

# *Utu and punishment*

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*Dr Patterson argues that utu in Maori tradition and law is different from punishment as understood in a European framework. He discusses the central concepts of an ethics of punishment, and shows that not all these concepts are present in utu. Furthermore, other concepts thought not to be essential to punishment are shown to be central to utu.*

## I INTRODUCTION

One of the distinctive features of Maori tradition and law is the practice of *utu*; it is a fundamental ingredient in a traditional Maori conceptual scheme. Firth emphasises its importance in saying that *utu* may almost be ranged alongside *mana* and *tapu*.<sup>1</sup> The practice emerges early in the body of traditional narrative when Tawhiri-matea, god of winds, is angered at his brothers for separating his father, Rangi-nui, the Sky Father, from Papa-tuanuku, the Earth Mother, and extracts *utu* by attacking them. One of the brothers, Tu-matauenga the fierce ancestor of man, is in turn angered at the cowardly way in which his other brothers have left him to fight alone against Tawhiri-matea. He obtains *utu* by capturing and eating his brother, thus destroying their *tapu* and reducing their *mana*. The theme continues through the myths and on into tribal and family histories. Detailed accounts are kept of injury and response, handed down from generation to generation and recited as reminders of what has to be done. Old injuries are kept alive until *utu* can be obtained. This is so prominent a feature that it is no exaggeration to say that *utu* is a major and dominating ingredient of traditional Maori law.

In both of the episodes *utu* takes the form of revenge. But the traditional concept of *utu* is wider than that of revenge, and must be understood in terms of *mana*.<sup>2</sup> In particular, it does not apply only to cases of revenge, where an unfriendly action is performed in response to an unfriendly action; it applies also to cases where a friendly action is performed in response to a friendly action, and to cases where a friendly action is performed in response to an unfriendly action. There are several other differences between *utu* and revenge, all of which support the view that *utu* is centrally a mechanism for maintaining and restoring *mana*.

Another perspective on the concept and practice of *utu* can be obtained by comparing it with the European concept of punishment. As opposed to revenge, which may be

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1 Raymond Firth *Economics of the New Zealand Maori* (Wellington, Government Printer, 1959) 421.

2 John Patterson "Utu, Revenge and Mana" (1989) 2 *British Review of New Zealand Studies* 51.

taken by or on behalf of an interested private party against a supposed offender, punishment is supposed to be imposed by a disinterested public authority upon a proven offender. That is not a definition; rather, it is meant to highlight some of the ethically important differences between revenge and punishment. Ethically speaking, if punishment is ever justified it is justified only when imposed by the state or at least some public authority, and must not be taken by a private individual or party. If you injure me and I act so as to "get my own back", that is revenge, not punishment. I am an interested party, in that it is seen as being in my interest to get my own back. Revenge, on the other hand, while perhaps always ethically dubious, is no more so when it is taken by a private party rather than a public authority. Punishment is supposed to be different. If the party that imposes punishment has a direct interest in the matter then there will at least be the suspicion that it was not imposed fairly or justly. Herein lies a major difference between revenge and punishment. This difference is reflected in the distinction between a supposed offender and a proven offender. Punishment, unlike revenge, must not be imposed unless and until proper procedures for establishing guilt and ruling out innocence or excuse have been followed.

## II BOTH *UTU* AND PUNISHMENT MUST BE INFLICTED INTENTIONALLY

How does *utu* fit into this picture? Start with a point of similarity: both *utu* and punishment must be inflicted intentionally. If an enemy were to die accidentally, for example, that would not count as *utu* at all, and until one of the enemy's kinsmen had been dealt with by the injured party, *utu* would still be required. The injured party has lost *mana* through the injury, and the accidental death of an enemy does nothing to restore the lost *mana*. Similarly with punishment; although, for example, the state may see fit to forgo punishing offenders who have suffered some accidental misfortune on the grounds that they have suffered enough already, it would be inappropriate to describe these as cases of punishment. Forgone punishment is not a special form of punishment; it is not punishment at all. Some no doubt would call upon the doubly dubious idea of divine punishment in this sort of case, but that would only reinforce the point that punishment must be imposed intentionally, for in redescribing an accidental misfortune as a case of divine punishment one is in fact denying that it was accidental.

