SAINT ANDREW'S DAY LECTURE 2015

THE URGE TO PUNISH

I've split this reflection into two parts. First, a psychological approach; second a moral or philosophical approach.

THE PSYCHOLOGY OF PUNISHMENT

I've called it The Urge to Punish, echoing Goethe's warning to 'Beware of all those in whom the urge to punish is strong.' An urge suggests a deep unconscious drive; but if we want to lead conscious and intentional lives we should identify, own and if necessary learn to counter the unconscious urges that drive us. This is doubly important if these urges drive not only private behaviour but public policy, as this one clearly does.

The urge to punish seems to be universal in humans, though it is stronger in some than in others, and may be more dominant in men than in women. It seems to come from a need to make sense of our lives and the causes of our suffering and frustration. I'll quote Nietzsche a couple of times in this presentation because he was a brilliant psychologist who spent a lot of time thinking about the human condition. This is what he wrote about our need to find explanations for the bad things that happen to us in life:

> Every sufferer instinctively seeks a cause for his suffering; more exactly, an agent; still more specifically, a guilty agent who is susceptible to suffering - some living thing upon which he can, on some pretext or other, vent his affects, actually or in effigy: for the venting of his affects represents the greatest attempt on

> the part of the suffering to win relief, the narcotic he cannot help desiring to deaden pain of any kind.[1]

I'll come back to his claim that an element in the relief we get from punishing others is the pleasure it gives us; but let me quote another psychologist on how revenging ourselves on those who've injured us is a way of making sense of the chaos of human life. This is from Adam Phillips:

> Our angers are inarticulate theories of justice; they are articulated, acted out, in revenge. If rage renders us helpless, revenge gives us something to do. It organizes our disarray. It is one way of making the world, or one's life, make sense. Revenge turns rupture into story.[2]

We are seeing that process at work in the political response to the recent outrages of IS in Paris.

The next factor to think about is the turbulent psyche of the human animal. We do not live in balance with each other the way the other animals on the planet do, more or less. It doesn't take much to provoke us into a revenge spiral that becomes impossible to control. You only have to think about the long vendettas that characterise human history or those that presently convulse the human community today to get the point. We talk about nature red in tooth and claw, but non-human animals rarely push conflict to the extremes we do.

In 1974, towards the end of the Vietnam War, the ecologist Joseph Meeker wrote a book called, The Comedy of Survival, in which he contrasted what he called the tragic and the comic ways of life.

Tragedy pushes conflict and disagreement among humans to destructive conclusions; in contrast to the other animals that follow what he called 'the comic way', prompting them to divert potentially deadly encounters into play. In the social life of animals the purpose of intra-specific combat is to gain ascendancy over the adversary, not to destroy him. When animals with the capacity to kill members of their own species reach a point in their battles where death will soon result, one combatant will frequently turn aside and attack some harmless object, such as a tree or shrub, in order to inhibit the killing behaviour or expend it harmlessly. "Honour" among animals is often satisfied by the safe discharge of aggression as well as by its more lethal expressions, and battles normally end with maximum face-saving and minimum bloodletting. Slaughter is necessary among animals only for nutritional reasons, Meeker wrote; but when status and the maintenance of social order are at stake, shame and ritualised aggression are more appropriate.[3]

Tragically, the human animal's highly developed self-consciousness pushes it to extremes of shame-and-honour-prompted rage, so the cycle of offence-revenge-offence-revenge begins to roll; and it can roll for centuries, long after the original offence is lost in the mists of time. That's why in human history the great law makers have tried to modify our drive towards uncontrolled revenge by imposing the principle of proportionality in conflicts within the human community. This was why Moses introduced the Lex Talionis or the Law of Proportion. Here's a chunk of what he said in the Book of Exodus:

> Whoever strikes a person mortally shall be put to death. If it was not premeditated, but came about by an act of God, then I will appoint for you a place to which the killer may flee. But if someone wilfully attacks and kills another by treachery, you shall take the killer from my altar for execution… When a slave owner strikes a male or female slave with a rod and the slave dies immediately, the owner shall be punished. But if the slave survives a day or two, there is no punishment; for the slave is the owner's property. When people who are fighting injure a pregnant woman so that there is a miscarriage, and yet no further harm follows, the one responsible shall be fined what the woman's husband demands, paying as much as the judges determine. If any harm follows, then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe.

Some of us now find that language distasteful, but in its day it was a liberal reform of the criminal justice system. Implicit in what Moses did was the recognition that since humans lack an instinctive sense of proportion in their conflicts, a wise society will impose it upon them.

