

1-1-1967

Punishment and Treatment of Offenders

Louis H. Swartz

University at Buffalo School of Law

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Criminal Law Commons](#)

Recommended Citation

Louis H. Swartz, *Punishment and Treatment of Offenders*, 16 Buff. L. Rev. 368 (1967).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol16/iss2/5>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

PUNISHMENT AND TREATMENT OF OFFENDERS*

LOUIS H. SWARTZ**

I. INTRODUCTION

WE have need of a more workable definition of, and set of labels for, the modern public institution of "how we deal with offenders," so that our communication, thought and action concerning that institution need not be frustrated by inadequate nomenclature. Our legacy of historic statements of the meaning of *punishment* at best serves us effectively along only one dimension of the modern institution—that concerned with the evil, pain or unpleasantness we inflict on offenders. Yet in focusing solely on this component, traditional definitions, applied to modern contexts, ignore or distort much of what the contemporary institution consists of—for example, such additional means as technical training, casework or psychotherapy, employment assistance and non-custodial supervision.

Pain or discomfort is implicit and inescapable in the imposition of the disvalued status of convicted offender, and in the compulsory aspect of any other consequence—custodial or non-custodial—that may or must be legally applied to the offender upon a finding of criminal liability.

However, we have become increasingly unwilling to let pain, or the threat of pain, by way of deprivation of liberty, *stand alone* as our means of dealing with the adjudged offender or as a means of influencing the potential offender. Furthermore, in large numbers of cases we have minimized the pain component through non-custodial sentences to probation, or through an attempted reduction of the harshness of the conditions of confinement. Brief definitional references to pain or unpleasantness now seem merely to confound thought and communication by presenting a distorted description of changing institutional means.

After considering the way others have met or by-passed the problem of defining the modern institution of "how we deal with offenders," I offer my own attempted solution. This involves discarding, for definitional purposes, language concerning authoritative infliction of suffering, which substantially biases from the outset consideration of what the modern institution is and what its problematic moral aspects are.

II. TRADITIONAL DEFINITIONS

Traditionally definitions of *punishment* have served a dual function, namely, (1) referring to the public institution of "how we deal with offenders" and (2) in so doing, describing the means, or characterizing the "essential" quality of the

* This article stems from some observations made by the writer as a panel member upon the occasion of Professor Jerome Hall's lecture, *Psychiatric Criminology: Is It a Valid Marriage? The Legal View*, delivered at the State University of New York at Buffalo, April 18, 1966, and published *supra* p. 349.

** Associate Professor of Law, School of Law, State University of New York at Buffalo.

means, employed by that institution. Historically the second function was performed by defining *punishment* as authoritative infliction of an evil, pain, or deprivation of a good. Thus Hobbes says:

A punishment, is an evil inflicted by public authority, on him that hath done, or omitted that which is judged by the same authority to be a transgression of the law; to the end that the will of men may thereby the better be disposed to obedience.¹

Blackstone's definition is similar:

[P]unishments . . . are evils or inconveniences consequent upon crimes and misdemeanors; being devised, denounced, and inflicted, by human laws, in consequence of disobedience or misbehavior in those to regulate whose conduct such laws were respectively made.²

However, because of substantial changes in the criminal law as it relates to the legal consequences of criminal conduct, the infliction of pain or deprivation of a good no longer adequately characterizes³ the means of the now revised public institution of "how we deal with offenders."

III. MODERN DEFINITIONS

A. *Punishment as Pain*

One way of coping with this divergence of modern institution from the traditional substantive definition of *punishment* is that followed by Jerome Hall. Hall says, in effect, that it is only the pain or deprivation component of what we do with offenders, and this only to the extent that it is a proportional or fit response to the gravity of an offense involving moral culpability, that he will call *punishment*.⁴ This proportional pain or deprivation component cannot be

1. Hobbes, *Leviathan* 202 (Oakeshott ed. 1960). "[Human punishments] are either *corporal*, or *pecuniary*, or *ignominy*, or *imprisonment*, or *exile*, or mixed of these." *Id.* at 205. Hobbes lists eleven inferences which he draws from his definition of *punishment* and which must be taken to qualify that definition, e.g.:

Seventhly, if the harm inflicted be less than the benefit, or contentment that naturally followeth the crime committed, that harm is not within the definition; and is rather the price, or redemption, than the punishment of a crime: because it is of the nature of punishment, to have for end, the disposing of men to obey the law; which end, if it be less than the benefit of the transgression, it attaineth not, but worketh a contrary effect.

