Adams, 4th ed

As for nontraditional, "creative" punishments, a recent Op-Ed piece in the New York Times offered a number of provocative examples of "shaming" penalties imposed as conditions of probation. A California judge required a burglar to wear a T-shirt proclaiming "I am a felon on probation for theft"; an Illinois farmer convicted of assault had to erect a sign warning "A Violent Felon Lives Here"; Arkansas and Wisconsin judges have had shoplifters stand in front of stores with signs admitting their crimes; a Florida woman was ordered to take out an advertisement in her local paper confessing that she had bought drugs in front of her children; and a Long Island drunk driver was made to display a license plate branding him a convicted felon. And let us not forget the revival of the chain gang in recent years in Florida, Alabama, and Lewis County, Washington—nor the California statute conditioning parole for repeat child molesters on "chemical castration."

To sum it up: Criminal punishment is an institution that is large, growing, and quite possibly mutating into new and surprising forms. . . .

Endnotes

[1] Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* 6 (1981).

[2] *Williams v. New York*, 337 U.S. 241, 248, 249 (1949).

[3] American Friends Service Committee, *Struggle for Justice* 83 (1971).

[4] See Jeffrie G. Murphy, *Introduction to Punishment and Rehabilitation* 10 n.6 (Jeffrie G. Murphy ed., 1973).

[5] Karl Menninger, *The Crime of Punishment* (1968).

[6] H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 158 (1968).

[7] *Id.* at 159.

[8] John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* 4 (1990).

[9] David Dolinko, "Three Mistakes of Retributivism," 39 *UCLA L. Rev.* 1623 (1992).

[10] 521 U.S. 346 (1997).

A *Utilitarian Theory of* Punishment

JEREMY BENTHAM

I. *Cases Unmeet for* Punishment

General View of Cases Unmeet for Punishment

The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, every thing that tends to subtract from that happiness: in other words, to exclude mischief.

But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.

It is plain, therefore, that in the following cases punishment ought not to be inflicted.

1. Where it is *groundless;* where there is no mischief for it to prevent; the act not being mischievous upon the whole.
2. Where it must be *inefficacious;* where it cannot act so as to prevent the mischief.
3. Where it is *unprofitable,* or too *expensive;* where the mischief it would produce would be greater than what it prevented.
4. Where it is *needless;* where the mischief may be prevented, or cease of itself, without it; that is, at a cheaper rate.

Cases in Which Punishment Is Groundless

These are,

(1) Where there has never been any mischief: where no mischief has been produced to any body by

From Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (London: W. Pickering, 1823), Chapter 1.

the act in question. Of this number are those in which the act was such as might, on some occasions, be mischievous or disagreeable, but the person whose interest it concerns gave his *consent* to the performance of it. This consent, provided it be free, and fairly obtained, is the best proof that can be produced, that, to the person who gives it, no mischief, at least no immediate mischief, upon the whole, is done. For no man can be so good a judge as the man himself, what it is gives him pleasure or displeasure.

(2) Where the mischief was *outweighed:* although a mischief was produced by that act, yet the same act was necessary to the production of a benefit which was of greater value than the mischief. This may be the case with any thing that is done in the way of precaution against instant calamity, as also with any thing that is done in the exercise of the several sorts of powers necessary to be established in every community, to wit, domestic, judicial, military, and supreme.

(3) Where there is a certainty of an adequate compensation; and that in all cases where the offense can be committed. This supposes two things: 1. That the offense is such as admits of an adequate compensation; 2. That such a compensation is sure to be forthcoming. Of these suppositions, the latter will be found to be a merely ideal one: a supposition that cannot, in the universality here given to it, be verified by fact. It cannot, therefore, in practice, be numbered amongst the grounds of absolute impunity. It may, however, be admitted as a ground for an abatement of that punishment, which other considerations, standing by themselves, would seem to dictate.

Cases in Which Punishment Must be Inefficacious

These are,

(1) Where the penal provision is *not established* until after the act is done. Such are the cases, 1. Of an *ex-post-facto* law; where the legislator himself appoints not a punishment till after the act is done; 2. Of a sentence beyond the law; where the judge, of his own authority, appoints a punishment which the legislator had not appointed.

