When Nemesis Is Limping

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Punishing Criminals: Concerning a Very Old and Painful Question, by Ernest van den Haag, *New York: Basic Books, Inc., Publishers, 1975. xii + 283 pp. $11.50.*

I

IN HIS WELL-KNOWN treatise on the Common Law[1] the late Justice Holmes sought to show that the underlying principle is the concept of damage and liability. It had its origin, so Holmes believed, as a substitute for the private vengeances exemplified in the blood feuds. Theoretically, the injury visited on the offender in the form of fines, confiscations, or other economic deprivations, or in the form of various bodily punishments, was in compensation for the injuries inflicted on the victim, and a further compensation might be owing to the sovereign for damage to the public peace. In the beginning, it seems, no distinction was made between criminal and civil offenses, between crimes and mere torts; and even in our own times, as Holmes showed in his subsequent discourse, the distinction is seldom drawn with exactitude by the jurisconsults. Contemporary theorists, indeed, have not gone much beyond the line of demarcation drawn by Plato in *The Laws,* which one eminent commentator has paraphrased as follows:

> Plato's resolution of the difficulty was to make [the] distinction between acts which were remediable in damages and acts which require [more severe] punishment—between injury and wrongdoing. If an injury has been inflicted, the court must make it good as far as is possible; it must conserve what was lost, restore what was broken down, make whole what was wounded or dead; and where the injury had been atoned by compensation, the court must endeavor always to convert the parties who had inflicted it and those who had suffered it from a state of discord to a state of unity. [But] if there had been wrongdoing, the guilty person must not only pay for the injury but must also be [otherwise] punished so that he would not repeat the deed in future; in other words the court must teach him virtue, which is for Plato the basis of punishment.[2]

It is with this latter category of offenders—who are now multiplying with fearsome rapidity almost everywhere in the world but nowhere at such a rate as in these United States—that Professor van den Haag is concerned in this crisply written and tightly reasoned essay. His is essentially a plea for the restoration of the concept of damage and liability, which is to say for the principle of retributive justice, to the conduct of criminal jurisprudence. Swift and certain punishment of the criminal, proportionate to his offense, the professor

believes, is the one and only deterrent to crime. Where this principle has prevailed the mere threat of punishment will in many cases suffice. Such threats of course are written into virtually all our criminal statutes, but unless and until the threats are carried out after each violation they will have little efficacy or none. Retribution, argues Professor van den Haag,

> must be paid because it is owed, because it has been threatened, and a threat is a (negative) promise. The payment of debts (or of retribution) fulfills an obligation undertaken in the past. Once undertaken, obligations are independent of the current or future usefulness of meeting them. Nonetheless keeping promises also affects the future, because the credibility of yet unfulfilled promises depends on keeping past promises; if past threats were not carried out present threats would become incredible and therefore ineffective in deterring anyone from crime. *Pacta sunt servanda;* promises must be kept, threats must be carried out. Else they won't be believed, there would be no point in making them, [for] those inclined to break the law would realize that the law has been bluffing. . . . The law still has a great deal of credibility handed down from past generations; [but] we may be consuming this stock of credibility, as we do other resources, at a perilous rate. Meanwhile, when one considers that no more than one percent of all offenders go to jail, it seems remarkable that our rising crime rate has not risen even more.

II

Even so, jail terms, augmented perhaps in some instances by fines or confiscations, are about the only punishments that can now be visited on the luckless or unresourceful one percent. Until a few hundred years ago it was another story. Jails in those times, as the professor points out, were relatively few and used principally for the detention of persons under inquisition or awaiting trial or execution. Judges had a wide repertory of punishments besides prison to match the great variety of crimes. Some were grotesquely savage, including torture, mutilation and attenuated death agonies. For minor offenses there were minor agonies such as branding, flogging and the pillory. In some cases, though, the penalties, even by our own squeamish standards, seem curiously mild, such as exile or banishment. All forms of corporal punishment, even some like whipping that a malefactor might prefer to a long prison sentence, are repulsive to the modern legislative or judicial mind and "corrective custody" seems the only humane alternative. Some liberal criminologists have proposed the abolition even of prisons and others have gone so far as to deny the ethical justification or social value of punishment in any form or circumstances.

