The Will to Punish

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Chapter 2: Why Does One Punish?

Legal theorists deem important the inaugural distinction between the definition and the justification of punishment, the former being a prerequisite, which is supposed to be value-neutral, whereas the latter represents the more substantial element of the concept, which relies on value judgments. We must know what we are talking about before attempting to argue on a moral basis about its raison d'être, philosophers and jurists say, including Hart.[1] That the division of the intellectual task be so easy, however, and that it even be possible, we may doubt, and as we have seen, we can also wonder about the neutrality of the operation, which consists in deciding what is punishment.[2] The fact that most definitions imply a pain inflicted on the offender already supposes an implicit justification that this suffering is necessary. If this is the case, what is this justification?

As John Rawls observes, "The trouble has not been that people disagree as to whether or not punishment is justifiable. Most people have held that, freed from certain abuses, it is an acceptable institution. Only a few have rejected punishment entirely, which is rather surprising when one considers all that can be said against it. The difficulty is with the justification of punishment: various arguments for it have been given by moral philosophers, but so far none of them has won any sort of general acceptance."[3] A consensus thus seems to exist about the fact that punishment is justified, but things gets complicated when one has to explain why. In fact this very question, *Why?*, can be understood in two different ways: prescriptive (Why should one punish?) and descriptive (Why do people

actually punish?). In the first case, what is expected is a theoretical justification provided a priori, generally by moral philosophers or legal scholars. In the second, what is anticipated is an empirical justification given a posteriori, which can be subjective, provided by the agent, or objective, proposed by the researcher. Although the limits between the prescriptive and the descriptive, between the subjective and the objective, are never perfectly drawn, I will present how the different normative approaches justify punishment and how the idiographic method relying on case studies disturbs, contradicts, and enriches these justifications.

Two theories of justification prevail in the philosophical and legal literature. For utilitarians, only the consequences that punishment can have from the point of view of society should be taken into account. For retributivists, only the act that has been committed should be taken into account, punishment being its just deserts. Focused on reducing criminality, the former are essentially looking toward the future. Concentrated on the expiation of the crime, the latter are mainly oriented toward the past. Utilitarianism tends to dominate in the intellectual realm and the public sphere when progressive opinions thrive. Retributivism tends to impose itself in periods when conservative and reactionary ideas prosper. During recent decades the second has tended to eclipse the first.

Utilitarianism, as a subtype of consequentialist ethics, holds that general principles and specific actions are assessed according to their predictable effects. The primary goal of these principles and actions is to increase the quantity of happiness in the world. Only what contributes to this goal is useful, and in terms of criminal law, punishment is justified only when it produces a more positive balance of good over evil than any alternative measure. For Jeremy Bentham, who first theorized this approach in 1780, "all punishment in itself is bad" since it causes suffering, and "it ought to be allowed only insofar as it promises to exclude some greater evil," on condition that there is not a less costly manner to obtain a similar

result.[4] Consequently "punishment ought not to be inflicted" when it is "groundless," "ineffective," "unprofitable," or "needless." Its immediate end is to prevent criminal acts: those of the offender as well as of the entire community. This prevention can be realized in three ways: by intervening on the offender's "will" with the objective of "reforming him"; by controlling his "physical power" with the intention of "disabling him"; by making "an example" so as to "influence the conduct of others." There might be a "collateral goal" of punishment, "that of providing pleasure or satisfaction to the injured party where there is one," but this should never be a justification as such. Thus defined, the theory has varied little with time. In its contemporary version, the rationales at work are, under another designation, those described by Bentham: rehabilitation, incapacitation, and deterrence. While utilitarianism is sometimes contested on theoretical grounds because of the possibility of condemning an innocent for the great good of society, it is at the empirical level that the most interesting discussions have taken place. Indeed since consequences are supposed to be assessed, proving efficacy is decisive.

As far as it limits the offender's ability to act, incapacitation seems the most obvious candidate in that regard. It can operate in three ways: execution, removal, and incarceration. The death penalty has considerably declined worldwide in recent decades and is now in force in only forty-three of the almost two hundred countries of the United Nations; it remains legal in thirty-four of the fifty states of the United States. Deportation has frequently been used in the past for criminals, the most famous example being Australia, the colonization of which was undertaken by 160,000 convicts from Britain; following this example, France created its penal colonies in Guyana and New Caledonia, which remained active until the mid-twentieth century. Imprisonment is today the most common form of exclusion: globally over ten million people are incarcerated, almost one-fourth of them in the United States; the constant progression of the carceral population is principally due to punitive policies and practices that send more people behind

bars for longer periods of time. Yet even under these conditions, the incapacitation lasts only the time of the stay. Is it effective, then? Based on available studies, that is doubtful. As an illustration, the decrease in thefts concomitant with the increase in prison sentences in California during the 1980s and 1990s could suggest a positive relationship between the two trends, but a closer analysis shows that the decline in offenses essentially concerned juveniles, for whom sentences had not been harsher, while among adults, who had been more severely sanctioned, criminal activities did not diminish.[5] Commonsense logic was deceptive.

