PUNISHMENT AS ASSURANCE

By MAX ATKINSON *

The aim of this paper is to expose an extra dimension to the traditional idea of punishment as a deterrent, and to suggest how this addition may have a bearing on the assessment of some kinds of arguments raised against utilitarian theories of punishment.

In the past it has been the practice of law teachers to distinguish two kinds of deterrence, the prevention of the offender and the deterrence by fear of himself and others. Contemporary law teachers may add a reference to the further deterrence achieved by the way punishment helps maintain a critical attitude to the conduct in question. But even with this latter addition such an account will understandably overlook a much more pervasive if less visible kind of deterrence, and this is the general deterrence arising out of a voluntary acceptance of the system of penal restraints as an authoritative system, by the law-abiding majority. For reflection on what is characteristic to the standard case of compliance with the requirements of penal laws suggests that the model is neither the classical one of temptation constrained by fear, nor the more modern idea of temptation defeated by a regard for the values pursued by the prohibition, a regard conditioned and 'kept up' by the punishment. The reality seems more humdrum and would be better described as a bland acceptance of a network of restraints into which the present one fits. Any particular restraint might be effective at any particular time by reason of the advantage it promises, the harm its breach threatens, or the moral force it might exert; but particular restraints also work in a way which is not explained by these features and can only be satisfactorily explained in terms of an idea of acceptance of the authority of the system they form a part of.

This phenomenon of acceptance of a system of rules as authoritative has formed a major part of Professor H. L. A. Hart's refutation of Austin's narrow conception of law as a matter of commands backed by sanctions.[1] His imaginative reconstruction has given us an account of the related concepts of obligation, validity and authority which are scarcely likely to be improved upon for a coherent and intelligible presentation of the positivist theory of law. Nevertheless, to introduce this vast idea from the world of general legal and political theory into the context of arguments for the justification of punishment may bring immediate objections. One could argue, for instance, that it is hardly

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1 *The Concept of Law.*

a relevant idea of deterrence at all because deterrence is only applicable to those who don't accept the system, or to those who do accept the system only in reference to those occasions when they might wish to make an exception. But the connection between this view of deterrence and punishment is only a short step further than the connection between punishment and deterrence in the narrower sense of prevention and fear. For this larger deterrence is predicated on a belief in a degree of efficacy of deterrence in the narrower sense, which belief would normally not be sustained unless this narrower enforcement and a manifest intention to secure it actually prevailed. So on this view punishment is seen as important not because it deters by fear or prevention, but because the law-abiding citizen can see that necessary restraints are secured by a system of relatively fearful consequences. The other ingredients of this idea of deterrence can now be seen; the acceptance of the system as authoritative requires certain restraining rules without which social life would not be possible — a Hart/Hobbes 'minimum-content natural law' view — together with the use of punishment to make these restraining rules effective to the degree necessary for a minimum confidence.

This view of deterrence as lying less in the threat posed by punishment to the disobedient than in the guarantee that such a threat represents to the obedient, has been largely neglected in orthodox expositions of utilitarian punishment theories. This is at least partly because it introduces inherently vague questions about the importance of one among many competing factors which would present social life as possible. But a better explanation comes from considering the scale on which this theory operates. For one must distinguish an argument that the absence of punitive sanction from any particular prohibition would destroy its effectiveness as an 'internal' restraint. Depending upon all sorts of circumstances this may or may not be the case; a sense of social responsibility, religious views or apathy may suffice to keep it up. But the thrust of the present theory is to the conditions for maintaining a system of social life in which any claim for self-restraint would be a meaningful claim. Moreover, although such a theory is about human behaviour and supposes the disintegration of social life as the only rational choice where essential restraints are not enforced, its truth and importance are consistent with a general ignorance in the community of the part played by punishment as a condition of social life. And it is perhaps just because claims for the rightness of punishment are put by social beings who are already fully committed to, and thus hardly perceptive of, the social organization, that this rock-bottom view of punishment as a foundation-stone of social life, is so easily passed over.

