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CHAPTER 1

THE PROBLEM OF JUSTIFYING PUNISHMENT

1.1 INTRODUCTION

Deliberately inflicting harm on others is usually morally wrong. However, under certain circumstances we seem to agree that punishment, which is a deliberate infliction of harm upon others, is not only acceptable, but can also be morally justified. The main objective of this thesis is to show that despite the fact that punishment is deliberate infliction of harm upon others, it can be morally justified. This justification, I shall argue, is connected to being civilised, i.e. a morally just response to crime is a civilised response. I shall therefore define the term "civilised" and argue that a pluralistic approach, one incorporating aspects of various other approaches, is required to answer the question. In doing so it resolves two thorny questions: who is to be punished and by how much? In addition to resolving these two questions, I shall argue that a morally acceptable account of punishment must also have at least five objectives. These are: (1) punishment should serve as a recognised channel for the release of public anger and indignation at offenders; (2) punishment should contribute towards the reduction of crime; (3) convicted offenders should be made better persons, rather than left as they are or to deteriorate further, by the process of punishment; (4) the harm or injury inflicted by crime should be rectified by punishment; and (5) punishment should be economical, i.e. it should not waste social resources. I shall argue that the two questions and the five objectives is each a necessary condition for morally justified punishment, and together they constitute the sufficient condition for such punishment. I shall argue further that

although each of the simple theories I examine fulfils some of the necessary conditions, none satisfies the sufficient condition.

Having stated that I consider a morally justified response to crime as being a civilised response, I need to show what I mean by "civilised" and then demonstrate why I hold the seven conditions I defend as being necessary, rather than fewer conditions or another set of them.

1.2 DEFINING THE TERM "CIVILISED"

For a society to be worthy of the description "civilised," it must endorse certain values. *The norms of a society must be moral if that society is to be a civilised one*, i.e. there is a logical connection between civility and morality. Let us imagine the opposite condition for a moment, a state in which no civility existed, such as in the Hobbesian state of nature. Civility in such a state is non-existent, and morality could not exist or develop either. A civilised environment is required for morality to be capable of germinating and developing. A society that did not care about whether innocent persons were being punished could not be described as "civilised." Nor could a society that did not care about whether offenders were brought to justice or not because, for instance, it believed everyone had sole responsibility for his or her own safety. A society which endorses power as the only regulating principle of human relationships does not begin to approach the requirements of any civilised society. It follows that punishment cannot be imposed on just anyone or in any manner in a civilised society, i.e. it cannot be imposed on anyone or in any manner if it is to be justified. Therefore, I set out in this thesis to determine exactly when punishment meets the requirements of civil society and hence when it is morally acceptable.

The question that now arises is, "when is a society civilised?" A civilised society furthers the normality of its members as well as of the society as a whole. This brings us immediately to the next question, namely, what is meant by "normality?" Before answering this question, however, it is appropriate to consider the contrary position, namely a society that does not further the normality of its individual members and of the group as a whole, i.e. a society that is not concerned with the well being of the individual and of the group. Would we consider such a society civilised? The answer almost everyone is bound to agree upon is that we would not.

Since I hold the notion "civilised" to be connected in an inextricable way to the notion of "normality," it is appropriate to address the question, "what is normality?" Since the word "abnormal" literally means "away from the normal," it implies a deviation from some specifically defined norm. But what is the norm? In the case of physical illness, the norm is the structural and functional integrity of the body; on this level, the boundary between normal and abnormal is usually, but by no means always, clear. However, what is normal behaviour? On a psychological level, we have no ideal or even ideal model to use as a base of comparison. Definitions of what is normal or abnormal on a psychological or behavioural level thus abound. Ultimately, any definition of normal behaviour must be somewhat arbitrary. Definitions tend to represent one of two broad perspectives. One view holds that the terms "normal" and "abnormal" are meaningful only from within a given culture. Abnormal behaviour is thus any behaviour that violates society's rules. This is generally the definition advocated by legal systems, entailing that behaviour which violates society's laws is abnormal. This definition is not satisfactory, however, since it entails that a sick society whose norms and rules are themselves pathological cannot be considered abnormal. Examples would be

Nazi concentration camp commanders who would be considered normal to the extent that they were responding accurately and successfully to their environment by not breaking its rules, law enforcement officials upholding immoral rules in Apartheid South Africa, or laws passed by the Taliban in Afghanistan. Their behaviour would be repulsive to most Western value systems today. Such repulsion is based on a particular set of values; and many of the perpetrators adherent to the laws of these regimes would today be indicted as war criminals or considered as having been oppressors. This implies that one may select values that apply to another society, which in turn raises the question as to who is to select these values. This situation in which one group's values is dominant over others is the fascistic background that gave rise to many oppressive systems, such as that of the Nazi camp commanders', of Apartheid, and of the Taliban. Complete cultural relativism, defining normality as what is accepted by the culture in question, rests on the dubious assumption that it is social acceptance that makes behaviour normal, that one set of values is just as good as another for human beings to adopt (Carson, Butcher & Coleman 1988: 8).

An alternative conception of normal is to see it as conducive to adaptation and abnormal as being maladaptive. Some degree of conformity is clearly essential to group life, and some forms of behaviour are not only harmful to the group, but also to the individual performing them. I therefore agree with Carson et al. (1988: 8-9) that the best criterion for determining the normality of behaviour is not whether society accepts it, but rather whether it fosters the well being of the individual and ultimately of the group of which he or she is a member. By "well being" is meant not only maintenance or survival, but also growth and fulfilment, i.e. the actualisation of potentialities. According to this criterion, behaviour is abnormal when it is maladaptive, even when it is socially accepted. This would include much behaviour that is

not usually prohibited by law, such as prejudice against others, wasteful use of our natural resources, regardless of whether such behaviour is prohibited or accepted by a given society. According to this view, we are morally justified in changing the behaviour of others when their behaviours have been identified as maladaptive, even if those behaviours are not prohibited by law.

With the adoption of abnormal as maladaptive, two assumptions are being made: (1) that survival and actualisation of one's potential is worth striving for, both on an individual as well as a group level; and (2) that human behaviour can be evaluated in terms of its consequences for these objectives. It may be objected that such assumptions are arbitrary, but unless we value the survival and actualisation of the human race, there seems little point in identifying abnormal behaviour and doing anything about it (Carson et al. 1988: 9).

The implications of defining "civilised" in terms of normality are that, just as with the notion of normality, whether a society or culture is civilised can be evaluated and determined from outside as well as inside that society. Moreover, there are different degrees of being civilised since different societies promote the well being of their members and themselves as a group to different degrees. Being civilised should therefore not be seen as an all or nothing matter, but should rather be seen as ranking on a continuum with absolutely uncivilised being the one pole and completely civilised the other.

1.3 THE PROBLEM OF PUNISHMENT

Punishment is morally problematic because it requires justification. The problem is contained in the fact that it involves doing things to people that, when not described as punishment, are held to be morally wrong. If punishment is

defined as the "intentional infliction of pain or deprivation by someone in authority to do so as a response to a harm suffered," and these pains or deprivations are not unlike the harms caused by crimes - fines are similar to theft, imprisonment to kidnapping, capital punishment to murder, etc. - then it seems to follow that punishment needs justification, especially in a constitutional democracy, which is committed in theory to the protection of human rights and the values of civil liberties, privacy and autonomy.

Underlying my argument is a particular view of personhood, an individual with rights. The view of persons underlying the theory is that *persons are moral agents who may be held accountable for their actions*, and that *they are at least in theory capable of being improved.* Holding persons accountable for their actions also presupposes that they are free agents, not being mere components in a mechanistic universe. I shall argue, however, that under certain specifiable conditions, they forfeit some of their rights, thus the rights of persons are not inalienable.[1]

Different kinds of theories provide different reasons why punishment may be justified. Justification may be undertaken by referring to intrinsic or extrinsic factors. The former holds that the justification lies within wrongdoers by referring to their guilt or to their capacity of being improved as moral agents; the latter refers to aspects outside the person being punished, such as deterrence of others, or undoing the harm done to others. The theory I shall expound synthesises both perspectives into a unitary theory.

Different moral theories have attempted (unsuccessfully, I maintain) to justify punishment. For classic utilitarians, for example, for whom pleasure is the only intrinsic good and unhappiness the only intrinsic evil; punishment is problematic because it involves the infliction of pain, i.e. unhappiness. It is therefore justified only if it can be shown that it

[1] I shall argue for this in Section 2.4.

produces sufficient pleasure or happiness, or prevents sufficient pain or unhappiness, to outweigh the evil caused. By contrast, moralists defending the values of autonomy and freedom as fundamental rights see punishment as problematic because it is coercive - it is inflicted on offenders against their manifest wills. For such proponents, punishment is justifiable only if the coercion is consistent with respecting the individual as a rational and autonomous agent. I, by contrast, argue that punishment must be a civilised response to crime, i.e. it must strive to further the well being of both the individual who is punished and the group of which he or she is a member.

1.4 OTHER REASONS WHY PUNISHMENT IS PHILOSOPHICALLY RELEVANT

Although I am chiefly concerned with the justification of punishment as the main reason why the notion is interesting for philosophy, punishment may also exert special appeal to philosophers for at least five further reasons, all of which are relevant to the fundamental problem: (1) The issue deals with an intersection between law and morals, between what is illegal and what ought to be prohibited. Not all moral offences are legal offences (abortion in the early stages of pregnancy is legalised in many countries, although many people believe the practice to be immoral), nor are all legal ones immoral (neglecting to wear seat belts might be illegal, but is usually not considered immoral, unless morality is defined in such a manner as to be co-extensive with law, or unless law is held to be a subset of morality). (2) The moral centrality of the concept of punishment requires that it be dealt with, at least to some extent, to gain a firmer grasp on notions such as blame, praise, reward, mercy, forgiveness, and justice. I shall show that my theory is capable of adequately addressing each of them. (3) Metaphysical issues, such as free will and determinism, and the analysis of human actions,

play a fundamental role in philosophising about punishment. The theory one is prepared to endorse and defend regarding punishment provides a good indication of the conception one holds of a person. If one endorses strict determinism (holding that criminals could not do otherwise than they did), then punishment cannot consistently be employed as a means towards the improvement of offenders. If we hold, however, that punishment ought to improve offenders, we implicitly endorse the view that persons can be changed, which implies that at least some free will exists. If it is argued that punishment ought to deter potential offenders from committing crimes, it is assumed that they have the ability to choose between prohibited and accepted behaviour. (4) Political philosophers, for whom the notion of "coercion" is the central notion of political power, may be drawn to philosophical ponderances of punishment since it is arguably the most powerful institutionalised form of coercion available. Punishment is the institution through which the state exercises force over those persons within its jurisdiction who do not comply with society's laws. In order to do so, it employs other institutions of power, such as the police, the courts, and penitentiaries to achieve this objective. (5) Finally, the philosopher's theorising about the subject intersects with other human sciences. Philosophers who now argue that one of the justifications of punishing potential offenders is that it deters, would have to revise their theories if convincing scientific evidence were obtained showing that punishment did in fact not serve as a deterrent. It reminds us that philosophy arises in and is accountable to the life-world, because if persons would not commit crimes, it would make the institution of punishment redundant, thereby also eliminating the need to justify the institution; but because persons do offend, and society wants to respond to such disobedient behaviour, it must be justified. The goals our justification endorses must have practical utility, i.e.

they must not only have theoretical value, but must be capable of being pursued in practice too. However, the philosopher is not subservient to the scientist. Scientists may be compelled to adjust their crime prevention or rehabilitation techniques so as not to conflict with the notions of justice or desert propounded by philosophers.

Regardless of the motivation behind an attempt to defend punishment, the justification of the practice remains a philosophical undertaking. Vindicating the goals or principles pertaining to the justification of punishment requires conceptual argument that cannot be established by any empirical means. Science might be able to show that punishment deters, or fulfils a need of society, for instance, but it is incapable of demonstrating why this justifies the practice. For such an account, philosophical reasoning is necessary.

1.5 PUNISHMENT AND A CONCEPTION OF CRIME

Since I shall be concerned with punishment as a morally vindicable response to crime, it is important to answer the question, "what is crime?" *Crime is the violation of another's rights, whether of an individual, a group, or a corporate body, where this violation is prohibited by law.* A crime can therefore only be committed against someone who has a right of some sort or other. Others have an obligation to honour this right. Failure to do so results in the commission of a crime.

This definition of crime does not imply that only those who can claim their rights have rights. Since the notion of "right" is connected to the notion of "obligation," X has a right to P if others have an obligation to provide X with P. X does not have to be capable of claiming his or her right to P. Thus, parents have an obligation to care for their children in an appropriate manner, even though the latter may

be incapable of claiming their right to be cared for properly, or even be aware that they have this right. The definition of right therefore applies to children, infants, the mentally ill, the comatose, and even non-human beings. This definition of crime therefore does not only make provision for fully rational adult individuals who can claim rights. We may thus also speak of the rights of children, of animals, etc. The state is the guardian of those who cannot claim there rights, having the obligation to prosecute the guilty who have violated the rights of others, even if the victims do not, or are not able to, press charges for having been victimised. The state is obliged to prosecute murderers, for instance, even though victims are no longer able to press charges, and even if they do not have someone who presses charges on their behalfs.

Some actions may be considered as immoral, but if they are not prohibited by law (i.e. if society does not explicitly proclaim that such actions are to be condemned), then punishing persons for performing them has no moral basis. For instance, if there is no law prohibiting the sale, distribution, or possession of pornographic material, persons selling, distributing, or possessing such material may not be punished even if society is of the opinion that the sale, distribution, or possession of such material is immoral.

Since crime is taken to be the violation of another's right, we may legitimately ask: "what makes punishment an appropriate response to crime?" Consequentialists who believe that the main objective of punishment is the reduction of crime may argue that crime is actually or potentially harmful, and therefore the state may inflict harm in order to reduce the greater harms of crime. Retributivists, those arguing that punishment must be justified as an intrinsically appropriate response to crime, must show why it warrants a punitive response. They may argue that punishment involves the taking of an unfair advantage over the law abiding, an

advantage which is annulled by punishment, or that crime requires censure which is administered by punishment, or that crime severs the bond between the criminal and the community and the good, a bond which punishment can re-establish (Duff & Garland 1998: 4). Proponents of reform theory may see punishment's justification as lying in the fact that it provides the state with an opportunity to rehabilitate offenders. Rehabilitation is not equated with deterrence since it involves a change of character or behavioural pattern. Still another approach, restitutionalism, sees punishment as a means of undoing the harm done to victims through crime. I shall argue that each of these approaches has merit in that each partially justifies punishment, i.e. each fulfils some of the necessary conditions of justifying punishment. None does so in full, however (hence none fulfils the sufficient condition), and therefore I propound a collaborative theory, one drawing on the positive elements of each.

1.6 THE OBJECTIVES OF THIS THESIS

One can seek philosophical justification of punishment at two levels: firstly, one can take for granted the principle that offenders ought to be punished and question whether a particular form of punishment, such as the death penalty or solitary confinement, is morally justified. Here one is concerned with any general criterion that any particular act of punishment must satisfy. Secondly, one can deliberately question the moral defensibility of the whole institution of punishment as a procedure for inflicting deliberate pain or suffering. As already indicated, I shall primarily be concerned with justifying punishment on the latter level.

After analysing and criticising the main theories of punishment, I shall put forth a unitary theory of punishment, i.e. a theory that incorporates elements from both forward-

looking and backward-looking approaches, including from retributive, deterrence, rehabilitative and restitutional theories.[2] Before proceeding any further, I shall explain why I believe a hybrid theory (one incorporating both backward-looking and forward-looking perspectives) is necessary. In addressing the issue of how any system of punishment can be morally justified, two other underlying questions need to be answered: whom are we justified in punishing? And by how much are we justified in punishing them? I shall argue that only a backward-looking justification, such as provided by retributivism, is adequately able to answer the "whom" question, but retributivism is unable to answer the "how" question. The contrary, however, is the case with forward-looking justifications, such as consequentialism. Although they are incapable of providing a suitable answer to the "whom" question, they can answer the "how" question. Therefore, in order to answer both questions, it seems that the only morally justifiable approach to punishment is a hybrid approach, one synthesising both backward-looking and forward-looking justifications. I shall claim that we need backward-looking retributivism because it enables us to determine whom to punish, but not how or in what manner. It is consequentialism, however, that furnishes us with a criterion for determining how much to punish, but not whom to punish.[3]

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[2] R. S. Downie (1986: 339-346) struggles with the question, what separates retributivists from utilitarians regarding punishment? He illuminates shortcomings and advantages of each approach and concludes that a comprehensive theory of punishment must incorporate retributive and consequentialist (deterrence and reform) elements, if it is to be capable of giving an adequate justification for the complex problem of punishing criminals.

[3] Feinberg (1995g: 613-617) states that an increasing number of writers has come to regard both pure retributivism and utilitarian theories as too extreme to be credible, and has opted instead for a mixed theory. According to this theory, since moral guilt is a necessary condition for legal punishment, social utility cannot itself be sufficient; and since social utility is deemed necessary, mere moral guilt cannot be sufficient. Both retributivism and utilitarianism have, therefore, to give up their sufficient conditions for justifying punishment. Feinberg argues that a

I shall argue that any theory endeavouring to justify punishment, and thereby constitute a civilised response to crime, must fulfil certain conditions, i.e. it must have a certain structure and endorse certain goals. Before presenting the goals of my theory, let me turn to reflections on why a theory need have goals at all, what their internal and external relations ought to be, and that they ought to be reasonable and coherent.

1.7 CHARACTERISTICS OF A THEORY JUSTIFYING PUNISHMENT

A theory may be described as a coherent attempt to portray, explain or predict any subject under investigation in a systematic manner. In this thesis, it is an attempt to morally justify punishment, i.e. to explain by means of argument under which conditions I hold punishment to be morally justifiable. One of the questions that must therefore be answered is "which characteristics must such a theory have?" I shall argue that there are five characteristics: it must have a function, be internally consistent, be realistic, statements pertaining to factual matters must be in accordance with known fact, and it should be simple. Theories should often also have other characteristics - theories of science, for instance, should often have predictive value too. In justifying punishment, however, I am not concerned with predicting anything. I am not, for instance, trying to predict how punishment would be most effective, how it would have greatest deterrent value, what kind of punishment would reduce crime most effectively, what punishment would satisfy society most, or the like. I am merely concerned with establishing under which conditions punishment is morally justifiable. Therefore, the five theoretical requirements of my theory are sufficient for it to qualify as a theory.

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mixed theory may thus hold that moral guilt and social utility are separately necessary and jointly sufficient.

(1) A theory attempting to justify punishment must explain why punishment is necessary at all. This is what I term its "function." Why is *punishment* necessary and not some other practice, such as compulsory education of offenders? Delineating a practice's function clarifies its practical objectives. A theory justifying punishment will not specify exactly what punishment ought to be administered in a given case, such as car theft, but will set out general principles that ought to guide specific actions, such as that punishment ought to be graded according to the severity of offences, and hence car theft ought not to receive the same or greater punishment as murder, rape, assault, armed robbery, or the like, ceteris paribus.

(2) A theory of punishment must be internally consistent. This entails more than that a single statement ought not to be asserted and denied, such as that rehabilitation is a paternalistic measure: a point argued for in one section ought also not to contradict a point argued for in another. A theory holding in one chapter that persons ought never to be used as means towards social ends and in another that criminals may be used for purposes of general deterrence would violate this requirement. It is imperative that any theory should be consistent. Because my theory incorporates both backward-looking and forward-looking perspectives, it may prima facie seem inconsistent. The perspectives are not mutually exclusive in my unitary theory, however, since they address different aspects of the justification of punishment.

(3) Any theory attempting to justify punishment must be realistic. By "realistic" I mean that it ought not to have objectives that cannot plausibly be pursued or attained, such as that punishment is justified only if it achieves the elimination of crime, or rehabilitates offenders in such a manner as to be certain that they will not offend again. A theory of punishment ought rather to have the more realistic

goals of bringing about a reduction in crime, or improving offenders.

(4) A theory of punishment must also be compatible with known facts. This means that those statements dealing with matters of fact (not with logical relations or value statements), such as that punishment deters potential offenders, should accord with currently held factual knowledge. A theory arguing that punishment is justified because it deters potential offenders would not be worth anything if the vast majority of research done on the matter showed that punishment does not have any deterrent affect.

(5) The final theoretical characteristic of a theory is that it should be committed to simplicity. It ought not, for instance, to propose seven objectives for the justification of punishment if five were to jointly pose a sufficient condition for punishment's justification. This may be described as being committed to "parsimony" or what is often referred to as "Ockham's razor."

1.8 THE NECESSARY AND SUFFICIENT CONDITIONS

Now that I have described the theoretical requirements any theory must fulfil, I shall briefly set out what I shall argue in the chapters to follow.

Firstly, I shall aim to resolve two fundamental questions:

(1) Whom may one justifiably punish?
(2) How (in what manner and to what extent) is one justified in doing so?

Since I hold that moral justification of punishment must be a civilised response to crime and hold civilisation to be inextricably connected to the furthering of well being of both the individual and of the group, punishment must pursue at least five goals, so establishing seven conditions for its

moral justification; failure to do so would not further the well being of individuals and of society as a whole. The goals punishment must have are:

(3) Punishment should serve as a recognised channel for the release of public indignation and anger at offenders.
(4) Punishment should contribute to the reduction of crime.
(5) Convicted offenders should be made better persons, rather than left as they are or made worse, by the process of punishment.
(6) The harm or injury inflicted by crime should be rectified by punishment.
(7) Punishment should be economical, i.e. it should not waste social resources.

I shall argue for each of these in the chapters to follow, and then I shall argue that these seven conditions are each a necessary condition and together they constitute the sufficient condition for morally justified punishment. Any theory that does not adequately answer the two questions and pursues the five goals is morally unacceptable.

I shall also derive three restraining principles from the arguments I shall expound in Chapter 5, principles that ought to check misuse in striving to realise the objectives. These are:

(1) No one ought to violate another's rights where there is a feasible alternative.
(2) Fairness requires that punishments should be graded in severity, according to the severity of the offences.
(3) If the rights of individuals are to be threatened, the threat should fall more heavily on wrongdoers (the guilty) than on others (the innocent).

The goals of my theory may be seen as being the aims of four distinct theories attempting to morally defend punishment - retributivism, deterrence theory, rehabilitationism, and restitutionalism. Retributivism pursues the goal of allowing society to express its anger and indignation at offenders, but does not pursue any of the other four. Deterrence theory is committed to the pursuit of two of the five goals, namely bringing about a reduction in crime, and being economical, but does not pursue any of the others. Rehabilitationism aims at improving offenders (i.e. making them better persons), bringing about a reduction in crime, and, I shall argue, at being economical in the long run; but it does not aim at serving as a recognised channel through which society can express its anger and indignation at offenders, nor is it committed to undoing the harm done or injury suffered through crime. Restitutionalism is primarily concerned with undoing the harm done by offenders, but, I shall argue, is also committed to being economical and serving as a recognised channel through which society may express its anger and indignation at offenders: I shall argue, however, that it is neither committed towards the objective of improving offenders, nor in practice towards bringing about a reduction in crime. None of these theories therefore itself pursues more than three of the five goals, and, I shall claim, even though they do address the moral issue, are all insufficient as adequate moral justifications of punishment.

In addition to being insufficient in respect of pursuing the five goals, the theories at issue also do not each adequately address the "whom" and "how" questions. Retributivism and restitutionalism provide an answer of whom to punish, but not how; deterrence theory furnishes us with a means of determining how much to punish, but not whom, and rehabilitation theory does not satisfactorily address either of these two questions.

In the next two chapters, I shall be preoccupied with retributivism. In the first of these chapters, I shall give a broad overview of the theory and criticise its shortcomings by arguing in which respects it cannot be defended and by pointing out in which respects it is deficient. In the second of the two chapters, I shall defend a version of retributivism by arguing that it acknowledges that society has a need to express its anger and indignation at offenders. The reason for my starting with retributivism is that this approach is best able to furnish an answer to the first of the two fundamental questions, namely whom to punish. After this, I shall turn to deterrence theory, rehabilitationism, and restitutionalism.

CHAPTER 2

RETRIBUTIVISM AND ITS LIMITS

2.1 INTRODUCTION

In this and the next chapter, I shall focus on retributivism. Arguably, it may be an expression of the most commonly held belief in society regarding the moral defensibility of punishment and may have the longest history too. I shall begin by providing a general overview of the theory, presenting its main elements and their implications. I shall then present a paradigmatic case of retributivism, namely that of Immanuel Kant. His theory will be discussed in general, before two issues he raises will be dealt with in greater detail and rejected, namely that it is never morally justifiable to use anyone as means towards ends, and that criminals will their punishment. I shall deal with the latter issue by examining Hegel's position on the matter in depth too, since his stance regarding this matter is more accessible because it is expounded in greater detail, while being consistent with Kant's position. I will then also present and reject attempts to justify retributive punishment with reference to consent. I address the question of whether retributivism is capable of adequately providing an answer to the question of how much punishment is morally defensible, and I argue that retributivism is incapable of providing a morally acceptable response to this question because it is committed to the principle of lex talionis, neglects important variables, and is not actually committed to respecting punished individuals as it claims it is.

In the next chapter, I provide a partial defence of retributivism by arguing that it is morally appropriate for one to express anger and indignation at offenders and that

retributive punishment justifies this. Let me now, however, begin with a general overview of retributivism.

2.2 THE MAIN ELEMENTS OF RETRIBUTIVISM BRIEFLY DESCRIBED

Retributivism (non-consequentialism) insists that punishment be administered intrinsically, independent of any consequentialist objectives, i.e. persons are to be punished because they deserve it, and that only those deserving of it are to be punished. In this regard a distinction between negative and positive retribution may be made - the former holding that no one but the guilty deserve punishment and may be punished, the latter holding that the guilty must be punished to the full extent of their desert. Positive retributivists thereby offer a complete justification of punishment, while negative retributivists do not; however, their theories may feature as constraining principles on consequentialist theories, by for instance, insisting that only the guilty be punished, even if punishing others were to have overall beneficial consequences.

Furthermore, punishment is seen to be good in itself, i.e. punishment is not justified by appealing to some external goal or principle. The strong version of retributivism, such as that which is propounded by Kant, holds that the guilty must suffer and that the moral order requires that punishment be imposed. This version of retributivism denies that punishment needs any external justification (by referring to beneficial consequences for society or the punished); those who are guilty fulfil the sufficient condition for punishment.

Retributive theories of punishment are backward-looking since it is only the crime itself, its nature, its motive, and its extent that is the object of interest for retributivists. Retribution may be seen as having as its underlying principle the notion that punishment is justified insofar as it is a morally fitting response to the violation of another's rights.

One of the central problems of retributivism therefore is to explain the notion of "desert." Since punishment is supposed to be justified as an intrinsically appropriate response to crime, desert is supposed to provide the connection between past crime and present punishment. But what exactly is this connection? And furthermore, does desert make punishment a fitting response to crime? The intuition that the guilty deserve to suffer is often offered as a reply, but this intuition requires explanation.

Fundamental to morality is a belief that persons ought to get what they deserve. What they deserve are benefits or harms made appropriate by some prior fact of the recipients. Therefore, benefits are rewards for achievements or compensations for injuries, while harms are punishments arising from culpable deficiencies in the recipients. Benefits and harms are deserved depending on some action, relation, or characteristic that is under the direct control of the individual involved. Importantly, the nature of desert has both a backward-looking and a forward-looking component. This is because desert demands that the morally significant element in a person's life (past) determines whether a person ought or ought not to receive some benefit or harm in the future. Applying this to the concrete case of punishment, it is the wrongful act of the criminal that is the element justifying the future action of punishment.

Given this view of punishment, whom may we punish? Retributivism concisely maintains that we are justified in punishing those who have willingly and knowingly committed crimes, i.e. only those who knowingly and willingly commit crimes deserve to be punished. Although looking remarkably similar, as shall be pointed out in 3.3.1, this is not necessarily the endorsement of revenge, if we narrow the definition of revenge to exclude retributive acts of punishment carried out by impartial officials of the state in

an unbiased and unemotional manner on behalf of wronged individuals.

Retributivism also maintains that because it is just to reward according to desert, so it is likewise just to punish according to desert. Consequent on the latter claim are three points:

(1) Inflicting legal punishment on anyone who has not violated a law is grossly unjust.
(2) A person who fails to satisfy one or more of the mental or psychological conditions for moral responsibility must not be punished, because it is believed that only persons who are aware of their actions' consequences can be held accountable for them.
(3) The amount of punishment inflicted must be in proportion to the offender's desert.

The "ought" in desert is supported by the underlying notion of "moral equilibrium," which demands that the benefits or harms an individual deserves are determined proportionally to the significant element (the crime) in the person's past. This position is that the criminal takes an unfair advantage of the law abiding, an advantage which can be annulled by punishment. It advocates positive retributivism since it does not only see punishment as an available option, but rather as an imperative, since if criminals were to be allowed to get away with their unlawful actions, the law abiding would suffer an unfair disadvantage (Duff & Garland 1998: 13; Benn 1985: 10).

A different retributive approach emphasises the expressive nature of punishment. Here punishment is not the mere infliction of hard treatment or deprivation in response to criminal conduct, but also involves an expressive element,

communicating to criminals that their actions were wrong.[1] This is also what distinguishes fines from taxes, for instance. Censure is by definition backward-looking; it expresses disapprobation for an action that has already occurred.[2] Two distinct questions immediately arise, namely, why should censure be expressed by the state, rather than by victims or other concerned individuals? And why should censure be expressed by hard treatment or deprivation? Could it not be expressed by mere conviction, or by a symbolic expression? The same treatment may also be justified in consequentialist terms - hard treatment or deprivation may more forcefully convince criminals that they ought not to repeat the offences, and also deter others from committing similar offences (Duff & Garland 1998: 14). This reveals that retributivist and consequentialist rationales are not necessarily diametrically opposed; they sometimes justify the same action with different reasons.

In addition, both views: that there ought to be less punishment in the world, and that there ought to be more; are compatible with retributivism. Those holding the former belief may conceive retributivism as a means of limiting punishment and the class of those punishable. Retributivism is accordingly held to be a way of limiting inhumane practices because it does not seek justification of punishment disproportionate to the magnitude of the crime committed. Capital punishment for car theft, for instance, would be unjustifiable in retributivist terms. Those holding the latter conviction, however, may envisage retributivism as a means for limiting permissiveness and codling of criminals because a punishment too mild would not be administered

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[1] Duff (1995: 169-198) maintains that one important element of punishment is communication. It allows the community to express an important message, both to itself and to the criminal, in the hope that such communication will bring about genuine penance on behalf of the wrongdoer.

[2] Joel Feinberg (1995a: 592-602) argues that proper punishments express, often through their conventional symbolism, resentment, disapproval, condemnation, or reprobation.

according to desert. As I shall explain in 2.7.1, retributivism is committed to the principle of *lex talionis*, which maintains that the magnitude of the crime and its accompanying punishment should be equal because the punishment serves as an annulment of the unfair advantage taken through committing the crime (Radin 1985: 152). If the punishment is not of equal magnitude as the criminal act, then it does not annul the crime completely; punishment in excess does more than is required for annulment and hence results in a further injustice.

In order for legal punishment of offenders to be morally vindicable, according to retributivism, they must have violated a law. Violation of a law is a necessary condition for legal punishment, but not a sufficient condition for moral justification: A law may be unjust. By violating such a law, offenders may not be acting immorally, and therefore would not deserve to be punished. This would not alter the legal status - for example, not carrying a pass in Apartheid South Africa for black persons was both a legal necessary condition and a sufficient condition for punishment under the pass laws, although it was morally unjustifiable. The same is true of many laws in Germany under Hitler, as well as in other oppressive regimes.

I pointed out that the moral justification of punishment requires the answering of two distinct questions, namely whom we are justified in punishing and in what manner. The first question may also be translated into why we are justified in administering punishment because in identifying whom we may punish we must provide a reason why these persons, and not others, can morally be chosen for punishment. In the next section, I shall be concerned with Immanuel Kant's theory of punishment since it is a paradigmatic case of strong retributivism. Kant clearly identifies the group of morally punishable people. He also argues for appropriate amounts of punishment, but I shall argue in a later section that a

retributivist account is inadequate in providing a morally satisfactory answer to this question.

2.3 KANT'S PARADIGMATIC RETRIBUTIVE THEORY OF PUNISHMENT

Kant defends retributivism by arguing that a retributivist claim is required by a general theory of political obligation, which is more plausible than any alternative theory (Kant 1965: 34). He presents a theory of punishment that rests on the general view that political obligation is to be analysed contractually in terms of reciprocity. If the law is to remain just, it is imperative that those who obey it will not be taken advantage of by those who do not. It is important that no one profit by his criminal wrongdoing. Stated differently, it is important that no one benefits from not bearing the burden of self-restraint. The objective of criminal punishment, he maintains, is the proper balance between benefit and obedience.

In order to understand Kant's position pertaining to punishment, it is important to gain a firm grasp on his moral philosophy because his theory of punishment is derived from it.

Kant's philosophy contains an important connection between free will, moral agency, and rationality. Kant holds rational decision to be identical with moral decision, i.e. the demands of rationality and morality are the same. He also maintains, however, that to be a free agent is to be a rational agent. It follows from this that to be a free agent is to be a moral agent too. A free will, according to Kant, is not a will unrestrained and undirected, it is a will directed by rationality; and this is a will subject to morality.

The distinctive feature of Kant's moral philosophy may therefore be seen as its uncompromising rationalism. He holds that it is reason in human beings that makes them moral beings. He believes the moral law, i.e. the principles of

morality, to be unchanging and universal, applicable in all societies and in all circumstances and throughout time. The problem facing us concerning morality is to distinguish maxims. He argues that since maxims must be universal, it follows that what is a right maxim for one must also be a right maxim for all others. It must be such that it could be and ought to be accepted and acted upon by anyone at any time in the relevant circumstances. Thus, if I wish to determine whether my actions are morally good, I merely have to ask whether I can will that my maxim become a universal law. If not, it must be rejected because it cannot enter into a system of universal legislation, and not because it fails to benefit others or me in any way. It is thus impossible for me as a rational being to adopt any principle as a guide for my actions that I could not also will others to act upon. This means that if persons will a crime, such as stealing, then they cannot object if they are victims of theft since their actions are to be applicable for all others too. Thus, according to Kant, those who choose to murder forfeit their right to life since they proclaim by their actions that life may be taken, which entails that they can be executed; property can be appropriated from thieves, etc.

Kant insists that judicial punishment ought never to be used as a means to promote some other good, neither for criminals themselves, nor for society (Kant 1986: 346). Punishment ought only to be imposed on criminals because they have committed crimes. The reason for this is that he holds all persons to be ends in themselves. To use other persons merely as means is, he argues, to ignore those persons' positions as themselves independent and rational judges of their own actions. Thus, conversely, to treat persons as ends is to allow them the same right and opportunity of choice and decision one claims for oneself, resulting in consistency in one's attitude to one's own case and to that of others. If we use other persons as means only, we exact for ourselves a

special and superior position, which it is impossible that all can enjoy. Consequently, our claim could not qualify as a universal maxim and therefore, Kant insists, is in conflict with the demands of morality. Kant adds that all rational beings inevitably regard themselves as ends in this sense, therefore none can rationally refuse to recognise the demands of this categorical imperative. It is morally unjustifiable, for instance, to perform scientific experiments on criminals condemned to death in order to benefit society. If all people are to be treated as means and not ends, it follows that punishment, according to Kant, does not have any justification on grounds of deterrence since using persons for purposes of deterrence is to use them as a means and not see them as ends in themselves. However, this is an untenable position to hold since it overlooks certain important differences between people. In the next section I shall argue against the claim that persons may never be used as means towards ends by arguing that not all persons are of equal moral standing, that those of a lower moral standing may sometimes be used as means towards certain ends, and that criminals have lower moral standing.

For Kant, the principle of equality is fundamental to the performing of punishment, i.e. he maintains that the same amount of suffering ought to be inflicted upon offenders as was caused by their crimes, the same degree of suffering imposed upon them as they imposed on others by their criminal actions, whether their actions harmed individuals or society. According to the principle of equality, Kant argues, any harm one does to someone else, one does to oneself. Thus, if someone vilifies another, he vilifies himself; if he steals from another, he steals from himself; if he kills another, he kills himself, and so on. This position is derived from Kant's argument that all actions ought to proclaim universal maxims, i.e. by our actions, we express the will that those actions are to be universally accepted, and hence, what may be

done to others is also willed upon oneself. It follows that criminals will their punishment because by laying down universal modes of conduct through their actions, they will that the same be done to them as they do to others. Thus, if they steal, they will that property be taken from them; if they murder, they will that their lives be taken, etc. I shall argue against this position in 2.5.4 by claiming that criminals do not proclaim universal laws of conduct through their actions, and hence it cannot be held that criminals will their punishments.

According to Kant, only the law of retribution, which is to do to others as they have done to us, can determine exactly the kind and degree of punishment because by examining what criminals have done, we can establish how much and in what manner to punish, and thereby determine punishment in accordance with the principle of equality. Other considerations, such as punishment's maximum utility in a given instance, would often yield punishments that are not of equal magnitude or of equal kind as the crime. I shall expand on this point in Chapter 4.

Kant stipulates that morally justified punishment must be determined in a court of law and not in one's private judgement because even though he considers all people to be rational agents, being victimised can lead to intense emotions, which may compromise one's ability to assess the crime in question in a rational manner. It ought therefore to be done by impartial officials. Retribution must determine the magnitude of the punishment by weighing the magnitude of the crime. By stealing from someone, offenders make the ownership of everyone insecure; hence, they rob themselves of the security of any possible ownership in accordance with the law of retribution. Again, this is because by acting we proclaim categorical imperatives, which means that if I believe it to be right that I may take your property, thereby making your property insecure, I am proclaiming that this

ought to be universally the case, hence my property may be made insecure and confiscated. Thieves therefore hold that nobody's property can be secure, which means that the thieves themselves also do not possess anything that cannot be taken away from them, nor can they *acquire* anything that cannot be taken away from them. The state will provide for convicted criminals, but it therefore has the right to demand their labour for any kind of work it may require; consequently they become slaves of the state for a specified length of time, or indefinitely, depending on the case in question. It follows that the only proper punishment for murder is death; no substitute satisfies the requirements of moral justice: nothing except death is equal to death. The execution of murderers must be conducted without any maltreatment of the condemned, however, in order to respect their humanity. Kant held that humans ought always to be treated with respect since only by doing so are we proclaiming the categorical imperative that everyone be treated with respect, and hence can expect to be treated with respect ourselves. If we would disrespect others, we would will that we be disrespected too.

Kant argues, if a society fails to carry out the punishment, it may be seen as an accomplice to the crime (Kant 1986: 346). This is so because we would not will that the imbalance created by criminals through their actions be undone, and hence we could be seen as being accomplices to the actions and willings of the criminals.

In this section, I pointed out that Kant maintains that persons ought never to be used as means towards ends, and why we can say that criminals will their punishments. I shall argue against both issues in turn, beginning with the claim that persons may never be used as means towards ends.

2.4 THE MORAL STATUS OF INNOCENT PERSONS, CRIMINALS, AND FORMER CRIMINALS

For the purpose of my argument, I need to distinguish between "innocent persons," "criminals," and "former criminals" to be able to argue that some persons may be used as means to an end, such as a socially desirable end, for instance. I define "innocent persons" as persons not yet having been found guilty of an offence, "criminals" as having been found guilty and presently being punished, and "former criminals" as persons who have already been punished for crimes for which they were found guilty. It is significant that the moral status of these three categories differs because it enables me to argue that some persons may be used as means towards an end in virtue of their having a diminished moral standing, as I shall now explain.

A "possible X" has the ability of becoming an X provided a significant event in its development occurs for its potential to be actualised. Thus, every healthy human ovum or spermatozoon has the possibility of developing into a person, if an important event, the fusion at fertilisation and implantation, takes place. A "potential X" will, given the normal course of development, become an actual X. An implanted zygote will, given a normal course of development, become a person, and may therefore be described as a "potential person." An "actual X" is a being that has actualised its potential for becoming an X. Thus, a fully-grown, normally developed adult person may be described as an "actual person." A "former X" was an actual X, but no longer is such an X. Dead persons were once actual persons.

What is important for my argument is that the moral status of these categories differs. Actual persons have all moral rights accorded beings with personhood status. Thus, all

persons have a serious right to life.[3] A potential X, however, has rights in virtue of becoming an X, but less than it would have as an actual X. Maturing foetuses are therefore accorded certain rights in virtue of their becoming persons, but these rights may be overridden when they come into serious conflict with those of actual persons. A late-term abortion is accordingly usually held morally and legally justifiable if the life of the mother is at stake. Possible persons hardly have any moral standing – probably no one seriously holds the position that all ova and spermatozoa have a serious right to life. Former persons also have certain rights, namely those derivative from the status they had as actual persons. Consequently, a former scientist is respected in virtue of having been a scientist, a former president is respected in virtue of having been a president, a former successful athlete is respected in virtue of having been a successful athlete, the dead are respected and have certain rights (such as having their wills honoured) in virtue of having been persons, etc.

The reciprocal is the case when dealing with negative moral terms, such as criminals. Here criminals have least moral standing and former criminals derive their status in proportion to the status they had as actual criminals. Potential criminals may be seen as persons having a high likelihood of becoming criminals because they live in an impoverished community, are unemployed, come from broken homes, and dropped out of school, for example. Possible criminals are all persons who have not become criminals but have the possibility of becoming criminals (which we all have), but are not categorised as potential criminals. The class of possible criminals thus includes those who are not expected to become criminals, such as those coming from good homes and favourable environments. For the arguments to follow, it will not be necessary to distinguish between

[3] By "serious right to life," I mean a right that can only be overridden by very weighty considerations, such as self-defence.

possible and potential criminals in detail, since both are innocent persons, i.e. persons not yet found guilty of an offence. Importantly, potential criminals are just as innocent as possible criminals are. Potential criminals may have a much higher likelihood of becoming criminals, but there is no certainty that any potential criminal will indeed engage in criminal behaviour. Possible criminals and potential criminals can therefore be accorded equal moral status.

Having established that criminals and former criminals no longer have the same moral standing as innocent persons do, we enquire as to the implications of this finding. When comparing potential persons and actual persons, I pointed out that the rights of the latter can override those of the former when there is a serious clash of interests. Thus, a late-term foetus may be aborted to save the life of the mother, even though late-term foetuses are usually already accorded a serious right to life. This indicates that superior moral categories can override more minor ones when there is a serious clash of interests between them. Returning to criminals and former criminals on the one hand, and innocent persons on the other, I shall argue in subsequent chapters, such as when I argue for the moral acceptability of general deterrence, that criminals may be used in ways that benefit society (the innocent people) in virtue of their having a diminished moral status.

It is important to note, however, that not just anything may be done to beings having a diminished moral standing. It is immoral for one to torture a horse for hours, even if one were to gain a great deal of sadistic pleasure from such torture. When there is a serious clash of interests, however, such as the right to life of a foetus and its mother, or when the safety of society seriously depends upon it, then beings of lower status morally may be used as means towards ends.

Before proceeding to the next section, I wish to address concerns that my argument that criminals and former criminals

have a diminished moral standing rests on a false analogy. If it is objected that the way in which criminals lose some of their moral standing is not analogous to how foetuses have a diminished moral standing compared to adult persons, I must clarify that this example was used merely to illustrate the fact that beings may have different moral standings at different times. Of course, we usually hold that criminals did not become criminals as predictably as foetuses become persons, rather we usually believe that criminals exercised at least some free will in doing so. This, however, only strengthens the argument that criminals may be used as means towards some end, such as general deterrence, because they could have done otherwise. Persons that are forced into committing an offensive act do not fulfil the requirement of being guilty in virtue of their not having acted voluntarily. In such cases, they accordingly also do not acquire a diminished moral status.

The conclusions drawn in this section (namely that criminals and former criminals have diminished moral statuses and that they may therefore be used as means towards certain ends) will have significance in subsequent chapters. For the present, I merely want to show that Kant's claim can be overridden when we make distinctions that he overlooks and therefore why we cannot agree that no one, not even criminals, may be used as means towards some end.

I turn now to the second of Kant's issues I hold important to address in detail, namely that criminals will their punishments. Is this really the case? What is actually entailed in the claim that they will their punishments? The issue of willing one's punishment needs to be critically evaluated; therefore, I shall do so in the next section, with special focus being on the philosophy of Hegel. The reason for my shifting the main focus from Kant to Hegel is that Hegel's philosophy (if correct) is consistent with Kant's position on the matter, but is more accessible to analysis

because Hegel expounds his position in greater detail. The shift in primary focus from Kant to Hegel will not disrupt the analysis of Kant's position in any way, and I shall point out consistencies and differences between Kant and Hegel where appropriate.

2.5 DO CRIMINALS WILL THEIR PUNISHMENT?

Retributivists such as Kant and Hegel, to name two, often maintain that criminals have a "right" to be punished. How is this to be understood? Kant's position was laid out in 2.3, namely that criminals lay down universal imperatives by their actions, so they will that the same be done to them as they do to others. If they kill, they express through their actions that they are to be killed too; if they steal, they express through their actions that their property is to be appropriated, etc. Hegel maintains that criminals will their punishment by their own free will on the following grounds: Given the universalisability of rules, the violation of rights has been proclaimed by criminals as their own rights.[4] Their crimes are the negation of rights. Punishment is the negation of this negation, and consequently a re-affirmation of right (Hegel 1965: 244).[5] How can this be understood? In this section, I shall examine what it means to say that criminals will their punishments. Once this is understood, it is easier to see why the general claim must be rejected as incorrect.

2.5.1 HEGEL AND FREEDOM OF THE WILL

Hegel maintains that right is based on the will. This means that right is based on freedom because freedom constitutes the

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[4] See 2.3 above, especially pages 25 to 26.

[5] If punishment is to be justified, it must respect the rights of those being punished. An important distinction is therefore made between what it would be good to do on grounds of utility and what we have a right to do. Since we do not always have a right to do what would be most expedient, the distinction is of paramount importance (Murphy 1985a: 76).

substantiality of the will: "... freedom is both the substance of right and its goal, while the system of right is the realm of freedom made actual, the world of mind brought forth out of itself like a second nature" (Hegel 1965: 20). "Freedom of the will" has two distinct meanings for Hegel. In the first sense, it means that persons are free to do what they want, that they are not restricted from doing whatever they feel. When the will is free in this sense, it chooses from different natural inclinations, opening up to one of them and accepting it, while rejecting others.

> In this element of the will is rooted my ability to free myself from everything, abandon every aim, abstract from everything. Man alone can sacrifice everything, his life included; he can commit suicide. An animal cannot; it always remains ... in an alien destiny to which it merely accustoms itself (Hegel 1965: 227).

This (the freedom of humans as natural beings) Hegel terms "arbitrary freedom." The arbitrary will chooses from inclinations external to it, opening up to it, accepting it, and thus being determined by it. It is something external to it. Real freedom, according to Hegel, is different: it is what he terms "absolute freedom." Primoratz points out that Hegel claims that the will has absolute freedom when it is the "general will" that expresses the conditions under which individuals with their arbitrary wills can live together in a community (Primoratz 1997: 67).

Hegel makes the distinction between the general will and the arbitrary will based on a dualistic conception of human beings. Human beings are both free agents having rights, but are simultaneously constrained by the interests of society. The latter interests are considered by Hegel as objective, and the former as subjective. As natural beings, persons are subject to the arbitrary will, being beings with instincts, passions, urges, and desires. At the same time, persons are spiritual beings with the ability to act in accordance with

the demands of morality and the law. Primoratz, commenting on Hegel, states:

> As a natural being, the individual is the subject of the arbitrary will, preoccupied with himself and his individual wants and interests, different from others, sometimes in conflict with them. At the same time, as a spiritual being, he is the subject of the general will; this will is no less his very own - his ethical and therefore "true" will, and something he has in common with others (Primoratz 1997: 68).

As can be expected, the arbitrary will and the true will are not always in agreement and therefore can conflict. When they do, the former ought to be checked and overridden by the latter because Hegel sees the arbitrary will as subjective and inferior, the general will as objective and superior. The arbitrary, subjective will is inferior because it is determined by emotions, feelings, desires, and impulses, which may be irrational. A conflict of the two wills, resulting in victory of the true, general will is neither a defeat of the individual, nor a triumph of a force alien to the individual. It is the emancipation of the individual from that which is subjective, transient, and inferior in the individual, and the affirmation of that which is objective, permanent, and superior.

Hegel therefore sees individuals as truly free, not when they are capable of pursuing their subjective goals and satisfying their subjective desires, but when their wills are in accordance with general ethical principles, because Hegel believes that such principles are what every person wills objectively, and are therefore an expression of the general will. The general will is expressed in laws when these are in accordance with reason. Laws demand "that every individual be respected and treated by others as a free being, for only thus does the free will find itself as its subject and contents in another." Only when someone is recognised as a free being is

he or she treated as a person. Consequently, an act is right if it is not a restriction of others' freedoms, and wrong when it is such a restriction, thereby not respecting them as persons (Hegel 1965: 38).

Now that I have described Hegel's position regarding the will, I can discuss his position with respect to punishment by dealing with the objective and subjective wills in turn, and then dismissing the claim that criminals will their punishments.

2.5.2 HEGEL'S OBJECTIVE JUSTIFICATION OF PUNISHMENT

By "objective justification," Hegel means justification from an external perspective, not from the perspective of the person being punished. The general will may be seen as the will of society, and since each individual is also a member of society, everyone shares in society's will, i.e. in the general will.

Hegel sees the breaking of a law as something contradictory and negative. It is something negative because it is the first act in the breaking of a law, the breaking of something positive (Hegel 1965: 246). He sees an offence as a nullity in a normative sense in that it gives expression to the arbitrary will of the criminal, which has an unlawful objective. This is in opposition to the will of the general will. The true will, which being general, is also the will of the criminal expressing the criminal's higher, permanent and objective will. Since it is an expression of the subject's better nature, it ought to dominate the arbitrary will and rule over it. An offence is also an act of a rational being and hence an expression of a rational rule. Like Kant, Hegel holds that persons affirm rules of conduct through their actions. These rules of conduct are the proclamations of universal modes of conduct. But a rule laid down by criminal conduct is in opposition to another existing, accepted general

rule, namely of the law: the expression of the general will. It is in opposition to something positive, and consequently cannot maintain itself. Finally, the rule laid down by the criminal act is also a nullity because its mere existence calls forth punishment, which is its negation (Hegel 1965: 246). Punishment is thus not merely a simple negation, but the negation of a negation, the second negation. By nullifying the offence, it demonstrates the nullity of it.