For deterrence, which implies that the threat of punishment dissuades potential criminals, it is certainly an old idea, if we think of how public executions were staged and the convicts' bodies exposed in medieval societies and even later. Long neglected by criminologists precisely because it evoked this bygone age, it has attracted attention again when economists have integrated it in their rational actor model, according to which, before acting, criminals are supposed to weigh the benefits expected from their deed against the costs of the anticipated sanction and the risk of being arrested. However, the passage from this theoretical model to empirical reality is far from convincing. Actually dissuasion is assessed mostly in two ways. At the individual level, one measures recidivism rates in cohorts after the infliction of the punishment. In France, for example, a survey of seven thousand convicts sentenced to prison has established that repeat offenses were less frequent when sentences were adjusted either before the incarceration or toward the end of the stay in prison, even when the criminal record, the type of offense and the length of the sentence are taken into account; these conclusions suggest that avoiding imprisonment or shortening its duration reduces the risk of repeat offense. At the collective level, one evaluates crime rates in the general population as changes are introduced in penal policies or practices. In the United States, for instance, the spectacular decline in homicides and thefts in the 1990s has been discussed in relation to the increase

in police presence on the streets or to the doubling of the prison population. But the comparison with Canada, where a similar trend in crime has been observed during that same period, while the number of officers and the carceral demographics were both decreasing by one-tenth, seems to invalidate the hypothesis of a beneficial impact of policing and incarceration.[6] For the most part, the results of these studies, sometimes passionately debated, refute the economic model of utility maximization, since less constraining measures and less repressive policies appear to have better results than opposite options.

Finally, rehabilitation, after having served as the main justification for incarceration at various moments in the history of prisons, notably at the beginning of the nineteenth century in Jacksonian penitentiaries and in the middle of the twentieth century with the penal welfarism movement, has gone through a long period of discredit since the 1970s. The idea that punishment can transform and meliorate the criminal, make him conscious of the seriousness of his act, and, thanks to educational and social resources, facilitate his reentry was then delegitimized as it was deemed ineffective under the "nothing works" motto of conservative intellectuals and politicians, especially in Britain and the United States. Recently, however, rehabilitation has found new advocates and statistical studies have established its benefits in terms of recidivism when compared to classical punitive methods.[7] The announcement of its death thus appears to have been premature.

The three rationales of the utilitarian justification refer to distinct approaches: physical for incapacitation, psychological for deterrence, moral but also educational and social for rehabilitation. Whereas they seem clearly differentiated from an analytical point of view, they partially overlap, in particular when the assessment of their efficacy is conducted. Should a decline in crime associated with an expansion of prison population, to the extent that one admits the existence of a link between the two phenomena, be attributed to the removal of criminals from society, to individuals

renouncing crime for fear of sanctions, or to criminals reforming as a result of reentry programs? Studies provide no definitive answer. But retributivists do not have this sort of doubt or even question. For them, punishment can be justified only by the crime committed.

Retributivism, as part of the deontological ethics, relies on the idea of obligation. It seems in principle much easier to defend since it supposes no external assessment of its social efficacy but simply the internal evaluation of its moral coherence. Indeed it asserts that, for justice to be done, those who have committed wrongdoings deserve to suffer. Punishment must be justified on this sole ground. The classical argument is developed by Kant: "Juridical punishment can never be administered merely as means for promoting another good, either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime."[8] This principle derives from the categorical imperative that humans should never be treated solely as means but always also as ends in themselves. One cannot punish for the greater good of society, but only because the person has been "found guilty and punishable," since "if justice and righteousness perish, human life would no longer have any value in the world." As for the way to implement this principle equality must guide "the mode and measure of punishment." Consequently "the right of retaliation" implies that "whoever has committed murder must die." Such right is based on the idea that "the undeserved evil which one commits on another is to be regarded as perpetrated against himself." In other words, the justice system tells the offender, "If you slander another, you slander yourself; if you steal from another, you steal from yourself; if you strike another, you strike yourself; if you kill another, you kill yourself." This radical version of retributivism dates back to the *lex talionis* of Babylonian and Hebrew laws, and, as we have seen, early Roman law developed instead a principle of reparation for the loss, while Islamic law combined both rationales.

Other versions of retributivism have been proposed, with different justifications for the penalty: restitution of the benefits unduly acquired by the offender, compensation of the damages done to the victim, satisfaction of the punitive affects generated by the wrongdoing among the population.[9] Two variants, which share some common grounds, deserve special attention. The first thesis asserts that the main function of punishment is expressive. According to Joel Feinberg, "punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those 'in whose name' the punishment is inflicted."[10] Its meaning is therefore essentially symbolic. Suffering as such does not suffice to characterize punishment. A form of reproach must be associated with it. As a consequence, the justification cannot reside in the mere equivalence between crime and sentence. It must rely on the equivalence between the crime and the condemnation that society wants to manifest, the latter depending on two elements regarding the former: "the amount of harm it generally causes and the degree to which people are disposed to commit it." Ultimately "pain should match guilt only insofar as its infliction is the symbolic vehicle of public condemnation." The second thesis somewhat extends the expressive function of punishment by focusing on its ethical implications. As Jean Hampton suggests, "We must link the point of the retributive response to the wrongfulness of the action."[11] Punishment can be justified not on the ground of the damage done to the victim but on the fact that the offender has committed a reprehensible action. Harm and wrong must be separated, as someone may be harmed without any wrong being committed, by a business competitor, for instance, and a wrong may be committed without anyone being harmed, in case of a failed attempt at murder, for example. The point of retribution is therefore not "correcting harms," which can be dealt with through reparation, but "righting wrongs," the wrongfulness of an action being that it is "an affront to the victim's value or dignity." Such "moral injuries"

are attacks on "human worth" in general and on "the person's value" in particular, often based on inegalitarian prejudices. Only those deserve punishment.