Another element in the human psyche that adds a further complication to our attempts to manage our drive to punish is the pleasure it gives us, a pleasure that may compensate us for the loss of the original offence against us. Here's Nietzsche again:

> It was in the sphere of legal obligations that the…uncanny intertwining of the ideas "guilt and suffering" was first effected... To ask it again: to what extent can suffering balance debts or guilt? To the extent that to make suffer was in the highest degree pleasurable, to the extent that the injured party exchanged for the loss he had sustained…an extraordinary counterbalancing pleasure: that of making suffer…this is a hard saying but an ancient mighty, human, all-too-human principle…Without cruelty there is no festival…and in punishment there is so much that is festive.[4]

In the past in Europe executions or punishment beatings were festivals for the public. Today on You Tube you can watch theatrically produced beheadings from Britain's ally Saudi Arabia as well as from Britain's enemy in the Islamic Caliphate now established in Syria. But we still have our own more sublimated versions in Britain. We have replaced the execution stocks and punishment stools with tabloid headlines that wind the public into states of enjoyable frenzy.

Let me summarise what I've said on the psychology of punishment before looking at the philosophical angle.

- The urge to revenge ourselves against those who offend us seems to be an atavistic instinct in the human animal.
- It can be interpreted as an attempt to make sense of our suffering. It organizes our disarray.
- What makes it so dangerous is that we lack proportion and push our urge for revenge to an insane and counter-productive degree.
- This is why human history is constantly beset with wars and violent vendettas.
- And we derive pleasure from punishing others or seeing them punished.
- All these factors make us the most complex and dangerous animal on the planet and they complicate our attempts to achieve effective ways of managing our own disordered behaviour.
- All this should alert us to the fact that however rational we try to be in planning our criminal justice policies, the measures we adopt are likely to be influenced by deep and disturbing forces in human nature that are rarely acknowledged or even fully understood.

PHILOSOPHICAL ASSUMPTIONS BEHIND PUNISHMENT

But as well as being possessed by forces of dark unreason, we also have a capacity for rationality and self-understanding in our self-management and in the way we order society. In its Scottish version, Hugh MacDiarmid described this human duality as the Caledonian antizyzygy, the existence of two competing or opposing elements within the same entity, dramatically expressed in Stevenson's Jekyll and Hyde story. It is our Jekyll-self that struggles to achieve a better balance in our management of the criminal justice system. This is why in Scotland over the centuries we have slowly purged it of its worst cruelties, though it is far from perfect even today. It is the attempt to bring a moral rationality to bear on our punishment systems I want to look at next, touching on a few of its main elements.

A claim rational penal systems make for themselves is that one of their purposes is to deter others from criminal behaviour. Emmanuel Kant would have objected to this approach on moral grounds. It treats offenders not as ends in themselves, as human subjects with rights and a unique personal history, but as objects, as disposable means to someone else's ends. That objection concentrates on the single greatest flaw in our current system: it tends not see offenders; it only sees their offences. Its judgements are not person-centred; they are action or conduct centred. They see the deed not the doo-er. I'll come back to that in a minute but now I want to return to deterrence theory.

The trouble with deterrence theories of most kinds is that they are faith statements beyond normal processes of verifiability or falsifiability. Take the death penalty. In the US it is still believed in, nowhere more fervently than in the Southern States. Yet a recent report by the National Research Council, called Deterrence and the Death Penalty, said that claims the death penalty had a deterrent effect on murder rates were "fundamentally flawed". The 2014 FBI Uniform Crime Report showed that the South accounted for 80% of executions in the US, yet it also had the highest murder rate; while the Northeast, which had less than 1% of all executions, also had the lowest murder rate.

And the same goes for the deterrent effect of imprisonment. The United States has the highest incarceration rate in the world. The natural rate of incarceration for countries comparable to the United States tends to stay around 100 prisoners per 100,000 of the population. The U.S. rate is 500 prisoners per 100,000, about 1.6 million prisoners according to the latest available data from the Bureau of Justice Statistics. Yet the US remains one of the most violent and divided societies in the world. Imprisonment does not deter crime. Indeed, there is evidence that it increases it. Not that these facts will in any way disturb the faith of those who believe in the doctrine of deterrence.