Further, if deterrence is an aim of punishment it is important that punishment be inflicted intentionally and not accidentally. Deterrence depends upon a threat of deliberate intervention; it is nonsensical to threaten an accidental consequence. If the "penalty" for offending were to follow without deliberate intervention upon the part of those issuing the threat, as a natural or causal or accidental consequence of the offence, this aim of deterrence either could not be achieved, in the case of accidents, or would be futile, in the case of natural or causal consequences.

## III PUNISHMENT CAN BE FORGONE; *UTU* CANNOT

It should be noted here that the statement that punishment or *utu* must be inflicted intentionally would be taken by many philosophers to imply that it is open to those imposing the punishment or the *utu* to do otherwise. In the case of punishment that is indeed the case, as forgiveness is a real moral possibility here. Within a formal legal

system sometimes punishment is said to be optional, in that the authorities concerned are permitted to decide whether or not to impose a penalty upon a proven offender, and sometimes punishment is not optional, in the sense that once an offence is proven the authorities must impose a penalty. But these are matters of law rather than matters of ethics. In the ethical sense, punishment is always optional. If there are other reasons why offenders cannot be forgiven, these will be legal reasons, not ethical reasons. Of course a particular ethical system might rule out the possibility of forgiveness, but any particular system is itself open to ethical scrutiny, and in that sense ethics itself as opposed to any particular code cannot absolutely rule out forgiveness.

What is the position of forgiveness with regard to *utu*? Prytz Johansen quotes the account of a prisoner of war, captured by Te Rauparaha; he begged for his life, and was told that if it had been just a personal insult he would have been spared, but that as the insult was to the tribe, to Ngati Toa, there was nothing that Te Rauparaha could do about it. *Utu*, Johansen concludes, is a necessity, a downright duty.<sup>3</sup> One might postpone *utu* more or less indefinitely, but that is all; it may be postponed but can never be forgone. Interestingly there is no word for forgiveness in classical Maori. Both Ryan and Biggs list *muru* as a Maori word for "forgive", but Williams says that this is a modern sense.<sup>4</sup> Ryan also lists *hohou te rongo* as "forgive" but Williams glosses this as "make peace", which is not the same as "forgive". Here then we find a real and important difference between punishment and the traditional practice of *utu*. Although both must be inflicted intentionally, forgiveness is always an ethical option in the case of punishment, but never in the case of *utu*. Of course *utu* may be postponed for a generation or two, but not forgone. Just in case this makes it sound as if the practice of *utu* is inflexible, we must remember that it is possible within the practice for a hostile exchange to be converted into a friendly one, as described in detail by Hanson and Hanson.<sup>5</sup> These though can still be seen as cases of *utu* rather than forgiveness. Either it is agreed that there is no longer any wrong that requires *utu*, or some suitable gift, entertainment or marriage constitute the *utu*. In no case is *utu* simply forgone.

#### IV PUNISHMENT, *UTU* AND UNPLEASANTNESS

Another contrast between *utu* and punishment is that whereas punishment is supposed to involve some unpleasantness, *utu* can involve acting in ways that would be welcomed by the typical recipient. Of course there are recipients and recipients, and no doubt there are some who welcome being imprisoned or fined or perhaps even killed. But that is not the point; while there may be no way of ensuring that each and every

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- 3 J Prytz Johansen *The Maori and his Religion in its Non-Ritualistic Aspects* (Copenhagen, Munksgaard, 1954) 71.
  - 4 PM Ryan *The New Dictionary of Modern Maori* (Auckland, Heinemann Educational Books, 1974); Bruce Biggs *The Complete English-Maori Dictionary* (Auckland, Auckland University Press & Oxford University Press, 1981); Herbert W Williams *A Dictionary of the Maori Language* (7 ed, Wellington, Government Printer, 1971).
  - 5 F Allan Hanson and Louise Hanson *Counterpoint in Maori Culture* (London, Routledge and Kegan Paul, 1983) Chap 7.

recipient of punishment finds it unpleasant, some at least of the aims of punishment require that the great majority of potential recipients would much rather not be punished.