These theses have the merit of integrating the symbolic, moral, and affective dimension of punishment. However, they describe an ideal world, which can be challenged with a reality principle. Indeed the public condemnation of a crime and the decision to punish it on this ground are not only related to its properties, notably the harm it has caused and the wrong it entails, but depends on power relations and tensions between meanings that change over time. Thus minor acts by "minor actors" can be more harshly sanctioned than major acts by "major actors," including when the latter victimize people and the former has no victim. Similarly a practice previously considered acceptable may be made an offense; an offense until then ignored may become an object of sanctions; and a sanction consisting of a fine may turn into a prison sentence, without the concerned acts having been modified.

But as is often the case in analytic philosophy, debates between utilitarians and retributivists have rather taken a fictional turn with fables proposing extreme cases or singular dilemmas either to prove their respective points or, more often, to refute that of their fancied opponent.[12] Thus H. J. McCloskey contests the utilitarian theory by imagining a sheriff who, after a crime has been committed, randomly arrests a black man "in order to stop a series of lynchings which he knew would occur if the guilty person were not immediately found, or believed to have been found," and, a little later, a man who, visiting an area where "a Negro rapes a white woman, and race riots occur as a result of the crime," concludes "that he has a duty to bear false testimony" by randomly accusing a black man so as to stop the collective violence. In these cases, which seem to reveal a conspicuous racial tropism of the author, the utilitarian is supposed to cause the punishment of an innocent individual for a greater collective good. Symmetrically, to contradict the retributivist theory, Gertrude Ezorsky imagines "a

world in which punishing has no further effects worth achieving," so that "the criminal, punished, is perfectly ready to go out and commit his crime all over again," while "ordinary men are not deterred in the slightest from crime by the threat of punishment" and "victims of crime have no desire for retaliation, and the pleasure of vengeance is unknown." Moreover if a "painless but expensive pill" able to cure "propensity to crime" is discovered, the utilitarians will adopt it, while the retributivists will prefer to keep on punishing so as to stick to their principles, with the result that, as juries are not infallible, they will end up killing innocents. This improbable parable is meant to return the compliment regarding the most common criticism against utilitarianism. Of course both utilitarians and retributivists have good arguments to disprove the supposed flaws uncovered by their respective opponents.

It is not certain, however, that these intellectual jousts do justice to the complex and serious issues related to the justification of punishment. By restricting the reflection to the confrontation between the two theses and even to debates within each strand, as is habitually the case, the risk is that one will overlook two elements. First, although they seem conceptually incompatible, these justifications can in fact be combined, either theoretically or empirically. On one side, several authors have noted the overlap between utilitarianism and retributivism, and some have even formulated hybrid versions, generally designated as pluralist. On the other side, in the public sphere, those who discuss this question, in particular politicians, do not attach great importance to the subtleties of philosophical reasoning; for instance, the advocates of penal populism use both arguments of deterrent effects and just deserts to defend their position. Second, beyond their divergences the two theories and their variants have two traits in common, which logically ensue from their normative stance. On the one hand, they do not content themselves with the analysis of justification; they contribute to the justification. On the other hand, they do not depict real situations, including when they rely on examples in the

form of allegories and apologues, and do not account for the justifications that agents actually give to themselves and to others for their decision to punish.

The most lucid reflection in that regard comes again from Nietzsche: "Today it is impossible to say for certain why people are really punished."[13] Not because the ultimate cause would be hidden, but on the contrary because too many reasons may be found in the multiple situations in which one resorts to punishment. It can be a "means of rendering harmless, of preventing further harm," a "means of inspiring fear of those who determine and execute the punishment," a "recompense to the injured party for the harm done," the "isolation of a disturbance of equilibrium, so as to guard against any further spread," a "repayment for the advantages the criminal has enjoyed hitherto," the "expulsion of a degenerate element," a "festival, namely as the rape and mockery of a finally defeated enemy," the "marking of memory whether for him who suffers the punishment or for those who witness its execution," the "payment of a fee stipulated by the power that protects the wrongdoer from the excesses of revenge," a "compromise with revenge in its natural state," or a "declaration of war and a war measure against an enemy of peace," among other reasons. This disparate catalog evidently contrasts with the logical dualism of the alternative between utilitarianism and retributivism. However, it is telling less of a contradiction with classical philosophical and legal theories than of a difference in "perspective," to use a Nietzschean concept. Indeed with the *Genealogy of Morals*, we are not any more in the pure realm of ideas and the law but in the impure region of the obscure motives of crime and punishment—the world of Dostoevsky more than the universe of Bentham and Kant, so to speak.

