**I. The Aims and Limits of Punishment**

In 1975 in New York Rabbi Bernard Bergman was indicted on charges of conspiracy to defraud the government through the use of inflated Medicaid claims made in connection with a number of nursing homes he operated. Bergman entered a plea of guilty and came before Judge Frankel for sentencing. Alan Dershowitz, Bergman's attorney, argued that no legitimate (or useful) purpose would be served by punishing Bergman. Weighing Dershowitz' contention, Judge Frankel entertained several theories of criminal punishment and explored their applicability to Bergman and his crime.

**II. First Theory: Rehabilitation**

First, Frankel considered the view that the only legitimate purpose of punishment is with the *rehabilitation* of the offender. On this view, the sole purpose of determining whether a defendant is guilty or innocent is to sort out who is and who is not "ripe" for rehabilitation, to identify those individuals who need preventive detention and therapy. Frankel rejected this purpose as a goal of punishment since punishment ought to visit a hardship upon the convicted criminal. If punishment is is seen as doing him some good, it fails to acknowledge what it means to punish someone for their crimes, it fails to punish. Frankel did not deny that rehabilitation might be something to consider while a convicted criminal is serving out his punishment. But he argued, rehabilitation cannot be the sole purpose for punishing a convicted criminal nor can it replace the grounds for sentencing a convicted criminal to confinement in the first place. If rehabilitation is the sole purpose of punishment, Bergman ought not to be punished.

**III. Second Theory: Deterrence**

Frankel then went on to consider the differences between specific and general *deterrence* theories of punishment, arguing that the latter is the basic aim of punishment, i. e., the primary point of punishment is to induce others to avoid acting as the offender did.

**IV. The "Crime" of Punishment**

Objecting to Frankel's analysis, Dershowitz sought to undermine Frankel's appeal to a theory of deterrence on the grounds that deterrence theories offend the Kantian maxim that persons ought to be treated as ends in themselves, never as a means only, and that punishing Bergman in order to deter others was a way of using Bergman for the greater good of others or of the society as a whole and that this was not fair to Bergman. (Kant urges that a minimal respect for persons requires that persons be treated as ends in themselves and not merely as a means to other people's ends). Frankel confessed that he did not "pretend to be an authority" on the work of Immanuel Kant, but that he believed that he was treating Bergman as an end in himself since Bergman had had the opportunity of abiding by the law or breaking it and accepting the penalty. Our legal system shows sufficient respect for persons, treating them as ends in themselves, since it presupposes that persons make choices and are accountable for their actions. Having defended his view, Frankel of course was faced with having to decide what specific punishment he should dole out in this case. What would deterrence require? And what punishment would fulfill the goal of retribution?

**V. Theories of Punishment: *Utilitarianism v. Deontological ethics***

The various theories raised by Judge Frankel's Sentencing Memorandum align themselves with two different moral theories: utilitarianism and deontological ethics. Utilitarianism is one of a variety of theories that takes the consequences of an act as the arbiter of whether the act is right or good. So if the consequences of an act or a policy are, taken together, good, then the act is good. Deontological ethics, of which Kantian ethics is an example, takes the moral correctness of an act as given by its conformity to our duties and obligations to treat one another in certain ways. A Kantian or retributive view of punishment is intimately bound up with what a person deserves. The utilitarian holds that for a punishment to be justified it must do some good. The problem with the retributive view, a utilitarian might say, is that it can produce situations where we are required to punish someone even if it clearly doesn't do any good and going about punishment in this way is inconsistent with a humane and forward-looking approach to criminality.

The Kantian, however, might argue that a utilitarian approach to punishment can lead to situations in which persons are undeservedly punished. Suppose a judge decides to punish you with life imprisonment for running a stop-sign. He decides to do so because he is "sick and tired" of having to deal "time and again" with lawlessness of this sort and he is hoping that by setting an example, others will come to realize the consequences of acting as you did and cease to behave so badly. Even assuming that the judge is right and that lawlessness of this sort will decline dramatically with the imposition of such a sentence, from a Kantian's point of view, you have very good reason to wonder what gives the judge the right to use you in this way. Indeed it is this wonder that lies at the heart of the retributivist and Kantian insistence that punishment must be deserved, if it is to be fair or just. The difficulty with a utilitarian approach to punishment, the Kantian will argue, is that it allows persons to be punished out of all proportion to their guilt and even in the absence of any guilt whatsoever, if it serves the best interests of the community at large.