Id. at 204.

2. 4 Blackstone, *Commentaries* *7.

3. See, e.g., Mannheim's comment made a generation ago:

At present the idea that punishment, as administered by the State, must necessarily be an evil, is more or less abandoned. There are often no longer any noticeable differences between methods of treatment which fall under the conception of punishment and other methods. In former times punitive treatment was, by its severity, usually distinguishable from non-punitive measures. To-day the complaint is often made that such *outward* characteristics no longer exist. . . . Occasionally . . . there may no longer be any differences even in the *intention* behind the application of penal and non-penal measures.

Mannheim, *The Dilemma of Penal Reform* 26 (1939) (Italics in original).

4. First, punishment is privation (evil, pain, disvalue). Second, it is coercive. Third, it is inflicted in the name of the State; it is "authorized." Fourth, punishment presupposes rules, their violation, and a more or less formal determination

separated from other custodial and remedial aspects of what we actually do with many offenders, but nevertheless is to be conceptually distinguished from them.⁵

Others have taken a somewhat similar position, defining *punishment* as "[T]he authoritative infliction of suffering for an offence."⁶ So, too, a dictionary defines *punishment* as "Cause (offender) to suffer for offence. . . ."⁷

These definitions, then, abandon the attempt to encompass the modern institution of "how we deal with offenders" by use of the word *punishment*. They restrict the sense of that word to the means (or "essential" quality of the means) used by the historic institution. Such means, of course, constitute one component or factor present in the modern institution.

Nevertheless, I think that misunderstanding occurs because of a continued

of that, expressed in a judgment. Fifth, it is inflicted upon an offender who has committed a harm, and this presupposes a set of values by reference to which both the harm and the punishment are ethically significant. Sixth, the extent or type of punishment is in some defended way related to the commission of a harm, e.g. proportionately to the gravity of the harm, and aggravated or mitigated by reference to the personality of the offender, his motives and temptation.

Hall, *General Principles of Criminal Law* 310 (2d ed. 1960) (Footnotes omitted). "[P]unishment implies the criminal's moral culpability and is apt (fitting, correct) in light of that . . ." *Id.* at 317.

5. "[P]unishment is a coercive deprivation intimately applied to an offender because of his voluntary commission of a harm forbidden by penal law and implying his moral culpability.

"There are . . . other ways of dealing intimately with offenders than that of punishing them. They may, e.g. be rewarded or educated. In addition, there are safety measures from which both punishment and education must be distinguished. . . . At the same time it should also be recognized that these sanctions are not actually separable. Wisely administered just punishment is educative. . ." *Id.* at 318.

"[Besides punishment] other sanctions (corrective, preventive or compensatory) have an important place in inclusive theories and peno-correctional programs, and . . . [it is recognized] that there are no sharp differences that wholly separate each sanction from the others." Hall, *Psychiatric Criminology: Is It a Valid Marriage? The Legal View, supra* at 349.

6. "Punishment might be roughly defined as the authoritative infliction of suffering for an offence. . . . [P]unishment involves the infliction of something unpleasant on the victim, whether consisting of positive physical pain or of deprivation of something which the victim desires such as his liberty. Curing offenders with kindness, therefore, does not, by virtue of lacking this feature, qualify as punishment." Fitzgerald, *Criminal Law and Punishment* 199 (1962).

So, too, for Hawkins, the meaning of *punishment* is: "To inflict suffering on an offender. . ." Hawkins, *Punishment and Moral Responsibility*, 7 *Modern L. Rev.* 205 (1944).

When people speak of reformation as the motive of punishment, they usually fail to make the important distinction between reformation procured *through* punishment and reformation procured *in association with* punishment. The latter is not part of the punishment at all; it is the conferment of a benefit, not the infliction of an evil. The ministrations of the prison chaplain, for example, are not, or at least ought not to seem to be, part of the punishment. . . .

