Adams, 5th ed.

The Utilitarian Theory of Criminal Punishment

RICHARD B. BRANDT

What is meant by an "examination of the ethical foundations of the institution and principles of Criminal justice"? The job of such an examination is *not* to provide a moral blessing for the status quo, for the system of criminal justice as it actually is in the U.S..... Rather, it is to identify the more important valid ethical principles that are relevant to the institution of criminal justice and to furnish a model of their use in criticism or justification of important features of this institution.

The broad questions to be kept in the forefront of discussion are the following: (1) What justifies anyone in inflicting pain or loss on an individual on account of his past acts? (2) Is there a valid general principle about the punishments proper for various acts? (Possibly there should be no close connection between offense and penalty; perhaps punishment should be suited to the individual needs of the criminal, and not to his crime.) (3) What kinds of defense should excuse from punishment? An answer to these questions would comprise prescriptions for the broad outlines of an ideal system of criminal justice.

In our [earlier] discussion of "distributive justice," we decided that "to act unjustly" means the same as "to treat unequally, in some matter that involves the distribution of things that are good or bad, except as the inequality is required by moral considerations (principles) with substantial weight in the circumstances." If this definition of "act unjustly" is correct, then there are two distinct ways in which there can be injustice in the treatment of criminals. First, criminals are *punished* whereas noncriminals are not. Punishment, however, is *unequal* treatment, in a matter that involves distribution of things good or bad. Therefore, if punishment is to be just, it must be shown that the unequal treatment is required by moral principles of weight. Thus, one thing that must be done in order to show that the practice of punishing criminals is not unjust, is to show that there are moral principles that require it. But second, the *procedures of applying* the principles directing unequal treatment for criminals may themselves operate unequally. One man gets a "fair" trial and another does not. There can be inequality in the chances given people to escape the application of legal sanctions in their case. Part of treating people "justly," then, is providing legal devices so that everyone has an equal hearing: scrupulous adherence to the rules of evidence, opportunity for appeal to higher courts for remedy of deviation from standard rules in the lower courts, and so on. We shall not here consider details about how legal institutions should be devised in order to secure equal application of the law; that is a specialized inquiry that departs too far from the main problems of ethical principle. It is a part of "justice," however. Indeed, we may view "criminal justice," as having two main aspects: just laws for the punishment of offenders and procedures insuring just application of these laws by the courts and other judicial machinery.

The existence of just laws directing certain punishments for certain offenses, then, is not the whole of justice for the criminal, but we shall concentrate on identifying such laws....

The Utilitarian Theory

Historically there has been a cleavage of opinion about the kind of general ethical principles required for coherence with our concrete justified beliefs about criminal justice. Many writers have thought that a utilitarian principle is adequate. Others have thought that some nonutilitarian principle, or more than one, is necessary. Most of the latter writers (formalists) have espoused some form of *retributive* principle—that is, a principle roughly to the effect that a wrongdoer should be punished approximately in correspondence with either the moral reprehensibility of his offense or with the magnitude of his breach or of the public harm he commits.

It is convenient to begin with the utilitarian theory.... The essence of the rule-utilitarian theory, we

From Richard B. Brandt, *Ethical Theory* (Eaglewood Cliffs, NJ: Prentice-Hall, 1959), pp. 480–481, 489–496, 498–499, 500–501.

recall, is that our actions, whether legislative or otherwise, should be guided by a set of prescriptions, the conscientious following of which by all would have maximum net expectable utility. As a result, the utilitarian is not, just as such, committed to any particular view about how anti-social behavior should be treated by society—or even to the view that society should do anything at all about immoral conduct. It is only the utilitarian principle *combined* with statements about the kind of laws and practices which will maximize expectable utility that has such consequences. Therefore, utilitarians are free to differ from one another about the character of an ideal system of criminal justice; some utilitarians think that the system prevalent in Great Britain and the U.S. essentially corresponds to the ideal, but others think that the only system that can be justified is markedly different from the actual systems in these Western countries. We shall concentrate our discussion, however, on the more traditional line of utilitarian thought which holds that roughly the actual system of criminal law, say in the U.S., is morally justifiable, and we shall follow roughly the classic exposition of the reasoning given by Jeremy Benthany[1]—but modifying this freely when we feel amendment is called for. At the end of the chapter we shall look briefly at a different view.

Traditional utilitarian thinking about criminal justice has found the rationale of the practice, in the U.S., for example, in three main facts. (Those who disagree think the first two of these "facts" happen not to be the case.) (1) People who are tempted to misbehave, to trample on the rights of others, to sacrifice public welfare for personal gain, can usually be deterred from misconduct by fear of punishment, such as death, imprisonment, or fine. (2) Imprisonment or fine will teach malefactors a lesson; their characters may be improved, and at any rate a personal experience of punishment will make them less likely to misbehave again. (3) Imprisonment will certainly have the result of physically preventing past malefactors from misbehaving, during the period of their incarceration.

