the popular support. The popular will, on the other hand, need not be moral by itself any more than any individual will is *ipso facto* moral. It can be, and mostly is, predominantly strategic. The liberal democratic principle that the popular will ought not to be substantively morally constrained in any way in relation to its content has a crucial implication for the perspective of moral justification of retribution in democracy. This entails that there need not necessarily be anything moral about democratic social arrangements in any substantive sense. As far as democracy goes, the social arrangements can be wholly strategic or, as Havel says, 'pragmatic', and yet these arrangements would be genetically, procedurally justified. The important thing is that the checks on the popular will are nonexistent. This is the fundamental principle, and many liberal thinkers would say also the fundamental value, of the dominant, liberal ideology in contemporary democracies. No particular conception of guiding values for one's life ought to be imposed on individuals. No moralising is allowed in liberal democratic societies. Everybody has the right to be as immoral as the other members of society are prepared to tolerate. As long as the amount of agreement in society is sustainable, no substantive standards are necessary, nor are they desirable. Hence, to stick to Havel's terminology, one could indeed legitimately conclude that the procedural character of liberal democratic legitimation virtually eliminates the necessity of moral rationality, which would be independent of 'the will of the rather spoiled consumer population'. Democratic dialogue in democracies is conducted in terms of power-seeking and power-granting, and as such is predominantly pragmatic. Pragmatism is an organic, indispensable part of democracy.¹¹

¹¹ This perspective has first been envisaged in the 1970s by a number of mainly German political theorists, the most famous of whom these days is Jürgen Habermas, but the group also includes Karl-Otto Apel, Wilhelm Hennis, and others.

If this perspective is projected on the moral problem of punishment, it becomes quite clear that the earlier analyses of desert-terminology by modern liberal retributive theories are further substantiated on the level of democratic political dialogue. This dominant ideological context of a democratic power-seeking and power-granting dialogue is liberalism. Liberalism entails that the dialogue must go on fair terms between the participants, but not that it should convey this rather than that message. The message endorsed by it can be virtually anything, as long as the dialogue itself, the procedural base of social decision making, is based on a fair distribution of opportunity for participation. This refers back to the 'pragmatism' Havel has in mind. It means nothing more than that public policies and laws, including policies of punishment, are legitimate not because they are related to substantive moral criteria, but rather because they stem from the values most widely shared in a particular community. From a strictly methodological point of view, this creates a gap in the supposed moral justification of retribution, which is traditionally supposed to pay paramount respect to the human dignity of offenders, and to be based on strictly moral reasons. As the values of any community are not *ipso facto* in any way moral, modern liberal 'retributive' theory half-heartedly accepts the not-necessarily-moral reality of democracies, while on the purely theoretical level of theory of punishment it retains notions of a strictly moral rationality as present in traditional Kantian retributivism. This hybrid product, the liberal retributive theory of criminal justice, is an extension of Rawls' liberal theory of distributive justice as fairness. For this very reason, it in a certain sense *inevitably* confuses the moral with the legal points of view. This is reflected in the misleading use of meritocratic retributive language.¹² It would therefore be crucial for any

¹² I am quite convinced that similar reasons lead Aristotle to distinguish between *politeia* (a form of 'democratic' participation in decision-making amongst the social elite – the aristocracy) and 'vulgar democracy', which he ranked as second worst social arrangement only to a complete anarchy (see *Nicomachean Ethics* and *Politics* for relevant remarks). I also believe that similar considerations led Edmund Burke to conclude that the four principles of social order ought to be as follows:

1. Social order is part of the natural order that God has created and it exists prior to the individuals who are born into it ...
2. Man is a social animal. Therefore, the family, not the individual, is the proper unit of social order. Families are organised into classes that reflect social functions ...
3. A national must have rules of behaviour to bring unity of purpose out of mutual adaptation of conflicting interests.
4. Inequality is inescapable in society. But social leadership is most properly founded on the natural sense of dependence, subordination, and affection, which respond to ability, virtue, age, and graciousness. These qualities of leadership are best institutionalised in a hereditary aristocracy.' Auerbach, N.M. "Edmund Burke" in D.L. Sills (Ed.),

future development of democratic theory of crime-handling to bear in mind the controversy between moral and strategic rationality in democratic society.

