

INTRODUCTION

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Michael Bayles had an uncanny ability to lay out a problem with clarity and power so that one felt, at the end, that one had a full conceptual grasp of the issues involved and of the points of entry for understanding and criticism. His analysis of the criminal law system in the first essay, 'Dismantling the Criminal Law System,' is a paradigmatic example of this ability.

He discusses there 'four different models for undesirable behavior,' the traditional system which relies on punishment, a treatment system, a social reform system, and a social defense system (18). In the process of laying out these four systems, he delineates the nature of punishment, the nature of criminal responsibility and the role that excuses and ignorance, mistake and accident, and duress play in the conceptual framework of criminal responsibility. He pinpoints the three ways in which we may try to 'dismantle' the criminal law system by noting that the process requires three steps--that conduct be made criminal, that it be applicable to groups of individuals, and that it involve punishment. We may thus decriminalize conduct, immunize some from being criminalized, e.g. mental defectives, and remove punishment from the system (by e.g. substituting treatment).

In discussing the social reform model, he lays out the main features of determinism since that model presupposes that it is the environment that is primarily responsible for undesirable behavior. Change the environment, and we will change the behavior. In laying out the social defense model, he examines preventive detention in its various forms, from bail to third offense rules, since preventive detention is the most obvious way in which to defend the social system from undesirable behavior. He is able, without an extended analysis, to question whether the requirement for bail is fair since it depends upon income and social status, neither of which are necessarily connected to criminal conduct. Some are thus detained unfairly.

The end result of this analysis is that we have a thorough and tidy conceptualization of the main elements of the criminal law system with, along the way, thorough and tidy conceptualizations of punishment, responsibility, and determinism, to name just three. The essay makes a wonderful introduction to the criminal justice system and a quick way to see how moral questions may be raised about the system and how change could be effected in the system. Who could ask for anything more?

But Bayles gives us more. In discussing the issue of whether Bentham assumed that 'people make rational choices when engaging in crime' (18), Bayles distinguishes, in his response, the question whether that assumption is an empirical proposition and the question whether, whatever its empirical status, it lays down a condition for the operation of the criminal justice system.

These are distinct questions, easily and often confused, and separating them is crucial to understanding debates about the criminal justice system. Since most murders are crimes of passion between people who know each other, it is at least questionable whether those murders, or at least some of those murders, are the result of rational calculations. Similarly, in the United States only about a fifth of the states now preclude those with mental retardation, that is, IQ's below 70, from being executed,¹ but if one feature of mental retardation is an inability to calculate means to ends, to think rationally, that is, about what one is doing and the consequences of one's actions, then it is conceptually confused to subject such individuals to the criminal justice system. They fail to fulfil one of the necessary conditions for the application of the system, namely, that they are rational calculators. And, of course, that conceptual mistake is paired with the moral wrong that results. Similarly, drug laws may be attacked for assuming that those who take drugs are as rational in their choices as alcoholics were assumed to be when alcoholism was treated as a crime.

In other words, the practical import of the conceptual distinction between treating a proposition as an empirical claim and treating it as a condition for the application of a model for controlling undesirable behavior is enormous. So Bayles has not only given us a conceptual framework for understanding the various models for controlling such behavior, but also a tool for critiquing the application of the most prevalent of those models.

It is difficult to write clearly in any discipline, and philosophy seems to present to its practitioners more problems than any other discipline. On the one hand, the drive for truth and its conditional nature in our world mean that few propositions, if any, can be maintained without an inordinate supply of conditionals. It takes good judgment to come to know which conditionals need expression and which can be ignored. On the other hand, the abstract character of philosophy's concepts and the

¹Raymond Bonner and Sara Rimer, 'Executing the Mentally Retarded Even as Laws Begin to Shift,' *New York Times* (August 7, 2000), A1 & A14.

inherent complexities of explaining what is complex in a way that is understandable to both practitioners and 'the vulgar,' as the Empiricists would have it, mean that only a few gifted philosophers will succeed in stating clearly its abstract but generally contingent truths. We need only to peruse any collection of philosophical writings to come to see how very difficult it is to achieve clarity. So when I praise Michael Bayles for being clear and, more important, for being so clear as to open up for view and for criticism complex subjects, that is no small praise. Such an ability ought to be the envy of philosophers, and the writings a model of philosophical writing.

The best evidence for the clarity of the following essays is found in reading them, and it heartens a commentator to know that he or she can do no better summarizing such essays than the author did in writing. Such knowledge lightens a commentator's burdens. 'Read the essays yourself! And learn.'

Bayles was a utilitarian, and as one reads through these essays, one is witness to the advantages of being a utilitarian. Taking a utilitarian stance towards problems means determining what courses of action are possible and then laying out the consequences of these possible alternative courses of action. Bayles does such a clear job of laying out and opening up complex subjects for view because, I suspect, he brings to them his utilitarian commitments.