In view of these suppositions, traditional utilitarian thinking has concluded that having laws forbidding certain kinds of behavior on pain of punishment, and having machinery for the fair enforcement of these laws, is justified by the fact that it maximizes expectable utility. Misconduct is not to be punished just for its own sake; malefactors must be punished for their past acts, according to law, as a way of maximizing expectable utility.

The utilitarian principle, of course, has implications for decisions about the severity of punishment to be administered. Punishment is itself an evil, and hence should be avoided where this is consistent with the public good. Punishment should have precisely such a degree of severity (not more or less) that the probable disutility of greater severity just balances the probable gain in utility (less crime because of the more serious threat). The cost, in other words, should be counted along with the value of what is bought; and we should buy protection up to the point where the cost is greater than the protection is worth. How severe will such punishment be? Jeremy Bentham had many sensible things to say about this. Punishment, he said, must be severe enough so that it is to no one's advantage to commit an offense even if he receives the punishment; a fine of $10 for bank robbery would give no security at all. Further, since many criminals will be undetected, we must make the penalty heavy enough in comparison with the prospective gain from crime, that a prospective criminal will consider the risk hardly worth it, even considering that it is not certain he will be punished at all. Again, the more serious offenses should carry the heavier penalties, not only because the greater disutility justifies the use of heavier penalties in order to prevent them, but also because criminals should be motivated to commit a less serious rather than a more serious offense. Bentham thought the prescribed penalties should allow for some variation at the discretion of the judge, so that the actual suffering caused should roughly be the same in all cases; thus, a heavier fine will be imposed on a rich man than on a poor man.

Bentham also argued that the goal of maximum utility requires that certain facts should *excuse* from culpability, for the reason that punishment in such cases "must be inefficacious." He listed as such (1) the fact that the relevant law was passed only after the act of the accused, (2) that the law had not been made public, (3) that the criminal was an infant, insane, or was intoxicated, (4) that the crime was done under physical compulsion, (5) that the agent was ignorant of the probable consequences of his act or was acting on the basis of an innocent misapprehension of the facts, such that the act the agent thought he was performing was a lawful one, and (6) that the motivation to commit the offense was so strong that no threat of law could prevent the crime. Bentham also thought that punishment should be

remitted if the crime was a collective one and the number of the guilty so large that great suffering would be caused by its imposition, or if the offender held an important post and his services were important for the public, or if the public or foreign powers would be offended by the punishment; but we shall ignore this part of his view.

Bentham's account of the logic of legal "defenses" needs amendment. What he should have argued is that *not* punishing in certain types of cases (cases where such defenses as those just indicated can be offered) reduces the amount of suffering imposed by law and the insecurity of everybody, and that failure to impose punishment in these types of cases will cause only a negligible increase in the incidence of crime.

How satisfactory is this theory of criminal justice? Does it have any implications that are far from being acceptable when compared with concrete justified convictions about what practices are morally right?[2]

Many criminologists would argue that Bentham was mistaken in his facts: the deterrence value of threat of punishment, they say, is much less than he imagined, and criminals are seldom reformed by spending time in prison. If these contentions are correct, then the ideal rules for society's treatment of malefactors are very different from what Bentham thought, and from what actual practice is today in the U.S. To say all this, however, is not to show that the utilitarian *principle* is incorrect.... Utilitarian theory might still be correct, but its implications would be different from what Bentham thought....

The whole utilitarian approach, however, has been criticized on the grounds that it ought not in consistency to approve of *any* excuses from criminal liability.[3] Or at least, it should do so only after careful empirical inquiries. It is not obvious, it is argued, that we increase net expectable utility by permitting such defenses. At the least, the utilitarian is committed to defend the concept of "strict liability." Why? Because we could get a more strongly deterrent effect if everyone knew that *all behavior* of a certain sort would be punished, irrespective of mistaken supposals of fact, compulsion, and so on. The critics admit that knowledge that all behavior of a certain sort will be punished will hardly deter from crime the insane, persons acting under compulsion, persons acting under erroneous beliefs about facts, and others, but, as Professor Hart points out, it does not follow from this that general knowledge that certain acts will always be punished will not be salutary.

