



### Justice or “Utility”?

**T**he core purposes of government are well expressed in the Preamble to our Constitution: to “establish justice” and to “insure domestic tranquility.”

But there’s a hierarchy of importance here. By seeking justice, you will necessarily promote domestic tranquility. However, if you seek domestic tranquility alone you won’t necessarily promote justice.

How, then, to address crime? Liberals emphasize prevention and rehabilitation. Conservatives, and many free marketers, emphasize deterrence and incapacitation (jail). But all share a *utilitarian* objective: to advance *future* public safety by altering the *future* behavior of the criminal. The problem is that utilitarian objectives can be sought without concern for justice.

For decades, liberals have run our legal system. Renouncing punishment as a proper response to an offender’s past crimes, their prevention-and-rehabilitation approach has tried instead to alter his future conduct, for the eventual betterment of society as a whole.

This anti-punitive strategy has obliterated personal responsibility. The felon endures few negative consequences for the damage he does to others. This has led to dual outrages: the unjust neglect of victims, and excessive leniency toward their victimizers.

But under utilitarianism, leniency is not the only option. If public safety is the sole objective, why not try to suppress crime rates by executing—or jailing forever—every criminal we catch, from jaywalkers to serial killers? Instead of inordinate leniency, why not try unbridled punitivity?

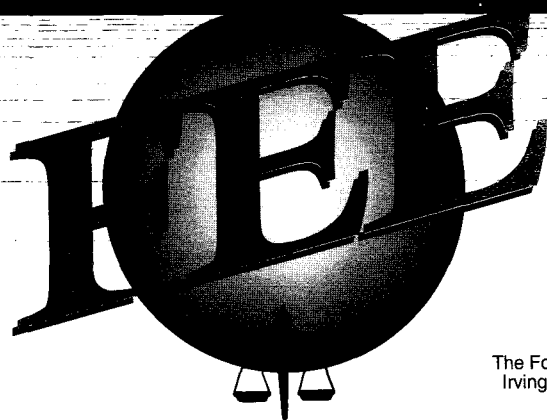
Many conservatives and free marketers prefer this alternative. Their deterrence-and-incapacitation approach represents the flip side of the same utilitarian coin. It, too, aims solely to alter an offender’s future conduct, for the eventual betterment of society as a whole. It, too, severs any clear causal connection between the degree of injury suffered by the innocent, and the degree of punishment imposed on the perpetrator.

Utilitarianism thus has led both the Left and Right to *injustice*: to disproportionate punishment in relation to the transgression. After all, once illegal acts are decoupled from a proportionate legal response, the only remaining argument is whether that response should be anemic or draconian.

Utilitarianism also leads both sides to *collectivism*. What counts to utilitarians, Left or Right, is not justice for individuals, but only lower crime *rates* for society in general. No longer gauged by the harm inflicted upon individual victims, punishments are instead based on arbitrary predictions of the criminal’s future dangerousness to “society.” In utilitarian social calculations, there is no place for the anguished human face of an individual crime

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## Protectionism, Old and New

Protectionism, which is the policy of protecting home industries from foreign competition, has many origins. Some date back to the ways of tribal societies which generally viewed foreigners as aliens and enemies. Others are singularly American, arising from economic stagnation and dollar decline. All are the result of misinformation which is more harmful than non-information. Error is always more active than ignorance.

Every form of protectionism builds on raw political force. It takes an army of tax collectors, administrators, and border guards to protect domestic industries by levying import tariffs and other restrictions on foreign products, or by paying bounties on domestic products. Protectionism builds on the governmental power to tax one man to help the business of another. Taking money from one American and giving it to another is the source of much social and economic conflict.

Protectionism receives its political strength from advocates of political power who welcome additions to governmental power. They are supported by mainstream economists who look to government officials for full employment and economic growth. Their primary concern is national income, national spending, and national employment. They favor national planning which obviously cannot tolerate international free trade; it would upset, disrupt, and quickly undo any planning.

The staunchest allies of these politicians are labor unions to whom government pro-

tection is of crucial importance. They live by the doctrine that union members have an inherent right to a job in their particular industry, at their present location, and at rates of pay that exceed market rates. Plagued by the inability to compete and by high rates of unemployment, they argue forcefully against everything foreign.