What is the nature of this negation? It is not concerned with restitution because that, according to Hegel, would be concerned only with the consequences; that is, the external conditions of the crime. Hegel argues that what must be negated is the malicious will of the criminal that is essential to crime. This is achieved in the same way in which the criminal negated the rights of the victim and the law on which it is founded, i.e. by coercion. The criminal used force or coercion to violate another's rights (by victimising others, stealing from them, assaulting them, killing them, or the like), and force or coercion is used to punish.

As we have seen, punishment for Hegel is the negation of a negation because it is the negation of the negation of the law. Stated differently, by breaking a law, one negates it; by punishing in response to the violation of law, one negates the breaking of the law. Since the law is the expression of the general will, punishment is the negation of the negation of the general will. This double negation, says Hegel, leads to a reaffirmation of right (Hegel 1965: 244). To put it in Primoratz's words:

> Punishment "annuls" the offence first and foremost by negating it. Offence is the negation of right; therefore punishment, as the negation of the offence, is not a negation of something positive, but a negation of a negation. By negating a negation one gets what was negated by the first negation. Thus punishment restores what the offence has negated - the right and the law (Primoratz 1997: 74).

This double negation does not restore the original condition, however. In the previous condition, in the condition in which no violation had been committed against the law, the law's authority had not been demonstrated in practice. By contrast, the law that has been negated and thereby become victorious through the negation of its own negation has assumed a mature form, one that has been tried in practice. When we examine the implications of Hegel's philosophy, we can see that they are remarkably similar to Kant's position. Both hold that the criminal must be punished. Kant maintains that criminals must be punished because by their criminal actions they have laid down a universal rule that also applies to themselves. If we would not acknowledge their rules as universal ones by refusing to punish them, we could not demand that our maxims be treated as universals either. This would, according to Kant, lead to a breakdown of morality. Refusing to punish criminals would make us accomplices to their crimes in this sense. For Hegel, punishing criminals is imperative since not doing so is to deny the law any force, which is an endorsement of wrongdoing. Hegel's philosophy compels him to conclude that the commission of an offence is not only the justification for punishing, but also the source of our duty to punish offenders. Consequently, we not only have a right to punish offenders, but an obligation to do so. He also holds that an offence that would go unpunished would be its affirmation as right. Failure to negate the negation of a law results in that law's loss of authority and hence ceases being a law (Hegel 1965: 274). A law that is applied, however, according to Hegel, exercises force, creates order, and expresses the will of society.

2.5.3 HEGEL'S SUBJECTIVE JUSTIFICATION OF PUNISHMENT

According to Hegel, it is not sufficient that punishment be justified objectively, i.e. from the viewpoint of the general will; it must also be justified subjectively, i.e. from the viewpoint of offenders. However, as already pointed out, punishment is a coercion, and hence subjectively an undesirable state of affairs. How can it therefore be justified in this way?

Hegel asserts that laws embody the general will and that punishment is justified subjectively as an expression of this will. This will is not alien and external to individuals, but is their own will expressing the better part of them, thus enabling them to participate in law and morality. Violations against the general will, i.e. criminal offences, therefore injure not only the individual offended against, or the society as a whole, but the offender as well (Hegel 1965: 38-39). This is in agreement with Kant, who holds that free, rational beings will their actions to be universally applicable. Therefore, by willing that others be coerced, one wills that oneself be coerced too. Returning to Hegel, a criminal offence may therefore be seen as the will in opposition to itself, the arbitrary will of the individual opposing the general will which is also part of the individual's will. When offences are requited by punishment, it is not only the expression of the general will of society, but also as the embodiment of the general will within the offenders themselves. Punishment is thus the expression of the offender's own will and therefore it follows that criminals can be said to will their punishment. Of course, this does not mean that criminals must will their own punishment on the empirical, subjective level of their wills. In fact, very few criminals do so. Most criminals do everything to evade detection by the police and avoid arrest. Persons may be unaware of their general wills, however, when

they fail to perceive what the rational, objective course of behaviour requires (Hegel 1965: 38-39).

The general will of individuals therefore wills the punishment of themselves. In this sense, punishment may be seen as having an aspect of coercion that is not coercion, and does not violate the dignity of free beings because it subjects them to treatment that they themselves will and hold as good. Through punishment, argues Hegel, one therefore does not impose treatment on others with which they do not agree because the general will is not only the general will of everyone else, but also of themselves.

Hegel furthermore endeavours to establish that punishment is also in accordance with the subjective, arbitrary will of the offender. Every offence is an act of generality too for the following reasons: It is an act of a rational being, as opposed to non-rational, because for Hegel human beings are by definition rational, having the capacity to use reason to determine which actions to perform. To see it as an act of a rational being means conceiving it not as an act of particularity, but rather as an act subsumed under a general rule, i.e. an act willed not only in this instance, but in other cases too. In the case of an offence, the rule proclaimed by the criminal is in opposition to right, it is not accepted by society, it does not express the general will and therefore it cannot be a universal rule. The connection with Kant is perspicuous, who holds that criminals will that the same be done to them as they do to others since they are rational, freely acting beings. A rational action is such that one would will for all others too, including oneself. Offenders thus have adopted a rule that has applicability for them, even though it cannot become a universal rule since it is in opposition to the general will. By their actions, they have declared it as their own particular rule; they may thereby be treated in accordance with it. By committing murder, they have proclaimed the rule that human life may be

taken; their lives may therefore be taken as well. The criminal's own rule is then simply being applied to her. By stealing, she proclaims the rule that the property of others may be stolen; her own property may accordingly be appropriated. When we treat criminals in this manner, we are not applying a rule that is foreign, incomprehensible, or hostile to them. It is her own rule, a rule that is involved in her own act. Of course, this rule could not be universalised, for either Kant or Hegel. For Kant, the practical impossibility that everyone takes property away from everyone precludes this rule from becoming categorical. For Hegel, the rule is in opposition to the general will, which may be seen as a rule applicable throughout society. By acting, criminals express a generality and may hence be treated in the same way in which they violated the rights of others. Others have the right to treat criminals as criminals have treated others. This establishes equality and universality.

2.5.4 REJECTING BOTH OF HEGEL'S JUSTIFICATIONS

In response to Hegel's subjective justification, it may be retorted that criminals do not want to proclaim a general rule by their actions; they merely wish to establish a privilege for themselves, an exception to the rule, while expecting others to honour the rule they have broken. By stealing, thieves do not proclaim a general rule. They do not steal that others may steal in the same proportion from them. It would be irrational since it would not result in any gain. If all offenders commit crimes because they wish to be punished, i.e. if they desire to be punished and hence commit crimes, then they would be equitable to masochists because they would perform actions to bring forth pain or suffering upon themselves. The claim that all offenders are masochists is highly doubtful. Subjectively therefore, the punishment

remains unwilled. Primoratz responds to this position as follows:

> If we came across a thief who argued along these lines, we should retort that his punishment is merely an application of the rule contained implicitly in his act, that it is in this sense based on his own will and in so far justified not only objectively, but subjectively as well. If he persisted in his refusal to universalise the rule and insisted on being privileged, on being an exception, the question would be: On whom does the onus justificandi rest? I think that it would rest on him, rather than on those who wanted to treat him in the same way he had treated his victim. He would be bound to prove that he has a right to treat others in a way in which they have no right to treat him - that, for example, he can rightfully take the property of others, but others have no right to take his property. This would be a tall order indeed (Primoratz 1997: 78).

If we confront offenders with a rule, they are bound to respond that there is no rule and that we are trying to point at something that does not exist because they will deny having proclaimed any rule by their unlawful conduct. If we then mention to them that by their conduct they were laying down a rule, even if they were ignorant of doing so, as Hegel explains, they may reply that our insistence that there is a rule does not convince them. Furthermore, Primoratz is not correct in maintaining that the *onus justificandi* rests on the criminal, because in punishing we are playing an active role, a role that is not forced upon us as in self-defence, but one that we voluntarily assume. We are not coerced by the general rule and hence by the demands of the double negation; we have a choice whether to punish or not. For this reason the *onus justificandi* rests on us.

Laying down a rule presupposes that the agent is free and hence capable of acting rationally. If he was not capable of doing so, we would not consider him a free agent, but rather as a subject with some behavioural disorder beyond his control, for instance. It may therefore be assumed that the

rules laid down by free, rational beings are rational. Many instances of criminal conduct are, however, not rational - many murders are committed in a fit of uncontrolled rage. Rape is not a rational act, nor is child molestation, etc. Rational people may lay down rules by their actions, but this is often not the case with criminals. There is consequently not always a subjective justification for punishment, since the criminal behaviour cannot always be described as a rational action, even if it is not determined by factors beyond the individual's control.

Having dismissed Hegel's subjective justification, I turn now to rejecting his objective justification. His objective justification relies on the distinction between the arbitrary will and the general will. The general will is expressed in laws when these are in accordance with reason. Here the problem arises. What exactly is the general will in accordance with reason? Crimes are the violations of laws. In a democracy, laws are passed by a majority of the legislature. Is the general will therefore to be equated with the majority opinion? If it is objected that society in general comes to adopt those laws that are required for the general good (such as traffic laws, laws against murder, rape, assault, drug dealing or possession, etc.), the best society developing out of the natural needs of its members, we then may concede that this might be the case in general, but there have been numerous societies one now generally considers immoral because they had immoral legal systems, for instance, and even generally acceptable societies sometimes pass bad laws, i.e. laws that turn out to be unjust in practice or do not further the good of the general society. If the general will is to be equated with the majority opinion, then this is a disconcerting answer, since majorities have often been mistaken or immoral. Moreover, majority opinions may also be no more than mere generalised subjectivity. If laws made by majority vote are not an expression of the general will, then

punishing violations of them has not been justified in any way. If laws are equated with the general will, and laws are the will of the majority, then the general will is nothing other than the will of the majority, hence there must be some other justification which gives the majority its claim. Laws which are not made democratically also cannot express the general will because such decisions ignore the will of the people. If this is how we interpret the general will, then Hegel's objective justification can be seen as nothing other than a positivist conception of law, i.e. that laws have intrinsic value and are to be upheld and obeyed in virtue of their being laws.[6] Hegel thus does not make any distinction between the moral and legal obligations to obey the law, or the moral and legal justifications of punishment. If this is what Hegel means by his justifications, then they are unsound, and since we can interpret his argument in such a way, there is good reason to reject his justifications. I therefore conclude that neither Hegel's subjective justification, nor his objective justification, is acceptable.

2.6 REJECTING JUSTIFICATIONS OF RETRIBUTIVE PUNISHMENT BY CONSENT

Arguably, one way in which persons attain a right over us is by our consent. If, for example, I consent to your preventing me from spending money gambling, I cannot morally make a legitimate complaint when you do prevent me from doing so. I had given you the right to do it, and you had the right to do it. In doing it, you violated no rights of mine, even if at the time of the action I did not want that right to be

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[6] Austin (1995: 31-42) outlines his positivist conception of law, which is a species of command, and he argues that the law's status as law is distinct from the question whether the law is compatible with morality or divine law. Austin's conception of law does not entail that laws must be just. By contrast, D'Amato (1995b: 19-30) invents an ingenious fictional tale of an unjust law to persuade us that justice is indeed part of the very structure of law.

exercised. The implication this carries for punishment is that my autonomy may be thwarted: I may be punished if I have consented to my being punished, even if I do not will the punishment at the time of its infliction. The question that will be examined in this section is whether there is any plausible argument maintaining that criminals will their punishment. Theories of the general will and social contract are two theories that attempt reconciliation of the curtailment of individual liberty with legitimate state authority, including the right, or authority, of the state to punish.

To justify government or the state in this context, it is necessary to justify at least some coercion. For Kant, as I shall now explain, for whom freedom is the highest human value, coercion is justified only if its imposition is necessary to prevent a greater loss of freedom. Freedom is the only value that can be employed to limit freedom because the appeal to any other value, for example utility, would undermine the ultimate status of the value of freedom. Kant thus argues that some forms of coercion are morally defensible since they are consistent with rational freedom. The argument may formally be laid out as follows: Coercion may prevent persons from doing what they desire on a particular occasion, and is therefore *prima facie* wrong. Such coercion may however, be shown to be fully justified, and hence not wholly wrong, if it could be shown that the coercion is such that it could be rationally willed by the person whose desire has been compromised (Murphy 1985a: 79).[7] Thus, if it can be shown that we rationally will our being punished when we transgress the law, we cannot complain when we are subsequently punished.

John Rawls's position is illuminative on this point. He argues that we ought to imagine an original position in which it would have been rational to adopt a rule of law and thus

[7] This latter point, I shall argue in Chapter 7, permits more than Kant might have realised - it opens the way to a paternalistic justification.

run the risk of having our desires thwarted, rather than an alternative arrangement, such as the classic state of nature. The only coercive institutions that are justified then are those that rational beings could agree to adopt for governing their social relations. The validity of such a theory does not depend on such an original position actually having occurred, however. The point is that any legislature has to provide us with a system of laws and principles upon which we could have agreed under such an original position. Laws to which the rational members of society could not all agree, are unjust (Rawls 1971: 17-22). If a law that prohibits women from occupying certain official occupations, is enacted for instance, then such a law is unjust, since rational beings could not agree to such a law from behind a veil of ignorance.[8] The criminals' complaints are not justified because they have rationally consented to, or willed their own punishments. The laws or rules they have broken work to their advantage as citizens when they are obeyed by others. In the original position, these laws would have been consented to by the original contractors. If they do not choose to sacrifice by restraining themselves, then they choose to pay in another way, namely by the prescribed penalties. This also illustrates why Kant maintains that any harm one does to someone else, one does to oneself. If one vilifies another, one vilifies oneself; if one steals from another, one steals from oneself; if one kills another, one kills oneself, and so on.

In arguing that the criminal has a right to be punished, Primoratz (1997: 105-106) employs the Rawlsian experiment of imagining oneself in an original position behind a veil of ignorance. One cannot be certain whether one would oneself not end up in a position in which one is an offender, and therefore be dealt with by the institution one has chosen. He

[8] For a more elaborate development of the idea regarding the right to be punished, see M. D. Dubber (1998: 113-146).

claims that we would not select a rehabilitative system because of certain unacceptable consequences of this approach. I argue in Chapter 6 that these concerns include indefinite and disproportionate sentencing, treatment of non-offenders, as well as denying persons their autonomy, the right to make one's own choices, and denying one any personhood status. Primoratz believes that we would reject any utilitarian institution of punishment, rejecting emphasis on the common good, punishment of the innocent, disproportionate sentencing, as well as the emphasis on society and the denial of individual rights, which this theory could imply and I argue later. He argues that we would adopt a retributivist theory, with its emphasis on justice and desert, as a system under which we could only be punished if we had voluntarily committed an offence. He therefore sees it as the best guarantee of our individual liberties (Primoratz 1997: 105-108).

It is here I strongly disagree with Primoratz. The veil of ignorance experiment requires one's setting aside all information about one's distinguishing social characteristics. In Rawls's theory, one is supposed to make a blind choice of principles from behind the veil of ignorance (being ignorant of one's race, sex, religion, wealth, talents, or ultimate values or aims in life), so that one will choose as though one would be in any social position, thereby having to take into account the interests of everyone equally and consequently ensuring fairness to all. It is by no means obvious to me that we would choose a retributivist system from behind a veil of ignorance. Would we choose to be punished according to the severity of our offences? If we assume that we may have turned to crime due to faulty learnt behavioural patterns, then it is safe to assume that we would prefer a rehabilitative system, a system in which we can expect to acquire more constructive behavioural patterns. The retributive model is by no means the obvious choice from

behind the veil of ignorance. I therefore conclude that retributivism is not defensible on the grounds of appealing to a connection between criminals and their wills.

In the next chapter, I shall provide a partial defence of retributivism that is acceptable (since I shall use aspects of retributivism in my own theory) by arguing that it addresses society's need to express its anger and indignation at offenders. Before doing so, however, I shall point out other shortcomings of retributivism. My defence of punishment rests on the demand, amongst others, that any theory justifying punishment must also adequately answer the question of how much to punish (the "how" question). I shall now argue that retributivism is not able to do so.

2.7 RETRIBUTIVISM AND THE "HOW" QUESTION

In Chapter 1, I pointed out that the justification of punishment must answer two fundamental questions, namely whom one is justified in punishing and by how much. In the next chapter, I shall give a partial defence of retributivism, thereby also arguing that it is able to answer the "whom" question. In this section, I shall address the question of whether it is able to provide a morally acceptable answer to the "how" question, and I shall argue that it is not.

2.7.1 RETRIBUTIVISM AND THE MEASURE AND KIND OF PUNISHMENT

As I have indicated, an important question that must be addressed is how much punishment ought to be administered. I shall now examine whether retributivism is capable of providing a satisfactory answer to this question. If one believes that the extent and nature of punishment ought to be determined by what offenders deserve, then the extent and nature of their punishment will be determined by the extent and nature of their offences committed. Retributivism entails

lex talionis because it is committed to the principle of equality (as I explained when dealing with Kant's retributive theory in 2.3). *Lex talionis* is the law of retaliation, according to which deserved punishment is precisely equal to the harm done in the crime, neither more nor less. It is best known in the biblical statement, life for life, eye for eye, tooth for tooth, wound for wound (Exodus 21: 22-25). It entails that not any punishment is justified, but only the right kind of punishment in the right amount. This entails an equal treatment aspect - like crimes ought to receive like punishment. There is also a resemblance aspect - punishment should fit the crime (Radin 1980: 154):

> ... the law looks only at the nature of the damage, treating the parties as equals, and merely asking whether one has done and the other suffered injustice, whether one inflicted and the other has sustained damage ...Hence the unjust here being the unequal, the judge endeavours to equalise it ... the judge endeavours to make them equal by the penalty or loss he imposes, taking away the gain (Aristotle 1999: 275).

Let us assume for the moment that lex talionis is to be the guiding principle with which to determine the nature and extent of punishment. This entails that one is justified in exacting as much suffering on offenders as they inflicted on their victims, but no more. The principle of lex talionis, however, also entails that if one punishes, one is obliged to administer punishment to the same level of suffering as was suffered by the victim, but no less. To fulfil both conditions simultaneously is a very delicate balancing act.

Primoratz (1997: 80) points out that lex talionis can be understood in two ways. Firstly, it can be taken literally, as Kant and Hegel would have us do, meaning that punishment is to be administered in the same way and to the same degree as the offence that was committed. Murder is therefore to be punished by capital punishment, kidnapping by imprisonment,

theft by fines, and so on. But how is one to punish child molesters, rapists, persons who commit perjury, embezzlers, slanderers, or those found guilty of treason? Clearly, the principle cannot be applied consistently in this form. However, *lex talionis* can also be interpreted as a demand that punishment and the offence be equal in respect of their magnitude, i.e. they are to be equal in value. Thus theft and imprisonment are different in kind, the former deprives victims of their material security, while the latter deprives offenders of their freedom. Both should be equal in value in the sense that the punishment should deprive offenders of something to the same degree in which their actions deprived their victims. However, one consequence of administering punishment in this manner is that it rules out the possibility of having victimless crimes, such as attempted crimes. An example is if X shoots at a passer-by with the intent to kill, narrowly missing the target, and thereby causing no injury. Furthermore, it would rule out the possibility of punishing an offender if the victim consented to the offence being committed, such as when adults freely choose to engage in a polygamous marriage, a practice prohibited under most Western legal systems.

Primoratz (1997: 88-89) maintains, however, that lex talionis, the law of retribution, is not to be interpreted literally. It merely requires that punishment be administered proportionally. As Aristotle states it in the *Nicomachean Ethics*: "justice is therefore a sort of proportion" (Aristotle 1999: 269). This, however, also poses a problem: if punishment is to be proportionate, then it should be proportionate to some highest level, but how this level is to be determined has not been satisfactorily established. Taking life for life in the case of murder may be comprehensible, as Kant suggests, but this would not work in the case of other crimes. What would be the proper response to rape, child molestation, blackmail, or perjury? If crimes are ranked

according to a proportionate punishment system, the latter being anchored to some fixed upper and lower limits, the problem still remains of how to establish this proportionality. When is a given crime X, for instance, twice as serious as another crime Y, thereby demanding two distinct punishments, the former's being twice as intensive as the latter's?

It is perfectly conceivable to rank offences on an ordinal scale according to their severity, and to do likewise with punishments. The most serious punishment would then be reserved for the most serious offence, the second most serious punishment for the second most serious offence, and so on down the scale to the mildest punishment for the least serious offence (Garvey 1998: 747). Having adopted this policy, however, we would still have no indication of how serious each punishment should be. Obviously, the most serious punishment should be reserved for the most serious offence, but what is this most serious punishment to consist of? Should it be the death penalty?[9] Should it be the death penalty preceded by severe torture? Should it be life imprisonment? Alternatively, ought it only to be a lengthy prison term less than life imprisonment? Perhaps it should not be imprisonment at all. If first-degree-murder is punished by a prison term of six months because this is the most serious punishment on our ordinal scale, we would say that the punishment is proportionate to the offence in a way, but only in an unsatisfactory formal way, but that it is totally disproportionate in another more substantive sense because it is much too mild when considering the gravity of the offence. The punishment suffered by criminals would then affect them much less than their acts affected their victims. Similarly, if disorderly conduct were to be punished by five years

[9] Walter Berns (1979) defends the death penalty by arguing that the real issue is not deterrence, but justice, which demands the death penalty as a continual reminder of the moral order by which we alone can live as human beings. He maintains that it is about justice in an imperfect universe.

imprisonment because that is the least serious punishment provided for, we would have a similar objection, only this time we would complain that the punishment is much too severe (Primoratz 1997: 89-90). It may be expected that the latter contingency would lead to disrespect with resulting loss of effectiveness of the legal system, juries and judges refusing to find persons guilty (even if there were sufficient evidence to do so) in order to spare the offender from an outrageously disproportionate punishment. This was frequently the case in England during the early nineteenth century.[10]

Primoratz argues that punishment should aim at proportionality in a substantive sense because then it will also have formal proportionality: murder should be punished by death, disorderly conduct by a small fine (Primoratz 1997: 90). But this is a very simplistic form of punishment, one that is not acceptable. On the contrary, punishment, as I shall argue in the next chapters, should not only be retributive, it should also yield positive results. Staying with pure retribution for the moment, however, we can establish how punishment ought to be determined. Although we can agree with Primoratz (1997: 90) that one should first determine how serious the injury caused to the victim was: the more serious the injury, the more serious the punishment, *ceteris paribus*, even this is problematic. If Smith steals amount X from Jones, are we then to fine Smith amount X? What if Jones suffered extensively because of the loss, such as that his family had to starve, would we not demand that the punishment be more severe than the mere material equivalent? It seems that the extent of punishment is not to be determined solely by the material loss suffered, but also by the magnitude of the disruption caused in the victim's life. Once

[10] Greenawalt (1995: 359-363) points out that in the Anglo-American legal system, jurors are aware that they have a duty to obey the instructions of the judge, and that they have legal power to disobey them when their consciences direct them to do so in the interests of justice for the defendant.

the seriousness has been established, the culpability of the offender should be taken into account. Furthermore, punishment should be greater when the offence was committed deliberately than when it was committed out of negligence, maintains Primoratz, because the former is more serious than the latter. Primoratz does not give a reason for this assertion, which can be justified consequentially, but not on retributivist grounds. Retributivism cannot justify it because the principle of *lex talionis* merely looks at the harm caused by the criminal act, determines the magnitude in the light of it, and a crime caused by negligence and the same kind of crime caused deliberately can cause the same amount of harm, hence, according to retributivism, require equal punishment. If retributivism could show that punishment is connected to the will, then it could be argued retributively that offences deliberately willed are more serious than offences that are not willed. However, as we have seen (in 2.5 & 2.6), retributivism neglects to provide an adequate connection between the will and punishment. There are arguments, however, that can establish that punishment of a deliberate offence ought to be more serious than punishment of an offence negligibly brought about, but these arguments are not retributive ones, they are consequentialist ones, which will receive attention in a later chapter.

Primoratz (1997: 90-91) asserts too that the motives of offenders should also be taken into account - which again would involve the will, which retributivism neglects. Leaving the will aside for the moment, however, he insists, for instance, that an offence committed out of retaliation ought to be punished less seriously than the same offence committed out of mere enjoyment. This, just as the previous point, cannot be established by retributivism either, because, as already pointed out, *lex talionis* only examines the harm committed, which can be the same with different motives,

requiring equal punishment for different motives, *ceteris paribus*, if there is to be consistency.

Lex talionis also has other difficulties. We generally accept that a person is to be punished less severely for a first offence than for a further offence. *Lex talionis* is incapable of making such a provision. I shall discuss this further in the next subsection.

2.7.2 RETRIBUTIVISM NEGLECTS IMPORTANT VARIABLES

We generally hold that a person convicted of a first offence ought to receive a more lenient sentence, *ceteris paribus*, than one having a prior record of criminal convictions. If only the severity of the offence is to be taken into account, then lesser sentences for first offenders cannot be accounted for by retributivism. This means that retributivist theory thus faces the charge of neglecting important variables.

Furthermore, retributivism leaves no room for mercy since it cannot accommodate the institution of pardon in any manner. If persons have committed a minor offence, requiring a fine, ought mercy not to be shown when not doing so would bring about great hardship on innocent persons, such as their families? Of course, it may be countered that the perpetrator should have considered this before offending. Nevertheless, we may want to leave open the possibility of mercy in some situations, such as when a person is guilty of a first offence, or did not intend the full extent of the outcomes of her offensive action, which was partially caused by unfavourable chance factors in the environment.

Primoratz (1997: 109) attempts to defend the institution of mercy while retaining retributivism by positing a hierarchy of principles, higher ones sometimes being able to override lower ones. The principle of justice, for instance, is very high on the ladder, capable of being overridden only in very rare cases. He further posits that the principle of mercy can

sometimes override the principle of punishing according to desert. He argues that whenever the administering of punishment would bring about severe hardship on innocent persons, then the principle of mercy ought to override the principle of justice. However, he sees the principle of justice as being very difficult to override and provides us with no clear rule by which this can be done:

> Now, the duties of justice are generally more binding than those of preventing suffering, so that most of the time the duty to punish will have to be carried out in full, notwithstanding the suffering of innocent third parties indirectly caused. But there will also be cases where the conflict of retributive justice and mercy will be resolved the other way round. Sometimes, when the offence committed is not very grave, and the suffering of the innocent parties involved that would be brought about by meting the full measure of deserved punishment would be very, very great, the call for mercy will override the duty to punish, and the penalty will be considerably reduced. There will also be cases in which the facts calling for mercy will be so weighty - say, the offender has sincerely and deeply repented of his misdeed and made great efforts to compensate the victim, and has been law-abiding generally ever since his offence - that the final decision will be a full pardon (Primoratz 1997: 110).

If retributivism is wholly backward-looking, however, then retributivism and mercy are incompatible: Retributivism is usually held to be wholly backward-looking, relying only on deontological principles. To apply mercy because it would bring about suffering for innocent persons if justice were applied to its full extent is not to have a backward-looking perspective, but a forward-looking one; it is not to apply a deontological principle, but a consequentialist one.

Because retributivism focuses only on the nature of the crime, not the intention of the offender in question, the theory is incapable of adequately dealing with offences with different intentions but with similar outcomes. Applying this

theory does not reflect our general beliefs about how a justice system should operate:

> Taken literally, lex talionis focuses only on the harm the offender has caused and ignores the offender's moral culpability. An offender guilty of intentional homicide would get the same punishment as one guilty of reckless homicide because the resulting harm - the victim's death - is the same. Lex talionis is therefore an ugly recipe for disproportionate punishments (Garvey 1998: 777).

2.7.3 THE PROBLEM OF RESPECT

A distinguishing feature of most retributivist theories, such as Kant's, is the notion of proportionality: punishment must fit the crime and must not be more or other than criminals deserve. Another feature is that we are required to give them what they deserve in order to respect them as persons or as autonomous moral entities (Radin 1980: 151-152). Following from this view of retributivism are two aspects, namely that any punishment that is not proportional is unjustified, and that any punishment that fails to respect the personhood of the offender is also unjustified. This line of retributivism generates a rights thesis - all offenders have the right to be punished in proportion to their desert and with respect for their personhood, and these rights are fundamental. I therefore set out Kant's argument as follows:

(1) Persons are never to be used as means towards an end, even if it is for their own end.
(2) Administering punishment as a means toward attaining some end, such as deterrence, or rehabilitation of the offender, is therefore not acceptable.
(3) Therefore, the only justification for inflicting punishment on anyone is that the individual has committed a crime.

Committing a crime is thus a necessary condition for inflicting morally defensible punishment. Underlying this principle is, according to Kant, however, a more fundamental principle, namely that persons ought always to be treated with respect and dignity. Kant is therefore forced to argue that the execution of murderers must be conducted without any maltreatment of the condemned in order to respect their humanity. I formulate his argument as follows:

(1) Persons have a fundamental and inalienable right to dignity and respect.
(2) The principle of equality demands that criminals be punished in accordance with the nature of their crimes.
(3) However, since a person's right to dignity and respect is fundamental and inalienable, it is not justifiable to apply the principle of equality to the letter for some brutal and heinous crimes.

Certainly, we can understand the implications of the argument - we would not torture persons for days or weeks before executing them, even if they had been found guilty of inflicting such cruelty upon their victims. There is an upper limit to the extent of pain and suffering we are willing to inflict on criminals, regardless of the nature of their crimes simply in virtue of the fact that they, like us, are human beings. Kant, however, advocates death as the only suitable punishment for murder. We are entitled to ask whether capital punishment as such is not a violation of a person's right to respect and dignity. Even if we assume that symmetry were to exist between the crime and the execution - that the execution were not carried out after an extended period of incarceration, that the date of the execution were not made known long before it is to be administered (leading to psychological harm), and that if a highly ritualised procedure

of execution were not followed - would it still not be an expression of disrespect and disregard of the person's dignity?[11] Surely, respect here for dignity of criminals would be to give them the opportunity to realise the suffering and harm they have caused, be contrite, and make amends, rather than to make these possibilities impossible by taking their lives. Executing murderers is denying them the very opportunity for fulfilling these conditions.

2.8 SUMMARY AND PERSPECTIVE

In this chapter, I gave a general outline of retributivism, enumerating its main elements and their implications. Kant's retributive theory was then examined in detail as paradigmatic of the general theory. Two issues argued by Kant I subsequently rejected in turn, namely that it is always morally wrong to use persons as means towards ends (criminals have forfeited some of their rights and may therefore be used for such purposes), and that criminals will their punishment. Since the latter claim is also endorsed by Hegel, it was rejected by examining Hegel's philosophy regarding punishment and the will in detail. Not only has his philosophy been highly influential on the matter, but is also consistent with Kant's claims. Neither Hegel's objective, nor his subjective justification was able to stand up to criticism. I then rejected attempts at justifying retributivism with reference to consent. Subsequently I evaluated retributivism in respect of how or how much to punish. I argued that retributivism is

[11] Hugo A. Bedau (1982) examines the death penalty in detail in America. He gives historical, sociological, etiological, legal and political perspectives, and both sides of the issue are presented. The background, development, the law, and the executions, and American society's attitude towards the death penalty are illuminated. Deterrence, problems, doctrines, and evidence regarding the punishment are presented. One of the first studies regarding deterrence of the death penalty on prison murders is included. The problems of recidivism and parole are also examined. The question is posed, is the death penalty desirable for punishing terrorism? The death penalty is discussed in relation to racism and rape. Important Supreme Court decisions pertaining to the death penalty in the United States are presented.

incapable of providing a morally acceptable answer to this question because it is committed to the principle of *lex talionis*, and is therefore incapable of regarding important variables (such as first-time offences, mercy or other external factors), and is not committed in practice to respecting offenders although it claims it is.

Now that I have revealed the nature of retributivism and how it cannot be defended, I shall give a defence of the approach by arguing that it enables us to express anger and indignation at offenders, which I shall show to be morally appropriate. Even though I will defend retributivism on these grounds, and because I claim that punishment should include an aspect of retribution if it is to be morally justified, I only do so in a limited way, continuing, where relevant, to point out its limitations.

CHAPTER 3

DEFENDING RETRIBUTIVISM

3.1 INTRODUCTION

In this chapter, despite its short-comings, I shall provide a partial defence of retributivism by arguing that moral judgements are linked to emotional concerns, and that it is morally appropriate for one to express one's anger and indignation at offenders and their offensive actions. I shall examine the connection between anger and indignation on the one hand and guilt on the other, and argue that we are only justified in expressing anger and indignation at those who are guilty, i.e. at those who have committed crimes and fulfil the requirements for moral guilt. Importantly, retributivism thus provides a morally acceptable answer to the question of whom we are justified in punishing. Because the expression of one's emotions can be excessive, especially when one is the primary victim, I shall argue that retributivism does not justify private revenge, and hence I shall argue for well-regulated punishment, i.e. punishment in an institutionalised form. If punishment serves as a recognised channel through which society can express its anger and indignation at offenders, it fulfils a need of society; and as I have already pointed out in Chapter 1, it is an objective any system of punishment ought to have. I shall then also defend retributivism against the claim that it endorses legal positivism. Finally, I discuss the limits of the retributivist justification, which lie primarily in the social conditions of a society and in the way the least fortunate are treated by the state.

3.2 ANGER AND INDIGNATION AND PUNISHMENT

In this section I shall be concerned with three tasks: I first discuss the nature of emotions, secondly, I argue that they are morally significant, and thirdly I defend punishment as morally appropriate for the expression of anger and indignation at offenders.

3.2.1 WHAT ARE EMOTIONS?

The initial reaction to this question is to give an answer such as that an emotion is a mental item like a sensation, and the having of which one cannot be mistaken about. This Cartesian view equates emotions with feelings, since in order to establish whether I presently have a given emotion, such as anger, I need merely to introspect for a reliable answer. It would be similar to my establishing whether I have a specific feeling, such as a headache. The problem with this "feeling theory of emotions" is, however, that the question of how we come to speak of emotions in an inter-subjective way, attributing them to others and being able to speak of them more or less uniformly, is left unanswered because I only have direct access to my emotion, such as anger, while you only have access to yours, and we have no real way of determining whether we share the same emotion. Moreover, it is not always the case that we correctly identify our own emotions: you may believe that you are angry with your father, but a psychoanalyst may interpret this as resentment. Furthermore, one may be unaware of one's emotions: a psychologist may lead one to the discovery that one has unconsciously loved a particular person all the while. Therefore, it thus seems sometimes to be that one is mistaken about an emotion, or one may have an emotion without feeling it. Emotions thus seem capable of having an unconscious existence, something that is inconceivable of mere feelings. Feelings that leave the realm

of consciousness are thought of as going out of existence, rather than having a continued existence at an unconscious level. Thus, when a doctor asks her patient whether he has had any pain during the night, the answer that he slept right through does not prompt the suspicion that the pain has continued on an unconscious level. When operated on under anaesthetic, one has no pain because one is without consciousness, i.e. no realm in which the feeling of pain can exist. Therefore, it follows that emotions cannot be equated with mere feelings.

One contrary position to this theory is held by William James who holds that without felt bodily symptoms emotions would be nothing but detached observation, and hence not emotions at all. He conceives emotions as physiological disturbances caused by perception, i.e. of external events. Thus, we are sad because we cry, angry because we strike, happy because we laugh; rather than crying because we are sad, striking because we are angry, laughing because we are happy, etc. This theory has the weakness that it applies only to presently occurring emotions, and not to lasting dispositional or unconscious ones. It also opens the door to the experiencing of emotions without the relevant context because only physiological disturbances are necessary.

A drug induced state in which physiological symptoms of anxiety were produced without any of the normally accompanying psychological states would qualify as anxiety on this account, even if the person who is drugged perceived them only in a detached way. This theory leaves no room for regarding emotions, as we often do, as justified or unjustified, rational or irrational, realistic or unrealistic, or of excessive magnitude.

Behaviourism is a third type of theory. In its extreme form, such as that advocated by Ryle, Skinner, and Watson, it holds an emotion as nothing other than behaviour of a given kind, or at least one's disposition to behave in a given

manner in given circumstances. This theory does credit to the public nature of emotions since the emotions of others are often observable. However, it neglects the private nature of an emotion, the inner state, emphasised by the Cartesian theory. Behaviour is the only criterion we have for attributing emotions to others, but we do not depend on our own behaviour to recognise that we are experiencing a specific emotion. In addition, by behaviour alone, it is difficult, if not impossible, to distinguish between some emotions, such as indignation from vexation, or either from resentment.

A fourth theory of emotions, propounded by Aristotle and Aquinas, makes cognition, motivation, or evaluation central aspects. For present purposes, it is unimportant whether we hold emotions to be cognitions, caused by cognitions, causing cognitions (as held by emotivism), or part of a motivational process. If there is a necessary connection between emotions and beliefs, then emotions can be rational or irrational, reasonable or unreasonable, just or unjust, etc., rather than random. Accordingly, emotions may be seen as complimenting reason, giving insight to moral, aesthetic, and religious values. This theory does not account for differences in emotion when perceptual states are identical, however. Why does one person who is cheated react with anger, while another takes it with amusement? The answering of this question would go beyond the scope of this thesis. However, many philosophers today (M. Stocker, R. M. Gordon and R. C. Solomon being three notable examples) endorse the view that emotions have cognitive components. It is widely held that emotions require beliefs; and emotions also require values and desires the agent holds. Descriptions of emotional states are rich in causal implications. For instance, one is embarrassed only if one is in a state having certain causal connections, particularly to beliefs, desires, and wishes (Gordon 1987: ix). "If one is to explain or predict human behavior in terms of beliefs and desires, then one should be prepared to

introduce emotions as well into the explanatory scheme" (Gordon 1987: 9). This is illustrated by Gordon in the following example: Let us imagine two farmers each wishing that it would rain so that their crops will not be destroyed by drought. Each believes as strongly as the other that his crops will not survive another week without water, and each cares as much as the other about the survival of his crops. Farmer A sets out pipes for irrigating the crops in case it does not rain. Farmer B does not undertake any such measure, however. From their actions we may infer that B believes it will rain, while A believes it will not. Let us imagine further, however, that both have been informed by a source they both trust to an equally high degree that there is a fifty percent chance of rain during the next seven days. So neither believes that it will rain, neither believes that it will not. They do not differ in any other relevant belief either. In order for us to explain the difference in their behaviour, we must refer to emotions, otherwise explaining the difference would be impossible. We may assume that A is afraid it will not rain and B is hopeful that it will. One who fears it will not rain but wishes it would, would tend to act like a person who believes it will not rain but wishes it would. Similarly, one who is hopeful it will rain, will tend to act as a person who believes it will rain and hopes it would. The different emotions of the farmers therefore serve as an explanation for their difference in action.[1]

In the next subsection, I shall show that morality is a practical subject concerned with our expression of emotions.

[1] For further discussions regarding the motivational element of emotions, see Stocker (1987), Gordon (1987), and Solomon (1976). Emotions are often said to distort our reality, and to tear us from our interests and lead us astray. Solomon argues that they are responsible for our reality, and create our interests and our purposes. In short, he holds our emotions and passions in general to be our reasons in life.

3.2.2 EMOTIONS AND MORAL DELIBERATION

Before I can successfully argue that punishment is a morally legitimate means through which society can express its anger and indignation at offenders, I find it important to first show why the expression of anger and indignation is relevant by arguing that emotions are an integral part of morality. I shall therefore begin by discussing the nature of morality. My arguments shall rest mainly on the position expounded by Simon Blackburn in the first chapter of his *Ruling Passions: a Theory of Practical Reasoning* (2001).

According to Blackburn, we must first note about morality that it deals with how we live in the world; therefore, it is a practical subject. It distinguishes those things that we will not do (or not do with considerable uneasiness) from those that we do readily. Morality is displayed both in our attitudes towards ourselves and others. Towards ourselves it is displayed as pride, guilt, shame, self-satisfaction, or the like; while towards others it is displayed in our attitudes towards them - whether they behaved well, fulfilled their duties, did more than was required of them, lived in ways we admire or disapprove of, etc. Our morality is shown in the things we demand of ourselves and others, tolerate, or forbid. To have a moral personality is to be sensitive to different aspects of things, and to have a disposition towards using them towards influencing or determining attitudes, emotions, and choices. As a practical subject, morality is manifested in our reactions to things and the motivations we have. It pressurises us towards behaving in a certain way, which choices we make, and of what we approve and disapprove. We also use moral considerations to put pressure on others in the way in which they make their choices (Blackburn 2001: 1).

Moral knowledge is concerned with how to behave, when to refrain from taking actions, whom to admire, with whom to get angry, etc., rather than what a state of affairs is actually

like. Moral knowledge thus is concerned with how to act or respond, and our values are exhibited through our actions. It follows that morality is therefore not only manifested in the situations in which we find ourselves, but in the way we react in those situations (Blackburn 2001: 1-2).

One of the questions that now arises is, "how do we attain moral knowledge?" I believe Blackburn is correct in maintaining that we acquire it in the process of growing up, just as we do our mother tongue, by interacting with others, thereby learning which values are appropriate or inappropriate. Some moral knowledge we get through direct instructions by parents, teachers, religious authorities, or the like - "it is wrong to tell lies!" We also learn moral behaviour through modelling by observing others, either of those with whom we have direct contact, such as our parents, or those we only know through the media, such as television or sports personalities - i.e. Daddy regularly gives to charities; I think it is good to be charitable. Although these situations differ somewhat, all of them involve human interactions. Of course, it is conceivable that someone could grow up without taking interest in any values, norms, and emotions, in a totally alienated manner (such as Camus' stranger or in real life as illustrated by psychopathic behaviour which, not coincidentally, we take to be abnormal); but usually values are absorbed, often without one's realising it, until one has acquired them, one introspects, or someone points them out to one. Later in life, one might rebel against one's values, but even rebels need ways of expressing what they are concerned about, what they are rebelling against, and what they demand from themselves and others. These other concerns then constitute their morality, since it is their value system, a system in accordance with which they will determine their behaviour and expect others to do so too. Morality is the set of values, norms, principles, beliefs, and attitudes according to which we behave and react in

interactional settings and the basis for judging how others choose to live their lives.

Blackburn (2001: 5) analyses morality into inputs and outputs: inputs are evaluations of persons, situations, or consequences as being of a certain kind; outputs are having an attitude, putting pressure on others to have a certain attitude, or favouring certain policies or actions. We need to practice morality to become skilled at turning the right inputs into the right outputs. This position is in line with Aristotle's views that we have to practice making the right decisions in different contexts until they become habitual modes of behaviour. An analogy from sport may be illuminative: a batsman needs to practice different strokes to deal well with different deliveries. At a high level of expertise, he may seem to carry out the strokes with precision and accuracy quite automatically. However, when practicing, a coach may point out different elements of a particular stroke and delivery to him. The same is true for moral judgements and actions. One may come to recognise certain injustices and respond appropriately in an instance, but this is not how we were born. We have to learn what information is to be evaluated in what way in order to be able to respond in an appropriate manner (Blackburn 2001: 5).

Moral concerns are different to other concerns, such as mere desires or preferences, however. I may desire chocolate ice-cream, or prefer tea to coffee, but even though these involve value judgements, they do not normally express any of my moral beliefs. Of course, if I believe that coffee is addictive and think that using addictive substances is wrong and that I should refrain from them, then my preference for tea may well be a moral one, but if I merely prefer the taste of tea to that of coffee, then it has no moral connotations.

Morality addresses needs that can only be addressed interpersonally. We would not have to campaign against unsafe nuclear reactors built in our vicinity if no such reactors

were built in the first place; we would not have to raise our voices against racial hatred if no such hatred were evident anywhere; global warming was not a moral issue until scientists alarmed us with data suggesting that we may be causing a rapid warming of our planet; the issue of cloning did not concern ethicists until the sheep Dolly was cloned, which brought human cloning a big step closer; and we would not have to concern ourselves with the justification of punishment if no one were ever to transgress, thereby making any punishment redundant, and so on (Blackburn 2001: 2-4).

Connecting values to morality in the way Blackburn does implies that morality is concerned only with issues that are of an intersubjective nature. But does this not include aesthetic ones too? Are all issues of aesthetics then to be considered as moral issues too? Aesthetic judgements, for Kant, are distinguished both from the expression of subjective likes and dislikes (such as that I prefer strawberry ice-cream to chocolate ice-cream merely on the basis of their tastes) and judgements that ascribe an objective property to something. Aesthetic judgements must hence be made on the basis of subjective factors, such as pleasure, but like property ascribing judgements, aesthetic judgements are concerned with making claims with which others are expected to agree. This is very similar to the conception of moral judgements here being defended, the crucial difference being that moral judgements are also prescriptive in respect to behaviour, while aesthetic judgements are descriptive. I may hold Mozart's compositions as being of the finest ever produced, and express this belief strongly in admiration, but I am not thereby suggesting that his compositions ought to be emulated. Aesthetic judgements may be prescriptive only in so far as that I expect you to agree with me on Mozart's compositions, and if you do not I will probably try to persuade you by pointing out features of his works. Aesthetic judgements do not prescribe actions or attitudes to actions,

however. But when I applaud charitable behaviour, I am implying that it is good to emulate such behaviour, I am hence prescribing charity; therefore this is an instance of a moral judgement.

Morality does not concern the whole realm of human choice and actions, however. I may prefer one tea to another and buy one brand of cereals because it is cheaper, but this does, *prima facie*, not involve moral conduct. Of course, morality is not necessarily excluded in these actions either - I might select the tea I drink because it is marketed by an environmentally-friendly company and I may decline a more expensive brand of cereals because many other people cannot afford it. Tastes are normally not to be disputed, but even here the matter is not a straightforward one: even simple pleasures of the palate can evoke moral and social judgement. Society regulates to some extent what foods are permissible and impermissible. Not any food pleasurable to me may honour a guest, for example. In the West, it is usually held inappropriate to serve a dog for dinner, for instance, because dogs are usually held as pets or service animals, therefore people have a special kind of relationship with them that makes them unsuitable as food, but in some Eastern societies this restriction does not apply. If someone deliberately chooses what is held to be disgusting in a society, they may become the target of moral reactions (Blackburn 2001: 8-10).

In answering the question, what the precise domain of morality is, we may say that a moral concern is always of an intersubjective nature, i.e. it always concerns others too, and its expression has a prescriptive component. Blackburn (2001: 9) suggests that we should think in terms of a staircase of practical and emotional ascent, with simple preferences, likes and dislikes at the bottom. Above this, we are to place actions, situations, or characters to which we have a more insistent hostility (such as having a simple aversion to it, have a disposition to be disgusted by it, to

hold it in contempt, to avoid it, or be angered by it). The difference between the two levels is not so much one of kind as one of degree, the second level involving a greater emotional involvement. For this reason, I think Blackburn's staircase should not be seen as having distinct categories, but rather as a continuum with boundaries between adjacent steps not always being easily visible. Nevertheless, the staircase example is effective in augmenting the perspicuity of the differences in emotional involvement between various levels. Continuing now with the staircase, the third level is the level constituting reactions against reactions of the previous level: you may be angry for my becoming angry and tell me that it is none of my business being angry over the matter. Suppose, however, that you share my anger, that may be all, but you may also feel strongly disposed towards encouraging others to share in the anger too. At this stage, you are clearly treating the matter as one of public concern, you are now clearly treating the matter as one of morality since it brings about a strong emotional involvement on your behalf (although this isn't what makes it moral) and you are ready to approve of those who agree with your stance and disapprove of those who do not. Going up a further rung, you may consider the sentiment compulsory, meaning that you are prepared to express hostility against those who do not share it. One level above that, you may even believe that the latter hostility is compulsory, and be prepared to confront those who do not share your anger, even though they might themselves be concerned at what was done. It should be clear that the emotional involvement becomes more intense the higher we climb the ladder of concern (Blackburn 2001: 9). I once again wish to stress that the boundaries between the different rungs is not always precisely determinable, although a definite transition is perceivable from one to another, just as adjacent colours on the visible part of the electromagnetic spectrum may not be easily demarcated (we cannot say precisely

where red ends and orange begins in a non-arbitrary way), yet we have no difficulty in distinguishing different colours such as red from orange.

The staircase gives us a scale with pure preference on the one hand and public concerns with emotional intensity describable as "moral commitment" on the other. The scale does not only indicate our emotional involvement; it indicates to which degree things or events capture our attention, our degree of engagement, and our preparedness to exert pressures on others to conform or to change (Blackburn 2001: 9-10).

Both those who climb the ladder too quickly and those who do not climb it quickly enough are subject to disapproval. The former may be considered with contempt for overreacting in a given situation, the latter with contempt for exhibiting a disinterested attitude. An example of a person who climbs the ladder too quickly is someone who demands that criminals convicted of mere housebreaking without any aggravating circumstance (such as that they were carrying firearms with the intention to kill or harm someone who detected them in the process) should receive life-imprisonment without the possibility of parole, or a teacher who would expel pupils who did not do their homework as required. A person totally disinterested by a murder committed in his or her office is an example of someone who failed to climb the ladder of emotional involvement far enough.

If we accept Blackburn's staircase of emotional involvement, then we have cases of harm and evil at the top end of the emotional scale where descent is not tolerated: I think paedophilia is fundamentally immoral, and there is not much room for discussion. If you disagree with me, then I am against you too, and my opposition may be exhibited in any of a number of ways, from my avoiding your company, to advising others to do so too, to attempting to change you, to constraining you in whichever way possible, or to deploying

social and legal pressures of whatever kind against you (Blackburn 2001: 12).

Moral disputes cannot be resolved by merely holding a vote since even if I realised that most people believed paedophilia to be morally acceptable, I would regard their view as completely wrong and them as having inappropriate standards for evaluating the matter (Blackburn 2001: 14-15).