Reformation, however, is really procured through punishment, when the delinquent realises that he has deserved his punishment and ought to amend himself accordingly.

Id. at 206. (Italics in original.)

Davitt, *Criminal Responsibility and Punishment*, in 3 *Nomos* 143, 144 (Friedrich ed., 1960): "In essence, punishment is the deprivation of a good, consequent upon the violation of a law, and against the will of the violator. . . . Punishment must be related to a criminal act."

7. *Concise Oxford Dictionary* (5th ed. 1964).

public expectation that the term *punishment* will perform its most important traditional function, *i.e.*, as a label for the public institution of "how we deal, etc." This expectation rightly extends to some of the most fundamental uses of the term *punishment* in legal contexts. Thus, the substance of the principle *nulla poena sine lege* ought to apply to the full range of consequences provided by the modern institution of "how we deal, etc.," as Hall himself firmly asserts,⁸ and so should the Eighth Amendment prohibition against cruel and unusual punishments. *Robinson v. California*,⁹ and cases following it, give limited but important support to this latter point.

B. *Punishment as Involving Pain*

H.L.A. Hart states that "[Punishment] must *involve* pain or other consequences normally considered unpleasant,"¹⁰ but apparently would accept non-painful things as punishment so long as they are accompanied by pain, unpleasantness, etc. Thus he would, I assume, accept as part of punishment the vocational training of offenders confined to prison. Probably training in the prison machine shop results in a benefit, the acquisition of valuable skills, and perhaps is not in itself unpleasant. Nevertheless, the pain of deprivation of liberty is "involved" in the confinement whereby such training takes place.

Professor Hart's definition appears in his illuminating paper, *Prolegomenon to the Principles of Punishment*. There he makes the suggestion that, in considering the social institution of criminal punishment, we distinguish between Definition of punishment, General Justifying Aim (What justifies our maintaining the institution or general practice of punishment?), and Distribution.¹¹ This latter category he divides into principles governing Liability (Who may be punished?) and Amount (which we may here elaborate as concerned with both

8. Hall, *op. cit. supra* note 4, at 55-58.

9. 370 U.S. 660 (1962). Cal. Health & Safety Code § 11721, under which defendant had been convicted, made it a misdemeanor, punishable in no case by less than 90 days in jail, "to be addicted to the use of narcotics." The majority of the Supreme Court held that the statute violated the prohibition of the eighth and fourteenth amendments against cruel and unusual punishment, and rejected the argument in a dissent that "Properly construed, the statute provides a treatment rather than a punishment." 370 U.S. at 685 (Clark, J., dissenting).

Citing *Robinson*, two circuit courts, in cases involving chronic alcoholism, have classified conviction itself as punishment within the meaning of the eighth amendment. See *Driver v. Hinnant*, 356 F.2d 761, 764-65 (4th Cir. 1966), and *Easter v. District of Columbia*, 361 F.2d 50, 54-55 (D.C. Cir. 1966).

10. Hart, *Prolegomenon to the Principles of Punishment*, 60 *Aristotelian Soc. Proc.* 1, 4 (1959) (Italics added.). Hart defines the "standard" case of punishment in terms of five elements:

(i) It must involve pain or other consequences normally considered unpleasant.

(ii) It must be for an offence against legal rules.

(iii) It must be of an actual or supposed offender for his offence.

(iv) It must be intentionally administered by human beings other than the offender.

(v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed. *Id.* at 4.

This definition follows closely, but explicitly restricts to *legal* contexts, the definitions used by Flew and Benn. See Flew, *The Justification of Punishment*, 29 *Philosophy* 291 (1954), and Benn, *An Approach to the Problems of Punishment*, 33 *Philosophy* 325 (1958).

11. Hart, *supra* note 10, at 4, 10.

Content and Amount). These distinctions, and his suggestion that we focus on the justification of the public institution, strike me as highly valuable ones.

