

# **A Rationale for Punishment\***

by J. Charles King

*Department of Philosophy, Pomona College*

Because problems concerning punishment arise at many intellectual levels, there is no one question or set of questions about punishment to be answered. I propose to address what I take to be some of the issues about punishment which are crucial for moral and social philosophy. I shall consider in turn the questions: What is the moral basis for punishment?; By whom is punishment justifiably imposed?; and, What kinds and degrees of punishment are justifiable? I shall then consider briefly what the principles reached mean both for ideal institutions and for the evaluation of our own current conditions.

## **The Moral Basis of Punishment**

In one sense, there is little disagreement about the moral basis of punishment since almost all thinkers are agreed that agents are to be punished only for doing what is wrong. Of course, there are many different ways of stating principles of right and wrong. Some might say, thus, that one is to be punished for violating "the moral law," while others might say punishment should be for violating the rights of individuals. The problem is that, even if one takes a particular version of what is right and wrong, one still must give an *exact* account of why, within that theory, doing what is wrong justifies punishment. I hold that the case is actually even more difficult, because I believe that the case for punishment must be a part of the very argument establishing principles of right themselves. I certainly cannot write out an entire theory of right here, so I must briefly sketch how I believe punishment fits into moral theory as a whole.<sup>1</sup>

Moral theory differs from scientific theory in that, rather than trying to explain and predict events, moral theory attempts to provide principles to guide or direct conduct. Since moral principles purport to guide our conduct, their justification is a two-sided process. Such justification must have a cognitive aspect: i.e., we must be shown how the purported principles allow us to determine what courses of action to follow or reject. For example, we would need to know how to determine whether a person does or

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does not have a right to some particular thing. But justification of moral principles must also have what I call a motivational aspect: i.e., it must show each of us what reasons we have, given our own considered desires or preferences, to act on the suggested principles. Lacking this motivational aspect of justification, the purported moral principles would make no claim on our conduct.

We all learn various principles of conduct as children and cannot avoid examining them as we mature. Moral theory undertakes this process of examination to the bitter end. This is, of course, a long and complex process. In my view we discover first that each individual appropriately has his or her own set of goals and purposes in life. I call these the individual's conception of the good (or conception of the good life). Such a conception ideally is the result of our bringing full information and understanding to bear on our own possible life plans and then choosing the one which, all things considered, most appeals to us. Each of us as an actual human being falls short of this ideal, but each of us pursues some more or less well-ordered set of goals and preferences which makes up our conception of the good. While aspects of such conception may be shared with others, the total conception, resulting as it does from our own considered desires, will be uniquely our own. It may, however, reflect as broad or narrow a set of desires respecting other persons as may characterize an actual person. I mark this personal uniqueness of conceptions of the good by saying that values are person-relative.

On this view, the most difficult task of moral theory is to ask how we may justify to individuals any principles restricting their conduct toward each other. (Such principles, I call principles of right.) As Hobbes taught us long ago, individuals definitely do need some way to regulate their conduct towards each other. We may see this clearly by adapting the device of imagining people in a state of nature, i.e., by imagining a group of individuals (persons like ourselves) with the restraint of shared moral principles removed. By imagining a practice or institution to be absent, the state of nature device enables us to see what reason we might have to wish to see it instigated, and, therefore, what reason we have to accept it. In discovering such a reason we may also discover the content of the practice or principle we have reason to accept. While this procedure is more familiar in the case of proposed justification of government (as used by both Hobbes and Locke), it is also useful for asking about principles of right themselves. (In a sense, Hobbes also used it in this latter way.) Now once we draw this distinction, I think we can see clearly the real force of Hobbes' argument to the claim that life in a state of nature is solitary, poor, nasty, brutish and short. While Hobbes hoped thereby to sell us a king, he skips a step. Hobbes is not correct about all anarchic situations. But he is correct about the particular one in which each person seeks his own conception of the good unencumbered by any shared principles of restraint. Of course, not all people would,

even in that case, be prepared to run roughshod over one another. But some would be, and in this first-stage state of nature that would be enough to lead more or less to the war of each against each. For in that circumstance, none has been shown reason to forbear assaulting or otherwise misusing others if that is what he wants to do. Further, in this circumstance, no one would know what to expect from another and would often reasonably react with force in order to preempt attack. Hobbes' point is, I think, that this circumstance is an unmitigated disaster for all. No one can hope to win for very long in this war, for the more one succeeds the more dangerous one looks to others, and thus, the more likely they are to organize against one. It is well to note that the disaster is not only likely destruction of your life, but also the lack of conditions of civilized living, for these circumstances lack the necessary background conditions for a productive economy to develop.