Can we accept the arguments set out in this section? If we can, then emotions have profound significance for the justification of punishment. Kant, as already mentioned, would of course reject it outright, since morality, according to him, can only be determined through the objective, rational will. But it is difficult to agree with Kant on this point because if we take punishment, for instance, and hold as I argued in the previous chapter that criminals do not will their punishment, then we could not punish them in accordance with a rule they established, as Kant believes. Nevertheless, we still feel that we have a right to punish them because they intentionally violated the rights of others. We feel angry because a crime was committed. We feel that we have a moral right to express our anger in an appropriate way, such as through punishment, even if such punishment were to yield no positive consequential result. We believe that we have a right to punish merely in virtue of the fact that a crime was committed. It is furthermore plausible that it is this compulsion to express our emotions that drives us to the establishment of a morality. If emotions were not to be the driving force behind moral actions, we might lack the conviction to act against injustices, wrongs, or to act for justices and rights. I therefore come to the conclusion that Blackburn is right in arguing that emotions are an integral part of morality.

3.2.3 EMOTIONS AND CRIME

In the previous subsection, I argued that the more we value a certain thing, behaviour, or state of affairs, the more emotional involvement we have towards it. It thus follows that if I have no disposition to be moved by a given event, then the event is unimportant to me, i.e. I do not care about it. Applying this to crime, if I am unmoved by a murder in my neighbourhood, it is an indication that murder does not matter to me, it leaves me cold, and I may therefore rightfully be described as having a callous personality. As I argued in the previous subsection, certain issues should matter to us, they should affect us emotionally; they should not leave us cold if we wish to avoid being morally condemned by others. If we react against murder, we indicate that life is important to us; if we react against armed robbery, we show that we are against the unlawful use of force; if we react against crime, we express the moral view that the unlawful violation of another's rights is unacceptable. Punishment is more than the mere infliction of pain upon offenders in response to their violations of law. It is a kind of language communicating a message.

What does punishment say? At the very least, it says that the offenders' actions were wrong and will not be tolerated by society. Punishment is not merely something done to, or inflicted upon, offenders. It is more than that. In comprising an expressive or communicative component, it allows society to express its anger and indignation at offenders, communicating thereby that it is deeply offended by their offences. This distinguishes punishment from mere penalties; both are deprivations, but only the former has this expressive function:

> Punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgements of disapproval and

> reprobation, on the part either of the punishing authority himself or of those "in whose name" the punishment is inflicted. Punishment, in short, has a symbolic significance largely missing from other kinds of penalties (Feinberg 1998: 74).

Punishment can also be described as a form of condemnation since it is an accepted institution through which society can express its anger and indignation at members who violate its laws. If the institutions of justice would refuse to bring someone to justice when it seems obvious that the persons in question are guilty, the institutions would disregard the values of society, thereby insulting it:

> It expresses condemnation much like champagne at a wedding expresses celebration, or black dress at a funeral expresses mourning. The conventions or social norms by which punishment "speaks" are a product or artefact of culture and history. Of course, these conventions, like those governing natural languages, do change, but at any particular moment they are relatively stable and impose "objective" constraints on how we can effectively express our condemnation (Garvey 1998: 741).

When we hear about a specific crime, it is appropriate to become emotional about the matter and demand that those responsible be brought to justice. By being affected in this way, our moral and social concerns are being demonstrated. When we hear of bloody murders, violent rapes, brutal molestations of children, or other atrocious crimes, we believe that the responsible beings deserve to be punished; we believe punishment to be right even if no beneficial consequence were to result from it. But the mere having of an emotion is not enough; actions should be taken demonstrating that we are really serious about the matter. Once having apprehended, tried, found guilty and punished the responsible person, we may be relieved and feel satisfied that we have taken action against something that greatly concerned us. In fact, according to Aristotle, we need to feel the right and

appropriate emotion if we are not to continue harbouring resentment against wrongdoers:

> Now we praise a man who feels anger on the right grounds and against the right persons, and also in the right manner and at the right moment and for the right length of time. He may then be called gentle-tempered, if we take gentleness to be a praiseworthy quality ... The defect, on the other hand, call it a sort of Lack of Spirit or what not, is blamed; since those who do not get angry at things at which it is right to be angry are considered foolish, and so are those who do not get angry in the right manner, at the right time, and with the right people. It is thought that they do not feel or resent an injury, and that if a man is never angry he will not stand up for himself; and it is considered servile to put up with an insult to oneself or suffer one's friends to be insulted. Excess also is possible in each of these ways, for when a man retaliates there is an end of the matter: the pain of resentment is replaced by the pleasure of obtaining redress, and so his anger ceases. But if they do not retaliate, men continue to labour under a sense of resentment - for as their anger is concealed no one else tries to placate them either, and it takes a long time to digest one's wrath within one (Aristotle 1999: 231-233).

I argued that emotions are not of the same kind as sensations, i.e. perceptions without value judgement. Sensations do not have any cognitive content, i.e. they do not constitute propositional attitudes. Because they lack cognitive content, describing sensations as reasonable or unreasonable, or just or unjust, is making a category mistake. Emotions are different, however. Since they have cognitive content, it is possible to describe them as reasonable or unreasonable, just or unjust. When can emotions be described as reasonable? Emotions that are unfounded, such as being afraid of the dark when there is no perceivable danger, may be described as unreasonable. When there is a perceivable danger, such as that there is a housebreaker in one's house, feeling great fear is not excessive, and hence the emotion may be held as reasonable. Being anxious that one is being spied

upon is irrational when there is no evidence that this has ever been the case, but if one finds a miniature camera hidden in one's home, the emotion may be regarded as rational. In the next subsection, I shall examine the connection between guilt on the one hand and anger and indignation on the other. I shall then argue that anger and indignation are only morally appropriate when the subjects towards whom these emotions are directed are guilty. Our emotional responses are hence connected in this way to rationality -anger is therefore appropriate when we believe someone to be guilty, but if this belief turns out to be false, the anger against whom it is directed should subside too. In the next subsection, I shall argue that anger at persons is only justified when those against whom it is directed are guilty.

As I already pointed out, the excessive expression of an emotion may lead to moral disapproval, just as a too mild expression might. How are we to ensure that punishment of offenders is perceived as just, not being too harsh or too mild? When just having been victimised, our emotions against the offender may be much greater than what they are after a considerable period of time has elapsed; or bystanders witnessing the crime may be outraged too, but exhibit a more socially acceptable emotional intensity against the offender. Because direct involvement in a crime can cause us to have excessive emotions, i.e. can cause us to climb the ladder of emotional involvement too far, the case for punishment to be administered by impartial officials of the state can be made, which I shall substantiate in 3.2.5. Before moving on, however, I wish to show that retributive punishment is justifiable from another perspective as well.

In order to demonstrate the appropriateness of expressing retributive emotions from a first-person perspective, imagine that you commit a dreadful crime, such as killing someone close to you. The murder need not have been premeditative, but may have occurred in a fit of uncontrolled rage. This is

not as unrealistic as it might seem since most murders are committed under similar circumstances. Would you not experience extreme guilt at realising the severe injustice and suffering you have caused? Many will agree that it is virtuous to experience guilt in such a situation, or if "virtue" is not the appropriate term to use, guilt seems appropriate by any standard of evaluation. Our feeling guilt in morally appropriate situations shows that others and our actions matter to us, and hence that we have moral sensitivity, i.e. that we are morally motivated. Of course, some criminals will not be so motivated, and hence not feel guilt for their crimes. I do not have to argue, however, that an immoral or non-moral person agrees that criminals ought to be punished. All I need to show is that moral persons hold it appropriate in order to argue that it is in accordance with morality.

Guilt feelings are sometimes held to be undesirable because they focus wholly on the past. The contrary, however, is the case. Taking the past seriously, acknowledging one's responsibility of past actions, is in many circumstances the only morally appropriate thing to do. Not to feel guilty over spilt blood (unnecessary blood) is at least indecent. Having committed a murder, for which the emotion of guilt is appropriate, is punishment as a suitable response not consequentially obvious? It is hardly conceivable that any humane punishment, of whatever magnitude, could be excessive. Since you are guilty and feel guilty, you are certain to understand the appropriateness of punishment as a consequence of your actions. You might even feel that punishment is not only morally justifiable, but that you ought to be punished for your deed. This insight makes no demand that the harm be undone in a restitutional sense. If I burn down my neighbour's house, it would hardly be perceived as justice if I merely build it up again and make compensation for destroyed property, were I to have the financial means of doing so.

Guilt requires more; it demands that punishment entail suffering. Remorse would be appropriate, but it is not always possible to determine when punished individuals are really remorseful because we only have access to their emotions from a third-person perspective. Having established that it would be appropriate for us to be punished, the question that needs to be answered is, whether it would be appropriate to punish others in similar circumstances. It would be condescending to withhold punishment from others that we judge appropriate in our own hypothetical situation, and thereby fail to fulfil an important moral principle, namely the universalising principle (Moore 1995: 123-126).

Applying this theory to concrete situations requires that we follow the following procedure: we ought to be able to imagine ourselves capable of committing a crime such as the one in question. We then ought to ask ourselves what we would experience psychologically after having become aware of our actions' consequences. This is followed by the recognition that feeling guilt for the wrongful act is appropriate under the circumstances. From this should follow the recognition that our guilt requires that we be punished. (Of course, it would only matter for moral persons, but as already mentioned above, this is all that had to be shown, since this shows that it is in accordance with morality.) From our requiring that we be punished, it should follow that we be punished to respect our wills, and hence be treated as persons of value and respect. Finally, returning to the case in question, the conclusion drawn is universalised to justify the appropriateness of any person being punished in similar circumstances to those in which we would agree to be punished ourselves. This latter point satisfies the demands of Kant's categorical imperative - do unto others as you would have them do unto you.

A similar conclusion may be arrived at by employing the Rawlsian experiment, establishing society's rules and

principles from behind a veil of ignorance: I may want to establish a society in which love and forgiveness are possible, and even play a prominent role, but I may equally want to leave open the possibility of revenge against those committing grievous injustices against me. Of course, the principle would also be binding upon me, making revenge against me possible if I grievously harm another person. This is a consequence of consistency with which I may be completely satisfied.

What has been established in this section is that morality is inextricably linked to our emotions. Crime causes society to be angry and indignant at offenders and hence it is morally appropriate that this anger and indignation be expressed.

Before arguing that punishment should be well-regulated, I shall address the connection between anger and indignation on the one hand and guilt on the other. Thereby I shall argue that one is only justified in expressing anger and indignation at guilty individuals, and that one is therefore only justified in punishing guilty individuals. Retributivism hence provides a morally acceptable answer to the question of whom we are justified in punishing.

3.2.4 ANGER AND INDIGNATION AND GUILT

Since I have shown that our emotions are involved in making moral judgements, I need to establish the nature of anger and indignation because one of the goals I maintain any punishment system ought to have is that punishment serve as a recognised channel through which society can express anger and indignation at offenders. Thereby I shall show that these emotions are inextricably linked to guilt.

Anger is an intense emotion of disapproval brought forth by presumed guilt. We feel guilty when we believe that our actions would rightly anger others. I may therefore be angry at hearing about an armed robbery that took place down the

road this morning, knowing that someone must be responsible for it. One may feel guilty at having run over a child due to one's inattention on the road, believing that one's action would rightfully anger others (and of course, one may also be angry at oneself). Therefore, guilt requires agency. One does not feel guilty for not being able to play cricket well if one believes that one does not have a talent for the sport; at best, one might feel ashamed for not being able to do better. Shame does not require agency. Of course, one might experience guilt if one believed that one's dismal performance at cricket was due to one's not having practiced. In the former case, in which one believes that one does not have a talent for the sport, anger from others would be regarded wholly inappropriate. However, if one should have practiced, then anger from others may be completely comprehensible. This shows that anger is connected to agency, and hence guilt. Anger may thus be seen as an intense reaction against the failure of others to perform in the expected manner, having had the ability to do otherwise than what they did.

Since I maintain that punishment should serve as a recognised channel through which society can express its anger and indignation at offenders, the above ought to have clarified that anger at just anyone is not morally acceptable. Anger is only acceptable when the agent against whom it is directed is believed to be guilty. Punishment ought therefore only to be administered when transgression of a law has occurred, the accused fulfils the conditions of moral guilt, and the law transgressed was indeed a moral one. Since anger is only appropriate when it is in response to guilt, guilt is a necessary condition for one's expression of anger and indignation. Anger expressed without guilt is unjust and morally inappropriate. Retributivism hence provides a morally acceptable answer to the question of whom we are justified in punishing.

Thus far, I have concentrated on anger. I maintain that punishment should serve as a recognised channel for anger and indignation. What is the difference between anger and indignation? I hold the two emotions to be of the same kind (both being negative emotions in response to believed guilt), but being just of different intensity, intense indignation becoming anger. Hence, serious crimes (such as murder, rape, child molestation, armed robbery, and the like) may warrant anger, while minor offences (such as traffic violations) may only warrant indignation. It is difficult to say when indignation becomes anger, and may require an arbitrary dividing line, but this is irrelevant for the purpose of my argument since no precise distinction between the two need be made.

Morality, as I have described it in this section, encourages coercion and rejection, and hence needs careful employment. I have already pointed out that the expression of emotions can be too excessive; hence, a case for well-regulated revenge can be made, which will now be done.

3.2.5 PUNISHMENT SHOULD BE WELL-REGULATED

Critics of retributivism may argue that the theory reduces punishment to revenge, an emotion that may sometimes be morally unacceptable because it may be excessive. Hegel had views regarding revenge and punishment too. When the arbitrary and the true (general) wills conflict, and the former prevails, and the individual breaks the law, the law retaliates by exercising retribution, punishing the individual. Seen from the standpoint of the individual, retribution becomes a form of coercion. Coercion is diametrically opposed to freedom. So if freedom is the substance of right, how can the curtailment of freedom, the exacting of coercion, be just and right?

Coercion is wrong, maintains Hegel, when it is a one-sided action, an aggressive act, a first action, i.e. when it is an offence. However, when it is a second act, a response against coercion, i.e. coercion against coercion, it is just and necessary. The second act of coercion is an annulment of the first, thereby reaffirming the law that the first act violated. Such coercion is therefore not the contradiction of the dignity of a free being and therefore retribution, coercion in response to coercion is right, just, and legitimate (Primoratz 1997: 69).

Retribution may be seen as having two forms: revenge and punishment. Revenge is retribution administered by the injured party. It is justified when it is administered in the right measure, i.e. when it is proportionate to the injury suffered and is not excessive. By excess is meant inflicting greater harm or suffering than the injury or harm suffered justifies. In the state of nature, where there are no institutions of justice, it is the only means of retribution. It has two major deficiencies, however. It may often be carried out partially and disproportionately to the magnitude of the injury suffered or right violated. This is so because it is administered by the party injured, thereby the injured become the judges of their own cases. Injured parties may often be incapable of examining a case objectively, being influenced by excessive emotions and they also often over-estimate the harm caused. This results in revenge often being carried out in too harsh a measure, being disproportionate to the injury suffered, or right violated, resulting in injustice, a violation of rights, another triumph of the arbitrary will over the general will, to put it in Hegelian terms. Moreover, because revenge is not institutionalised, being exercised in response to often excessive emotions, the person against whom it is directed may come to see it as a simple wrong and react to it by causing another wrong by retaliating against those exercising revenge. Thus a series

of injuries may be set in motion, rather than bringing about a reaffirmation of justice with reconciliation (Hegel 1965: 247). Reconciliation would enable the injured party and the offender to put the injurious past behind them and live together in society in mutual toleration and respect of each other.

Punishment, by contrast, is retribution carried out in the name of and in accordance with the general will. It thus administers justice without subjective considerations, doing so in the proper way and with the proper measure. Therefore, where there is an institution of justice, revenge is no longer necessary or justified (Primoratz 1997: 71).

Revenge is not necessarily immoral. It is often held to be morally unacceptable because injured persons are seldom, if ever, able to administer justice fairly because they are seldom, if ever, able to evaluate the facts of the matter rationally, without excessive emotional intensity, or objectively. Victims ought therefore not to be judges in their own cases. If victims are judges in their own cases, evidence and verdicts are likely to be biased, and punishment is more likely than not to be excessive. It must be stated, however, that the tendency of being incapable of being objective when being the judge in one's own case is a mere contingency, not a necessity. The term "just revenge" is not a contradiction. We can imagine cases in which revenge could be justified, such as when a person is injured by another, but because they live in a country where the institutions are corrupt, filing a charge against the offender would not prompt the institutions of justice to take up the case. If the injured person then does just as much harm to the offender as was done in the offensive act, just revenge may be said to have occurred.

To retaliate or to initiate an aggression are two different moral matters. It is therefore ineffective to

attempt a rejection of retributivism by arguing that it is a form of revenge.

Moreover, there is a salient distinction between revenge and punishment, a distinction that is accepted by retributivism. The difference between the two lies in the fact that the latter is administered by persons authorised to do so (such as judges and prison officials), while revenge is carried out in absence of authority. Legal punishment (the moral justification of which is the primary objective of this thesis) is thus not plagued by the subjective biases that generally discredit revenge (Primoratz 1997: 84).

Retributive punishment is not revenge, vindictiveness, cruelty, or the like, but can and ought to be humane. However, it is dangerous when carried out by individual persons or groups of persons, such as vigilante groups. Therefore, the state ought to administer the punishment and thereby (if done in a proper, regulated manner, with impartiality) deny feelings of resentment (Moore 1995: 128).

Consequentialists may protest against revenge, arguing that it has a destabilising effect upon society. This argument is most forceful when directed against private revenge or vigilante activity. However, rather than weaken the case for retribution as partly constituted of revenge, it strengthens the argument for institutionalised, well-regulated revenge. The state should exercise retribution on behalf of its wronged members.

Institutionalised revenge, i.e. retributive punishment, may be morally justified on two grounds, namely that it brings some satisfaction to the victims and interested members desiring it, and it defuses the likelihood of private revenge or vigilante activity (Murphy 1990: 144). This would of course not mean that the state would be required to act upon all desires for revenge since some would be unjustified or excessive. In order to ensure that revenge is not exercised excessively, punishment should be administered according to

desert, i.e. offenders ought not to be punished disproportionately to the gravity of their offences. Criminals ought to be protected from procedural biases too when tried. For this reason, it ought to be impermissible for criminals to be punished more harshly after hearing victim impact statements because criminals ought to be punished for what they have done and not in accordance with the emotional intensity caused in the victims.

3.3 RETRIBUTIVISM AND LEGAL POSITIVISM

Since retributivism justifies punishment as a response to the violation of a law, critics may attack it for endorsing legal positivism. I shall defend it from this attack.

Retributivism, by being backward looking, may be described as being conservative. Furthermore, one may gain the impression that retributivism justifies any violation of law. This positivistic conception justifies punishment in response to any violation of any law, thereby supporting any political and legal order, no matter how just these systems may be. According to this view, punishment is justified completely by the commission of an offence. This implies that retributivism justifies punishment for violations against laws that violate human rights in totalitarian systems, or that it was just to punish persons violating racial laws under the Nazis and in Apartheid South Africa. This impression of retributivism, however, rests on a misconception.

Primoratz (1997: 95) points out that these implications would hold if retributivism were logically linked to a legal philosophy that maintains that all laws ought to be obeyed regardless of their contents. This is not the case, however. When a retributivist describes an action as an offence, the term "offence" is not used in a substantive legal sense, but in a normative sense. By "violations of laws" is meant the violation of *morally legitimate laws.* Retributivism is not in

any way committed to what is to count as a legitimate law, and hence not to this conception of what is to count as an offence (Primoratz 1997: 96). Therefore, if retributivists pronounce judgement on the violation of any law, they must first determine that the law was in fact violated by the person charged, and must hold that the law in question was morally legitimate. If the law is held to be morally illegitimate, then what the accused has done can be seen as an offence only in the legal, substantive sense and not in the normative sense. Since retributivists are concerned with the normative sense, they will say in cases of illegitimate laws that there are no real violations, and therefore there cannot be any justification for punishment against them.

It is now important for me to briefly address the question of how we can distinguish between a moral and an immoral law. I agree with Kant on this point. He holds that moral requirements have the form of categorical imperatives. This imperative stipulates that we should act only on those maxims that we would will to be applicable for all agents. If our actions are to be guided by such a principle, then the laws ought to be guided by this principle too because laws prescribe how one may or may not act.

3.4 THE LIMITS OF RETRIBUTIVE JUSTIFICATION

Even though retributivism is incapable of providing a satisfactory answer to the question of how we ought to punish, it does satisfactorily answer the question of whom to punish. However, even with respect to the latter, retributivism is not entirely satisfactory. In this section, further limits to retributivism's justification need to be mentioned because not all offenders who willingly and knowingly commit crimes may be justifiably punished. According to most retributive theories, punishment is imposed merely because the criminal deserves it, either from society's viewpoint, or from the criminal's.

Society's interest may be described broadly as revenge, and the criminal's interest as expiation. However, is it defensible to punish any sane individual committing a crime? Are there not instances in which it would be morally unjust to punish persons because of their backgrounds, for instance, such as starving persons who willingly and knowingly steal from others to provide for their families when they can find no alternative means of doing so?

The explanation from society's perspective may hold that criminals deserve to be punished because they have taken advantage of the agreed upon sharing of benefits and burdens; they therefore owe something to society as a result of renouncing the burden of self-restraint which others have assumed. From the criminals' perspective, punishment is appropriate because it respects their autonomy in choosing to perpetrate. After having paid their debts, they are allowed back into society. This is what thinkers such as Kant and Hegel see as the criminal's right to be punished.

It was argued that punishment is justified retributively if criminals would have consented to their being punished from an original position, subsequent to due rational deliberation. This presupposes that those committing crimes do so willingly, i.e. it presupposes that they have a reasonable choice whether to restrain themselves according to the rules of society or to disregard the rules and risk being punished.

Not all crimes are of such a nature, however. One cause of criminality is need and deprivation on the part of disadvantaged members of society. Others include motives of greed and selfishness that are reinforced by capitalist society. Primoratz (1997: 97) maintains that the retributivist will be the first to insist that social conditions ought to be taken into account when meting out punishment. However, let us not go this far yet. Let us first determine whether a person is guilty or not. If a just law has been violated, and the accused fulfil the conditions

of guilt, then we have grounds for punishing them. Turning to the administering of punishment, I have already argued in 2.7.2 that retributivism is incapable of taking issues of aggravation or mitigation into account; therefore, it cannot morally determine the extent of punishment to be administered.

Since my concern is with the moral justification of punishment, it follows that a highly important issue to consider when establishing the degree of guilt of an offender is the moral standing of society. To have the right to punish, *the laws of society must be just*. This is a necessary condition, but not a sufficient one. Society must also be committed towards eradicating the conditions that breed crime. Of course, it is unrealistic to expect that this objective can ever be fully met, but society should aim towards doing so:

> If it does little or nothing about those social problems that generate law-breaking, and then goes on to punish the law-breakers, it will be rightly seen as both callous and hypocritical, and thus as lacking the moral standing requisite for punishing offenders in good faith (Primoratz 1997: 98).[2]

If society is accused of being hypocritical when it punishes its criminals while failing to undertake any measures to eradicate the negative conditions that breed crime, making it an accomplice to their crimes, it will be seen as even more hypocritical if it furthers those motives that lead to crime. It is often argued that capitalist society furthers precisely those traits that lead to crime. The correctness of this evaluation is not a philosophical question, but one of empirical interest reserved for criminologists and sociologists. Any society in which it can be shown that its criminals are motivated by precisely those motives and traits

[2] David Lyons (1993: 3-6) argues that the general obligation to obey the law rests on the idea of a social contract and fairness. If we cannot fully participate in the political system, or if we are not treated fairly (where this is seen in a broad sense), then we do not have any moral obligation to obey the law. This entails that we do not have a moral obligation to obey a law that oppresses us.

generated and reinforced by it will have forfeited its legitimate right to punish:

> ... any society where it can convincingly be shown that those who break the law are acting out of the very motives which the society systematically generates and reinforces will be guilty of gross hypocrisy and will lose its moral license to punish (Primoratz 1997: 98).

Capitalism promotes crime in two important ways: firstly, it is based on a system of exchange, which necessarily means that interests of members are opposed, leading to egoism, self-interest, and discouragement of community; secondly, capitalism has an unequal distribution of wealth, with a likelihood of confining some to poverty, thereby destroying any remaining sense of community. The laws of capitalist society ban criminals' egotistic actions because they conflict with the dominant societal class, while the egotistic actions of the powerful are legalised. It is not very difficult for the powerful to live according to the laws of society, nor is it a significant benefit for the powerless to live in a community with social ties. Capitalist society can therefore be seen as a direct cause of crime in the former and an indirect cause in the latter. Capitalist society alienates members of society from one another by motives that are not truly human in that it promotes competitiveness that creates an obstacle to the establishment of genuine communities (Murphy 1985a: 86).

The assumption that criminals need to be punished in order that their bonds to society are restored has the underlying assumption that each individual is bonded in a meaningful way. However, this assumption may be challenged. If society fails to take the interests and needs of all communities seriously, if it neglects the powerless, the poor, the needy, the disadvantaged, then it cannot legitimately demand allegiance of the neglected communities, and consequently lacks the moral

basis for punishing them for many crimes, crimes that arise out of the social conditions in which some offenders find themselves (Delgado 1995: 264).[3]

The unqualified egoistic tendency of the capitalist society leads to the social instincts of society's members not becoming developed very strongly since they who are abandoned by all cannot have any strong attachment of feeling towards those who have left them to their fate. It may be presumed that they will not develop any strong moral behaviour either because the societal role models they have are often perceived as negative ones.

As it has previously been established, the basis of the social feeling is reciprocity. When those in power disregard this, the social sentiments of the disadvantaged become weakened towards them; therefore, if the advantaged do not respect the disadvantaged, the latter will not respect the values of the former, which can lead to crime.

Retributivism claims to be grounded in justice too. However, is it just to act out of those very motives that society is guilty of encouraging and reinforcing? If some criminality is caused by greed, selfishness, and indifference to one's fellows, then it must be asked whether acting according to these motives can be truly criminal when society itself encourages and reinforces these very character traits. Ironically, the characteristics that have been identified as the causal antecedents of crime are also those that enable one to be successful in a competitive society (Murphy 1985a: 89).

Retributivism's legitimacy rests on a community's shared values and rules. The rules benefit all concerned, and as a kind of debt for the benefits derived, each person owes obedience to the rules. In the absence of such obedience, punishment is justified because payment for the benefit is

[3] Richard Delgado (1995: 249-273) investigates the applicability of a theory of punishment on those coming from "rotten social backgrounds" - a group comprised of a disproportionate number of poor people and minorities, but by no means limited to such people.

owed. This is so because as a rational being, one can see that the rules benefit everyone including oneself, and that being rational, one would have selected them in an original position of choice. However, many criminals do not share the values of their gaolers, instead they suffer from alienation. They would be hard-pressed to name the benefits for which they are supposed to owe obedience. Let us take, for instance, persons who are arrested and convicted of a felony offence with primarily economic motives, such as robbing a bank. On investigation, we find that they are impoverished members of the lowest social class, whose lives were filled with frustrating alienation from the prevailing socio-economic system. They were out of work, had no transportation even if they could find work, substandard education for them and their children, terrible housing and inadequate welfare for their families, condescending, tardy, and inadequate welfare payments, harassment by the police, but no real protection by them against the dangers in their community, and near total exclusion from the political process. Is their punishment still adequately described as a debt paid to society? (Murphy 1985a: 91). If justice, as Kant and Rawls insist, is based on reciprocity, then it is difficult to see for what these members are supposed to reciprocate.

Of course, one should be cautious in claiming that deprived individuals enjoy no benefits from society at all. Most do (at least to some degree) enjoy the right to general subsistence, to have water and electricity (although countries may be mentioned in which this is not the case, South Africa and many other African countries and most South American countries are notable examples), and the right to life. The contention is, however, whether this bare minimum is all to which these members are entitled. Furthermore, if offenders grow up in a community without having any significant contact with the rest of society, without coming to share the values of society in general, then legal punishment against such

offenders can hardly be described as having any significant moral justification, and may rather be described as the arbitrary exercising of force (Delgado 1995: 264).

What this amounts to is that *retributivism cannot morally justify punishment as a response to all violations of law.* Retributivism only rests on an acceptable foundation if the social conditions of society are of such a nature as reasonably to enable all of its members to have fair participation and acceptance of its general values. This is not an outright rejection of retributivism, however, but only stipulates the societal conditions that must be present for it to be morally justifiable.

3.5 SUMMARY AND PERSPECTIVE

In this chapter, I defended certain aspects of retributivism by arguing that it is morally appropriate for one to express one's anger and indignation at offenders. In doing so, I showed that anger is only morally justified if the subject at whom the anger is directed is guilty. Therefore, retributivism answers the question of whom we may justifiably punish, namely those who fulfil the moral conditions of guilt. I argued for well-regulated (institutionalised) punishment. Retributivism hence pursues one of the five goals I set out in Chapter 1, namely that punishment must be a recognised channel through which society can express its anger and indignation at offenders.

I then defended retributivism against the objection that it is an endorsement of legal positivism. Finally, I enumerated and discussed the social limits to the retributive question of whom we may morally punish.

Let us examine to what extent retributivism fulfils each of the necessary conditions of morally justified punishment I identified in 1.8. In doing so, the approach must not only be evaluated in terms of whether it fulfils the conditions in

theory, but also whether it does so in practice: (1) It provides a morally acceptable answer to the question of whom we are justified in punishing. (2) It does not provide an adequate means for determining how much we may punish offenders. (3) Bringing satisfaction for society, i.e. serving as a recognised channel through which society can express anger and indignation at offenders: retributivism pursues this objective with most conviction; in fact, its defence rests upon this objective. It is morally obligatory to be indignant and angry at witnessing or experiencing injustices. In order to express this anger in an acceptable, channelled manner, retributivism maintains that we have a right to punish those who have willingly and intentionally committed criminal acts. (4) Crime reduction: the punitive system (which rests on retributivism) may have crime reduction as one of its objectives in theory, but it is wholly ineffective in attaining that objective as the high rate of recidivism shows, as Kolstad mentions:

> There seem to be problems with the prison system the world over. Prisons are overflowing, understaffed, and riddled with drugs. They do not seem to function adequately, even as a means of individual deterrence. The number of re-offences and offenders increase partly as a result of a non-functioning prison system. The rate of recidivism after imprisonment is about 70 percent all over the world (Kolstad 1996: 326).

(5) Improving offenders: for centuries, the punitive approach has held that criminals must understand the extent of their wrongdoings through the penalties imposed upon them. What is clear, as the rate of recidivism shows, is that criminals did not become better persons by punishing them in this manner. Imprisonment alone is insufficient for improving offenders. Rotman (1998: 295) states: "Traditionally, rehabilitation has been considered to be one of the purposes of imprisonment, on the mistaken assumption that incarceration itself could be

rehabilitative." The aim of restitutionalism is to make offenders become aware of the suffering they have caused, thereby instilling guilt and remorse within them. However, it may be seriously doubted whether this can be enough to bring about a positive change within offenders. (6) Undoing the harm done through crime: This objective is not pursued at all by retributivism - victims are completely disregarded. (7) Being economical: The punitive system of punishment does not approach this goal or strive towards it to any significant degree. Legal and penal costs are remarkably high and augmenting continuously in most Western countries, which have punitive legal systems based on retributivism. Retributivism consequently only fulfils two of the seven necessary conditions.

Since retributivism is incapable of furnishing a morally acceptable answer to the issue of how much to punish and does not pursue four of the five objectives I set out in Chapter 1, I conclude that the approach is insufficient on its own to morally justify punishment even though it gives us a channel for expressing our anger and indignation at the guilty. For this reason, the theory needs to be combined with other approaches. In the next chapter, I shall be preoccupied with utilitarianism since it promises to yield a solution to the question of how much or in what manner to punish. I shall argue, however, that the theory has severe shortcomings too and is insufficient on its own as a moral justification for punishment.

CHAPTER 4

UTILITARIANISM

4.1 INTRODUCTION

In the previous chapter, it was pointed out that retributivism is only able to justify our administering of punishment upon offenders, but is not able to determine the extent of punishment, nor is it able to take any mitigating factors into account since it is capable of operating only according to the principle of lex talionis. In this and the next chapter, an acceptable answer to the "how much to punish" issue is sought. Both chapters focus on deterrence. In this chapter, I focus on utilitarianism since it attempts to employ the notion of deterrence as its main justificatory tool. However, I shall argue that the utilitarian approach to punishment has serious moral flaws for reasons I shall enumerate and discuss. Nevertheless, the notion of deterrence as such can be defended and successfully employed for determining the extent and kind of punishment, but that shall be the focus of the next chapter. I shall now first present utilitarianism and indicate why I hold it to have morally untenable implications.

4.2 UTILITARIANISM'S DEFENCE OF PUNISHMENT

4.2.1 THE PRINCIPLE OF UTILITY

The term "utility" in philosophy refers to what is of use to human beings, or sometimes to all sentient creatures. Thus, it denotes what is good for humans - most frequently welfare. Cicero and Hume argued for its fundamental importance for ethics, but it was promoted by Bentham as the only end of

right action. For Bentham, utility means happiness or pleasure:

> By utility is meant that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness, (all this in the present case comes to the same thing) or (what comes again to the same thing) to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered: if that party be the community in general, then the happiness of the community: if a particular individual, then the happiness of that individual (Bentham 1996: 12).

Utilitarianism therefore is the doctrine that treats pleasure or desire satisfaction as the only good of morality:

> Of an action that is conformable to the principle of utility, one may always say either that it is one that ought to be done, or at least that it is not one that ought not to be done. One may say also, that it is right it should be done; at least that it is not wrong it should be done: that it is a right action; at least that it is not a wrong action. When thus interpreted, the words ought, and right and wrong, and others of that stamp, have a meaning: when otherwise, they have none (Bentham 1996: 13).

Bentham maintains that the principle of utility requires no proof because it is the fundamental principle of morality. He denies that it can have any direct proof, reasoning that that which is used to prove everything else cannot itself be proved, i.e. a chain of proofs must have their commencement somewhere (Bentham 1996: 13).

The main ethical element in contemporary utilitarianism is direct consequentialism - the view that rightness and goodness of any action, motive or political institution, depend entirely on the good of the overall state of affairs consequent upon it. Most direct (or act) utilitarians maintain that an act is morally obligatory if it yields better utility than any alternative available action open to the agent. If one believes that one should bring about the best

state of affairs possible, but believes, for instance, that equality rather than the quantity of *well being* is important for the attainment of overall goodness, then one may be a consequentialist, but then one is not a utilitarian. Utilitarianism is only interested in the overall quantity of happiness produced by an action. Some forms of consequentialism maintain that an action is not most desirable if it simultaneously causes maximum overall happiness and creates a grave imbalance. On the other hand though, if an action makes two persons very happy, but one very unhappy, ceteris paribus, act utilitarianism will maintain that the action is desirable, a position that may be denied by consequentialists. Some utilitarians reject direct consequentialism in favour of rule consequentialism, which maintains that the rightness of an action depends on the consequences of various sets of rules, rather than on the consequences of the action itself. Rule consequentialism thus maintains that we ought to follow that set of rules as a guide to our actions that will bring about the best overall outcome, rather than evaluating actions directly in terms of their own consequences, as direct consequentialism does.

Utilitarianism has a number of elements that, prima facie, make it attractive, most salient of which is the view that the actions of humans ought to be evaluated according to the value of their consequences, together with the belief that only this approach will enable us to evaluate moral actions rationally, objectively, and uncontaminated without any emotional bias, while any other theory is bound to be plagued with subjectivism and sentimentality. The difference between utilitarianism and Kant's moral theory is that, while both theories insist that an action be evaluated unemotionally and without subjective bias, the former determines the moral value of an action by focusing only on its results, the latter by focusing only on the intention connected with the action. Utilitarianism accordingly presents itself as a theory in

which all moral issues, and the moral worthiness of all actions, can be evaluated with the same simple principle, namely by merely attending to the consequences of the actions in question (Primoratz 1997: 15). In addition to this, because utilitarianism counts each person as equal, agent and subject alike, a balance between the interests of the agent and others is attained. "This theory thus transcends the conflict between egoism and altruism, individualism and collectivism, and provides a solid foundation for social ethics and political and legal philosophy" (Primoratz 1997: 16).

The utilitarian theory of punishment is the mere result of applying utilitarianism as a general ethical theory to the moral problem of punishment. This implies that punishment is good, or held to be justified, if it brings about maximum overall utility. Therefore it may be expected that whatever is an advantage to the former will also be an advantage to the latter. As already mentioned, two main questions need to be answered when justifying punishment: (1) Whom may we punish, i.e. what justifies one's inflicting pain or suffering upon others on account of their past behaviour? And (2) how and to what extent may we punish, i.e. is there a general principle by which the proper amount of punishment can be determined for each offence? In answering the first question, exceptions also need to be addressed, i.e. what kind of defence should excuse one from punishment? In applying utilitarianism, it must be established under which conditions of applying punishment greatest overall utility would not be attained.

Utilitarianism asserts the normative principle that an action or policy is right insofar as it promotes the greatest happiness or *well being* of everyone in question. By this principle, punishment is justified insofar as it improves the *well being* of society in general by discouraging potential offenders from committing crimes. This is because it

incapacitates offenders, discourages them from committing the same crimes again, and deters others:

> The immediate principal end of punishment is to control action. This action is either that of the offender, or of others: that of the offender it controls by its influence, either on his will, in which case it is said to operate in the way of reformation; or on his physical power, in which case it is said to operate by disablement: that of others it can influence no otherwise than by its influence over their wills; in which case it is said to operate in the way of example (Bentham 1996: 158).

The most comprehensive theory of punishment established with adherence to the utilitarian theory is the one by Bentham. He considered all the desirable effects of punishment, proceeding to more specific questions, such as what the appropriate limits of punishment are, how severely it ought to be administered, and what its desirable traits are. In his *Introduction to the Principles of Morals and Legislation*, Bentham announces this principle and points out its psychological foundations:

> Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it. In words a man may pretend to abjure their empire: but in reality he will remain subject to it all the while. The principle of utility recognises this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law. Systems which attempt to question it, deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light (Bentham 1996: 11).

Utility may thus be seen as that which brings about advantage, pleasure, good, or happiness (Bentham 1996: 12). Simplified

it may be seen as a striving towards the reduction of mischief, unhappiness, pain, or evil. The principle of utility thus approves of any action that increases happiness and disapproves of any action that decreases it. For this reason, the principle of utility is also called the "general happiness principle" (Bentham 1996: 11). The roots of utilitarianism are evident in Ancient Greek philosophy, exemplified by the following showing that its entailment is not foreign to Aristotle's moral philosophy:

> Now there do appear to be several ends at which our actions aim... it is clear that not all of them are final ends; whereas the supreme good seems to be something final. Consequently if there be some one thing which alone is a final end, this thing ... will be the good which we are seeking. ... a thing chosen always as an end and never as a means we call absolutely final. Now happiness above all else appears to be absolutely final in this sense, since we always choose it for its own sake and never as a means to something else ... (Aristotle 1999: 27-29).

The utility, pleasure, and happiness referred to are those of all persons affected by the consequences of the action. By "action" is not only meant the action of an individual, or individuals, but also actions taken by governments, laws, and any social rule. Bentham believes, however, that all these actions can be understood in terms of the actions of individuals. The principle of utility is thus the fundamental principle of morality, as well as the fundamental principle of legal and political institutions. Thus, whatever is judged morally must be evaluated in terms of the principle of utility and nothing can therefore be said to be good or bad intrinsically:

> No actions are intrinsically right or wrong, obligatory or prohibited; no motives or dispositions are good or bad in themselves - it is only their consequences with regard to pleasure and pain,

happiness and misery, that give them their moral status (Bentham 1960: 127).

4.2.2 THE OBJECTIVES OF PUNISHMENT

Punishment is the infliction of pain or harm on an offender, and hence, according to the principle of utility, must be an evil. If it ought to be administered, this ought to be done only if the evil thereby inflicted is outweighed by a greater benefit (Bentham 1996: 163).

Utilitarians defending a theory of punishment generally find their rationale in three main claims:

(1) Potential offenders, those tempted to break the law, can usually be dissuaded from doing so by the threat of punishment.
(2) Punishment is instructive; it gives malefactors a lesson, resulting in an improvement of their characters, reducing the likelihood that they will offend again.
(3) The utility of imprisonment is that it incapacitates offenders, preventing them from offending again during the time of their confinement.

The consequences that should serve as the justification for the practice of punishment, as well as its institutions, according to utilitarianism, may consequently broadly be identified as (1) incapacitation, which may be temporary (as in a prison term) or permanent (as in life imprisonment or capital punishment); and (2) deterrence (particular and general).

Suppose X is guilty of a felony for which he is sentenced to a lengthy prison term. For the time of his confinement, X is incapable of committing a similar offence again (incapacitation). Since the pain and discomfort X experiences

through his imprisonment ought to persuade him that he should never commit a similar offence again in order never to be liable for a repetition of the punishment, punishment has a deterrent effect on him even once he leaves prison (particular deterrence). But he also serves as an example to others. Potential offenders, those contemplating a similar offence to X, are often deterred from committing a crime because they fear that they will suffer the same punishment that was or is administered to him (general deterrence).

The utilitarian theory of punishment looks wholly to the future because its only aim is to prevent future suffering. Furthermore, the offence has directly affected only the victim, while similar offences in the future can affect anyone. Then while the evil of the offence often cannot be rectified, those of the future can always be prevented. Therefore, the prevention of future offences is the objective of punishment, as well as its justification:

> If we could consider an offence which has been committed as an isolated fact, the like of which would never recur, punishment would be useless. It would only be adding one evil to another. But when we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent, but also to all those who may have the same motives and opportunities for entering upon it, we perceive that the punishment inflicted on the individual becomes a source of security to all. That punishment which, considered in itself, appeared base and repugnant to all generous sentiments, is elevated to the first rank of benefits, when it is regarded not as an act of wrath or of vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations, but as an indispensable sacrifice to the common safety (Bentham 1962: 396).

While retributivism looks back towards the crime and the responsibility of an offender, deterrence theory looks forward to discouragement of further violations of the law.

Utilitarians therefore justify a state's having a system of laws and enforcing them, punishing violations in order to

maximise utility. Punishment, however, is itself an evil and should be avoided whenever this is consistent with the general good. Offenders are not to be punished for their own sake but are to be punished for offences they committed in the past as a way of maximising utility.

Bentham (1962: 396) believes that all actions are the outcomes of rational deliberation, each person weighing the advantages and disadvantages to determine maximum utility. This analysis of the motivation of a potential offender is extremely rationalistic. May we not accuse Bentham of oversimplifying the matter? Can we plausibly hold that every offender calculates rationally before committing an offence, carefully weighing the pleasures against the harms and then deciding how to act merely upon the result of this calculation? We know that many crimes are motivated by irrational factors, being driven by passions and prejudice. Bentham is aware of this objection, but finds it unconvincing. He believes that all persons calculate, especially when deciding between the options of pleasure and pain:

> ... and as to the proposition that passion does not calculate, this like most of these very general and oracular propositions, is not true. When matters of such importance as pain and pleasure are at stake, and these in the highest degree (the only matters, in short, that can be of importance) who is there that does not calculate? Men calculate, some with less exactness, indeed, some with more: but all men calculate. I would not say, that even a madman does not calculate. Passion calculates, more or less, in every man: in different men, according to the warmth or coolness of their dispositions: according to the firmness or irritability of their minds: according to the nature of the motives by which they are acted upon (Bentham 1996: 173-174).

Bentham sees the prevention of crime as the most important objective of punishment in the sense that the punished offender is only one person, while there are many that may commit similar offences in the future. He thus sees general

prevention as more important than particular prevention, and therefore also as the primary justification of punishment (Bentham 1962: 396).

According to this view, punishment can give satisfaction too. This may take one of two forms, either by compensation or vindictive satisfaction. Punishment is devisable in such a manner that it provides material compensation to the victim. Needless to add, this is not always possible. Nevertheless, Bentham considers it an important form of satisfaction since it can often be applied. Furthermore, vindictive satisfaction can assume numerous forms in that it can be any pain or discomfort inflicted on offenders and so can be not only satisfaction for their victims, but also for anyone else experiencing anger and indignation at offenders and wanting them punished:

> It is not vengeance which is to be regarded as the most malignant and dangerous passion of the human heart; it is antipathy, it is intolerance - the hatreds of pride, of prejudice, of religion, of politics. The enmity which is dangerous is not that which is well founded, but that which springs up without any substantial cause (Bentham 1960: 309).

Bentham regards this motive as not only useful to the individual, but also to the public, and considers it to be necessary because he believes that this vindictive satisfaction motivates accusers and witnesses to come forward, even though they may experience financial costs and other disadvantages by doing so:

> Take away this resource, and the power of the laws will be very limited; or, at all events, the tribunals will not obtain assistance, except for money - a means not only burdensome to society, but exposed to other very serious objections (Bentham 1960: 309).

When administering punishment, according to utilitarianism, we ought therefore not only to take its deterrent value, or

compensatory function, into consideration, where appropriate, but ought also to respect society's right to express anger and indignation at offenders. I argued in the previous chapter that retributivism is required too for a comprehensive theory of punishment because it allows society to express its anger and indignation at offenders. If utilitarianism also fulfils this condition, one might ask why we need retributivism at all. Though both theories endorse this condition, I shall argue that utilitarianism is not able to answer the question of whom we are justified in punishing because it does not operate with the common conception of justice and makes too many exceptions (4.3.3). By making too many exceptions, utilitarianism does not allow punishment to serve as a recognised channel through which society can express its anger and indignation at offenders, therefore this objective must be covered by retributivism.

Bentham insists, however, that the latter function of punishment ought not to be permitted to augment the extent of punishment beyond what is required by general and particular deterrence. Primoratz states it as follows:

> No penalty is to be meted out or made more severe for the purpose of satisfying the pleasure of vengefulness. Such pleasure, however great in itself, is always outweighed by the suffering which causes it (Primoratz 1997: 22).

4.2.3 THE LIMITS OF PUNISHMENT

If the ends of punishment simultaneously serve as its justification (punishment is justified because it pursues those ends, the same ends determining the limits of punishment), it follows that it is unjustified when those ends cannot be attained by punishing, or when they cannot be realised rationally and economically, or when an alternative, less harmful method is available for attaining the same ends.

Punishment ought never to be inefficacious, groundless, unprofitable or unnecessary (Bentham 1996: 159).

For Bentham, punishment is groundless when there is no utilitarian reason for applying it, i.e. when there is no harm to be prevented. It is also groundless when the action in question generally causes harm, but in the case in question has not done so because the persons to whom it was done voluntarily consented to it. Punishment is also groundless when the action was necessary to secure a great good or prevent a greater evil (Bentham 1996: 188).

Utilitarians also hold that punishments that are administered in response to unconscious or unintentional violations of law, or retroactive laws, are inefficacious and ought not to be administered. The same holds for punishment of irresponsible persons (such as children), persons under the influence of alcohol, and insane individuals. Punishment of such individuals would have neither a function of particular deterrence, nor of general deterrence (Bentham 1996: 160-161).

They also argue that punishment is unprofitable when the evil it inflicts is greater than the evil it prevents. For instance, when a community, such as a foreign country, would be enraged by its administration, or when guilty persons could greatly benefit society if they were not punished (Bentham 1996: 163-164).

It also follows that punishment ought not to be administered if it is unnecessary because the same desired result could be achieved by some other, less offensive means, such as through rehabilitation, social policy, or education.

Bentham holds that it is logically possible for punishment to be administered upon an innocent person, i.e. the guilty person and the person punished need not necessarily be the same person, provided such punishment fulfils the principle of greatest happiness. However, the question is, even if it is permissible for utilitarians, can we justify such an action? An important distinction lies between avoidable and

unavoidable punishment. By "unavoidable" is not meant "absolutely unavoidable," but only unavoidable without thereby producing a greater evil; the distinction is therefore actually between unprofitable and profitable punishment. For Bentham, punishment of the innocent is unjustified when it is unprofitable. It is unjustified because it is unnecessary and groundless. When punishment of the innocent yields the best consequences, however, it ought, according to Bentham, to be administered. Faced with the objection that this is a violation of one of the most fundamental and universally recognised principles of justice, Bentham responds undeterred that this principle is frequently referred to but never convincingly argued for, and cannot stand up to the lucid principle of utility on which his theory of punishment is based (Bentham 1962: 476). Punishment is justified, of innocent and guilty alike, when it yields beneficial results and unjustified when it yields harmful ones.

When would punishment of the innocent be beneficial? For Bentham, when the identity of the offender is known, punishment of the innocent is unnecessary and ought not to be administered since that would be an unnecessary infliction of harm. When it cannot be established who the real offender is, and when refraining from punishing would not yield greatest utility, then punishment ought to be administered, even if this means punishing the innocent. Collective punishment is a form of punishing the innocent that has to be endorsed by Bentham, should there be no reliable means of determining which individual is to blame and when this would further utility (Primoratz 1997: 26).

4.2.4 THE MEASURE OF PUNISHMENT

For the utilitarian, the measure of punishment is established by finding a balance between the good consequences achieved by

punishment and the evil thereby inflicted. This entails three main elements:

(1) Punishment must be severe enough to serve as an appropriate deterrent. In order to do so, the pain of punishment must outweigh the benefits attained through the crime. The lower limit of punishment is thereby established, a limit below which crime would become inefficient because it would no longer deter adequately.[1] In order to do so, punishment must increase in proportion to the temptation to commit the crime (Bentham 1996: 167). This utilitarian stipulation is in contrast to some other theories that hold that the more temptation was involved in committing a crime, the less the punishment ought to be. But Bentham (1996: 142; 166-168) maintains that to hold such a view is to have an irrational assessment of punishment because applying this view in practice would diminish punishment's efficacy.

(2) The more severe an offence is, the more severe its punishment ought to be. This may be interpreted as an expression of proportionality.

(3) Punishment should not be harsher than is required for the realisation of its objectives. This rule therefore establishes the upper limit of punishment (Bentham 1996: 175; Bentham 1962: 400).

Bentham also maintains that rich persons should be punished more severely than poor ones. This would presumably only be applicable for monetary fines since a prison-term of ten years would presumably be equally severe for both, while a specific monetary fine would be disproportionate punishment

[1] Van den Haag (1997: 530-531) argues that although we do not know with absolute certainty whether capital punishment deters, its greater severity still gives us reason to assume more deterrence from it. He places the burden of proof on abolitionists to show why the greater severity of capital punishment should not have greater deterrence. By contrast, R. J. M. Costanzo (1997: 95-112) provides much evidence that the death penalty does not deter potential murderers and gives reasons why this is so. This indicates that it is not the case that the most severe punishment has greatest deterrent value.

since the rich person would comply with relative ease compared to the poor person (Brandt 1997: 514).

