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BEYOND PERSECUTORY IMPULSE AND HUMANISING TRACE:

ON DIDIER FASSIN'S *THE WILL TO PUNISH*

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Developed from the Tanner foundation lectures for 2016, *The Will to Punish* is a one hundred page essay which draws upon the author's perspectives as an anthropologist, an ethnographer, and a genealogist in the mode of Foucault and more especially Nietzsche to consider the nature of punishment in modern western, capitalist, societies. The argument was developed alongside the contributions of three North American-based scholars of the penal system, Bruce Western, Rebecca McLennan and David Garland, and it provides a punchy, challenging, vision of modern criminal justice and punishment from a critical point of view. It is organised around three basic questions: what is punishment? why does one punish? And who gets punished? There is a degree of overlap between the answers to these questions, since the what, the why and the who are necessarily connected, but overall, the framework of the lectures enables Fassin to launch a set of arguments that, while not necessarily novel, nicely bring out the different angles on orthodox positions that a critical perspective offers. It could be said to provide something of a state of the art summation of the general lines of critical thought, raising questions about critical method, what has been achieved, and what else there is still to do.

The Limits of Analytical Theory

The lectures commence with a prologue designed to show how in the face of anthropological and contemporary evidence, what we conventionally think of as the essential link between crime and punishment is not at all obvious. This is the prelude to a series of questions, which begins with the framing of the question 'what is punishment?' in the influential work of the analytical, normative, legal theorist, HLA Hart. Hart produced five criteria for punishment, which when present identified the modal and legitimate use of the term. The primary aim of Hart's argument was to analyse in what circumstances it was morally and politically acceptable for a state to allocate pain in a society, and how to translate such pain into a legitimate social form, that of punishment. The main elements in Hart's answer had to do with law, which could identify the nature of an offence and an offender, and of an authority within a legal system who could apply punishments appropriately to offenders for their offences.

Fassin's argument is that when one looks at what happens in penal systems, such as that of the United States or France (where he has conducted substantial fieldwork), one finds that the seemingly neutral and formal configuration of offender, offence and authority are all called into question by social practices. Anyone who has seen episodes of *The Wire* or the French police series, *Engrenages* (English: *Spiral*), will recognise Fassin's argument. The police intervene in the social life of poor and racially segregated neighbourhoods in a way that pays little or no attention to actual or suspected offences, acting rather like an external force of occupation, 'viewing their public as composed of probable enemies and potential criminals', and feeling entitled to punish 'with little discernment' (37). Punishment, with or without discernment, is of course not the police's role according to a legal conception. Yet, the magistrates and judges who are supposed to do this, and who are disparaged by the police as lenient and law-bound, in fact either carry on the police work of

punishing without law, or work suspects through the legal process in ways that accepts the police view and is prejudicial to the suspect.

This latter aspect is most fully developed later in the lectures, where Fassin notes how 'judges do not seem aware of [the non-legal] *modus operandi* of the public forces' (106), while they react prejudicially to the out of place poor and racially other defendants who come before them. The objectification of legal language then permits the judge, apparently, to stand back from his subjective perceptions and to be 'convinced that he has ruled impartially for the common good' (108). These interactions between police, judges and the poor also take place in a broader social and political context of calls for law and order, so that the political and institutional system as a whole stands behind the flagrantly unfair, non-legal, ways which pervade the criminal process. In this way, Fassin argues, modern societies are very far from the legal punishment of the offenders for the offence in Hart's definition. So much the worse for current justice practices, which ought of course to be reformed, might be the liberal retort. Fassin's response to that might be that the modern practices are so much part and parcel of a social system predicated on injustice that no calls for reforming the part without reform of the whole will succeed.

In addition to this social critique of the criminal justice system, Fassin wishes to contest the starting point of Hart's analysis: that punishment necessarily involves pain or other unpleasant consequences. Here, he adds genealogical enquiry to sociological investigation. Historically and in different cultures, the link between harm and wrongdoing on the one hand and crime and punishment is not necessarily obvious. Broadly, what we see is a transition that takes place with the growth of the western state and capitalist society, with both related to the evolution of theological thought. The initial move is from a logic of compensation between individuals or groups to one of the infliction of suffering with 'fiscal and political implications' (52), and favouring 'the consolidation of kingship' (53). To this view, Fassin would add the importance of the Christian church, for the 'conception of punishment as suffering is ... inscribed within a soteriology in which only the infliction of pain can give access to redemption and salvation' (54).