Nevertheless, such a vast Hobbesian kind of generalization may be objected to on its dogmatic choice from amongst competing claims about the conditions needed to secure a minimum self-restraint. A skeptic might point to a society in which a vigorous monopoly of propaganda could produce an 'honour-system' so that sufficient motive for compliance with restraints could be stimulated without the guarantee

represented by punishment. The reply might be made that this merely locates the punishment elsewhere in the system, *e.g.*, to enforce the monopoly, or to support the forbearance and respect among those who control the propaganda. But although the underlying assumptions here are clearly crucial, it seems unprofitable to try to counter this form of skepticism by further argument. Instead, a compromise of sorts might be offered which would make some allowance for this weakness. The compromise offers a stronger case by putting a much weaker claim. This is the claim that it is by reference to this 'authoritative' basis of restraint, whatever the conditions for securing it might be, that certain views on punishment may be best understood and assessed. This commits one to asserting that many people would at least find it natural to acknowledge this aspect of punishment as vital, even if in the result they could be proved wrong by some conclusive facts about human nature, and that some of these have developed theoretical positions on punishment which depend on that aspect. I shall have to leave this claim to hover over the remainder of this paper, and to be satisfied indirectly by some examples of punishment theories and assertions in the concluding pages.

An objection might now be put that what has been said might well be conceded, but that it has little if any relevance to the assessment of theories of punishment once a basic social system exists. Theories of punishment should concern the day-to-day operations of a system of government, and the present idea of deterrence drops out of the picture once this minimum assurance is constituted by rendering violence, theft and deception punishable. However, although the first thrust of the theory is to the conditions necessary for social life, it has an analogical application to practices within social life. For if we take — what is admittedly a loaded example — a restraint such that one person's breach of its nature affects the burden on others, *e.g.*, one person's not paying his income tax, then any proposal that tax-paying be henceforth a matter of honour would soon raise the question why one should jeopardise one's own financial security by contributing. In this case the most rational decision of each person may well be the one that leads to the result all would wish to avoid, the failure of the revenue system. But B concludes there is little point in parting with more of his money where C is not forced to contribute also; A reaches the same conclusion, not just because he shares B's view of C, but because he anticipates B's decision. In other words, the failure to punish for failure to co-operate leads to a breakdown in the taxing system in a way which is not satisfactorily explained by talking *only* about the fear of punishment. For a distinct dimension of punishment theory is invoked when one says that the failure to punish resulted in a 'loss of authority' in the practice, even if it is also the case that the maintenance of this authority depended in a way on the fact that people feared punishment.

Neither can this deterrent idea be accounted for along 'maintenance of standards' lines. For it was not the case that the punishment pro-

moted the belief that the policy of the practice ought to be supported as something important, but that the existence of punishment gave grounds for assurance that one would not be seriously prejudiced by acting on such a belief. To the extent that punishment did 'condition' a belief in the duty to pay tax, such a belief is likely to continue, at least for a while, and perhaps cause some conflict with those who now sense the dangers of acting on it. Although this restraint then is 'internal' in the sense that it is not brought about directly by force or fear, it is quite different from the idea of an internal restraint arising from the conditioning effect that punishment of conduct may have on moral attitudes to it. The difference is between the fact of punishment constituting a reason for a belief and punishment itself influencing a belief.

To take a more standard case of crime: If a moratorium were held on prosecutions for stealing for a given future period, it would at some stage become a rational policy for protecting one's possessions that one ought also to accumulate those of others. The theory being that there is more security in having a warehouse full of T.V. sets and Volkswagens to replace those one is likely to lose. It is enough merely to suggest this fantasy in order to make the point that compliance with the non-stealing rule in the normal case where stealing is punished, is not sufficiently explained on the grounds that punishment restrains by fear or by exerting a moral pressure to supplement normal moral attitudes. The practice of not stealing rests also on its acceptance as a mutually beneficial if sometimes inconvenient arrangement. Where failure to punish is seen as a threat to the value of the arrangement, then punishment is acknowledged to be a deterrent by way of assurance.