4.2.5 THE PROPERTIES OF PUNISHMENT

Three of the most important properties of punishment mentioned by Bentham are exemplarity, popularity, and remissibility. I shall discuss each briefly.

(1) The exemplary nature of punishment depends on the fact that it has both a real and an apparent value. The former is the actual pain and discomfort imposed on an offender, and the latter is the pain and discomfort imagined by others. Deterrence, the main function of punishment, is achieved by the apparent value. Punishment that had no apparent value, only real value, would serve no real purpose, it would only be an infliction of suffering upon the offender, and hence it would be unjustified. Beyond the satisfaction attained through real punishment, maintains Bentham, it ought only to be inflicted insofar as it maximises its apparent value. Any real punishment inflicted beyond what is necessary to achieve the desired apparent value is unnecessary and a needless infliction of suffering:

> If delinquents were constantly punished for their offences, and nobody else knew of it, it is evident that, excepting the inconsiderable benefit which might result in the way of disablement, or reformation, there would be a great deal of mischief done, and not the least particle of good. The real punishment would be as great as ever, and the apparent would be nothing. The punishment would befall every offender as an unforeseen evil. It would never have been present to his mind to deter him from the commission of crime. It would serve as an example to no one (Bentham 1962: 398-399).

Punishment should thus always be as exemplary as possible; its apparent value should be as great as possible. This is most easily achieved by increasing the real value, but can also be

achieved by carefully choosing the type of punishment, or by ritualising it in order to make huge impressions on the minds of spectators:

> The real punishment ought to be as small, and the apparent punishment as great as possible. If hanging a man in effigy would produce the same salutary impression of terror upon the minds of the people, it would be folly or cruelty ever to hang a man in person (Bentham 1962: 398).

(2) Punishment should be popular, or at least not unpopular in the sense that unpopular punishment would be unnecessary inflictions of suffering upon innocent persons because the punishment cannot be reconciled with the community's moral or religious beliefs, its feelings, or traditions. Unpopular punishment may have the undesirable effect of weakening the institutions of justice - people becoming reluctant to come forward to press charges or bear witness, or even actively working against the institutions. Bentham concedes that this is more a property of the people, rather than of the punishment, but he nevertheless insists that it should be considered (Bentham 1962: 308).

(3) Punishment should be remissible because the institutions of punishment are fallible. Occasionally a person is punished who should not have been. In such cases, reparation should be possible. However, Bentham does not hold, as we have seen, that punishment of the innocent is impermissible, therefore this is not the reason why it should be remissible. The concern is rather that an offender may be punished without any overall positive consequence.

4.3 EVALUATING THE UTILITARIAN APPROACH TO PUNISHMENT

In this section, the utilitarian approach will be critically evaluated. I shall argue that utilitarianism cannot be rejected by appealing to practical consequences of the theory

(i.e. empirical findings cannot conclusively dismiss utilitarianism) or by criticising the theory for endorsing suffering. However, I shall argue that utilitarianism is morally unacceptable because it does not operate with the notion of desert and hence does not operate with the commonly held conception of justice. Act utilitarianism is also morally unacceptable because it endorses punishment of the innocent when doing so is utility maximising. Rule utilitarianism, however, cannot be said to endorse punishment of the innocent because it would have overall adverse consequences in the long-term, such as undermining authority of the legal institutions.

4.3.1 THE UTILITARIAN APPROACH AND EMPIRICAL FINDINGS

Given the aims of the utilitarian theory of punishment, it makes sense to ask whether the empirical conceptions underlying this approach to punishment are sound. According to the theory, punishment is justified because it brings about a reduction in crime, i.e. the evil of punishment reduces the evil of crime. It does not say that crime is eradicated completely; nevertheless, it significantly reduces its overall rate. Is this assumption correct? There are many instances in which a high degree of punishing, even severe punishing, is accompanied by a high level of crime and vice versa. The differences may be seen in the United States of America and European Union countries. The former has a much greater prison population with generally severer penalties than the latter, and despite this, the United States has a far greater crime rate, indicating that punishment does not have a significant deterrent effect. Utilitarianism therefore faces the charge that punishment is not useful, that it is not beneficial, and in fact does not have utilitarian value (Primoratz 1997: 33).

Utilitarians may respond that this does not refute their theory because for them, if punishment does not have beneficial consequences, then it has no justification. This means that if it would have no utilitarian justification, then utilitarians would have to reject any form of punishment, and thereby become abolitionists, if they wish to be consistent. The only justification that can be given, utilitarians will insist, is that punishment should be beneficial; hence, it should bring about a reduction in crime, or curb a rise in crime if refusing to punish would increase the level of crime.

Regarding exemption from punishment, it may be pointed out that Bentham neglects to show that failing to punish normal offenders would markedly decrease the overall well being, while exempting persons under the conditions mentioned above would only do so to a negligible degree. Critics may argue that utilitarianism ought to excuse no one in order to maximise the deterrent effect regarding a given behaviour.[2] In defence, the utilitarian responds that the intoxicated, the insane and the like, are not likely to be deterred by punishment. One does not maximise utility by eliminating the traditional excuses, therefore the theory is not threatened or weakened by them.

Regarding the claim that utilitarianism ought not to consider mitigating factors when punishing, utilitarians answer by pointing to the fact that persons acting impulsively, rather than with premeditation, do not consider the penalties connected to their behaviour. They would therefore not be deterred by more stringent laws. Such persons are also not likely to repeat the offence, so a mild sentence saves a good person for society. Giving milder sentences to those offenders who have had fewer opportunities

[2] Richard Brandt (1993: 348-353) reviews the main concepts and principles of criminal law. After comparing moral and legal obligation, he carefully distinguishes between different kinds of legal justifications and excuses and goes on to explore the ways legal guilt and moral reprehensibility can diverge.

in life is also a way of increasing the good by decreasing the imbalance.

4.3.2 WHY UTILITARIANISM ENDORSES SOME SUFFERING

If we attempt a criticism of deterrence theory by questioning its utilitarian basis, by pointing out that suffering is bad in itself, and punishment is the deliberate infliction of suffering, therefore the suffering of offenders ought not to be added to that of their victims, utilitarians have a ready answer: *utilitarianism demands only that punishment ought not to inflict more suffering than it prevents*. Although Bentham regards all punishment as mischief, he maintains that it is justified if it avoids a greater evil. By reform, by deterrence, by incapacitation, the evils of failing to punish are outweighed by punishment (Benn 1985: 11). Bentham puts it as follows:

> But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil (Bentham 1996: 158).

4.3.3 UTILITARIANISM AND JUSTICE

A strong objection that may be made against the utilitarian theory of punishment is that, in contrast to retributivism, it does not see punishment as something deserved and hence *does not employ the concept of justice*. Justice implies responsibility. In a normal sense, not in a moral or legal sense, we maintain that persons could have acted otherwise if (1) they had the ability to do so, and (2) they had the opportunity to do so. If A represents her country in chess, she can be described as having the ability to do so, even if she performed poorly on a given occasion. B may have the opportunity to do so if she were chosen for the national team,

even if she did not actually have the required expertise to play at that level. Being responsible for a crime, however, entails more than this, it employs the term "responsibility" in a different manner. Being responsible for a crime entails having a guilty mind. A guilty mind, "*mens rea*," is said to contain three conditions: (1) knowledge of circumstances, (2) foresight of consequences, and (3) voluntariness (Sterba 1997: 501). Assume one has a gun in his hand and has been told that the gun is not loaded. Assume he himself had verified only a short while ago that it is in fact not loaded. He pulls the trigger, unaware that in the meantime someone has loaded the gun. A bystander is injured. One cannot be said to have had knowledge of circumstances. If one knew that the gun was loaded, but failed to realise that one could kill or injure someone by firing into the air, one cannot be said to have had adequate foresight. Finally, if one is forced to pull the trigger by external coercion while the gun is aimed at a person, one cannot be judged to have acted voluntarily. Under such conditions, one would be excused from blame on the grounds of not having a guilty mind. Of course, in the first two cases, one may be charged with negligence, but that is another matter.[3] *Persons are morally responsible if, and only if, they acted freely, that is, if they acted as free and responsible agents.* This is not at all foreign to our Western justice systems. In order to find persons guilty, it must be established whether they acted freely, whether their action was one of choice. A person freely transgressing the law may

[3] Negligence alone does not establish legal liability. To be legally liable for one's conduct, one's actions must cause the harms of the other person. Stated differently, there must be a close causal connection between the conduct and the resulting injury. However, identifying the cause of a result is not always easy. When can we say that our actions have led to a certain consequence? When is the causal connection between our conduct and the injurious result close enough to establish legal liability? It is often maintained that the action must be the proximate cause of the injury. However, this only raises the further question, what constitutes proximate cause? Brody (1993: 416-420) examines causation in this respect.

be punished (Primoratz 1997: 34).[4] Aristotle states it as follows:

> But the term "involuntary" does not really apply to an action when the agent is ignorant of his true interests. The ignorance that makes an act blameworthy is not ignorance displayed in moral choice ... it is not general ignorance ... but particular ignorance, ignorance of the circumstances of the act and of the things affected by it; for in this case the act is pitied and forgiven, because he who acts in ignorance of any of these circumstances is an involuntary agent (Aristotle 1999: 125).[5]

For the utilitarian, the object of the offence is wholly uninteresting since the only issue that matters is the consequences of punishing. Accordingly, punishment becomes a mere means of attaining the objectives of society. Utilitarianism does not see individuals as free, responsible agents, but merely as entities that may be manipulated for the common good (Primoratz 1997: 35).

Bentham believes that mentally ill persons ought not to be punished, but not because they deserve some other treatment, such as therapy, as we generally hold, but because it would have no deterrent value and therefore would bring no benefit. The insane generally do not have the mental capability for being susceptible to deterrence by punishment; therefore, they should not be punished. I agree with Primoratz (1997: 39-40) who points out that this explanation is not convincing. It is correct to assume that we cannot deter other mentally ill offenders from committing similar offences by punishing mentally ill individuals; nevertheless, doing so may be effective in the sense that it may have a strong deterrent

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[4] For an interesting treatment regarding the nature of intention, and the different kinds of it (a criminal action done with direct intention; an action done with a further criminal intention; and simple intention), as well as the distinction between direct and oblique intentions recognised by many legal systems, see Hart (1993: 353-362), where Hart deals with the place of intention in the criminal law. For the purpose of my argument, it is sufficient that intention be dealt with in its general broad sense.

[5] For an elaboration of Aristotle's views regarding under which conditions a person is not considered blameable, see Aristotle (1999: 125-129).

affect upon other normal potential offenders. Offenders could not base their hopes upon the insanity defence by simulating mental illness if it were abolished. The utilitarian may respond that punishment of the mentally ill would have overall adverse consequences because it would bring about an unfavourable attitude within the general community because one generally believes that those who are mentally ill in such a way that they do not have their criminal behaviour under voluntary control ought not to be punished. If they would be punished, the legal institutions would become disrespectful, thereby undermining their authority and effectiveness because persons would become less willing to co-operate with them. This defence, as Primoratz points out, is morally unsatisfactory. We do not disapprove of punishing the mentally ill because it would enrage the public, but because it would not be just. We would object to such punishment even if the community were wholly in favour of it. The utilitarian may attempt another defence by arguing that if a criterion could be found with which to reliably distinguish between normality and mental illness, then the problem of the insanity defence would not arise, but since we do not have such a lucid criterion, the distinction between punishment of mentally ill offenders and normal ones is not as obvious as assumed. However, this is not strictly correct as we do have some criteria and we do use them. This attempt to defend the position can be seen as just a desperate attempt to evade the problem since there are indeed generally recognised methods and procedures for determining the mental state of an accused individual. These may not be infallible, but they are the best available.[6]

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[6] Thomas Aquinas held the natural law position that only a just law is a law - *lex iniustia non est lex* (1993: 69-75). He first provides a definition of law and then describes the four types and their interrelationships. He believes, as does Aristotle, that each being has its natural purpose or end and that fulfilling that purpose defines its good. Norman Kretzmann (1995: 7-19) examines Aquinas's arguments, and his motives for adopting this doctrine.

Withholding punishment because it would not serve overall utility is not only advocated by utilitarians for mentally ill individuals, as we saw; punishment would also not be administered when it would be offensive to a community or to a foreign power, or when the offenders could do more good for society if they were not punished. Offenders ought also not to be punished, according to utilitarianism, if they were intoxicated, were minors when committing the offence since they were incapable of foreseeing the consequences of their actions. Bentham also argues that offenders ought to be exempted from punishment if the crime was committed under physical compulsion, if the agents were ignorant of the possible consequences of their behaviour, if they innocently misapprehended the facts, or if the motivation to commit the offence was so strong as to preclude any possibility of the threat of law deterring them from the crime. Furthermore, Bentham believes that punishment should be remitted if the crime was a collective one and the total punishment of all offenders would be a greater disutility than that of the crime. The utilitarian also holds that punishment is unjustified when the apparent value of punishment could be achieved without actually punishing an offender (Primoratz 1997: 42). In all these cases, the utilitarian does not hold that punishment ought not to be administered because it would be undeserved, but because it would not serve the interests of utility.

Before addressing the question of whether utilitarianism provides us with an adequate answer to the question of how and in what measure we may punish (4.4), it may be noted that utilitarianism does not satisfactorily answer the question of whom we may punish because it does not employ the notion of desert. It makes too many exceptions in which punishment ought not to be administered, such as when it would not outweigh the harms done through punishment, even though the person in question may be guilty and hence deserve to be

punished. Utilitarianism does not address the need of society that punishment ought to serve as a recognised channel through which society can express its anger and indignation at offenders. This need is hence addressed by the retributive element in my theory.

4.3.4 UTILITARIANISM AND PUNISHING THE INNOCENT

Utilitarianism is often attacked for allegedly endorsing punishment of the innocent. In this subsection, I shall examine whether punishment of the innocent is always morally unacceptable and answer the question whether utilitarianism does indeed endorse punishment of the innocent.

Punishing a single scapegoat may sometimes seem efficacious. Would utilitarianism not be committed to punishing in such cases? Imagine, for instance, that the crime rate in a society has risen sharply, and confidence in the police and the legal institutions has drastically deteriorated due to incompetence of the police. The only solution to this unwelcome state of affairs and the only way of preventing many offences from being committed, which they almost certainly would if drastic measures were not adopted, would be to punish someone. The measure would prevent many otherwise committed crimes and with the right kind of publicity would restore a great deal of confidence in the police and the legal institutions. However, because the police are so incompetent, they lack the opportunity to convict a guilty person. They have once again mistakenly arrested innocent persons. Releasing them would be the just thing to do, but it would also do a great deal of social good to make a conviction. The convictions would have bad consequences for the convicted, but overwhelmingly good consequences for society (Primoratz 1997: 43). From the utilitarian perspective, it would be morally prohibited to release them, and obligatory to convict them. Primoratz

(1997: 44) claims that seen from a utilitarian perspective, even for the innocently arrested persons, it would be morally obligatory to cooperate in their own convictions, since that would bring about the most overall good by restoring confidence in the legal system.

Michael Clark convincingly argues that punishing the innocent would undermine our autonomy because if the state would adopt the practice of punishing innocent persons, we may be subjected to crime by the state too. He believes that it would undermine our autonomy because we could not plan our lives confidently because we could not be sure that penal sanctions would not interfere with our plans even if we took care not to break any law. Under a system in which punishment of innocent persons is accepted (at least under some conditions), morally innocent persons punished vicariously, or as part of a collective penalty, would have no case against the state (Clark 1997: 31). To quote Clark:

> Freedom from unfair sanctions imposed by officials of the state has a special value for us: if we tolerated unjust penal sanctions we would not be accorded respect as people even by those who were, in a decent regime, otherwise honest, trustworthy and acting officially in the public interest. We shall always be at risk from criminal elements, but if we were unjustly at risk from the state as well, we should be liable to be treated as means by anyone. Respecting the constraint on distribution is not a matter of maximising overall autonomy, since it may expose us to more crime; but if it does, it is the criminal offenders, not the state, who are primarily responsible for it. The state would not be responsible for the extra crime in the way it would be responsible if it punished personally innocent people (Clark 1997: 31-32).[7]

[7] J. McCloskey (1993: 253-261) provides an alarming estimate of how frequently innocent persons are convicted in the United States of America. He estimates that at least one in ten of those convicted of serious and violent crimes is completely innocent. He investigates seven causes of wrongful conviction, namely: presumption of guilt, perjury by police, false witnesses for the prosecution, prosecutorial misconduct, shoddy police work, incompetent defence council, and the nature of conflicting evidence.

Autonomy is something that concerns Bentham, however. He contends that punishment should not be administered if the relevant law had been passed *after* the offence was committed, or if the law had not been made public because we could never be confident of regulating our conduct in any way if retroactive laws may make us liable for punishment in future.

The question may still be posed, why should autonomy take precedence over social safety? We hold it appropriate, for instance, to lock up the insane and quarantine the infectious in order to protect society. The simple answer is that the innocent do not endanger society as the insane or infectious do. "The innocent, unlike the infectious and some of the insane, are not threats to others" by their own volitions (Clark 1997: 32).

What could we say if utilitarians tried to defend themselves against the above example by arguing that a theory ought to be evaluated and tested against actual cases, not against highly improbable hypothetical situations? To this we may respond that the example above is not merely a hypothetical example - many actual instances can be given in which innocent persons were deliberately convicted and punished. (I shall provide historical examples shortly.) Staying with the charge of hypothetical examples for the moment, however, we may respond that even if this were only a hypothetical example, it would still have relevance because when evaluating an ethical theory, not only actual cases may be examined, one ought also to test all logical possibilities. Pertaining to utilitarianism, and despite the protests of utilitarians, it is not illogical that punishment of the innocent could become highly desirable, in which case utilitarianism would be committed to it (Primoratz 1997: 45).

If we remain with actual historical examples, we still find sufficient evidence in which innocent persons have been convicted for the "good" of society:

> In our century - to go back no farther in time - the trials in Moscow in the thirties, or in Budapest in 1949, or in Prague in 1952 gave eloquent proof of this.
> At these trials, people who had devoted their entire lives to the revolution were condemned as counter-revolutionary conspirators; people who had done nothing against their country but, on the contrary, had always been patriots, were denounced as foreign spies. Besides these standard accusations, in Budapest and Prague the accused were punished, equally without grounds, as "Titoists" and "Zionists."...
> ... It is reasonable to presume, however, that at least some of the leading actors in these trials, at least some of those who initiated the trials ... organized the entire business because they believed that these trials were politically necessary, and acted with a perfectly clear conscience, in the conviction that what they were doing was morally justified. With respect to false confessions and repentances of the accused, one can reasonably claim, on the basis of what has been learned about these trials so far ... that many of the accused made these confessions because ... it was their moral duty to do so...
> The ethical standpoint which led the one and the other to reach such a conclusion was a variant of utilitarianism widespread in our century, which is best described as "revolutionary Machiavellianism" (Primoratz 1997: 49-50).

The utilitarian may retort that those trials were not really justified, doing more harm than good because the truth did come out and undermined the respect people had of the legal systems of those countries. We may grant this, but the fact that the organizers of the trials believed them to be in the best interest gave them a subjective justification at the time. If the trials would have had overall beneficial consequences, would we hold that they were morally fully justified? We would not because they would not accord with our commonly held conception of justice, which rests on guilt and desert.

Primoratz (1997: 52) mentions that utilitarians have attempted a rebuttal of the argument against punishing the innocent by pointing out that punishment is by definition a

hardship inflicted upon an offender. They claim that since innocent persons cannot be termed "offenders," punishment of the innocent is logically impossible. In response, we may say that this line of argument fails to distinguish between "punishment" and "deserved punishment." Guilt is not a necessary condition for a practice to count as punishment and no contradiction is involved in asserting that someone was punished for something they did not do.

Juridically, however, there is a connection between punishment and guilt. We would find it extremely odd if a judge sentenced a person, but added that the accused was actually innocent. This shows that (even if it is not necessary) there is indeed a connection between guilt and punishment. The connection lies in the fact that we believe persons ought only to be punished if they are guilty. This is a different point from the conceptual one, which is independent of what we believe. Aristotle explains it as follows:

> ... if a judge has given an unfair judgement in ignorance, he is not guilty of injustice, nor is the justice unjust, in the legal sense of justice (though the judgement is unjust in one sense, for legal justice is different from justice in the primary sense), yet if he knowingly gives an unjust judgement, he is himself taking more than his share, either of favour or of vengeance. Hence a judge who gives an unjust judgement for these motives takes more than his due just as much as if he shared the proceeds of the injustice (Aristotle 1999: 311).

This does not rule out any possibility of judicial error, but merely shows that unintentional punishment of the innocent is possible, although intentional punishment of the innocent is not held to be possible. If we do not call intentional conviction and punishment of innocent persons "punishment" then we would have to call it something else, "deliberate institutionalised victimisation of the innocent" perhaps.

This does not bring us any further since it is just changing the term with which we describe the phenomenon under discussion.

What would we say if utilitarians challenged us by saying that if their theory would sometimes endorse punishment of the innocent, then it would be in justified situations? What if they challenged us by asking whether we would never endorse punishment of the innocent?

In order to answer this question, let us first examine what it is to test an ethical theory. Testing an ethical theory entails examining its fundamental moral principle. Such a principle, being fundamental, cannot be deduced from other moral principles, nor can it be criticised for not having been deduced in such a manner. Such a principle will almost invariably be very general. It will hardly ever appear unacceptable, *prima facie*. The Golden Rule, or the categorical imperative, does not seem to raise any objections at the outset. Maximizing the good and minimizing the bad seem equally appealing. However, in order to establish whether we can live by such a principle, its contents must be more closely examined and tested. The contents of a moral principle are the implications it has for the lives of individuals and for society in various situations. So to evaluate the implications, one must consider one's emotions, attitudes and thoughts that arise in the pre-theoretical evaluation of the situation. This is not to say that our emotions, attitudes and thoughts are infallible. Certainly, they can and sometimes need to be revised. This becomes necessary when they are inconsistent, or contradict another principle we already accept (Primoratz 1997: 57). It is not unreasonable to suggest that most people would find punishment of the innocent, even if this would have overall beneficial consequences, both counterintuitive and morally unacceptable (Primoratz 1997: 58).

Fundamental principles sometimes conflict, leaving us no way in which to satisfy both, in which case we have to choose between them. Our choice depends on the situation, however. If we were to be asked by a utilitarian, whether we would never endorse punishment of the innocent, the answer would have to be that the case is not that simple. If a person is faced with punishing an innocent person to secure some good for society, we usually hold it to be wrong. However, a much worse situation can be imagined. If the choice is punishing an innocent person or destroying a whole nation, such as when a small country is seriously threatened with total destruction by a big nuclear power if the former does not hand over a specific person whom the small country holds to be innocent, we would endorse punishment of the innocent. The reason may lie in the absolute irremissibility of the destruction of an entire nation. No good could ever be done towards that nation again. In the case in which punishment of the innocent is accepted to halt a crime wave, this is not the case. A crime wave does not completely destroy and a more appropriate solution may be found in the future. Perhaps this must be our conclusion - perhaps our conclusion depends on the degree of harm threatened. It seems that punishment of the innocent is only justified if the consequences of not doing so result in the total destruction or permanent harm of a community or society. The difference between this stance and that of act utilitarianism is clearly distinguishable. Act utilitarianism would endorse punishment of an innocent person even just to save two other persons: it would endorse it even just to do more good than harm.

The prohibition against punishment of the innocent should therefore be seen as a fundamental moral principle, but not an absolute one. Perhaps morality should be seen as having a plurality of fundamental moral principles. This example illustrates that morality does not have perfect answers for resolving all moral dilemmas, i.e. morality is not always

capable of providing an answer with which a moral agent can feel wholly comfortable (Hursthouse 2001: 63-87).[8]

Against the charge that utilitarianism endorses punishment of the innocent, rule utilitarians have a plausible defence. They can argue that in the long run, convicting and punishing innocent persons undermines confidence in the state, hence doing more harm than good. Any provision allowing punishment of the innocent would be detrimental to public confidence in the law. This is something that cannot be done universally without ultimately undermining confidence in the law and political systems; therefore, rule utilitarianism cannot be accused of endorsing punishment of the innocent, even if this were to have short-term utility value. It is therefore not obvious that the rule utilitarian is committed to an immoral action with respect to punishing innocent persons.

4.4 UTILITARIANISM AND THE "HOW" QUESTION

Having enumerated all the difficulties of utilitarianism in the previous section, is it capable of furnishing us with a morally acceptable account of how much to punish? This was the main reason for examining utilitarianism since it promised to do so.

A major criticism directed against it is that the theory would at least sometimes justify punishment disproportionate to the magnitude of the crime committed. If we examine the issue of severity of punishment, a salient contrast between retributivism and utilitarianism is encountered: whereas retributivism maintains that punishment must fit the crime

[8] Rosalind Hursthouse argues that not all moral dilemmas are resolvable in such a manner as to be wholly satisfactory for a moral agent. She advocates a virtue ethical approach to ethics, rather than a deontological or consequentialist approach. While I believe that virtue ethics has an important contribution to make to ethics, I have not chosen to use this approach in defending the practice of punishment because I hold a rights-oriented approach to be better suited for establishing precise criteria, such as those constituting the necessary conditions of my defence of punishment.

(capital punishment for murder, for instance, and less severe punishment for less serious crimes), utilitarianism determines the severity of the punishment so that it meets the objectives of the utilitarian system (Benn 1985: 13). In this respect it is not inconceivable, nor is it a contradiction to the theory, to punish a less serious crime more severely than a more serious one, should the former be in need of more deterrence because that particular crime, for instance, exhibits a striking increase in society.

It was pointed out earlier that the primary objective of punishment for utilitarians is general deterrence. It was also stated that the apparent value of punishment increases when the real value of punishment is increased, and the main objective of the utilitarian theory is to increase the apparent value to the highest feasible level. Now, executing persons in public for minor offences has a high likelihood of having a very strong deterrent effect. Utilitarianism would be against it, *prima facie*, since the inflicted evil would greatly outweigh the evil caused by committing the offence. We need not strain our imagination too far, however, to find an example in which vastly disproportionate penalties would be justified by utilitarian theory. Disproportionate punishment would be justified if the principle of economy would simultaneously be upheld (Primoratz 1997: 37).

If a minor offence, such as disorderly conduct in public, were to become widespread, it may be useful to impose harsh punishments for it, rather than the generally mild ones imposed. If the offence could be prevented by imprisoning only one person for five years, for instance, the punishment would be effective and economical, and hence "JUSTIFIED" by the utilitarian theory. Alternatively, let us assume that a country is experiencing a sudden increase in organised crime, specifically the crime of car theft. After many months of investigation, the police manage to arrest a significant number of the criminals, but by that time the indignation and

anger of the public has grown to such an extent that opinion poles indicate a large majority being in favour of the organisers being sentenced to life imprisonment. This would definitely incapacitate them, and would probably discourage anyone else susceptible to discouragement from committing similar offences. The objective of deterrence would thereby be completely attained. But surely, this cannot be morally right. Car theft, no matter how great its extent, cannot possibly warrant punishment equal in severity to rape or murder, or other dangerous crimes. The deterrence theorist can respond by pointing out that punishment should provide a motive for preferring the lesser offence to the greater. If less serious crimes were to be punished with disproportionate severity, so that these crimes receive equal or greater punishment than some more serious ones, then criminals committing the less serious crimes would have no prudent reason for not committing the more serious ones, especially if this would favour their cause of remaining undetected. If armed robbery, for instance, were punishable by death, just as murder, then an armed robber would have no prudent reason for not killing any bystander who may be an eyewitness. Nonetheless, it still does not completely rule out any inconsistencies in the severity of punishment. Utilitarian theory would also permit disproportionate punishments in the other direction, however. If six months imprisonment were to be sufficient to serve as an adequate deterrent against first-degree murder, then the punishment would be sufficient, and hence justified according to utilitarianism. As argued in the previous chapter, this would not begin to serve the aims of morality because by punishing too mildly, we indicate that the offence in question is of no great concern to us; therefore, if the legal institutions were to punish too mildly, they would no longer serve as an adequate channel through which society can express its anger and indignation at offenders.

Utilitarianism justifies severe penalties of minor offences, but this would not be objectionable if the threat never had to be carried out. Retributivism maintains that only serious crimes deserve to be seriously punished, while utilitarianism claims that the benefit of punishment must always outweigh the harm of punishing.

Utilitarianism would endorse higher penalties for offences committed under a strong temptation to do so since they would be in need of greater deterrence. On this view, a starving person who steals a loaf of bread would be punished more severely than a rich person stealing something not desired very strongly, ceteris paribus.

In this section, it became evident that *utilitarianism cannot furnish us with a morally acceptable account of how much or in what manner to punish*. In the next chapter, I shall defend a non-utilitarian approach to deterrence, one resting on retributive foundations. In doing so, I shall provide a morally acceptable account of how we ought to resolve the question pertaining to the measure of punishment.

4.5 SUMMARY AND PERSPECTIVE

Having established in the previous chapter that retributivism furnishes us with a morally acceptable answer to the question of whom to punish, I shifted the focus in this chapter to deterrence as propounded by utilitarianism in pursuit of a morally acceptable answer to the question of how much to punish. Although utilitarianism was a candidate for this question because it emphasises deterrence, the approach has numerous implications that make the theory morally untenable, such as that it does not aim at justice and that it endorses disproportionate sentencing. Utilitarianism is consequently unable to provide us with a morally acceptable account of determining the measure and kind of punishment.

Although I rejected utilitarianism, I wish to defend deterrence and shall do so in the next chapter. I shall argue that deterrence can be defended by demonstrating that deterrence has retributive foundations, and in doing so it can be defended without having to depend on utilitarianism with its untenable implications. The arguments in the next chapter will also provide an acceptable way of determining the measure of punishment.

CHAPTER 5

DEFENDING DETERRENCE

5.1 INTRODUCTION

Utilitarians hold that deterrence is one of the central concerns of their theory and are usually opposed to anything approaching retributivism. In what follows, I shall show that it is in fact possible to divorce deterrence from utilitarianism since it is possible to show that deterrence actually relies on retributive foundations for its justification and that we can therefore keep deterrence without having to rely on any utilitarian implications.

I shall defend both particular and general deterrence by employing retributive principles and shall also argue that the requirements of particular and general deterrence are not the same in all cases, the latter sometimes requiring more force, or punishment, to be inflicted in order to be effective. I shall argue that this is morally justified.

Of course, to use criminals for purposes of general deterrence, when general deterrence requires more than mere particular deterrence would require, entails using criminals as means towards an end, the end of general deterrence, and not to see them as ends in themselves. I shall need to justify this too, and shall do so by employing a distinction I already made in 2.4. Kant would argue that using criminals for purposes of general deterrence, when this is more than particular deterrence requires, would be wronging criminals because we would thereby reduce them to means to a social end. However, it may be argued retributively, as Kant himself does, that murderers deserve to die, for instance, and that the deterrent effect this would have on potential murderers would just be a fortunate side effect. However, if we do not accept

this retributive rationale, we must face the challenge of justifying general deterrence in cases where punishing criminals goes beyond what is required by particular deterrence. I shall therefore argue that general deterrence is morally justified, even if it goes beyond what particular deterrence requires, by employing an argument based on self-defence and the principle of just distribution.

As we also saw, utilitarianism was rejected because it entails untenable consequences, such as not aiming at justice, and endorsing disproportionate punishment when this is utility maximising. It was pointed out that the central concern for the utilitarian approach to punishment is deterrence. However, if I can show that punishing with deterrent objectives is actually to do so retributively, I shall be able to retain deterrence while rejecting utilitarianism, rejecting it with its untenable implications.

I shall first turn to particular deterrence, thereby laying the foundations for the defence of general deterrence. I shall argue that particular deterrence is morally justified since we may describe it as a form of self-defence.

5.2 PARTICULAR DETERRENCE AS A FORM OF SELF-DEFENCE

Daniel Farrell (1995: 39) contends that in a Lockean state of nature, one right we would claim directly is to resist others' attempts of violating our rights. Imagine, for instance, that we are attacked by persons wielding knives and who intend to kill us in order to rob us more effectively. Most of us would agree that we have a right to resist the attackers, even with deadly force if necessary. Let us term this "direct self-defence." I shall distinguish this from "indirect self-defence" shortly. We would not normally voluntarily yield to the attacks of such attackers, since we believe it to be our right that we defend ourselves in situations in which we are attacked without provoking the attackers. It is important to

point out that one is justified in exercising this right only if no other viable option is available. Clark explains it as follows:

> If rational persuasion worked well enough, there would be no need to threaten punishment. Equally, if there were every prospect that I could protect life and limb against an aggressive assailant by rational persuasion, I would not be justified in using violence to defend myself; but, if persuasion fails or is not feasible, then may I not use physical force, at least when the assailant is responsible for attacking me, having chosen to do so? (Clark 1997: 29).

Imagine that we have been attacked by specific attackers on numerous occasions in the past, and we have reasons to presume that the attackers will continue with their attacks in the future. Suppose further that we have learned that the attackers have a particularly strong aversion to physical pain. Suppose that we had learned that if we could subject them to a specific level of pain, if continuing with their attacks, they would cease attacking us. In such a case, we seem to be justified in threatening them with severe physical pain if the attacks are continued. If threats are not enough, subsequent to an attack, we have the right to inflict such pain. We are supposing that short of killing the aggressors, this is the only way of deterring them from trying to kill us:

> We are surely as justified in defending ourselves against crime when necessary by threatening penal sanctions against those who might be responsible for offending as we are in defending ourselves with force where necessary when others voluntarily attack us. The threat of punishment can be regarded as a form of self-defence; though when the punishment is inflicted it is no longer self-defence, since the offence has already been committed (Clark 1997: 28).

The question I shall now address is whether we are justified in applying more force to fend off a future attack than is necessary to fend off a present attack. Let us

therefore shift the focus slightly. Suppose that circumstances are exactly as above, only that at the time of the most recent attack, we know exactly that a future attack will occur and when it will occur. Suppose also that we know that when it occurs we will be incapacitated because we will be recovering from an operation, for instance. During the present attack, we are only faced with two choices: either we repel the attack as before, or in addition to repelling the attack, we inflict severe physical pain as a deterrent to future attacks. If we inflict the additional pain, the attackers will not attack us again when we are unable to resist, while otherwise they will. If we are justified in fending off an attack, even with deadly force if necessary, why should we not be justified in inflicting force beyond presently necessary force in order to prevent a future attack? Applying this to legal punishment, it may be contended that the above justification of particular deterrence is directly applicable to punishing offenders. By incarcerating them, for instance, we prevent them from committing further crimes. If one has the right to self-defence in a Lockean state of nature, then in a society where the state is one's agent, the state may exercise that right on behalf of its citizens (Farrell 1995: 40-41).

The question that needs to be answered, however, is whether indirect deterrence is indeed justifiable. Are the principles of self-defence not backward-looking? We would not say that one is justified in doing just anything to anyone in defence. Generally, we do not believe, for example, that one is justified in killing an attacker's family, even if this is the only way of repelling an attack. For example, we usually hold that one is justified in killing murderers in self-defence, rather than their children, even if the latter action would be just as effective. What this indicates is that punishment must be aggressor-oriented. We believe, for reasons discussed shortly, that by attacking us, aggressors

lose certain rights, but we do not thereby believe that anyone else loses those rights. This is all connected in some way to the question whether the principles of self-defence and of particular deterrence are retributivistic.

If one believes that one is justified in inflicting harms on a potential aggressor when one is faced with only two choices, either inflicting harms or suffering harms oneself, then one must state why one holds one's belief to be justified. Following Farrell (1995: 42), I argue that since it is the aggressors who force us to make the choice, they are entitled to suffer the consequences since by hypothesis one or the other must suffer. Hence, this may be seen as a form of distributive justice and it follows that one would be justified on these grounds. From a spectator's point of view, it is plausible to argue that I am justified in intervening on behalf of a victim against a potential aggressor in order to save the former. I am justified on the same grounds in intervening even if the aggressor is not directly threatening me.[1] It may be pointed out that this line of reasoning is weakly retributivistic: because aggressors attack us, therefore we subject them to certain harms, harms we would not be justified in imposing upon persons who did not aggress against us. Weak retributivism thus holds that perpetrators must suffer, not because they perpetrate, but because by their choices they establish a situation in which someone must suffer, and they can and should be the ones who suffer (Farrell 1995: 43). Consequentialism also justifies my using as much force as necessary in self-defence, even if it is not in accordance with the utilitarian principle. An elderly man may, for instance, kill three attacking young men in self-defence and hence on balance cause greater harm and yet be justified in his deed (Clark 1997: 30).

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[1] Jane English (1986: 248-256) presents an interesting set of arguments pertaining to self-defence.

Let us now proceed to general deterrence, where I shall argue that we are morally justified in using offenders as means towards general deterrence, beyond what is required for mere particular deterrence, because by offending they have forfeited certain of their rights.

5.3 GENERAL DETERRENCE AS WEAK RETRIBUTION

In the previous section, I argued that particular deterrence is a form of self-defence, and even if this is so, punishment with this end has retributive characteristics. Let us now turn to general deterrence.

If general deterrence is justifiable, it cannot be justified on distributive premises like particular deterrence because we have justified particular deterrence by arguing that aggressors force us to suffer harm or inflict harm upon them. In carrying the above example over to general deterrence, we are concerned with the situation in which no attacker is responsible for the other potential attack with which we are faced, but where we can decrease the likelihood of these potential attacks becoming actualised by doing more harm to any actual attacker, thereby creating a greater deterrent effect for other potential attackers than is required for self-defence. Perhaps we should extend the distributive principle to allow us to use those who have committed certain offences in the past to deter future potential wrongdoers. We are justified in using them as means towards this end by virtue of the fact that they have forfeited some rights by their perpetrations.[2] Farrell calls this view "undefended extensive weak retributivism" (Farrell 1995: 44). If this is all we can say about general deterrence, then the result remains a weak element of retributivism. Put simply, what this view holds is that it is more appropriate that certain groups of individuals suffer,

[2] See 2.4.

namely those who have committed crimes, rather than that certain other individuals should suffer, and that it is more appropriate because the members of the former group have been convicted of crimes, while the members of the latter group have not.

An alternative defence along these lines may be Herbert Morris's view, which employs the principle of fair play. Morris argues that unless we all restrain ourselves in certain ways, we would all be worse off than we would otherwise be. The argument maintains that if most members of society restrain themselves in relevant ways, then they have the right to take advantage of those who fail to restrain themselves in the required manner. Morris's argument fails to provide an answer to the question, how we have the right to punish some in order to deter others, however. Of course, we may assume that fairness grants that those managing to restrain themselves have the right to do certain things to those failing to restrain themselves, but it does not show that it justifies doing exactly what general deterrence would require; and it implies using these people for social ends. Furthermore, Morris's account fails to justify using offenders as means to our social ends if they are simply not willing to restrain themselves in the appropriate way, i.e. if they are simply not willing to adopt the rules laid down by a society with whose objectives they disagree or are indifferent towards. If we, for example, are surrounded by people still in the Lockean state of nature, we have the right to defend ourselves against their attacks by justifying our actions according to the principle of self-defence, but we cannot appeal to the principle of fair play, advocated by Morris, since the attackers have not agreed to accept our conditions for fair play (Farrell 1995: 45).

Rawls provides a more plausible account. The idea propounded by Rawls is that even if the perpetrators have not consented to restraining themselves in a certain way, they

would have done so in an original position from behind a veil of ignorance. It follows for Rawls that we are bound to conform to the standards and rules to which we would have agreed in the original position (Rawls 1971: 17-22). For Rawls, justice thus requires us to restrain ourselves in the appropriate manner and allows us to punish those failing to restrain themselves in the appropriate way too. Rawls's approach may be plausible, but it is vulnerable in whichever way his philosophy is vulnerable in arguing from an original position behind a veil of ignorance is vulnerable. It is vulnerable on a theoretical level - it presupposes that those behind the veil of ignorance are ignorant of the socially significant facts about themselves (race, sex, economic class, social standing, religion, natural abilities, and even our conception of the good life). From behind the veil of ignorance, they are to determine those principles that would enable them to further the good life, whatever that may be. Since the good life is not known, we cannot suppose that the life leading to moral justice can necessarily be known. For this reason, Farrell deems it necessary to seek an alternative justification for general deterrence.

In our Western legal systems, we do not simply use perpetrators once they have been convicted in order to attain certain ends, but rather, we warn people that if they commit certain offences, they will be used as means towards certain ends. It might be wrong to use criminals as means towards general deterrence if we have not warned them before they committed the crimes that we shall use them for such purposes; but having warned them, having proclaimed penalties, for instance, beyond what is necessary for particular deterrence, are we justified in using them for general deterrence purposes following conviction? It must here be pointed out that we do not generally believe that we are justified in doing Y if A do X, even if we previously told A that we would do Y if they did X. Simply our telling persons that we would do Y if they did

X is not sufficient to justify our doing Y when they do X. Otherwise, we would be justified in doing something we had no right to do simply by telling the relevant party that we would do it (Goldman 1979: 54-56). We are not primarily making the threat in order to rationalise our punishment once the offender has acted against our threat. Threats, if they are taken seriously, are means of restricting certain people's actions, and they require moral justification. If we believe that our threats would restrain some people from performing certain harmful actions, and this is the only available effective measure for reducing such harmful actions, then we may argue that we are morally justified in making our threats, adding that our threats are not directed at the public in general, but only towards potential offenders (Farrell 1995: 49).

A problem that arises in making threats is that they are generic threats, rather than individualised ones. We are threatening everyone with the same penalty, or range of penalties, for each particular crime. Stated differently, our threats are not based on individual considerations, derived in response to particular threats. This may be objectionable since we might not be justified in threatening anyone with more than is necessary for deterring him or her from committing certain offences against us. It may be possible to individualise our threats in a setting of small magnitude, but in any larger society, it would be practically impossible to do so. Since we are therefore left with either issuing uniform threats or establishing an extraordinarily complex bureaucracy for issuing individualised threats, it seems that we are justified in doing the former (Farrell 1995: 49).

Supposing now that our threats have been justifiably made, we are still faced with the task of justifying their carrying out. We may argue that threats that are never carried out when appropriate are not credible. Therefore, in order to maintain the credibility of our threats, we are justified in

carrying them out - in fact, we must carry them out if they are to have any effect:

> Sanctions are threatened principally in order to defend us from crime by deterring potential offenders from committing criminal acts. It is inconceivable, at any rate in the societies we live in, that such threats should prove effective if they were never carried out (Clark 1997: 29).

Critics may rightly respond that we have things back to front. If there are certain things we are not justified in doing, then we have no right to do them simply because we say that we would do them. The critics' objection presumably rests on the assumption that in issuing generic threats, we will do more than necessary to perpetrators than is required to prevent them from wronging us again, at least in some cases. Put differently, the argument is that in doing more to criminals than particular deterrence requires, we are invariably wronging them because we are thereby using them as means towards our own ends.

It is not sufficient for us to put certain penalties on certain forms of behaviour, and make potential offenders aware of the penalties attached to various forms of offensive behaviour, in order to justify our using offenders as means towards general deterrence. The critics may respond that we are simply never justified in doing more than is required to deter offenders from committing the same offences again, even if we told them that we would do more if they violated our laws (Farrell 1995: 50).

We are not left in an impasse, however. Farrell (1995: 51) asks us to imagine that we are attacked in a Lockean state of nature. Imagine not only that we would not be able to repel a future attack by the recurrent aggressors, but also the attacks of other potential aggressors. According to the principle of distributive justice, we are justified in harming an attacker in order to deter any future attack. If the

present attack makes one more vulnerable to attacks from others, then we are surely justified in using the present attacker as a means towards preventing future possible attacks by inflicting harm upon the aggressor beyond what is necessary for preventing attacks from the present attacker. Remember that our principle has established that if either the innocent or the offenders must suffer, it is desirable that the latter do so. It is therefore not only a principle of self-defence, but also one of protecting the innocent against unjust aggression.

Again, the critics may respond that the attackers might have had no way of knowing the harm caused by their unlawful conduct. What is therefore required is that we extend our principle to include both harms that are created knowingly and those that are not (Farrell 1995: 51-52). Alternatively, if we do not want to extend our principle in this manner, we may respond to the critics' objection by saying that the offenders ought to have known the extent of the harm caused based on evidence and calculable probabilities. This evidence was available to them; therefore, we shall still hold them liable even if they claim to have been ignorant of their actions' probable consequences. The argument thus runs as follows:

(1) We are justified in doing more to offenders than particular deterrence requires, if our failure to do more makes us more vulnerable to attacks from others.
(2) The attackers knew or ought to have known that their attacks would make us more vulnerable to attacks from others.
(3) Therefore, we are justified in doing more to offenders than mere particular deterrence requires.

The critics of general deterrence are therefore incorrect to assume that we are not morally justified in doing more in the

interests of general deterrence than particular deterrence requires (Farrell 1995: 52).

5.4 USING CRIMINALS AS MEANS TOWARDS GENERAL DETERRENCE

Suppose our vulnerability would not be augmented by a given offender's attack if we do not retaliate at all, nevertheless we have good reason to believe that our doing so will increase our general level of security against attacks from others. Alternatively, suppose that we are more vulnerable by not retaliating, then it is tempting to believe that by doing more than necessary we will increase our general level of security to what it was prior to the attack. If we justify our retaliation, or our doing more in these circumstances, then we must resort to what Farrell (1995: 52) previously termed "undefended extensive weak retributivism." Our principle of distributive justice is not applicable here because we are not faced with a dichotomous choice - either harm or be harmed. The harming of the perpetrator to deter others must therefore be seen as retributivistic since the harming of the perpetrator is carried out wholly because it would do us some good, and we are justified in doing so because the harmed individual is a wrongdoer; and this is undefended extensive week retributivism. We are thus forced to conclude with Farrell that general deterrence is not as consequentialist as commonly assumed. It has retributive foundations because it rests on the foundation that we are justified in using criminals for general deterrence purposes; we are justified in using criminals because by offending they have attained a diminished moral status. Not just anyone may be used as such a means, innocent persons may not be in virtue of their having a higher moral status because they have not been found guilty of a criminal offence. This is in agreement with the distinction I already made in 2.4.

5.5 THE MEASURE OF JUSTIFIED FORCE

I have argued that the principle of distributive justice justifies our using force against an offending individual to protect others or ourselves from harm. The question that now arises is, what limits does this principle impose on our responses? It must be pointed out here that the harms imposed in accordance with this principle need not have been proclaimed in advance. This is because offenders leave us with a choice of either our being harmed or our harming them. This principle seems to warrant our use of force only insofar as it is necessary to prevent harm done to us or other innocent persons. How then are we to determine the magnitude of the force necessary for successfully repelling a given attack in advance? By any standard, this is an empirical question that is difficult to answer. Perhaps it may be impossible to determine precisely. If this is the case, we will have to base our actions on estimates of the amount of force required. Needless to add, our estimates will vary from case to case, and these too will be very difficult to make. Farrell asks us to imagine that we bypass this problem by announcing a set of responses in advance, actions we shall take in response to certain wrongdoings against us. The intensity of our response will vary, being placed in different categories, depending on the seriousness of the possible attack against us. Our proclamations will face two distinct limits. Since we are basing our justification on the principle of distributive justice, we are not justified in doing just anything to fend off an attack. If my life is endangered, for instance, I may kill the attacker in self-defence, but if I am only facing the prospect of having my clothes torn, I may blacken an eye. Once again, however, we are left with a vague guideline, since people's intuitions vary about which response is acceptable in a given situation;

it is the same sort of problem with how much to punish (Farrell 1995: 55-56).

I have supposed for the purpose of my investigation that we are only entitled to use as much force as is necessary to fend off an attack. Let us now examine this assumption more closely. It is plausible to assume that by not repelling attackers in a manner that discourages them from launching any further attacks, they are likely to attack again, thereby endangering us or other innocent individuals. Therefore, doing more than is minimally necessary to fend off specific attacks seems justified. Nevertheless, each case still seems to have an upper limit of justifiable force. Because the exact amount of force might not be determinable, we are still justified in establishing it by means of estimation, by virtue of the fact that we are entitled to defend ourselves and other innocent individuals.[3] This does not rule out the fact that in our need to ensure our safety, our estimates may exceed the amount of force necessary for repelling some attacks in some instances. However, this would be going beyond what the principle of self-defence justifies. Suppose, however, that we decrease the likelihood of attacks by reacting not to individual cases, but to categories of cases pre-determined on empirical estimates, such as that car theft should be punishable between one and three years imprisonment, and first-degree murder between fifteen years and life imprisonment. Under such conditions, we would be justified in adopting such a strategy to decrease our vulnerability as well as that of other innocent persons, even if this means doing more in some specific cases (Farrell 1995: 57-58). We are justified in doing so on the principle of distributive justice, not only on grounds of utility. Once again, it must

[3] Cohen (1993: 485-493) emphasises the extent to which contract law can be seen as a branch of public law. Because the law must have regard for the general and institutional effects of classes of transactions, it must, when settling disputes, be prepared to go beyond the original intention of the contracting parties.

be emphasised that even using some individuals as means towards attaining a general goal is justified because the persons who might be treated more harshly than their cases require are wrongdoers, and either wrongdoers or we must suffer. This means that our theory still relies on some element of retributivism. The retributivistic element lies in the fact that perpetrators must suffer, rather than any other person, or groups of persons, having to suffer.

5.6 IMPLICATIONS OF DETERRENCE THEORY

The conclusions derived from the previous section allow us to draw distinct implications of deterrence theory:

The first is that no one should deliberately and intentionally violate another's rights where there is a feasible alternative. This implication is derived from the fact that deterrence relies on the notion of self-defence, and one may only aggress in self-defence if there is no feasible alternative. The implication for punishment is that it ought not to be greater in severity than is required for general deterrence. As mentioned in the previous section, this means that punishment ought to be graded according to the severity of the offence: the more severe an offence is, the more severe its punishment ought to be, *ceteris paribus*. This does not only mean that punishment should be fair, or that it should be most carefully imposed, but also that there is a noticeable relation between the magnitude of the punishment and that of the crime. A proper gradation is also beneficial to the furthering of deterrence (as I have already established in 5.5). If a murderer and a car thief were both to receive five years imprisonment, *ceteris paribus*, then justice cannot be said to have been done because the former is guilty of a more serious offence than the latter.