The procedural character of democratic legitimation of decisions militates against substantive moral criteria. The sanctity of the right to choose takes over almost all significance from the duty to act rightly. More precisely, the perspective of moral justification (involving the 'moral explanation' of actions, decisions and strategies) is replaced in liberal democracies by the perspective of procedural legitimation (involving the process by which decisions are reached, strategies developed, and actions conceived and taken). The two things are fundamentally different. Procedural legitimation allows for what from the substantive moral point of view can be viewed as immorality. This is clearly exhibited in the contemporary workings of liberal democracies: decisions whether troops will be sent to war-torn regions of the world are not based on moral considerations, but on economic and political calculations, although this militates against the very humanitarian and moral meaning of the acts considered. Interpersonal relations are increasingly seen as determined by things such as loyalty to corporate interests, rather than by the moral duty to treat others as ends and not as means only. Issues such as right to abortion are considered not in the light of independent moral criteria, but simply on the basis of the balance of power and influence of rival protagonists, such as various religious and feminist interest groups. Finally, sentences are handed down and punishments executed not so much according to the moral appearance of each particular case, including its legal background, but increasingly according to the public cry for quick 'solutions'. This often reaches absurd forms, with various formulas for the treatment of offenders invented (such as combinations of community service and prison term) – formulas which give the impression that crime and punishment are treated in the same way as a problem with computer software, which can be eliminated by a suitable 'expert' in a matter of

International Encyclopedia of the Social Sciences (New York: Macmillan and the Free Press).

In democracies, punishment is widely considered justified because crime violates the values dear to the community, and it is assumed that punishment can prevent this. This implicit assumption is taking the liberal 'retributive' theory even further from the retributive towards the deterrence grounds. It has perhaps most clearly been illustrated by authors such as Andrew von Hirsch *Past or Future Crimes: Deservedness and the Dangerousness in the Sentencing of Criminals* (Manchester: Manchester University Press, 1985), Andrew Ashworth, *Sentencing and Penal Policy* (London: Wiedenfeld and Nicholson, 1983), Hyman Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979) and others. The desert-theorists who explicitly rely on Rawls' theory of justice (Sadurski, Campbell) do not draw this implication as starkly, but it is nevertheless inherent in their arguments.

hours. The entire personal dimension of crime and punishment, the uniqueness of most cases, the fact that crime it is simply not possible to 'stamp out' crime or do anything like that, the fact that 'experts' know almost nothing about the ontology of crime and punishment, about their development and relationship with different cultures, historical epochs and global life styles, are completely eliminated from the democratic rhetoric about criminal justice. These facts are eliminated because the public does not want to hear them, and tends to dislike those who present them to it. The critical moral fact of all democracies is simply that there is nothing particularly morally admirable in citizens as such, whether they are oppressed or part of a democratic system. The majority of them are a selfish, spoiled and interest-driven population, which means that their decisions and political choices reflect these same characteristics. Yet all the morally unfortunate aspects of policies that result from their choices are perfectly legitimate because this is how democracy works. In this sort of a moral setting, retributive punishment is simply impossible, because it is based on the ontological idea of just deserts, and militates completely against interest-based criteria for social policy.

3. *An alternative for a democratic theory of crime-handling*

While this section cannot provide a comprehensive theory of crime-handling it will attempt to propose a general direction for such an alternative. An obvious thing for an alternative theory to do is to dispense with the language of desert. The second one is to acknowledge that the relevance of moral justification of punishment stems from the fact that punishment is a deliberate infliction of pain.¹³ The third thing to start with is a definition of law.

The first two assumption are made present by merely acknowledging them. As far as the definition of law goes, there have obviously been several definitions in recent history. One depicts it as merely an instrument for coercion; another one defines it, somewhat more precisely, as a monopoly on the use of force in society. The Marxist definition depicts it as 'the will of the ruling class', while the Lenninist version defines it as a tool in the proletariat's struggle for power, and for the establishment and

¹³ I am, of course, skipping the treatment of utilitarian, communitarian, republican and other theories of punishment, mainly due to the limitations of space. A comprehensive treatment of these theories is present in a book on *Theories of punishment and restorative crime-handling*, which is currently in completion. The illustration of the longevity of the idea of moral relevance of punishment primarily as a deliberate infliction of pain can be found in Ted Honderich, *Punishment: the Supposed Justifications* (Harmondsworth: Penguin, 1971).

short term maintenance of its 'dictatorship'.¹⁴ All these definitions have been justly and extensively criticised. The definition I wish to propose is somewhat different.