**VI. The Capital Punishment of the Dog Provetie (May 15,1595)**

The dog Provetie bit the finger of the child of Jan Jacobsz van der Poel while the child was playing in the house with a piece of meat in his hand. A few days later the child died of fright. The dog was arrested and imprisoned and a confession was elicited from him "without torture or being put in irons." The dog was then tried and condemned to death. The court ruled that the dog Provetie be taken to Gravesteijn "where evildoers are customarily punished" and hanged by "a rope until death ensues" and then taken to the gallows field, "to the deterring of other dogs and to all as an example." Moreover, all "his goods, should he have any" were ordered confiscated and forfeited to the local authorities. Why is the trial and punishment of the Dog Provetie strange? What makes it absurd? What does its absurdity suggest about the rationale for punishment?

**VIII. Utilitarian Theories of Punishment (Again)**

The Utilitarian argues that punishing a person is justified if and only if doing so has (or is likely to have) better consequences than not doing so, "when, and only when, it is a means to such future goods as *reform* of the offender, *protection* of society against other offenses from the same offender, and the *deterrence* of other would-be offenders" (Feinberg) — by contributing to the individual's retribution, by incapacitating the offender, thereby preventing him from engaging in further undesirable behavior, and through deterring others from committing the same offense. The utilitarian holds that it is necessary for punishment to be justified that it do some good.

**IX. Deontological Views of Punishment Re-visited**

The deontological view of punishment is usually referred to as retributivism. The deontological view holds that punishment of an individual is justified if and only if it gives him or her what he or she *deserves*. "Punishment is justified only on the ground that the wrongdoing *merits* punishment." (Feinberg) Justification is backward-looking as opposed to forward-looking.

**X. Proportionality**

A utilitarian interpretation of proportionality will rest on the future advantages of the punishment. A punishment is disproportionate only if it is more or less than what is required for the pursuit of a legitimate state purpose. Any punishment which is inflicted beyond what is necessary, say, to deter the offender and others from engaging in anti-social conduct is without point. On a retributive theory the punishment must *fit* the crime; it ought to be of a gravity or severity justly proportional to the seriousness of the crime.

**XI. The Function of Punishment**

Punishment might be said to have two distinctive features: *hard treatment* and *reprobation*. If either is absent, punishment is lacking. Punishment expresses the community's disapproval, indignation, resentment. Expression of the community's condemnation is generally believed to be an essential ingredient of punishment. "Indeed it can be said that punishment expresses the *judgment* ( as distinct from the feeling) of the community that what the criminal did was wrong." (Joel Feinberg) The two features of punishment usually go hand in hand. The community does not express its disapproval of what the criminal did and then inflict unpleasant treatment, although it may sometimes appear as if this is the case, i.e., a judgment is expressed at the end of the trial and a punishment is then inflicted. As Joel Feinberg says, "it would be more accurate in many cases to say that the unpleasant treatment expresses the condemnation."

**XII. Punishments and Penalties**

What is it that a punishment has and a penalty lacks? Is the difference simply the degree of severity? The loss of one's driver's license is a penalty; a day in jail is a punishment. But for some people the loss of one's license is significantly harsher than a day in jail. The key difference is to be found in the *stigma* attached to punishment. What separates a punishment from a mere penalty is that a punishment condemns, the penalty does not. Furthermore, the difference is far from inconsequential. Someone who is threatened by punishment is entitled to certain safeguards and protections: the right to a trial by jury, the right to confront witnesses, etc.; whereas a person who is threatened by a mere penalty — a parking fine, suspension of one's driver's license — is protected by no such safeguards.

**XIII. The Subversive Drivers Act (*New York State Legislature*, 1961)**

In 1961 the NY State Legislature enacted "The Subversive Drivers Act," requiring "the suspension and revocation of the driver's license of anyone who has been convicted, under the Smith Act, of advocating the overthrow of the Federal government." According to the bill's sponsor, Assemblyman Paul Taylor, the legislature was simply exercising its right to regulate automobile traffic in the interests of public safety. Was this punishment?