To make it seem closer to punishment as far as unpleasantness is concerned, we could divide *utu* into two sorts: the sort we find in the bloody stories of intertribal feuding, and the sort we find in the stories of reconciliation and spectacular entertainments. Then we could contrast only the first sort with punishment, prising off the second and contrasting it instead with reward. In English there is no obvious word for "reward and/or punishment", and that compound expression is much closer to the sense of *utu* than is "punishment" alone.

But that would produce only apparent clarity, and would in fact obscure the real nature of *utu*. The problem of seeing unfamiliar concepts through familiar but distorting conceptual "spectacles" is bad enough to start with, and we only make it worse by arbitrarily dismembering the subject of our enquiry. So rather than take the concept of *utu* apart so as to force it into familiar European conceptual patterns it is better to concede that *utu* and punishment differ importantly in this respect. Punishment is basically unpleasant. *Utu* has no such feature. It can be either pleasant or unpleasant, revenge or reward, depending in most instances upon the situation out of which the need for *utu* arises. In this respect, *utu* is like treatment rather than punishment.

The unpleasantness of punishment is closely related to the aim of deterrence. The threatened penalty must be sufficiently unpleasant - or at least it must appear to be sufficiently unpleasant - to outweigh the expected advantages of committing the offence. Of course there may be individuals who happen to like what is done to them as punishment, but unless the typical recipient wishes to avoid it, it does not act as a deterrent and we would call it treatment rather than punishment. A treatment might be unpleasant or it might be pleasant; what matters is whether it is effective. Punishment too should be effective, but insofar as deterrence is an aim of punishment it is supposed to work by dissuading the potential offender from committing the offence, not by somehow changing the offender so that he or she will not offend again.

In the case of *utu*, a problem is that the parties involved are almost certain to be related to each other. Given Maori conceptions of kinship, meting out any form of unpleasantness to your relatives is problematic. The aim of *utu* after all is to restore *mana*. If your relatives injure you that increases their *mana* and decreases yours, and the *utu* is supposed to reverse those changes. This leads to a difficulty if *mana* is taken to be essentially a collective matter not an individual one, as is argued by Prytz Johansen.<sup>6</sup> The difficulty is that, under this interpretation, if one member of a tribe performs some action which increases his or her *mana* at the expense of the *mana* of another members of the same tribe, effectively the tribe's *mana* is unchanged, and if *mana* were essentially tribal there would be no need for *utu*. But there is ample evidence that, even when the parties are very closely related, *utu* is in order. We find this notably in the narrative of

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6 Above n 3, 85-86.

the separation of Earth and Sky, where first Tawhiri-matea and then Tu-matauenga exact *utu* from their brothers. Under a radically collectivist interpretation these exchanges make no sense, as tribal *mana* is neither lost nor gained. Here, it is only personal *mana* that is at stake.

There are of course cases where one member of a tribe performs some action which damages the *mana* of the whole tribe, and in such cases it makes perfectly good sense for the tribe to take whatever action is needed to restore the lost *mana*, for example by presenting a suitable gift to an outside party or precipitating a new conflict which will unite the tribe in a great victory. But when the action of one member of a tribe simply increases that individual's *mana* at the expense of another member's *mana*, nett tribal *mana* can stand unchanged and hence under a collectivist view of *mana* no response is called for.

