NOTE ON THE ARTICLES: "WHY DO WE PUNISH? THE CASE FOR RETRIBUTIVE JUSTICE"[1] AND "THE JUSTIFICATION OF PUNISHMENT"[2]

This note is a commentary on the articles cited above and an expression of views on their subject matter.

I. NATURE OF QUESTION

Both articles deal at length with the justification of punishment inflicted by society upon some of its members through its criminal justice system. The nature of the punishment under consideration is not described; it presumably includes at least those kinds of punishment which our own society inflicts, such as imprisonment and financial penalties, and it may go on to include inflicting pain and killing.

I think that Professor Weiler is right when he says that the debate about the criminal justice system rarely addresses itself to the most fundamental question. He first states the question as, "Why do we punish at all?"[3] but then quotes Tolstoy as asking the question, "By what right do some people punish others?" I think that the second question clearly must be addressed at some point.

Even if we decide to examine the reasons for society's behaviour rather than the justification for it, I have some doubt that the first question is properly, "Why do we punish at all?" That question might be taken to mean: "Why do we choose to impose punishment in individual cases?" There is, I think, an even earlier question: "Why do we establish a system of laws and institutions, one of the functions of which is to inflict punishment?" It seems to me that the answer to the latter question is clearly that society maintains the system in order to protect itself and its members, and not for purposes of retribution. I suggest that if the system were not thought necessary for protection, society would not be prepared to pay the cost of its upkeep. If there are at the present time calls for more police and harsher punishments, I submit that that is not because of an increase in society's moral disapproval of wrongdoing but rather because some members of society feel themselves to be in greater need of protection. Here I seem to be in disagreement with Mr. Cavanaugh, who finds that "retribution is probably the sole view most commonly adhered to by the general public or the 'reasonable man' "[4] and that it is a view which is widespread among leaders in the judiciary and in government. I do not doubt that the human beings who react to given situations may be moved by revulsion to inflict punishment by way of retribution; one who is not affected by the viciousness of an act would not be human.

1. J.M.P. Weiler, "Why do we Punish? The Case for Retributive Justice" (1978) 12 U.B.C.L. Rev. 295.
2. Cavanaugh, "The Justification of Punishment" (1978) 16 Alta. L. Rev. 43.
3. Weiler, *supra* n. 1 at 295.
4. Cavanaugh, *supra* n. 2 at 47.

But I do suggest that the criminal justice system as it exists in Canada today is a reflection of the desire of Canadians for the protection of themselves and their society rather than a reflection of a desire to express a moral disapproval of wrongdoing.

Professor Weiler suggests that in answering the questions which he poses, a choice must be made between a "retributionist" theory and a "utilitarian" theory. He first describes the "retributionist" view as being 'that punishment of the morally derelict is its own justification for it is right for the wicked to be punished".[5] That seems to me to be a statement of a fundamental proposition and one which correctly embodies the idea of retribution, unless retribution is a synonym for revenge. However, he appears to view the purpose of those who hold the "utilitarian" view as being the reduction of "antisocial behaviour." It does not seem to me that the latter description goes deep enough. I think that the reduction of certain kinds of harmful behaviour is an intermediate objective but that the end is the protection of society and its members against harmful behaviour, and I will debate the issues from that point of view.

Mr. Cavanaugh begins by posing three questions: "Has society a right to pass judgment at all in matters of morals? Should there be a public morality, or are morals always a matter for private judgment? If society has a right to judge, does it have a right to enforce what it may perceive as the commonly held standard?"[6] The first two questions are somewhat abstract unless it is implicit in them that the answers will in some way influence society's conduct, and in my view they really need not be addressed. In the context of the article the third does not seem to me necessarily to raise retribution as the justification of punishment, but rather the question of society's right to enforce morals in order to preserve itself, which I think is a different question. Mr. Cavanaugh later, however, describes retribution as "the just consequence of [the criminal's] anti-moral behaviour,"[7] which appears to embody the idea of punishment of moral dereliction.

Mr. Cavanaugh also deals with a view which "is best described as 'expiatory' ": "punishment is a purging of guilt for the offender, or is a 'payment of his debt to society' ".[8] To the extent that "this school of thought tends to ease the burden of guilt, and is responsible for the notion that, once punishment is inflicted, an offender's crimes shall not be held against him"[9] it may be thought to be of value. It does not seem to me, however, that the provision of an opportunity of expiation of itself, disassociated from the retributive idea of the rightness of punishing wrong, can effectively be argued to be a sufficient justification for the maintenance of a punitive legal system, and I will not deal with it further.