(2) Where the penal provision, though established, in *not conveyed* to the notice of the person on whom it seems intended that it should operate. Such is the case where the law has omitted to employ any of the expedients which are necessary, to make sure that every person whatsoever, who is within the reach of the law, be apprized of all the cases whatsoever, in which (being in the station of life he is in) he can be subjected to the penalties of the law.

(3) Where the penal provision, though it were conveyed to a man's notice, *could produce no effect* on him, with respect to the preventing him from engaging in any act of the *sort* in question. Such is the case, 1. In extreme *infancy;* where a man has not yet attained that state or disposition of mind in which the prospect of evils so distant as those which are held forth by the law, has the effect of influencing his conduct; 2. In *insanity;* where the person, if he has attained to that disposition, has since been deprived of it through the influence of some permanent though unseen cause; 3. In *intoxication;* where he has been deprived of it by the transient influence of a visible cause; such as the use of wine, or opium, or other drugs, that act in this manner on the nervous system; which condition is indeed neither more nor less than a temporary insanity produced by an assignable cause.

(4) Where the penal provision (although, being conveyed to the party's notice, it might very well prevent his engaging in acts of the sort in question, provided he knew that it related to those acts) could not have this effect, with regard to the *individual* act he is about to engage in: to wit, because he knows not that it is of the number of those to which the penal provision relates. This may happen 1. In the case of *unintentionality;* where he intends not to engage, and thereby knows not that he is about to engage, in the *act* in which eventually he is about to engage; 2. In the case of *unconsciousness;* where, although he may know that he is about to engage in the *act* itself, yet, from not knowing all the material *circumstances* attending it, he knows not of the *tendency* it has to produce that mischief, in contemplation of which it has been made penal in most instances; 3. In the case of *mis-supposal;* where, although he may know of the tendency the act has to produce that degree of mischief, he supposes it, though mistakenly, to be attended with some circumstances, or set of circumstances, which, if it had been attended with, it would either not have been productive of that mischief, or have been productive of such a greater degree of good, as he determined the legislator in such a case not to make it penal.

(5) Where, though the penal clause might exercise a full and prevailing influence, were it to act alone, yet by the *predominant* influence of some opposite cause upon the will, it must necessarily be ineffectual; because the

evil which he sees himself about to undergo, in the case of his *not* engaging in the act, is so great, that the evil denounced by the penal clause, in case of his engaging in it, cannot appear greater. This may happen, 1. In the case of *physical danger;* where the evil is such as appears likely to be brought about by the unassisted powers of *nature;* 2. In the case of a *threatened mischief;* where it is such as appears likely to be brought about through the intentional and conscious agency of *man.*

(6) Where (though the penal clause may exert a full and prevailing influence over the *will* of the party) yet his *physical faculties* (owing to the predominant influence of some physical clause) are not in a condition to follow the determination of the will insomuch that the act is absolutely *involuntary.* Such is the case of physical *compulsion* or *restraint,* by whatever means brought about; where the man's hand, for instance, is pushed against some object which his will disposes him *not* to touch; or tied down from touching some object which his will disposes him to touch.

Cases Where Punishment is Unprofitable

These are,

(1) Where, on the one hand, the nature of the offense, on the other hand, that of the punishment, are, *in the ordinary state of things,* such, that when compared together, the evil of the latter will turn out to be greater than that of the former.

Now the evil of the punishment divides itself into four branches, by which so many different sets of persons are affected. 1. The evil of *coercion* or *restraint;* or the pain which it gives a man not to be able to do the act, whatever it be, which by the apprehension of the punishment he is deterred from doing. This is felt by those by whom the law is *observed;* 2. The evil of *apprehension;* or the pain which a man, who has exposed himself to punishment, feels at the thoughts of undergoing it. This is felt by those by whom the law has been *broken,* and who feel themselves in *danger* of its being executed upon them; 3. The evil of *sufferance;* or the pain which a man feels, in virtue of the punishment itself, from the time when he begins to undergo it. This is felt by those by whom the law is broken, and upon whom it comes actually to be executed; 4. The pain of sympathy, and the other *derivative* evils resulting to the persons who are in *connection* with the several classes of original sufferers just mentioned. Now of these four lots of evil, the first will be greater or less, according to the nature of the punishment which stands annexed to that offense.