The fundamental mechanism of social dynamics, in my view, is *trust*. Any community, any society, would cease to exist as a community, it would lose its social character, if a certain amount of trust was withdrawn from, or within that community. All social activity rests on the assumption of trust. When we drive on the road, we trust that other drivers will, for the most part, respect the rules of the road, or otherwise driving would be an extremely risky enterprise. When we go to the doctor, we trust that he/she is competent, and benevolent. We trust our governments that, again for the most part, they will act in our general interest, and we trust our lawyers that they will represent our case to the best of their abilities. We also for the most part trust other people that they will not act unfairly towards us, that they will not take our property, harm us or take our life. Hence, trust is essential for all social activity. One of the most important roles of the government is to provide assurances that a reasonable amount of personal security in society is available, and that it makes sense to invest in it the amount of trust necessary for all communal and social living. The society secures (or attempts to secure) this critical amount of trust by legislation. Law can therefore be plausibly defined as the institution and maintenance of the functional minimum of trust in society. It is an instrument for social control, and as such it plays the role of institutionally securing the critical quantity of trust.

Let me, then, summarise the three fundamental assumptions again:

- (1) elimination of desert-language
- (2) recognition that the moral relevance of punishment stems from the fact that it is a deliberate infliction of pain, and
- (3) the view of law as trust-maintaining.

From these three assumptions, a particular definition of an offense follows: an offense is a breach of institutionalised trust in society. It creates a disturbance of social relations, based on trust, and the task of crime-

¹⁴ The supreme Soviet prosecutors, N.V. Kriljenko and A.J. Visinski have developed a core of jurisprudence corresponding to the Lenninist idea of the criminal law. According to them, in political criminal cases the admission of guilt of the defendant is far more significant for the state than any evidence of guilt. The criminal judiciary is a 'political weapon', or an 'organ of class struggle', and, consequently, it ought not to be geared according to the 'eternal law of truth, justice, etc.', but only according to 'the interest of the revolution ... bearing in mind all the time what verdicts would be most desirable for our labourer and peasant'. [Visinski, *Teorija dokaza u sovjetskom pravu*. Serbo-Croatian translation from the Russian by V.M. Jankovic (Beograd: Naučna Knjiga) 1948, pp. 100-101 cited according to Igor Primorac, *Prestup i kazna: rasprave of moralnosti kaene* (Beograd: Mladost, 1978, p 131].

handling is the restoration of trust and the alleviation of the consequences of its breach. Also, the above three assumptions entail that crime-handling institutions ought to abandon punishment as a deliberate infliction of pain.¹⁵ Instead they ought to follow the pattern of action which is most promising for a successful restoration of trust in the community. These two corollaries are consistent with each other. Punishment does not restore trust. Presumably, it deters future offenders. In fact, it does neither. This I believe is fairly uncontroversial in contemporary criminology. Only a small amount of offenses are ever reported – according to most statistics, considerably below fifty percent. When some of these offenses are accidentally discovered, and when their victims are asked why they have not reported them, the most common answer is that the victim did not really see what good the police could do, that there was no need for the institutional involvement of society, or that the victim (and the local community, in some cases) did not want to hurt the offender. Many times, also, the answer is that the offense occurred in the past, that 'what was done cannot be undone', or that, in the meantime, the relationship with the offender, if not normal, was 'much better'.¹⁶ This, again, presumably happens in more than half of all criminal behaviour.

In other cases, where offenses are grave, the popular will frequently requires substantial punishments. Battering, rape, armed robbery, murder, all carry significant punishments in modern democratic societies. These punishments are not only frequently a public issue, debated widely by the media, but they are also a political instrument for prospective governments, who use the rhetoric of 'a crackdown of violent crime' for purely political reasons.¹⁷ Due to the fear of violent crime and its dramatic increase in modern democracies, it can be generally said that political pressures are predominantly responsible for the increase of punishment. Some modern democracies, in absolute terms, have draconic penal systems.¹⁸ Yet clearly in those societies punishment is ineffective; it does

¹⁵ This idea was also envisaged by Rawls – see Bonnie Honig, *Political Theory...*, *op. cit.*, ch. 4.