What follows from this is that, in spite of their different conceptions of the good, each person (or almost every person) is shown good reason (in fact overriding reason) to acknowledge principles of restraint in their conduct towards each other.<sup>2</sup> There are many different principles which would do the job. For example, if all would agree to obey me we could easily have peace together. I would argue, however, that it is only the minimal principle which will do the job of bringing peace that each has reason to accept. Formulation of such a principle is a long and complex task. Fortunately, it need not be undertaken here for the purposes of my argument concerning punishment, because the basic outlines of such a principle are clear: it must specify limits which each person in the state of nature has reason to acknowledge as binding on his conduct, and these limits must be such as to avoid the Hobbesian conflict. But in the specification that each person must have reason to accept the principle, we get a considerable restriction of possible principles, as we do from the combination of this with the necessity that the principle be such as to avoid the war. If we add the supposition that each of the persons wishes to achieve the desired end at minimal cost to himself, we see that the only plausible candidates will be principles which in some way specify a small range of action from which all must refrain. The obvious candidate from the tradition is some kind of natural-rights theory specifying those respects in which persons must refrain from interference with each other's activities. But even if we get this far, immensely difficult problems remain, because differing paths may be taken in developing the precise content of a natural-rights theory.<sup>3</sup> In order to discuss punishment, however, I need go no further in that direction on this occasion.

Whatever exact principle of right one gives, even if it is as restricted as most natural-rights theories would hope, one faces the following well-known problem. We would, of course, expect someone to argue that what he really needs in order to avoid the war of each against each is not that he himself should abide by a principle of restraint, but merely that he be able to convince enough other persons to do so that he is able to benefit from

peace and a social condition while continuing so far as possible to behave utterly without restraint himself. Since this line of objection is so obvious, it must be dealt with before we can think that the argument for the principle of right is itself complete; i.e., before we have really given good reason why each person in a state of nature should agree to the principle of right.

Let us notice first the effect which would obtain from the possibility of acting as this line of objection indicates. In short, the effect is completely to undermine the possibility of agreement to the principle of right. As long as we all know that each of us may reason this way, then none of us has good reason to accept the principle of right — not because we lack reason to avoid the war of each against each, but because as long as this line of reasoning is attractive, the principle of right must remain ineffective as a way of securing ourselves against the evils of the war. Thus, the fact that each of us has overriding reason to wish to see the principle of right adopted by all gives each of us good reason to agree, as well, to further provision to reduce the attractiveness of the line of argument just offered, even though we realize the possibility that such a practice could be turned against us.

Since violation of the principle of right will reasonably be viewed as being based on the reasoning under consideration, the violator of that principle acts in a manner appropriate to the Hobbesian state of nature, not to the stage when conduct is restrained by the principle of right. But our own restraint in regard to the violator is rational only on the assumption of mutual restraint contained in the principle of right. Thus, we no longer need exercise such restraint toward him. With him we are returned to the first-stage state of nature and may use force against him. In so doing we do not violate his rights or in any other way violate the principle of right, because he has broken the reciprocity required for us to view such a principle as binding. In this we find the philosophic grounding for the moral legitimacy of the practice of punishment. Punishment is just that practice which raises the price of violation of the principle of right so as to give us all good reason to accept that principle.

From this position on the moral foundations of punishment follow several views concerning who may punish and to what degree, which I fear will be found displeasing by many with whom I agree on a host of other issues. I shall simply present my views and defend them by replying to likely objections.

### **Who May Punish?**

In most traditional theories of punishment it is taken as simply obvious that the state is the appropriate agent for carrying out punishment. Those who take individualist and libertarian principles seriously will, of course, see this traditional identification as in need of further exploration. We must therefore take seriously the question of who has the moral authority to punish.