The utilitarian, however, has a solid defense against charges of this sort. We must bear in mind (as the critics do not) that the utilitarian principle, *taken by itself, implies nothing whatever* about whether a system of law should excuse persons on the basis of certain defenses. What the utilitarian does say is that, when we *combine* the principle of utilitarianism with *true* propositions about a certain thing or situation, then we shall come out with true statements about obligations.... In fact the utilitarian can properly claim that we do have excellent reason for believing that the general public would be no better motivated to avoid criminal offenses than it now is, if the insane and others were also punished along with intentional wrongdoers. Indeed, he may reasonably claim that the example of punishment of these individuals could only have a hardening effect—like public executions. Furthermore, the utilitarian can point out that abolition of the standard exculpating excuses would lead to serious insecurity. Imagine the pleasure of driving an automobile if one knew one could be executed for running down a child whom it was absolutely impossible to avoid striking! One certainly does not maximize expectable utility by eliminating the traditional excuses. In general, then, the utilitarian theory is not threatened by its implications about exculpating excuses.

It might also be objected against utilitarianism that it cannot recognize the validity of *mitigating* excuses. Would not consequences be better if the distinction between premeditated and impulsive acts were abolished? The utilitarian can reply that people who commit impulsive crimes, in the heat of anger, do not give thought to legal penalties; they would not be deterred by a stricter law. Moreover, such a person is unlikely to repeat his crime, so that a mild sentence saves an essentially good man for society.[4]

Sometimes it is objected to utilitarianism that it must view imprisonment for crime as morally no different from quarantine. This, it is said, shows that the utilitarian theory must be mistaken, since actually there is a vast moral difference between being quarantined and being imprisoned for crime. *Why* is it supposed utilitarian theory must view imprisonment as a kind of quarantine? The answer is that utilitarianism looks to the future; the treatment it prescribes for individuals is treatment with an eye to maximizing net expectable utility. The leper is quarantined because otherwise he will expose others to disease. The criminal is imprisoned because otherwise he, or others who are not deterred by the threat of punishment, will

expose the public to crime. Both the convicted criminal and the leper are making contributions to the public good. So, quarantine and imprisonment are essentially personal sacrifices for the public welfare, if we think of punishment as the utilitarian does. But in fact, the argument goes on, we feel there is a vast difference. The public is obligated to do what is possible to make the leper comfortable, to make his necessary sacrifice as easy for him and his family as possible. But we feel no obligation to make imprisonment as comfortable as possible.

Again the utilitarian has a reply. He can say that people cannot help contracting leprosy, but they can avoid committing crimes—and the very discomforts and harshness of prison life are deterring factors. If prison life were made attractive, there might be more criminals—not to mention the indolent who would commit a crime in order to enjoy the benefits of public support. Furthermore, the utilitarian can say, why should we feel that we "ought to make it up to" a quarantined leper? At least partly because it is useful to encourage willingness to make such sacrifices. But we do not at all wish to encourage the criminal to make his "sacrifice"; rather, we wish him not to commit his crimes. There is all the difference between the kind of treatment justified on utilitarian grounds for a person who may have to make a sacrifice for the public welfare through no fault of his own, and for a person who is required to make a sacrifice because he has selfishly and deliberately trampled on the rights of others, in clear view of the fact that if he is apprehended society must make an example of him. There are all sorts of utilitarian reasons for being kindly to persons of the former type, and stern with people of the latter type.

Another popular objection to the utilitarian theory is that the utilitarian must approve of prosecutors or judges occasionally withholding evidence known to them, for the sake of convicting an innocent man, if the public welfare really is served by so doing. Critics of the theory would not deny that there *can* be circumstances where the dangers are so severe that such action is called for; they only say that utilitarianism calls for it all too frequently. Is this criticism justified? Clearly, the utilitarian is not committed to advocating that a provision should be written into the *law* so as to permit punishment of persons for crimes they did not commit if to do so would serve the public good. Any such provision would be a shattering blow to public confidence and security. The question is only whether there should be an informal moral rule to the same effect, for the guidance of judges and prosecutors. Will the rule-utilitarian necessarily be committed to far too sweeping a moral rule on this point? We must recall that he is not in the position of the act-utilitarian, who must say that an innocent man must be punished if in *his particular case* the public welfare would be served by his punishment. The rule-utilitarian rather asserts only that an innocent man should be punished if he falls within a class of cases such that net expectable utility is maximized if *all* members of the class are punished, taking into account the possible disastrous effects on public confidence if it is generally known that judges and prosecutors are guided by such a rule.... When we take these considerations into account, it is *not* obvious that the rule-utilitarian is committed to action that we are justifiably convinced is immoral.[5]...