What we must realize is that the concept of *mana* is a changing and complex concept, as has been demonstrated by scholars such as Schwimmer and Metge.<sup>7</sup> In particular, while undoubtedly the collective aspects of *mana* are and have always been of great importance, they do not exclude an emphatically individualist aspect. The fact that collective aspects are of overwhelming importance does not show that *mana* is essentially tribal or collective. The solution is to realize that the concept of *mana* is neither essentially individual nor essentially collective,<sup>8</sup> and to define kinship relations appropriately to the situation. Kinship is always a matter of degree. Provided the parties are not very closely related, the bonds of kinship should be weak enough to be broken by an insult or injury which calls for *utu*. If a group of distant kin harms me, that reduces the *mana* of my immediate kin-group, at the expense of the distant relatives. Although inflicting *utu* on them will reduce their *mana* and hence to a degree that of my wider kin-group, the latter effect will be slight as compared with the amount of *mana* restored to my immediate group in obtaining *utu*.

In cases where the two parties are closely related, forming parts of one and the same tribal group, *utu* is still called for but perforce takes a different form. Here we find the practice of *whakahee*, where a chief who has been treated with indignity by members of his own tribe responds with an action that is designed to bring some form of trouble upon the whole tribe, from outside. Rather than censure their chief for responding in this way, the tribe endures the resulting misfortune and respects the chief who has brought it down on them. Shortland's interpretation of this is that the chief's purpose in performing *whakahee* is to "punish the whole tribe in order to get at that part of it who did him wrong".<sup>9</sup> Johansen disagrees: the aim is to conquer discord in the tribe by

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7 Eric Schwimmer "Guardian Animals of the Maori" (1963) 72 *Journal of the Polynesian Society* 398; Joan Metge *The Maoris of New Zealand: Rautahi* (London, Routledge and Kegan Paul, 1976) 63-65; Joan Metge *In and Out of Touch: Whakamaa in Cross Cultural Perspective* (Wellington, Victoria University Press, 1986) 61-73.

8 Metge 1976, above n 7, 65.

9 Edward Shortland *Maori Religion and Mythology* (London, Longmans, 1882) 101; Edward Shortland *Traditions and Superstitions of the New Zealanders* (London, Longman et al, 1856) 20.

uniting it against a common enemy.<sup>10</sup> On either interpretation, it does not matter which member or members of the tribe perform the action that precipitates *whakahee*. In that sense the initiating action is collective rather than individual. And Johansen's reading sees the response too as collective, in that it would not matter which individual performs the act of *whakahee*. Whoever performs it is acting for the tribe.

And whatever the aim of *whakahee*, an effect is that the members of the tribe group are forced to respond to the new threat from outside in a unified way, rather than squabble amongst themselves and risk tribal disintegration. Here *utu* operates as rehabilitation, in the literal sense of the word: the parties are reunited under the roof of their tribal home.

## V PUNISHMENT, *UTU* AND OFFENCES

Punishment must be for an offence. We would not condone a system or even a case of punishment which did not take all reasonable steps to make sure that those who are punished have broken some law. Sometimes we can be persuaded that this does not have to involve an intentional breach, as for example in many traffic laws. But even here the ethics are dubious. To be entirely above board - insofar as it can ever be entirely above board - punishment must be for an offence in the strict sense of an intentional breach of the law. But in the case of *utu*, one does not have to act intentionally or indeed at all. This is obvious from the practice of *murū*, where *utu* is taken in the form of plunder from a kinsman who has broken a *tapu* or suffered some misfortune. One is held responsible for everything that happens within the sphere of one's *mana*, whether it is an intentional act or not.

It is easier to understand this practice of *murū* if we place it in a contemporary setting. Imagine that you are a farmer, and your farm has been devastated by a flood which has carried away stock, washed out roads and bridges, and ruined the crops. A group of your relations arrives, but they do not help out with putting things right. No, they proceed to ransack the house, loading food and furniture onto a truck and carrying them away. Even the television set and perhaps the children as well. A European would be outraged at this sort of treatment, but Peter Buck, who had himself taken part in a *murū* raid following an accidental death, emphasizes that a Maori who has been the subject of *murū* is rather pleased that the tribe has taken the trouble, rather pleased to be seen as an important enough member of the tribe to merit this treatment.<sup>11</sup>

Johansen explains the practice of *murū* by saying that a *tapu* breach or accident is seen as an *aituaa*, an "extraneous and uncontrollable element in things", and also as "a piece of evidence that the man's life has not been able to fill out his world".<sup>12</sup> Maning, who gives an eyewitness description of *murū*, says that a man is held to be responsible not only for his own actions but also for anything that happens within the sphere of his

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<sup>10</sup> Above n 3, 76.