First, I would note, however, the fact that reasoning similar to that I have just employed shows why any principle of right must include provision for a principle of compensation for harm.<sup>4</sup> Some such principle must be allied with any principle of right, since in its absence one is left to suffer losses as if in the first-stage state of nature. Suppose you destroy my prize hog. It does not matter whether you did it intentionally or not. If the hog is destroyed, I am out a hog. I am in the same position as if you had seized the hog without my consent. Thus, for the same reasons that your seizing of the hog would undermine my reason for accepting the principles of right, my having to suffer its loss, even unintentionally, would undermine my reason for accepting the principles of right. I have no reason to accept a principle which leaves me to suffer the very harms I am trying to avoid by agreeing to the principle. In the first-stage state of nature I can proceed against you, as I will for harm. Thus, the principles of right must provide some principled relief in the case of harm, otherwise I would be worse off than before. I would then reasonably resort to force to get my compensation, and if you did not view yourself as owing compensation, you and others would simply resist (rightly in your view). In that case we would be back in the beginning of the war of all against all.

Next, it is extremely important to see the very general function which the availability of the practice of punishment is to perform. Since each of us in the state of nature has an overriding need to see peace established, and since the line of reasoning leading to violation of the principle of right is a threat to the possibility of establishing that peace, each of us has good reason to view a violation of that principle as an offense not merely against one person but against each and every person. This is because the violation of the principle of right, once that principle has begun to be abided by, is just exactly to act upon a line of reasoning the final outcome of which is the destruction of the possibility of peace. With all of this known to the persons in the state of nature, each person has good reason not only to acknowledge the principle of right but also to agree that all are to view violations of the principle of right as an offense and that all will have good reason to agree that a practice be followed to short-circuit the reasoning which would thus undermine the possibility for peace. But on this view, offenses against the principle of right are shown to be not merely offenses against individuals who may rightly claim compensation for those offenses, but also to be offenses against all others who make up the society in question. Thus, when one chooses to violate the principle of right, one not only does a specifiable harm to a specifiable individual who may appropriately seek to have that harm redressed, one acts as well upon a kind of reasoning which may legitimately be thought to be a danger to the whole arrangement of peace in which each and every member of society has an overriding interest. Thus, it makes perfectly good sense not only that one might be thought to owe restitution to those whom one has wronged, but also that one might rightly be subject to further attack

by any or all of those making up the social group.

I know that some who are sympathetic with many of the positions I have taken will not view this position on punishment happily. In many cases this will be due to the belief that crime and punishment are strictly an affair only between two people: the violator of rights and his victim.<sup>5</sup> On such a view both restitution and punishment would be claims residing with the victim and only with the victim. The victim could hire an agent to pursue his case for him if he wished, but the entire decision whether the violator should be punished would be that of the victim.

Now I understand the frustration with the neglect of victims to which we have been accustomed. I also understand that punishment has too often been presented as involving a "debt" to a vague beast called "society" and that awful injustices have been done in this vague creature's name. Nonetheless, I am not able to agree that the violation of the principle of right is a matter only between criminal and victim. Saying that some vague entity like society has been harmed is not the only alternative to seeing crime as involving only victim and violator. Rather, the fact is that violation of the principle of right is also a violation against *each* member of the society. Since each has an overriding need for peace, and since violations of the principle of right tend to undermine not only that peace but also the very reason for restraining one's own action, so *each* person may legitimately claim a right to prevent such violations. Thus, no mysterious "society" is involved, but rather a relationship between all the persons in the society. In this respect my view supports Locke's contention that each person has executive authority of the law of nature.<sup>6</sup>

I am sure that some will think that by spreading the authority to punish as far as I do, I run the danger of severe violation of individual rights. They may say for example that those who are not explicit victims of a given crime did not have their rights violated and thus merely wrong the offender if they move against him. Or they may say that I actually allow further violation of the right of the victim in that I take from him a decision that is his by right—namely the decision as to punishment of his offender.

I think that if my argument is examined carefully I do none of these things. Notice that by my argument the principle of punishment is part of the very argument which shows us reason to acknowledge principles of right at all. The showing that one is liable to punishment thus works in automatic harmony with claims to rights. When one has violated the principle of right, one forfeits rights and cannot claim that they protect one from punishment. If my argument is correct, this forfeiture extends beyond one's relation to the particular victim, because one's reason for abiding by the principles of right extends to a relationship with all others, not merely the victim. I would point out that this claim in no way broadens the offenses for which one may be punished. Those are set in the principles of right and remain the same, however this issue is settled.