I think then that the true questions to be addressed are: "Why should we have a system of criminal justice?" and "By what right do some people punish others?"

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5. Weiler, *supra* n. 1 at 295-6.
6. Cavanaugh, *supra* n. 2 at 43.
7. Jones, *Crime and the Penal System* at 136 as quoted by Cavanaugh, *supra* n. 2 at 47.
8. *Id.*
9. *Id.*

II. RETRIBUTION AS A JUSTIFICATION FOR PUNISHMENT

I do not find it too easy to follow the idea of "retribution" in Professor Weiler's article. It starts with the description which I have already quoted and which I would have thought is indeed what is meant by 'retributionism": "The view that punishment of the morally derelict is its own justification for it is right for the wicked to be punished".[10] At a later point in the paper there is a somewhat different description. In Professor Weiler's view, the retributivist conceives of the criminal law as consisting essentially "of a set of rules which define and protect a zone of freedom for each member of society".[11] In this conception, one who violates these rules has invaded that zone and has gained an unfair advantage over the law-abiding members of society who have exercised self-restraint; he has become "unjustly enriched"[12] The purpose of punishment is to restore the equilibrium of benefits and burdens by exacting the debt which the wrongdoer owes and to take away the "illegitimate windfall profit"[13] from the offender. At this point, there seems to me to have been introduced the idea of protection of the "zone of freedom"[14] and, if that is so, it seems to me that "retributionism" has moved away from punishment of the wicked as justification and towards achievement of a concrete end in the interest of society. Indeed, at one point Professor Weiler justifies the punishment of the violators of the zones of freedom by saying that "it is only reasonable that those who exercise self-restraint will be provided with some assurance that they are not assuming burdens which others can renounce with impunity, else the fabric of social life will dissipate with the decline of the sense of mutual trust".[15] Here it seems that the preservation of the "fabric of social life" has become an objective, and that the objective is no longer merely the punishment of the moral derelict for the sake of punishment. Whether or not he means that, I must say that I do not agree with a theory which suggests that the reason for the punishment of, for example, rape, is that the rapist has received a profit which the rest of us have foregone: I prefer a theory that suggests that rape should be punished, if at all, because the prospect and actuality of punishment will result in a lesser number of rapes than would occur if there were no system of punishment, and that society will accordingly be better protected.

I also have difficulties with the development of the idea of retribution in Mr. Cavanaugh's article. It starts with the question of the enforcement of morals, the justification for which is that the "criminal law exists to protect society, not only by protecting the individual and his property from harm, but also by protecting the community of moral and political precepts which define the society",[16] and that "some

10. Weiler, *supra* n. 1 at 295-6.
11. Weiler, *supra*, n. 1 at 312.
12. *Id.*
13. Weiler, *supra*. n. 1 at 315.
14. *Id.* at 312.
15. *Id.* at 314.
16. Cavanaugh, *supra* n. 2 at 44.

such morality is necessary to the society's existence"; here he seems to be saying that morals should be enforced to preserve society as we know it, and not merely because a breach of morals is wrong. Later, he refers to retribution as "that which is deserved"[17] and the "just consequence of . . . anti-moral behaviour," and quotes Goodhart[18] to the effect that without retribution in punishment as an expression of the community's disapproval of crime, the disapproval may disappear; apart from this he does not give a justification for punishment solely based on retribution, unless it is to be found in his references to the degree of popular, judicial and governmental support for retribution.

Both articles seem to me to require comment upon the idea that "punishment of the morally derelict is its own justification for it is right for the wicked to be punished".[19] It seems to me that those who hold this view would, before the act, identify and prohibit under threat of punishment certain types of behaviour which are thought to be wrong, and would not require any other criterion to be satisfied, such as the protection of members of society from the effects of that conduct. They would then go on, after the act, to prescribe punishment for the reason that the conduct was wrong, and not because conduct of that kind tends to have harmful effects. It seems to me that that is the only kind of meaning that can be attached to language of this kind.