Apart from paying taxes and not stealing, there are innumerable examples of punishment practices where the policy behind the practice rests its value at least in part upon a reciprocity of restraint, notwithstanding the many examples, such as non-harmful sexual offences and wanton damage, where this idea would seem inapplicable. However, some modification is called for in accounting for this idea of punishment as applied to particular practices; it is not exactly the same idea as applied to the possibility of social life that we first began with. People accept restraints sometimes because they perceive the advantages they promise and sometimes because they treat them as authoritative. What seems to distinguish an 'authoritative' acceptance is that the appreciation of these advantages is never carried out and, if it is thought relevant, is delegated to someone else whose opinion (or whose acceptance of somebody else's authority) is accepted. Ultimately, the explanation may be given that one has appreciated the values of a system which has set up various people to provide these opinions. These two ideas of acceptance, which are likely to be combined in the attitude one has towards a conventional practice, actually produce two versions of this idea of punishment as a deterrent. For it is possible to distinguish the claim that the institution could not be authoritative for A without the general support it draws from B, C, D *etc.* (a support itself dependent upon

the use of punishment), from the claim that the institution would not be acceptable to A unless he could see that the use of punishment would patch up certain holes. The original claim that social life *per se* required a minimum use of punishment is like the first of these claims, whereas the claim that particular practices require a minimum use of punishment is likely to be an amalgam of both, depending on the extent to which one's commitment relies upon an appreciation of the practice or an acceptance of it as authoritative; where A appreciates the practice himself, then the punishment is a deterrent as a matter of direct assurance; but otherwise it may be a deterrent because the assurance it gives directly to B, C, D *etc.*, attracts a degree of support without which the practice could not survive as an institution that could exert any authority over A. So punishment can be said to be both a reason for restraint and a condition of its feasibility and in both cases it can be said to be a deterrent in virtue of the assurance it provides.

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Up till now I have attempted to develop an idea of deterrence which would see fear, prevention and 'education' as merely the tip of the iceberg of the restraint that punishment effects. It remains to consider how useful this emphasis may be in the context of punishment theory.

1. Reference to this idea may well show the sense of some otherwise puzzling remarks about the nature and purposes of punishment. Sir David Ross[2] has stressed the importance of punishment as a 'promise' to the law-abiding citizens; there is an 'undertaking' which must be honoured. These words suggest retributive sentiments, akin to the views of Hegel, Mabbott and others, that the offender has a 'right' to be punished. One might speculate, apropos Rawls,[3] that Ross is looking at punishment from the 'administrative' level, adopting the view of a judge or official whose concern is to carry out a given policy. But it is not necessary to resort to this possibility to give point to the remarks, for it is perfectly intelligible to claim that laws imply a promise to their beneficiaries on the analysis of punishment given. The allegiance of the law-abiding citizen both demands and assumes a minimum protection against those who wish to live with him without participating in the system of mutual restraints. Where punishment is seen as an assurance without which such allegiance would not be secured, it makes sense to picture this punishment as a matter of obligation owed to those who have committed themselves to the system.
2. This idea may also be relevant in the assessment of claims made by theories of punishment. Thus it is sometimes assumed that because a rational weighing up of pros and cons, punishment versus advantages versus moral principles *etc.*, is a largely fictional model of the criminal law in action, that the only adequate explanation of compliance must be in terms of some kind of psychological determinism.

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2 *The Right and the Good.*
3 'Two Concepts of Rules', (1955) 64 *Philosophical Review*, 3.

Herbert Packer[4] develops arguments along these lines and suggests that the gap in traditional deterrent theories, which he conceives as a large one, comes from not appreciating the degree to which our moral attitudes are conditioned and kept up by the criminal law. For Packer, compliance with the restraints of the law is largely a matter of this persistent if mild process of brainwashing. But Packer's view appears too simple. The fact that I return a borrowed book as a matter of semi-conscious habit, without rational debate with myself or even consciousness that what I do is open to rational assessment, is not necessarily evidence that I have been conditioned to *want to* return borrowed books. This kind of 'non-rational' compliance is accounted for in terms of fulfilling obligations arising from the authority of the practice of promising. This model of compliance seems far closer to the everyday working of legal restraints in an 'internal' way than any supposition that I have, by some associative technique, been 'injected' with a collection of moral predispositions, regards, attitudes, concerns, dislikes *etc.* It would seem to follow, if this is the case, that any theory of punishment which is premised on the bolstering of particular regards against potential temptations (*e.g.* the view of A. C. Ewing that the 'primary importance' of punishment lies in its 'educative' effect) is much less persuasive where the standard case of compliance with rules is a consequence of accepting them as part of an authoritative system, than where compliance with restraints comes from evaluating and choosing them on some *a la carte* basis.