As to the victim's supposed right to say whether his violator is punished, I simply see no reason to think such a right exists. Now it is certainly true that a victim has a special kind of claim and a special status *vis-à-vis* a violator. The victim has not only the claim we all have (i.e., that the violator be punished), but has also the claim for return of goods, compensation for suffering and expenses, etc. But one might have a claim such as this even against one who had accidentally done one harm. Nor would I have any objection to a scheme in which production of assets to compensate the victim might be part of a violator's punishment. Nevertheless, I would insist that punishment and compensation or restitution are different phenomena and that my theory here shows the moral basis of this fact.<sup>7</sup> Compensation or restitution is what one owes for doing harm whether intentionally or not. It is owed to the victim. Punishment is what one is liable to for intentional violation of the principle of right. Since maintenance of this principle is in the interest of all, it may be demanded by any. In this way the legal distinction between crime and tort finds a basis in moral philosophy, although I certainly would not be committed to all aspects of the current legal practice.<sup>8</sup>

While these theoretical considerations concerning who may punish seem to me conclusive, it may help those who are doubtful to consider some implications of the position I reject which seem to me implausible at the level of ordinary judgment. Take for example a case in which one person, Jones, has administered a vicious beating to another, Smith, while robbing Smith's store. Suppose that Jones tells Smith as he is beating him that this is only a sample of what Smith will get if he agrees to prosecute Jones should Smith discover where to find him. Now perhaps Jones is stopped from beating Smith by customers who come into the store. Assuming Smith will want to prosecute, they take Jones directly to a private court nearby, while they take Smith first to a medical center and then to the court. (Imagine perhaps that Jones glares at Smith as he is led away.) Smith, bandaged up a bit, comes into the court, but he is still terrified by Jones' earlier threat. He says, therefore, to the judge, "I have no desire to prosecute this man." One of the customers says, "But he beat you so!" Smith says merely, "My reasons are my own," and leaves (perhaps with a last terrified glance at the grinning Jones). To get the full effect imagine that Jones now prosecutes the customers for kidnapping or false arrest and wins damages and penalties from them.

Or suppose another case. You live on a quiet street of homes. Suddenly bombings begin in your neighborhood and a number of houses are destroyed with all the owners being killed. It turns out that all the dead occupants either died intestate or were pacifists who had specified that they simply wished to forgive anyone who killed them. Now you discover who has been doing the bombings. Must you and other neighbors wait to catch the bomber in another attempt (perhaps failing and being blown up); or

may you apprehend and *punish* him for what he has already done? On my view the answer is yes, you may go ahead; on the victim-violator view it is no, you must wait.

Clearly, I could produce other such cases to illustrate the point. These might involve the very young (perhaps a child abuse case where the child is overawed by the parent, etc.) or the very old, or frightened or naive, etc. The point is, however, simply that the most plausible judgments in these cases are in accord with my theoretical account. They thus provide corroborating support, even though I should think the theoretical case could stand on its own.

Perhaps a word should be added to foreclose dispute concerning my theory and deterrence. One could fairly say that part of the justification for punishment I have offered depends on the fact that everyone, by my argument, has reasons to wish to see a practice followed which will raise the cost of violating the principles of right and thereby discourage people from doing so. But on my view no one may be punished only to deter others. Rather, one is punished because he violated the principles of right. He is punished pursuant to principles he, himself, had every reason to accept. In common parlance he deserves to be punished. In this sense he "deserves" it because the punishment follows from his action on the basis of principles which he has every reason to accept and on acceptance of which by others he wishes to depend. Thus, none may complain that they have been ill used merely to deter others. A chief point of the whole practice is to deter, but the practice does not thereby allow punishing those who have committed no offense. It is well to note, also, that even though raising the cost of crime is the chief part of the argument in defense of punishment from the standpoint of right, the practice may be found to play many roles. For example, it will doubtlessly help to organize the expression of the natural desire for revenge which otherwise might in and of itself undermine the peace. (I shall return to the question of revenge later.)