A similar shift is operated when one leaves the theoretical domain to enter empirical situations. As evidence I will take three brief ethnographic cases illustrating forms of punishment in the street, in court, and in prison.

First scene. Three adolescents are talking and laughing joyously in a small square near the hostel of the youth protection service, where they stay. Like the other minors residing in the three-floor house, they have been placed in this institution by a juvenile judge either because they have committed a misdemeanor or because they are deemed endangered. The three teenagers are of African origin. Two police officers on patrol stop by and ask for their papers. Such a check is banal but illegal, since there is no indication of a crime being or having been committed and since it is moreover established that such a stop is often based on racial profiling. The adolescents present their travel passes, which should be regarded as sufficient since they contain their name and photograph. Not satisfied, the police demand their identification cards. The adolescents, who do not have these documents with them, explain that they live in the hostel some twenty yards away and propose the officers accompany them to fetch them. The police ruthlessly refuse and threaten to take the boys to the precinct for further verification. This is an obvious abuse of authority since the travel pass should have sufficed and the visit to the hostel would have been an alternative if they had doubts. Panicked at the prospect of being taken in, one of the teenagers escapes, runs to his lodging, takes the requested card, and swiftly returns to prove his good faith. But the reception is not what he expects. The police scold him harshly, using racist slurs while slapping him. Alerted by the shouting, one of the social workers of the service goes outside, only to hear one of the officers threaten the boy by saying "I'm going to kneecap you!" and yell at him "You're a failure in your family! You're a failure at school! You little faggot!" Not without difficulty, the social worker interposes herself and finally brings the adolescent back to the hostel. There, with the director of the institution, she tries to convince him to file a complaint against the officer, telling him it is important to defend his rights. Still shaken and distressed by the humiliating and aggressive handling he just endured, the teenager keeps repeating in a low voice that it does not matter. Obviously he knows how

much weight the word of a black minor under the care of a youth protection service would carry compared to the word of the police, how easily his complaint could be reversed into a case against him for resisting arrest, and in the end how costly it could be to try to assert his rights. Interrupting the discussion, he impatiently returns to his room.

Second scene. A thin man in his mid-thirties, looking lost in the impressively vast space of the regional courthouse, stands in the defendant's box. Haggard after twenty-four hours spent in custody, he faces charges for driving without a license and insurance. As he was on his way home, he had a minor car accident: he crashed into a signpost and drove off, not realizing that his license plate had fallen off. The police did not have difficulty identifying the vehicle, which officially belonged to the man's wife, and summoned him, but he did not go to the precinct. Four months later two officers came to his apartment to arrest him as he was leaving for work. At the trial the judge notes with irritation that it is not the first time he has had dealings with the justice system. Indeed he has already received nineteen citations in the past fifteen years, mostly for similar offenses. He has been sentenced to prison four times, generally for between two and four months. Born one of seven children in a Roma family, he dropped out of school, had a series of temporary jobs, and finally stabilized his professional situation for some time as a delivery driver. Under the usual pressure of this sort of activity, and with the multiplication of speed cameras, he was caught several times for excessive speed, received points, and lost his license. He nevertheless continued working and was arrested on several occasions while driving. The first time he was incarcerated, he lost his job. From then on, his life became precarious again. After his last stay in prison, he remained unemployed for several months but was eventually hired in a warehouse. When he was arrested after the car accident, he was on the verge of signing a long-term contract with his company. The trial lasts only thirty-five minutes and concludes with a verdict of six months in prison and payment of damages. The

defendant is handcuffed and taken to the local jail. In my conversation with her afterward, the judge, disheartened, comments, "We don't know what to do in these cases. We're helpless. We know he'll do it again, but we still have to apply the punishment. With his previous convictions, what else could we do?" When I meet the man in prison three days later, he is bitter: "Sure, driving without a license is illegal, but you can't call it a serious crime. It's not right that you end up together with burglars and rapists just for that. I've been inside four times and I have been offered a lot of stuff. I've even been straight up to join robberies. There are Islamists here too; they try to recruit us." He is persuaded that if the sentence has been so severe it is because he is a Roma. After a brief pause, he adds, "I'm really pissed, because I was putting my life back together again. I had a job. I had my kids." His wife is on the verge of giving birth to their fourth child. His eldest son is having behavioral problems in school. Six months later I have the surprise of bumping into him in jail; by then he should have been out due to automatic sentence reductions. A guard later tells me that he had actually been released after serving his time, but that only three weeks later he was arrested again and sentenced to ten months in prison for domestic violence.

Third scene. An inmate is brought into the cramped room adjacent to the solitary confinement unit, where disciplinary board hearings take place. Behind a small wooden podium, the sinister-looking man faces the three persons who will judge him: a deputy warden, a correctional officer, and a civil society volunteer. He is accused of making racial slurs against a black guard as he was returning from the yard several weeks earlier. Normally, in such a situation, the complaint of the officer is detailed and the report of an investigation conducted by a superior is appended. In this particular case, the only evidence is the statement of the correctional officer, whose name is not even revealed to the prisoner. There are no witnesses, no specifics, no inquiry. Knowing neither his accuser's identity nor the circumstances of the alleged offense, the inmate seems disconcerted. "Don't even know who the guy is," he mutters.

