

5 The Paradox of Non-Punishment

Care should be taken that the punishment does not exceed the guilt.

Cicero, *De Officiis*

50 In the earlier essay that considered punishment (in Chapter 3), we saw how two related paradoxes emerged from our common moral and empirical assumptions. After an intermission in which we dealt with blackmail, we can return to punishment. The present paradox emerges if we begin to think “outside of the box,” more openly and radically.

A situation in which a system of justice broadly like our own achieves complete deterrence seems close to ideal. In such a system no crimes are committed and, as a result, no one is punished. Some people who think about systems of justice worry mostly about crime (and other illegal activities that I’ll henceforth refer to under the blanket heading “crime”). Others worry a great deal about the severe punishment meted out to human beings, even if they are guilty. And nearly everyone is worried about the “punishment” of the innocent. If we could make all these different worries subside, because our world were one in which no crimes were committed and hence no one would be punished, this would surely be wonderful.

But things are not so simple. Assume that we have a very high level of certainty about the level of threatened punishment that

is necessary in order to deter crime. The likelihood that criminals will be caught is also a crucial factor in deterrence, and hence in determining the level of crime, but let us bracket this matter. Our certainty that a certain level of threatened punishment would do the job need not (and is unlikely to) apply to all crimes, but the argument can go forth even if we limit punishment to only certain sorts of crimes, or confine it to a certain range of target populations. Let us call the level of such perfect deterrence “the deterrence point.”

If the deterrence point applies to crime X, so that anyone committing crime X will face punishment at the level of the deterrence point (or higher), then we can predict that no crimes of that sort will occur. Let us call this the Ideal of Perfect Deterrence. In other words, *for every potential crime X, a punishment level that reaches the deterrence point prevents both crime and punishment.* The only catch is that the deterrence point needs to be very high: it will be disproportionate to the crime, and it will often in itself be unusually severe according to commonsense standards of punishment.

In order to explain what I have in mind, I can begin by telling the story of what led to the discovery of this paradox. In retrospect I can see that a number of things did so, but the final insight is due to the London traffic authorities. While in Israel, where I live, a simple parking violation will at most generate a modest fine, with severe measures (such as towing) being reserved for proportionately serious offenses (blocking traffic, for example), in London, I was warned during a recent visit, the enforcers are merciless, and one’s car is liable to be towed for any offense. This caused an immediate improvement in my parking behavior, and concentrated my mind.

Now we need only to go further in the same direction. Assume, for instance, that we want to prevent parking around a certain main public square because the public would greatly benefit if the area were free of cars. If, instead of a modest fine, the penalty were to rise to a fine of \$10,000, and perhaps also include confiscating the vehicle, and if the city were to publicize these disproportionate consequences adequately, then such a heavy

penalty could predictably prevent *any* instance of parking in the given area. The fine might also be pegged to one's income, as it apparently is in Finland for certain offenses, so that even the super-rich would not be tempted, since they would face the threat of proportionately stellar amounts. Or, assume that we want to prevent attempts to forge the currency. If the national legislature were to enact a law mandating a life sentence without parole for anyone convicted of forgery, and perhaps also that all of the person's property would be confiscated, then it is very likely that no one would risk committing forgery. Or consider "carjacking," the stealing of a car when it is in use by the forceful eviction of the driver. If carjacking were treated as equivalent to, say, second-degree murder, we could then predict (at least in certain societies) that thieves would limit themselves to more traditional ways of stealing cars.

52

We cannot go all out for a world that functions in accordance with the Ideal of Perfect Deterrence in all spheres in which punishment would be relevant and with every constituency. We would have to acknowledge pragmatic limits: for example, drug users under the total burden of their addiction may not be deterred from petty theft whenever it can support their habit, whatever the sanctions. There would also be ethical limits, such as not threatening to harm the criminal's family. And there are various other reasons to doubt whether perfect deterrence can be met often, primarily because people are irrational and self-deceptive in various ways. But we shall focus here on those instances where the proposal might apply and, in any case, the interest in the paradox remains even if it is mostly theoretical.

A crucial ingredient in applying the deterrence point is that people must have full assurance that, so long as they do not commit crimes, they will not be punished. As H. L. A. Hart put it, "For the system which makes liability to the law's sanctions dependent upon a voluntary act not only maximizes the power of the individual to determine by his choice his future fate; it also maximizes his power to identify in advance the space which will be left open to him free from the law's interference" (1970: 181-2). Achieving this goal would depend on mechanisms such

as requiring the state to prove conclusively in court that that specific person has committed the crime. The law would also allow certain excuses from punishment to be available to the perpetrator, and it would include other safeguards. We need to assume, for the sake of our thought experiment, the complete and dependable existence of all such conditions. Similarly, we are assuming that the threat of punishment is used only in order to prevent genuine crimes and not, say, as a mechanism in the service of political oppression or religious orthodoxy.