### **Degree of Punishment**

To this point I have said little about how a person may be punished. The remarks about returning to the Hobbesian state of nature seem to imply that there is in principle no limit to punishment; for example that one might use capital punishment for petty theft, or perhaps use torture if one wished. In fact, I can see no basis in the principles of right for rejecting these implications. This is a hard saying! Let me hasten to add that I do not personally approve of such procedures. They do not fit my own set of person relative values, but I do not see how those tastes of mine can be argued on the basis of right. Most people will be inclined to reject my philosophic position here because they think there should be some kind of relation between the crime and its punishment. They believe that somehow there should be a scale of



severity of punishment varying with seriousness of crime.<sup>9</sup> This proportionality has certainly been an ideal of our culture. Nonetheless, I can see no way to argue as a matter of abstract principle that there is a natural relation between degrees of crime and degrees of punishment. Attempts to do so seem invariably to depend upon strictly person relative value judgments as to which crimes are worse. Attempts to avoid this pitfall seem invariably to fall into it in the end. For some cases it seems clear enough at first glance how punishment may fit the crime. For example, if one murders, then it seems reasonable that one's own life might be taken. But suppose someone argues that in fact murder which robs me of my life and rights is the foulest of crimes and, thus, death is too easy a penalty for it. Perhaps he proposes daily torture for years. But by what reasoning allied to the principles of right can we possibly settle this disagreement? I can see no appeal to principles of duty or any other kind of appeal to general considerations which could settle this dispute.

As an illustration of my claims here, I shall discuss Murray Rothbard's suggested principle of proportionality in punishment. Professor Rothbard suggests that the root idea of proportionality in punishment is "that the criminal loses his rights *to the extent* that he deprives another of his rights. . . ." <sup>10</sup> As Professor Rothbard recognizes, extent of rights violation is, even in monetary cases, hard to gauge. If one simply returns the sum stolen to the victim (plus interest, cost, etc.) the criminal has not really been punished. Professor Rothbard suggests, therefore, the principle of "two teeth for a tooth." The criminal must return, for example, any sum he had stolen and then pay the same sum to the victim, plus something for fear, anxiety, etc. In a case of bodily assault the victim may beat, or have beaten, the criminal to a degree as bad (or a little worse) than he was beaten. He may, of course, allow the criminal to buy his way out of this, but I take it that the victim may set any price he wishes.

I join Professor Rothbard in the desire that those who rob and assault and rape and murder should have it put to them in a way which brings home the seriousness of their crime. (I'm not sure, come to think of it, just how he proposes to handle rape on his view.) But I do not see that he has actually given us an objective measure of how we may proportion punishment to crime. It is important to note that I am neither agreeing nor disagreeing concerning any particular punishment. My point is that a person who held the same principles of right as Professor Rothbard might disagree in good faith with his suggested levels of punishment. I can see no way for Professor Rothbard to show that person to be wrong. This kind of disagreement might arise at several levels. Even in the strongest instance for him, that of theft of money, the case does not seem clear. One party may suggest that if \$25,000 is stolen, then using the Rothbard criterion \$50,000 must be returned, so that \$25,000 restitution is made and \$25,000 penalty is paid.

Thus, the criminal's rights would be violated to the same degree as the victim's. But someone else might well argue that what is relevant here as a mark of degree of rights violation is not the absolute amount of money taken, but the proportion of total assets taken. His reasoning might run something like this. If \$25,000 is 50% of a person's total assets, then stealing it from him violates his rights to a much greater degree than if you steal the same sum from a person with assets of \$2 million. Thus, in order really to make punishment proportional to crime you must state the penalty (although not the restitution) in terms of percentage of assets. Now one can imagine problems with this view for, according to such a view, stealing relatively small sums from a very rich man may be a good bet for a very poor man. But in Professor Rothbard's view, stealing small sums may be a good bet for a very rich man because the penalty is rather small to him if caught. The point is that I can see no objective criterion in the notion of degree of rights violation to imply a choice between these two options. The choice will simply reflect the interests and person relative values of whoever is taking one of the positions.

But clearly monetary cases are the easiest ones. There is no clear degree of rights violation built into assaults, murders, rapes, and kidnappings. One person may say that rape is worse than murder as a violation of rights so that, if murder is to be punished by death, then rape should be punished by daily torture followed by death. This is not an altogether unreasonable position. After all, the murder victim does not have to endure a perhaps humiliating physical and mental examination and does not have to live with memories which may threaten what should otherwise be one of the best parts of life. Nevertheless, someone else may hold that only murder is punishable by death, for only murder violates rights to the extent of removing life. But how is this to be resolved? What is to be counted as losing rights to the same degree as one took them away? The notion of degree of loss of rights is not clear enough to give an answer. If one says the answer is that the criminal must suffer the same thing, we are helped little, for in many cases he simply cannot suffer the same thing. No matter how you treat him, he will know he is in the hands of people carrying out a process of punishment. Thus, his experience remains incommensurable with the terror of being beaten by an assailant who, for all you know, intends to kill you or kidnap you or whatever.