It was different with our ancestors. Whether guilty of crime or innocent of it they had to live much of the time on intimate terms with pain. "Extreme physical suffering," as the professor reminds us, was "routine" for them. "Anesthetics were unknown, and surgical patients, the victims of accidents, and the sick suffered horrendously, as did women in childbirth." This doubtless was one of the reasons they could spare so little empathy for the sufferings of condemned evildoers and miscreants. Another and perhaps stronger reason was the gratification of seeing retributive justice in action; it must have seemed to them another proof that the social order, like the universe itself, was activated by a rational principle. Thus it was that the public execution of savagely punitive sentences took on the character of popular festivals.

> People took their families to attend hangings, beheadings, drawings and quarterings, disembowelings, burnings or torture on the rack. Far from feeling guilty or squeamish, or deriving but a furtive pleasure from it, people

> publicly rejoiced and enjoyed a spectacle as cruel as anything the Romans were ever blamed for. They did not doubt that the forces of good were carrying out God's will. Having relegated them beyond the pale, law-abiding citizens enjoyed the suffering of criminals as a spectacle. Justice was as haphazard as it was cruel. . . . There was remarkably little empathy. . . . Wrongdoers deserved what they got, and God was in his heaven. . . .

And in a footnote Professor van den Haag recalls the assurance by St. Thomas Aquinas (hardly a man of sadistic temper) that the raptures of the saved in heaven are vastly enhanced by their observation of the agonies of the lost in hell!

III

THE LEGAL immunity from physical punishment now extended to all convicts in custody may be, so our professor surmises, owing as much to the modern malady of "alienation" as to pure humanitarian zeal. We live, he reminds us,

> in a far more abstract world than our ancestors did. Few of us till the soil or herd cattle. Most of us work with lifeless matters or with abstract symbols, and are rewarded by money [*i.e.*] by abstract purchasing power. Far more than in the past we deal with each other at arm's length, by telephone or by writing. People and events are often seen as images on a screen or heard as disembodied voices. Bodies have become private, intimate things not to be invaded for any public purpose. . . .
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> We no longer feel as sure as we did in the past about what is good and evil, and about the responsibility [for their crimes] of those we condemn. Thus we no longer want to punish. "Correct," rehabilitate, yes; or if the worst comes to the worst, get rid of the incorrigible or intolerable as painlessly and privately as possible. But punish?—we hesitate and prefer not to. The indirect and abstract suffering in prison may be seen as rehabilitative as the suffering that takes place in a hospital. Originally it was meant to be. Prisons are still called "corrective institutions," though no longer penitentiaries—we no longer expect penitence.

But Dr. van den Haag, who is a psychoanalyst as well as a sociologist, has still another explanation of the modern revulsion to corporal punishment, namely its relation to abnormal sexuality, which came to light in the eighteenth century. The professor cites the well-known passage from the *Confessions* of Rousseau in which Jean-Jacques tells of the mixture of pain and sensual delight he experienced as a child in the spankings administered to him by Mlle. de Lambercier for some minor mischiefs or misdemeanors. Or the pleasure may accrue to the one who inflicts the pain, as in the even better known case of the Marquis de Sade. Both masochism and sadism, says the professor, lapsing for the moment into the esoteric jargon of the trade,

> involve a merging of aggressive and libidinal drives. A psychic identification of the sadist with his victim, of the masochist with his punisher, is also involved. The sadist violently denies the humanity of the victim identified with his passive drives. . . . The pleasure lies in the process of de-identification endlessly repeated, not in the result. . . . In turn the masochist introjects (identifies with) the aggressor who punishes him. . . .

This has encouraged some influential psychiatrists and their devotees to consider the whole concept of retributive justice a form of social sado-masochism. Dr. Karl Menninger, for example, according to our author, has promoted the view that in punishing criminals we punish ourselves and actually need them for this purpose, and in

fearing them it is really ourselves that we fear. The trouble with this diagnosis of the real motives and purposes of criminal justice, Professor van den Haag thinks, is that it helps us to no conclusion about its moral justification.