Now we can see the Paradox of Non-Punishment:

- 1 At the deterrence point, no crime of type X is committed, and therefore no punishment for Xing occurs (since no one commits X). If there is no crime, and no punishment, things are ideal.
- 2 Nevertheless, we do not want a perfect deterrence point on such terms. We would view with horror a mature system of justice that threatens radically severe and disproportional punishment.

53

Let us now explore some possible arguments opposing a system of punishment based on perfect deterrence. First, someone might argue that perfect deterrence is unjust. There is something in this charge for, after all, a world that exhibits the Ideal of Perfect Deterrence threatens a level of punishment that goes beyond desert. However, this move at once confronts the difficulty that, since no one is being punished, there is, in fact, no injustice. A law can be unjust even if it is never applied. But someone can hardly be a victim of unjust punishment when no punishment occurs! Under perfect deterrence, Cicero would have nothing to worry about. Unlike traditional consequentialist suggestions, where punishment achieves good social results through actual injustice ("punishment" of the innocent, or the unjustly severe punishment of the guilty), in the case of perfect deterrence there can be no such injustice, since no one is to be punished in order to deter others from crime. Likewise, no one is being used (in the Kantian phrase) "only as a means" for the good of others, or

sacrificed for their sakes. The admittedly serious problem of injustice that would occur were the punishment meted out is prevented from the start through the threat of that very punishment.

Second, what if someone *were to* commit a crime? Then indeed he or she will confront an unhappy and unjust prospect. Here I can reply in two ways. The first reply remains on the theoretical level. Even when dealing with a case in which it is completely certain that deterrence will work, most people would still object to the actual threat of overpunishment that is proposed. So the fear that someone will be caught in the net cannot be doing all of the intuitive work in making us reject the proposal to pursue the Ideal of Perfect Deterrence. This result suffices for my purposes. We can learn about morality, as we do about physics or economics, by playing with models that imitate ideal conditions. Second, we can surely think of cases in which, empirically, deterrence will be foolproof. In these cases, the deterrence is so strong that one would have to be literally crazy to succumb to committing the crime. Such obvious derangement might for that very reason be dealt with in a different manner. Moreover, even if a convicted person (who *is* guilty, after all) were to be severely punished by an adequately constructed system of justice which generally exhibits the Ideal of Perfect Deterrence, this overpunishment would be rare. Additionally, its importance would be negligible when compared to the evils of the current arrangements, where both crime and the suffering of punished criminals abound, in part as a consequence of the fact that societies consistently fail to provide incentives that are sufficient to deter crime. And, surely, in the proposed system the risks of punishing the innocent would decline considerably as compared to the current one.

A third argument might be based on fear. If people feared that they would suffer punishment at the draconian level of the deterrence point were they to commit the crime, this would haunt their lives. This possibility, however, is very much exaggerated. Admittedly, the institutional setting for overpunishment, and the intention to carry out the threats, would be there were someone to commit the given crime. This is required in order

for the threat to be taken seriously. However, if people knew that the justice system provides an environment in which the innocent will not be harmed, then they would not commit crimes, remain innocent, and feel secure. A further response that might be made to the argument based on fear is that in adequate systems of justice it's even now possible that people will be punished for crimes they did not commit, and even (in some societies) possible that a person will be executed for a crime he didn't commit, yet few live in fear of that happening to him or her.

Fourth, it might be thought that the agency of individuals is affected when matters function in accordance with the Ideal of Perfect Deterrence, so that their decision-making processes are illicitly overwhelmed. Under the conditions that apply with the Ideal of Perfect Deterrence, after all, a large number of crimes that would have been committed in our current system are blocked, yet only the threat of extreme punishment prevents those crimes from occurring. But this argument is doubly faulty. Its logic would apply also to the fact that people are now deterred from crime because of their fear of the prevailing levels of punishment. It is wrong to commit crimes: if someone desists from crime because of the threat of punishment, that seems to be a good result. I do not see how one could plausibly argue that society owes the potential criminal an option to be punished less severely (namely, according to currently prevailing arrangements) just so that this person may more easily decide to commit a crime.

The threat of overpunishment with which we are concerned thus significantly differs from that of pre-punishment. Christopher New (1992) proposed that we may punish a person before he commits a crime when we know beyond a reasonable doubt that the person is going to commit it, and when we also know that we will be unable to punish him after he commits it. I replied (Smilansky 1994d) that such pre-punishment runs counter to the idea of respect for persons, according to which we must let the (still innocent) person decide, even at the last moment, to refrain from committing the crime, thus allowing her to maintain

her moral goodness and not be punished. But the idea of respect for persons does not seem capable of performing a similar role here since, again, no one is owed the threat of lesser punishment just so that he may more easily take up crime.