Hart does not say how far he would go in extending the scope of his definition of *punishment* by use of the word "involve." He states, however, that he is concerned with the social institution or general practice of punishment.¹² One can readily see that his definition can be interpreted to include any and all legal consequences that may or must be imposed by law upon due determination that an individual is criminally liable for commission of an offense. These legal consequences are non-voluntary, and all "involve" the pain and unpleasantness of status reduction by way of conviction, and perhaps additionally the application of legal compulsion, either actual (as in the case of confinement of any kind) or threatened (as in the case of suspended sentence, probation, or parole).

Thus the elastic word "involve" would, perhaps, enable the definition of *punishment* to serve its traditional dual function—as a label for the public institution of "how we deal with offenders," as seems to be Professor Hart's intention, and at the same time would characterize the means of that institution.

Nevertheless, it seems to me that Hart's definition accomplishes few of the purposes for which it apparently was intended. It does not refer unambiguously to public institution of "how we deal with offenders." On the contrary, had Hart not, apart from his definition, told us that he meant to take that social institution and its moral justification as his subject, his definition would have left us in doubt as to whether he meant to refer to the entire modern institution or only to the traditional means of that institution.¹³ Second, Hart's definition does not adequately characterize the means of the modern institution. Indeed, because of the complexity of the modern institution, I can think of no way of epitomizing its means in a relatively short definition. Nor is there need, as part of Definition, to describe these means. Such can be left to a discussion under the headings of General Justifying Aim, Liability, and—especially—Content and Amount. Third, assuming that it was designed to do this, the definition does not unambiguously identify or underscore the aspect of the institution of punishment which Hart states is the feature needing justification, namely, "*deliberate* imposition of suffering."¹⁴ Whatever that phrase is meant to include, its scope is far narrower than "involve pain, etc." The former imports purpose to cause pain, the latter does not.

12. See, e.g., *id.* at 1, 3, 10.

13. Thus Benn, whose definition, cited by Hart, *id.* at 4, contains the phrase "must involve an 'evil, an unpleasantness . . .'" restricts the meaning of *punishment* as do Hawkins and Fitzgerald, *supra* note 6. See Benn, *supra* note 10, at 330-32. See also Benn & Peters, *The Principles of Political Thought* 209 (1965), originally published under the title *Social Principles and the Democratic State* (1959).

14. Hart, *supra* note 10, at 2 n.2 (Italics added.) See also Benn & Peters, *op. cit.* *supra* note 13, at 202: "To [Flew's] criteria another might be added: that the unpleasantness should be an essential part of what is intended and not merely incidental to some other aim."

C. Suggestions

1. Definition

By the public institution of "how we deal with offenders" I mean to refer to the legal sanctions (consequences) applicable to an individual upon due determination that he is criminally liable for an offense, and the written and unwritten norms governing their use.¹⁵ The sanctions¹⁶ include criminal conviction, fine, suspended imposition or suspended execution of sentence, probation, imprisonment, and parole, among others.

2. Name

The name for this institution, however, presents a problem for which, apparently, no wholly adequate solution now exists. The term *punishment* has served as the historic name for the institution of "how we deal with offenders," and also as a name for the workings of the institution in any particular individual case. I suggest that we continue to use the name *punishment* in both of these senses.

Nevertheless, the usefulness of the term *punishment* in public debate and practical affairs is substantially impaired by its mental association with practices, philosophies and attitudes many of us wish to be rid of. In addition, some will employ *punishment* legitimately enough, to refer solely to the historic means of the institution of "how we deal, etc.," and the two meanings will constantly have to be distinguished from one another. Thus, I believe we have need for an alternative name—of equivalent explicit meaning—but a name that does not have unwanted and misleading overtones, including a possibly disproportionate emphasis upon, or confusion with, the historic means of this institution. The solution of coining an entirely new and unfamiliar term for the institution would probably receive little support.

It seems to me that *treatment of offenders*, a term now in common use, is the most generally acceptable second—and alternative—name for the institution of "how we deal with offenders," and that its contraction *treatment* is an acceptable name for the workings of this institution in any particular case. The great shortcoming of this term and its contraction is that the word *treatment* may carry misleading overtones from the area of voluntary medical care. However, one of the central meanings of *treatment* is simply "ways of dealing with,"¹⁷ and it is in accord with such meaning that the word is used here.