<sup>11</sup> Peter Buck (Te Rangi Hiroa) *The Coming of the Maori* (2 ed, Wellington, Maori Purposes Fund Board, 1950) 421.

<sup>12</sup> Above n 3, 145.

*mana*. Hence when *utu* is taken in the form of a *murū* raid, the plundered victim may well be pleased rather than annoyed, as it is a recognition of the extent of his *mana*.<sup>13</sup> The point to emphasize about *murū* - and hence about *utu* - is that the original offence does not have to be an intentional action. And this is not just a conceptual point; not only is it logically in order to seek *utu* for an accident, for an unintended happening, it is morally and legally in order as well.

*Utu* is unlike punishment in a related respect; many of the actions that result in a need for *utu* are not breaches of prohibitions belonging to a code of law. Some of course are, but traditional Maori law does not regard as offences many of the sorts of action that call for *utu*. Maori legal prohibitions are largely matters of *tapu*, and breaches of *tapu* do not call for *utu*. At least, they do not call for human *utu* (one way of looking at *tapu* breaches in terms of *utu* on the part of *atua* or gods). The sorts of actions that commonly call for *utu* are insults or injuries to other people, and these do not constitute offences in traditional Maori law. In a sense, other people and tribes are fair game. As long as your actions do not encroach on the area of *tapu*, you can do what you like to enhance your tribe's *mana* at the expense of others, as is shown in several of the stories about Maui.

One might then contrast *utu* and punishment in this manner: in the sense relevant to punishment, an offence is something laid down in a system of law; not necessarily written or codified, but ascertainable by some specified or clearly understood procedure. The Maori parallel to this is *hara* (offence), not *utu*. Although, for example, an insult to a chief will always be a ground for *utu*, and although it is easy enough for anyone who knows the parties and their traditions to tell what will constitute an insult and what will not, it is not entirely accurate to call such an action an offence. Granted, the insulted party will *take* offence, but that is something entirely different. As opposed to an insult or injury to a chief, which is not an offence in anything like the legal sense, there are various offences against the law of *tapu*, such as touching the head of a chief or stepping over him. These are *hara* (offences) and do not call for *utu*. That would be redundant, as the chief and his people do not have to take any action. The consequences of a breach of *tapu* are inevitable. Sometimes they are described as cases of punishment by the gods, and here the concept of *utu* might be used, but unlike European punishment there is no suggestion that the gods concerned have any alternative but to take retaliatory action.

We must also note that the concept of an offence applies, even in the loosest of senses, only to one type of case of *utu*, where the *utu* takes some hostile form. The other sort of case, where the interchange is a friendly one involving gifts or hospitality or assistance in some project, even the widest sense of "offence" is inappropriate. So here again there is a strong contrast between *utu* and punishment; one whole class of *utu* exchanges does not and indeed cannot feature any form of offence, whereas all cases of punishment are supposed to be cases where a person has committed an offence against the law.

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13 FE Maning, *Old New Zealand* (Christchurch, Whitcombe and Tombs, 1930) 98-100.

## VI PUNISHMENT, *UTU* AND THE OFFENDER

For an offence to be committed there must be an offender. Here we can find a rather closer link between punishment and *utu*. It is an important feature of the ethics of punishment that the recipient of the penalty be the actual offender or offenders. Not only must there be an offence for which the punishment is meted out; it must also be meted out to the offender. At first sight it seems that the case of *utu* does not parallel this pattern. *Utū* is commonly a matter between kin-groups rather than individuals. Thus there is nothing wrong with taking *utu* from somebody other than the original offender, provided that they are closely related. As Buck puts it, "so long as some members of that tribe were killed, it did not matter if the real culprit escaped"; and again, "the family group was held equally responsible with the culprits, because, after all, the individual was merely a unit of the family group".<sup>14</sup> This is one of the very important features of *utu*; to start to understand the practice of *utu* it is necessary to see it as operating within the conceptual system which is not like an individualist European system, in that the interests of the individual person must often give way to those of a whole tribe, from remote ancestors to the living members and through to future generations.