A more solid element in the theory of punishment is that of protecting the public from the aggression and predation of criminals. It is hard to disagree with this. However we account for it, we have to recognise that the volatile human psyche produces monsters as well as saints. Leaving aside for now the extent to which social

conditions may contribute to the creation of men of violence – and they are usually men - it is obvious that any sane society needs ways to contain men like the serial killer Angus Sinclair who was found guilty last year of the famous World's End Pub murders of Christine Eadie and Helen Scott in 1977.

A more dubious element in the theory of punishment is that it is the way we express our disapproval of criminal misconduct. Respect for others and the social order are fundamental to stable societies, so punishing wrong-doing is a necessary part of the rhetoric of a civilized society; it is an essential element in the moral pedagogy of stable human communities. There are two difficulties with this. The first is that a wise society won't want its mechanisms of disapproval to be so counterproductive that they amplify rather than diminish the faults they are intended to condemn.

But the second difficulty is more serious. Moral fashions change. Some even believe that in civilized societies our morality is constantly evolving to a higher level. What is certainly true is that morals are as volatile as the human psyche. We have already noticed Moses taking the institution of slavery for granted. Today we see it as a gross evil. Until recently marital rape was thought to be a contradiction in terms, because of the moral belief that a wife was her husband's property. Now it is a crime we despise. And until 1980 Scotland punished homosexual acts between consenting adults as a crime. Nowadays gay people have the same sexual rights as everyone else. So we should be wary of the unchanging integrity of our moral opinions. And there's something else we

should pay particular attention to when we struggle with these issues.

The basis for many of these outdated forms of moral outrage is religion, so it is worth reflecting for a moment on the role of religion in Scotland's approach to crime and punishment. Religions that claim their moral systems are based on acts of divine revelation lock themselves into the moral norms of ancient societies. Both the Bible and the Qur'an take slavery for granted; as well as the subordination of women; not to mention a ferocious hostility to same sex relations. That's why most of the religious communities in Scotland are having problems with gay marriage; just as they had or still have problems with full feminine equality. To base your criminal justice system on the inherited norms of late Bronze Age Middle Eastern societies is to put yourself on a collision course with any idea of moral evolution or development.

Mind you, the idea of morality as a set of revealed norms valid for all time is not exclusively a religious idea. It can become a secular doctrine too. That's what has happened to the Second Amendment to the United States Constitution that protects the right of people to keep and bear arms. It was adopted in 1791 in the context of a very different time; but it has achieved such a level of sacred authority in contemporary America that it is now beyond the wit and skill of legislators to alter, making the US one of the most violent countries in the world.

But I want to return to another influence from religion that still hangs around our thinking about punishment like the Haar off the

North Sea. It is the theological understanding of sin. The best definition of sin is willed disobedience of God's moral commandments. Behind it there lies a pre-Darwinian anthropology. In the original creation myth humanity was formed in a single afternoon without any pre-history and was immediately endowed with free will to choose between good and evil. All choices were freely made within the eternal sunshine of the spotless mind. So sin was an act of willed disobedience, and therefore they had to be punished. This was a moral anthropology in which humans had no history to distort or determine their choices.

Compare that innocent or immaculate picture of human nature to how we now think of humans after Darwin and Marx and Freud, the great explorers of the dark and hidden continents of the human psyche. The philosopher Spinoza came long before these three destroyers of our imagined innocence, but he anticipated them in his attitude to human behaviour. He said freedom of the will was the name we gave to our ignorance of causality. He anticipated what we now know about humanity's long march to self-consciousness, unconsciously burdened not only with an immediate personal history but with the evolving history of the human species itself. We arrive on the scene in life already programmed and determined by forces that were never in our control. That's why Spinoza advised us: 'With regard to human affairs, not to laugh, not to cry, not to become indignant, but to understand'.

The opposite approach to the theological moralism of revealed religion is what Marx called materialism, the claim that most violence and injustice are the result of material forces, not of the

vicious disposition of individuals. In other words, human behaviour cannot be judged apart from its material or historical context.

The theological understanding of sin as willed, freely chosen disobedience has gone deep into Scotland's psyche, even among people who think their attitudes are formed more by secular than religious forces. So wrong actions are judged not against the long, often sorry story of human history; but, as it were, in a historical or moral vacuum.