It is easy to confuse the nature of this restraint with a theory that the association of punishment with the conduct in question will maintain a moral conviction that the conduct is wrong independently of its status as something prohibited by an authoritative system. The latter theory, that punishment probably influences moral attitudes, is hardly worth denying; it may be more or less influential than the ritual drama of the legal process or the respect that position may give to the opinions of judges. But those who advocate this view are not merely seeking to widen the explanation of how punishment deters; they wish this 'educative' effect to play an active role in making decisions about the administration of punishment, so that sentences might be set, or obsolete punishment practices kept up, or excuses disallowed *etc.*, with this in mind. In considering this very difficult question of promoting what may well be conceded as a by-product of punishment into a justification for its use, one must focus on how important such a 'maintenance of standards' effect is in practice, and as against alternative methods of education which do not rely on

4 *The Limits of the Criminal Sanction*, ch. 3.

punishment.[5] In interpreting the available evidence, it is important not to confuse a restraint based on an authoritative acceptance of rules with a restraint based on a specific moral attitude to their substance. Nigel Walker[6] cites as an example of a 'declaratory' theory

5 The theory of maintenance of standards, currently enjoying something of a vogue, is perhaps a natural counter to the growing scepticism about traditional deterrence, associated in some quarters with a tendency to question whether punishment remains an institution of much social value. Sceptics of the traditional view may find themselves with the uncomfortable choice of either conceding that punishment is an expendable institution — in which case we should brace ourselves for a brave new world of 'socal hygiene', penalties re-characterised as taxes on conduct, prevention and treatment *etc.*, — or, alternatively, of embracing a retributive account giving pride of place to the pursuit of ideals of fairness in the classical Kantian sense. For these sceptics, emphasis on the way in which punishment may keep up a regard for the values protected by the criminal law suggests an attractive utilitarian escape, and one supported by the seeming pointlessness of denying that punishment would have some such effect.

But although widely invoked, the theory of maintenance of standards is not without its difficulties, foremost among which is whether and in what sense it is said to be a 'theory' of punishment. For it is clear that any punishment practice may achieve benefits ancillary to the purposes for which it is instituted. The restraint on vendettas and private systems of protection are cases in point. But these advantages of official punishment would be ill-described as 'justifications' just because they indirectly assist deterrence of other crimes than those for which the punishment was set up. The reason is surely that we are already committed to the use of punishment in such cases on our old-fashioned ground of general deterrence (together with that deterrence by assurance which is the theme of this paper).

Whether this can also be said about maintenance of standards is a moot point, and one to be argued for separately at the institutional and administrative levels. At the former — deciding what shall be punishable conduct, — the question is whether we would be very interested in attaching punishment to conduct in order to influence opinion that such conduct is undesirable (in order to deter it), unless we were already convinced that punishment was appropriate to deter by fear those persons who could be so deterred without first changing their sense of values. For most of us do not change our regard overnight, although we might respond readily enough to an apparent threat to our security. If we are already so convinced, then the 'theory' is idle, a description rather than a justification of punishment.

At the administrative level, deciding what kind, how much *etc.* punishment for an offender, the point arises in a different way. Here, the prime place given to fairness in relating the amount of punishment to the moral gravity of the offender's conduct will usually have pre-empted the matter. The judge in sentencing is constrained by the duty to measure his sentence by his appreciation of this moral gravity; he has no margin to design a sentence in order to promote a high regard for those values threatened by the criminal's conduct. Even when this fairness requirement is sacrificed to 'make an example' of the offender, we would have to ask whether this is really using punishment as a conditioning instrument, or simply a matter of raising the ante in the deterrent/crime stakes.