Perhaps by excess of confidence, he has not requested a lawyer and keeps repeating that he does not remember anything of the episode, about which the disciplinary board is incapable of providing any information. For lack of substantial elements in the file, the deputy warden contents himself with enumerating the thirty-some episodes of misconduct since the defendant's incarceration, as if they could serve as evidence for the supposed recent altercation. To his dismay, the prisoner is sent back to a cell nearby without having even been asked to defend himself. During the deliberation, a trainee correction lieutenant comments to me that, in the facility where he has been working as a guard for ten years, they would never have made a decision on such a vague accusation. Yet when the prisoner is brought back into the room, he is told that he is sentenced to seven days of solitary confinement. In an irrepressible act of rage, he punches and breaks the podium behind which he stands. Three guards who were waiting outside rush into the room, pin him against the wall, and handcuff him. While he loudly protests the unfairness of the decision, they take him to his punitive cell. The civil society volunteer who sits on the board tells me in an aside that if the man were to appeal, he would definitely win his case. But the inmate is certainly not even aware of this possibility. Not only will he spend the next seven days in solitary confinement, but the incident will affect the granting of a sentence reduction, block the possibility of a temporary release, and delay his prospect of being released on parole. Multiple punishments for the same act are the rule in prison. Another deputy warden with whom I later speak makes it clear that, even when prison officials do not believe in the veracity of the guards' version, especially when the accusers are known for their aggressive behavior, they cannot afford to appear to disown the guards. "He who says that we decide on the sole basis of facts and the inmate's profile does not tell the truth." Commenting on sentences to solitary confinement delivered for minor offenses in a context of recent tensions in the prison, she adds that punishing prisoners, even when it is obvious that

they have been harried and responded to provocations by an officer, serves to satisfy and appease the personnel. "It avoids the guards taking revenge on the prisoners," she straightforwardly explains.

These three cases illustrate the diversity and intricacy of the reasons that police officers, criminal judges, and prison wardens punish. Of course these examples do not exhaust all forms of punishment in law enforcement, judicial, and correctional institutions. In particular, one of the most common reasons worldwide for penalizing people is fiscal: either officially, through fines, or unofficially, through bribery, the police and more generally the penal system collect money, especially from the most vulnerable segments of society. Federal investigations conducted in the United States have shown the banality of well-structured networks among police officers, judges, jails, and municipalities, enabling the extortion of penalties and exertion of pressure on the poor belonging to ethnoracial minorities for insignificant or even fabricated offenses in order to increase the budget of the corresponding institutions.[14] As for the three reported situations in the street, in court, and in prison, I want to show the difficulty of simply answering the initial question: Why do people punish? when one is interpreting not imaginary dilemmas but actual cases.

In the first scene, the two law enforcement agents express their diffuse resentment against the three adolescents who embody the black youth of the housing projects—"the bastards," as the officers habitually call them, with the connotation of illegitimate birth associated with the word. But the combination of hostility and racism, which is common among the police working in low-income neighborhoods, has a moral resonance in this case: being under the supervision of the judicial institution, the teenagers have already had dealings with the penal system, either as delinquents or as victims or, more often than not, as both. Although the agents pretend to ignore that the boys live in the hostel, they evidently know where they come from, imagine what may have been their story, and mistreat them accordingly; hence the hassle about the documents, the

threat to arrest them, the hurtful words, the slaps. For the officers, it is legitimate to punish the adolescents because of what they think of them. The psychological harassment and physical abuse not only allow the police to exert their discretionary power but also serve to inculcate a social order, as the youths are learning, through the repetition of similar experiences, their social position of racial and moral inferiority.

In the second scene, the judge wearily indicates that she was embarrassed by the case but felt that she had to issue a prison sentence for lack of alternative. In fact she was not constrained in her decision by the law since mandatory sentencing did not apply to this particular situation, and she does not even seem convinced of the efficacy of the verdict to prevent future offenses from being committed. Besides, she undoubtedly realizes that the incarceration will make the man lose his job, take him away from his family obligations, and render the living conditions of his wife and children more precarious. More than anything else the prison sentence seems to be the result of a judicial routine acquired in the course of hearings during which similar cases accumulate and alternative sanctions are rarely envisaged. As one of her colleagues later told me, when law-makers imposed mandatory minimum prison time for repeat offenders in 2007 under a right-wing government, judges initially protested in the name of the individualization of sentences and the autonomy of their decisions, but they progressively got used to the new norm. Facts proved her right; five years later, when a newly appointed progressive minister of justice published a memorandum asking prosecutors to interpret the legislation with discernment, mentioning traffic violations as an example, of which the Roma inmate was a typical case, they did not abandon the inflexible practices they seemed to have adopted reluctantly shortly before, and the prison population continued to increase steadily.