¹⁶ This is perhaps most commonly the case with domestic violence.

¹⁷ Most recently, American President Mr. Clinton has been charged repeatedly by human rights activists for refusing to grant an abolition of death penalty by a lethal injection in the case of a police murderer in Arkansas whose sanity had been brought into question convincingly, and who has since the commission of the crime undergone an extensive lobotomy and was claimed to have been incompetent to undergo execution. In the middle of the presidential campaign, not wishing to present himself to the *populus* as 'soft' on crime, Clinton returned to Arkansas for the execution, although he was in no way required to do so and in fact it was not usual for presidential candidates to interrupt their campaigns in order to attend an execution.

¹⁸ This is certainly the case with the United States of America. The debate about capital punishment, for example, has recently resurfaced in Western Australia, governed by a conservative government.

not deter prospective offenders, nor does it restore trust. After the offender is sentenced to years in prison, this does absolutely nothing for the restoration of the victim's (and/or the community's) trust in him/her. The debate is usually about whether a punishment is sufficient to be 'fair' (that is, to harm the offender in accordance with how much he has hurt the victim/community), or to enable him to offend again. This latter concern is usually expressed not through the debate about whether the offender has been successfully 'rehabilitated' in prison so as not to wish to repeat (this illusion was abandoned in the 1970s), but rather whether and why he/she *ever* ought to be released back into the community. After the offender is punished, 'we' still do not trust him/her. We do not want him/her around. We are aware that punishment does nothing for him, while it perhaps does something for 'us' in terms of satisfying 'our' vengeful feelings. After the punishment is executed, the conflict created by the offence is not resolved – it is deepened. The crisis of trust is not alleviated – it is aggravated. Both the offender and the victim have reason to hate and fear more than they did before punishment.

This is similar to any other instance of betrayal of trust. When one walks the street or sits at home and watches television, one trusts (at least sufficiently to embark on the walk or to remain at home) that one will not be victimized by a mugger, rapist or armed robber. When one becomes so victimized, one is aggrieved, because one's trust is betrayed and one is placed in a situation contrary to the assumption of trust. Similarly, when marital faith is betrayed by an adulterous spouse, trust is often destroyed beyond repair. In our societies, adultery is not a criminal offence and as such is not punishable, but even if it was, punishing the adulterous spouse would do nothing to restore the marriage. The principle is that penalisation is not trust-enhancing. It is positively trust-degrading, and therefore socially harmful.

Secondly, punishment does not appear to have any significant deterrent effect. There is no positive correlation whatsoever between the severity of punishments in a social system and the crime rate in that same system. If anything, there is a striking negative correlation: in societies where penalties are more severe, crime rates rise most rapidly. Amongst modern democracies, the United States of America is certainly one of the states with most severe penalties; yet crime rates in America rise faster than in any other similar country.

Modern combined deterrence-desert theories have a favourite argument concerning the apparent ineffectiveness of punishment as a deterrent: they say that, yes, it is true that crime rates are rising, but that, were there no

punishments, they would have risen faster still.¹⁹ From the methodological point of view, this is a totally unacceptable argument. It purports to support an empirical claim (i.e. that punishment deters crime) by an allegedly *a priori* claim (i.e. that punishment deters crime), despite the empirical evidence to the contrary (i.e. that it does not). While little needs to be said about the logical status of this rationalization, criminologists with a strong democratic taste are cautious to dismiss punishment altogether, because of the 'chicken and the egg' appearance of the problem: perhaps the prior element in the correlation between the rise in the severity of punishments and the rise in crime rates is not punishments, but crimes. Perhaps it is not true that, in order to combat a stagnant level of crime +, punishments are increased due to democratic political pressures, which then counter-productively leads to a further and corresponding rise of crime rates to ++. Perhaps crime rises independently of punishments from + to ++, and the rise in punishments follows the rise in crime, rather than *vice versa*. In this case, punishment does not necessarily make the situation with crime rates worse. Perhaps punishment does not affect crime. And perhaps, to a low degree, so low that it is practically unnoticeable, it does affect it positively, in which case it might be wise to refrain from recommending the abolition of punishment.