Here, the position becomes more complex. One might think that Fassin would paint a picture of the church in cahoots with the state to help reproduce the kinds of repression masked as legality previously described. To some extent, I think that is his view, but there is more at stake here, even if it is not quite clear how to grasp it. The birth of the prison has 'long been presented as both the sign and the result of a humanisation of punishment' (55) which references the ideals of the Enlightenment, Beccaria and John Howard, Bentham and the Jacksonian penitentiary. To be sure, the nascent prison system would then align with manufacturing capital, as in the nineteenth century US prison, and this 'conspicuous alliance' of Christian morality, Enlightenment philanthropy and early capitalism continued 'until the end of the nineteenth century, when progressive currents succeeded in imposing a vision of the prison system more in conformity with the principles of modern democracy' (56). In all this, there seems to be some interest not just, as Bentham put it, in grinding rogues honest, but in 'a retribution supposed to redeem the offender' (56). While distancing himself from support for this redemptive element in modern penalty, Fassin sees it as important to 'acknowledge the relevance of ... the trace left by religion in contemporary criminal law' and to consider it 'from a critical perspective' (57).

To do so would be to acknowledge the ongoing influence of a theological-juridical element in a system that would otherwise regard itself as secularised, practical and modern. We should think of a penal theology as present in aspects such as the individualisation of the sentence (which personalises guilt and echoes sin), the infliction of suffering (which reflects the Christian exaltation of pain), and the discourse of moral reform (which revives the idea of redemption). Recognising

these residues, we both get away from any simple understanding of punishment as the infliction of pain (Hart), and in thinking critically about continuities as well as ruptures, glimpse 'perhaps even potentialities for the future' (58). If all this leaves Hart's analytical, legal, definition undone, for it is evident 'how intellectually risky and politically problematic' (59) a definitive answer to the question 'What is punishment?' is, Fassin's discussion has also opened up the question: where does a critical treatment of punishment lead?

Of course, we could say that where the state and the law leads, the church follows, sanctifying and hiding a modern violence. Surely that is part of the story, but it appears not to be all that Fassin wants to say. His approach acknowledges some value in a history that involves Enlightenment humanitarianism, 'modern democracy' and 'moral reform', but where do these lead if they are not just exalted covers for how the system persecutes those it controls?

Moral Development and Persecution

The question intensifies its presence in the second of Fassin's lectures, on why one punishes. Here, he continues with the critique of an a priori (analytical, liberal, normative) account of punishment in favour of an a posteriori approach based on an 'idiographic method' (64) (i.e., one that is sociological, historical, genealogical).

With regard to punishment's orthodox self-understanding, Fassin explores its famous dichotomy of utilitarianism and retribution, and several aims that fall thereunder. He asks the usual questions about incapacitation and deterrence, and comes up with something like the standard social-liberal story on rehabilitation. It served as the main justification for incarceration in late nineteenth century penal reform movements; then after twentieth century penal welfarism, it experienced a period of discredit under conservative 'nothing works' criticism, before finding new advocates and studies. These suggest rehabilitation's benefits with regard to recidivism in contrast to traditional punitive forms, so that the 'announcement of its death ... appears to have been premature' (67). Fassin does not take this observation further, but in isolating a 'moral but also educational and social' (67) dimension to punishment through rehabilitation, his comments align with his previous thoughts about a theological-juridical dimension to punishment which is not entirely subsumed by a control perspective.

Turning to the retributive side of the orthodox theory of punishment, there is a question about a doctrine that in its own terms sees itself as morally expressive and ethically linked to wrongfulness of action. What does a critic have to say of retributivism as the righting of wrongs, the addressing of affronts to human dignity? Such approaches 'have the merit of integrating the symbolic, moral and affective dimension of punishment', but 'they describe an ideal world, which can be challenged with a reality principle' (72). They also depend on power relations for their meanings, which change over time. There is of course truth in such criticism, but one wonders whether Fassin might want to say more about links between an admittedly ideal ethical theory and the trace of moral reform he sees in the theological-juridical world. This provides the possibility of moral, educational and social dimensions to punishment through rehabilitation, but it is surely linked to ethically redemptive elements in retributive theory. Fassin does not pursue such a line. He would rather leave this world of orthodox explanations behind in favour of a Nietzschean view where we are no longer concerned with 'the pure realm of ideas and the law but in the impure region of the obscure motives of crime and punishment' (72).