The controversy over questions of crime and punishment reflects essentially the conflict of two powerful and opposing traditions of the Western imagination. One of these and much the older is the basic Christian doctrine of Original Sin which the professor accepts and confidently equates psychologically with the Freudian Id. He has chosen to illustrate the dust wrapper of his book with a reproduction of a famous woodcut engraving by Albrecht Dürer showing the expulsion from paradise of the primal ancestors of our human race. From them we inherit that "strong inclination to evil" which abides dormant or active within us all. The will to evil, however, may be inhibited by conscience, repressed through fear of retribution, or counteracted by grace. The other tradition, dominant since the Enlightenment among many intellectuals, most reformers, and all revolutionaries, is that of the innate and universal goodness of mankind, and of inevitable progress and ultimate human perfection. If men seem on the contrary depraved and degenerate, it is only because—as the Rousselian revelation has it—they have been corrupted by the institutions and laws of a corrupt society.

In that revelation, as the professor acknowledges, there was a certain truth. The existence of society makes inevitable the existence of crime. Society demands from its members the acceptance of certain responsibilities and restraints as the price of their security and freedom. But for some the price will always seem too high, the reward too meager, and temptation too powerful. Hence the necessity of coercion through punishment or the threat of punishment. The necessity is especially acute in times like ours of rapidly changing social patterns, when the cake of custom, as Bagehot called it, has been broken by wars, revolutions, technological innovations, and vast demographic shiftings, and the traditional civic and social virtues have been widely replaced by the spirit of *anomie*, alike among the rich and powerful and the powerless and poverty stricken.

IV

PROFESSOR VAN DEN HAAG is at some pains to show us why the elaborate and expensive programs for curing crime by the "rehabilitation" of convicted criminals were foredoomed to failure. The main reason appears to have been that these programs were therapeutic by design. It was assumed that the convict is a psychologically "sick" person who should therefore be kept in confinement and under treatment until his psychic needs have been met. The difficulty is that these needs

> are not those that he [the convict] feels but those he is felt to have. Experts and prison authorities decide on them, and on the length of his stay. The "needs" they attribute to the convict derive from their own notions about proper behavior and lifestyle. . . . If he is held because bad behavior is predicted, he is, as it were, made to suffer in advance for his expected future acts. Perhaps these social precautions can be justified as such, but not as punishment nor as treatment. For surely treatment in the medical sense is in the convict patient's interest as he defines it [himself], and punishment refers to past offenses only.
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> Justice, at any rate, becomes irrelevant. The link between guilt and the punishment deserved by it—[*i.e.*] justice—is severed and replaced by a link between therapy and expected future conduct. Dr. Karl Menninger (acknowledges the therapeutic view when he writes: "The very word 'justice' irritates scientists."

Generally speaking, the professor, who deplores the wide discretion in sentencing

allowed to judges or assumed by them, seems to approve Jeremy Bentham's prescription of uniform sentences proportionate to the crime in all cases. Nevertheless he concedes that there may be convicts whom it would be dangerous to turn loose after their sentences have been served. For some of these he suggests that the ancient practices of exile or banishment might profitably be revived. For others, however, there should be institutions where such persons could be kept in "non-punitive" confinement. There they might "live in apartments shared with family or friends"; they might receive visitors, prepare their own meals, earn an income from work made available to them, in short enjoy all the advantages of freedom, except, of course, freedom of movement.

Professor van den Haag devotes more than a score of his pages to a discussion of arguments for and against the death penalty, which the Supreme Court, after a great deal of wavering, has now decided is not a cruel or unusual punishment in the constitutional meaning of the terms. Fifty years ago or thereabouts, when the question of whether the penalty is or is not a deterrent was being widely agitated, a British lady criminologist, Miss F. Tennyson Jesse, made the observation that whether or not capital punishment deters others from committing capital crimes it certainly deters the condemned person from ever repeating the offense. The professor adopts and elaborates the argument. "Convicts serving life sentences may be unable to commit further crimes within" [their prisons], still

> Without the death penalty these convicts are immune to threats of further punishment. It seems unwise to grant convicted criminals this heady immunity not available to non-convicts who are less dangerous. The federal prison system currently has custody of an offender who, since being confined for murder, has committed three additional murders on separate occasions while in prison. . . . Ways could be found to deprive these inmates of nearly all capacity to harm each other or the prison personnel. But to achieve this prisons would have to become truly inhumane. Convicts would have to be permanently chained or isolated. . . .