Further, I have written all of this granting, for the most part, that the criterion of the *same* degree of loss of rights is obviously correct. But it is not. Someone might maintain, with just as good reason, a criterion of restitution plus double the loss of rights or three times the loss of rights. Again I can see no objective reason to choose one of these rather than another. There is just as much reason to say that a criminal should lose rights to twice the extent as his violation as there is to say he should lose them to the same extent.

I conclude that attempts to fit punishment to crime are in an important sense arbitrary. They are based on valuations which are at root person relative. What follows is that we have arrived at a point at which moral principles must be supplemented by the actual workings out of social life, but cannot provide a complete blueprint for the institutions involved.

From these considerations we also see the practical hopelessness both of Locke's imagined case in which each person has executive authority of the law of nature and of any case in which each individual is imagined actually to carry out punishments either for wrongs to anyone or for wrongs done only to himself.<sup>11</sup> For, while I have tried to show that there is available a general argument for the claim that violators of the principles of right may be punished, there is no general argument to fix a relationship between violation and a particular punishment. As a result, persons of good will might agree on what the principle of right said in a given case and agree that a violation had occurred, and even agree that punishment was due; yet they might still disagree as to the appropriate punishment. Thus, in a situation of *strictly individual enforcement of the principles of duty*, one would have an almost sure return to the war of all against all. Imagine how the case would have to work. A person appears at your home and announces that he has come to punish you for assaulting him. Suppose you had in fact punched him the night before and were willing to make amends. He announces the penalty as a \$5,000 fine to cover his costs and 50 lashes. You say the penalty far outweighs the crime and you won't submit to it. Perhaps one can imagine negotiating it out, *but* can one really imagine negotiation with a real criminal or a person prone to violence? Won't the criminal usually see the victim as *overly harsh in his punishment*? Won't the victim always feel the violator takes the crime with insufficient seriousness? Doesn't one really have here just a prescription for a way to get the war of each against each going again?

What we see from this is the fact that the necessity of punishment implies with particular clarity the necessity of a legal system—or some analog thereof—if a society of any complexity is to function. Such a legal system, however, need *not* require the existence of a state. It may be argued that a competent group of private agents could do the job better. But if the *practice of punishment is to work (as is essential to the argument for right itself)*, one needs a clear statement of what activities are to be punished and what punishments are to be levied as well as third parties to judge the facts and the application of the rules to those facts. One also needs persons with enough power to carry decisions out. In short one needs a legal system.<sup>12</sup> Sadly enough, moral theory cannot show us all the ways in which that system should work. It can show us the need for the system. It can show us the principle of duty which the system should enforce *and be bound by*. But we must await the workings out of particular societies in light of the *personal values of the participants in order to fill in such crucial details as*

penalties and procedures. Moral theory sets the boundary of the principles of right around the ways in which such problems may be legitimately worked out, but it cannot give all the answers.

This may seem a terribly unhappy and unsatisfying answer to those who hope that moral theory can settle all the hard questions in a neat and simple way. I find, however, that this result is interesting and challenging. It takes seriously the many different values and circumstances people may confront. I have argued that, for reasons going deep into the nature of human beings, principles of rights are needed and that they must be enforced by a practice of punishment. But the details of that punishment (like the details of the exact practices giving concrete expression to the principles of right) may appropriately differ from circumstance to circumstance. I can imagine in a small group an arrangement under which each person serves as his own law enforcement agency. Perhaps each person would post in a public place a list of the penalties he would levy for particular actions. I can imagine a much more plausible situation in which offenses and penalties are publicly announced by competing judicial or protection companies. I would expect that such companies would tend in any one area to set about the same level of penalty. It would be a competitive disadvantage to set penalties much lower than your competition since customers would view patronizing a lenient agency as an invitation to be picked out as a better prospect for robbery or whatever. Thus, penalties would tend toward the highest level set by any agency with any significant share of the market. (I am assuming that costs of extremely harsh penalties are not significantly greater than those for lesser penalties. An execution, while expensive when carried out by current states, is potentially quite an inexpensive proceeding.) But harshness would also find an upper limit in the amount of penalty customers could really bear to think of having exacted. Very few people could enjoy the prospect of having children executed for stealing apples. Thus, one would expect to see emerging, even in a strictly competitive agency situation, a fairly standard set of penalties which resulted by morally permissible steps from individual choices based on person relative values. Of course, one might more directly obtain a similar result with a dominant protection agency if one developed, or from a cooperatively formed association including most of a population, or, especially, from a contractually formed state.