I find that these lines contain two major flaws: one is strictly moral, and the other one is more sociological. First, it is not wise at all to refrain from advocating the abolition of punishment just because it perhaps has no negative effect on crime rates. Punishment is a deliberate infliction of suffering, and as such it is inherently something negative. If it has no significant positive effect, and it clearly does not, it ought to be abolished. Secondly, the entire problem is not the 'chicken and the egg' type of problem at all, when viewed from the point of view of trust. Quite beside the dilemma of what is the prior and what is the posterior element in the correlation between a rise in the severity of punishments and a rise in crime rates, punishment is clearly for the most part a trust-degrading practice. In the context of trust, it is undesirable, and ought to be eliminated altogether.

Now, what could be done about crime? First of all, not much. After all, there is only a limited amount that can be done about any damage to trust. Where the breach is less significant, more could presumably be restored; in cases of the gravest crimes, such as murder, robbery or rape, it depends on the character of the offender, the circumstances of the offence, the mentality of the community, and, not the least, on how forgiving the victim of crime is. If the offender shows a genuine will to compensate the victim

¹⁹ Von Hirsch, *Past or Future...*, *op. cit.*

as much as possible, and provides convincing reassurances that he will not be a repeat, punishment almost obviously makes very little point. If a murder or a rape, for example, were committed under circumstances which are unlikely to reoccur, the restoration of trust in the community is more likely. If the community is a forgiving and understanding Norwegian village, for example, however politically incorrect this statement might appear, prospects for reconciliation are greater than if it is a backward Sicilienne village, with centuries of history of vendetta. If the victim of crime is a forgiving priest, obviously prospects for an optimal resolution of the conflict are greater than if the victim is an unemployed, angry middle aged housewife, highly susceptible to the passions of vengeance.

Clearly there must exist a certain amount of coercion in any society, and it must be available from institutions of crime-handling, to keep the offender and the victim of crime within mutual reach, and if trust cannot be restored and the offender is dangerous, to detain him/her, and remove him/her from the community. However, I believe that this coercion must under no circumstances be punitive. It must not represent a deliberate infliction of pain for the sake of justice. It ought not to operate in terms of desert terminology. Democracy has a certain inherent animosity towards the imposition of substantive constraints of moral rationality on the popular will. Democratic institutions for crime-handling therefore ought to concentrate on the functional definition of crime in terms of trust and on the possibilities of restoring trust. It is in this direction, and not in the direction of punishment, fairness and 'just deserts' that crime-handling policies ought to be developed.

Not much more can be said in this article without taking the reader's time unjustifiably.²⁰ As a conclusion, then, I shall point out two important things about the trust-based direction for the theory of crime-handling.

First, trust-enhancing policies of crime-handling are functionalist (they assume that all social activity is based on trust and therefore that trust is a necessary ingredient of it all). They do not require the superimposition of moral over strategic rationality. This sort of crime-handling is therefore consistent with the global dialectics of democratic power-seeking and power-granting.

Secondly, the assumption that, in the course of time, trust-enhancing policies would work despite spontaneous vengeance and cry for justice is not based on the assumption of goodness of human nature. I think, in light of the evidence of both the history of crime and of criminal justice, that the

²⁰ The case for a trust-based interpretation of crime and criminal justice has recently been made by Wesley Cragg, *The Practice of Punishment* (New York: Routledge, 1992). I think that this interpretation can be developed substantially further and in a more radical way than Cragg does it, but his development of the point illustrates the general thesis of this section.

assumption of this sort of inherent human benevolence would inevitably prove to be a grave mistake. I rather tend to assume that, once policies are changed so as to enhance trust, it would be difficult, obstructive and in the long term self-defeating for any individual or community, to persist in trust-degrading vengeance in the face of positive promises offered by the availability of greater quantities of trust in other communities and for other individuals. This is very much in the spirit of Adam Smith:

It is not from the benevolence of the butcher, the brewer, and the baker that we expect our dinner, but from their regard to their own interest. We address ourselves not to their humanity, but to their self love and never talk to them of our own necessities but of their advantages. Nobody but a beggar chooses to depend chiefly on the benevolence of his fellow citizens.²¹

This principle could be formulated as follows: the more trusting the individual and the community are, the more trust they will receive, and consequently a greater cumulative amount of trust-impregnated opportunity for social advancement will be available to them at any given time. The driving force of progressivist and optimising competitiveness, the flair of which is so clearly distinguishable in the strategic rationality of democratic social systems, ought to ideally and in the course of time, make for a successful result of transition from justice-based to trust-based policies of crime-handling, despite all of the 'unfairness', 'injustice' and other difficulties which would inevitably occur in the process of transition itself.