Apart from these technical difficulties, the deliberate use of punishment to induce a non-rational acceptance of values carries with it a high price: chiefly the real (although to some protagonists hardly visible) loss of individual freedom involved, a point made several years ago by Professor Hart. It also threatens to institutionalize irrationality in our thinking about social goals. The present Australian public opinion that private consensual homosexual conduct should continue to be punishable may well have been influenced in this way by its long association with penal sanctions. To guard against the risk that simple prejudice of this kind may take the place of rational judgment, we should confine such devices to those, such as small children, for whom unquestioning obedience may be a paramount consideration. In other cases we should heed the liberal philosophy of John Stuart Mill and allow our values to find their level in a free market-place of ideas, to be supported where necessary by rational appeal, rather than insidious persuasive methods.

6 *Sentencing in a Rational Society*, 35.

maintaining standards, a remark by the Home Secretary explaining why he attached great importance to the declaratory nature of the *Race Relations Bill*, '... the very process of giving the law brings an instinctive response from the great majority of our citizens'. To the extent that this occurs it seems more likely that it would be a consequence of a respect for the opinion of parliament and the authoritative status which the system gives their enacted opinion, than any supposition of implanting moral values, such as a moral regard for black people, by a persuasive technique based on the use of punishment.

3. This enlarged view of the deterrent aspect of punishment may bring out the crudity of some proposals based on a narrow traditional vision. Professor Del Vecchio[7] has published an article advocating that because punishment does little to prevent crime, it ought to be done away with altogether, and replaced by a system of compensation. This would preserve individual responsibility he argues, whilst allowing for the fundamental weakness of deterrence and reform theories. H. B. Acton, whilst conceding 'serious practical difficulties' in this idea, nevertheless admits that it 'goes some way towards meeting the case of those who consider imprisonment to be ineffective and wasteful, without eroding conceptions of justice that are essential to civilized life'.[8] The optimism of Del Vecchio and Acton fails to allow adequately for what is involved in punishment as a deterrent however, for a system of reparations would fail to provide that minimum assurance against the risk of harm in any real sense. Although a liability for compensation would no doubt be a restraint on offenders, it would be so only incidentally in the manner of a licence fee or a tax. This fact would be apparent to the law-abiding citizen, whose viewpoint is a vital consideration. As soon as deterrence by threat of harm is seen to be supplanted by reparation for harm done, then, irrespective of the attitude of the potential criminal, the law-abiding citizen's regard for the authority of inconvenient restraints must be importantly affected. For in normal conditions this regard is supported ultimately by the guarantee of security that arises from a manifest intention to suppress those whose crimes constitute a threat to himself. For this reason, at least the central core of every system of restraints — those protecting against violence, theft and deception — would need support by sanctions designed to suppress, and not merely to exact reparation for their breach.
4. I have mentioned the dangers of confusing this basis of restraint with the claims of those who urge the use of punishment 'to maintain standards'. There is a distinct source of confusion, however, with another view of punishment which also emphasises its expressive aspect. This latter view also stresses that punishment 'denounces' crime and 'affirms' social values, but it seems to stop short at this

7 In Acton, *The Philosophy of Punishment*, 197.
8 *Id.*, at 34.

stage, without explaining the denunciation as being important eventually to support a utilitarian policy of education or conditioning. In fact it seems reasonably clear that many expressions of this idea rest on a strong conviction that they constitute something more than utilitarian theory can offer. In this tone they can be found among the British Idealists, Kant and possibly Lord Denning. Such reprobative ideas are difficult to assess, partly because they are rarely expounded in any systematic way, partly because those who express them seem hardly aware that they are anything but obvious. Lord Denning's notorious statement[9] to the Royal Commission on Capital Punishment, though emphatic, was both cryptic and casual. It was enough, however, to make him the proponent of a theory of punishment, although it is very difficult to say what that theory is. Against his 'denunciatory theory' S. I. Benn[10] made the seemingly obvious point that denunciation does not imply the deliberate imposition of suffering, the feature needing justification. Professor Hart has subsequently suggested a way of saving Denning's *dictum* from Benn's point,

> ... by treating it as a blurred statement of the truth that the aim, not of punishment, but of criminal legislation, is indeed to denounce certain types of conduct as something not to be practised.[11]

Otherwise, Professor Hart has treated this picture of punishment as an apt expression of moral indignation as a 'semi-aesthetic idea that has wandered into the theory of punishment'. Despite these judgments, attempts have been made to find a more substantial competitor to conventional utilitarianism in the reprobative aspect. One of the more interesting of these attempts, in that it is presented as a systematic if brief account, has been put recently by Dr. Finnis.[12] His views will be considered as a means of bringing out the importance of punishment as a deterrent in the sense under discussion.