Another implication we may draw from the foregoing is that if the rights of individuals are to be risked, the risk should

fall more heavily on wrongdoers (the guilty) than on others (the innocent). This, as has been established above, is the principle underlying weak retributivism, which is the basis for a defence of general deterrence. Since rights sometimes have to be violated for general deterrence to be effective, it should be the rights of the guilty, rather than of the innocent. This is also the rationale behind the reasoning justifying the use of guilty persons as means towards the end of general deterrence.

Concisely stated, the implications of deterrence theory are that the following three principles are derivable as restraining principles of a morally defensible punishment system, principles that ought to guard against abuse in the striving towards the goals of punishment:

(1) No one should deliberately and intentionally violate another's rights where there is a feasible alternative.
(2) Fairness requires that punishments should be graded in their severity, according to the severity of the offences.
(3) If the rights of individuals are to be threatened, the threat should fall more heavily on wrongdoers (the guilty) than on others (the innocent).

Pertaining to the amount of punishment that may unobjectionably be imposed, I showed that we are justified in issuing uniform threats to categories of potential offenders and in punishing offenders according to pre-established categories. Such categories may have upper and lower bounds within which sentences may be handed down, thereby enabling one to take aggravating and mitigating factors into account. This conclusion, however, may be one that is not wholly satisfying to some since it limits the range of possibilities for sentencing individual offenders. Nevertheless, it is the

only practicable solution I found that does not invite excessive abuse. We saw that retributivism is wholly inadequate for determining the severity of a sentence. The remaining two theories that will still be discussed (rehabilitationism and restitutionalism) fare no better. It will be seen that, in a pure theory, rehabilitationism would endorse indeterminate sentence lengths, punishment of the innocent, and largely disproportionate sentencing. Restitutionalism faces similar difficulties to retributivism. Whereas deterrence theory does not provide us with an ideal solution, it does have the advantage of furnishing us with an acceptable one, however, one that provides certain discretion for aggravating and mitigating factors while curbing the possibility of administering largely disproportionate sentences.

5.7 SOCIAL LIMITS OF DETERRENCE

Prevention occurs when persons make rational decisions to forego the benefits of crime because the pain or discomfort would be greater. An assumption underlying deterrence theory is that persons are rational calculators who, prior to committing crimes, weigh the benefits against the possible disadvantages of apprehension and the likelihood thereof. Deterrence also functions in a second, subtler way; by stigmatising those who violate society's norms, it reinforces compliance with the norms. However, this theory does not have strong applicability for those living in impoverished communities. Persons who rebel against the norms of society for political reasons, thereby wishing to draw attention to their community's plight, are unlikely to be deterred by prudential considerations. Furthermore, deterrence is also likely to have little or no effect on severely impoverished individuals committing crimes due to economic necessity. Those in despair are inaccessible to deterrence motivations.

Members of deviant sub-cultures are socially inaccessible, while disoriented impoverished members are psychologically inaccessible. For deterrence to have utility value, it must threaten the individual with the loss of something valued. Individuals living miserable, impoverished lives have little or nothing to lose that is valuable to them and may even be better off imprisoned since in prison their basic needs are met. This has also been given as a reason why recidivism amongst those from impoverished communities is so high (Delgado 1995: 265). What I wish to point out is that even though deterrence may often be justified, employing it may sometimes be partly or wholly ineffective.

The question may also legitimately be raised, whether punishing individuals not sharing society's norms has any deterrent value. It is most likely that such treatment is counterproductive when seen as unfair by the punished. If we are punished for what we cannot help doing, then we have little incentive to avoid what we can help doing, resulting in a further undermining of values. Unjust punishment is not really punishment, but the mere exercising of force against persons whose behaviour is against the values and norms of society in general. In addition, if persons are punished to deter others for actions not reasonably under their control, the punishment is unjust (Delgado 1995: 265-266). One could just as well punish insane individuals to deter sane persons from committing crimes. Such arbitrary application of the law is likely to be detrimental, persuading people that the law is arbitrary and therefore not worthy of respect.

In 3.4, I argued that the retributive justifications of punishment are acceptable only if society is structured in such a manner as not to alienate any of its members from full participation. "Participation" is meant as that which provides or allows equal opportunities for all citizens in all spheres of society. In terms of deterrence, it is not the case that one is not justified in deterring the alienated,

impoverished members of society, when doing so is in agreement with a law that is not immoral; one may do so to protect oneself. The problem is, however, that although it may be morally justified in response to a given violation of law, the deterrence of such persons is likely to be much less effective than deterrence of other societal subclasses.

5.8 SUMMARY AND PERSPECTIVE

In this chapter, I argued that deterrence is justified on both a particular level, as well as a general one. General deterrence is justified even if it requires that one employ more force than would be necessary for mere particular deterrence for a case at issue. This of course requires that criminals be used as means towards social ends, but I argued that this is morally acceptable in virtue of their having forfeited certain of their rights through offending, and hence having diminished moral standing. Having argued thus, I was able to address the issue of how much force is justified in a particular case, i.e. how severe the punishment may be in order for it to be morally tenable. I argued for a punishment scale with categories of punishment being in proportion to the force applied in committing the criminal acts. This may not be an ideal solution, but it is the most suitable one I could envisage that could be practically applied. Having defended deterrence, three principles were derivable from the conclusions drawn, principles that ought to constrain the objectives of any punishment system. These are: (1) no one should deliberately and intentionally violate another's rights where there is a feasible alternative; (2) fairness requires that punishments should be graded in their severity, according to the severity of the offences; and (3) if the rights of individuals are to be threatened, the threat should fall more heavily on wrongdoers (the guilty) than on others (the innocent).

How far does deterrence go towards vindicating punishment? Let us examine it in light of the necessary conditions for which I argue. Because deterrence is usually associated with utilitarianism, and I have here given a defence of deterrence with retributive foundations (to avoid the untenable implications of utilitarianism), I shall here evaluate both theories, pointing out differences where appropriate. In this evaluation, deterrence theory based on utilitarianism will be referred to only as "utilitarianism" and deterrence theory with retributive foundations only as "deterrence theory": (1) Only deterrence theory (as defended in this chapter) provides a morally acceptable answer to the question of whom we are justified in punishing. (2) Only deterrence theory is able to adequately answer the question of how much to punish, and of all the theories I examine in this thesis, deterrence theory is the only theory that provides a morally satisfactory answer to this question. It is also the only theory capable of accommodating aggravating and mitigating factors. (3) Utilitarianism is not capable of accounting for punishment in such a manner that it serves as a recognised channel through which society can express its anger and indignation at offenders because it does not punish according to desert and therefore endorses vastly disproportionate sentences. Deterrence theory can do so, however, since it rests on retributive foundations and retributivism fulfils this condition. (4) Bringing about a reduction in crime: both utilitarianism and deterrence theory wholly endorse this objective - the theories are wholly directed towards this goal. (5) Improving offenders: utilitarianism and deterrence theory are only concerned with punitive punishment, hence it is just as ineffective in pursuing this objective as is retributivism. (6) Undoing the harm done: neither utilitarianism, nor deterrence theory, mentions this objective at all, although utilitarianism would have to endorse it if doing so would be utility maximising, which it presumably

would be since it would increase the happiness of victims. (7) Being economical: utilitarianism is committed to this objective since it holds that punishment should not cost so much as to make it financially disadvantageous. Deterrence theory, by contrast, does not have this objective, and there is no reason to believe that it pursues this goal any more than retributivism does since it rests on retributivist foundations. Utilitarianism therefore fulfils only two of the seven conditions, while deterrence theory fulfils three of them.

It is now appropriate to ask again, what has been achieved so far? I have argued that we are justified in punishing offenders if they fulfil the requirements of having guilty minds. Consequently, the question of whom to punish has therefore been successfully addressed by retributivism. By administering punishment, one of the goals I argue punishment ought to strive towards, namely to serve as a recognised channel for expressing anger and indignation at offenders, is pursued. Retributivism is however not capable of furnishing a morally acceptable answer to the question of how much to punish. For this reason I turned to utilitarianism with its emphasis on deterrence. I rejected the approach because it has numerous morally untenable implications. However, in this chapter I defended deterrence without utilitarian principles, arguing for its defence with retributivist foundations. In addition, I was able to develop a means for determining the amount of punishment to be administered. The "how much to punish" issue was hence successfully dealt with in this chapter. Three constraining principles were derivable from my defence of deterrence. By answering the questions of whom to punish, how to punish, and by allowing punishment to serve as a recognised channel through which society can express its anger and indignation at offenders, only three of the seven necessary conditions for the justification of punishment have been addressed. To adopt a moral stance to punishment is to

adopt a civilised stance. The mere identification of whom we may punish, how we may do so, and that the institution is a recognised channel for society to express its anger and indignation at offenders, does not make any attempt to improve offenders, nor does it address the needs of victims either, for instance. These are issues that need to be addressed in a civilised society; these are issues that must be addressed by morality. In the next chapter, I shall therefore focus on the rehabilitative approach since it pursues three of the five objectives I set out in Chapter 1. Once again, the rehabilitative approach will not be morally acceptable in its entirety, but it is well suited for a broader hybrid justification of punishment.

CHAPTER 6

REHABILITATION: A QUALIFIED DEFENCE

6.1 INTRODUCTION

In the previous chapter, I dealt with deterrence theory, arguing that we have the right to use offenders for general deterrence purposes. However, mere imprisonment seems to be ineffective in significantly reducing the incidents of crime. A brief look at today's penal systems suffices to confirm that our present systems of punishment are not working optimally, i.e. punishment often does not have the intended deterrent effect, the high rate of recidivism being one of many indicators. Some persons dissatisfied with this contingency have argued that criminals ought not to be punished, but rather treated. The criminal is not seen as a person requiring punishment, i.e. someone needing the deliberate infliction of pain or suffering, but rather as someone requiring treatment.

The favourable attitude towards rehabilitation of offenders however, is not the mere response to the inefficacy of wholly punitive responses to crime. Plato holds in *The Republic* that persons who do not possess the characteristic of justice are afflicted with disharmony between the elements of the soul. Such persons, maintains Plato, are comparable to persons afflicted with physical ailments. This seems to imply that treatment of offenders is appropriate, just as treatment of ill persons is appropriate:

> ... we ought to consider injustice! ... It must be some kind of civil war between these same three elements, when they interfere with each other and trespass on each other's functions, or when one of them rebels against the whole to get control when it has no business to do so, because its natural role is to be a slave to the rightfully

> controlling element. This sort of situation, when the elements of the mind are confused and misplaced, is what constitutes injustice, indiscipline, cowardice, ignorance and, in short, wickedness of all kinds. ... there is an exact analogy between these states of mind and bodily health and sickness. ... Healthy activities produce health, and unhealthy activities produce sickness. ... And health is produced by establishing a natural relation of control and subordination among the constituents of the body, disease by establishing an unnatural relation. ... So justice is produced by establishing in the mind a similar natural relation of control and subordination among its constituents, and injustice by establishing an unnatural one (Plato 1987: 221-222).

The issue of rehabilitation is not without moral difficulty, however. In this chapter, I shall critically evaluate the rehabilitative approach to punishment and provide a qualified defence of rehabilitationism. I argue that in order to be morally justifiable, rehabilitationism must be constrained by distinct principles, such as that only the guilty be treated, or that indeterminate sentence lengths are only acceptable if there is no feasible alternative because the subjects in question pose a serious threat to society. I will also address reasons why rehabilitation may have been unsuccessful in the past and shall then defend a qualified rehabilitative approach, i.e. one that is constrained by principles of justice. The social limits of any rehabilitative approach will then also be enumerated and discussed. In the next section, I present a paradigmatic case of the rehabilitative approach to exemplify its nature, before contrasting it with the punitive approach in the section following.

6.2 A PARADIGMATIC APPEAL FOR THE REHABILITATION OF OFFENDERS

Karl Menninger, a renowned psychiatrist, argues for the abolition of the punitive approach to punishment, replacing it with a rehabilitative approach. He argues that criminals

should be treated, not punished. Just as Plato, he sees criminals as being mentally imbalanced, that is as having a disharmony, a disposition that should be corrected.

Menninger rightly maintains that our current punitive system of punishment is an utter failure. He criticises current practices of dealing with criminals as being hopelessly ineffective - prisons are expensive, often over-crowded, unhealthy crime-breeding dens and seem to operate with revolving doors, the same people going in and out repeatedly, i.e. recidivism is a major problem. Menninger does not believe that punishment serves as an adequate deterrent as illustrated by the fact that the crowds attending public executions in eighteenth century England were most likely to have their pockets picked, even though pocket picking was a capital offence. Many criminals are also prepared to take chances, only a small percentage of them being caught, convicted and punished. Of those criminals who are punished, many only become more resolute, living in constant opposition to the law. In addition to this, the intelligent criminal is seldom caught. On the contrary, it is the less skilled criminal, the less intelligent, the criminal who does not know how to commit crime properly, who is usually caught. Furthermore, Menninger maintains that for many the crime is a mere impulse or accident expressed under unbearable stress. If offenders are perverse, lonely, resentful individuals, they join the only group to which they are suited, the outcasts and criminals. Having been ostracised by the community, they join the society to which they have been introduced, adopting their new set of rules. Many criminals are sentenced to arbitrary confinement and once they have served their time, they are again dumped loose on society, without positive (most likely negative) changes having taken place in them. They are expected to survive without any help from society; hence, recidivism becomes the logical outcome (Menninger 1985: 173-174; Menninger 1986: 325).

Crime is so difficult to eradicate, Menninger contends, because it serves the needs of offenders and non-offenders alike. Not only does it serve the needs of both sides, the motives of offenders and non-offenders are similar - what distinguishes serious offenders is that they merely have a greater sense of helplessness and hopelessness in the pursuit of their objectives. Menninger further believes that all forms of crime are manifestations of violence in some or other form. Based on his psychiatric practice, he asserts that most episodes of violent outbursts are preceded by intense feelings of helplessness or hopelessness by the offender. He argues that this is because no one has complete freedom since we are all constrained by societies norms, rules, and restrictions. However, most of us manage to keep our impulsive, anti-social, destructive impulses under control, or sublimate them into socially acceptable practices and behaviour. This is a position already held by Plato:

> There is a better and a worse element in the personality, of each individual, and that when the naturally better element controls the worse then the man is said to be "master of himself", as a term of praise. But when (as a result of bad upbringing or bad company) smaller forces of one's better element are overpowered by the numerical superiority of one's worse, then one is adversely criticised and said not to be master of oneself and to be in a state of indiscipline! (Plato 1987: 201).

Not all, however, manage to restrain themselves. Persons who have failed to receive love and affection often attempt to attain it by illogical means that often assume criminal forms. It should here be noted that such means almost certainly do not seem illogical to those employing them, i.e. those with an imbalance often lack the ability to assess the situation rationally. In Platonic terms, we may describe this as the faculty of reason being overridden by the other faculties. Menninger also holds that retaliatory responses to crime are

ineffective because the potential to commit crime, being a mental imbalance, is an illness that requires treatment by professionals such as psychiatrists, psychologists and social workers. Therefore, it follows that because such behaviour is held to be an illness, vengeance or retaliation is itself a crime because it is usually held to be morally wrong to punish persons for being ill (Menninger 1985: 173; Menninger 1986: 325-326).

Menninger argues for the replacement of the punitive attitude to crime by a therapeutic attitude. He pleads for the attitudes of avoidance, ridicule, scorn, and punitiveness, when dealing with criminal offenders, to be replaced by an attitude in which criminals are seen as individuals not fully in control of their behaviour or mode of conduct, and in need of professional help in order to attain adequate control, to be able to live in society as law-abiding citizens. For Plato, once again, this would be equated to restoring a balance within the soul between disharmonious elements. Doctors, psychiatrists, psychologists, social workers, and everyone else involved in reforming criminals, should not impose any unnecessary suffering on offenders, even if they are provocative, uncooperative, hostile, or the like. In addition, just as physically sick patients, they are to receive only the treatments necessary for their cures. Therapists have the duty to care for them, to rehabilitate them, to reform them, and to prevent them from doing harm to themselves or others. It follows that in order to be successful, the therapeutic attitude requires love accompanied by hope, not hate (Menninger 1986: 328).

Thus, in order for our legal system to have any positive affect upon those with whom it is most concerned, the ineffective punishment system must be replaced by an effective, scientific treatment system. The fundamental scientific question that needs to be asked is, which of the available treatments would bring about most effective reform

regarding the criminal in question? Once this has been settled, Menninger argues for treatment to be continued until a positive change, a satisfactory change, has been attained. "Satisfactory change" is meant as criminals having gained adequate control over their behavioural modes of conduct to be able to live as law-abiding citizens in society. Given the scientific nature of the assessment, each offender is to be evaluated unemotionally and the only objectives are to be positive results. Since the time required to attain effective rehabilitation may differ markedly between different subjects, Menninger argues for indefinite sentencing, the length being dependent on the success or otherwise of the treatment. Criminals' characters, their personalities, the environments from which they come, its effects upon them, and their effects upon it, would all be assessed. Employing scientific re-education, the offenders are to be reformed to establish, respectively, a mutually satisfactory situation for them and society, which entails different levels of control, including releasing them back into society as soon as their situation allows it. Those who cannot yet be rehabilitated must be indefinitely detained in the interest of society; there are to be no exceptions, i.e. no one is to be released prior to being satisfactorily rehabilitated (Menninger 1985: 175). The protection of society is therefore adopted as the fundamental objective (Menninger 1985: 177). Nothing is to be done in the name of punishment since punishment would now be irrelevant. The objective is only to rehabilitate offenders in the interest of society.

Menninger concedes that the rehabilitative approach has its limitations. He agrees that some criminal conduct is not yet curable, just as many physical afflictions are not yet curable, pending further scientific knowledge. Therefore, the only option is for offenders with such behaviours to remain confined in prisons. Menninger is also aware that society is most reluctant to let violent criminals, such as brutal

murderers, be treated without punishment. In response, he argues that the aetiology of most crimes is still largely unknown, but that it is these brutal, seemingly inexplicable modes of criminal behaviour that are most in need of scientific explanation. Questions such as why some people become brutal murderers, why others become sexual offenders, and why others from impoverished social backgrounds, from whom one might expect a tendency towards criminal activity, never become criminals, are pressing scientific questions that need urgent attention (Menninger 1986: 329). Menninger argues that crime is often the indirect product of poverty, psychosis and social immaturity and so to neglect these variables is therefore to impose moral blindness upon oneself, and to treat people by leaving out essential human factors. Therefore, he concludes that we must rely more upon creative parole, counselling, education, and outpatient treatment. His method of dealing with offenders is clearly consequentialist. He argues for a constructive social attitude, therapeutic in some instances, restraining in other instances, but preventive in its total social impact (Menninger 1986: 330).

6.3 DIFFERENCES BETWEEN THE PUNITIVE AND REHABILITATIVE APPROACHES

(1) The first difference that may be noted is the intended subjective experience of the subject. Punishment usually is seen as an unpleasantness deliberately inflicted on offenders for offences they have committed. The unpleasantness is essential to it and not just an accidental accompaniment to another treatment. It is administered by a person authorised to do so by the system of rules against which an offence has been committed. The rehabilitative approach on the other hand does away with punishment in the commonly used sense, replacing it by scientifically based treatments. Instead of asking what penalty is warranted by the crime, whether agents

were fully responsible for their actions, whether circumstances exonerate them wholly or in part, it asks what kind of treatment is most likely to rehabilitate them. This no longer represents deliberate suffering, and if suffering occurs through the treatment, it is an accompanying factor that is not intended. Desert is replaced by needs.

(2) A further distinction between the objectives of punishment as general deterrence and rehabilitation is that the former attempts to prevent crimes by would-be offenders, while the latter attempts to prevent additional crimes by one-time offenders. Deterrence aims at the behaviour of non-criminals, while rehabilitation aims at modifying criminals' behaviour. Seen from this perspective, rehabilitation would seem to be preferable to deterrence since it aims at influencing the behaviour of offenders, those who have already committed an offence, while deterrence also aims at influencing the behaviour of potential offenders, those who have not yet committed an offence. It is justifiable to ask, why should we be the targets of any deterrent action if we might never actualise a negative potential? Rehabilitation, on the other hand, in this respect, deals with the changing of maladaptive behaviour once such behaviour has been exhibited. This certainly seems to be less objectionable. It is clear that rehabilitation is therefore not aimed at preventing new crimes, i.e. first offences by individuals, but only subsequent crimes.

(3) An obvious practical advantage of rehabilitation is that it can be tailored to suit individual needs while punishment as deterrence is tailored to suit a general target group of which, as in any target group, there may be strong deviations from the norm. This means that the instrument of deterrence will be applied more stringently than is necessary for some individuals, and not stringently enough for others. Proponents of reform theory see punishment not as a means for deterring offenders from offending again, but rather changing

their characters, i.e. changing the conditions within them that lead them to commit crimes. Criminal behaviour is seen as an illness that can and ought to be treated.

(4) If crime is the by-product of illness, or if criminals can be successfully treated without violating their rights, then rehabilitation is the rational response to crime as seen from the point of view of those treated. If I exhibit criminal behaviour, which may thwart my long-term well being, because, for instance, I may be incarcerated, then it would be rational for me to want any treatment that does not violate my rights if the treatment aims at eradicating my maladaptive behaviour. It would therefore be irrational for me to choose mere imprisonment because I believe imprisonment would deter me from similar conduct in future. It would also be irrational to choose mere deterrence, being operantly conditioned like any animal capable of reacting towards given stimuli; however, it would be rational to choose therapy, and that which enables me to cease my maladaptive behaviour and gain greater control over my conduct. Proponents of reform theory argue that the justification of punishment is that it provides the state with an opportunity to reform offenders that punishment itself is insufficient to effect. However, since reform need not be accompanied by punishment, punishment is neither a sufficient nor a necessary condition to effect reform.

It has already been established that society has a right to express its anger and indignation through punishment and that offenders may be used for purposes of general deterrence. Neither of these objectives, however, makes any significant attempt at improving offenders, one of the goals I insist morally defensible punishment must have. Therefore, the rehabilitative approach, with its emphasis on therapy, must be examined and critically evaluated, with the objective of drawing positive elements into a unitary theory of punishment.

The rehabilitation of offenders is arguably the most audacious of the goals I defend since, as will become evident in this chapter, if rehabilitation is advocated in a pure theory, it leads to violations of individual rights, such as indeterminate sentence lengths:

> The reformation of the offender is a result more difficult to achieve, but also more worthy of effort. To "reform" or "amend" the offender means to effect a change of her inclinations, motives, habits, character. If an offender wanted to repeat the offence, but desisted under the influence of fear of punishment, we should not say that she has been successfully reformed; we should say that she is no better than before, but has been efficiently deterred by fear. An offender truly reformed is one who does not desist from breaking the law again out of fear, but one who no longer wants to do that, who is free from criminal inclinations and habits. She will not break the law even when she has reason to believe that she will not be discovered and need not fear punishment (Primoratz 1997: 20).

The rehabilitative approach has probably created more passionate opposition than any other approach, philosophers arguing for a return to retribution, or at least remaining with a normal punishment system, motivated by fear of the abuses and unlimited authority that a system of rehabilitation might have. These concerns pertain to, amongst others, the issues of indeterminate sentence or treatment lengths, treatment of non-offenders, preventive detention, the lack of respect accorded offenders under such a system, and often changing their value systems against their wills. In addition to these is the claim that while such a system would be just as compelling as any punishment system, a therapy system is incomprehensible to the public and that it would not function in the interests of justice, but in the interests of science, which is in contrast to the punitive system.

Luis (1997: 517-521) is one of those urging a return to retributivism, not in the interests of society, but in the interests of criminals. The concerns of critics like Luis,

are that the things done to criminals under a humanitarian system, under a system of rehabilitation, would involve greater compulsion than that under a punishment system. If embezzlers, for example, were to have a likelihood of being cured by undergoing psychotherapy, they would almost certainly be compelled to undergo the treatment for as long as is necessary, which some opponents of rehabilitationism see as forcing them into something against their wills, and hence a violation of their human rights; while if they were punished, the length of their sentences would already be known when their punishments were handed down. It is denied that rehabilitation is connected to desert (a person may, for instance, be detained for many years for a minor offence, should therapy require it), but desert, maintain the critics of the rehabilitative approach, is the only connecting link between punishment and justice. Rehabilitation is implemented as a means towards a cure, not as a means towards justice, i.e. justice is replaced by scientific results.

Then, the system of punishment is comprehensible to the public, i.e. society has a sense of what is right. In countries with a jury system, this can be exemplified by the fact that juries sometimes refuse to convict when they regard a given threatening punishment as unjust. This was often the case in nineteenth century England for example, when capital punishment was mandatory for theft above a specified value. Juries then often arbitrarily set the value of the stolen item below the value requiring capital punishment, thereby acquitting the accused. This could not be done in a rehabilitative system where the public would not be making the decisions; rather experts would determine the length, nature and intensity of treatment. These experts would work with instruments and techniques that are no longer accessible to any but those who have been trained in their relevant field of expertise. This is so because the punishment system is based on principles that are accessible to the "common man," while

the rehabilitative system is concerned with specialist facts, facts that are accessible only to scientists and other experts (Luis 1997: 518). If we were to object about any given treatment, claiming that it is way beyond desert, the experts would reply that no one was talking about punishment and therefore no one was talking about desert. The objective, they would remind us, is rehabilitation, not punishment. The therapist will bring research findings, statistics and progress reports of persons being treated, thereby proving that one treatment deters or cures. Only if the results of the presented research are shown to be unreliable by other findings, or the statistical analyses are brought into doubt, can the administering therapist be criticised, but this would not remove the rehabilitative approach, at best, it would bring a more efficient treatment for the offender in question. Science does not work in terms of rights or justice, only evidence (Luis 1997: 519).

Although, another objection to the rehabilitative approach is that if one uses persons as deterrents for others, i.e. if one employs them in the interests of general deterrence, then one is using them as means and if one uses them as means towards an end, it is objected, one no longer employs desert. This, as I argued in 5.4, is not the case. When one uses criminals as deterrents for others, one is doing so only because they have offended, thus one is employing retributive justification. Of course the scientist (the psychiatrist or psychologist) would rehabilitate the criminal in the interests of society and would thereby not be doing this in the interests of justice, but in the interests of desired scientific results, thereby no longer taking interest in the criminal as a human being, but merely as a scientific subject. The critic asks why anyone should be sacrificed in the name of rehabilitation for the interests of society (Luis 1997: 519).

A system of rehabilitation that is divorced from desert would open the door to severe violations of human rights.

What would hinder a government from curing any unwelcome condition, such as being critical of an oppressive regime, standing up for human rights and freedom of expression, for instance? (Luis 1997: 520).

What I shall argue is that *punishment combined with rehabilitation is the only morally desirable course to take*. Nevertheless, the concerns pertaining to a rehabilitative system must be addressed.

I begin by examining the connections between crime, illness, and rehabilitation. Is it really the case that all crimes are the result of illnesses? Alternatively, even if all crimes are not the result of illnesses, are we not still morally obliged to treat offenders?

6.4 THE CONNECTION BETWEEN CRIME, ILLNESS, AND TREATMENT

To answer the question, whether it is plausible to assume that all crimes are the result of illnesses of some or other sort, I will argue in the first subsection that the answer must be in the negative. In the second subsection, I shall argue that even though crime is not necessarily the result of an illness, treating criminals is nevertheless an appropriate response to crime.

Are criminals really responsible for their actions? Is it not possible that they are *not really responsible*, that they did not really intend their actions, that they are not really guilty of their offences? Would it not be more appropriate to see them not as free agents, but rather as unfortunate products of unfavourable environmental conditions, such as unemployment, broken homes, bad housing, alcoholism or other substance abuse? If we answer in the affirmative to these questions, then social environments in which such conditions prevail are identifiable as "crime-breeding environments." If such environments breed crime, then societies that tolerate such conditions are responsible for their consequences and

therefore have the criminals they deserve. Consequently, society may be identified as the real culprit, or at least as an accomplice to the offence. If this were the case, then punishing offenders would be the epitome of hypocrisy, blaming them for something for which they are not really responsible, claiming to punish according to desert and justice (Primoratz 1997: 96).

Those who question the efficacy of a punishment system, advocating a rehabilitative system instead, may do so by arguing in either of two distinct ways: the first denies that offenders are ever responsible for their actions, therefore they ought not to be punished; the second is that even if they are always responsible for their actions, a rehabilitative system is still preferable for dealing with them. These positions will be dealt with in the two following subsections respectively.

6.4.1 WHY CRIME IS NOT NECESSARILY CAUSED BY AN ILLNESS

The first argument maintains that because offenders are never really responsible for their actions, they can never be justifiably punished. This approach may be superficially more attractive, but ultimately less plausible than the position holding that not all crime is the result of illness, but nevertheless should be treated. It might mean that offenders are not at all responsible in which case the entire blame is to be ascribed to the social conditions of offenders, i.e. to the conditions of society. The extreme societal determinism propounded by this view is difficult to accept, however. The assertion that there are no responsible actions, that no one is responsible for their actions, is highly implausible. None of us would be responsible for our actions. But, our everyday institutions of society function adequately by employing terms such as "responsibility," "choice," "decision," etc. If it is argued that criminals generally come from unfavourable

environments, then we may respond that, on the contrary, not all persons committing crimes come from crime-breeding environments, such as poverty, unemployment, child abuse, or the like. Many criminals come from very good social backgrounds. If this is not denied, and the argument is to be upheld, then the definition of "crime-breeding environment" will have to be extended to cover these good environments too, probably coming to cover all environments at some stage because all environments to a greater or lesser extent will have criminals. By doing so, we would assert the thesis that the mere fact that someone breaks a law is proof that they come from a crime-breeding environment. This is to say nothing useful at all about social reality. It would mean that we all come from some such an environment; therefore, it would apply to everyone, and hence would be non-explanatory with respect to criminal behaviour because all our environments (socio-economic class, educational standard, family background, etc.) have at least some criminals. Furthermore, if we were to adopt the position that if criminal behaviour occurs, then there must necessarily be an unfavourable environment causing it, we would have no way of testing the theory because we would have no way of falsifying it. Even if this does not destroy the theory's appeal, it certainly diminishes its intellectual satisfiability.

Where does rehabilitation come in? If all environments have the potential for causing crime, then why do some people become criminals and others do not? The answer may lie in the susceptibility of subjects. This would imply that those persons who turn to crime must have a lower resistance level for negative environmental influences. Since rehabilitation aims at raising the susceptibility level of offenders so that they are able to refrain from offending again, criminal behaviour becomes equated to an illness of some sort.

Surely it is wrong to punish someone for something she could not help doing, for something for which she is not

responsible. If offenders are not responsible, if they are sick, then it seems right that they ought not to be punished. Ill persons ought not to be punished, and since on this view everyone who commits a crime is ill, it is surely wrong to punish anyone who commits a crime. Since the appropriate response to sickness is treatment, it follows that offenders ought to be treated, not punished. The relevance of treatment to the rightness or wrongness of punishing offenders is anything but obvious since the problem is that we seldom, if ever, punish people for being sick. Instead, we punish them for actions they performed. The reason for not punishing sick persons is connected to the notion of responsibility. If one cannot be held responsible for some illness, punishment makes no sense and is morally unjustifiable. However, even if we grant that crime is an illness, then this by no means implies that the afflicted persons are thereby judged not responsible for their actions. *Illness itself is not a sufficient condition for withholding responsibility.* If this were to be the case, then we would have to judge persons afflicted by physical illness as not being responsible for their actions either. But we do not do this. We do not, for example, acquit bank robbers if it was established that they had serious flu at the time of committing their crime. Secondly, even if mental illness rather than physical illness can be identified as predisposing someone towards becoming a specific criminal, this disposition does not excuse them from all kinds of crime. Thus, a person judged to suffer from exhibitionism may be excused for indecent exposure, but it cannot be a plausible defence for car theft, income tax evasion, rape, murder, or any other unrelated crime. Thus, it seems that mental illness per se, just as physical illness, is not a sufficient condition for excusing someone from performing a given offensive act (Feinberg 1993: 395). Even if offenders are mentally sick, it by no means follows that we can make the

general claim that they are not responsible for any of their actions.

In order for the argument (that criminals are never responsible for their actions) to be persuasive, it must be shown that the particular illness with which offenders are afflicted prevented them from ever acting differently (Wasserstrom 1985: 191). This would be plausible, for instance, if criminals all suffered from a compulsion to break the law, i.e. if they all had an irresistible impulse to do so. The kleptomaniac, or someone suffering from an addictive affliction, would be a person approaching a condition that may be described as an illness. But here pity rather than blame, and treatment rather than punishment, seem appropriate (Wasserstrom 1985: 191). Carson, Butcher and Coleman describe obsession as follows:

> An obsession is a persistent preoccupation with something, typically an idea or a feeling. A compulsion is an impulse experienced as irresistible. In obsessive-compulsive disorder, individuals feel compelled to think about something that they do not want to think about or to carry out some action against their will. These individuals usually realize that their behavior is irrational but cannot seem to control it ...
>
> Most of us have experienced minor obsessional thoughts, such as persistent thoughts about a coming trip or date, or a haunting melody that we cannot seem to get out of our minds. In the case of obsessive reactions, however, the thoughts are much more persistent, appear irrational to the individual, and interfere considerably with everyday behavior (Carson, Butcher & Coleman 1988: 189).

The obvious question to ask is, however, how strong would a compulsion have to be in order for criminals to be exonerated from any guilt? Would they, for instance, have to be compelled to steal even though a police officer is visible? Is there something more involved in compulsive behaviour? What is meant by "compulsive behaviour" other than meaning that the behaviour is inexplicable according to the motives and

behaviours that people usually have? Why should we suppose that criminal behaviour is caused by more motiveless behaviour than to which we are usually all subjected? Alternatively, why should criminals be less constrained by rules that ordinarily constrain us? While there are problems such as these, there is also no reason to believe that all criminal behaviour is caused by irresistible impulses. It therefore cannot be claimed that all criminals ought to be exempted from punishment because they have sicknesses of this sort. Those criminals whom we are willing to exonerate are generally those we judge to be driven towards performing the criminal behaviour without any rational deliberation, and the behaviour may be wholly irrational. Kleptomaniacs who steal items for which they have no use and exhibitionists who expose themselves occasionally despite knowing that their behaviour is offensive and the object of disapprobation may be examples of this kind. The rationally deliberating clerk who quietly and cautiously embezzles money, blackmailers who employ their intelligence in a rational manner but towards illegal ends, and terrorists who carefully and methodically plan destructive flights into buildings to cause extensive numbers of victims, however, are examples of criminals we would not be willing to exonerate. Criminals of the latter group knew what they were doing and could have done otherwise (Feinberg 1993: 396-399).

It may be argued, however, that while all criminal behaviour is not caused by compulsive disorders, the remainder are also afflicted by an illness, the most ready candidate being insanity. It has always been conceded that persons ought not to be punished if they did not know the nature of their actions or could not evaluate their behaviours as wrong (Wasserstrom 1985: 192). It is by no means obvious, however, that all remaining crimes are caused by mental illness. The rationally deliberating clerk who quietly and cautiously embezzles money, blackmailers who employ their intelligence in a rational manner but towards illegal ends, and the terrorists

who hijack aircrafts to crash into buildings may again serve as examples of criminals we would not normally consider mentally ill. It is by no means evident that all criminals are either acting under irresistible impulses, are incapable of foreseeing the consequences of their own actions, or are suffering from other definite diseases. Accordingly, it is incorrect to assume that they ought not to be punished (Wasserstrom 1985: 193).

One final approach brings all remaining offences under the category of mental illness. It does so by making the commission of an illegal act the defining characteristic of a mental illness. Those criminals who are not afflicted by mental illness or irresistible impulses are termed "sociopaths." This is a mental illness that manifests itself solely through the commission of illegal acts. The argument is that the illness, like any other, should be treated rather than punished (Wasserstrom 1985: 193). This assumption also may be questioned and dismissed as unconvincing, however. When we hold that an event X causes an event Y, both X and Y must be independently identifiable. This is not always a simple scientific matter since in science, causes are sometimes unobservable, such as when we speak of sub-atomic particles, radio and electromagnetic waves, molecular structures, etc. In these latter cases, however, there are clear correspondence rules connecting unobservable causes with observable phenomena. The problem with the theory assuming that all criminal behaviour is caused by a sociopathic personality is that if mental illness is the cause of criminal behaviour, then criminal behaviour cannot be proof that criminals are ill. Arguing that criminals have a sociopathic personality because they exhibit criminal behaviour is to employ an invalid argument having the form: if p then q, and q therefore p (the fallacy of affirming the consequent).

Having found no plausible account maintaining that all criminal behaviour is the result of an illness, let us now

shift the focus slightly to the position that even though all criminals might not be ill, they nevertheless should be treated.

6.4.2 TREATING CRIMINALS

I now turn to the second of two issues addressed in this section. I shall argue that even if criminal behaviour is not always the result of an illness of some sort, criminals ought nevertheless to be rehabilitated because they stand to benefit thereby.

If we believe that the environment has an influence on shaping one's behaviour, it would mean that society is partially responsible for the crimes committed: it is not necessarily the sole culprit. If the objection is to be understood as such, then it no longer rules out responsibility completely: it at least leaves open degrees of responsibility, and therefore also degrees of guilt on behalf of criminals (Primoratz 1997: 97).

This second approach argues that a rehabilitative system is preferable to a punishment system, not because all criminals have diminished responsibility and therefore cannot be held fully responsible, but because rehabilitation is preferable to punishment even for those who are fully responsible. It therefore maintains that the legal system ought not to deal with how to punish offenders, but rather with how best to rehabilitate them. This is not because all of them are sick, but because no good comes from punishing even those who can be held responsible for their actions (Wasserstrom 1985: 193).

Menninger, as we have seen, advocates the elimination of responsibility. The state of mind at the time of the act in question, he maintains, is no longer to be determinative (as it now is) of how the criminal shall be handled by society. For him only two questions are relevant: did the offender

commit the act in question? If he or she did, what is the appropriate societal response to him or her? This proposal is completely forward-looking and rehabilitative in perspective. This approach brings with it the elimination of a distinction between wickedness and disease. Penal institutions would become places of safety in which offenders receive their required treatment. We ought to treat them as though they were sick because this just makes more sense than punishment. Whether someone was responsible for their actions or not is not relevant. So even those who are not sick ought to be treated in a manner that would best facilitate their adequate functioning in society. The only question is how to bring about the rehabilitation of offenders (Wasserstrom 1985: 194).

The advantage of the wholly forward-looking approach is seen when contrasted with the present punishment system. The latter does not rule out that offenders would be punished even though they were cured, i.e. when there is no likelihood of their offending again. This punishment would not benefit them, but might even harm them. And punishment, of course, is judged morally seriously offensive. It is this which a rehabilitative system, such as by Menninger, seeks to prevent, and on this ground may be judged to be preferable.

However, both theoretical and practical objections to such a view may be expressed.

The practical objections are: firstly, certain effective treatments may themselves be morally objectionable, and secondly, this may bring about a world in which we all become indifferent to those characteristics that make a person responsible (Wasserstrom 1985: 195). The proposed system could become an institution of manipulation, for instance, operating under the guise of safety. However, these are difficulties that may be avoided by, for instance, determining precise timeframes in which rehabilitation must be undertaken to rule out indeterminate sentencing. In addition, it may be stated that abuses can occur in all rehabilitative systems,

but also under all penal systems today, leaving the former no more objectionable than the latter; and the former may be argued to be preferable since it may rehabilitate some who would otherwise become recidivists.

More serious are the theoretical objections. The first is that a purely rehabilitative system would wholly disregard the issue of general deterrence. Such a system, as that proposed by Menninger, would ask only one question regarding offenders: what is the best response to these individuals in order to prevent them from offending in a similar manner again? If we have offenders who committed a crime by an impulsive act that is unlikely to be repeated, or who are unlikely to offend again because they are sincerely contrite, then the logic of this treatment approach would require that they be released immediately. This is so because in this system it is only the future conduct of offenders that receives consideration. There is simply no room for general deterrence in such a treatment system (Wasserstrom 1985: 196).

The second objection is that it would lead to morally indefensible consequences. It should be clear that the rehabilitative approach has one objective as its main concern, namely the improvement of offenders. Offenders ought to be altered so that they will not offend again. This is certainly a most commendable objective to pursue. To do so without constraints, i.e. to do so with the only guiding principle being the improvement of offenders, however, is to invite consequences which we would not hold to be morally justifiable, including unqualified preventive detention, the problem of treating the innocent, and the problem of indeterminate sentence lengths. However, we ought not to reject rehabilitation in its entirety, but ought rather to constrain the theory in such a way so that it accords with our generally held principles of justice, while retaining the objective of improving offenders.

In the next three sections, the focus will be on the main problems pertaining to a rehabilitative system, namely preventive detention, treating the innocent, and indeterminate sentence lengths. I shall argue that a mixed theory can deal with such issues successfully, while being internally consistent, resulting in a rehabilitative system that is just. I begin with preventive detention.

6.5 PREVENTIVE DETENTION

The rehabilitative approach gives rise to the concern that such an approach would justify preventive detention, i.e. detention of persons judged extremely likely to commit serious offences if not prevented from doing so, because this approach has as its primary objective the prevention of crime by treatment of offenders or likely offenders. If a group of offenders was to be identified as being exceptionally likely to commit crimes because it has a certain character trait, lives in an unfavourable environment, or the like, then advocates of the rehabilitative approach might argue for preventively treating the offenders by, for instance, trying to change their character traits or conditioning them to be more resistant against criminal behaviour in their unfavourable environments. In this section, I shall investigate whether preventive detention is morally justifiable, and if so, under which conditions this would be the case.

It first will be necessary to determine under which conditions quarantine, as a form of detention of those suffering from certain physical illnesses in order to prevent the spread of disease, is held morally unobjectionable, before arguing by analogy that preventive detention, being analogous, is morally justifiable under similar conditions. I shall establish that preventive detention is in theory justifiable to prevent harms to others. In the light of the moral

distinctions made in 2.4 between innocent persons, criminals, and former criminals, I shall attempt to establish how accurate the predictive techniques must be in order for actions taken on their basis to be justified. This will be followed by an examination of how invasive the information gathering process morally may be. I shall point out that different standards for both issues are applicable for innocent persons and former criminals. Finally, I shall argue for what may be the acceptable and justifiable duration and extent of preventive detention.

6.5.1 HARM AND THE MORAL JUSTIFICATION OF QUARANTINE

To determine under which conditions preventive detention is morally justifiable, it is necessary to determine precisely under which conditions quarantine, i.e. a state of enforced isolation from the public on medical grounds due to a threat posed, is morally unobjectionable.

We hold it appropriate that persons posing a serious medical threat to others are quarantined if the threat is life-threatening or threatening to long-term well being. I set out the argument as follows:

(1) The liberty of persons posing a serious threat to others may be curtailed.
(2) Persons having serious, contagious diseases (i.e. life-threatening diseases or diseases seriously threatening one's long-term well being) pose a serious threat to others.
(3) Therefore, the liberty of persons having severely serious contagious diseases may be curtailed.

It is obvious that the justification of quarantine rests on the prevention of harms to others, i.e. on the harm principle, and not because any good is imposed upon those quarantined,

i.e. on the grounds of paternalistic intervention.[1] Posing a serious medical threat, where "serious threat" is defined as "threatening life or long-term well being," is therefore a necessary condition for quarantining.

It is not, however, a sufficient condition. The contagious disease not only must pose a serious threat to others, but also must uncontrollably do so. We are not justified in quarantining persons with flu or a contagious cough, even though both conditions may be life-threatening: flu for the elderly and young children and a cough for persons with a constitutionally weak respiratory system. If early treatment is sought, or adequate precautions taken, then the threat can be significantly reduced. Therefore quarantining persons afflicted with serious diseases that are contagious, but whose contagiousness is controllable, would also be morally objectionable. Persons afflicted with AIDS or other sexually transmitted diseases, for instance, are not quarantined, and ought not to be quarantined, since their life-threatening contagious diseases are not beyond their control, i.e. not all persons coming into contact with persons having such diseases are vulnerable and we have a reasonable idea of what to do to prevent passing on the disease. I thus continue with the above argument as follows:

(4) But only serious, contagious diseases that are uncontrollably threatening to others justify a curtailment of liberty.
(5) Not all serious, contagious diseases uncontrollably threaten the life or long-term well being of others.
(6) Therefore, not all persons having serious, contagious diseases may be quarantined.

The conclusion arrived at is thus that a sufficient and necessary condition for quarantining persons is that the

[1] The harm principle will be discussed in detail in Chapter 7.

quarantined have a serious, contagious disease beyond control. I shall argue in the next subsection that if the same conditions hold for persons posing any threat to others, i.e. not only a medical threat, then preventive detention is also justified for them.

6.5.2 HARM AND JUSTIFIED PREVENTIVE DETENTION

Let us assume for the moment that we are able to determine with absolute accuracy that certain persons pose a serious threat to others, i.e. if they are not forcibly restrained from doing so, then they will kill or seriously harm others within a determinable timeframe. Are we justified in preventively detaining them in order to prevent them from committing violent crimes? If the argument of the previous subsection is held to be sound, then, by substitution, preventive detention is also morally permissible under certain determinable conditions. If we substitute the term "serious, contagious disease" with "strong disposition towards committing serious crime," we get:

(1) The liberty of persons posing a serious threat to others may be curtailed.
(2) Persons having strong dispositions towards serious crimes (i.e. crimes threatening life or long-term well being) pose a serious threat to others.
(3) Therefore, the liberty of persons having strong dispositions towards performing serious crimes against others may be curtailed.

Just as with quarantine, preventive detention is justified by the harm principle, persons may be preventively detained to prevent others from being seriously harmed. All that has been argued thus far, therefore, is that we are morally justified in preventively detaining persons for the well being of

others, and not for their own well being. In the case of quarantine, posing a serious threat was found to be a necessary condition for quarantining. The same holds for preventive detention, i.e. persons posing a crime threat, but not a serious one, may not be preventively detained. By "serious crime threat," I mean the threat to commit a crime of grave magnitude that would threaten life or long-term well being.

Analogous to quarantine, preventive detention has serious threat as a necessary condition for its moral justification, but serious threat is not a sufficient condition. Persons preventively detained must not merely pose a serious threat to others, but must uncontrollably do so, i.e. the threat must be beyond their voluntary control, or they must be unwilling to exercise control over the threat. The latter implies, for instance, that persons with AIDS can morally be detained if they are unwilling to practice protected sex, knowing that their disease is serious and contagious under such conditions; if they are willing to practice protected sex, however, there is no moral ground for preventively detaining them. Thus, not all dangerous persons may be preventively detained. The above argument therefore continues as follows:

(4) But only conditions uncontrollably threatening serious crimes to others justify a curtailment of liberty.
(5) Not all dispositions towards serious crimes uncontrollably threaten the lives or long-term well being of others.
(6) Therefore, not all persons having a strong disposition towards crime may be preventively detained.

The conclusion arrived at is thus that a sufficient and necessary condition for preventively detaining persons is that the detained have a strong disposition towards performing

serious crimes against others, and that they are unable or unwilling to exercise control over their dispositions.

We may now proceed to the question, how accurate the predictive techniques must be in order for us to act on their bases in preventively detaining persons.

6.5.3 ACCURACY REQUIREMENTS

Schoeman (1985: 201) believes that if a rate of accuracy on a par with jury trials were to be attained, then a sufficiently high level of accuracy would be attained to justify our preventively detaining persons on that basis. He believes that the maxim that rather ten guilty go free than one innocent be detained may serve as a suitable guide. It is not being asserted that the worst thing in the world would be to find an innocent person guilty, for that would preclude all investigations since all human investigations are bound to be fallible sometimes, no matter how much care is taken to avoid making mistakes. I will show why I take Schoeman's assumption to be incorrect.

For the sake of argument, it was assumed in the previous section that we could establish with absolute certainty whether a person does, or does not, pose a serious threat to others. It was found that preventive detention would be morally justifiable if it were absolutely certain that a person would pose a serious threat to others in a determinable timeframe. The issue now at hand is, however, whether we can ever determine with absolute accuracy what a person will do precisely in the foreseeable future. If we are not able to attain absolute certainty, then the question needs to be asked, whether a lower standard is acceptable for detaining innocent persons. The answer we are forced to give is an emphatic "no!"

Having an accuracy rate of ninety percent, or anything usually attained in jury trials, is not sufficient for

enabling us to preventively detain innocent persons. The reason is that we are dealing with innocent persons, not with persons who already have a diminished moral standing. It is therefore not sufficient to have an accuracy rate of ninety percent, or any rate less than absolute certainty, since we are not dealing with criminals or former criminals, but with mere potential or possible criminals, i.e. innocent persons.[2] Possible or potential criminals are not guilty, they have not yet committed crimes and it is not absolutely certain that they ever will. For this reason the accuracy rate vindicating preventive detention of innocent persons must attain absolute certainty. This requirement may rule out preventive detention of innocent persons altogether because it is highly doubtful whether we could ever attain an absolutely accurate predictive technique, i.e. one that never resulted in any mistake.

The absolute certainty requirement has been established for innocent persons. When dealing with former criminals, however, the accuracy requirement need not be so stringent when having a less stringent requirement enhances the safety of innocent persons in society. In 2.4, I established that former criminals have a diminished moral status in virtue of having been criminals. For this reason a lower accuracy rate is morally acceptable when dealing with former criminals, so when dealing with former criminals, a rate of accuracy on a par with jury trials may be morally acceptable. I argued in the previous chapter that we are justified in using offenders as means towards the end of general deterrence, i.e. for purposes of crime reduction. Similarly, we may use former criminals for such purposes if there is a reasonable degree of scientific certainty that they will offend again. This would amount to preventive detention. As we have seen, we are not justified in using anyone as a means to such an end, but only those who have acquired a diminished moral standing by

[2] See 2.4 for the important distinction between "innocent person," "criminal" and "former criminal."

committing crimes. By preventively detaining those who have already offended against society in a severe manner and are judged as being very likely to do so again in the foreseeable future, we are using former criminals as a means towards the prevention of severe crimes, a measure that we are justified in employing, since, as was explained in the previous chapter, we are faced with either suffering the consequences of crime or causing those to suffer themselves that would cause us to suffer in such a manner. However, I established in the previous subsection that we are only justified in preventively detaining persons who pose a serious threat. Hence preventively detaining former offenders is only justified if there are weighty reasons for expecting a severe threat to be imminent. Preventive detention is therefore not an instrument that may be employed for general crime reduction purposes, i.e. preventive detention may not be employed against former criminals to prevent crimes that are not life-threatening or threatening to long-term well being. Preventive detention for car theft, for instance, is hence morally untenable.