The fascinating thing about Scotland's immediate struggles with these competing narratives of human understanding, these antizyzygys, is that the biggest recent reform to our criminal justice system was based on a delicate acceptance of philosophical materialism rather than theological moralism. I am referring to the Kilbrandon reforms of the 1960s. Kilbrandon's genius was to get us thinking about how to respond effectively to those whose lack of social education resulted in offending behaviour; and he got us to acknowledge that offending children, then known as delinquents, were themselves victims of a failed social system. His fundamental principle was that delinquency in children could not be treated or understood in isolation: it always had a context, and the generally recognised background was failure in parenting, usually linked to poverty. Causation is always complex, but there is an undoubted and continuing correlation between poverty, defined dynamically, and offending behaviour. Charged with finding solutions to the rise in the rate of juvenile delinquency in post-war Scotland, the Kilbrandon Committee found that 'the true distinguishing factor common to all children concerned is their need for special measures

of education and training, the normal upbringing process having, for whatever reason, fallen short'. The Committee held that the arrangements for dealing with these children were unsatisfactory, and it recommended the removal of those under 16 from adult criminal procedures. The result was the setting up of the Children's Hearings system within an ethos that sought to change rather than punish offending children. The Kilbrandon mantra was 'needs as well as deeds'; pay attention to the context of need that led to the offending deed; do not judge the act as if it had no pre-history.

The depressing thing is that the Kilbrandon insight was never applied to the criminal justice system as a whole. So we go on feeding slightly older versions of the children from the Hearings System into the adult prison system, where they get lost in the cycle of repeat offending. It is always easier to forgive children than adults, of course; but offending adults all started out as offending children; and none of us ever ceases to be the child we were, even when we are no longer aware of its continuing and maybe troubling presence in our lives.

Even those who reject determinism have to admit that we are all determined by many material and historical factors not in our control. Compare the probable careers of two boys born on the same day in the same maternity hospital, one going back to a deprived housing estate with inadequate adult role models and that of a boy from a secure background sent to a private school.

The fact is our penal system sends a disproportionate number of men and women to prison from deprived communities. This suggests that

material and structural forces are more powerful than moral choices in where people end up in life and in how we respond to them. And we know from the Prison Reform Trust that between 20% and 30% of the Scottish prison population has a significant learning disability. And we know from other surveys that over half of the children in custody have been in the care of, or involved with, social services.

CONCLUSION

The urge to punish, while to some extent understandable and deeply rooted, is too blind a force to understand or respond to the psychological complexities of human behaviour: and when engaged in blindly and reactively only serves to fortify and maintain offending behaviour. It is coloured by ancient myths about fallen human nature and a vengeful God, so that even secular minded moderns take it absolutely for granted that the obvious response to those who behave badly is to inflict pain upon them, whether physical or psychical.

And because of the way law and order issues have become increasingly politicised in our tabloid-driven culture, it is difficult to have a hard, evidence-based look at the best way to deal with offenders. To oppose deeply held public prejudices always takes courage; and not all politicians and legislators posses that most important of the virtues. We certainly have a duty to protect the public, so we'll always need custodial institutions in which to isolate truly dangerous villains. But most of the men and women in our gaols are not rebels against society; they are the victims of society's own failures. They are parked there not because they really

endanger the rest of us; but because we can't come up with better ways of responding to the social contexts that produce them. So the prison system becomes an unintended form of social cleansing. And since we are not as cruel as the system we have created might suggest, the fairest way to see it is as the consequence of our bafflement and inability to come up with anything better. So it is high time to heed Spinoza's challenge, 'With regard to human affairs, not to laugh, not to cry, not to become indignant, but to understand'.

I'll close with a postscript. Chris Mullin, the former Labour MP for Sunderland, kept a journal of his years at Westminster and I read it with great pleasure when it was published; but one entry stabbed me with sadness. The film *Billy Elliott* is showing in one of the schools in his constituency, and as he waits to go in he muses on the plight of the hundreds of children standing beside him in the queue. He concludes the entry with these words:

> I look at all the shiny, optimistic little faces waiting with their parents in the playground at Grangetown School for the doors to open. And then I look at their parents and I can see at a glance who will prosper and who is doomed.

Doomed is a strong word to use about any child's future, yet it is the fate that waits in ambush for thousands of poor children in our grossly unequal society. It is time we imagined a better way. And a good place to start might be by taking another look at our urge to punish them.

[1] Nietzsche Genealogy of Morals Third Essay, section 15.
[2] Adam Phillips, *The Beast in the Nursery*, London 1998, p.98
[3] Joseph Meeker, *The Comedy of Survival* , University of Arizona Press, Tucson, 1997), p. 40.
[4] Nietzsche, *The Genealogy of Morals.* Second Essay, section 6.