Dr. Finnis commences by listing six sorts of values which every society in some degree upholds. The first five of these include values of individual and general welfare and of justice and respect for law. The sixth is a summary of all the others and is termed the 'Common Good'; it is the sum of all the values society is attempting to realize. A crime manifests an indifference to and thus a public affront to one or more of these values. Dr. Finnis sets out all of this with careful detail and with supporting examples. He goes to this trouble because, as he says,

> . . . many theorists think of crime as merely a set of forbidden 'harms', and then are at a loss to understand the infliction of punishment. Is not misery simply being added to misery? Punishment can then be seen only as deterrence, deterrence becomes a

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9 'The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime.' *Cmd.* 8932, para. 53.
10 'An approach to the problems of Punishment', *Philosophy*, 1958.
11 *Punishment and Responsibility*, 7.
12 'Punishment and Pedagogy', 5 *Oxford Review* (1967), 83.

> simple matter of inducing fright, reformation becomes a separate affair to be pursued by specialists in psychological manipulation, and retribution is nothing short of superstition. Penal theory is thus effectively wrecked.
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> But if a crime manifests an indifference in some degree to a complex and considerable set of values for which society holds itself responsible, the functions and moral status of punishment come readily into view. Punishment seeks to *vindicate* those values, all and severally.[13]

Such an emphasis on vindication brings out more clearly the point of punishment. It is 'essentially, not an infliction of pain or loss of liberty, but a subjection of the criminal's wayward will to the will of society'. A satisfactory analysis of these views should perhaps commence with the meta-ethical assumptions on which it may be based. For there is a conception of what would constitute the 'wreckage' of penal theory which sees the acknowledged use of something evil to avoid an alternative evil as unsatisfactory, and this view is not universally shared. On the account given, one cannot 'understand' crime if the picture is primarily one of misery added to misery, even if the object is to avert misery. So the fact that punishment is painful is made incidental to the fact that it is the subjecting of a wayward will. However, I shall bypass this larger question of the criteria for a satisfactory theory of punishment, and contend that this theory of vindication is a consequence of a too limited account of deterrence. Along with such writers as Packer, Ewing and Honderich,[14] Dr. Finnis sees only the tip of the ice-berg. Deterrence, he says, 'is simply a matter of inducing fright'. But reference to the broader idea of deterrence previously sketched will show that, if this fright is seen as a means of setting up a workable system of restraint on self-advantage, and if this latter restraint, based on a support for the authority of the system, is a major condition of securing the organization needed to preserve the Common Good, then a satisfactory penal theory can be built on deterrence which will form the primary test of being the means to achieving the six values listed by Dr. Finnis. It would fail only by lacking an element of harmony in the sense that it would have to admit the deliberate use of something evil.

Not only does this search for something better than utilitarian deterrence result from a too narrow idea of its scope, it would also seem that the sense of plausibility attaching to the emphasis on vindicating comes largely from this utilitarian idea of the way in which a workable system is supported, so that 'vindication' ought to be seen as an oblique reference to the conditions for securing this workability. Suppose we ask the obvious question why we should vindicate these values, and particularly why in this manner. Dr. Finnis' answer is that theorists who ask such questions

> Evidently . . . seek a *symbol* of the law's continuance in operation.

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13 *Id.*, at 88.
14 *Punishment, The Supposed Justifications.*

> What they fail to see is that a more relevant symbol is of the law's continued *supremacy.*
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> The supremacy of the common good over all individual value preferences is what punishment primarily vindicates, and it is this supremacy that the subjection of the will of a valued citizen primarily manifests.[15]