In the third scene, the die seems cast from the start. The deputy warden who chairs the hearing knows that, despite the absence of evidence presented to the disciplinary board, the fact that it is

an accusation of verbal abuse against a guard renders a sanction necessary. He anticipates that officers and inmates will scrutinize the judgment. An adjournment of the case for lack of established proof and investigation report or, worse, a clement verdict would be regarded on both sides as an implicit condemnation of the personnel. The prisoners would consider it a victory, and the news would soon be disseminated throughout the entire facility. The guards would interpret it as an absence of support from their institution, and their unions would probably express their anger. Under these conditions sentencing to solitary confinement is a tactic of peacekeeping in which showing fairness is secondary to maintaining order. No one is fooled: the wardens are realistic about its actual meaning; the prisoners view it as one more injustice of the system; even the guards seem aware of it, as they tell me in private that it was no surprise to them that this colleague would have been insulted or assaulted, considering the bully he was, but such acknowledgment would not have prevented them from protesting had the provoked inmate not been punished.

Do the theories of justification apply to these cases? Concerning the officers, it seems difficult to speak of retributivism, even if the punishment is harsh, since there is no offense committed, or of utilitarianism, as the only predictable consequence of the harassment is the adolescents' frustration and rancor. Regarding the judge, the brevity of the sentence and the de-socialization caused by the imprisonment do not advocate for the prisoner's incapacitation, dissuasion, or rehabilitation, which the repeat offense three weeks after his release appears to refute ex post; moreover, the disillusionment the magistrate expresses about her decision suggests that she even doubts the properly punitive rationale of the sanction for an act which, after all, has involved no victim other than the suspect himself. Finally, from the perspective of the disciplinary board, the penalty is less motivated by the alleged offense, since there is neither evidence nor even inner conviction of the jury, than by the previous incidents, although they have already been adjudicated

and sanctioned; if one were tempted to be consequentialist by considering that the warden actually wants to preserve the peace in his institution, such analysis would amount to admitting the punishment of a possible innocent at the risk of generating other tensions.

Rather than attempting to impose a rigid theoretical framework on a complex empirical matter, we can use the three narratives to propose a distinct way of answering the question: Why punish? by dissociating the justifications, as they are provided by the agents (How do they justify their act of punishing?), and the interpretations, as they can be produced through a distanced analysis (How can one interpret these acts?). In the first case, the work of subjectivation of the agents aims at rendering acceptable, above all in their eyes, a problematic action. In the second case, the endeavor of objectivation of the analysis aims at rendering explicable, from a more general perspective, a type of equivocal action. These two operations are rarely distinguished. Yet the comprehension of scenes such as the three under discussion implies taking both of them into account.

The claim often heard from the police, that when they intervene in disadvantaged neighborhoods they merely enforce the law, must thus be placed in perspective with their assigned function, which consists in using their discretionary power to call to social order the purportedly dangerous classes. The firm conviction manifested by the magistrates, that they decide in complete independence and with reasonable fairness, must likewise be considered in light of an expanding culture of severity in criminal courts under the pressure of successive governments and public opinion, whose expectation is less about justice than about a socially differentiated distribution of penalties. The efforts of the corrections administration to provide disciplinary boards an appearance of respect of the rule of law must finally be analyzed in relation to the priority systematically given to the subordination of inmates and the security of the facilities. Justifications and interpretations therefore resonate with each other, and the local scenes must be understood as the products of broader

social processes. The forms of punishment dispensed by the various agents are always inserted in the historical, cultural, and political context that makes them possible. Connecting the two levels—micro and macro, so to speak—is crucial to avoid focusing the explanation on individual conduct or decisions as well as to account for differences across space and time.

Until now both justifications and explanations of punishment have been presented in a rational frame—through the alternative between utilitarianism and retributivism in the normative theories, or through the diverse mechanisms of social order, bureaucratic routine, and institutional peacekeeping in the empirical descriptions. But the analysis must go further. Rationality does not exhaust the reasons people punish as they do. "Punishment constitutes an emotional reaction," affirms Durkheim. Trying to understand why it is always in excess, why shame doubles suffering, why disgrace supplements exclusion, why cruelty surfaces in the infliction of pain, he suggests that these unnecessary sanctions "are a form of additional tribulation that serves no purpose, or one whose sole reason is the need to repay evil with evil."[15] His reflection seems, however, to stop halfway, since it remains close to the radical retributivist theses, which rationalize vengeance as a response to an injury endured by an equivalent injury on the offender. It does suggest the pleasure in the infliction of pain, but does not name it.

It is once more in Nietzsche's writings that one can find the most exacting and lucid exploration of the emotional involvement in punishment: "the voluptuous pleasure '*de faire le mal pour le plaisir de le faire*,' the enjoyment of violation," he writes.[16] To punish is not merely to return evil for evil; it is to produce a gratuitous suffering, which adds to the sanction, for the mere satisfaction of knowing that the culprit suffers. In the act of punishing, something therefore resists rational analysis or, better said, resists being analyzed as rational: a drive, more or less repressed, to make suffer, which society tends to delegate to certain institutions and professions. Correctional institutions and officers occupy an extreme

position in this process because they deal with a captive population that is already morally condemned, and they do so out of the sight of society. Let us consider the following tragic case.