In this respect, it does not particularly matter which member of a tribe performs an action that calls for *utu*; the response can be directed against any or all members of the offending tribe. In European individualistic terms, *utu*, unlike punishment, does not have to be of the offender. But when we view the matter in Maori terms, the two cases are much closer. Whereas Europeans tend to concentrate upon an individual actor, Maori will often regard a family or other tribal group as the actor. In European terms, I insult you and so your uncle obtains *utu* by insulting my elder brother. In Maori terms, my family insults yours and so your family obtains *utu* by insulting my family. So, seeing the situation in Maori terms, it turns out that it *is* an ethical requirement in the case of *utu*, just as it is in the case of punishment, that the recipient be the offender. It would definitely be a mistake, according to Maori ethics, to inflict *utu* upon the *wrong* tribal grouping, just as it is a mistake, according to European ethics, to punish individual scapegoats.

But while there is a close parallel here, it is not a perfect parallel. In the case of punishment, if an offence is a group offence it is ethically important to make sure that any penalty falls equally or proportionately on all members of the offending group. This is not quite paralleled in *utu*, where any individual member of an offending group may be the direct recipient of the *utu*. Of course there is a sense in which that individual represents the entire group, but the difference is still worth noting. If anything the system of *utu* is simpler, as there is one question that has to be asked in the case of punishment that does not have to be asked in the case of *utu*: exactly how is the blame and burden to be distributed amongst the members of the offending group? In the ethics of punishment this is an important question. In the ethics of *utu* it does not have to arise.

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<sup>14</sup> Above n 11, 388, 371.



## VII AUTHORITY

A further difference between punishment and *utu* is the place and nature of properly constituted authority. In the case of legal punishment, an important legal and ethical idea is to separate an offended party from the punishing party. To obtain redress, offended parties are required to work through a disinterested official system, and may not "take the law into their own hands". Direct retaliation is ruled out, and except in cases of overwhelming provocation it is no defence or excuse to maintain that one was acting in direct response to an injury.

The system of *utu* is quite different. At first sight it might even seem that what is an important requirement in the case of punishment is entirely missing here. In significant cases of *utu* there are authorities involved, but they are tribal authorities, authorities of the tribes who are parties to the dispute. Just who is actually involved will depend upon the nature and gravity of the matter, but when it is serious there is likely to be detailed discussion as to the nature of the injury and the appropriate form of *utu*. These discussions may involve only the injured party or they may also be a matter of negotiation between both of the tribal groups involved. But although in this sense there are customary legal procedures to be followed by the appropriate authorities, they typically involve only interested parties. John Savage, an early European commentator, reports that in almost all cases a decision to punish would be partial.<sup>15</sup> The decision is not made by a disinterested, independent authority. It is of course possible in principle to invite a more or less disinterested outside party to settle a dispute, but the chances of finding a suitable party within a traditional Maori context would be slim, and neither of the parties to the dispute would be bound by such a decision. In this respect, traditional Maori law has no system of theoretical disinterested authority.

All matters of *utu*, then, are in the end matters for the parties involved to settle as best they can, and if your resources are insufficient for you to extract *utu* from an enemy (or from a friend for that matter), you simply lose *mana*.

## VIII AVOIDING PUNISHMENT AND AVOIDING UTU

Within the New Zealand legal system, one way of trying to avoid punishment is to show that the action of which you are accused was unintentional. Except in cases of strict liability, which are ethically dubious anyway, that is always a relevant consideration and might amount to a good excuse. Another way is to show that, while the action was admittedly performed intentionally, there were other excusing or mitigating circumstances.