Now that I have argued for the conditions under which preventive detention may be imposed, the question that arises is how invasive the predictive techniques may be to justify their employment.

6.5.4 PREDICTIVE TECHNIQUES

I established that we would be justified in preventively detaining innocent persons if our predictions would be of absolute certainty, and that a less stringent requirement is morally acceptable for preventively detaining former criminals. In order to make predictions of dangerousness, it is safe to assume that it would be necessary to investigate the lives of the subjects investigated in detail. How invasive may the information gathering process be? It is a common fact that the prediction of natural phenomena requires

extensive probing. The variable and highly complex nature of human beings would make it astonishing to find that accurate predictions about human behaviour could be attained without extensive probing into every facet of persons' lives. Since the problems of interaction and interpretation seem to make the task of prediction almost impossible, we may have reached the point at which we must conclude that preventive detention must be abandoned altogether. This is not because isolating an individual for the protection of others is unjust, but because determining whether a person is dangerous would require such extensive violations of individual liberties that we are not even entitled to make the investigation into the threat potential (Schoeman 1985: 201).[3] Schoeman (1985: 202) believes that mass mandatory screening is morally acceptable if the threat facing society is of extreme magnitude. I shall argue that he is not correct in holding this view.

Compelling innocent persons to undergo screening for the purpose of preventing violent crimes to others is not justified by the harm principle because it is not known beforehand whether those persons subjected to screening pose any threat at all. This would almost inevitably lead to the compulsion of many innocent non-threatening persons to undergo screening. Only once it is absolutely certain that certain innocent persons pose a serious threat to others, may they be compelled in any way, and this certainly cannot be established without screening, screening to which innocent persons cannot be morally compelled. This is not comparable to screening aircraft passengers before they board aircrafts since airport passengers are not compelled to anything to which they do not agree. By purchasing a ticket for a flight, every passenger implicitly consents to the conditions of the airline and their

[3] A practical consideration pertaining to the information gathering process is that the more time consuming the process is, the fewer people one is able to investigate, with the result that the effectiveness of reducing crime by this means will be limited in roughly inverse proportion to the time required for an investigation.

security, which includes being thoroughly checked and searched. But if a state decided to screen all its members for any signs that they may become criminals in the future, it would involve screening to which the members of society have not consented in any way.

There is once again a difference between innocent persons and former criminals when we come to the measures for preventing crime. Former criminals have a diminished moral standing in virtue of having been criminals. Therefore, the requirements pertaining to interference into their lives need not be as stringent as for the innocent. Former criminals may, in virtue of having been criminals, be compelled to undergo screening, should this be deemed necessary. They were violent in the past and hence are no longer wholly innocent. In the interests of preventing violent crimes, former criminals may be subjected against their wills to screening in the interests of preventing violent crimes. If it is established that they still pose a serious threat, or a renewed threat, they may be preventively detained.

6.5.5 DURATION AND EXTENT OF PREVENTIVE DETENTION

Now that I have argued under which conditions preventive detention may be determined and imposed, the duration of such detention must be determined. Persons who are quarantined are detained until the threat their conditions pose for society is no longer above a specified threshold level, i.e. until their medical conditions have been cured or changed to such an extent so as no longer to pose a serious threat to others (Schoeman 1985: 204). As long as they fulfil the necessary and sufficient conditions for quarantine, however, they may be quarantined. The same may be held for those preventively detained. In the previous chapter, I argued that the measure of punishment is dependent on the amount of force exercised by criminals. This determination may be overridden if it is

evident that criminals still pose a serious threat at the end of serving their sentences (the sentences handed down for their crimes). They may then be kept in detention as a preventive measure for longer than their sentence determined.

It is important to point out that preventive detention is not to be seen as a cure for any disease and is hence not a therapeutic act, it nevertheless shares several characteristics with therapy: both are imposed without any sense of moral outrage and the duration of detention may in both cases be indeterminate. Preventive detention would be an everyday affair because we will presumably always have some dangerous former criminals who are likely to commit serious offences, while quarantine is usually only a response to an emergency. However, we may presume that quarantine would become an everyday affair too if there were always people with serious, contagious diseases in society who fulfilled the necessary and sufficient conditions for quarantine.

6.6 TREATING THE INNOCENT

The answer to the question whether innocent persons may be compelled to undergo treatment ought already to be clear from the previous section. Even if given individuals were to be identifiable without unjustified interventions into their lives (because, for instance, they come from broken homes, have had inadequate education or vocational training, are unemployed, etc.), i.e. are potential offenders, it would not be justified to compel them to undergo any treatment.

A medical example may again be illustrative. If a group of persons is identifiable as being at heightened risk of contracting a specific contagious disease because its members have a certain gene, it could not be morally forced against its collective will into undergoing gene therapy. In being mere carriers of the gene, they are not yet an actual threat, and, depending on contingent factors, might never become one.

Of course, once the potential threat becomes an actual threat, once these individuals become afflicted, thereby endangering others, treatment against their wills is morally justified; even quarantine is justified, should it be necessary. The same conditions hold for persons being disposed towards criminal behaviour. Perhaps they will never offend, perhaps they will be able to restrain themselves, and then forced treatment would have had no moral justification. But of course, treatment may be administered once the threat has become actualised because they would no longer be innocent.

6.7 SOLVING THE PROBLEM OF INDETERMINATE SENTENCE LENGTHS

Menninger pleads for indeterminate sentence lengths, i.e. detention until criminals are reformed. However, this would open the door to disproportionate sentencing - murderers would be released after only six months if scientific evidence showed that they are cured of their criminal behaviour, while car thieves would still be detained after twenty years if their conditions had not improved sufficiently to warrant release. This would be a disconcerting contingency. However, there is nothing intrinsic to a rehabilitative theory that requires indeterminate sentencing.

In 5.4, I argued that we are justified in using offenders for purposes of general deterrence. I then showed in that chapter that the magnitude of the punishment we impose on offenders ought to be ranked on an ordinal scale (the more serious the harm inflicted by an offensive act, the more serious the punishment ought to be, *ceteris paribus*), and that the force imposed on offenders ought not to be of excessive magnitude when compared with the harm done or intended by their offensive acts. The extent of punishment ought therefore to be determined by adjusting it to the demands of general deterrence (as established in the previous chapter). Within the sentenced period, intense therapy ought to be

undertaken. The demands of therapy may not increase the length of confinement within a prison institution unless the requirements for preventive detention are satisfied, but then this is not done primarily for therapy, but for society's protection.

Having surpassed the objections facing a therapy system, it is now appropriate to ask why attempts at reforming offenders have generally been unsuccessful in the past.

6.8 REFUTING PAST ATTEMPTS AT REHABILITATION

Some writers who have examined the attempts at rehabilitation over the last few decades point out that they have not yielded the anticipated results. Why is this so? Is it perhaps that rehabilitation is just unsuitable for dealing with offenders? In this section, I shall argue that rehabilitation is not always ineffective, depending on how it is administered and on the paradigm within which it is conceptualised. However, I shall not restrict my analysis to the empirical findings, but shall show that the underlying difficulty may be of a more fundamental nature, namely that psychology (and other human sciences concerned with rehabilitation) has inherent difficulties pertaining to how it approaches some problems. In the final subsection of this section, I shall address the problem of choosing values for those being rehabilitated.

6.8.1 SCIENTIFIC REASONS WHY THERAPY MAY HAVE FAILED

Before attending to the more fundamental reasons why rehabilitation may have been unsuccessful, I shall briefly mention three scientific reasons why it may have been so:

(1) Punishment and rehabilitation should not be used as a means of aversion therapy as some behaviourally oriented psychologists may have done. This approach involves the modification of offensive behaviour by the old-fashioned

method of punishing the subjects. Such punishment may entail either the removal of positive reinforcers or the use of aversive stimuli, the fundamental objective being the reduction of the "temptation value" of stimuli that elicit undesirable behaviour. Electric shock is the most commonly used aversive stimulus, although drugs may also be used (Carson et al. 1988: 592).

Researchers have indicated that because punishment is aversive, it is likely to prompt avoidance learning. If aversive treatment is likely to do so, then it may be assumed that aversive rehabilitation prompts such learning too. Learning how to avoid punishment does not necessarily mean learning how to cease with the offensive behaviour; instead it may result in the person's learning how to avoid being detected and apprehended. This may result in an increase of criminal behaviour, rather than the intended decrease. Which of these outcomes occurs seems to depend partly on the recidivists' perceptions of how fair the treatment is, and partly on the kind of treatment to which they are being subjected. In this case, treatment may well be counterproductive since studies have shown that punishment augments future offending in social out groups. This may be because the criminals become more motivated to evade detection, or because they are assisted by members of their community who perceive the administered punishment as being too severe. Research findings show that undesirable behaviour (understood here as offensive behaviour) can be suppressed only by employing extremely severe punishment, punishment that is more intense than would otherwise be considered humane. Moreover, if punishment is sufficiently intense to serve as an adequate deterrent, it is likely to have severe emotional effects that can interfere with any alternative learning of socially acceptable behaviour. It may therefore be concluded that rehabilitation should not employ punishment to any significant degree since doing so seems to be ineffective.

(2) Rehabilitators should take the perceptions of their subjects into account. Rehabilitation seen by the recipients as objectively unjust is likely to foster defiance in the form of increased offending, therefore rehabilitative measures should not be severe so as not to be counterproductive (Sanson, Montgomery, Gault, Gridley & Thomson 1996: 157-158). An appropriate response in the light of these findings is that therapists should take special care to take the perceptions of their subjects into consideration, and ensure that these are not of an undesirable nature. Criminals should therefore always be treated as humans worthy of respect, and every effort should be made to ensure that they perceive the treatments as being for their own goods, justified by the actions they performed in the past. Even though I maintain that criminals have a diminished moral standing, this is not in opposition to seeing them as humans who ought to be treated with respect. An analogy may again be illustrative: even though a late-term foetus has less moral standing than an adult person (which means that the rights of the former may be overridden by the rights of the latter when their interests clash), we nevertheless hold that foetuses are to be respected, exemplified by our treating the killing of a foetus as a very serious moral matter. Even though criminals may be used as means towards the ends of general deterrence, for instance, they can and ought to be treated with respect.

(3) Rehabilitation should not be preoccupied with deterrence. Deterring offenders does not significantly change them in any way; it merely fosters in them the fear of being punished if they behave in a certain way. Rehabilitation should be different: it should not deter offenders or potential offenders out of fear of being punished; rather, it should change offenders' value systems so that they no longer wish to offend, having come to believe that offending is wrong and ought not to be done. In the past, rehabilitation may often have focused on deterring offenders from committing

further crimes, a rehabilitative effort that is not likely to be very effective since it does not involve changing offenders' outlooks on life, and hence what ought or ought not to be done. There is nothing intrinsic to rehabilitation, however, that requires it to focus on deterrence, rather than on the value systems of offenders and on teaching them more acceptable behavioural patterns in society. Since I showed that many of the empirical problems are problems only because the rehabilitative efforts were incorrectly applied, I conclude that there is no weighty empirical reason why a comprehensive system that yielded positive results ought not to be developed for the rehabilitation of offenders.

6.8.2 FUNDAMENTAL REASONS WHY THERAPY MAY HAVE FAILED

I now turn to more fundamental reasons why therapy may have been unsuccessful, namely that psychology and the other social sciences involved with rehabilitation of offenders are, if applied on their own, often inadequate for dealing with the complex problem of criminal rehabilitation. The criticisms I shall level against psychology will be applicable (unless otherwise indicated) for the other sciences dealing with therapy too. The difficulties pertain mainly to two issues: firstly, psychology applies in inadequate model for describing abnormality; and secondly, there is seldom agreement between the schools on how data are to be collected or which are to count as relevant.

The first source of difficulty is that, in dealing with behavioural abnormalities, psychology in general (and psychiatry in particular) employs a medical model - patient, treatment, prognosis, etc. This model demands that subjects be categorised and then treated according to their diagnosis. This categorising frequently leads to difficulties and differences of opinion amongst experts concerning the category into which the subject is to be placed:

> Unfortunately, both reliability and validity have proven extraordinarily difficult to achieve in the classifications employed in abnormal psychology. This is due in no small part to our complexity as human beings, as behaving entities. But it is also due, according to many observers, to our having chosen an inadequate model for describing behavioral abnormalities. The reasons for our having done so are doubtless complicated, but a significant contribution to the confusion thereby introduced was the adoption by our forebears of an essentially medical or disease metaphor in conceptualizing abnormal behavior. By this we mean that abnormal behavior has been viewed as the product of illness or disease, and the average citizen has been given much information assuring him or her that this is indeed the case. But is it? While we are untroubled by the notion of a diseased brain, what possible meaning, on close examination, can be assigned to the concept of a diseased mind? Philosophical profundities aside, they are not, after all, the same thing (Carson et al. 1988: 24-25).

Philosophy, unlike psychology as part of a medial model, given its nature of asking fundamental questions (critically examining the meaning of concepts, ideas and theories, critically analysing and evaluating arguments, and its pursuit of wisdom and fundamental insight) works with a model of philosophical counselling (client, orientation in life, conceptualisation, meaning, perception, interpretation, etc.). I shall defend the role of philosophy in rehabilitation later. But now, I return to the issue of categorisation.

Michelle Foucault argues that by categorising we constrain our ability to think in any other system. At the beginning of *The Order of Things*, he quotes a category system, purportedly taken from a certain Chinese encyclopaedia, which classifies animals according to the following categories: belonging to the Emperor, embalmed, tame, sucking pigs, sirens, fabulous, stray dogs, included in the present classification, innumerable, drawn with a fine camelhair brush, etcetera, having just broken the water pitcher, and that from a long way off look like flies (Foucault 1970: xv). What Foucault wishes

to show with this classification is that the sheer impossibility of our thinking in these categories is the limitation of our own system of thought which has different categories. We simply cannot perceive how the animal world can be classified in such a manner because we are locked in our own discourse. When we classify anything, we operate within a system of possibilities bounded by our own conceptual schemes. This system enables us to do certain things, but also limits us to this system and these things since it depends on our own limitations. Furthermore, by classifying something, one has not yet necessarily said precisely what it is, but rather grouped items together which resemble each other in certain ways or have some characteristics in common. This is the case with many categories employed by psychology, most notable of these probably being schizophrenia:

> While we now have … a set of defining criteria that when properly applied will permit us to say who is and who is not schizophrenic with a high degree of reliability, we remain to an extraordinary extent uncertain of the information yield pertaining to any such act of inclusion or exclusion. That is, it remains unusually difficult for most of us to arrive at a coherent picture of what schizophrenia is, one that goes beyond, so to speak, the defining criteria themselves (Carson et al. 1988: 364).

A possible further problem of psychology, as well as all other human sciences, is that there is seldom, if ever, an agreement within the discipline on how to gather data, or which data are relevant, i.e. there is a proliferation of different schools. This may not always be a problem when there is general agreement between the schools, but when they operate in mutually exclusive frameworks, communication between them becomes difficult, if not impossible. In psychology, the way clinicians approach a given problem depends on their basic orientation. When assessing a subject, for instance, the biologically oriented clinician, such as a

psychiatrist or neuropsychologist, will generally concentrate on biological assessment methods aimed at uncovering any underlying organic malfunction causing the maladaptive behaviour; unstructured assessment techniques, such as the Rorschach, will be used by the psychoanalytically oriented clinician to detect intrapsychic conflicts; in the effort to determine the functional relationships between the environment and maladaptive behaviour, the behaviourally oriented psychologist will employ techniques such as behavioural observation and self-reports to identify maladaptive learned behaviours; and the humanistically oriented clinician might use interview techniques to discover blocked or distorted personal growth. This is not to deny or throw doubt on the value of any of these approaches, but what we often have is that the same problem is frequently described, evaluated, and treated in radically different means without making any overall attempt to determine whether an alternative approach might not be more accurate and effective in a given case.

The claim that scientific treatment is superior to other treatments is not of an *a priori* truth, but is of an *a posteriori* nature, the truth of which is dependent on contingent factors, such as what the problem is. This is not to argue that science is not of great value, or that alternative methods and procedures are always superior, but science, especially when we are dealing with the human sciences, may often have an inadequate approach for investigating certain behavioural phenomena, therefore we would be wise to widen our scope in such cases. This is particularly true for the rehabilitation of offenders too:

> There are many experiences and problems common to human existence about which science as yet has had little to say. Included are such vital experiences as hope, faith, courage, love, grief, despair, death, and the quest for values and meaning. Authentic insights into such experiences can often be gained from literature, drama, and autobiographical accounts that strike a common chord and relate

> directly to an understanding of human behavior. Material from such fields as art, history, and religion can also provide useful insights … (Carson et al. 1988: 24).

Philosophy is, of course, the most invaluable discipline in providing fundamental insights into such issues. I shall expand on this point in 6.9.1.

6.8.3 REHABILITATION AND CHOOSING VALUES

Since I defend a rehabilitative system, it is necessary to face a possible criticism levelled against it, namely one that is often directed against psychiatry, but that may be directed at all professions concerned with the rehabilitation of offenders or with behavioural therapy, which is that they are actually the guardians of the status quo, adjusting persons to a sick society, rather than improving society through the betterment of its individuals. There were frequent allegations that psychiatry was used as a means of political control in the Soviet Union - that dissidents were controlled by placement in mental institutions. Although it is seldom claimed that psychiatry is used in the West to deal with social critics, there remains the possibility that therapists, including those dealing with the rehabilitation of offenders, are placed in some ways in the role of gate keepers of social values, changing behaviours and attitudes that are disagreeable to society as a whole. This may even be more so when dealing with offenders, when dealing with individuals who violated the laws of society. This again brings us to the question, what do we mean by "abnormal?" The answer to this question is possible only in the light of our values. Of course, it may be questioned whether scientists, or in this case therapists, should be concerned with how what they develop should be used. Should the physical scientist who develops long-range nuclear weapons be concerned with how they

are used? Should someone advocating therapy for criminals be concerned with how the particular therapy approach advocated is employed? Should a behavioural scientist who develops powerful techniques of behaviour control be concerned with how they are applied? Many scientists try to sidestep this question by insisting that science is value free, that it is concerned only with developing techniques, not with how they are applied. Science cannot be value free, however. Each time, for example, that therapists eliminate one form of behaviour or substitute one form by another, they are making a value choice since rehabilitation takes place in a context containing the values of the rehabilitator, the subject to be rehabilitated, and the society in which they both live. So how does one distinguish between norms that are relevant and those that are not? This question will often have to be answered by the rehabilitators themselves because they are the highest authorities on issues pertaining to rehabilitation of persons' behaviours, i.e. psychology often lays down its own rules, rules that are inaccessible to any other profession. The answer they give should, however, be determined by adhering to a fundamental principle regarding normality (Carson et al. 1988: 614-615). This should be in accordance with the conception of normality presented in 1.2, namely that normality furthers the well being of the individual and of the group of which the individual is a member. This conception of normality is also what characterises civilisation.

6.9 DEFENDING A QUALIFIED REHABILITATIVE APPROACH

In Chapter 1, five objectives, which any morally defensible system of punishment ought to strive towards, were presented. The theory of punishment towards which I am working in this thesis, a mixed theory having rehabilitation as one of its components, is best able to pursue three of them by rehabilitation. These are: (1) punishment should contribute

to the reduction of crime, (2) convicted offenders should be made better persons, rather than left as they are or made worse, by the process of punishment, and (3) punishment should be economical, i.e. it should not waste social resources. Each of these will be attended to in turn.

6.9.1 REHABILITATION AND THE REDUCTION OF CRIME

As we have seen, Menninger rightly pointed out that our present system of punishment is ineffective and that as a result our prisons seem to operate with revolving doors. This need not surprise us; in fact, it would be surprising if it were otherwise. Many persons turn to crime because they cannot manage to lead a normal life, a life without confrontation or offence against society. The reasons for their inability may be as varied as crime itself; nevertheless, they are all treated roughly uniformly by the punitive system. Once offenders are caught and convicted, they are generally thrown into prisons where they spend the time until their release dates without help or rehabilitation. Now branded "criminal," each is ostracised from society. In prison, they join others who are in similar conditions. Able to join the only community that is still willing to accept them, they meet other more experienced criminals from whom they acquire skills and techniques on how to be "better" criminals: "And if an offender comes to identify himself as a 'criminal,' the result may be more crime, since crime is what 'criminals' do" (Garvey 1998: 752).[4] On being released, they are often just dumped back onto society, expected to have learned their lessons and now to live lives devoid of crime. However, the label "criminal" has not left any of them, it

[4] It is an established fact that prison sentences often make even "better" criminals out of offenders, teaching them even more undesirable skills and behaviours, enculturating them into a subclass that is outcasted by society. This greatly contributes to the high recidivism rates in most systems (Sanson et al. 1996: 163).

will often stick to them for the rest of their lives. Their chances of finding suitable employment, of settling down peacefully, are thus diminished from the outset. The only way of life they ever knew, a life of crime, is soon adopted again until they are re-arrested, tried, convicted and imprisoned. There they again spend their time without rehabilitation or any constructive help at all. Can we expect such a system to bring about a reduction in crime? The answer is an obvious "no!" Not only does it not assist the offender in any beneficial way, it does not even attempt to do so.

The rehabilitative approach, by contrast, has as its fundamental guiding principle the rehabilitation of offenders. The objective is to rehabilitate offenders so that they will not offend again. In this sense, it has a forward-looking perspective. Needless to add, rehabilitation must be criminal-oriented, i.e. the therapy or assistance provided must be tailored to meet the criminals' needs. In this sense, it is backward-looking. In addition, there is not only one therapy that is a panacea for all crimes, just as there is not only one medication for all illnesses. No doubt, there will be criminals who cannot yet be effectively treated by any available therapy. For many there will be effective treatments, however, and these criminals ought to be helped. The question of who can be helped, who cannot, and by what method or technique, is to be answered by the rehabilitation experts, just as physicians decide who can be helped medically and in what way. This is not to say that those for whom no effective treatment is available ought to be left unattended. After all, many illnesses do not yet have cures, but we nevertheless do our best to apply the existing therapies, based on current research findings and the state of our present knowledge pertaining to the issue, hoping that they will have some positive effect, and develop more promising treatments as experience is gained. We have no reason to be less optimistic when dealing with criminals. No doubt, the

cause of crime, as other human behaviour too, may be biological, psychological, or sociocultural. The nature of the therapy will depend on the cause of the criminal behaviour. The therapy approach is undoubtedly committed to the reduction of criminal behaviour, and ultimately to its total elimination, thereby necessarily bringing about a reduction in crime - if no criminal behaviour, then no crime. The wholly punitive punishment system has no such objective:

> ... society should give some thought to what it is that causes these people to become so barbaric, and should give some thought to what the penal system ought to do with them. Because if we do not, we had then better plan what to do when they become our neighbors once again (Nygaard 1995: 7).

In the previous section, I pointed out that one of the reasons why past attempts at rehabilitation may have been ineffective is that they were mainly conducted by psychologists who used an inadequate model for dealing with maladaptive behaviours and categories that often hinder, rather than facilitate, the rehabilitation of persons with such behaviours. A less rigid approach, one not preoccupied with scientific method and being more pragmatically oriented pertaining to the crime problem, may be more efficacious:

> If the present categorical classification system continues to be used, there needs to be a clearer set of classification rules to make the categories more accurate and more mutually exclusive. The classification rules should be made more exhaustive and incorporate behaviors that do not overlap with other categories. Such an undertaking, while scientifically desirable, would doubtless be extremely difficult - perhaps, in the final analysis, impossible. There appear to be few if any "pure" clusters for grouping the behavior of persons into the type of neat pigeonholes ideally required by the categorical approach (Carson et al. 1988: 247).

Science, however, is not the only route to knowledge, nor is it the only way of rehabilitation. Another of these is philosophy.

Schuster (1999: 75) points out that Plato's philosophy is preoccupied with the good life and well being.[5] Aristotle maintains in his ethics that virtue is constituted by the mean: his ethics therefore has the primary objective of teaching people the good life through moderation. He maintains that moderation can be taught through philosophy (Aristotle 1999, Bk. 7 Ch. 5). The Stoics held crime and other behavioural abnormalities to be manifestations of a diseased soul, which in turn is caused by disharmonious emotions. Impulses and passions were thought to be controlled by reason, hence the Stoics argued that people could be improved or cured through the education of their reason (Inwood 1985: 128-152). It is interesting that Bertrand Russell (1986: 110) held Stoic self-discipline to be more appropriate than much twentieth-century psychotherapeutic practice. The Epicureans and Sceptics also held philosophy to be the key to a meaningful existence (Nussbaum 1994: 15, 508). Further examples of philosophy being employed therapeutically may be found in Augustine (1939), Philo of Alexandria (Winston 1981: 42), and Maimonides (Bakan 1991: 46).

Over the past two decades, philosophers have been setting up philosophical practices as an alternative to psychotherapy. The objective is to deal with many problems usually faced by psychiatrists or psychologists, problems that actually have a philosophical nature, such as finding a meaningful life, or developing a satisfying world-view according to which one can orient oneself. Within the psychotherapeutic paradigm, these have been seen as mental disorders, rather than as examples of the kind of conceptual confusion that they are. The success attained by such practitioners is in many cases just as high,

[5] For a more detailed discussion of Plato's concern with well being, and how his philosophy has been adopted in philosophical practice, see Schuster (1999: 78-84).

and sometimes even higher, than that attained by psychologists, if success is measured that is, by the satisfaction of the clients.[6] Let it again be noted that one approach is here not being advocated in favour of another, the replacement of scientific rehabilitation by philosophical, or any other non-scientific rehabilitation approach, is not being argued. I am however arguing a broader approach towards rehabilitation, an approach that does not just work according to a narrow scientific method of analysis and that does not automatically categorise each subject according to certain criteria.

Crime is a phenomenon that not only affects the criminal and his or her direct victim; it affects all of us, everyone in society. It therefore is an issue that should concern all of us, and we should all work towards its elimination, or at least towards its reduction. Persons not involved in law enforcement, the penitentiary, or rehabilitation of offenders may ask, how can we help? This is not an idle question for much of the progress that has been achieved regarding our treatment of criminals has resulted from the work of concerned citizens. Many opportunities dealing with rehabilitation will be reserved for trained specialists, both professional and paraprofessional - psychiatrists, psychologists, social workers, and other medical and para-medical personnel. In addition, there are many professions, ranging from law enforcement to teaching and the ministry, that can and do play

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[6] Matthew Lipman (2000) provides examples in which philosophy is being applied therapeutically. A centre in Montreal, La Traversee, is devoted to helping women and children who have been victims of sexual aggression. The centre uses philosophy as an integral part of its therapeutic approach and is satisfied with the results. Philosophy is capable of providing a special kind of enlightenment that is critically important to those who are bewildered. Coping with traumatic experiences, such as sexual abuse, requires cognitive factors such as concept formation and critical questioning. This is where philosophy plays a crucial role. The abused children at La Traversee make use of philosophical dialogue with the objective of discovering acceptable alternative ways of coping with violence. Through the dialogue, their judgements are improved and they learn ways in which they can count on one another. The Austrian Centre for Philosophy for Children also conducted valuable conversations with Bosnian refugees.

key roles in the well being and behaviour of many people. Training in all these fields usually offers individuals opportunities to work in community clinics and related facilities, to gain experience in understanding the needs and problems of people in distress, and to become familiar with community resources. If citizens are aware of community resources, they can find many ways of being of direct service. Whatever their roles in life - teacher, student, business executive, homemaker, lawyer, police officer, or trade unionist - their interests are directly at stake. For although the health of a society may be manifested in many ways - in its purposes, courage, moral responsibility, scientific and cultural achievements, and quality of daily life - its health and resources derive ultimately from the individuals constituting it. It is they who plan and implement its goals in a participatory democracy. We should all work towards improved public education, responsible government, the alleviation of group prejudice and poverty, and the establishment of a more sane and harmonious world.

If, when dealing with offenders, our fundamental objective is not concerned with assisting them in not offending again and reducing the conditions that lead to the criminal behaviour as well as possible with our available means, then we cannot truly claim to be doing our moral duty in respect to dealing with criminals.

6.9.2 REHABILITATION AND IMPROVING OFFENDERS

Society labels criminals as "bad" and non-criminals as "good," *ceteris paribus*. It follows that if persons become non-criminals after having offended, they become better persons. However, more than this is meant by "good." Good persons are also able to care for others and make meaningful contributions to society, such as by pursuing a meaningful career. This is not foreign to the views held by the ancient philosophers,

such as Plato and Aristotle. In fact, ethics in ancient philosophy was explicitly directive in how to live the good life. This ability persons can also gain through the right kind of rehabilitation. The question may now arise, but if different conceptions of the good life exist, how are we to choose which of them is to be advocated in rehabilitation? This was already addressed in 1.2 in dealing with the issue of normality. It follows from the definition of normality argued for that no fixed set of values is to be imposed on those rehabilitated, but rather, the objective of rehabilitation ought to be the fostering of well being of both the individual rehabilitated and the group of which he or she is a member.

The present punishment system, as has already been mentioned, releases persons who have served their sentences without providing them with any means for coping in society and without enabling them to be meaningfully reintegrated into it, such as by finding a job and having a stable home. The therapy system would at least make this one of its primary objectives:

> Specific deterrence forestalls future offenses by changing the offender's cost-benefit calculus. Rehabilitation, on the other hand, forestalls future offenses by changing the subject's preferences. The specifically deterred offender now knows what it feels like to be punished, and out of fear, avoids making the same mistake twice. The rehabilitated offender, in contrast, now knows and accepts that what he did was wrong, and out of respect for the law and the rights of others, no longer thinks it is morally tolerable to violate either of them. The distinction can be elusive, but it is important nonetheless (Garvey 1998: 757).

Of course, there will still be recidivists, just as recovered patients sometimes have relapses, but many successes will also be attained, successes that will become more frequent as rehabilitation becomes more effective. Here too, the only system that has the improvement of offenders as its objective is the rehabilitative system. Imprisonment does no good and

cannot plausibly be expected to do so: "...containment is only a shot of morphine for a sick and painful society. When it wears off, the disease is still there and the pain is worse" (Nygaard 1995: 6).

6.9.3 WHY REHABILITATION PROMISES TO BE ECONOMICAL

One common reaction to be expected from persons first reading the above proposals is, who is going to bare the cost of such treatment? The rehabilitative system will require many psychiatrists, psychologists, social workers, and other persons involved in rehabilitation; who is going to assume the cost? Before answering this question, let us ask what the present system of punishment is costing society. What do the many prisons cost and what are they delivering in return? Crime is thereby not being effectively reduced; on the contrary, recidivism is the norm rather than the exception. Are we then getting our money's worth? If crime is not actually being reduced, then for what are we really paying? The further question that needs to be asked is not only what the expenses are, but also what the returns are. Undoubtedly the rehabilitative system will initially cost a fair deal, but the advantages society is likely to attain by it are immeasurably greater. In the first place, if offenders no longer become recidivists, we save productive persons for society. The persons might cost the state more money for their initial treatment, but should ultimately cost the state less since repeated imprisonment should become unlikely. Returned to society, former offenders ought to be able to be productive citizens, generating wealth rather than costing revenue for their repeated imprisonments and care. The reduction in crime promised by the rehabilitative system should ultimately reduce the cost of crime enforcement as well as of the legal system. Being able to return productive members to their families also has the benefit of enabling

them to contribute to their care, where they might otherwise have been dependent on the state for their support. Ultimately, however, the greatest benefit will probably not be found in monetary terms, but in the peace of mind gained through having a more peaceful, crime-free society.

6.10 SOCIAL LIMITS OF REHABILITATIONISM

Rehabilitationism does not emphasise the offenders' blame for their actions, nor does it presuppose a rational agent, or the existence of rational choice: it emphasises that offenders are maladapted to their environments and that they can usually improve if assisted to do so. If we examine the treatment of offenders from impoverished communities, offenders guilty of offences arising out of economic need, political offences committed as a form of protest against their miserable conditions, or to draw attention to their oppression by the dominant social group, we are faced by numerous moral difficulties.

Firstly, the wholly rehabilitative approach assumes that criminal offenders are always ill in some form or other, an assumption that is not always correct. Persons such as Martin Luther King, Lech Walesa and Nelson Mandela (all Nobel Prize Laureates) and Mahatma Gandhi all served time in prison for crimes against the state or the general social order, yet no one would seriously suggest that any of these persons is mentally ill.[7] Persons committing more minor offences, such as theft, are also not necessarily exhibiting the symptoms of a mental illness. Starving persons who steal food are not exhibiting ill health either. On the contrary, many will

[7] Ronald Dworkin (1993a: 6-13) considers civil disobedience in the context of the nature of law and of the roles various actors play in our legal system. He argues that because law and morality are not easily separated, the validity of law is itself often an issue of dispute in civil disobedience cases. Both prosecutors and legislators should weigh the consequences of prosecution and the fairness of prosecuting people for violating laws they believe to be immoral and that may be invalid.

assert, as I do, that they have a healthy instinct for survival. If they steal to save their families from starvation, they are not only not ill, but are loving and caring to those close to them (Delgado 1995: 266). It should be emphasised that most criminals exhibit the very character traits encouraged by capitalist society as normal - self-interest, indifference to others and acquisition. Of course, society may still wish to rehabilitate such offenders, providing them with means and modifying their behaviour in such a manner that they may satisfy their needs and interests in non-violent and socially acceptable ways. This presupposes, however, that such an alternative exists, but this may not always be the case.[8] If society fails to create the structures and social conditions enabling all members of society to satisfy their needs and interests, then no rehabilitative approach will be adequate in the long-term (Delgado 1995: 267).

If rehabilitation is applied to persons not sharing the dominant values of society, they will almost certainly be considered cured or rehabilitated only once they have adopted the values of the rehabilitator and of the dominant society. This means that offenders' rights to determine and choose their own values is denied. We may well imagine offenders saying that we may punish them if we so wish, but we should not interfere with their rights to choose what is valuable (Delgado 1995: 267). Therefore, rehabilitators should not impose any values upon offenders other than those that facilitate the fostering of well being of the individual and ultimately of the group.

In the chapters dealing with retribution and with deterrence, I argued that punishment is only justified if

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[8] Feinberg (1995c: 91-112) considers the consequences of the debate between positivism and natural law for conflicts in the political arena. Most positivists agree with their natural law opponents that citizens in a democracy are morally obliged to obey the valid laws of their country. Feinberg dissents from this opinion.

society provides a framework in which all communities can participate as equals, having the same rights and opportunities. The same holds for the rehabilitative approach. Societies ought therefore to strive towards the reduction and ultimate elimination of social, ethnic, religious, or racial oppression to be able to legitimately expect the members of its communities to accept the norms and values of the general society and thereby avoid conflicts. It may be reiterated that the view of normality adopted in this thesis is that survival and actualisation of a group's potential is worth striving towards too, not only that of individuals, and hence a society that does not strive towards the well being of its communities may be described as maladaptive (as well as uncivilised) and in need of reform. The rehabilitative ideal defended in this chapter, i.e. in which the aim is to foster and enhance the well being of the individual and ultimately of the group, does not conflict with any of the limits mentioned in this section.

6.11 SUMMARY AND PERSPECTIVE

In this chapter, I presented the rehabilitative approach and defended a qualified form of it. I first presented a paradigm exposition of the theory before enumerating the main differences between this approach and the punitive one. The main concerns pertaining to such a system were also mentioned before dealing with the main problems in detail.

I found no necessary connection between crime and illness, i.e. I found no plausible account that attributed all criminal behaviour to some illness or other. I also pointed out, however, that even if offenders were ill in some way or other, it would not condone any offensive actions they may have performed by virtue of this fact alone. To do so, the illness would have to have determined their actions completely. Having argued that not all crimes are the result of illnesses,

I nevertheless argued that even if not all criminals are ill, they still ought to be treated because this promises to yield a more positive outcome than mere imprisonment.

Turning then to preventive detention, I established by means of argument that this is morally justified only for those persons who have already committed offences in the past, which means that innocent persons cannot morally be subjected to such treatment. In this respect, I concluded that the accuracy requirements for criminals and former criminals is not as high as that of innocent persons since the former have diminished moral standing. I also argued that preventive detention morally may be imposed on those qualifying for such treatment (i.e. criminals and former criminals) until they no longer pose an uncontrollable threat.

The arguments with regard to preventive detention also enabled me to draw conclusions for the issues of treatment of innocent persons and indeterminate sentence lengths. Pertaining to the former, I argued that this is not morally tenable at all; pertaining to the latter, I contended that the length of sentences ought to be determined by the requirements of general deterrence set out in 5.5, and not by the requirements of rehabilitation, except when conditions for preventively detaining persons exist.

Before arguing for a qualified rehabilitative approach, I addressed the reasons why past attempts at rehabilitation may have been unsuccessful, both on empirical and philosophical grounds, and addressed the problem of imposing values. In expounding a qualified rehabilitative approach, I showed that rehabilitationism pursues three more of the five objectives I set out in Chapter 1. Finally, I discussed the social limits of rehabilitationism too.

Let us evaluate rehabilitationism in light of the necessary conditions I argue for justified punishment: (1) It does not provide a morally acceptable account of whom to punish or rehabilitate, since even innocent persons would be

rehabilitated in a pure system if doing so would prevent crime. (2) The "how" question is also not acceptably handled because a pure system would endorse open-ended punishment, i.e. rehabilitation until the goals of rehabilitation have been achieved, regardless of how long this takes. (3) Bringing satisfaction for society: the rehabilitative approach does not aim at this goal at all in any direct way. Punishment is not an aim, even if it would serve a need of society; the only primary objective is to rehabilitate offenders. If rehabilitation for murder could be achieved without any discomfort for a given group of offenders by, for instance, prescribing a specific medication for them, then these offenders would be released, according to the rehabilitative approach, resulting in no visible punishment for society, thereby denying society the right to express its anger and indignation through punishment. On the contrary, it may be presumed that prematurely releasing criminals, or releasing them without any perceptible punishment, has the contrary effect, i.e. it angers the members of society even further. (4) Crime reduction: the rehabilitative approach has as its fundamental guiding principle the rehabilitation of offenders with the objective of reintegrating them into society without re-offending. If therapy is successful, it will ultimately bring about a most noticeable reduction in crime.[9] (5) Improving offenders: the only approach that is committed towards improvement of offenders is the rehabilitative approach, having it as its fundamental guiding principle. Offenders are to be assisted and changed so that they will be able to return to society once released and live productive, crime free lives. The ultimate aim of rehabilitation is the fostering of well being of the individual being rehabilitated as well as the well being of

[9] See 6.9.1 for elaboration on how rehabilitation pursues the goal of bringing about a reduction in crime.

the group of which he or she is a member.[10] (6) Undoing the harm done: rehabilitationism is not concerned with the well being of victims in any way; it focuses only on criminals and does therefore not pursue this objective at all. (7) Being economical: the approach that is ultimately most committed to being economical is the rehabilitative approach. It promises to give taxpayers best value for their money. Of course, the rehabilitative system will initially cost a fair deal, but the advantages it is bound to yield are immeasurably greater than those attainable from any other simple approach. Criminals who do not become recidivists are saved as productive persons for society. Their initial treatment may cost the state more, but the reduced likelihood that they will require repeated imprisonment would ultimately reduce the costs. Former criminals who are able to become productive members of society generate wealth rather than cost revenue for repeated imprisonments and care. The reduction in crime promised by the rehabilitative system will ultimately reduce the costs of crime enforcement and of the legal system too. Of the seven necessary conditions, rehabilitationism in a pure form is only capable of fulfilling three.

At this stage, it is once again appropriate to address the question, what has been achieved so far and what still lies ahead? Retributivism and deterrence theory together fulfilled three of the necessary conditions for a justification of punishment, namely to show whom we may punish, to what extent, and allowing punishment to serve as a recognised channel through which society can express its anger and indignation at offenders. In this chapter, I then addressed the rehabilitative approach, stressed its positive elements, and argued that rehabilitationism is best able to pursue three of the five objectives I maintain any punishment system must have. A hybrid approach with rehabilitative objectives too, with sentences determined by the demands of general

[10] For details on this point, see 6.9.2.

deterrence, has so far been argued. Four of my stipulated objectives are already pursued, namely: punishment ought to serve as a recognised channel through which society can express its anger and indignation at offenders; punishment should bring about a reduction in crime; punishment should improve offenders, rather than leave them as they are, or leave them to deteriorate further; and punishment should be economical. One more objective is to be pursued, but for this I shall need to turn to the restitutional approach. Before doing so, it is important that I discuss paternalism, since one of the most common reactions from this chapter may be that rehabilitation as I defend it would result in paternalism. Paternalism, as I shall argue in the next chapter, is morally defensible and unlike many of its critics would claim, is not even diametrically opposed to liberalism.

CHAPTER 7

DEFENDING PATERNALISM

7.1 INTRODUCTION

In the previous chapter, I argued that just punishment ought also to have retributive elements. One of the goals of rehabilitation is that offenders ought to be made better persons, rather than left as they are, or allowed to deteriorate further, by the process of punishment. Making them better, rather than leaving them as they are, or leaving them to deteriorate further, requires making changes to their lives to which they may sometimes not consent since many offenders assume a hostile, acrimonious and suspicious attitude towards the system imposing punishment on them. A possible objection against my defence of rehabilitation is that it would amount to paternalism and it is by no means obvious that this is morally justifiable. Therefore, I need to show that paternalism is morally justified.

What exactly is paternalism? Paternalism is "the power and authority one person or institution exercises over another to confer benefits or prevent harm for the latter regardless of the latter's informed consent" (Honderich 1995). It is therefore a threat to autonomy as well as to liberty and privacy. On any normative principle, paternalism is desirable towards children, the mentally ill, and others similarly incapable of adequately caring for themselves. Since I have argued against the view that criminals are in general mentally ill, I offer a defence based on different grounds. In addition, liberals, such as John Stuart Mill, seek to limit paternalism to the bare minimum. As examples of paternalistic laws, one may mention: laws requiring motorcyclists to wear helmets when operating their machines, laws forbidding persons

from swimming at a public beach when life-guards are not on duty, laws making suicide a criminal offence, laws forbidding women and children to work at certain types of jobs, laws requiring a license to engage in certain professions, laws specifying that persons must spend a certain proportion of their income for the purchase of retirement annuity or medical aid insurance, laws forbidding specific types of gambling, laws regulating the maximum rates of interest for loans, and laws against duelling. Other regulations may also be paternalistic, such as laws specifying the types of contracts that will be upheld by the courts, not allowing consent as a defence in a murder charge, and requiring members of certain religious sects to accept blood transfusions (Dworkin 1995a: 210).

Regarding punishment, the question that needs to be resolved is, can we compel anyone against his will to undergo treatment or therapy with the objective of making him a better person, with the aim of reforming him?

I shall begin by presenting a wholly paternalistic theory of punishment. Because I am concerned in this thesis with establishing a theory of morally justifiable punishment, I hold it necessary to examine a wholly paternalistic attempt at justifying punishment, and then to show why this attempt fails. I have chosen Herbert Morris's theory because it is the most comprehensive attempt at justifying punishment paternalistically that I have come across. I shall first briefly describe the theory before subjecting it to critical evaluation. I will then begin with my own defence of paternalism. Given the liberal opposition to paternalism, my defence of paternalism will begin with a discussion of liberalism, taking Mill's liberalism as the basis for my discussion since his philosophy may be considered as paradigmatic on the issue. Liberalists usually oppose any paternalistic intervention, but I shall argue that this is inconsistent and that liberalism endorses some paternalistic

intervention, and hence liberalism and paternalism are not diametrically opposed to each other. Finally, I shall examine the issue of whether it is morally justified to preventively detain persons on paternalistic grounds.

7.2 PATERNALISM AND PUNISHMENT

In this section, I examine an attempt to justify the whole institution of punishment paternalistically. In the theory I present here, Herbert Morris defends the paradoxical claim that punishment respects the status of offenders as moral persons. He argues that punishment is a complex communicative act that conveys the message to moral agents that the behaviour they exhibited was a violation of communal values and therefore wrong. Morris is not advocating a communitarian theory, however, since he does not hold that paternalistic punishment ought to have any communitarian benefit, but ought to benefit only the individuals punished. For him the objective of punishment is the realisation of offenders that certain behaviour is wrong: a recognition of the good, and the offender's freely choosing the good in future. Offenders should come to see the good of their own punishment and realise that violating certain communal values is ultimately detrimental to themselves. Legal punishment is seen as analogous to parental disciplining of children, which is for the well being of the individual being disciplined, as well as for society. Morris's theory rejects utilitarian justifications of punishment, regarding these as failing to acknowledge criminals as moral agents. He insists that basic retributive values be upheld, namely that only guilty persons be punished, that punishment should be proportional, and that the moral worth of the individual should always be upheld.[1]

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[1] Morris (1995: 74-93) maintains that punishment is justified primarily, not as a method of crime control, but because the criminal, having committed a crime, deserves to be punished. He attempts to derive the principle of retribution from more general principles of justice or

7.2.1 MORRIS'S PATERNALISTIC THEORY OF PUNISHMENT

Morris attempts to defend paternalism as an appropriate response in terms of a system of punitive sanctions against offenders. He approves of punishment, but in order for it to be justified, one must punish paternalistically (Morris 1998: 96).

He assumes that a system of punishment presupposes the following: (1) certain conduct has been determined to be wrongful, (2) recognised deprivations are imposed in response to such conduct, (3) these deprivations are imposed by someone having authority to do so, (4) wrongdoers are made aware that the deprivations are imposed because of the wrongdoing, and (5) the context of punishment makes it clear that the measures are designed to make offenders aware that their conduct was wrong, and not to compensate victims or make reparations of some sort (Morris 1998: 96-97). The communicative element therefore distinguishes punishment from mere retribution or retaliation.

The communicative act of paternalism is primarily concerned with justifying conduct for another's well being. Deprivations and limitations thereof are justified in terms of the benefits for actual and potential offenders. Morris therefore sets out to argue that punishment is for the actual and potential offenders' goods. He distinguishes his theory from rehabilitation, claiming that rehabilitation may often be undertaken not primarily for the good of the individual, but for that of society. He also maintains that rehabilitation fails to inculcate a message of the moral good, a central component of his theory (Morris 1998: 97). He does not give

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fairness. He argues that the criminal, by free riding on a mutual scheme of social co-operation, has treated law-abiding citizens unfairly, and hence owes them a debt. He further argues that a system of deserved punishment, unlike a system that regards criminal behaviour as a mental illness, treats criminals with respect and dignity, as responsible agents, and that criminals therefore have a right to be punished. They also have a right to all the guarantees of a due process system, in contrast to a therapy system.

reasons for this claim, and if one considers what he means by the "good," no apparent reason for his holding this view comes to light. For Morris, the good requires that one come to realise the wrong done to oneself and others by one's criminal actions, which requires empathy, the ability to accurately imagine oneself in another's situation and also requires the imaginative capacity for understanding the implications for one's future self that result from wrongful actions. It further requires a commitment towards being a certain kind of person (a view not elaborated upon by Morris). It therefore not only requires an understanding that certain actions have led to the present situation, but that certain actions will lead to certain consequences, i.e. it not only entails an understanding of past actions, but also of future ones (Morris 1998: 98). For him the "good" thus has a number of component parts, including that one come to appreciate the nature of the evil involved for others and for oneself in wrongfully behaving, but there is no reason why rehabilitation ought to rule out instilling within offenders a sense of empathy and developing the required imaginative capacity.

Morris also assumes that paternalism always entails giving someone something they do not desire, or withholding something from someone they desire. According to Morris, paternalism is in opposition to the desires of the paternalistically treated persons. He believes that giving someone something they desire is not paternalism but benevolence. This, I hold, is a fallacious assumption because of the following: collective restrictions are also paternalistic if the liberty of the whole group is restricted so that if every member adheres to the restrictions, each will benefit thereby. Compulsion may be necessary to enforce such restrictions, but this is only done with the understanding of the members that general restrictions are necessary for their collective benefits. Paternalism therefore is not necessarily the restriction of liberties against the subject's consent (Dworkin 1995a: 211).

For example, if one requires that seat belts be worn in the front seats of cars, one is enforcing a good for the well being of the subjects, a good which most of them recognise. It is not that those neglecting to wear seat belts do not value their bodily well being, but, as I will discuss in 7.4.3, may value another freedom more, perhaps unreasonably, namely the freedom of travelling in the front seats of cars unrestrained. Perhaps they do not recognise the danger involved or underestimate the odds of becoming victims.

Morris defines punishment as a deprivation that persons generally seek to avoid, therefore being in opposition to their desires; but their present desires will not influence the deprivations imposed on them. Most importantly, however, his theory entails that punishment has the objective of inculcating a certain moral good within actual and potential offenders (Morris 1998: 98).

Morris's theory presupposes that the rules defining punishment meet certain moral conditions, but he remains vague on these conditions: he assumes that attachment to these values partly defines one's identity as a moral being and as a member of a moral community, and that disregard for such rules may result in a rupture between oneself and others or oneself and the community, accompanied with a loss of identity to some extent. He assumes that it is part of the good that one suffer for having done wrong, and that one be inclined to restore what has been damaged and that one acknowledge the appropriateness of having to suffer as a consequence of having committed a crime. Morris also holds that to be part of the good is to be determined to avoid repeating those actions that were wrong or injurious in the past and hence to be able to forgive oneself; and finally, it is also held to be part of the good that one see oneself as an individual worthy of respect and responsible for one's actions (Morris 1998: 99):

> It is a moral good, then, that one feel contrite, that one feel the guilt that is appropriate to one's wrongdoing, that one be repentant, that one be self-forgiving and that one have reinforced one's conception of oneself as a responsible being. Ultimately, then, the moral good aimed at by the paternalism I propose is an autonomous individual freely attached to that which is good, those relationships with others that sustain and give meaning to a life (Morris 1998: 99).

Morris's theory therefore seeks to justify punishment as a means towards the good of the offender. Any punishment that does not have this objective is held to be morally unacceptable:

> ... on this theory we seek to achieve a good entirely through the mediation of the wrongdoer's efforts to understand the full significance of the wrongful conduct, the significance of the punishment being imposed, and the significance of acceptance of that punishment. Thus, unacceptable to this theory would be any response that sought the good of a wrongdoer in a manner that bypassed the human capacity for reflection, understanding, and revision of attitude that may result from such efforts (Morris 1998: 100).