On the other hand, as to the evil of the offense, this will also, of course, be greater or less, according to the nature of each offense. The proportion between the one evil and the other will therefore be different in the case of each particular offense. The cases, therefore, where punishment in unprofitable on this ground, can by no other means be discovered, than by an examination of each particular offense; which is what will be the business of the body of the work.

(2) Where, although in the *ordinary state* of things, the evil resulting from the punishment is not greater than the benefit which is likely to result from the force with which it operates, during the same space of time, towards the excluding the evil of the offense, yet it may have been rendered so by the influence of some *occasional circumstances.* In the number of these circumstances may be, 1. The multitude of delinquents at a particular juncture; being such as would increase, beyond the ordinary measure, the *quantum* of the second and third lots, and thereby also of a part of the fourth lot, in the evil of the punishment; 2. The extraordinary value of the services of some one delinquent; in the case where the effect of the punishment would be to deprive the community of the benefit of those services; 3. The displeasure of the *people;* that is, of an indefinite number of the members of the *same* community, in cases where (owing to the influence of some occasional incident) they happen to conceive, that the offense or the offender ought not to be punished at all, or at least ought not to be punished in the way in question; 4. The displeasure of *foreign powers;* that is, of the governing body, or a considerable number of the members of some *foreign* community or communities, with which the community in question, is connected.

Cases Where Punishment is Needless

These are,

(1) Where the purpose of putting an end to the practice may be attained as effectually at a cheaper rate; by instruction, for instance, as well as by terror; by informing the understanding, as well as by exercising an immediate influence on the will. This seems to be the case with respect to all those offenses which consist in the disseminating pernicious principles in matters of *duty;* of whatever kind the duty be; whether political, or

moral, or religious. And this, whether such principles be disseminated *under*, or even *without*, a sincere persuasion of their being beneficial. I say, even *without;* for though in such a case it is not instruction that can prevent the writer from endeavoring to inculcate his principles, yet it may [prevent] the readers from adopting them; without which, his endeavoring to inculcate them will do no harm. In such a case, the sovereign will commonly have little need to take an active part; if it be the interest of *one* individual to inculcate principles that are pernicious, it will as surely be the interest of *other* individuals to expose them. But if the sovereign must needs take a part in the controversy, the pen is the proper weapon to combat error with, not the sword.

II. *Of the Proportion Between Punishments and Offenses*

We have seen that the general object of all laws is to prevent mischief; that is to say, when it is worth while; but that, where there are no other means of doing this than punishment, there are four cases in which it is *not* worth while.

When it *is* worth while, there are four subordinate designs or objects, which, in the course of his endeavors to compass, as far as may be, that one general object, a legislator, whose views are governed by the principle of utility, comes naturally to propose to himself.

1. His first, most extensive, and most eligible object, is to prevent, in as far as it is possible, and worth while, all sorts of offenses whatsoever; in other words, so to manage, that no offense whatsoever may be committed.
2. But if a man must needs commit an offense of some kind or other, the next object is to induce him to commit an offense *less* mischievous, *rather* than one *more* mischievous; in other words, to choose always the *least* mischievous, of two offenses that will either of them suit his purpose.
3. When a man has resolved upon a particular offense, the next object is to dispose him to do *no more* mischief than is *necessary* to his purpose; in other words, to do as little mischief as is consistent with the benefit he has in view.
4. The last object is, whatever the mischief be, which it is proposed to prevent, to prevent it at as *cheap* a rate as possible.

Subservient to these four objects, or purposes, must be the rules or canons by which the proportion of punishments to offenses is to be governed.