15. Compare Wortley, *The English Law of Punishment*, in *The Modern Approach to Criminal Law* 50 (Radzinowicz & Turner eds. 1945): "Punishment may be provisionally defined as the totality of the legal consequences of a conviction for a crime."

16. Professor Hall's usage, in referring to a single sanction called *punishment*, has not been adopted by others, so far as I know. See Hall, *General Principles of Criminal Law*, ch. 9 (*The Sanction—Punishment*) (2d ed. 1960); "[T]he distinctive sanction of the criminal law—punishment"; Hall, *Psychiatric Criminology: Is It a Valid Marriage? The Legal View*, *supra*, at 349.

17. See, e.g., *Concise Oxford Dictionary* (5th ed. 1964): "*treatment* . . . (Mode of) dealing with or behaving towards a person or thing . . ."

3. Conviction

As indicated above, conviction itself is one of the sanctions to be included in the category of *punishment (treatment of offenders)*.¹⁸ Because this point is often overlooked, it perhaps merits some words of explanation.

Conviction constitutes *punishment* even in the traditional sense, *i.e.*, the authoritative infliction of suffering on an offender for an offense. In part this is because of the official condemnation¹⁹ and social disgrace normally thought to be involved. From the social point of view, the possibility of criminal conviction alone probably acts as a significant factor in preventing offenses. Thus, Hart speaks of the general deterrent effect of "the disgrace attached to conviction for crime."²⁰ Within bounds we seek to continue, rather than eliminate by legal change and social education, social disapproval of crime and the stigma of criminal conviction.²¹

Besides immediate condemnation and disgrace, conviction involves the imposition of a legally and socially disvalued status,²² a disadvantageous position

Use of *treatment* as a broad general term meaning simply "authorized ways of dealing with" offenders, now extends over several decades. See, *e.g.*, Michael & Adler, *Crime, Law and Social Science* 27-32 (1933); Wechsler & Michael, *A Rationale of the Law of Homicide*, 37 *Colum. L. Rev.* 701, 1261, 1264-1325 (1937).

Compare Lady Wootton, who uses the words "dealing with" offenders as an intentionally neutral term. Wootton, *Crime and the Criminal Law* 33 (1963).

18. "By punishment is meant not only the physical and mental anguish involved in the exaction of a penalty, but the conviction itself." Barry, *Introduction to Morris & Howard, Studies in Criminal Law* at xxiv (1964); "[T]he condemnation plus the added consequences may well be considered, compendiously, as constituting the punishment. Otherwise, it would be necessary to think of a convicted criminal as going unpunished if the imposition or execution of his sentence is suspended." Henry M. Hart, Jr. [hereinafter cited Henry Hart], *The Aims of the Criminal Law*, 23 *Law & Contemp. Prob.* 401, 405 (1958). Concerning the classification of conviction itself as punishment within the meaning of the eighth amendment, see cases cited *supra* note 9.

19. "What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition." Henry Hart, *The Aims of the Criminal Law*, 23 *Law & Contemp. Prob.* 401, 404 (1958). "[The mental] patient has not incurred the moral condemnation of his community, whereas the convict has." *Id.* at 406. Professor Hart makes it clear, however, that not all criminal conduct, as presently defined, merits moral condemnation, *e.g.*, strict liability offenses, and that some judges do not believe that moral condemnation is involved in the process of pronouncing conviction and sentence. *Id.* at 422-25, 436-37.

The Comment to § 4.01 of the Model Penal Code, dealing with criminal responsibility, refers to the fact that we "condemn the offender by conviction." Model Penal Code § 4.01, Comment (Tent. Draft No. 4, 1955). Also see Lasswell & Donnelly, *The Continuing Debate over Responsibility: An Introduction to Isolating the Condemnation Sanction*, 68 *Yale L.J.* 869 (1959).

"In particular cases, the community's judgment of unworthiness may vary from conventional disapproval to one charged with intense indignation and detestation." Barry, *op. cit. supra* note 18, at xxv.

20. Hart, *supra* note 10, at 26.

21. See, *e.g.*, Hart, Book Review, 74 *Yale L.J.* 1325, 1330 (1965) and Paulsen, Book Review, 14 *Buffalo L. Rev.* 562, 564 (1965), commenting on proposals in B. Wootton, *Crime and the Criminal Law* (1963).