This aspect of European legal thinking is a complex one, and detailed examples are as likely to confuse as to clarify. Fortunately the Maori side of the story is simple, so we do not need a mass of detail of the European side. In the case of *utu*, the sorts of condition that would excuse an action or mitigate its gravity just do not operate. All offences are offences of strict liability. For example, commenting upon a case in which

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<sup>15</sup> John Savage *Some Account of New Zealand* (London, Murray, 1807) 31.

a white New Zealander who shot and killed a Maori intruder was found not guilty of a firearms offence, Moana Jackson comments that in Maori law the question whether the gun was fired on purpose or accidentally does not arise; in either case recompense (*utu*) must be made.<sup>16</sup>

Indeed this applies not only to *utu*; it holds for *tapu* breaches as well. Whether or not you intended to insult or injure a chief, he is entitled to *utu* in either case; whether or not you intended to touch his head or to drink from his cup, you are exposed to the danger of his hereditary *tapu*.

## IX GUILT

In the case of punishment, the distinction between supposed guilt and proven guilt is important. To inflict punishment on the basis of supposed rather than proven guilt is an injustice. Admittedly the methods of proof actually used may not always be all that they might be, but at least the principle is a clear one; the methods of legal proof are meant to make sure that only the guilty suffer, by preventing people from being punished on mere suspicion or allegation of guilt.

In the case of *utu* the distinction between supposed and proven guilt cannot be made so clearly. In traditional Maori law there is no independent agency for proving guilt, nor are the methods of proof actually used really disinterested. In classical times at least they often involved omens and the like, of necessity produced by or at least amongst one of the interested parties.

Just in case it sounds from this as if the system of *utu* is or at least was a thoroughly unjust one, it is important to reflect upon the fact that *utu* is fundamentally connected with *mana*. Thus, if some other party seeks *utu* from you, that shows that they believe that you have deprived them of some of their *mana*. And this is a case where thinking does indeed "make it so". That is, if you think that you have lost *mana*, you have indeed lost *mana*. And if somebody else thinks that you have gained some of their *mana*, you have indeed gained some of their *mana*. It gets more complicated when more parties are involved, but the simple picture helps to show why the apparent injustice of the system of *utu* does not matter. A European, if wrongly accused, will leave no stone unturned to *disprove* the allegation, to disown responsibility. A Maori, or at least a Maori of great *mana* and secure position, will be inclined simply to *accept* the responsibility, whether or not he or she did in fact perform the action. In accepting responsibility one accepts also the increased *mana* that accompanies any action that calls for *utu*.

## X AIMS OF UTU AND OF PUNISHMENT

This comparison of *utu* and punishment concludes with a brief consideration of their aims, starting with retribution. Insofar as retribution is accepted as an aim of punishment, *utu* and punishment are alike. The *Heinemann New Zealand Dictionary*

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<sup>16</sup> Moana Jackson interview (11 July 1990) *Radio New Zealand News*.

defines retribution as "a repayment, especially in the form of punishment", and repayment is one of the central ideas in *utu*. It is not always fashionable to see the New Zealand legal system as retributive, particularly in the "eye for eye, tooth for tooth" sense. But there is frequent reference, even from convicted offenders, to ideas such as "repaying a debt to society", and that supports the concept of retribution as a perceived aim of punishment. An important difference between punishment and *utu*, though, is that the payments are all in the one direction in the case of punishment, whereas with *utu* they can go either way. Within the New Zealand system of punishment, there is no provision for society to repay its debt to its members.

Another stated aim of punishment is redress. Here the dictionary definition is: "1. The setting right of what is wrong. 2. Any relief for compensation from wrong or injury". This clearly applies well to *utu*, or at least to those cases that arise from a wrong. Even in detail and in practice, *utu* is reasonably effective in providing redress. We must remember though that if a tribe does not have enough strength to enforce *utu*, it will simply have to do without, or at least wait until it does have the strength. The same has been said of the New Zealand justice system, with some justification. But even if it is above suspicion in that respect, there is another grave fault as far as redress is concerned; the sorts of punishment inflicted upon convicted offenders often do little or nothing to set right what is wrong, to offer relief or compensation where it is needed. This charge is made in detail in Moana Jackson's report on the New Zealand system of criminal justice.<sup>17</sup> Jackson maintains that Maori methods such as *murū* are more effective for righting wrongs and compensating injuries than the European system of punishment.