Offenders must also always be treated with dignity, even when the offender consents to being treated otherwise (Morris 1998: 100).

The paternalistic goal is not to make offenders feel less burdened or more content. This may be a likely by-product of the punishment when the good is attained, but it is not one of punishment's objectives (Morris 1998: 100).

Morris considers possible criticisms of his theory, specifically, can a plausible connection between punishment and the good sought be given? Secondly, can there be any serious objection to limiting someone's liberty for their own goods?

In response to the first, he argues that parents: sometimes coercively interfere with their children to prevent harm to them, sometimes to ensure continued healthy growth,

sometimes to establish appropriate socialisation, but sometimes for moral education. Pain, deprivation, and a feeling of loss often accompany moral education. Not all anger directed against a child is punishment, however. A parent's spontaneous outbursts of anger serve no moral purpose; they only distress the child. Anger or disapproval only serves as punishment if the parent deliberately visits upon the child some pain or deprivation because of some wrongdoing by the child. The absence of this connection between wrongdoing and punishment may arouse guilt in the child, and may bring about future compliance, but does not relieve guilt, nor is it proper moral communication, and hence does not serve as moral education. Morris therefore argues that punishment must have some special and logical relationship to wrongdoing. In this way, punishment is connected to the good in a way in which mere blame or disapproval is not (Morris 1998: 101).

He argues as follows: one of the important lessons children learn is that parents are entitled to inflict some pain or deprivation in response to wrongdoing. A punitive response also conveys to children the magnitude of the values disregarded. The child therefore becomes aware that there are different degrees of value to which different degrees of punishment are connected as responses to their disregard (Morris 1998: 101-102). Furthermore, punishment rights the wrong done (a point I shall criticise and reject shortly). It is as though the debt is paid, life can go on with normal societal relationships. Punishment assists the child in learning what it must know as a moral person, that some things are not permitted, that there are degrees of seriousness, and that one is sometimes responsible for wrong done and sometimes not, and that it deserves degrees of blame. By feeling guilt, by acknowledging responsibility for the wrong done, and by accepting some deprivation as a consequence, the child is

restored to a normal position with others. It is an integral part of moral education (Morris 1998: 102-103).

Morris projects this paternalistic theory of punishment onto society and therefore onto adult individuals. By legislating laws, providing sanctions, and enforcing these for violating laws, citizens learn what society's values are, what the weight of each value is, and the response that may be expected for disregarding these values. Punishment is a forceful reminder of the harm done to others and oneself. In the case of legal punishment too, Morris maintains that it rights the wrong, allowing offenders to restore their relationships with society, having paid the debt (Morris 1998: 104).

Morris (1998: 105) argues that punishing offenders is justified because it ultimately benefits the punished individual. He believes that all of us, as rational beings, would consent to a system in which we are benefited if we should stray from society's prescriptions. Morris denies that this is objectionable because it is for the moral good of the punished. The person's personhood and dignity are respected throughout.

Regarding the objection whether we should always only punish paternalistically after having warned that we will punish, Morris replies that society does warn by proclaiming its laws and prescribing punishments for transgressions.

Responding to the criticism that paternalism would justify open-ended punishment (punishment until the moral transformation of the perpetrator has been achieved), Morris replies that his theory does not justify such treatment since the goal is not repentance at all costs, but repentance freely arrived at and not just an adherence to norms and laws. Punishment must also take into consideration the severity of the harm done, thereby ruling out an open-ended punishment system since that would result in disproportionate punishments.

A further question faced is whether conditioning or forfeiting of one's autonomy would be appropriate when consented to by the offender. Morris clearly rejects this, arguing that the goal of punishment is to increase moral autonomy, not to make offenders automatons (Morris 1998: 105-106).

Morris realises that his theory faces its sternest challenge from critics who argue that the theory has no relevance for those offenders who are already repentant, or for those who know the values of society but are indifferent to them. Regarding the first, he claims that the guilty and repentant wrongdoers will accept the appropriateness of the punishment because it is an indication to them and others that they are truly repentant and because it rights the wrong. Regarding the indifferent offender, Morris states that his theory presupposes two fundamental conditions of the society in which his theory is applied, namely, (1) that the values promulgated are indeed just and that society's members have roughly an equal opportunity of conforming to those values, and (2) that there is a general commitment to upholding the values promulgated. However, Morris fails to conceive how a moral theory of punishment could be applied if such conditions are not met (Morris 1998: 107).

Regarding the theory's application, it can only be applied to agents capable of recognising society's values. Reasonable ignorance or mistakes of law are to be mitigating factors. What about the assumption that criminals have the same right to be free as do we all? The answer is, perpetrators have forfeited their rights, especially if the restrictions placed upon them are similar to those inflicted by them on others. The theory presupposes that rights can be forfeited, waved aside, and relinquished. A right not forfeitable, according to this theory, is the right to one's dignity and autonomy, but he does not give a reason for this right's special status.

This paternalistic theory therefore opposes any theory of punishment primarily retributivist or based on utilitarian considerations (Morris 1998: 108-109).

7.2.2 EVALUATING MORRIS'S THEORY

Morris argues against therapy or rehabilitation, claiming that these measures are generally designed to benefit society, rather than the individual (Morris 1998: 97). However, this need not be the case. Many persons voluntarily undergo psychotherapy, and would be indignant at the suggestion that their primary objective is to benefit society. Of course, oppressive regimes may sometimes want to employ rehabilitation for changing the attitudes and behaviour of individuals critical of the regime, but such employment of rehabilitation would be morally unjustified if it is not conducive to furthering the actualising of potential within the individual.

Morris's definition of the good encompasses the capacity to empathise with others and develop a future-oriented perspective. He would therefore almost certainly be incapable of dealing with antisocial personality offenders, bearing in mind that he has ruled out rehabilitation for the treatment of offenders. Carson, Butcher and Coleman describe antisocial personality as follows:

> Antisocial personality, ... is a personality disorder in which the outstanding characteristics are a marked lack of ethical or moral development and an apparent inability of the individual to follow approved models of behavior. Basically, these individuals are unsocialized and seemingly incapable of significant loyalty to other persons, groups, or social values. These characteristics often bring them into repeated conflict with society...
>
> Typically intelligent, spontaneous, and usually very likeable on first acquaintance, antisocial personalities are deceitful and manipulative, callously using others to achieve their own ends. Often they seem to live in a series of present moments, without

consideration for the past or future (Carson, Butcher & Coleman 1988: 237-238).

Then, Morris believes that punishment should arouse guilt in criminals, i.e. they should experience guilt and not only acknowledge that they are legally guilty. Antisocial personalities are unlikely to experience any guilt, depending on the degree of their antisocial conditions. He also does not provide any indication how the system of punishment ought to ensure that the punished feel guilty. Criminals may acknowledge that they are guilty but may not feel guilty, which is what Morris wants. However, not only might antisocial individuals be incapable of feeling guilt and remorse in a punishment setting, But criminals might also see their criminal actions as having been justified, rationalising that violence is appropriate in given circumstances, for instance, or that society is responsible for their behavioural malfunction, and therefore they need not actually feel guilt or remorse since they are not primarily responsible for the crimes.

Morris maintains that punishment rights the wrong done. He stipulates, however, that it is not imposed to make reparation to the victims or to society. How then is the wrong made right? In the case of legal punishment too, Morris maintains that it rights the wrong, allowing offenders to restore their relationships with society, having paid their debts (Morris 1998: 104). Are we to understand it in terms of a Platonic or Hegelian notion? Plato argued that punishment, though often painful to the body, is a benefit rather than a harm to the person being punished to the degree that the punishment improves her soul or character, making her a better person in the future.[2] If Morris wants us to think along Platonic lines, then it must be pointed out that the Socratic theory has therapy as its underlying theme. Hegel believes

[2] For this dialogue extracted from Plato's *Gorgias*, see Plato (1995: 8-13).

that punishment is a negative act, one that can only be negated by punishment. Punishment rights the wrong done in criminal behaviour by inflicting suffering on the perpetrator. This metaphysical argument fails to show, however, how two negatives make a positive. If punishment is a negative, then how is the original negative of the crime negated by it?[3] Leaving metaphysical arguments aside, is not the crime victim usually the one to suffer most by the criminal's behaviour? Morris and Hegel fail to take account of the actual harm done or type of harm.

In response to the claim that criminals pay a debt to society through punishment, it must be stated that this is a very simple and incorrect picture, as Nozick's counterexamples have made clear.[4] It is not necessarily the case that those who have benefited from some joint enterprise have a duty, or moral obligation, to contribute to it. They may, for instance, have been innocent bystanders, innocent recipients of the benefits, who could not avoid receiving them and who would not have voluntarily taken part in the joint venture to receive the benefits. Examples would be people who voted against their government but now benefit from their government's economic reforms; or people benefiting from the negotiations their organisation is engaged in with the trade union, even though they themselves are not members of the latter. It is not sufficient that they merely receive the benefits; they also must have accepted them willingly (Ellis 1997: 92).

It is a difficult question to answer under which conditions a person has accepted a benefit willingly, but we may identify situations more easily in which this clearly is not the case. Someone who thought, for instance, that the benefits of cooperation would not repay the costs involved, and therefore who would rather that there be no such scheme

[3] This stance was already rejected in 2.5.
[4] See Nozick's examples in Chapter 6 of *Anarchy, State, and Utopia* (Nozick 1974).

and not pay the costs, and who receive the benefits merely because they cannot avoid receiving them, or it would be too costly not to receive them without others doing likewise, cannot reasonably be described as having received the benefits willingly. An example of the first kind are persons benefiting from a sports field built in front of their house so that they can watch the events held there from their balconies. They are not causing the organisers any loss when they do so, although the organisers would be better off if the balcony spectators were to contribute financially too for the benefits they get, just as normal spectators do. This is not equitable with their causing them a loss, however. Similarly, if someone causes one a loss, he is not necessarily benefited by it. If a person weighing one-hundred-and-sixty kilograms were to fly with a small airline, the airline may indeed suffer a loss for having to use more fuel than would be the case with a passenger with less weight, but the passenger causing the loss would not benefit in any way that other passengers do not. The heavy passenger's receipt of the benefits does not put him under an obligation to pay the costs in return. The question here is not whether free riders sometimes cause a loss to participants, but whether they necessarily do so and do so in a relevant way (Ellis 1997: 92). They need not do so, however.[5] It is conceivable that criminals deny that they owe any allegiance to society since they have not willingly accepted the benefit of security created through mutual cooperation.

The analogy drawn between punishment of children in their families and punishment of offenders in society may also be questioned, and Morris may be accused of employing a false analogy. Unlike parental punishment, legal punishment might not be analogous to familial discipline because it usually

[5] For similar details on these arguments and examples, see Ellis (1997: 92-95).

does not have a happy family environment, but rather involves hostile attitudes.

Morris's theory also ignores: the magnitude of the punishment to be administered, society's right to express its anger and indignation at offenders, deterrence, bringing about a reduction in crime, undoing the wrong through restitution, and the costs of punishment. His theory leaves many issues unexamined, just as all other simple theories that I have examined have left issues unexamined. This is not to assert that no single approach could adequately address all these issues, but I have not been able to determine how this might be done and therefore I advocate a unitary theory that combines retributional, deterrent, paternalistic, rehabilitative, and restitutional elements.

7.3 LIBERALISM

7.3.1 MILL'S LIBERALISM

Mill argues that the only justification one has for curtailing the liberty of any person is self-protection (Mill 1995: 198). For Mill, a utilitarian, the only purpose for which power may be exercised over members of society against their wills is to prevent harm to others. A person's own well being, either physical or moral, is not a sufficient reason for warranting restriction of liberty. Remonstrating with, reasoning with, persuading or entreating persons to act in a manner that would make them happier, or because in the opinions of others to do so would be wise or even right, are good reasons, but they are not sufficient reasons for compelling them to act as suggested because Mill sees a greater danger in interfering in the lives of others for their own good than not interfering (as will be explained shortly). The liberty to act in any way one pleases may be restricted only if one's actions cause harm to others, either individually or collectively. This is referred to as

the "harm principle." Concerning themselves, their independence is an absolute right. Everyone has sovereignty over her own mind and body (Mill 1995: 198).

Mill qualifies his principle so that it applies only to persons fully capable of making rational decisions. Children, or those who are still in a state requiring them to be taken care of by others, must be protected against their own actions as well as against external injury. Mill's principle also applies only to societies in which the members are capable of responsibly leading their lives by means of rational deliberation in a liberal environment (Mill 1995: 198).

Mill strictly adheres to utilitarianism regarding all ethical matters. It is utility in the largest sense, grounded on the permanent interests of man as a progressive being. If someone acts to hurt others, there is a *prima facie* case for punishing them by law, or where laws are not applicable, by expressing general disapprobation. Persons may also be compelled to perform positive acts for the benefits of others, such as to defend the country, or to testify truthfully in a court of law, or any other action necessary for the orderly functioning of society. Persons may cause injury to others, not only by their actions, but also by their inactions. In either case, they are accountable for the harm done (Mill 1995: 199).

Liberty, according to Mill, is to be granted to the domains of: individual consciousness, liberty of thought and feeling, absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological. Expressing and publishing opinions is closely connected to the liberty of thought, and is therefore, in Mill's view, practically inseparable from it. One ought to enjoy the liberty of pursuing one's own goals and shaping one's life according to one's life-plans by doing as one likes, as long as what is done does not harm others. Persons are to enjoy the liberty of uniting in groups for pursuing

diverse interests and activities so long as these do not harm others. The persons uniting are to be of full age and are not to be deceived or coerced. Mill maintains that only societies upholding these liberties are free, regardless of their form of government. These principles are absolute and unqualified. One is only free when one is capable of pursuing one's own good in one's own name, so long as one does not deprive others of theirs or impede their efforts to obtain it. Mankind gains most, if all its members are left to pursue their goals as they find best according to their own judgements rather than by compelling each to live as seems good to the rest (Mill 1995: 199).

Curtailing another's opinion, maintains Mill, is morally objectionable since by doing so one may curtail a correct opinion, thereby assuming one's own infallibility; and even if the silenced opinion is wrong, it may still possess a portion of truth. Furthermore, even if the defended opinion is not only true, but the whole truth, it will be held as a prejudiced opinion if not permitted to be strongly contested because persons believe most strongly what they themselves have experienced. This may have the consequence that the meaning of the doctrine itself will be in danger of being lost and deprived of the vital effect of its character and conduct, which means that a truth we wish to impose by silencing other opinions will not be readily adopted and hence not be held as the truth by others (Mill 1995: 200).

Andrew Kernohan (1998: 30) argues that coercive state paternalism can be rejected on the grounds that interfering with someone to accept some conception of the good, cannot make it a conception of the good for that person. This was similarly argued by Locke in *A Letter Concerning Toleration*. Locke argued that a law could not be enforced pertaining to the worship of God because what would be enforced would only be acceptable to those believing it. If such practices are carried out without faith, they cannot be a part of the good,

nor pleasing to God. "Even if a life of prayer is the best life to lead, forcing someone to pray against her will cannot make prayer a component of the best life for her" (Locke 1991: 33). Kernohan (1998: 33) maintains that we would not be doing any good by imposing a good upon others, even if they adopted the good, if the means for imposing the good life limited their abilities to make autonomous choices. Thus, only a life that is accepted when subjected to critical reflection, can be part of the good. Kernohan therefore argues that it is not sufficient that one endorse the life paternalistically imposed, but that one realise it as the truth, i.e. that one not only endorse the view, but accept it as knowledge too:

> Our interest in leading as good a life as possible explains what is wrong with the coercion of a malevolent despot who forces people to lead bad lives. It does not explain, however, what is wrong with the coercive paternalism of a benevolent despot who forces people to lead good lives. If we add that people have an interest in leading a life that not only is a good life but also is a life they believe to be good, and we note, with Dworkin, that people cannot be forced to assent to beliefs about value, then we can say what is wrong with coercive paternalism (Kernohan 1998: 34-35).[6]

Given these reservations, what control may society exercise over its members? Everyone who is enjoying protection from society should be bound to observe a certain line of conduct towards the rest. This conduct, Mill maintains, exists first in not injuring the interests of one another and in all persons bearing their shares of duties (to be fixed on some equitable principle) in defending the society or its members from injury and molestation. Society is justified in enforcing these conditions at all costs on those who endeavour to withhold fulfilment of these conditions. Society is justified, according to Mill, in going further. A person's actions may be injurious to others or lacking in

[6] For more information about Kernohan's arguments regarding a person's ability to seek the good, see Kernohan (1998).

consideration for their welfare, in which case society is morally justified in punishing the individual. However, no such consideration is justified if the actions of the individual bear consequences only for the agent, even if these are detrimental ones. In such cases, the individual is to have the liberty (both social and legal) to do the action and face the consequences (Mill 1995: 200). Bird expands on this point as follows:

> Libertarian rights are of such weight that it is not only the case that they cannot be violated in order to produce greater overall welfare. They are also not to be violated even to prevent a greater number of similar violations in the future (Bird 1999: 141).

No one, Mill asserts, can have as strong an interest in a person's life as the person possessing it can. The interference of society to overrule persons' judgements regarding their own lives must be based on general assumptions that may be wholly wrong, and even if correct are likely to be misapplied to individual cases by persons beholding the circumstances merely from without. This is because the first-person account is held by Mill to be more reliable than the third-person one since the former has direct experience of a given situation, while the latter does not. Society may provide opinions or seek to persuade, but the persons themselves are the final judges. The persons in question may suffer severely as a result of their misjudged actions, or because others avoid them or have less favourable sentiments towards them because their behaviour aroused strong disapprobation, but the sufferings are not imposed as a punishment for their actions (Mill 1995: 201).

Actions injurious to others require a very different response, argues Mill. Encroachment on their rights, losses or damages suffered by them not justified by the agent's own rights, or injury to others as a result of failure to act where acting was required, calls forth moral reprobation or

moral retribution and punishment in more serious cases (Mill 1995: 201). Not only these acts, but also the dispositions that lead to such acts, are considered immoral and hence fit subjects for disapprobation (Mill 1995: 202).

Mill correctly realises that no person is a completely isolated being and that it is therefore impossible for anyone to do anything seriously or permanently injurious to themselves without thereby affecting at least their near connections. He therefore deems it necessary to argue why society ought not to be permitted to curtail the liberty of adult persons in such circumstances. If persons ruin their moral or mental faculties, they may bring adversity on all who depended on them for their happiness and so disqualify themselves from rendering the services they were obliged to perform to society. If such offences were to become frequent, they might have as great an impact on society as any other action of disapprobation, and even if they do no direct harm to others, they may nevertheless be described as harmful by serving as bad role models. Many may require them to conduct their activities so that they do not mislead those susceptible to corruption. Even if their conduct were to have no further influence than upon those who already share their attitudes, some will question whether society ought not to intervene amongst persons incapable of taking care of their own lives, just as it intervenes on behalf of children or under-aged individuals. Such intervention could only be against practices that have proved themselves adverse in every respect for individual well being over the ages. Mill (1995: 203) maintains that if persons become incapable of paying their debts or adequately caring for their families because of extravagant behaviour, for instance, they may be held liable for not being able to settle their debts or care for their families, but not for their lifestyle leading to the difficulties. Only when there is definite damage (or definite risk of damage) to another individual, or to the public, is

society morally justified in punishing them. Mill contends, however, that society has no moral right to curtail the liberties of adults in order to bring their conduct up to a certain acceptable level. Society has this opportunity throughout the childhood years of its citizens. It has had the whole period of childhood in which to try making them capable of rational conduct in life. If society lets a considerable number of its children remain incapable of any significant degree of rational consideration, society has itself to blame for its consequences (Mill 1995: 203).

7.3.2 EVALUATING MILL'S LIBERALISM

Mill argues that self-protection is the sole justification for using force against another and that intervening on behalf of an individual's self-interest is never a sufficient reason. Gerald Dworkin rightly analyses Mill's argument as follows:

> (1) Since restraint is an evil, the burden of proof rests on those advocating restraint.
> (2) Since the conduct that is being considered is wholly self-regarding, the normal appeal to the protection of the interests of others is not applicable.
> (3) Therefore, we have to consider whether reasons referring to the individual's own well being are sufficient to overcome the burden of justification.
> (4) Either the interests of the individual cannot be advanced by compulsion, or the attempt to do so involves evils that outweigh the prospective good.
> (5) Therefore, the promotion of the individual's own interests does not provide a sufficient justification for the use of compulsion (Dworkin 1995a: 212).[7]

[7] Gerald Dworkin (1995a: 209-218) investigates whether legal paternalism (restricting someone's liberty for their own good) is ever justified. He respects Mill's position, but points out how widespread paternalistic practices are, and how drastic their total elimination would be. He

Clearly, the premise that may be questioned here is (4). It entails Mill's assumption that individuals are the best judges of their own interests. The claim is that they are the ones most interested in their own well beings, and therefore have an immeasurably greater understanding of their conditions than anyone else. For Mill the interference of society in individual affairs, as has already been shown, requires general presumptions which may be wholly incorrect, and even if right, have a high probability of being misapplied to individual cases. The strongest of Mill's arguments against the interference of conduct affecting only the agents is, however, that when it does interfere, there is a high probability that it interferes wrongly and in the wrong place. All errors individuals may commit by acting unrestrainedly are outweighed by the harms caused by being restrained by others, by what the latter believe is expedient (Dworkin 1995a: 213). Translating this into utilitarian terms results in the view that society gains more if everyone is permitted to do what seems good to themselves, rather than by compelling each other to live as seems good to the rest. But is this really the case?

Legitimate criticism may be directed at the assumption that the vast majority of adults know what is best for themselves. Interestingly, Mill himself is aware of the limitations of the doctrine that everyone knows best what actions best promote their well being. He realises that the uncultivated cannot be competent judges of motivation, those who need to be made wiser usually desire it least, and if they desire it, they would be incapable of procuring the means towards it by their own judgements. A second example of incompetent decision-making is when someone attempts to make an irrevocable decision about something that will affect him

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attempts to establish criteria for distinguishing justified from unjustified paternalism.

in the future, such as selling himself into slavery. The presumption on personal liberty of judgement is only relevant when pertaining to present and actual considerations, not when it is formed prior to experience, and when it cannot be reversed after experience has led one to judge the original as an error. The important point about these exceptions is that Mill does not argue that government interference is always and everywhere unjustified, but that the burden of proof regarding such interference should rest on those advocating it.

We are therefore not left with an absolute prohibition, but only with a presumption. Why does the argument against paternalism not assume a similar form? Mill would have to show that exercising force against someone against their will for the subjects' own well being is necessarily a greater evil than withholding force and precluding the persons' attainment of the otherwise obtained benefit. However, according to Dworkin, this cannot be done since it is not correct (Dworkin 1995a: 214).

Preventing persons from selling themselves into slavery (a paternalistic measure, which Mill himself acknowledges to be legitimate), or from taking heroine or other addictive drugs, or from hang gliding without first being formally instructed, may constitute a lesser evil than allowing them to have the liberty of carrying out such intentions. A consistent utilitarian could only argue against paternalism if it could be argued that it does not maximise the good. This contingent question may be refuted by contrary evidence in some cases. For instance, motorcar manufacturers are being compelled by law in some countries to equip their vehicles with airbags. Recent evidence shows, however, that these safety devices can be extremely dangerous for children and that they are already responsible for a number of deaths. In this case, the paternalistic measure, as applied, may not always yield maximum utility.

Mill's argument has a non-contingent element too, however. He assumes that all normal adult human beings have the rational capacity for interpreting experiences in their own way, a way that is best for them. However, the case in which adult persons wish to sell themselves into slavery brings out the difficulty. Why should we here not interfere? Mill would answer, because of their liberty. Their voluntary choice is evidence that what they choose is desirable, and allowing them their own means of pursuing it best attains their well being. However, by selling themselves into slavery, they relinquish their liberty, abandoning any possibility of enjoying it again in the future. Their present act has an irrevocable consequence. Mill holds that in alienating one's freedom one is not acting freely. Strictly speaking, it may be held that the original act of selling oneself into slavery is a free act, but that this free act precludes the performing of further free acts. Nevertheless, Mill is correct in arguing that persons wishing to sell themselves into slavery must be constrained if they are unaware that their intended acts would limit their freedom in this way.

Paternalism is therefore given justification by Mill, albeit a very narrow one. It is justified if one limits the voluntary actions of individuals that would, if exercised freely, preclude any further free enjoyment of their liberty. Pertaining to slavery, however, it is incorrect to argue that slavery is wrong merely due to utilitarian considerations:

> In demanding a collective order that gives fair and equal consideration to individuals and their claims and rights, then, the liberal individualist is taking ultimate value to inhere in states of the collectivity as such. But this is just what value-individualism forbids (Bird 1999: 73).

Liberal-individualists may attempt to counter that they do not deny the value of states of collectivity, but these collectivities have value only because they ultimately are

conducive to positive states within individuals. Thus, equality or justice is good because it gives individuals peace of mind or other positive internal states. However, this, as Bird rightly realises, is utterly implausible. Liberal individualists surely would not only reject slavery on the grounds that it has adverse consequences for the enslaved; but would they not reject it even if it would not have such negative consequences for the enslaved? (Bird 1999: 73).[8] Slavery is wrong independent of whether it gives peace of mind or any internal state of individuals merely on the basis that it limits the potential of individuals, preventing them from freely acting and developing to the full.

The implications for punishment are clear. Mill rejects any curtailment of an offender's liberty beyond what is necessary to prevent harm to others. Thus, according to Mill, one is not morally justified in rehabilitating offenders or admitting them to a treatment programme without their consent. If after the punishment, imprisonment for instance, they resort to the same legally prohibited behaviour, society is again justified in punishing them for violating the liberties of others. Rehabilitation and treatment, however, remain morally unacceptable for Mill.

Different implications result, however, for juvenile offenders. Mill acknowledges that children, or persons not of mature age, are not to enjoy unrestrained liberty. They still are in the formative stage, the stage in which society trains and educates its members, enabling them to become responsible individuals. Therefore, since Mill's liberalism does not apply to persons not of adult age, nothing moral may be said against treating juvenile individuals paternalistically, even compelling them to undergo treatment or rehabilitation if this enables them to become responsible adults.

[8] For a more elaborate account of Bird's argument regarding this issue, see Bird (1999: 73-81).

As was seen in the previous chapter, I argue for rehabilitation of all offenders, not only of juveniles. Therefore, I shall argue that paternalism is morally defensible, and thereby dispel the objection that rehabilitation of offenders is morally unjustified because it is a paternalistic measure.

7.4 DEFENDING PATERNALISM

Now that the nature and implications of liberalism for interfering in a person's liberty have been expounded, we may turn to paternalism. I shall begin by arguing that paternalism is justified in its commitment towards the elimination of harms. I shall claim that the harm principle is applicable to accumulative harms too and show that liberals are committed to preventing such harms, the prevention of which is sometimes equitable to paternalistic coercion. I shall subsequently make an important distinction between coercion and interference because not all coercions are interferences, and liberalism is not opposed to paternalistic coercions. This will be followed by my defence of paternalism.

7.4.1 LIBERALISM, PATERNALISM, AND THE HARM PRINCIPLE

When may we morally restrict the liberty of another person? Mill furnishes us with the classic liberal answer to the question: restricting the liberty of one person can be justified only if it prevents a greater harm done to others. Mill's position will be termed the "harm principle."

Several things should be noted about this principle at the outset: by "harm" is meant not only direct personal injuries, such as broken bones or the loss of material property, but also more diffuse social harms, such as air and water pollution or the impairment of public institutions. Mill

stresses that harm to others is a necessary condition for the justification of public actions, but not a sufficient condition. He determines the importance of harms and interferences against two fundamental interests, namely personal security and the appropriate opportunities for self-development and progress. These two interests are the only two at stake in the distribution of liberty, according to Mill, and the harm principle is proposed as the broad political guideline that attains the appropriate balance (Mill 1972: 146; 163). Thirdly, the harm principle always forbids one's deciding for others what is in their best interest, i.e. individuals should always have the right of veto in their own case (Mill 1972: 171-172).

Liberals agree that liberty has priority over any other kind of good. They differ, however, over how stringently this principle should be applied in practice (Bird 1999: 37). Welfare liberals may hold, for instance, that a certain amount of material welfare is a prerequisite for one's enjoying the liberty to which one is entitled. More libertarian liberals might maintain that it is not only possible, but morally obligatory, to separate institutional protections of liberty from the provision of material welfare in order to safeguard liberty (Bird 1999: 37-38).

If we analyse Mill's harm principle more closely, we see that it is not a simple principle, but complex, containing at least the following two simple principles:

(1) The prevention of harm to others is sometimes a sufficient reason for interfering against another person, and

(2) the individual's own good or well being is never a sufficient condition for exercising force over him or her, either by society or by individual members (Dworkin 1995a: 209).

I agree with Dworkin in assuming that no one, with the possible exception of a few pacifists or anarchists, questions the validity of the first half of the principle. The second part deals with Mill's rejection of paternalism.

Let us examine the first part of the principle. Mill argues that the harm principle pertains only to the actions of individuals in which it is evident that the action itself caused the harm. This, however, does not account for accumulative harms, and Mill's conception of the principle may therefore be too narrow, as will now be explained.

Kernohan (1998: 72) argues that the liberal state should adopt policies that interpret the harm principle in such a manner as to prevent accumulative harms:

> An accumulative harm is a harm done by a group, not to a group. It is a harm to another person brought about by the actions of a group of people where the action of no single member of that group can be seen, by itself, to cause the harm. Most often, an accumulative harm will also be a public harm, a harm which cannot be done to one individual without at the same time being done to a whole community or populace, but there is no conceptual necessity to this fact; accumulative harms may be serious individual harms. A public harm can take two forms: Either it is a harm to the interests of individual members of the group or it is a harm to the group's interests that is not a harm to the interests of any individual member (Kernohan 1998: 73).

When seen by themselves, the actions of accumulative harms may be quite harmless, only when seen collectively do they assume a harmful nature. A number of examples may be illustrative. If only one person in a city were to have a vehicle emitting harmful gases, the person's use of it would have almost no affect on the surrounding air. If a thousand such vehicles were to do so in the given city, there might still not be any significant affect on the environment. At some stage, however, a threshold is reached at which the emission of gases into the air by such vehicles causes a

noticeable change in the quality of air in the city. At that stage, the authorities are fully justified in curtailing the emission of further gases into the air, even though no single person is alone responsible for the present state of affairs. Therefore, they are *prima facie* justified in prohibiting the use of harmful fuels. If one person walks across the lawn in a park, it has no significant affect on the lawn. If ten thousand people walk across it, however, there is bound to be almost nothing left of it. Once again, at some stage the threshold is reached beyond which any additional walking would harm the lawn.[9] Again, any kind of activity that is done in excess causes harm. If everyone of a medium-sized town were to visit the same supermarket within the same hour, the result would be an extraordinary chaos. Thus, "The state should take an active role in society to prevent both individual harmful conduct and accumulative harms" (Kernohan 1998: 73). Since any action can become harmful if overdone, and because circumstances can change so that activities that were once harmless can become harmful, and persons once doing no harm suddenly do harm, empirical investigations must be undertaken to establish whether a specific action causes harm (Kernohan 1998: 78) and whether something can be done to prevent it.

Kernohan applies his theory of accumulative harms to cultural oppression. He believes that the state should modify its neutrality in order to prevent harm. Such harm is difficult to realise because of two reasons, namely individuals can be harmed by the prejudices accepted within their culture, thereby being unaware that they are actually being harmed, and such harm is cumulative in nature, i.e. no specific act or event can be identified as the cause. Racial,

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[9] It is interesting to note that utilitarianism is incapable of dealing with accumulative harms. An act utilitarian will have to hold that walking across the lawn is unobjectionable since one's action causes no harm. The rule utilitarian, by contrast, goes to the other extreme, reasoning it would have best consequences if a rule were adopted prohibiting any walking across the lawn, thus the rule utilitarian will not walk across the lawn, even if it would do no harm.

sexual, or religious oppression in everyday affairs is not the result of one single act of discrimination, for instance. By ignoring cultural oppression, liberalism has given preference to tolerance to the detriment of equality (Kernohan 1998: 1). "Equality" is understood in the sense that all persons are equally free, i.e. all are able to act as free individuals, un-coerced by other individuals or groups.

A distinction between a theoretical and a practical challenge to equality may be made. A theoretical challenge becomes a practical challenge when the former challenge gains sufficient support in order to be a force reckoned with in society (Kernohan 1998: 5-6). If only one person in society promulgates sexist views, the challenge will not have any significant affect on society, thereby remaining a theoretical challenge; but if many others adopt this attitude too, a point will be reached at which it affects society, thereby becoming a practical challenge. Oppression is never just the result of one action, but a sequence of actions (Kernohan 1998: 12).

The argument Kernohan employs to argue that the state ought to act against cultural oppression runs as follows:

(1) Liberalism must regard beliefs in the unequal moral worth of persons as false.
(2) If the transmission of false beliefs in moral inequality by individuals causes harms to significant interests, then the liberal state must abandon universal tolerance and combat this individual harm.
(3) The transmission of false beliefs in moral inequality does cause significant harm.
(4) Therefore the state must combat the transmission of false beliefs by individuals.
(5) If the social transmission of false beliefs in inequality is a harm, then it is an accumulative harm.

(6) It is of equal importance for the state to combat accumulative harms, as it is to combat individual harms.

(7) Therefore the liberal state must adopt an active role in reforming culture and combating the cultural oppression of groups (Kernohan 1998: 24-25).

Liberals endorsing the harm principle ought therefore to endorse measures curtailing accumulative harms too, which means that measures ought, according to the harm principle, to be adopted that curtail harms not directly attributable to any specific person or group of persons, or do not harm any specific person or group of persons, but are nevertheless harmful. Such measures may not necessarily be paternalistic, since the harms prevented need not necessarily have been harms directed at those causing the harms; however, if the accumulative harms would have harmed the persons causing it, by, for instance, harming the group of which one is a member, or polluting the water on which one depends, then such measures may be termed "paternalistic."

Turning now to the second part of the harm principle, we may agree that no reasonable person would disagree that prevention of harm to others is always a relevant reason for coercion.[10] However, many disagree with Mill's contention that it is the only relevant reason. Thus, no one will seriously suggest that laws against larceny, battery and homicide are unjustified, but many maintain that the state is also justified, at least in some circumstances, in prohibiting actions that hurt or endanger the actor. Most of us agree, for example, that it is morally right that motorcyclists be compelled by law to wear helmets.

The liberal tradition has been prominent in its commitment to anti-paternalism. The idea behind this is that all

[10] I shall make an important distinction between coercion and interference in the next subsection.

individuals ought to have a sphere in which they are immune from external moral influence, regardless of the consequences for their own well being. This by no means implies a view of humans as being only sentient beings. Persons who are able to pursue projects and to act as moral agents are also capable of making substantial miscalculations of what would be in their own best interests. These errors may cause them serious and permanent injury or harm. Liberals generally argue that individual liberty is of such great value as to preclude any intervention in such cases, excepting only the most serious cases, such as wanting to sell oneself into slavery, which Mill himself mentions. However, opening the door for some exceptions, such as wanting to sell oneself into slavery, seems already to allow in some form of paternalism, and therefore paternalism and liberalism seem no longer to be diametrically opposed (Bird 1999: 30).

Before dismissing the second part of the harm principle, it is necessary to clarify the difference between coercion and interference. Coercions, I shall argue, are not necessarily interferences.

7.4.2 COERCION AND INTERFERENCE

One reason why libertarians may want to reject any form of paternalism may be that any form of coercion of persons is seen as an unjustified intervention in the lives of those persons. It is correct to assert that paternalism implies coercion, but coercion does not necessarily result in interference; therefore, coercions that are not interferences are not affected by the argument that they are unjustified on the ground that they are interferences.

In order to argue this proposition, I introduce a distinction made by Bird (1999: 116). Bird distinguishes between four kinds of obstacles, only two of which are necessary for purposes of this argument: (1) coercive

obstacles, i.e. obstacles prohibiting certain actions by a person in authority to do so, and (2) interferences, i.e. obstacles that interfere with, or hinder, one's pursuit of certain of one's goals. This point is of central importance because the negative concept of liberty is often associated with a strong libertarian stance, a view in which society, or the state, is only justified in coercing when another coercive interference is thereby prevented or punished.[11] The central concern of negative liberty is, however, the notion of non-interference, a category that is broader than that of non-coercion. The liberal using a negative concept of liberty is therefore not correct in asserting that all coercions are interferences. If they are not interferences, then the principle of non-interference is not necessarily violated by applying coercion (Bird 1999: 120).[12]

It follows that paternalistic measures that are coercions are not necessarily interferences. Thus, when dealing with a coercive measure, such as taxation, the question is not whether liberty is reduced by it, but rather whether the reduction of liberty caused by it is always serious enough to qualify as the kind of interference that individuals should never be forced to undergo, and the state is never justified in applying (Bird 1999: 121).

The kind of ownership right that is of central concern to libertarians is the right to prevent anyone else from making authoritative decisions over how the owned object is to be disposed of. Pertaining to the self, this means that outsiders have no right to decide how it is to be used (Bird 1999: 142).

Since I have argued that not all coercive interventions in persons' lives are interferences, i.e. if interferences are

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[11] A distinction between a "negative concept of liberty" and a "positive concept of liberty" may be made. The former construes liberty simply as freedom from obstacles, interference and coercion; the latter construes liberty as the freedom to perform a privileged category of actions.

[12] For an expansion of this point, see Bird's discussion (1999: 115-120), including his explanatory diagram (Bird 1999: 119).

obstacles that prevent one from pursuing certain of one's goals, the rehabilitation of offenders is not morally objectionable if it can be shown that such interventions count as coercions and not interferences. It must be borne in mind that we are concerned with convicted offenders, persons we are justified in punishing. These persons would be rehabilitated while they are serving their sentences. We would therefore not interfere with any of their goals because these could not be pursued anyway while they are serving their sentences. Our coercive measures would not only not hinder their pursuit of their goals, but would increase their ability to do so once they leave prison, enabling them to live as productive, law-abiding individuals.[13]

Thus far I have argued that liberalism and paternalism are not diametrically opposed since the former is committed by the harm principle to the prevention of accumulative harms, which in some cases amounts to preventing persons from harming themselves, and hence is a paternalistic measure. I also made the distinction between coercions and interferences and pointed out that rehabilitation is not necessarily interference and hence is unaffected by the libertarian rejection of paternalistic measures as being unjustified interferences. Having argued that paternalistic interventions are coercions, and not interferences, I shall now argue that such coercions are morally justified.

7.4.3 PATERNALISM AND FURTHERING OF WELL BEING

The second part of the harm principle now needs to be rejected, i.e. the part that maintains that the individual's own good or well being is never a sufficient condition for exercising force over him or her, either by society or by individual members. This part of the harm principle can be

[13] See 6.9.2 for how rehabilitation improves offenders, thereby enabling them to actualise more of their potential.

rejected if it can be shown that paternalism can be morally justified. I shall endeavour to do so in this section.

As has been shown, even Mill argued for paternalism towards children, arguing that it is only unjustified to curtail the liberty of adult human beings. What is the difference? What justifies paternalism towards children? The answer given would be that they lack the cognitive capacities to make fully rational decisions. Nothing is more natural than for parents to discipline their children. Young children are ignorant of certain dangers, are unaware of the adverse consequences of many actions, actions that not only can hurt them, but also hurt others, or lead to irrevocable damages to persons or property. This does not in any way mean that children are mentally ill in any way. Such actions are kept in check until the child becomes mature enough to recognise the consequences or most likely outcomes of intended actions.

What does it mean to be fully rational, however? How many adults might not be capable of making responsible, rational decisions because they are not fully rational either? To what extent are the criminals, the persons primarily under discussion, capable of exercising fully rational choices? Although the extent to which children are capable of exhibiting fully rational decisions is an empirical issue, their capacities are clearly below those of the average adult. First, it is difficult for children to delay gratification for significant periods. Furthermore, very young children are not capable of imagining themselves in different situations. It follows that it therefore is not only morally justifiable, but also morally obligatory for adults to restrict the actions of children in specific ways. Paternalism exercised by the parent is not intervention for the mere sake of restricting children, but for enabling them to develop the insights necessary to judge certain modes of acting as desirable or undesirable, advantageous or disadvantageous, beneficial or harmful. It therefore has as an objective the development of

the future orientation of the children, an objective of fostering a responsible attitude within children. However, the paternalist may now go further and argue that some adults also lack the capacity to make enlightened, mature, responsible decisions; and by guiding their conduct, we do what they would do if they were fully rational. Therefore, we are not really interfering with their wills and are not really interfering with their freedoms. As was shown in 2.6, Kant holds too that some forms of coercion are morally defensible since they are consistent with rational freedom. He therefore holds coercion to be morally completely acceptable if it could be rationally willed by the subject who is being coerced. I lay out the argument as follows:

(1) Given situation X, a rational person would choose A.
(2) Person P is faced with situation X.
(3) But P is not rational and does not choose A.
(4) But if P were rational, he or she would choose A.
(5) Therefore, we are justified in guiding P's choice towards A.

Certainly, it would be more desirable to act paternalistically towards persons with their consents. This is not as absurd as it first appears. There are instances in which persons have to be forced in a given way, a way that is not contrary to their actual desires, but for which they merely lack the ability to carry out the appropriate choice. An example may be illuminative. Persons trying to give up smoking, for instance, may ask their friends not to offer them any cigarettes and to forcibly compel them to stop smoking should they wish to do so in their company. They would thereby be giving consent to actions being done to them that are in agreement with their own objectives or desires, but where they themselves are unable to pursue these objectives on their own.

What needs to be justified, however, is not a specific measure, but a whole system of rehabilitation without consent. Since none of us is without rational or emotional deficiencies of some sort, at least occasionally, as well as avoidable and unavoidable ignorance, it is rational and prudent for us to take out social insurance policies. However, it is a contentious issue what forms of protection one ought to accept. Since we are now dealing with a whole system of rehabilitation, a mode of conduct towards offenders, however, we have to establish carefully defined limits. Detention of criminals is here not at issue - it was already established in Chapter 5 that it is morally justifiable to use criminals for purposes of general deterrence. The issue under discussion is, however, whether criminals who are being detained for purposes of general deterrence may, while they are being detained, be forced to undergo rehabilitation. The question at issue is, to what conditions could rational persons agree to limit their liberty even when the interests of others are not affected? (Dworkin 1995a: 216).[14] It is reasonable to assume that there are certain basic things all rational beings would want to have in order to pursue their own good, no matter how that good is conceived, such as the right to be justly treated. Even Mill argues for compulsory education of children. Of course, he argues that this is because children are not yet fully rational, but if they were rational, they would also choose education for themselves. One could then agree that the attainment of such goods should be promoted, even when not presently recognised as such by the individuals concerned. I formulate the argument pertaining to the compulsory education of children as follows:

[14] Dworkin attempts to justify paternalism in general as a legitimate societal policy in specific instances.

(1) It is morally justifiable to act paternalistically towards beings incapable of attaining conditions that would allow them to maximise their good.
(2) Children are not capable of attaining conditions that allow them to maximise their good.
(3) Therefore, paternalism towards children is morally justifiable.

However, when we turn to adults and to goods in general, we are faced with the contingent fact that people are prone to differ on what is desirable, even when faced with very basic issues such as health or life. We are faced with the difficult situation in which, for instance, some people are willing to risk their lives defending a political regime because they believe it upholds certain ideals they value, such as religious ones, an issue over which others of another persuasion are bound to disagree. What persons will value most, depends on the relative merits they attach to different values. Consider persons who know the statistical probability of being injured or killed when not wearing seat belts in the front seats of cars and who know the types and extent of the various injuries that may occur as a result. However, these persons also insist that the inconvenience of fastening the belts every time they get into a car outweighs for them the possible risk to themselves. I agree with Dworkin (1995a: 216) that such weighing is unreasonable. Let us assume that these are not persons trying to injure themselves, for conscious or unconscious reasons, nor do they just like living dangerously. We are assuming that they are like us in all relevant respects, but just put an extraordinarily high value on inconvenience, one which is considered unreasonable. The only difference is, the outcome of the actions is ignored once the calculations are made. Paternalism, I shall argue, may be employed to correct evaluative mistakes. We are prepared to act against cognitive delusions. If persons believe they will

not be hurt when jumping off a fifty-story building, we would detain them, even forcibly if necessary. Our justification for interfering would be that they do not really want to be harmed, and that if they were fully aware of their actions' consequences, they would be dissuaded from performing them (Dworkin 1995a: 216). The same holds for the case in which persons choose not to fasten their seat belts. If the persons who chose not to fasten their seat belts, judging the inconvenience to outweigh the risk involved, were to have a serious accident, they would look back on it and regard the fastening of the seat belt as not such a grave inconvenience compared with the injuries suffered.

Turning again to offenders, we may say that many offenders are not aware of the benefits involved in being rehabilitated. If they could lead a more productive, law-abiding life after being rehabilitated, then they would surely agree that the inconvenience of having their right to refuse treatment temporarily curtailed for the attaining of this objective does not outweigh the inconvenience of running the risk of being a recidivist. Therefore, if we could convince them of the course of action, they also would not wish to continue with their course of action.

The distinction made between coercion and interference is of importance. Paternalism implies coercive measures for the benefit of the subject, and not to further any other objective. One is therefore not justified in curtailing the liberty of individuals where this is not for the individuals' own benefit, or, in a milder form, one is not justified in curtailing the liberty of individuals if one's coercion would interfere with their pursuit of reasonable goals. Activities such as hang gliding or mountain climbing can therefore not be justifiably curtailed completely, since this would preclude persons interested in pursuing such goals from undertaking such activities. If such activities are undertaken with reasonable precautions, they do not pose an unreasonably high

risk to their lives or general well being. Demanding that only properly instructed persons with proper equipment hang glide or climb mountains in reasonable weather conditions is not coercion that may be termed "unnecessary interference" since making such demands neither hinders persons from participating in such activities, nor curtails them from carrying out such activities completely.

7.5 PATERNALISM AND PREVENTIVE DETENTION

In the previous chapter, I argued that preventive detention of former criminals is morally justified if a serious threat to others is thereby eliminated. It may now be asked, whether preventive detention is also morally justified on paternalistic grounds - is it morally permissible to preventively detain persons who seriously contemplate committing suicide, for instance, is it morally defensible to preventively detain people who have a high likelihood of doing serious harm to themselves?

I argued in the previous section that it is morally justifiable to act paternalistically towards persons if the interventions impose an alternative upon the persons being coerced, which they would have chosen themselves, had they been able to consider the matter rationally. Of course, in the case of suicide, the issue is whether they would have chosen suicide when deliberating over their situation rationally, taking the present and the possible future into account. If it could be established that a wholly rational decision led to their choice, and that there was no preferable alternative, then paternalistic intervention is morally unjustifiable. However, if persons contemplating suicide are doing so while in a temporary depression, and a rational decision would not yield suicide as an option, then preventive detention to prevent persons from killing or seriously harming

themselves is morally justifiable. I set out this argument as follows:

(1) We are justified in acting paternalistically towards others if we are thereby imposing a good upon them or preventing them from doing harms to themselves that they would recognise as such, were they capable of rationally deliberating over the matter.
(2) Preventive detention may preclude persons from doing harms to themselves that they do not actually want, i.e. have not rationally chosen.
(3) Therefore, we are justified in preventively detaining persons on paternalistic grounds.

Just as preventive detention for the protection of others, preventive detention for the protection of those being preventively detained on paternalistic grounds may in practice only be imposed on former offenders since the accuracy requirement for former offenders is less than absolute. If it could ever be determined with absolute accuracy that anyone will do serious harm to herself if she is not preventively detained, then preventive detention on paternalistic grounds would be justified for innocent persons too. However, since it is unlikely that complete accuracy will ever be attained, only former criminals may be preventively detained because a standard of accuracy less than absolute is acceptable for them since they have diminished moral standing in virtue of having been offenders.

7.6 SUMMARY AND PERSPECTIVE

This chapter began with an examination of Morris's theory, which is an attempt to justify punishment administered paternalistically. I rejected the theory as being too simplistic, as I have found all other theories of punishment

that focus only on one element to be, such as paternalism, retribution, deterrence, rehabilitation, or restitution. It must be noted that I am not suggesting that this is necessarily the case, but I believe that a complex approach, as the one I am proposing, can yield a better theory than a simple one.

I then proceeded with my own defence of paternalism. For me to fully justify rehabilitation, the question that I had to resolve was, can one morally force offenders to undergo treatment against their wills in order to make them better persons? To defend paternalism as part of rehabilitation, I deemed it necessary to examine it against the backdrop of liberalism, since liberalism usually opposes any form of paternalism.

We saw that Mill held the exercising of force over another permissible only to prevent harm against another. Doing so in the interests of someone's own well being is not a sufficient condition for doing so. He held, however, that this pertains only to fully rational beings. Beings incapable of taking care of themselves, such as children and the insane, are exempted from the harm principle. The implication that Mill's liberalism has for punishment is that one is not justified in forcing offenders to undergo treatment except in the case of juvenile offenders.

I argued that the harm principle consists of at least two simple principles, each of which was dealt with in turn. The first of these (namely the prevention of harms to others is sometimes a sufficient reason for interfering against another person) was shown to be relevant not only for individual harms, as Mill held, but for accumulative harms too. Not only does the prevention of accumulative harms sometimes assume a paternalistic form, but also Kernohan convincingly argued that the liberal state should take actions against accumulative harms. Even Mill made exceptions to his harm principle, and

thus his application of the harm principle and paternalism are not diametrically opposed.

I then attended to the second part of the harm principle (namely, the individual's own good or well being is never a sufficient condition for exercising force over him or her, either by society or by individual members). Before rejecting it, it was necessary to make a distinction between coercion and interference. There are obstacles that are not interferences. This point is of central importance because the negative concept of liberty is often associated with a strong libertarian stance, a view in which society, or the state, is only justified in coercing when another coercive interference is thereby curtailed or punished. The central concern of negative liberty is, however, the notion of non-interference, a category that is broader than that of non-coercion. Liberals are therefore not correct in arguing that all coercions are interferences - coercions do not necessarily violate the principle of non-interference. Implications of this distinction were spelled out: I argued that forced rehabilitation of offenders, while they are serving their sentences, would amount to coercion, but not to interference.