Unemployment undoubtedly is a great social evil that concerns us all. It is an economic phenomenon of loss and waste that harms not only the jobless but also their fellow workers who are forced to support them. Alleviation of unemployment has become an important political task by which governments are judged and measured. But the problem also raises a basic question: can import restrictions increase the demand for labor and reduce unemployment? Unfortunately, they cannot, because they reduce the productivity of labor and, therefore, reduce the demand for labor. Surely, a newly protected industry gains temporarily from the reduction of competition: it can raise prices, earn higher profits, and pay higher wages. But other industries will consequently suffer from the loss of trade and the higher costs of labor. Consumers everywhere experience reduced purchasing power.

In many respects, trade barriers are similar to natural obstacles that thwart human effort and impair man's well-being. Both increase the demand for specific labor. For example, the destruction of housing by flood, earthquake, or fire increases the demand for housing supplies and construc-

tion labor, while also reducing the demand for a myriad of other goods which the destruction victims must now forgo.

Similarly, import restrictions on domestic cars may boost the demand for domestic cars, but they also reduce the demand for other goods which the restriction victims, that is, consumers must forgo.

Trade restrictions thus destroy more jobs than they can possibly create. Yet most American workers are convinced that they need such government protection.

Without trade barriers, they believe, foreign products made by cheap foreign labor would flood American markets and force American workers to suffer substantial wage cuts or outright unemployment. Americans can trade with each other because they have similar income and working conditions, but they cannot trade with foreigners who work for less at lower living standards.

When carried to its logical conclusion, this wage-rate argument bars all foreign trade because no two countries are identical in labor productivity and income. It may even bar interstate commerce because wage rates differ from state to state. Wage rates in New York State are generally higher than those in Mississippi; by this argument, therefore, New Yorkers must not trade with Mississippians. In actual fact, the cost of labor is merely one of many cost factors determining the competitiveness of a product.

It is significant that the loudest agitation for protection is heard in those industries competing with high-cost foreign labor. The American automobile industry is competing with Japanese and German carmakers who pay considerably higher wages and fringe benefits. If the wage argument were correct, there would be few Japanese and German cars on American roads.

When the labor argument is not believable, American protectionists quickly retreat to a sixteenth-century defense: the balance-of-payments doctrine. It contends that government should promote exports to bring money into the country and stifle imports. The modern version urges legislation and regulation to restrict the use of

foreign goods and encourages exports for the purpose of creating jobs in the country. Both versions, the old and the new, are spurious and erroneous.

The United States is currently experiencing chronic balance-of-payment deficits with Japan. The ordinary Japanese trade surplus runs at about \$10 billion a month, of which \$5-\$6 billion are with the United States. They consist of dollar earnings which the Bank of Japan then promptly invests in U.S. Treasury obligations. The Bank of Japan is the world's biggest financier of U.S. deficits, both in the federal budget as well as in current trade accounts, and is the strongest supporter of the U.S. bond market. If it were not for this solid support by Japan, the world's biggest creditor country, the financial conditions of the United States, the world's largest debtor, would be rather precarious.

In many parts of the world the U.S. dollar is greatly undervalued in terms of purchasing power. The dollar buys 30 percent to 50 percent less in Japan and Germany than it does here in the United States. Yet in this age of instant communication and capital mobility, it is not purchasing-power parity that determines exchange rates but capital profitability and opportunity. U.S. balance-of-payment deficits are the result of excessive monetary ease on the part of U.S. monetary authorities, of low interest rates, of high taxes on capital and on savings, and of chronic deficit spending by the federal government. America is consuming too much while saving and investing far too little.

Protectionism makes for strange bedfellows. It brings together big business and big labor, politicians counting votes and government officials yearning for power, sixteenth-century thinkers and twentieth-century economists. It unites many petitioners for political favors and largess in a common cause against consumers and foreigners.



Hans F. Sennholz

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victim. He or she sinks into a sea of faceless, collective crime statistics.

Don't misunderstand: prevention, rehabilitation, deterrence, and incapacitation are worthwhile ancillary objectives of the criminal law. But they aren't *primary* objectives. They address only general social conditions, so that anonymous citizens of tomorrow may not turn to crime. None of them, though, need be grounded in the principle of making punishments fit past crimes. None of them need be rooted in justice.

The alternative? A legal system that aims primarily at exacting *retribution*.

Retribution means administering punishment to a criminal in proportion to how much he has hurt others. I use "retribution" to mean "reflection." The crook's basic aim is to gain by force something at the expense of someone else. His actions impose damages upon an innocent person. The fundamental goal of a strategy of moral retribution, then, *is to reflect those damages back onto the criminal himself*.

This policy is both moral and practical. Moral, because it upholds innocent human life, and the just social framework upon which individual survival and well-being depend. Practical, because a policy of reflecting proportionate losses back upon the culprit frustrates and negates his desire, which is to profit at someone else's expense. Retribution means *he won't get away with it*.