We find ourselves leaving the world of Bentham and Kant for that of Dostoevsky (72), though we might think that Dostoevsky also had some things to say about rehabilitation, retribution, and the

role of the theological in the juridical. In drawing on Nietzsche, however, Fassin takes us in a different direction. Returning to his earlier view that the police use their 'discretionary power to call to social order the purportedly dangerous classes', while the judiciary operate 'an expanding culture of severity in criminal courts under the pressure of successive governments' (80), Fassin considers the non-rational aspects of punishment, which also go beyond the standard grounds, though arguably in a different direction. Here, he is on Durkheimian ground, though Durkheim suggests 'the pleasure in the infliction of pain, but does not name it' (81). Nietzsche does name it, as the 'voluptuous' pleasure of doing bad things for their own sake. To punish is not just 'to return evil for evil', but 'to produce a gratuitous suffering, which adds to the sanction, for the mere satisfaction of knowing that the culprit suffers' (81). There is a 'drive, more or less repressed, to make suffer, which society tends to delegate to certain institutions and professions' (81), and here Fassin focuses on the prison as a place of punitive excess.

In a powerful section, Fassin illustrates what we might call the persecutory function of modern punishment, with the kind of cruelty that goes on behind prison doors. This is an opaque and impenetrable world where 'neglect, abuse, brutality, and even torture' (83) occur with impunity. It is normal to portray the multiple abuses that ensue as one scandal after another, where each case is confined to its own terms, and responsibility is focused on individuals or individual institutions. But when the system continues to ignore its own responsibilities for seemingly disparate events, abuse becomes (pace Hart) a backhanded part of the punishment, leading to a widespread complicity. When judges continue to send people to prison, 'their decision entails much more than a deprivation of liberty, and they cannot not know it' (83). Society cannot ignore its own responsibility, for it authorises these uncorrected abuses by default and 'perpetrates them by proxy' (83). Punishment becomes 'an almost unbounded power to punish, ... an indefinite right to inflict suffering' (84). The United States with mass incarceration becomes the exception which is also exemplary of the dynamics of western penalty as a whole, and all this is enhanced by public media access to punitive systems that becomes 'a contemporary form of pornography,... an ambiguous excitement at the sight of people suffering....' (85). This dark, persecutory, side of punishment is always there as its shadowy supplement, its 'accursed share' (Bataille). Yet, as an aside, we might note that Fassin acknowledges that not every penal system tends towards the US model, and that, for example in European systems, some are more sensitive 'to the need to ensure humanity in punishment' (84), so the Nietzschean drive to sadism in punishment is not all there is.

The final lecture, on who gets punished, recapitulates themes already developed concerning the blind eye turned to social inequality in a criminal justice system which focuses on the poor and marginalised but finds ways to deny or finesse the structural issues. At the core of orthodox penal theory lies the legal subject in whom responsibility for the crime is vested. This is first seen in the legal categories of mens rea and actus reus, but there is a further bind through individualisation of the sentence. While this might originally have been seen as a compassionate means of contextualising a bare legal responsibility, it has become a way of further singularising the individual, so that penal individualism and penal individualisation work together to desocialise crime (Norrie 2014, ch 12). In the process, the social context becomes a means of risk assessment, and difficult social circumstances are seen not as deflecting the need to punish, but as incriminating the individual to a further degree. In the process, society absolves itself of its responsibility for the creation of criminogenic contexts, and the very idea of a social scientific understanding of the phenomenon of crime becomes attacked as a way of justifying criminal activity. The political accusation offers the advantage to those in power of evading their social accountability and legitimating their punitive policies.

Fassin asks how it could be that 'at the very moment when social insecurity increases, crime wanes, and prisons fill, criticisms against social analysis and emphasis on individual liability become so preeminent' (112). His answer reaches for a psychoanalytic term, disavowal, the 'rejection of a reality that would be unbearable to admit' (112). Modern democracies with their overleaping penal policies are in denial of just how much the crime problem is a kind of social equivalent of an auto-immune disease, something that society does to itself. But what underlies this? Fassin will not go too deeply into a psychoanalytic understanding, for there is, he says, no more a Freudian social unconscious than there is a Durkheimian collective consciousness (112). Yet, there is this striking phenomenon of disavowal, and we also saw that Fassin identifies a level of non-rational affect that is simply the pleasure in seeing others suffer. Fassin gets at this through Nietzsche, but whence come these phenomena if not from some deep-seated psychological elements in the modern human mind? If there is no collective social unconscious, there are nonetheless psychological, affective, states which get expressed at the social level in consistent, patterned, recognisable ways. We can identify structural mechanisms, social practices, ethical outlooks and affective dispositions which cohere. The chain of connections is from a social logic of class and ethnic inequality, marginalisation and conflict to an ethical logic of separation, a negative othering of the marginalised, and then to a psychological logic of fear, anger and hate which enjoys seeing the negatively othered getting 'what they deserve'. We should perhaps avoid the a priori diagnosis of collective, psychological, phenomena, but I doubt we can avoid the a posteriori identification of systemic patterns of psychological affect in social and historical contexts.