To sum up, I think that democracy is a formidable obstacle to the realisation of moral rationality, because of its procedural legitimation and the fact that its constituents are simply predominantly immoral and interest-driven. Most ideas of morality throughout history have had the form of restrictions and deliberately imposed hindrances to the pursuit of interest. This is not because theorists needed to depart from the beautiful reality in order to create sensible theories, but rather unfortunately because the reality is so grim that departures from its facts, as the only hope to either change it or make it more bearable, were necessary. Crime is not a product of any particular form of social organisation. Crime is the expression of human nature, wanting to take the most and to further its interest the furthest. Crime-control is the expression of society, needing to suppress human nature. Hence, without going into wide discussions too much, it is reasonable to conclude that crime is inevitable as long as there are people in society. So is the need to curb crime. The dialectic of these two inevitabilities is the space for political manipulation, and this manipulation is particularly easy in a political setting where the predominant form of accounting for choices and decisions is procedural

²¹ Adam Smith, *The Wealth of Nations* (New York: E.P. Dutton [1776], 1910). p.1:13.

legitimation, rather than substantive moral justification. Democracy is such a political setting, and therefore the strictly moral policies are more of an accident in democracies than they are their product. For this reason, I have argued that the retributive theory is implausible in the context of democracy. Instead I have proposed an alternative theory, based on an external moral principle (elimination of deliberate infliction of pain), but which would be translated into reality not by referring to that moral principle in its own right, but rather by observing the functional necessities of social life – in particular the indispensability of accumulation of large quantities of trust. By setting up arrangements for crime-handling which would utilise the role of trust in society, a democratic society could reach a convergence of its legitimation with moral justification based on an independent moral standard.

The theory hinted upon here is very much along the lines of functionalist social theory, in particular as espoused by Niklas Luhmann. It is important to point out that the best result from the moral point of view which this form of social organisation of crime-handling could achieve can never go beyond pure coincidence of convergence between the internal principles of democracy and moral rationality. This convergence cannot be overcome in the sense of becoming a necessary outcome of democratic society, a morally rational corollary of democratic political rationality. The two are irremediably separated, and the best one can hope is that they may face each other through a glass wall. The face of democracy can only resemble the face of moral rationality if it is manipulated by controlling its internal needs resulting from the egotistic urge of strategy and interest; in its appearance, the moral profile of democracy can come very close to a profile that is genuinely moral; – yet it can never become a genuinely moral profile.

The theory proposed, as I mentioned above, implies that in the process of transformation of a democratic social system from one based on the unavoidably political idea of 'criminal justice' to one based on trust and elimination of deliberate infliction of pain, great injustices would occur. These indeed would not be just a side-product of a social change that is in the overall perspective positive, but could prove tectonic. One might say that this is a price to be paid for a morally better democratic system of crime-handling. I am not so sure that 'price' would be the right word. I am rather inclined to say that 'justice' has been so much discredited by political manipulation that it does not really matter whether there is an explosion of injustice or not, as long as the alternative criterion of elimination of deliberate infliction of pain is preserved. Justice or injustice, there should be no manipulation of pain, threat and 'punishment', as these are the formidable aspects of the presence of the state in most

contemporary law and order societies. These statements sound naive, I admit, but they are so only if the assumption of the necessity of punishment is taken for granted. The theory of trust briefly outlined here entails that there is no necessity of punishment – in fact, that punishment makes things worse. Assuming that the principle of trust is plausible, and that observing it can produce results, the abolition of punishment as such appears to me to be an admirable result whichever way one looks at it.²²

Aleksandar Fatić
 Philosophy Faculty
 Australian National University
 Canberra ACT 0200
 Australia

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