On June 23, 2012, in a Miami prison, Darren Rainey, a fifty-year-old inmate suffering from schizophrenia and sentenced for cocaine possession, was punished for having defecated in his cell and refusing to clean it.[17] The sanction, called "the shower treatment" by the guards of the mental health unit, was commonly used with recalcitrant prisoners. The man was locked under a scalding-hot shower and, although he was screaming for help, was left shut up for more than an hour—until he died. According to witnesses, when his body was carried away, it was so burned that his skin had shriveled. Initially the police classified the death and the correctional institution took no sanction. It was only after a local newspaper publicized the case, revealing, on the basis of various testimonies from former personnel, that guards "taunted, tormented, abused, beat and tortured chronically mentally ill inmates on a regular basis" in order to provoke a response justifying punishment, that an inquiry was finally conducted. This was not the first time similar incidents ending in the death of an inmate after he had been mistreated were reported in this prison. In one case, three senior corrections department investigators were even sent to inquire; they described major dysfunctions with a systemic situation of abuse and corruption. But their report was dismissed by the state department of corrections, and they themselves were sidelined by their superiors. Only two years after Rainey's death were some minimal institutional changes undertaken, as the warden of the facility was discharged and two of the officers on duty on the day of the incident resigned, but no criminal charge was filed by the justice system. One more year was necessary for the medical examiner to present his report, which pronounced that the death had been accidental: the prisoner had died when he slipped and fell on the floor of the shower.

This tragedy is not isolated. Various reports stress the banality of physical, psychological, and sexual violence in the carceral world

in the United States.[18] Even when an inmate dies, administrative sanctions are rare and criminal charges exceptional. Moreover the refusal given to lawyers, activists, and researchers who request permission to penetrate the prison world shows that the institution wants to avoid any sort of external presence and independent inquiry. This opaque and impenetrable universe can thus perpetuate neglect, abuse, brutality, and even torture with complete impunity. In fact it is often the institution itself that promotes cruelty and expects its personnel to be its executants. Solitary confinement, which was once imagined to be a possible path toward moral reform, has in the past decades revealed its bare truth: it is the mere imposition of a form of "social death," in Lisa Guenther's words, for months or years, such as in the case of a former Black Panther activist who spent forty-two years in solitary confinement. It is estimated that on any given day, more than eighty thousand prisoners are in restricted housing, with an average duration of five years for the twenty-five thousand individuals confined in supermax facilities. But the isolation and the radical de-socialization of the inmate is still not enough for the prison administration, which invents other torments, like the prohibition against lying down, leaning against the wall, or practicing physical exercise, as was the case for Chelsea Manning seventeen hours a day during her time in solitary confinement.[19] Consequently, since the corrections administration and the justice system not only tolerate these practices but also deny the right to assess them, when they do not simply encourage them, we can consider that they are actually part and parcel of the punishment: when judges sentence someone to prison, their decision entails much more than a deprivation of liberty, and they cannot not know it. But since the majority of politicians and citizens turn a blind eye to this reality, and even demand more severity in the law, more inflexibility from the magistrates, and harsher conditions for prisoners, we can argue that society does not content itself in authorizing these exactions; it perpetrates them by proxy. As Everett Hughes writes about the "unconscious mandate given by the rest of us" to the prison

guard in the United States, "If, as sometimes happens, he is a man disposed to cruelty, there may be some justice in his feeling that he is only doing what others would like to do, if they but dared; and what they would do if they were in his place."[20] The indifference of the public, the silence of the political world, and the unwillingness of the penal system to change thus indicate that there exists a sort of license to exert, in its nakedness, an almost unbounded power to punish, namely as an indefinite right to inflict suffering.

Whereas it is certain that the United States represents an extreme case, it is far from being unique as fragmentary testimonies collected by human rights organizations and sometimes journalists across the world demonstrate. Yet it is difficult to imagine that such levels of cruelty would be possible or at least ignored or tolerated in European correctional institutions. The "Continental dignity and mildness" of the prison system in Europe, which James Q. Whitman contrasts with "American harshness," should certainly be relativized, but the differences he rightly emphasizes suggest that major variations exist within Western societies in terms of legal norms, institutional control, and, ultimately, respect of the rule of law regarding punishment. In fact, even within Europe, Nicola Lacey notes substantial differences, deeming "Britain's criminal justice system far less sensitive than that of Germany to the need to ensure humanity in punishment."[21] To consider that there is a limit clearly drawn between punitive policies and practices among nations would nevertheless be an error: the United States is certainly a borderline case, but it enlightens more broadly the emotional dimension of the drive to punish and the excesses it may generate. In the context of Europe, this component is repressed and the excesses are contained—which has not always been the case—but they remain present and could certainly revive. In this sense the penal and correctional system of the United States should be viewed as both exceptional and exemplary.