What I take all of this to show is that the fact that moral theory cannot specify uniquely appropriate degrees of punishment is not nearly so awful as some might think. It does not leave us all likely to live in a state of barbaric punishments. It does mean that the individuals living in any location need to work out a way to have publicly announced punishments for determinant crimes, but surely we all thought that was the case to begin with. Thus, what seems awful to some at first glance really is just common sense and is perfectly compatible with full respect for individual rights.

### Implications for Current Practice

Finally and briefly, I turn to the question of what implication these views on the morality of punishment may have, not for constructing social ideals, but for the critique and improvement of the society in which we live. First, we must remember the fact that when law permits and forbids the wrong things, i.e., when the precepts of law are not in accord with the principles of right, *there is much punishing done which many people perceive to be unjust*. The distaste for this unjust punishment will tend to rub off on just punishment. Further, when many people are in doubt or confusion about the appropriateness of many laws and when there is strident opposition even to laws justifiable by rational principles of right, a similar loss of faith in punishment itself is likely.

Second, one of the worst single features of our current criminal law is the separation of the questions of punishment for the criminal and restitution for the victim. While these are philosophically separable claims, there is no reason they cannot be combined in some way so as to insure greater attention to the victim's right to restitution.

Third, and most importantly, the present system of "criminal justice" simply does not offer the protection which is its justification for existence. We are, without doubt, suffering from what James Buchanan has called "The Samaritan's Dilemma."<sup>13</sup> Too many modern men find it just too painful to consider punishment of an actual offender which would be sufficient to prevent crime's being carried out. If this is true, then perhaps the most crucial need is to make clearly and carefully the case for the moral permissibility of punishment. *Perhaps an example of what we need to do is to rehabilitate the supposedly outmoded and barbaric concepts of revenge and righteous indignation.*<sup>14</sup> There is nothing wrong with seeking revenge, in and of itself. As with any other natural inclination, its uninformed use may be disastrous. But one important role played by punishment is the channeling of the desire for revenge into paths not destructive of peace. In our times, however, desire for revenge and the feeling of rightful indignation or outrage at the commission of crime are usually left aside as barbaric and uncivilized. Paradoxically, civil peace and order are in great danger now, *partly because the reduction in these supposedly barbaric impulses has removed a chief support from the practice of punishment which makes civilization and order possible*. Many similar points could be made with respect to attitudes toward police and other issues.

Especially noteworthy is the question of what sorts of punishments are acceptable. Surely imprisonment is one of the worst choices which could be made. We need to raise a whole new consideration of such punishments as transportation or establishment of a coventry as well as of execution and forced labor to reimburse victims.<sup>15</sup> Such a catalogue sounds harsh. Much

harsher still is the fate to which many good and decent people have already been consigned by the bogus humanitarianism which makes effective punishment almost impossible in our times. At the root of the problem lies, I think, a lack of moral self-confidence. Too many people, especially among the leaders of opinion, simply feel too much guilt and anxiety to be able confidently to assert their rights to security of their persons and possessions. They lack the sureness of their own worth which would allow them to demand punishment for those who rob them. Instead they excuse the offenders and blame "society," i.e., everyone and thereby no one.<sup>16</sup> With the most conspicuous persons speaking thus, the cries for protection uttered by ordinary men and women go unheeded. I know how to present a rational moral case for the individualist and for punishment as an integral part of the defense of individual rights. What I do not know how to do is to win away those powerful members of our society whose morality is a concoction of romantic self-hatred. Unfortunately until that is done, I see little prospect for improvement in our present lamentable condition.<sup>17</sup>