Moreover, it is misleading to describe a situation of perfect deterrence as one in which agency is overwhelmed. The Ideal of Perfect Deterrence does not operate through some sinister mechanism of brainwashing or through intervening chemically in the brain. The government in such a world does not invade anyone's privacy, nor does it bypass or modify anyone's agency or autonomy. Everything remains as matters are now: the agent is untouched. By upping the ante for a given crime, say, from \$50 to \$5,000, or from two years on probation to 12 years in prison, we have merely provided the potential criminal with a further rational reason to choose freely not to commit the crime.

Using the deterrence point is actually doing a favor to certain kinds of potential criminals: those who are deterred by the increased threats but would have committed the crime under the old rules. We are saving them from the crime and, if they are caught, the punishment.

The idea of a system of justice that in its very essence threatens people with radically severe and disproportionate punishment is distasteful. Yet, within the spheres where perfect deterrence can be applied, both crime and punishment are prevented. That is what makes perfect deterrence attractive. The criminal justice system aims to prevent crime. If this can be done, and its achievement does not even require that anyone pay the price of being punished, then what is there to complain about? Compare this to a situation where the very thought of the prospect of taking medicine, if one were to become ill, would prevent all illness: wouldn't that be wonderful? Our current system, which involves high levels of both crime and punishment, is also distasteful, and the need for it is not attractive at all. We have yet to see a compelling principled reason for rejecting the Ideal of Perfect Deterrence (under the "Hartian" constraints mentioned earlier).

One possible reason, prominent in Catholic thinking, which has come up in discussions of nuclear deterrence, concerns intention.

In order for such deterrence to be effective an intention to do the wrong (kill civilians en masse) must be formed, and the very formation of the intention can be said to be morally wrong. For good discussions see, e.g., McMahan (1985); Kavka (1987: ch. 2). The case of punishment that we are considering is very different: it is focused on punishing the guilty, typically would not involve the threat of death, is not intended to prevent social annihilation, is repetitive, is made by a system of justice, and so on. Such basic differences may help explain why nuclear deterrence is widely practiced and accepted, while threatening with gross and excessive punishment is shunned. Nevertheless, a similar reason based upon the wrongness of the intention to do wrong might be put forward here, in opposition to overpunishment. But this worry does not seem too weighty, except within certain theological assumptions: I doubt if a hypothetical intention can be so morally wrong, when it will not be actualized. And if it is actualized on some rare occasion, then the overpunishment itself (and not the intention) is what matters. I cannot enter into theological considerations here.

The proposal that we seek perfect deterrence through the justice system where we can achieve it, by using the threat of overpunishment, naturally arouses strong opposing intuitions. So long as we feel that we cannot overcome these intuitions, and continue to stand by our current practices, we confront the Paradox of Non-Punishment.

Arguably, we confront paradoxicality in any case. It seems paradoxical not to choose a way in which we can prevent both crime and punishment (we perfectly achieve the desired aim of the criminal justice system even without punishing anyone). But it also seems paradoxical to choose a process based upon the Ideal of Perfect Deterrence, since we are then saying that a system of justice ought to threaten people with radically severe and disproportionate punishment, which is far beyond what they deserve, in a way that would be manifestly unjust if the threat were to be carried out.

Civilized Western societies seem to have designed systems of justice that function by punishing criminals in a restrained

fashion as the society's primary means of reducing crime. But the prospect of perfectly deterring crime in certain spheres by using the threat of radically severe punishment confronts us with a paradox. It seems unreasonable not to construct a system of justice that can prevent crime without actually punishing anyone (it makes both crime and punishment disappear together). But it also seems morally unacceptable to construct a system of justice that functions primarily by threatening its citizens with unjust punishment, while the justification for the system is dependent on the thought (even if it is true) that its threats will never need to be carried out.

6 On Not Being Sorry about the Morally Bad

The sentiments of others can never affect us, but by becoming, in some measure, our own.

David Hume, *A Treatise of Human Nature*

Bad things often happen, and morally good people ought to regret that they happen. People are sometimes morally permitted not to do anything about such bad things, not to have to struggle to prevent them from occurring; otherwise the demands of morality would be excessive. But what could be more obvious than that a morally good person ought to be sorry about the occurrence of bad things? Even more so, it would seem, if the bad things occur in one's vicinity, or one is involved with them. I shall argue that sometimes it is morally permissible not to be sorry when bad things happen. It is even permissible to be happy about it. But how *can* morality say this?

Consider a case that is unambiguously bad. Before you were born your parents gave birth to a seemingly normal daughter, except that she was born with a severe defect in her heart, which led to her death after only a few weeks. Let us bracket the effect on your parents. You were born afterwards. In time, you learned that, had your sister survived, your even having been conceived would have been precluded. Are you sorry that she died? I am, in fact, that child, born because my sister died shortly after she