**XIV. Flemming V. Nestor (*United States Supreme Court*, 1960)**

Nestor had immigrated to the United States from Bulgaria in 1913. In 1955 he became eligible for Social Security. But one year later, in 1956, he was deported under the Immigration and Nationality Act, for having been a member of the Communist Party from 1933 to 1939. At the time he was deported he had been in America for 43 years and had been a member of the Party for more than two decades. Although he was forced to leave the country, he could look forward at least to the continuation of his social security benefits. However, the Social Security Act was amended in 1954 (in the height of the McCarthy period) to allow the termination of the benefits of an alien who was deported on a number of specified grounds, one of which was, past membership in the Communist Party. Social security administrators stopped Nestor's benefits. Nestor then brought suit in District Court seeking a reversal of the administrative decision. The District Court ruled in his favor, saying he was deprived of his benefits without the the opportunity to exercise his constitutional rights to defend himself. The Supreme Court, however, reversed the lower Court's decision, arguing that the termination of Nestor's benefits was within the plenary power of Congress to regulate an activity and that it was not, did not constitute, a punishment, and hence Nestor was not entitled to the usual safeguards and protections of a criminal defendant. If you were on the Court, would you side with the majority or with the dissent?

**XV. Strict-Liability, Penalty, and Punishment**

Some commentators believe that imposing imprisonment rather than fines for the violation of strict liability statutes is improper, if not unconstitutional, when the defendant is not the least at fault. Violations can only be punished by a fine, forfeiture, or other civil penalty, and none of the disabilities based on conviction of a criminal offense can follow. Statutory rape and the felony-murder rule, and various "public welfare" offenses (for example, the mislabeling of drug products) have been among those offenses imposing strict criminal liability, the defining feature of which is the refusal to require proof of the actor's state of mind as a prerequisite for liability. A basic principle of our law, however, has been that the punishment must be deserved. And this principle has been interpreted to require a finding of *mens rea*: Only where I have acted with the intent to commit an offense against the law, and therefore acted with a culpable or blameworthy state of mind, should I be subjected to punishment. Justifications for strict criminal liability offenses are often utilitarian in nature: appealing to the supposed good consequences of imposing such liability. It can be argued, for example, that it will deter crime by inducing those contemplating felonious conduct to think again or think twice before engaging in such conduct. One might object, however, that it is wrong and unfair to thus use the defendant as an expedient to promote the greater public good. Persons should be punished only when they manifest a culpable state of mind for the offense with which they have been charged. "There is something very odd and offensive in punishing people for admittedly faultless conduct; for not only is it arbitrary and cruel to condemn someone for something he did (admittedly) without fault, it is also self-defeating and irrational." (Feinberg)

**XVI. Punishment and Taint**

The principle of tainting dates back to the origins of prosecution for criminal homicide. In 13th century England the assumptions was that if a person caused the death of another, he had upset the natural order; some response was necessary to expunge the taint. English law extracted two forfeitures in the case of homicide: one, the instrument of death was forfeited to the Crown and two, the killer forfeited his lands and goods. The model of taint haunts criminal law. The Subversive Drivers Act might best be understood in this light.

**XVII. Punishment and the Risks of Wrong-doing (Offender Beware!)**

In defense of the felony murder rule one might argue that someone who engages in a felony runs the risk that things will turn out worse than she expects. So in a case where the defendant committed an assault against someone who turned out to be a police officer, he was convicted of assaulting an officer without regard to the reasonableness of his mistake. The U. S. Supreme Court upheld the conviction because "from the very outset ... his planned course of conduct was wrongful." So the wrongdoer had, as it were, "to take his victim as he found him." If wrongdoing justifies disregarding mistakes about aggravating circumstances, then committing a felony can justify disregarding whether the deadly outcome of the felony is accidental or culpable. Both tainting and subjecting offenders to the risks of a punishment greater than might otherwise "fit" the crime violate the principle of just punishment: Punishment must be proportional to wrongdoing.