It appears to me to be quite wrong for me to say to another human being that he is morally deserving of punishment, and that I will therefore put him into a cage. Nor do I see that that situation is changed if I multiply myself into a judge and jury, a parliament, or a "society"; in this respect, what would be wrong for me to do myself would be equally wrong for me to do in conjunction with others. I am myself a sinner, and so are the other members of society, and we do not have the divine attributes necessary to entitle us to punish sin because it is sin. For it is a terrible thing to put a human being into a cage, and it is a terrible thing to set oneself up as a moral arbiter with the right to determine whose sin should be punished because it is wrong, and whose sin should not.

Feelings of retribution do enter into some individual laws, and feelings of retribution do enter into specific cases of punishment, but that is because those who deal with the specific cases are human beings who are moved, like the rest of us, by mixtures of motives; if their feelings were always kept in strictly separated compartments, they would not be human. But that is not to say that these are the feelings which should be recognized as the appropriate foundations for decisions about systems of criminal law and punishment.

This discussion has had little relevance to the great field of regulatory offences. It is difficult to see how the theory of retribution

17. This and the following phrase Jones, *supra*. n. 7 at 136 as quoted by Cavanaugh n. 2 at 47.

18. Goodhart, *English Law and the Moral Law*, 53 as quoted by Cavanaugh n. 2 at 47.

19. Leiler, *supra* n. 1 at 295.

applies, for example, to my failure to deposit 25 cents in a parking meter, or even to my inadvertently packing an open liquor bottle in my car with no intention of drinking it. It is doubtful that most people would consider these as moral derelictions deserving of punishment. Unless they are to be considered instances in which punishment is not justified, however, it seems that some theory of deterrence must be called in aid. The only adequate justification of punishment in such cases is that conduct must be discouraged if in general it is of a kind which is thought to be socially harmful, whether or not an individual example of that conduct has or may reasonably be expected to have any adverse effects.

III. PROTECTION OF SOCIETY AS JUSTIFICATION FOR PUNISHMENT

Professor Weiler appears to recognize only two answers to the fundamental questions about the reasons for justification of punishment, the "retributionist" answer and the "utilitarian" answer. The latter term is used with reference only to Benthamite utilitarianism, of which the behavioralist school of rehabilitation is said to be a variant. I do not think that he is right in doing so. It is possible to hold the view that the criminal justice system can be justified only if it protects society, without subscribing to the view that a system of punishment is justified if it increases pleasure and reduces pain and does not take other values into consideration.

I think that I am morally justified in inflicting violence upon a person if that violence is necessary to protect me or another person from sufficiently serious harm, and if I use only the amount of violence necessary for that protection. There may be some who abhor violence to the point of saying that even then violence is not permissible and I sympathize with them; but the moral justification of self-defence is sufficient for most of us and represents as high a moral standard as mankind generally can reasonably be expected to strive to attain. Similarly, a society is morally justified in inflicting violence in order to protect itself, i.e., the individuals who compose it, from harm. I think that it is also morally justified, and indeed morally required, to say in advance what the acts are for which it will inflict punishment, and the range of punishments which it will inflict; that is not treating a person as an object as is sometimes said, but as a rational being responsible for his own acts, and the advance statement will lose its force if it is not made good by the infliction of the threatened punishment. Obviously, there are great and difficult questions to be answered about the nature and extent of the violence which can morally be inflicted in order to guard against those harms, and about special considerations arising from the particular circumstances and the personality of the person who is to be subjected to the violent punishment. The ways of answering those questions cannot be gone into here; it is sufficient to say there is upon society a heavy moral burden of continuous inquiry into them, while recognizing also that a society may well stand morally condemned if it does not do what it can to order itself in such a way that its defence justifies the infliction of punishment.

Mr. Cavanaugh points out that punishment based on deterrence is based on the assumption that people, to some degree at least, are hedonistic, i.e., that they are rational and will seek pleasure and avoid pain, and will take into account the possibility of punishment, even if only as one factor.[20] He also points out the lack of empirical evidence about the effects of that possibility.[21] He appears to agree, however, that, along with the other aims which he discusses, deterrence is a legitimate aim or justification of punishment.

Mr. Cavanaugh refers to the attack by C. S. Lewis upon rehabilitation or deterrence as a justification for what is intended as, or may have the effect of, punishment. Lewis' view is that punishment for these purposes tacitly removes the criminal "from the sphere of justice altogether, instead of a person, a subject of rights, we now have a mere object, a patient, a 'case' ".[22] This is, I submit, not so. To prohibit an act upon pain of punishment, and then to inflict the punishment upon performance of the act, may be a course of conduct which is indefensible for other reasons, but it treats the actor and others as rational human beings whose conduct will be affected by it. To provide a means of rehabilitation in order to reduce the pressures urging a repetition of prohibited conduct is not bad in itself, though it may lead to excesses.