### NOTES

1. I recently completed, and am now seeking a publisher for, a manuscript entitled "Rational Individualism: A Moral Theory." In that manuscript I provide both an account of the nature of moral theory and the principles of an individualist moral theory. In the following remarks on punishment I have tried to abstract somewhat from the content of my particular moral theory so as to make some points about punishment which might be of some interest even to those who would not accept my overall position. Nonetheless, in order to explain my view of the task to be undertaken, I do draw, in what follows, on parts of my own views about moral theory. I would especially point out that I assume moral theory to be divided into the three traditional parts: value, right and moral worth. More importantly, I assume here what I defend in the manuscript, namely, that individuals are usually responsible for their actions.
2. I say "almost all" here because it is possible to imagine a person whose greatest desire is to live in the Hobbesian war of each against each or to act in ways only possible in that war. Such a person my argument does not convince. But since it does apply to almost everyone, this possible exception is of little importance. With him all the rest of us will remain in the first stage of a state of nature, and we may deal with him accordingly. This answer departs from Kantian necessity and universality, but I take that to be a virtue rather than a defect. I defend that judgment at length in the manuscript already cited. In the remainder of this paper I simply ignore this exception for simplicity and refer to "all" rather than "almost all."
3. Since I develop here no exact theory of right, I shall simply use the expressions "principle of right" or "principles of right" to refer to the role such a principle would play. Thus, the expression "principle of right" might take, for instance, the principles I have argued for in "Rational Individualism" or those of some other view.
4. I use the term "harm" here although I am aware of the difficulties attached to it. What will count as a harm will differ depending upon the actual content of a principle of right. Thus, since I am not using here a completely specified theory of right, I leave the exact specification of harms open as well. In any case the point I make here is a general one which holds however one specifies harms.

5. See, for example, Murray N. Rothbard, "Punishment and Proportionality," in Randy E. Barnett and John Hagel, III, eds., *Assessing the Criminal* (Cambridge, Mass.: Ballinger, 1977), pp. 259-70; or Rothbard, *For A New Liberty*, rev. ed. (New York: Collier Books, 1978), pp. 87-88.
6. John Locke, *Second Treatise*, chap. II, sec. 7.
7. This is my primary disagreement with Randy Barnett's proposal that a restitution procedure can provide a new paradigm of punishment. I agree that restitution to a victim is important and is overlooked by current practice. I can even agree that forced labor to earn compensation for a victim may at times be a reasonable kind of punishment. I cannot agree, however, that it is the only appropriate punishment both for the reasons stated and for others in the following section. See Randy E. Barnett, "Restitution: A New Paradigm of Criminal Justice," in Barnett and Hagel, *Assessing the Criminal*, pp. 349-83. Mr. Barnett was kind enough to send me extensive criticism of views I expressed on punishment in an earlier paper. He will think, I fear, that I have learned less than I should from his criticism.
8. On the issue of tort and crime, see Richard A. Epstein, "Crime and Tort: Old Wine in Old Bottles," in Barnett and Hagel, *Assessing the Criminal*, pp. 231-57. In general, I think the position I offer agrees with Epstein here, but I have elaborated, at the moral level, what he calls simply "moral fault." As a result, my position may go beyond what he is willing to defend.
9. For a very clear example, see Rothbard, "Punishment and Proportionality." See also Locke, *Second Treatise*, chap. II, sec. 8. For a very interesting, related discussion, see Edmund L. Pincoffs, "Are Questions of Dessert Decidable?" in J. B. Cederblom and William L. Blizek, eds., *Justice and Punishment* (Cambridge, Mass.: Ballinger, 1977), p. 75.
10. Rothbard, "Punishment and Proportionality," p. 259.
11. See Locke, *Second Treatise*, chap. II, sec. 8.
12. In effect, I am urging that Locke was right about the inconveniences of the state of nature. See, *Second Treatise*, chap. IX. In making this claim, however, I wish to admit only the need for a legal system and to leave open whether it is provided by anything reasonably to be called a state or by a free market on an anarchist model. That issue need not be settled for the point I am making here.
13. James M. Buchanan, "The Samaritan's Dilemma," in *Freedom in Constitutional Contract* (College Station, Texas: Texas A & M University Press, 1977), pp. 169-80. See also, Buchanan's book *The Limits of Liberty* (Chicago: University of Chicago Press, 1975), chap. 8. While he approaches it from a different disciplinary perspective, Buchanan's remarks on punishment are very much in the same spirit as my own.
14. Murray Rothbard is almost the only other person from the academic world whom I have heard speak of revenge in the same vein.
15. On transportation of criminals, see Leonard P. Liggio, "The Transportation of Criminals: A Brief Political-Economic History," in Barnett and Hagel, *Assessing the Criminal*, pp. 273-94.
16. As pointed out earlier, I assume in this paper that individuals are usually responsible for their actions.
17. I wish to thank The Center for the Study of Public Choice of Virginia Polytechnic Institute and State University for providing me with unusually pleasant and congenial surroundings during the writing of this paper.