Asking, for instance, what we have contracts and what sustains contract law is to ask, for a utilitarian, how contracts serve us in the long term to produce a greater good, and asking what changes could be made in contract law to make it better makes us look at the ends we currently have, compare them to ends we ought to achieve, and then see what changes ought to be made in what we now do that would allow us to achieve those new ends or achieve better the ends we already have.

Being a utilitarian forces us, that is, into a causal frame of mind. 'Change a cause, and you change the effect' is a principle for understanding, and when applied to such practical issues as our criminal justice system and contract law, it means that we are that much closer to understanding what effects particular causal factors have in what we get and so much closer to being able to regulate those effects so as better to achieve better ends than we currently get.

The reader will find no sustained attempt to justify utilitarianism or any other general feature of Bayles's thought in these essays. They were not designed to probe such matters. They rather illustrate as well as any essays could how very effective a public voice a philosopher can have who

is knowledgeable and clear and concerned, as Bayles was, with making things clear so that those who want to change them would know where to begin and how best to proceed.

All this praise is not to suggest that Bayles's essays are without difficulties. I once introduced Michael for a talk by pointing out that there are four possible kinds of essays and talks -- those that are true and look true, those that are false and look false, those that are false and look true, and those that are true and look false. Obviously, I noted, the essays strived for would seem to be those that are true and look true, and I then said, by way of introduction, and as a joke, 'Professor Bayles is at least halfway there!'

But the best essays, the ones, that is, that make it into the canon and are read and reread, are those that are true but look false. These pique a reader's curiosity and call for refutation, but, being true, resist it. So other practitioners of the craft work on the topic, trying to figure out what it is about the subject chosen that has led to an essay that looks false and, not succeeding in finding anything that is false which could lead to such an appearance, give the essay stature.

Many of Bayles's essays are problematic in just this way: they appear false, at least in regard to some of their claims, but resist refutation. The last in this anthology, on marriage being a bad business deal, has that look about it. 'Why,' one wants to ask, 'if it is such a bad business deal, do so many get married?'

Perhaps we are not such rational self-interested calculators as economists would have us think? Perhaps it is completely misplaced to think of marriage as a deal at all, let alone a business deal? Perhaps some variable that would make a difference to its being a business deal has been left out? Perhaps the criteria being used to determine that it is a bad business deal are mistaken?

These and other questions instantly begin to pile up in one's mind, tumbling over each other as the essay's thesis generates more and more. *Something* seems wrong about it, and so it behooves us to try to find out what it is that is causing the appearance of falsity. Yet when one looks at it in detail and examines the care with which Bayles has constructed his arguments, noting, for instance, that the situation varies in different states because different states handle marriage law and particularly marital property in very different ways, one finds it hard to figure out what exactly has gone wrong, if anything. So perhaps he is right? So perhaps those who are thinking about getting married for reasons other than children ought to think twice about the economics of it all?

The essay illustrates well Bayles's ability to marshal plausible arguments for an implausible thesis. The very best essays in philosophy generate questions. They do not settle matters, but unsettle our understandings by forcing us to confront propositions which strike us as off-the-mark or odd or 'not quite right' while giving us good reasons for thinking that, nonetheless, they are true. The best of Michael Bayles's essays achieve this goal. We are forced to question ourselves and our understandings, and one could ask for no more from a philosopher.

I have made some minor changes in the text of some of these articles such as, for instance, adding italics where a book is named and is italicized elsewhere in the article. Otherwise the articles are as they were printed except for what errors I have myself introduced and failed to discover. In particular, I have not made all the texts consistent with one another. The various journals in which these articles appear have different formats for their articles, and I was concerned that any attempt to standardize the articles would introduce more errors and, perhaps more important, frustrate those who wanted to quote the articles and those who wanted to double check the quotations with the originals. I judged it better that the articles be consistent with their originals than with each other.

The bibliography is as complete and accurate as I can make it, but I cannot guarantee its completeness and accuracy any more than I can guarantee the thoroughness and accuracy of the index. Mistakes seem to creep in. Besides, Bayles published a great deal, and some of what he refers to as his minor pieces occur in very out-of-the way publications that would make them difficult to track down if one did not already know of their existence. It is possible some such piece has escaped my notice, and if so, the fault is as much mine as any other errors in the anthology.

I cannot end without a note of regret that Myke Bayles is not with us these days. He would have relished the legal and moral intricacies of the Clinton impeachment, and the legal and moral delights of the Supreme Court decision in *Bush v. Gore* would have kept him, and so us, occupied for a long time to come. He brought a wealth of knowledge to whatever he touched, and we readers were blessed by that knowledge combined with a moral indignation tempered by a playful cynicism and by a sense that this sort of thing is part and parcel of the human condition, to be repeated time and again whenever human beings congregate and try to regulate their behavior through the rule of law. I learned much from him when he and I were friends, and I have learned much from his writings as I have chosen those to be reprinted and worked through them for this volume. He is missed.



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