To the question, "Why do we punish at all?", or the question, "Why do we establish a system of laws and institutions one of the functions of which is to inflict punishment?" my reply would be: "To protect society and its individual members against harm." To the question, "By what right do some people punish others?" my answer would be: "By the right, and by the strictly limited right only, of self-defence."

IV. LIMITATIONS UPON PUNISHMENT

The purpose of punishment, then, in my view, is the protection of society and its members from harm. The next question is whether the protection of society and its members from harm justifies *any* sanctions which may help to achieve that purpose, or whether there are limitations which, for other reasons, must be placed upon the sanctions which are permissible. Before doing that, it will help to mention what are usually said to be the purposes of punishment, which are referred to in both articles.

The purposes are retribution, deterrence, and rehabilitation. At the level of the means which may be adopted to minimize harmful behaviour, there is an argument for a form of retribution, namely, that punishment by law is a substitute for an otherwise inevitable system of private revenge and protects those who would voluntarily or involuntarily be caught up in such a system. There is an argument for deterrence, and, indeed, deterrence is the major immediate purpose

20. Cavanaugh, *supra* n. 2 at 47.
21. *Id.* at 50.
22. *Id.* at 49.

of the criminal justice system; it may not be attractive to say to members of society that if they misbehave, the naked force of society will be marshalled in order to inflict violence upon them, but it is less unattractive than the situation which would exist if the legal system did not deter. Rehabilitation has a place, at least for those who want to make their ways in society without coming into conflict with the legal system. It may be that rehabilitation is not as effective as some have thought, and it may be that as Professor Weiler says, the pursuit of rehabilitation has created abuses in the form of indeterminate sentences and unbridled discretions. If so, rehabilitative systems should be re-examined to see whether the abuses can be done away with and substantial benefits obtained from a reformed system. The failure of the system of rehabilitation, if it has failed, does not necessarily mean that a reformed system would not succeed, and even if it should be concluded that no system of rehabilitation should be maintained, that conclusion would have no effect on the basic idea that the only justification for the criminal justice system is the protection of society.

I return to the question: Does the end of protecting society justify any means, however frightful? The answer of a civilized society must be no, and the limits which it recognizes may be a significant test of the degree of civilization of a society. While our own society probably would not be judged to be among the most barbarous, it is doubtful that it would be judged to be among the most civilized.

We recognize that at some point the protection of society does not justify the effect of a harsh punishment upon the individual. We recognize that extenuating circumstances such as provocation or the desire to protect someone should reduce the severity of punishment. We recognize a difference between a murder committed in the heat of the moment and one which is coldly premeditated. We recognize that some kinds of wrongdoers such as children and insane persons should be punished less or not at all. We recognize that in general there should be some proportion between the perceived seriousness of the crime and the likely effect of punishment upon the person who is punished. These differences in treatment may be taken (and Mr. Cavanaugh takes them) to be evidence that punishment is apportioned to the outrage inspired by the offense and is therefore based upon retribution, but I do not think that that is or should be so. Some limitations are there because going beyond them would not protect society. Some are imposed by ideas of fairness. Others are there simply because there are limits to the horrors we can bring ourselves to inflict upon other people. That is to say, other values impose limitations upon what society can rightfully do, or will do, in order to protect itself against the harmful acts of individual members of society. That is different from saying that the quantity of punishment is or should be that which matches the quantity of wickedness in a wicked act; if outrage sometimes increases punishment it is because outrage affects judgment.

V. SUMMARY

My views may be summarized as follows:

1. Canadian society is entitled, within limits, to protect itself and its members against some kinds of harmful conduct. In order to do so, it has established systems of criminal justice.
2. Canadian society should not, and normally does not, inflict punishment upon an individual merely because that individual deserves to be punished. Retribution is not enough.
3. Punishment should be, and normally is, part of a system designed for the protection of society through the reduction of some kinds of harmful conduct. Laws based on moral outrage, and specific punishments based on moral outrage, are wrong and aberrant.
4. Canadian society should, and normally does, recognize limitations imposed by other values on the severity of the punishments which it inflicts.

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