This, apparently, is the professor's answer to the arguments of the Marchese di Beccaria, advanced more than two hundred years ago and repeatedly invoked since then, that death sentences are degrading and brutalizing to culprit and executioner alike. The alternative envisaged by Beccaria would be even more so. No one today would dream of immobilizing even the worst criminal for the rest of his days "in chains and fetters, in an iron cage . . . in perpetual slavery." Nowadays a life sentence seldom means all that the words seem to imply, but rather some years out of the prisoner's life, during which, "so far from being kept in fetters, [he] is entertained by TV and social workers and may have sufficient freedom to commit additional crimes."

To the somewhat weightier objection, that where an innocent person may have been convicted and put to death through judicial error all possibility of correcting and redressing the injustice is lost, the professor retorts that irrevocable injustices are by no means peculiar to courts, that innocent persons are inadvertently killed in traffic accidents, by surgeons' errors, by being dosed with the wrong medicines or overdosed with the right ones. It would be no more reasonable to abolish the death penalty because of an occasional unintended injustice than to abolish automobiles or surgery or medicines because of occasional errors of judgment. Abolition would be justified only if it could be shown that the losses to justice outweigh the gains.

V

THE ANNUAL COST of crime in America is now being estimated as in the neighborhood of sixty billions of dollars—a stag-

gering sum, even in terms of our vastly inflated currency. Most of it must be paid by the law-abiding not only as victims of robbery and violence but also in their capacity as taxpayers. The expense of the conduct of what passes for criminal justice has reached a fantastic figure. A well publicized trial, of which there have been so many of late, may drag out for month after month and its cost may run into the hundreds of thousands or even millions.[3] At the same time many, perhaps even most, criminal cases where arrests have been made and indictments returned, never come to trial at all.

> Between ten and twenty postponements are not uncommon. When defense lawyers suspect their client can be shown to be guilty, they delay—with the consent of the judge—until witnesses disappear or become unwilling to waste another day in court. Without witnesses the complainant is safely acquitted. Trial judges, although given rules about expeditious trials, often have no choice. If they do not grant adjournments the appellate courts may reverse the decision despite the rules.

Professor van den Haag thinks it marvelous that in these conditions "the overwhelming majority of people remain law-abiding," and so it is. But if the historical examples apply, the main drift is toward anarchy and ultimately dictatorship. Mme. Mandelstam for example has told us how the majority of Russians at first even welcomed Stalin's rise to power as a relief from the anarchy and violence of the first post-revolutionary decade.

[1]*The Common Law* (Boston: Little, Brown & Co.), thirteenth printing. The book was first published in 1881, twenty-one years before Holmes' appointment to the Supreme Court.

[2]Huntington Cairns, *Legal Philosophy from Plato to Hegel* (Baltimore: The Johns Hopkins University Press, 1949).

[3]At the trial of the San Quentin jailbreakers at San Rafael, California, four months and more were wasted before a jury acceptable to both prosecution and the defense could be selected.

By Whose Consent?

The Morality of Consent, by Alexander M. Bickel, *New Haven and London: Yale University Press, 1975. 156 pp. $10.*

THE DUST-JACKET FLAPS of *The Morality of Consent* contain some rather unspecific blurbs and a biographical sketch of the author. One suspects that the writer of that copy, like the reviewer, despaired of summarizing in brief compass the purport of this difficult work, which is, frankly, unfinished to a degree not suggested by most of the critical notices that have appeared. According to an unsigned foreword, Alexander M. Bickel, legal scholar and public philosopher, "had left the manuscript for this book" at his death in 1974. However, the reader soon realizes that what the author left were lectures (on democratic process, the nature of citizenship, aspects of civil disobedience, and moral authority), the metamorphosis of which into a book unfortunately had been terminated short of a fully articulated statement. Therefore, the temptation cannot entirely be resisted to grapple with the more important work adumbrated here rather than the slight though piquant volume actually in hand.

The title suggests a treatise on the rights of minorities or on the conditions of willing acquiescence in a democratic government. Both these topics recur in the lecture-essays, but it is not precisely accurate to postulate them as a main theme. A better title would have been "The Computing Principle." This principle, which Bickel professed to draw from Edmund Burke, is the home base for every foray. Although it is never fully defined, it may be described fairly, perhaps, as a maxim of pragmatism and caution, a warning to take into account circumstances and consequences in the governing of men. Bickel skillfully posed the desirability of this principle, as a mode of proceedings, over against a single-minded moralistic pursuit of ends.