Punishment is also meant to prevent or deter us from breaking the law, even if this aim is all too often not achieved. What is the Maori parallel? Clearly it is not *utu*. Here the appropriate comparison is with *tapu* rather than *utu*. Of course one might be deterred from insulting a chief for fear of his response, but that is not the proper parallel to the way that punishment, or rather the threat of punishment, is meant to deter or prevent us from breaking the law. We might also be deterred from doing all manner of things we are legally entitled to do, in the presence of a chief, and the system of punishment is not meant to work like that. No, the Maori equivalent of deterrent punishment is *tapu*. Maori criminal law is enshrined in the practice of *tapu*. Forbidden actions are *tapu*, or are made *tapu*, and fear of the consequences of breaking *tapu* is a powerful deterrent.

Finally, consider reform and rehabilitation. It is widely believed that these are important aims of punishment. No number of high-sounding words, though, can persuade even the moderately sceptical that these aims are achieved at all often. The reformed offender should not offend again; far too many offenders do. The rehabilitated offender should be fully accepted back into the community; far too few offenders are. In the Maori case, the proper comparison is with *murū* rather than *utu* in general. The system of *utu* does not pretend to reform or rehabilitate anyone. It is a much more

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<sup>17</sup> Moana Jackson *The Maori and the Criminal Justice System, a New Perspective: He Whaipanga Hou* (Wellington, Department of Justice, 1988).

straightforward transaction. In the case of *murū*, though, we have a system which is meant to bring people back into the communal network. In Maori eyes, this is reform. In anyone's eyes, it is rehabilitation.

This series of comparisons between the aims of *utu* and the aims of punishment reveals some important new points about *utu*, and reinforces others. Again the central connection is between *utu* and *mana*. European punishment works more like the system of *tapu* than the system of *utu*. There is a proverb which states that *tapu* is the *mana* of the gods;<sup>18</sup> in that sense, when the gods are the offended party they proceed to put matters right, they restore their own slighted *mana*, swiftly and inevitably. But everyday *utu* is a matter of restoring the balance of *mana* amongst lesser beings, notably amongst various tribal groupings, involving recent ancestors but not involving the gods. This means that it is in many ways like New Zealand civil law, rather than the New Zealand system of punishment.

## XI CONCLUSIONS

Apart from the law of *tapu*, which can operate without the need of human intervention, Maori parallels to a European system of legal punishment are found in the practice of *utu* and in particular in the version of *utu* known as *murū*. But the parallels are approximate only. Although both punishment and *utu* involve a deliberate response to an offence or injury and aim to achieve retribution or repayment, they differ in important respects. Ethically speaking, punishment can be forgone, but *utu* cannot; punishment should be unpleasant enough to deter, but *utu* may be entirely friendly and welcome; punishment should be confined to offenders who have been proven guilty of intentional offences, but *utu* may be exacted from individuals who have done no wrong. The aims of punishment are complex and contentious, but the aim of *utu* is straightforward; *utu* is a mechanism for restoring lost *mana*.

Of course *utu* is both a traditional concept and a living and changing concept, and this paper has glossed over the differences between the traditional concept and its contemporary relations. But as with so many concepts, both Maori and European, a philosophical understanding involves a degree of idealisation and abstraction, involves constructing a conceptual model which is probably not identical in detail to any past or present real-world version of the concept. To attend in detail to the differences between various traditional and contemporary concepts of *utu* (or of *mana* or any of the other related Maori concepts) would obscure the main point of the paper, which is to highlight some radical differences between what we might call the essence of *utu* and the essence of punishment. Given these fundamental differences, it is clear that if Europeans are to understand the Maori concepts and practices they must forget much of what they take for granted when they think about punishment.

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<sup>18</sup> See Jackson 1988, above n 17, 43.