The Social and the Psychological

The contrast between a juridical framing of a social practice and the social context in which it operates is a key critical theme, but critical theory would not have got very far if it only replicated the best of television drama on the subject to hand. Giving the social context an historical dimension and showing how the legal form discloses hidden ethical and affective dimensions takes us further, and this is Fassin's route with his emphasis on both the theological trace in punishment and the persecutory impulse identified by Nietzsche. The latter is the glaringly obvious conclusion to draw from current penal trends as they affect the policing of marginalised groups and the increase in punishments and prison numbers. The former exists as an ongoing trace to seek to moralise, to redeem, to make better. No doubt this trend is under threat, and no doubt also, it can be seen as the apologetic surface which hides the persecutory essence, but it also seems to be an important element, separate from and irreducible to persecution. Perhaps we could say that the dominant thrust of modern penality is towards the persecutory, but a desire to humanise remains, albeit one that is contained within overall system impulses: persecutory in the major, reformative in the minor key.

How should we account for these different directions underlying the juridical mechanisms of punishment, and pushing them mainly in one direction, but not exclusively so? How can punishment embody the persecutory impulse and the humanising trace? The route to an answer is suggested in my comments above about the need to understand human psychology, and how it informs affective attitudes in particular ethical settings and social contexts. Here, I conclude simply by indicating how this might go. In Melanie Klein's work, we find reference to two positions in the development of the infant personality, the 'paranoid-schizoid' and the 'depressive'. The first is the basis for a persecutory affective state, which focuses hate and the wish to destroy on objects which the infant fails to see as a whole (Klein, 1946/ 1997; Reeves, 2019). In a world split between the definitively good and the irretrievably bad, the latter should be annihilated. The second position evolves from the first as the infant comes to see that the irretrievably bad object was in fact just one facet of a

more complex being, and that the bad should be understood alongside the good in whole objects (Klein, 1935/ 1998). In this position, the infant is troubled that it may have wished to destroy, and may have destroyed, objects it took to be all bad, but which it now realises are those that, in their wholeness, it really loves. It therefore develops a desire to repair and restore relationships it fears it may have destroyed (Klein, 1937/ 1998).

Klein's point was that the two early psychological positions remain within the human psyche in adult life, and that the more social and pacific depressive state is best maintained in stable social contexts which do not generate too much anxiety. Modern society is no doubt an anxious place, and modern penalty already majors in persecutory othering. Klein seems a good resource for understanding a human psychology that finds persecutory othering an attractive affective state in the Nietzschean manner. At the same time the theological trace in modern punishment perhaps suggests a better, healthier, psychological position, akin to Klein's depressive state, that could seek to humanise and reform, treating the other as a whole object.

The argument could be taken further into Freudian metapsychology, where it is possible to identify different understandings of guilt in Freud himself, suggesting, as in Klein, primitive and mature psychic states (Norrie, 2018). The early form of guilt is based on introjected fear of, and anger towards, the father/ parent, which animates a harsh and repressive superego with persecutory functions (Freud, 1930/ 1985). In the mature form, guilt is based upon ideals that the psyche has evolved in relations with good parent figures, and what Hans Loewald (1980, 394) calls the sense of the superego as an atonement structure. Breaking with parent figures in the Oedipal struggle leads to a coherent sense of self in the superego, but this leaves the self regretful at having displaced those that it loves. The moment is foundational for the desire to return to an earlier wholeness that carries the child through its life, and makes it seek reconciliation with others. This involves atonement in its original meaning, a sense of at-one-ment (Morris, 1976, 100), that the self wants to retrieve, and this wish is a basis for mature guilt.

There is of course much more to say, but I only wish to indicate how a critical criminal justice project might think through problems of persecutory excess and of the religious trace in penalty, and how these sit in a social-historical setting. This is not a means of seeking to create a collective social unconscious, or deflecting attention from the social grounds of penalty, especially as these reveal a social logic that is repressive and persecutory. It is to add a psychological dimension to the social which can explain and ground the hidden impulse and trace in penalty. It is only to ask where the desire to hurt and to be nasty to others comes from, and how they might be part of the human psyche. At the same time, it is to think, at the level of human psychology, if there are other, better, healthier ways to be than angry, hateful and malicious, though the possibilities for so being require ongoing attention to the overall social context.

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