This is at first sight a puzzling answer. Punishment could not *show* that the common good is preferable to self-choice as a matter of moral goodness. Moreover, every instance of punishment also demonstrates that in a sense 'the law' is not supreme, since these are breakdowns the law is trying to prevent. Nevertheless, the drift of this answer can perhaps be brought out by insisting on the question: Why should punishment be used to vindicate the supremacy of the common good? That this is apparently not recognised as a relevant question suggests something about the concept of vindication. For this question would not arise only if the statement (*i.e.*, the statement that punishment vindicates the supremacy of the common good) were treated as a description of what punishment involves, as distinct from a justification in the sense of a reason for employing punishment. As a description, its immunity from criticism as a theory of punishment could result only from its failure to constitute such a theory. It would be like claiming that punishment shows that those who break the law will suffer. Nobody would deny this as a description, but something more is required to treat it as an argument for using punishment. In fact that something can be found behind this idea of vindication and it is the view of punishment with which this essay has been concerned. Suppose we have a ritualistic stage-play, a sort of political Oberammergau, designed and used to praise the common good. This might be envisaged to have more than a propaganda plus entertainment effect. It might be supposed, somehow, to *demonstrate* the supremacy of the common good in the sense of showing that it was in practice being achieved with success against obstructionism. Now one might say that the fact that we have something of value here is not a result of having a demonstrable account of a viable system, but a result of *having* such a system. But this is where vindication comes in, for the viability of the system also depends upon a minimum morale of its members, so that a demonstrative account constitutes a reassurance which in turn strengthens the authority of the system. One can now look at the general institution of punishment, as well as every instance of its use, as a continuing stage-play along these lines, maintaining the efficacy of the system by highlighting it for all to see. To advocate a theory of vindication on this basis is then to emphasize one or both of two related claims. The first would be a claim that, included among the minimum conditions for social life is a degree of assurance which only punishment could provide (giving due weight to the importance of publishing the punishment as a factor in this assurance); the second claim is that within social life itself the point of sub-

15 *Supra.*, n. 11 at 89.

scribing to particular restraints may depend in large part on their being enforced with sanctions against others. One who thought about punishment in terms of the importance of these claims would naturally wish to characterise it as something more than a mere pain or deprivation, and even conceivably as a 'subjection of the will of the valued citizen'.

The above attempt to boil down this reprobative theory into an expression of the deterrent importance of punishment as an assurance may well have missed its point. One way of testing for this would be to ask what difference there would be between an efficacious system of pursuing social goals, founded on the deterrent consideration sketched, in which the punishment vindicated the supremacy of the law, and another efficacious system, again based on this broader deterrence, but in which the punishment did not vindicate the supremacy of the law.

> Vindication is not some mysterious or occult process; it is what suffices for the encouragement of the law-abiding, the instruction of the teachable, the deterrence of the intractable and the reform of the amenable. And what it vindicates is, in sum, the *superiority* of the socially preferred values — the common good — to the values that might otherwise guide the individual will.[16]

Out of this description, only the idea of encouragement of the law-abiding expresses the importance of punishment as a deterrent by way of assurance. The inclusion of education, deterrence by threat, and reform as part of what vindication is about suggests larger claims than this interpretation allows for. Further, there may well be a suggestion that vindication is more than a matter of demonstrating efficacy, and that the punishment in some sense helps establish the intrinsic merit of the 'socially preferred values'. In trying to give a utilitarian account of the plausibility of this theory I have, perhaps unfairly, ignored these further suggestions. I have also assumed that any picture of punishment which sees it as an assurance on which co-operation and self-restraint might depend is unarguably utilitarian.

In considering the key question of the meaning of 'vindicate', it is apparent that some kinds of offence suggest this idea more strongly than others. An example would be the punishment of Welsh language publicists who disrupted court proceedings. Such an offence against the machinery of administering the law can be pictured as an attack on the foundations of social life itself, whereas the idea of an offender as an 'outlaw' remains largely in the background in the standard case of criminal conduct. The fact that the disruption of court proceedings would constitute a clearer case of a claim for 'vindicating the law' than an offence which does not so clearly oppose the *system* of law and order, suggests that the underlying appeal is to the importance of maintaining the authoritative status of a legal institution. What is said to be vindicated in the clear case is in fact the authority of the law, an idea which makes sense where punishment is treated as a factor without which a

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16 *Id.*, at 83.

claim invoking this authority would not be acknowledged in practice. This would be the case where punishment is seen as an assurance without which any regard for the authority of a restraining institution would be pointless and eventually dangerous.