The pleasure associated with the act of punishing is not limited, however, to the tacit delegation of cruel acts to certain institutions

and professions. It can also be felt personally by those who attend or even participate in the punishment. Lynching in the southern states under Jim Crow, stoning in certain Muslim countries applying sharia law, beating to death of presumed thieves by self-defense groups in sub-Saharan Africa and Latin America directly implicate the crowds that associate with them. But most of the time this troubling relationship takes indirect and attenuated forms. This is how one can interpret the success of numerous documentaries and reality shows, in which individuals are humiliated and mortified by police officers, judges, guards, journalists, even spectators for infractions they are suspected of having committed. One of these series sets up stings for "men caught soliciting sex from underage" girls and makes them confess on a hidden camera before being arrested by the police as they leave the "predator house." Another one films the daily life of maximum security prisons, focusing on their most violent scenes and most sinister prisoners, and even developing a new technology, a virtual reality headset, "which puts viewers inside America's jails and takes one of TV's most immersive series to a breathtaking new level."[22] Contrary to what one would have thought and, in a way, to what Foucault argued in his discussion of the death of the regicide Damiens, the spectacle of the punishment and its cruelty, which gathered people around the scaffolds where tortures and executions took place, has not disappeared; it has moved to the screen, including that of computers, as in the case of Allen Lee Davis's dramatic death by electrocution.[23] Surely this spectacle has been adapted to the demands of contemporary sensibilities: it has been softened; it does not have for its object the body, but the dignity of the person; it does not show a physical agony, but a social death. Yet it is a contemporary form of pornography, which arouses an ambiguous excitement at the sight of people suffering for their misdeeds. This is typically the case with the practice of public shaming by some magistrates in the United States, which consists in having the individual convicted of a misdemeanor carry a poster on which his

offense is inscribed, in the same way as Hester Prynne, Nathaniel Hawthorne's adulterous heroine, had to wear on her chest the scarlet letter "A" for her crime.[24] But it is also what led the Islamic State to stage and publicize the beheading of its victims, thus anticipating, not without reason, the horror mixed with fascination that these images would not fail to elicit in Western countries. The cruel expressions of punishment and the pornographic manifestations of its spectacle are not aberrations. Their excesses—impulsive or deliberate—reveal that, in the act of punishing, there is always something that transcends pure rationality.

The three scenes previously recounted can indeed be reinterpreted in light of the emotions at play. For the police, the pleasure of intimidating, humiliating, abusing verbally and physically the adolescents is patent, as it is in numerous cases I observed during my fieldwork, when social inequality and ethnoracial distance added to power relationships. Thus, in other episodes, the officers overtly expressed their contentment at having disrupted a friendly party in a park by unjustified stop-and-frisks, and evidently enjoyed provoking a man in custody, desperate at the prospect of his imprisonment for an old sentence. In court, the affects may be less present in the decision, which does not satisfy the judge, than in the interactions that precede it, the admonition of the accused, the embarrassing comments on his social condition, and the offensive remarks on his opioid-replacement therapy redoubled by the lecture of the prosecutor and even the reproof of his attorney, all elements that go much further than the act of sanctioning an offender and reveal a delectation in the relationship of subjection thus generated. In the conversations I had with inmates whose trials I had attended, several told me how mortified they felt for having been treated in this way and how eager they were to see the end of this ordeal, with the anticipation of their incarceration being almost a relief. Finally, the trouble that is perceptible among the three persons on the disciplinary board in charge of adjudicating the case with an empty file shows their embarrassment, but the expectation

of retribution expressed by the guards, even though guilt is not established, signals more unsettling sentiments. In fact during certain hearings, the president of the commission could also articulate statements the only objective of which seemed to be the belittlement of the prisoner or the emphasis on further negative consequences of the verdict. The excesses of the act of punishing therefore vary depending on the institutions, the contexts, the situations, and the persons; they can be manifest or hidden, explicit or ambiguous. But even in the supposedly most civilized forms of dispensing justice, a dark side remains.

Paraphrasing Georges Bataille, one could speak of the "accursed share" of punishment, thus transposing his idea of excess from the material to the emotional economy.[25] Of this accursed share, often disavowed, neither justifications nor interpretations can provide a full account.

The initial question: Why does one punish? has thus progressively been complicated. It first divided into two interrogations, one normative (Why should one punish?), the other analytical (Why do people actually punish?), the latter serving as an empirical test for the former. It then shifted toward another one: How do we punish?, which appeared to be indispensable to integrate the affective dimension of punishment eluded in usual rational approaches. Thus, from justification as pure reasoning, as it is discussed by philosophers and jurists, the reflection went to the justification by the agents (How do they account for what they do when they punish?) and the interpretation by the observer (How can one account for the various contexts and meanings of the act of punishing?), ending with the exploration of the obscure or, better said, obscured part (How much is the pleasure of making or seeing suffer an element of the act of punishing?), the one most profoundly buried and most difficult to even name.

Having arrived at this final stage, we could now reverse the direction of the reading and consider the philosophical and legal

approaches as a deliberate endeavor to conjure the irrational dimension of punishment: law, as discipline and as matter, would serve to master the impulsion of cruelty—logos sublimating hubris. The effort is certainly laudable. Repressive institutions and professions as well as politicians should certainly learn from it. But it falls on the social sciences to break the enchantment of this virtuous circle by explaining why police officers, magistrates, and guards punish as they do, why penal populism prevails over utilitarianism and even moderate retributivism, why punishment is so often in excess not only of the crime it sanctions but of what it is supposed to be.

A blind spot in the definition and the justification remains, however. Indeed the work of the agents involved in repression, the discourse of political leaders, and the surplus of suffering are not uniformly deployed in the social space. They target certain categories and certain territories while sparing others. This is precisely what philosophical and legal theories aiming at defining and justifying punishment tend to mask by presenting it as impartial and fair. We must therefore examine the question of the social distribution of punishment by asking: Who gets punished?

Notes

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