A retributive system would incorporate many of the worthy crime-reduction ambitions of the utilitarian. For example, long terms of confinement under harsh conditions, with inmates forced to work and pay restitution to victims and taxpayers, would surely deter more criminals than does our current toothless system. Being locked up would also prevent them from causing ordinary citizens more trouble, and—who knows?—possibly encourage the occasional inmate to rehabilitate himself.

But since we cannot predict their future dangerousness, a retributive system would abandon such utilitarian fads as treatment programs and "selective incapacitation." A term of confinement would be tied to the seriousness of a convict's offenses—period.

Because retribution entails punishment, it's often criticized as being motivated by a crude thirst for revenge. In fact, a retributive legal system is the antithesis of private revenge, and the basis for the rule of law.

My dictionary says "revenge" is "the carrying out of a bitter desire to injure another for a wrong done to oneself or to those who seem a part of oneself." Of course, revenge-based punishment need not be just: the injured party may retaliate disproportionately to the harm done. By contrast, "retribution" is "just or deserved punishment, often without personal motives, for some evil done."

If we're to have a just and peaceful society, the use of after-the-fact, retaliatory force cannot be left to the arbitrary whims of private victims, each employing subjective criteria of personal injury. Precisely to minimize and avoid vengeance, vindictiveness, and vendettas, and the disproportionate punishments to which they lead, a justice system must be based upon retribution, not revenge.

Retribution constitutes the premise that the level of punishment must fit the severity of the crime. This does not mean we need to punish *in kind*: the law need not literally demand "an eye for an eye," sinking to the specific tactics of the wrongdoer. But it does mean that society should punish *in proportion*: the law ought to recognize gradations of evil and injury, and respond accordingly.

In short, retribution is the only premise fully consistent with justice and individualism. With justice—because it implements *proportionality* in criminal sentencing, fitting the punishment to the crime. With individualism—because it bases punishments on actual harm done to *individuals*. Retribution does not look to society's future: it remembers the individual victim.

Our nation's Founders made it clear that they saw no clash between the moral end of justice, and the practical ends of insuring domestic tranquility. A valid conception of retribution, of "just deserts," can incorporate many of the worthy purposes advanced by utilitarians. But it can also provide those purposes the crucial moral grounding they have never had. □

# Justice and Cultural Diversity

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by Philip Perlmutter

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**D**iversity and multiculturalism are increasingly heralded as desirable goals for society. It is argued that government should translate them into everyday realities—and in proportion to a group's percentage of either the local or national population, whichever is higher. For example, if a group such as women, blacks, Hispanics, Asians, American Indians, or gays are "x" percent of the national population, then that's the percentage of jobs they should have.

How government relates to individuals and groups—and vice versa—are not new problems. The framers of the Constitution and Bill of Rights grappled with them. And while none of the Founding Fathers foresaw the evolution of today's enormous and multivariied population, they knew of the dangers of a divided people, and of a government that gives special privileges to some groups, whether royal, religious, or political.

George Washington visualized an America that "gives to bigotry no sanction, to persecution no assistance," and that "requires only that they who live under its protection should demean themselves as good citizens." With equal simplicity, John Quincy Adams wrote that America "is a land, not of *privileges*, but of *equal rights*" and that "*privileges* granted to one denomination of people, can very seldom be discriminated from erosions of the rights of others."

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Such views, plus the guarantees of the Bill of Rights, formed the basis of the American ideal, though all too often not of its reality. It is the contrast between the ideal and the reality that leads to the question: what kind of governmental system best insures the greatest freedoms for individuals and groups, as well as the greatest possibilities of undoing wrongs among and between them, and with the least injury to any, and to the nation's unity?

There is ample evidence that insuring individual equal rights, with unrestricted opportunities for redressing individual and group wrongs, is more desirable than insuring group preferential rights, where redress is limited or prioritized by the victim's group affiliation and percentage of the population. Governments and elections by majorities, pluralities, or coalitions, whatever their shortcomings, are still more salutary for most people and less injurious to some than governments of proportionalized minorities.

The latter model seems theoretically fairer and more attractive because it seems to offer immediate representation and redress to some minorities. But in reality it also generates, multiplies, and perpetuates tensions and conflicts among many minorities, eventually overshadowing whatever initial progress was made, delaying solutions to existing problems, and endangering the well-being of society itself.

Also, by providing benefits to some groups on a preferential basis, a disrespect, if not contempt, for the recipients, the providers, and the law is created or re-