Everything considered, the utilitarian theory seems to be in much less dire distress, in respect of its implications for criminal justice, than has sometimes been supposed. It does not seem possible to show that in any important way its implications are clearly in conflict with our valid convictions about what is right. The worst that can be said is that utilitarian theory does not in a clear-cut way definitely require us to espouse some practices we are inclined to espouse. But to this the utilitarian may make two replies. First, that there is reason to think our ordinary convictions about punishment for crime ought to be thoroughly re-examined in important respects. Second, the utilitarian may reply that if we consider our convictions about the punishments we should administer *as a parent*—and this is the point where our moral opinions are least likely to be affected by the sheer weight of tradition—we shall find that we think according to the principles of rule-utilitarianism. Parents do regard their punishment of their children as justified only in view of the future good of the child, and in order to make life in the home tolerable and in order to distribute jobs and sacrifices equally.

The Retributive Theory of Criminal Justice

... [The] "retributive theory"... asserts that it is a basic principle of ethics roughly that pain or loss should be caused to persons who have done wrong, with a severity corresponding with the moral gravity of their deed—and of course the "gravity" of the deed not being defined to accord exactly with the utilitarian

theory about how severely wrongdoers should be made to suffer. In saying that such a principle is a "basic" principle of ethics, proponents of the retributive theory deny the possibility of deriving this principle from any principle directing to do good, that is, from any kind of utilitarian principle....

The traditional retributive principle is perhaps best stated today in a way suggested by Ross's formalist system, somewhat as follows: "It is prima facie obligatory for society to cause pain or loss to every person who commits a morally objectionable act to an extent corresponding with the moral gravity of his offense." We can assume that other considerations, such as the obligation to avoid general insecurity, will require that punishment be imposed only for infractions of properly publicized laws, by specially authorized persons, and after a trial according to procedures selected in order to guarantee a fair application of the law.

Should we accept the retributive principle as a basic "axiom" about moral obligation (or else the assertion that it is intrinsically better for offenders to be punished than to go unpunished)? Various considerations suggest that we should answer this question *negatively:*

1. Our ethical theory is *simpler* without this principle, and therefore it should be rejected unless it enables us to deduce, as theorems (when we combine it with true factual premises), ethical principles which are valid, and which cannot be deduced without it. But since our discussion of the rule-utilitarian theory of punishment has not disclosed any major objection to that theory, there is no reason to complicate our theory by adding a retributive principle.

2. The retributive principle asserts in effect that a principle aim of the law is to punish moral guilt. But if so, then it ought to punish merely *attempted* crimes as severely as successful crimes, and since an attempt is a case of setting oneself to commit a crime, it is as much a deliberate deviation from subjective obligation as the successful commission of a crime. Assuming that this implication is incorrect, clearly the retributive principle alone will not do as a principle guiding legislative practice.

3. According to retributivism, laws should be so framed that no one will be punished, no matter what he does, if he is morally blameless. This is objectionable. It is of great importance that the law be able to set up standards of conduct, and require all to conform, whether or not they are convinced of the desirability of the standards. The law must be in a position to demand certain conduct from individuals, say in the Defense Department, whose conscientious deliberations might lead them to betray secrets essential to the national defense. Again, the law must be in a position to ban some practice like polygamy, irrespective of the value judgments of any persons. Therefore, we must again say that the retributive principle cannot be the only principle guiding the framing of law and judicial practice.

Endnotes

[1]In *Principles of Morals and Legislation.*

[2]Act-utilitarians face some special problems. For instance, if I am an act-utilitarian and serve on a jury, I shall work to get a verdict that will do the most good, irrespective of the charges of the judge, and of any oath I may have taken to give a reasonable answer to certain questions on the basis of the evidence presented—unless I think my doing so will have indirect effects on the institution of the jury, public confidence in it, and so on. This is certainly not what we think a juror should do. Of course, neither a juror nor a judge can escape his prima facie obligation to do what good he can; this obligation is present in some form in every theory. The act-utilitarian, however, makes this the whole of one's responsibility.

[3]See H. L. A. Hart, "Legal Responsibility and Excuses," in Sidney Hook (ed.), *Determinism and Freedom* (New York: New York University Press, 1958), pp. 81–104; and David Braybrooke, "Professor Stevenson, Voltaire, and the Case of Admiral Byng," *Journal of Philosophy*, LIII (1956), 787–96.

[4]The utilitarian must admit that the same thing is true for many deliberate murders and probably he should also admit that some people who commit a crime in the heat of anger would have found time to think had they known that a grave penalty awaited them.

[5]In any case, a tenable theory of punishment must approve of punishing persons who are *morally* blameless. Suppose someone commits treason for moral reasons. We may have to say that his deed is not reprehensible at all, and might even (considering the risk he took for his principles) be morally admirable. Yet we think such persons must be punished no matter what their motives; people cannot be permitted to take the law into their own hands.