The first object, it has been seen, is to prevent, in as far as it is worth while, all sorts of offenses; therefore,

> *The value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offense.*

If it be, the offense (unless some other considerations, independent of the punishment, should intervene and operate efficaciously in the character of tutelary motives) will be sure to be committed not withstanding; the whole lot of punishment will be thrown away; it will be altogether *inefficacious.*

The above rule has been often objected to, on account of its seeming harshness; but this can only have happened for want of its being properly understood. The strength of the temptation, *caeteris paribus,* is as the profit of the offense; the quantum of the punishment must rise with the profit of the offense; *caeteris paribus,* it must therefore rise with the strength of the temptation. This there is no disputing. True it is, that the stronger the temptation, the less conclusive is the indication which the act of delinquency affords of the depravity of the offender's disposition. So far then as the absence of any aggravation, arising from extraordinary depravity of disposition, may operate, or at the utmost, so far as the presence of a ground of extenuation, resulting from the innocence or beneficence of the offender's disposition, can operate, the strength of the temptation may operate in abatement of the demand for punishment. But it can never operate so far as to indicate the propriety of making the punishment ineffectual, which it is sure to be when brought below the level of the apparent profit of the offense.

The partial benevolence which should prevail for the reduction of it below this level, would counteract as well those purposes which such a motive would actually have in view, as those more extensive purposes which benevolence ought to have in view; it would be cruelty not only to the public, but to the very persons in whose behalf it pleads; in its effects, I mean, however opposite in its intention. Cruelty to the public, that is cruelty to the innocent, by suffering them, for want of an adequate protection, to lie exposed to the mischief of the offense; cruelty even to the offender himself, by punishing him to no purpose, and without the chance of compassing that beneficial end, by which alone the introduction of the evil of punishment is to be justified.

But whether a given offense shall be prevented in a given degree by a given quantity of punishment, is never any thing better than a chance; for the purchasing of which, whatever punishment is employed, is so much expended in advance. However, for the sake of giving it the better chance of outweighing the profit of the offense,

> *The greater the mischief of the offense, the greater is the expense, which it may be worth while to be at, in the way of punishment.*

The next object is, to induce a man to choose always the least mischievous of two offenses; therefore

> *Where two offenses come in competition, the punishment for the greater offense must be sufficient to induce a man to prefer the less.*

When a man has resolved upon a particular offense, the next object is, to induce him to do no more mischief than what is necessary for his purpose; therefore

> *The punishment should be adjusted in such manner to each particular offense, that for every part of the mischief there may be a motive to restrain the offender from giving birth to it.*

The last object is, whatever mischief is guarded against, to guard against it at as cheap a rate as possible; therefore

> *The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given.*

It is further to be observed, that owing to the different manners and degrees in which persons under different circumstances are affected by the same exciting cause, a punishment which is the same in name will not always either really produce, or even so much as appear to others to produce, in two different persons the same degree of pain; therefore,

> *That the quantity actually inflicted on each individual offender may correspond to the quantity intended for similar offenders in general, the several circumstances influencing sensibility ought always to be taken into account.*

Of the above rules of proportion, the four first, we may perceive, serve to mark out the limits on the side of diminution; the limits *below* which a punishment ought not to be *diminished;* the fifth, the limits on the side of increase; the limits *above* which it ought not to be *increased.* The five first are calculated to serve as guides to the legislator; the sixth is calculated, in some measure, indeed, for the same purpose; but principally for guiding the judge in his endeavors to conform, on both sides, to the intentions of the legislator.

. . .

The Argument for Retributivism

MICHAEL MOORE

A *Taxonomy of Purposes of Punishment*

The Prima Facie Justifications of Punishment

. . .

Retributivism, the final theory used to justify punishment, is the view that punishment is justified by the desert of the offender. The good that is achieved by punishing, in this view, has nothing to do with future states of affairs, such as the prevention of crime or the maintenance of social cohesion. Rather, the good that punishment achieves is that someone who deserves it gets it.

Retributivism is quite distinct from a view that urges that punishment is justified because a majority of citizens feel that offenders should be punished. Rather, retributivism is a species of objectivism in ethics that asserts that there is such a thing as desert and that the presence of such a (real) moral quality in

From *Law and Psychiatry: Rethinking the Relationship* (Cambridge: Cambridge University Press, 1984): 233–243. Reprinted with permission of the author.