22. See, *e.g.*, Graveson, Status in the Common Law 101-02 (1953) (the "status of convicted felon"); The Law of Criminal Correction 616 (Rubin ed. 1963). Cf. Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice* (Appendix I: A Note on Stigma, Status Degradation, and Status Elevation Ceremonies in the Criminal Process), 69 *Yale L.J.* 543, 590-92 (1960).

of indefinite and probably life-long duration²³ created by law.

Conviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities.²⁴

For the offender who has been convicted before, further convictions may be said to involve a worsening or aggravation of this status.

4. *Sanctions without conviction*

A borderline question is whether probation, without criminal conviction, is to be included in *punishment (treatment of offenders)*. Such probation, upon determination that the individual was criminally liable for the offense, was possible under the Probation of Offenders Act of 1907.²⁵ Apparently probation without conviction is now used informally to a limited extent in our federal courts under the name of the Brooklyn Plan or "deferred prosecution."²⁶ If, however, Brooklyn Plan probation does not presuppose determination of criminal liability, then it would clearly not conform to my definition of what Flew and Hart helpfully call the "standard case" of *punishment (treatment of offenders)* and would have to be relegated to a possible area of "secondary cases."

IV. ADDITIONAL REMARKS

Finally, I would like to comment that definitions of *punishment* in terms of pain and suffering have probably unduly *narrowed* the scope of our efforts to identify and discuss the chief aspects of the modern institution of "how we deal with offenders" that require moral justification. Infliction of pain constitutes a vital category of issues, but it is only one out of several that should be considered. A different category of issues concerns our responsibility for changes in the personality of the offender, changes in his identity and very "self." This includes change brought about by the various legal status, social, and psychological dimensions of conviction itself. It includes the deterioration or negative education that may occur in the prison environment. Most difficult of all, however, it concerns our possible intentional efforts to "make over" the individual,²⁷ to reshape his underlying personality as a way of controlling his

23. *But see, e.g.,* Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 Wash. U.L.Q. 147 (1966).

24. *Parker v. Ellis*, 362 U.S. 574, 593-94 (1960) (Warren, C.J., dissenting). A footnote by Chief Justice Warren to the passage quoted above reads: "For example, under § 504 of the Labor-Management Reporting and Disclosure Act of 1959, persons who have been convicted of specified crimes are ineligible to serve for a five-year period in various positions for labor unions or employer associations. 73 Stat. 536-537." *Id.* at 594 n.30.

25. 7 Edw. 7, c. 17. The possibility of probation without conviction was eliminated by the Criminal Justice Act of 1948, 11 & 12 Geo. 6, c. 58, § 3. See Jackson, *The Machinery of Justice in England* 199 (4th ed. 1964).

26. *See, e.g.,* Tappan, *Crime, Justice and Correction* 550-51 (1960); 1965 Jud. Conf. of the U.S. Proceedings Rep. & Dir. of the Admin. Office of the U.S. Courts Rep. 34, 224-29.

27. Compare the now classic comment by C.S. Lewis:

To be taken without consent from my home and friends; to lose my liberty; to undergo all those assaults on my personality which modern psychotherapy knows

future behavior. By what methods, in which cases and under what circumstances, to what extent, and toward what "ideal personality," are we justified in trying to change the offender?

One has the impression that traditional definitions of *punishment*, with their built-in formulation of the issue in terms of pain and suffering, have made it all too easy for philosophical discussion to skirt this and other central aspects of the modern institution of "how we deal with offenders."

how to deliver; to be re-made after some pattern of "normality" hatched in a Viennese laboratory to which I never professed allegiance; to know that this process will never end until either my captors have succeeded or I grown wise enough to cheat them with apparent success—who cares whether this is called Punishment or not? That it includes most of the elements for which any punishment is feared—shame, exile, bondage, and years eaten by the locust—is obvious.

Lewis, *The Humanitarian Theory of Punishment*, 6 Res Judicatae 224, 227 (1953). See also Morris & Howard, *Studies in Criminal Law* 167-68 (1964).