Turning to a rejection of the second part of the harm principle and a defence of paternalism, I claimed that paternalism towards children is justified because they are not yet capable of exercising fully informed, rational choices. I maintained that one finds paternalism justified in those cases in which the subjects would have selected the benefit, had they been capable of making a rational, informed decision. I then argued that one should also extend paternalism towards adults when evaluative mistakes are thereby to be corrected. Many adults make irrational decisions, or are incapable of making fully rational ones, and these should be the targets of paternalistic interventions. In the case of paternalism towards criminals, I argued that one is justified in acting paternalistically towards them by forcing them to undergo

rehabilitation because it is what they would have desired if they had been capable of assessing the situation rationally. If rehabilitation would enable them to avoid becoming or remaining recidivists, then this is surely a desirable course of action to take. The limits of morally justifiable paternalistic intervention were also briefly discussed.

Finally, I examined whether it is ever morally justified to preventively detain persons against their wills for their own goods. I concluded that preventive detention on paternalistic grounds is morally justified if the subjects being preventively detained could have willed the preventive detention rationally.

I showed thus far that retributivism adequately determines whom we are justified in punishing, and deterrence theory, with what measure we are justified in doing so. I have argued that justified punishment allows society to express its anger and indignation at offenders, that we are justified in using criminals as means towards general deterrence, and that we may morally rehabilitate criminals, thereby pursuing the objectives of improving offenders, reducing crime, and ultimately having economical punishment. The rehabilitative ideal was defended in this chapter against the objection that it implies paternalism by arguing that paternalism is morally desirable. One more objective needs to be pursued, namely that punishment ought to aim at undoing the harm done through the criminal act, thereby acknowledging the plight of victims. This will be my main concern in the next chapter.

CHAPTER 8

RESTITUTION: UNDOING THE HARM

8.1 INTRODUCTION

An examination of punishment systems in use worldwide today shows that they are largely ineffective. Recidivism is a major problem. Furthermore, severe penalties do not deter to the extent hoped by advocates of deterrence theories. In the previous chapter, I argued that a morally justified punishment system ought also to place strong emphasis on rehabilitation, not only on punitiveness. The ineffectiveness of the punitive system has prompted some thinkers to re-evaluate the whole system of punishment, however, replacing it with a different, more effective, less costly one.

Our present system for dealing with criminals, the punitive system, which sees crime as a violation of the state's laws, has not always been the paradigm in use for *responding to crime*. Prior to the adoption of this paradigm, the system that was in use may be described as a restitutional one. This system is as ancient as the provision of the Old Testament and the 4000-year-old code of Hammurabi (Tobolowsky 1993: 90). Its underlying premise is that crime was not primarily a matter between criminals and the state, but between criminals and their victims.

> Our contemporary understanding of social theory related to crime and victimization can be traced back to a major paradigm shift that occurred during the Norman invasion of Britain in the twelfth century. This marked a turning away from viewing crime as a victim-offender conflict within the context of community. Crime became a violation of the king's peace, and upholding the authority of the state replaced the practice of making the victim whole (Umbreit 1994: 1).

Randy E. Barnett argues that the present paradigm of criminal justice is experiencing a crisis and ought to be replaced by a more efficient one, described as a system of restitution.[1]

In this chapter, I discuss the restitutional paradigm, followed by a critical evaluation thereof. Barnett's position on restitution will serve as the basis for the discussion of this chapter because his position may be seen as paradigmatic on this issue, containing the main elements of the restitutional approach. I argue that it has certain merits, merits that ought to be incorporated into the present punishment system, but that the restitutional paradigm ought not to replace the punitive paradigm entirely, instead it ought only to complement it.[2]

I previously stated that any justification of punishment must answer two distinct questions, namely whom one is justified in punishing, and to what extent one is justified in doing so. Retributivism was shown to be capable of providing a satisfactory answer only to the first question, deterrence

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[1] Common themes are distinguishable amongst abolitionists, including a critique of the concept of "crime,"- seeing it not as a violation against some commonly acknowledged norm, but rather as a conflict between members of the community. Another is that we should civilise our responses to crime - our model should be the civil law's resolution of disputes, rather than the criminal law's punishment of crime. Thirdly, we should resolve disputes within the communities in which they occur by informal procedures involving the parties involved in the conflict and their communities. Finally, there is the theme of reconciliation: reparation or restorative justice ought to be sought, but that which will reconcile the offender to the community, rather than that which is merely retributive justice (Duff & Garland 1998: 333).

[2] Judith Karp (1996: 331-339) argues that judges and prosecutors should consider restitution in the same manner in which they consider other criminal sanctions. Karp explains that the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power empowers judges to order compensation for victims for damage and pain suffered, but that few actually use this power. She argues that the only difference between criminal and civil law is one of emphasis, and the sanction of restitution can serve the goals of punishment and penological philosophy. She argues that there is little difference in enforcing a criminal fine and ordering restitution. Her conclusion is that increased awareness of, and sensitivity towards, the victim's plight would increase the use of restitution sentences. While I agree that restitution ought to become more frequent and insist that punishment ought always to have a restitutional element where there is a victim, I argue that concentrating only on restitution would make the system too simplistic, since it would neglect important rehabilitative, deterrent and retributive elements.

theory to the second. A rehabilitative theory is not capable of answering either without constraints of justice. In this chapter, we shall find that the restitutional approach provides an answer to both questions. The answer it provides to the question of degree is laden with difficulties of a practical nature, however.

8.2 BARNETT'S PARADIGM OF RESTITUTION

8.2.1 BARNETT'S CRITICISM OF THE PRESENT APPROACH TO PUNISHMENT

Barnett attacks the system that sees punishment as a response that is unpleasant, and deliberately imposed on offenders because of an offence that they have committed, not just the natural consequence of their actions. The unpleasantness is essential to it, not a mere accompaniment to some other treatment (Barnett 1985: 213).

This definition of punishment is not necessarily in accordance with the rehabilitative paradigm because the primary aim is not to improve offenders; it is rather that if improvement does occur, then it is a welcome accompanying effect of punishment. The retributive paradigm may, for instance, maintain that the infliction of suffering on offenders causes them to realise the harms they have done and causes them to change their moral outlooks. Barnett points out that this end in itself is "speculative at best and counterfactual at worst" (Barnett 1985: 214). The high rate of recidivism is an indication that it is contrary to the facts because many criminals' moral outlooks are not changed by mere punishment; on the contrary, they often become more resolute criminals.

Barnett questions the foundation on which deterrence rests because, if deterrence actually is the *end*, he maintains, then it is unimportant whether the individual really committed the

offence, since all that is required for deterrence is that it be proved that the individual committed an offence. The actual occurrence is relevant only insofar as that a truly guilty person is more easily proved guilty. The judicial system becomes not a truth-seeking device, but merely a means to legitimate the use of force (Barnett 1985: 214). This would be correct if one justifies punishment wholly on utilitarian grounds, as I argued in Chapter 4, but I seek to justify punishment by means of a hybrid approach, so not only utilitarian considerations are brought into the theory, but retributive, rehabilitative and restitutional ones too. Barnett furthermore maintains that there is no reliable criterion for determining how much deterrence may be employed. This, I argued in Chapter 5, is incorrect too; there are clear criteria that may be employed for determining the amount of punishment administrable, based on the amount of force generally required to deter potential offenders, and by grading punishment in proportion to the crime committed. Therefore, deterrence is not rejected or seriously attacked by Barnett's criticism.

Barnett does not argue that retribution, deterrence, or rehabilitation are undesirable, but maintains that they alone are insufficient to justify punishment (Barnett 1985: 215), a point on which I am in full agreement with Barnett. Regarding the present paradigm of criminal justice, he points out that even its advocates generally acknowledge its overall ineffectiveness (Barnett 1985: 216). These advocates maintain, however, that it is ineffective because it is not administered severely enough. All that is needed, they argue, is that crime be punished more severely. Barnett says that they neglect to ask why the system fails to punish so as to yield beneficial results, instead of harmful ones. Bianchi criticises the punitive system as follows:

> What we in our western societies understand by a criminal law system is a state-run organization, possessed of the monopoly to define criminal behaviour, directed towards the prosecution of that behaviour which it has defined - irrespective of the wishes or needs of a possible victim or plaintiff - and which has at its disposal, pre-trial and post-trial, the power to keep its prosecutees and convicts in confinement. Representatives and managers of the criminal law system cherish the pretension that their organization could protect society from such a dangerous threat as criminality. In fact, however, the organization, since it was established in its present form about the end of the 18th century, has, in every respect and on all counts, failed to accomplish what it promises. Quite the reverse. For a long time the criminal law organization has been escalating dangerously. Any enhancement of the punishing power of the organization has so far led to more rather than less criminality. A nation that builds more prisons and imposes more repressive punishment usually provokes criminality (Bianchi 1998: 336).

Barnett believes that the present criminal justice paradigm is experiencing a crisis, i.e. it is in a crucial stage in which a decisive change is impending. It is in a crisis because it is in an eclipse, i.e. the public lacks the will to apply it in any but the prevailing way. He further maintains that there is an increasing tendency to allow people to live according to their own means so long as they do not harm others. He believes that this attitude is exemplified in society's stance towards drug use, abortion, and pornography. Society increasingly maintains that where there is no victim, the state has no right to intervene, no matter how morally suspect the behaviour may be, an example being freely chosen prostitution. A second reason why the paradigm is experiencing a crisis is that it is largely ineffective. Inflicting pain or unpleasantness on criminals generally produces sympathy towards them, which causes offenders to feel victimised too. In addition, many criminals are not caught, and even if caught, the criminal justice process is slow and far removed from the crime. Furthermore, victims stand to gain little, if anything at all, by pressing charges against

an offender. On the contrary, the victim stands to lose further time and money, so do the witnesses, as well as incur increasing risk of retaliation.[3] He goes on to claim that the criminal justice system is in a crisis due to the collapse of its twin pillars of support - its moral legitimacy (which I wholly agree) and its practical efficacy (Barnett 1985: 216). Bianchi's criticism again emphasises this point:

> In order to do the job it has undertaken and to find continuous public support for that, the criminal law organization must always keep alive a negative stereotype of "the criminal". It must maintain its stigmatizing power. At best the managers of the system are unable, or unwilling, to prevent the media from feeding the negative stereotype of "the enemy of society". This negative stereotype is a direct result of the system's ideology. Since the "war against crime" is continually being waged by its managers and their supportive politicians, an "enemy-image" is constantly being produced (Bianchi 1998: 336).

Barnett contends that attempts to salvage the present system have assumed three distinct forms:

(1) Offenders are punished in proportion to their crimes. The aim is to increase faith in the criminal justice system, perceiving it to punish according to desert.

(2) Having realised that mere punishment failed to rehabilitate offenders, the rehabilitative ideal was promoted in the belief that rehabilitation is the only main goal of the criminal justice system. However, this failed too - prisons still functioned merely as places of secure confinement with little improvement for offenders or their families. The system was expensive and required offenders to be supported by

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[3] This chapter should not create the opinion that victims are always completely blameless regarding their victimisation experiences, and that offenders are necessarily wholly to blame. Many victim-offender relationships constitute complex interactions. The degree of guilt or blame varies from case to case. Elucidating the differences and describing the interactions is the task of victimologists. For details regarding victim responsibility for crimes, see especially Chapter 3 of Karmen (1984).

the state, as well as many of the offenders' families who subsequently required welfare benefits.

(3) In recent years the field of victimology has emerged, resulting in victims gaining some rights, such as claiming compensation, but these are usually very limited in scope and only applicable in certain types of victimisations.[4]

No theory directly questions the paradigm of criminal justice, however (Barnett 1985: 217-218).

8.2.2 BARNETT'S PROPOSAL

The system Barnett proposes in response to the ineffectiveness of the punitive one is one of restitution, not of punishment. It treats crime as an offence of one individual against the rights of another. The victim has suffered a loss. Here justice consists in culpable offenders making good the loss they have caused. This means that an offence is not to be seen as an offence against society, but against an individual victim. The rapist did not rape society, he raped the victim and his debt therefore is to the victim, not to society.[5]

The position that sees crime as an offence of an individual committed against the rights of another is, however, strictly speaking, incorrect. Many crimes involve companies, organisations, institutes, or the state. An

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[4] Rosenfeld (1996: 312-313) distinguishes between compensation and restitution, the latter being a special case of compensatory justice. For the purposes of this thesis, a distinction between the two terms is not essential and may be interchanged unless otherwise indicated.

[5] Gordon Basehor (1998: 768-813) discusses the roots of new integrative and restorative justice theories, as well as success of current preliminary applications of these theories. He argues that the traditional retributivist and rehabilitative paradigms offer only a simplistic choice between harming and helping offenders. He claims that these theories fail to adequately address the needs of communities and victims; and proposes a new paradigm to replace the others, namely one of reintegrative or restorative justice. This theory, based on specific cultural approaches to crime found in New Zealand and Japan amongst others, aims at addressing the needs of communities and victims through apology and reparation. It is hoped that this process leads to the reintegration of offenders into society. While he is right that the other two paradigms are simplistic when applied on their own, the restitutional paradigm is just as simplistic when applied in a pure form. I therefore advocate a hybrid approach to punishment, pursuing goals from all here examined paradigms.

example may be persons cheating on their tax returns. These crimes are not accurately described as being between two individuals. If we allow, however, that Barnett actually means "person" instead of "individual," then his claim has more credence. Organisations, companies, institutes, and the state, to name only a few, may be described as "legal persons," and are recognised as such by most legal systems. Persons, whether they are individuals or complex institutions, have rights, rights that can be violated. When the rights of a person are intentionally violated by the actions of another, a crime is committed. Crime is thus an unlawful loss suffered by a person.

Barnett mentions two restitution proposals: punitive restitution and pure restitution:

(1) Punitive restitution: Given this view, restitution should merely be added to the paradigm of punishment. The offender is still to be punished as before, but restitution ought also to be made to the victim. Offenders might be forced to compensate the victims by their own work (whether this be while in prison or not). Another proposal is that offenders pay proportionally to their ability. In this regard, a poor person could pay in terms of days of work, a rich person by an equal number of day's income (Barnett 1985: 219). However, this approach does not replace the given system of punishment, but only supplements it. Offenders are still sentenced to an unpleasant period of punishment.

(2) Pure restitution: Here the focus is not on the fact that the offender deserves to suffer, but that the offended party desires compensation. The system would work in the following way: when persons are apprehended for an alleged offence, a court would determine their guilt or innocence. If they were found guilty, the offenders would be sentenced to make restitution to the victims. If they were immediately able to do so, this would be possible. If they were not immediately able to do so, but the court found them to be

trustworthy, they would be permitted to continue at their jobs or find new ones, while paying restitution out of their future income. This would entail a legal claim against future wages. Failure to pay could result in confinement or other more restrictive measures (Barnett 1985: 220). If it is found that offenders were not trustworthy, or unable to find employment, they would be confined to an employment project. This would be an industrial concern in which actual goods and services would be produced. The level of security at such centres could vary, with those confined to centres requiring least security receiving the highest wages. Cost for room and board would first be deducted, followed by a sum for restitution. Any additional earnings would go to the offenders, which they could either use at their own discretion or pay as restitution in order to hasten their release. If workers refused to work, they would not be entitled to release. If they did not make restitution, they could not be released. Such would be the basic philosophy of the new system. Variants could be found in the details. Barnett claims, for instance, that with such a system, victim crime insurance would be more economically feasible and highly desirable. Victims would claim from the insurance companies, leaving the companies with the right to claim restitution. The insurance companies could better supervise the progress offenders make and in addition could establish industries in which they employed released offenders. It would be in the interest of insurance companies to reduce the overall level of crime and recidivism since that would reduce the overall number of claims. The benefit for the victims is immediate compensation, provided that they co-operate with the authorities to apprehend and convict the offenders. Centralisation, Barnett further contends, would increase efficiency by enabling the pooling of smaller claims against an offender (Barnett 1985: 221).

Another device may be direct arbitration between victims and their offenders as a kind of substitute for plea-

bargaining. By allowing criminals to negotiate reduced restitution, the likelihood that a guilty plea would be attained would be increased so reducing the risk of a rejected charge for the victims or insurance company. Proponents of this view hold that it brings greater satisfaction to the victims, creates a greater awareness of offenders that their offences are against another individual and not against society in general, and might bring about a more effective change in offenders towards becoming more responsible (Barnett 1985: 221).

What exactly is restitution, however? Which standard is to be applied in ensuring the right amount of restitution? The problem is how one can put a price on pain, suffering, or life? Barnett concedes that any non-arbitrary solution is lacking, but holds that this shortcoming does not seriously discredit the restitutional theory. Restitution is still held to be superior to punishment because the former provides at least some tangible compensation, even if this is arbitrarily determined, while the latter provides none at all. The primary intention of any system as a response to crime, Barnett insists, must be restitution, not punishment (Barnett 1985: 223).

8.3 EVALUATING BARNETT'S RESTITUTIONAL THEORY

8.3.1 THE AFFECT OF CRIME

Barnett claims that most members of society are today just spectators of the justice system, including the victims. If one's car is stolen, for instance, the whole justice process proceeds without one's involvement after one has provided the necessary details when reporting the crime. Seldom is one aware of progress made, or how the investigation is proceeding, until one is required to testify in court.

Barnett therefore urges more victim involvement in the criminal justice process.

The restitutional system is highly commendable because the victims of crime receive assistance. Restitution cannot undo a loss, but it can make the loss easier to bear. A restitutional system would not neglect victims' needs as they are in the punitive system.[6] There is no reason, however, why the needs of victims could only be addressed in a wholly restitutional system, why in fact, restitution, rehabilitation and punitiveness cannot be accommodated within a unitary system.

But is it correct that an offence is not to be seen as an offence against society, and only against an individual victim, as Barnett claims? It is indeed correct to say that the rapist did not rape society, but only the individual victim. This by no means implies, however, that only the individual directly harmed suffers a loss. When a person is raped, he or she is the direct victim. His or her family is also harmed, however, experiencing grief, anger, and a sense of deep injustice. The victim's community is victimised too. When one hears of a rape in one's neighbourhood, one does not only have deep compassion for the victim, one also feels vulnerable and experiences fear and anxiety because the rapist may strike again, possibly victimising oneself or one of one's loved ones, and one is angry that such an injustice has been done. Crime is therefore not only a matter between the criminals and their victims. It affects the whole society. Society therefore has a right to employ measures to deal with crime and those responsible for criminal activities. The state, as the supreme guardian of society, not only has the right to exact a punishment in response to crime and criminals, but also has a moral obligation to do so. If the state shows no interest in the well being of its members, it

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[6] For a lucid victimological account of how victims are treated by present punishment systems, see Chapter 5 of Karmen (1984).

cannot expect to have the respect and loyalty of those members for long because it will have lost its moral authority.

It is not the case therefore, as maintained by Barnett in facing possible objections, that only the primary victim is actually involved, and that most other members of society are mere silent observers of the justice system. They are affected too, even if not as directly or intensely. Although it is correct to say that the principle source of the restitutional model's strength lies in the fact that it recognises the rights of victims, secondary victims ought not to be forgotten. What Barnett is doing is not replacing one system that neglects the rights of some parties involved by another that does not, but rather replacing one system that neglects the rights of primary victims with a system that neglects the rights of secondary victims. The aim of my thesis is to propose and defend a system that addresses the needs of *all* parties involved, and one which does so to the best possible degree.

8.3.2 ACCUSING THE INNOCENT

The principal source of the restitutional paradigm's strength is that it recognises the rights of the victims. By offending against others, offenders become indebted towards their victims, a debt that can be assigned, inherited, or bestowed. Persons could select in advance who would be entitled to claim restitution, should one not be able to do so. By insuring with a company with a record of accomplishment for tracking down those who victimised their policyholders, security is augmented because crime is more effectively combated (Barnett 1985: 222). If a person is murdered, having no heirs, the restitutional right could fall to anyone willing to track down the perpetrator. Specialists might develop in this business.

However, if criminals become indebted to their victims, and this debt can be assigned, inherited, or bestowed, as

Barnett suggests, then we are inviting misuse of a system to an extraordinary degree. We can imagine, for example, that for a given crime, two persons are suspected. One is unemployed, only has the minimum standard of education, and does not have any savings. The other is the son of a wealthy millionaire, has good education, and earns extremely well in his father's company. Leaving the interests of justice aside, it is clear that the victim would stand to gain much more compensation from the latter than from the former. The rich suspect might pay immediately, while the poor suspect would have to work (perhaps in an employment community where he or she would not earn much because unable to find work anywhere else). For some victims it might be very tempting to press charges against the rich suspect because the prospects of gaining financially would be much better than if charges were pressed against the other. This is a problem that Barnett recognises when dealing with possible objections, but with which he deals inadequately, as I shall explain. The rich person might even be accused, rather than the poor one, if the case against him would be slightly more difficult to prove than against the other because although the victim might have a more difficult case to win, the rewards of winning would be far greater. If the accuser wins, he or she has much to gain; if not, only the legal expenses would have to be paid. What Barnett would be creating is not a system that would increase the attainment of justice, but rather a system functioning according to market logic, and it can hardly be in the interest of justice that sentencing be dictated by such logic.

Although it is probable that specialists would arise in tracking down the perpetrators of murdered persons without heirs, they would not do so with the motive of doing justice, but rather of making money. Again, it can be assumed that those from whom more could be gained, or could be gained in a shorter period, would have a higher likelihood of being accused. The punitive system is not without error, and

innocent persons are frequently convicted; however, this flaw is not the result of financial greed. It is therefore reasonable to assume that the percentage of innocently convicted criminals would rise significantly under Barnett's restitutional system compared to a system in which monetary gain is not the primary objective of victims.

8.3.3 POOLING CLAIMS AND FRAUD

Pooling smaller claims against an offender may increase efficiency. Would it, however, not also undermine the interests of justice because those not entitled to claim (those who have not been victimised) would add their claims to an already existing pool of claims in which it is likely that the case against the accused will be won, in order to receive money? This would be similar to insurance fraud in our present system. This is not to claim that abuse of the system only occurs in the restitutional system, but I believe that the restitutional system encourages abuse more so than the punitive system. In a restitutional system, persons who claim that they have been victimised when they have not been, may still have a chance of receiving restitution payments. In the punitive system, such fraud also occurs, but mainly for insurance claims where claimants may benefit financially by making false reports. There is unfortunately no conceivable way of eliminating such fraud completely. I am not arguing that any system is likely to have no fraud, but Barnett's system would make every crime a wholly restitutional question, thereby providing an incentive to commit fraud against all types of crimes, not only against insurance claims or the like as is the case in our present system.

8.3.4 REPORTING CRIME

Victims would become more willing to report crimes and appear at trials if restitution could be gained. Naturally, only if crimes are reported, could damages be claimed. By contrast, our present system often victimises victims further, requiring them to spend vast amounts of time and energy in the interest of serving justice. Karmen explains as follows:

> Those who cooperate with the police and prosecutors incur additional losses of time and money for their trouble (for example, attending lineups and appearing in court). They also run a greater risk of retaliation by the offender. In return, they get nothing tangible - only the sense that they have discharged their civic duty by assisting in the apprehension, prosecution, and conviction of a disruptive or dangerous person, generally a social obligation that goes largely unappreciated. The only satisfaction the system provides is revenge. But when restitution is incorporated into the criminal justice process, cooperation really pays off (Karmen 1984: 186).

8.3.5 VICTIMLESS CRIMES

One may object to Barnett's system because he suggests only activities that have victims should be defined as crimes. He argues that since crime is a matter between criminals and their victims, activities that do not have victims should not be considered as crimes (Barnett 1985: 231). Barnett is not correct on this point since it would lead to a much more dangerous society as negligence would not be punishable. Most traffic laws, for instance, would have to be scrapped since one could only punish if harm were done, and not merely if one posed a risk on the roads to others.

If only offences against individuals ought to count as crimes, and victimless offences would not be considered as such, then many felonies of today would not rank as crimes. Treason, for instance, cannot be seen as an offence against an

individual, and yet it is a very serious one, having the potential for threatening the social order. Attempted crimes, such as attempted murder, in which there is no victim, would also go unpunished. Nor is there always a specific potential victim who might claim psychological damages, we need merely think of attempted fraud, or attempted terrorism, which is not directed at anyone specifically. This system might even have a high probability of increasing the level of crime in society since persons would only be punished for harms actually committed, not those they only attempt. Therefore, they would be willing to take greater risks because the odds of gaining through offensive behaviour are much greater. If it is known, for instance, that there is only a one in ten chance of being convicted for fraud, many may believe it to be a risk worth taking. Attempted murders or attempted robberies, for instance, where no one was injured, would be ignored by the system except for psychological harm suffered.

8.3.6 RESTITUTION AND DETERRENCE

Responding to the objection that the restitutional system would not deter potential offenders because monetary sanctions are insufficient deterrents, Barnett rightly responds that this is unproven, and in any case the punitive system does not adequately deter offenders from offending. Certainty is more effective than severity, and it may be assumed that a system of restitution would be more certain since victims would have a greater interest in co-operating with the justice system, increasing the likelihood that more will be done to arrest and convict perpetrators. This greater success itself should deter potential offenders (Barnett 1985: 225-226).

8.3.7 THE BENEFIT OF CRIME

Crime would no longer pay, Barnett maintains. But would it not? If we mean by "pay" that crime benefits those committing it, can we then expect the eradication of crime under a wholly restitutional system? Such a system, or any system with restitution as one of its components, can be expected to have the advantage of motivating inmates towards becoming productive persons, since by being productive they are able to reduce their time required to complete restitution, thereby shortening the time until they can attain complete freedom. However, I would not go so far as to assert that the restitutional system would create an environment in which crime would no longer pay, and hence deter all potential offenders from committing crimes. Even abolitionists, such as Bianchi, acknowledge that not all elements of the present punishment system can be wholly eliminated because the restitutional system is not capable of dealing adequately with all contingencies. A restitutional system might be a more certain one than the present punitive one, but those offenders unwilling to cooperate with this system would still have to be confined until they would be willing to do so. These may be few, but the practice of confinement cannot be wholly eliminated:

> Perhaps, if we improve our legal system, the number of dangerous people will be so small that, even in a large country like the United States, two or three small places of quarantine will be sufficient, and certainly not the huge store of hundreds of thousands of human beings which that country has today (Bianchi 1998: 342).

8.3.8 THE ECONOMICS OF RESTITUTION

Another advantage is the enormous savings to tax payers since the cost of arrest, trial and detention would be borne by criminals themselves. Idle inmates under the present system

might be encouraged to become productive inmates with the whole society benefiting. Compared to the punitive system, the savings to tax payers might be considerable, but it should be questioned whether it would yield a financial advantage compared to my multi-dimensional system that also emphasises rehabilitation.[7] The restitutional system would not be educative or rehabilitative, i.e. it would not provide the criminal with means of learning adaptive behaviour and recidivism may therefore still be a significant problem, in contrast to the results attained in a well-functioning rehabilitative system. Not all crimes are consciously willed: many are performed by persons with maladaptive behavioural patterns that can be reversed or corrected.

8.3.9 LENGTH OF CONFINEMENT

Offenders under this system would know that the length of their confinements is in their own hands - the harder they work, the faster complete restitution could be made. In response, it must be stated that although offenders would know that the length of their confinements is in their own hands, those of the lower socio-economic classes can expect to have longer terms of confinement because their jobs would not pay as well as those of the higher socio-economic classes. The system would therefore not be just since it would favour the haves over the have-nots, i.e. it would not be a system of equality.

8.3.10 SPILL OVER

Pertaining to the making of restitution, spill over may also occur, i.e. convicted persons may use funds from family members to pay back their debts sooner. This may cause more people to suffer the consequences of restitution than the

[7] See 9.4.

system ought to do. Of course, we may query whether this is as bad as the imprisoned families' having no source of income and the suffering caused by having a family member in prison. The restitutional system may therefore have the upper hand on this point.

8.3.11 WORKING OFF THE DEBT

Is it plausible to assume that criminals will work off or have the skills to work off their debts? Barnett answers that criminals will be faced with only one choice, either to work off their debts or to remain imprisoned. Barnett assumes that many criminals are acting rationally in an irrational system, a system in which it may sometimes be beneficial to commit crime. Some bank robbers have for instance, been imprisoned only to be released at the end of their sentences to live in wealth for the rest of their lives. Perhaps they thought it was worth it. The restitutional system would not make any such provision: criminals would have to work until they have made restitution in full, no matter how long it would take them to do so (Barnett 1985: 227). Therefore, restitution could break the vicious circle of recidivism. Barnett does not address the objection that some would not be able to work off their debts because they lack the skills to do so, but his argument implies that they would be fated to remain imprisoned.

8.3.12 CRIME AND ECONOMIC COMPENSATION

If the restitutional model has the advantage of bringing greater satisfaction to the victim, it has the disadvantage of focusing wholly on monetary restitution. Although it may increase awareness that an offence is primarily against the direct victim, and not against society, it may reinforce the belief that all crimes can be undone through monetary means.

This is not the case, however, since although it is possible to pay a huge amount to a murdered person's family, or a raped woman, or a formerly kidnapped person, it is not possible to equate the amount to any monetary value. Non-monetary offences are not directly convertible into monetary terms.

8.3.13 RESTITUTION AND THE MEASURE OF PUNISHMENT

Under Barnett's restitutional system, persons found guilty of criminal activities would not be sentenced to confinement or sent for rehabilitation, they would be sentenced to make restitution to their victims. If immediately able to do so, this could be done, resulting in different justice for the poor and the rich because the financially well off would not experience the same degree of burden imposed upon them as the poor. Of course, this could be remedied to some extent by imposing sentences in proportion to the offender's income, rather than to the crime committed. This would greatly complicate the system, however, because a court would be obliged to determine each offender's income before imposing sentence.

8.3.14 RESTITUTION AND REHABILITATION

Seen from a psychological perspective, restitution would make the rehabilitation of offenders likelier. For my purposes, it would have an advantage compatible with the kind of rehabilitation for which I have argued. Being reparative, it could help alleviate guilt and anxiety, which can otherwise precipitate further offences. Restitution is an active process that contributes towards the improvement of the offender's self-esteem. However, the extent of this affect should not be overestimated. All of us have behavioural patterns; those of criminals are generally maladaptive. If learning better coping strategies does not change these

patterns, it is more likely than not that the criminal will offend again. Restitution might alleviate guilt, thereby increasing the offender's self-esteem, but there are no indications that it can do any more, nor are there any efforts to do more.

8.3.15 RESTITUTION AND MENTAL COMPETENCY

Barnett proposes that mental competency be done away with because only the harm done is to be determinative for punishment. However, doing away with the requirement of mental competency is to do away with one of the fundamental principles of criminal justice that holds that for one to be held responsible for a crime, one must have a guilty mind, i.e. one must fulfil the requirements of *mens rea*. We therefore hold it unjust to punish individuals who do not fulfil this condition. Barnett (1985: 230) responds that everyone who *can* be held responsible for a crime ought to be held responsible; this would deny many the defence of mental incompetency that they might have put forward even though they were mentally competent.

In response, it must be observed that Barnett's endorsement of the position that mental competency be excised, that everyone should be held responsible for the harm they caused, also indicates the callousness with which this system is to operate. Of course, this is not a necessary condition of his theory, but he advocates it nonetheless. Are those persons whose criminal behaviour is the result of their having an illness that causes them to commit criminal behaviour to be held accountable for their uncontrollable behaviour? It must be borne in mind that not all criminal behaviour is the result of an illness of some sort, but some may well be (as has already been pointed out). Moreover, is no effort to be undertaken to assist them, treat them, and cure them from their undesirable involuntary states? Barnett's restitutional

system is not concerned with the needs and conditions of offenders. On these grounds alone, his pure restitutional system would thus be more inhumane than the most stringent retributive system.

Since doing away with mental competency is not a necessary condition of any restitutional system, but only one of Barnett's proposals, the objection raised here is not one that must be directed at all restitutional systems. Mental competency and a restitutional system are not mutually exclusive, i.e. they are compatible. The justification of punishment I am expounding in this thesis demands that only those who are to be punished fulfil the requirements of *mens rea* and that those punished make restitution.

8.3.16 RESTITUTION IN ALL CASES?

A wholly restitutional system would not be capable of addressing all contingencies pertaining to crime and dispute resolution either. Bianchi recognises too that even under a restitutional system we would still need elements of the criminal process.[8] There will still be a role for officials such as judges, prosecutors and police, and for institutions such as compulsory detention - those who pose an immediate serious threat to others must be quarantined, those who refuse to negotiate their disputes must be detained until they are willing to do so, and those whose injurious conduct has aroused strong passions must be offered sanctuary pending successful dispute resolution (Bianchi 1998: 342-344). However, even if, as Bianchi insists, these forms of detention are more humane than those of the punitive paradigm, we may criticise it because it would be more liable to intrude on individual liberties than would a just system of punishment that at least determines the severity of punishment in

[8] Bianchi is an abolitionist who advocates the restitutional paradigm, and favours a civil process of dispute resolution, rather than a criminal process of conviction and punishment.

proportion to the severity of the crime committed. Moreover, one function of the criminal justice system is to protect offenders against the unlawful retaliation of victims, a task the restitutional system may not be capable of fulfilling as adequately (Duff & Garland 1998: 334).

8.3.17 RESTITUTION AND THE NECESSARY CONDITIONS

Let us evaluate restitutionalism in respect to the necessary conditions which I argue any morally justified theory of punishment must fulfil. Is it capable of fulfilling the sufficient condition by fulfilling all the necessary conditions?

(1) The "whom to punish" question: The restitutional system is capable of furnishing us with a morally acceptable answer of who may justifiably be punished. Although Barnett proposed discarding the requirements of *mens rea*, restitutionalism does not require this and can be implemented with these requirements. Those who are guilty and have victimised others are to make restitution.

(2) The question of degree: Restitutionalism tries to answer this question by insisting that restitution must be made in full, regardless of how long this takes. This, in practice, however, as has been shown, leads to disproportionate sentences and is therefore morally unacceptable.

(3) Serving as a recognised channel through which society can express its anger and indignation at offenders: Would society be just as satisfied if criminals would no longer be punished, but merely had to pay, if they have the means? It must be reminded that Barnett has proposed that those who could pay immediately would be permitted to do so, those who would be unable to would have to work to earn for their restitution. Is this something with which society would be satisfied? The answer is probably no. The well-known O. J.

Simpson case in the United States of America may serve as an appropriate example. Simpson was accused of double homicide after his former wife and her lover were brutally murdered. He was acquitted in the criminal case. More than two-thirds of Americans (who were able to follow the court proceedings on television) believed the jury's verdict to be incorrect. Simpson was then accused in a civil case brought forward by the father of the murdered male victim. This case Simpson lost and was subsequently ordered to pay a multi-million dollar settlement to the families of the victims. Was this satisfactory to the public, especially those who believed him wrongly acquitted in the criminal case? Was conviction in the civil case what he deserved, if one believed him guilty of the crimes? I think not, and I presume that most people would agree. Most of us believe that punishment should involve some form of pain or discomfort, and we also believe that the more serious a crime is, the greater the pain or suffering following in the form of punishment should be, *ceteris paribus*. Those believing that he was innocent, on the other hand, will see his conviction in the civil case as an injustice done to him, but nevertheless may believe that he was lucky not to have been convicted in the criminal case, which is indicative of the fact that they also do not hold punishment in a criminal case and punishment in a civil case as equal. Even those who believe him innocent seem to acknowledge that a prison sentence would have been a greater expression of anger and indignation against Simpson than a monetary penalty could ever be. Restitutionalism is therefore inadequate for serving the retributive need of society.

(4) Crime reduction: Although proponents of both punitive and restitutional paradigms claim to strive towards this objective, it is not enough to claim that the objective is endorsed by their respective systems; Each system's efficiency needs to be demonstrated. Just as does the punitive system, the restitutional system may claim to have

crime reduction as one of its objectives, but it is ineffective in attaining this objective. There is no reason to assume that restitution should fare markedly better than the punitive system since punishment is pain that we can all imagine at least to some extent, but nevertheless it fails to serve as an effective deterrent. Those punished were not made better by their punishment and most subsequently reoffend. Restitution is likely to have the same effect if offenders do not learn new behavioural coping patterns for their environments. Certainly, restitution might increase the likelihood that people will report crimes, but it may also greatly increase falsely reported crimes. The restitutional paradigm cannot therefore be seen as adequately pursuing the goal of crime reduction.

(5) Improving offenders: Restitutionalism faces the same objections as retributivism. Neither is committed towards improving offenders in any serious way, relying wholly on pain and suffering, not on enabling offenders to develop more socially acceptable modes of behavioural patterns. Even if convicted persons would suffer by having to pay, there is no plausible reason why they should learn any differently than they did with retributive punishment. The aim of restitutionalism is to make offenders become aware of the suffering they have caused, thereby instilling guilt and remorse within them. It may be seriously doubted, however, whether this can be enough to bring about a positive change within offenders. The wholly punitive approach also conveys the message of wrongful action and suffering to offenders, most offenders nevertheless become recidivists. The retributive and restitutional approaches lack measures to improve offenders. It is a mistaken assumption that imprisonment alone will be rehabilitative, and it may plausibly be assumed that it is also mistaken to assume that restitution alone will be rehabilitative.

(6) Undoing the harm done: Restitutionalism is the only simple approach that actively strives towards this objective, although this is not always a straightforward matter. Property offences are most easily resolved in this regard. The value of property can be fairly accurately determined; hence, the amount of property lost by a victim can be established without extensive difficulties. Sentencing of convicted offenders would involve demanding from them that they repay the amount lost by the victims. However, bodily or psychological injuries inflicted are less easily given a value in monetary terms and the harm inflicted upon a homicide victim cannot be undone in any way. An arbitrary value could be assigned which murderers must pay into a fund, for instance, which is employed for the assistance of homicide victims' families, though the effect of homicide on the victim's family also cannot be undone in any direct way. The harm inflicted upon secondary victims - the deep loss experienced by the families of homicide victims - cannot be translated into monetary terms non-arbitrarily. The same holds for victims of rape, armed robbery, aggravated assault, and other traumatic victimisation experiences. Although the financial cost of psychological treatment required as a result of being victimised may be accurately and non-arbitrarily determined, this is not equateable to the actual harm suffered through the victimisation experience.

The arbitrariness with which some restitutions need to be undertaken is, however, no grave disadvantage to restitution when compared with punitive treatments because the latter also relies on many arbitrarily determined sentence lengths. Of course it is possible to equate harms caused with punishment administered when punishment is applied wholly retributively in a telionic manner, such as when the death penalty is required for murder, *ceteris paribus*, but as I have already shown, this is only possible in the responses of a small

minority of crimes.[9] The vast majority of crimes have sentences attached to them that may be administered within a range of arbitrarily determined upper and lower limits.

Since the punitive and rehabilitative approaches often are not concerned with the plight of the victim and do not attempt to undo the harm suffered, the restitutional paradigm is therefore commendable for pursuing the goal of undoing the harm done through crime.

(7) Being economical: Restitutionalism is committed to this objective, at least in theory. A purely restitutional system would save the state a great deal since most of the costs would have to be borne by the convicted parties. Those responsible for crime would also be responsible for the administration of justice resulting from their unlawful behaviour. In the punitive system this is not so. Instead, criminals are convicted, sentenced to a term in prison, perhaps released on parole, meaning they require some form of supervision, each element costing money and none of which the convicted has to pay. On the contrary, the state pays and this means that it is the law-abiding tax-paying citizens who really pay for the administration of punishment to criminals. Under a restitutional system, criminals would not be imprisoned idly until their date of release. The system would demand that those who cannot make financial restitution immediately would have to work until the earnings of their labour have paid the required restitutional amount.

Undoubtedly, putting prisoners to work could be profitable. Robertson (1997: 1058) mentions that prison labour was a profitable manufacturing business between 1890 and 1935 in a number of American states:

> The New York prison system had a particularly rich offering of vocational courses, including commercial art, barbering, carpentry,

[9] See 3.4.1.

masonry, tailoring, bookbinding, machine shop practice, sales, and cartooning (Robertson 1997: 1058).

The skills could be applied while the prisoners were serving their sentences, but could also be of great value to them once they left prison, enabling them to acquire jobs that may have been previously inaccessible to them. In addition to this, prison industry programmes can be very profitable and attractive for investments. It has been remarked that some companies that would otherwise relocate to the Third World to reduce labour costs find the cheaper workforce of prison labour an attractive alternative (Robertson 1997: 1059). It must be noted that here too it is extremely important that this goal be pursued without violation of any of the constraints established, such as that only the guilty ought to be punished, otherwise the institutions cannot be termed "prisons" in which prisoners work, but "labour camps," as occurred often enough in immoral regimes of the twentieth century.

Employing prisoners can also be expected to have widespread approval from society. Surveys suggest that the greater public strongly supports work-related programmes in prisons. Most people hold the view that inmates should not be released until they learn a skill or trade, and believe too that it would be a good idea that prisoners work in manufacturing, building, or provide services, especially when the state would otherwise have to hire workers to do the work. A vast majority of persons also welcome the idea that prisoners are paid wages if two-thirds of this would go to their victims or towards prison costs (Robertson 1997: 1059-1060).

In theory, restitutionalism is therefore clearly committed to being economical. However, whether it could be fully implemented, as Barnett advocates, so that convicted offenders would be made liable for the legal costs, the costs of their

imprisonment, and having to make restitution to their victims, is highly doubtful. The costs of many felony trials are much more than what most persons earn annually and the cost of confinement with adequate supervision is far beyond many persons' earning capacities too, bearing in mind that most offenders come from the lower socio-economic class and are not highly skilled labourers. If prisoners were therefore compelled to cover all the costs resulting from their unlawful behaviour, then most criminals would probably have to serve life-sentences. This would neither be in the interest of society, nor would it serve the interests of justice, since less severe crimes would effectively be dealt with just as harshly as more severe ones. While the restitutional model is commendable for having the reduction of economic costs to the public as one of its objectives, the radical cost reduction envisioned by Barnett is almost certainly not attainable. The most realistic solution would be to assign an arbitrary value that criminals would have to pay, the amount depending on the severity of the crime and on their ability to make restitution.

Restitutionalism therefore fulfils five necessary conditions in theory, but only two in practice. Hence, as a pure theory, it is morally inadequate for the justification of punishment.

8.4 PUNITIVE VERSUS PURE RESTITUTION

The evaluation of pure restitution reveals that, although it has distinct benefits, it is deficient in many respects. But as even Barnett already mentioned in discussing possible restitutional models, a restitutional model need not be advocated in its pure form, it may be part of a punitive system; hence, such a system may be described as one of "punitive restitution." A system of punitive restitution has restitution as an element in punishing or rehabilitating

offenders. Such a system would be more likely to further the goal of a morally justifiable form of punishment as I am defending in this thesis, one that has retributive, deterrence, rehabilitative, and restitutional elements, and adequately answers the question of whom to punish and to what extent.

Whereas no wholly restitutional system has been implemented in modern times, punitive restitution is increasingly being employed. Mediation sessions are becoming increasingly frequent. Victim-offender mediation, with the objective of attaining a restitutional solution, results in very high satisfaction for both victims and offenders. The vast majority of both groups is also found to perceive the outcomes of such mediations as fair. This may be because victim and offender meet each other with the objective of attaining a mutually acceptable solution. The process thereby assumes a more humane character than does the present system of punitive sanctions. Punitive restitution is also able to avoid the untenable consequences of pure restitution, such as that secondary victims are disregarded (since punitive restitution still involves punishment, thereby allowing society to express its anger and indignation), disproportionate sentences for the poor and the rich, creating the impression that crime can be wholly undone through monetary means, and failing to acknowledge that criminals ought to be rehabilitated. Victims having participated in such mediations generally experience much lower anxiety about being victimised again. Furthermore, a study, of which the sample was not statistically significant, found that juveniles who took part in mediation were less likely to become recidivists within a one-year period (Umbreit 1994: 154-155). Although the study was not statistically relevant, it may be a promising indication that such mediation does have favourable consequences in this respect.

It should be noted that mediation has only been applied to minor offences, such as burglary, theft, or other offences not involving losses or injuries of large magnitude. What happens is that victims and offenders meet each other with the aim of attaining a negotiated settlement acceptable to each of them. The restitutional solution is, however, not the only means available for dealing with offenders found guilty of such offences in systems providing mediation as an option. If one of the parties is not willing to participate in mediation, or if a mediated settlement cannot be attained, punishment is imposed by the court as is done in the wholly punitive system. Mediation is therefore an option, albeit a desirable one, not a requirement.

The request that mediation be applied to violent cases has increased in frequency following the success attained in minor cases. This trend has been initiated by people who have become victims of violent crimes, such as aggravated assault, attempted murder, sexual assault, and armed robbery, probably because they have a need to be regarded by the justice system and desire a response that addresses the losses or injustices they have suffered. Family members of murder victims have also expressed this request (Umbreit 1994: 160-161):[10]

> A growing number of representatives of major victim advocacy organizations ... are beginning to recognize the value of mediation for those victims of violence who express a need for it. As they directly confront the very source of terror in their lives, through mediation, some victims of violence are able to obtain a greater sense of healing and closure. The field of victim-offender mediation is faced with an exciting opportunity to stretch its original vision

[10] Restitution sentences have been applied in severe felony cases too, but the outcome seems not to have been satisfying to the communities involved. In response to two incidences of dam collapse, one in the United States of America and the other in Italy, where the constructors of the dams were held accountable, victim compensation prevailed over criminal penalties. These outcomes did not satisfy many who had lost family members in the disasters: "nor was it considered to be satisfactory by a significant number of the people affected. Indeed, in both cases ... the legal responses intensified anger and frustration" (Calavita, Dimento & Geis 1991: 417).

> and significantly alter its original model to appropriately address the needs of parties affected by violent criminal conflict. This can only happen with a serious commitment to re-examine the basic model and understanding its limitations; an increased awareness of the victimization experience (Umbreit 1994: 161-162).

The emotional intensity of such cases, however, makes it unlikely that they could be mediated with a non-judgemental attitude. For this reason it is unlikely that severe cases could be settled merely through mediation. However, this should not preclude any restitutional element in any punishment administered. I therefore here propose a multi-levelled punishment system in which the elements of rehabilitation, retribution, and restitution can all be pursued. Even though, as we have seen, pure restitution is unacceptable, the notion of restitution has many positive elements, elements that should not be rejected by discarding the whole theory. Restitutional elements ought to be part of any punishment system so that, importantly, an attempt is made to undo the harm done.

8.5 SUMMARY AND PERSPECTIVE

In this chapter, I critically examined the restitutional approach to punishment since one of the objectives I argue any morally justified punishment ought to have is that the harm done through crime be undone as far as possible. This dimension of punishment hence acknowledges the plight and needs of victims. The pure restitutional approach, however, has numerous flaws and shortcomings, which I pointed out. Therefore, I concluded that restitution should be part of a punitive approach having therapy as one of its components. Punitive restitution is increasingly being applied with promising results.

It is again appropriate for me to review what I have argued thus far. I showed that retributivism answers the

"whom to punish" question, and deterrence theory the "how to punish" question. Retributivism also best pursues the objective of allowing punishment to serve as a recognised channel through which society can express its anger and indignation at offenders. Rehabilitationism best pursues three of the objectives, namely improving offenders, reducing crime, and being economical in the long-term. Restitutionalism best pursues the goal of undoing the harm done to victims. Thereby all necessary conditions have been realised by the different theories.

In the next chapter, I will argue the reasons I hold the seven previously identified conditions (the answering of the two questions and the pursuit of the five goals) each as being separately necessary and jointly sufficient for the justification of punishment. Subsequently, in the final chapter, I shall briefly summarise what I have argued, discuss notions related to the justification of punishment, and present my hybrid approach, discussing how it could be realised in practice.

CHAPTER 9

THE NECESSARY AND SUFFICIENT CONDITIONS

9.1 INTRODUCTION

In this chapter, the focus will be on the necessary and sufficient conditions for morally justified punishment. I shall defend each of the seven necessary conditions I proposed for the vindication of punishment and argue why I hold each of them to be necessary. Subsequently, I will give grounds for my position: the reasons I hold these necessary conditions as jointly constituting the sufficient condition and why this is important. But now, let us direct our attention to why the seven conditions I propose as necessary ones are indeed necessary.

9.2 DEFENDING THE NECESSARY CONDITIONS

In this thesis, I set out to defend a theory of punishment having seven necessary conditions together constituting the sufficient condition for morally justified punishment. I shall now undertake to establish why these are the conditions that are indeed individually necessary and together sufficient. In stating that "punishment is justified" or "X justifies punishment," I am concerned with the relationship between two concepts, punishment and its justification. The justification of punishment, as I have argued, depends *interalia* on values that we have. Necessary conditions of any value statement can only be established by argument, i.e. value claims must be supported by valid and sound reasoning.

When justifying punishment, we are dealing with morality and related concepts, particularly guilt, retribution, deterrence, rehabilitation, and restitution, and therefore

with an issue requiring conceptual argumentation. This assertion together with having stated in Chapter 3 that morality is a practical subject, results in an apparent contradiction, which I find myself compelled to reconcile. Morality is a practical subject insofar as it arises from our needs and interests in affairs of everyday life. The principles we derive in accordance with these needs are normative ones, which means that they are concerned with values. Because they are normative principles, their explication and vindication require, since we are concerned with the relation of these values to the justification of punishment, conceptual argumentation.

I argued throughout this thesis that the justification of punishment requires it to have seven necessary conditions. To substantiate my claims that they are indeed necessary, I shall examine each of the conditions individually and ask whether punishment could be considered justified if the condition in question was not held. By asserting that P is a necessary condition for Q, it is being asserted that it is inconceivable that Q could come about without P. To state that rehabilitation is a necessary condition for morally justified punishment, for instance, is to hold that only punishment with a rehabilitative element can be held to be morally justified.

9.2.1 THE WHOM TO PUNISH QUESTION

The first of the conditions I hold to be necessary for any theory justifying punishment is that it adequately answers the question of whom we are justified in punishing. Although this is obviously important, we need to ask why it is necessary. Let us imagine a theory or system of punishment that did not find this question important. Could we hold any society adopting it as civilised in respect of how it dealt with punishment? We must bear in mind that I argued in 1.2 that morality is conceptually connected to civility, i.e. only a

civilised society can be a moral society. Civility in turn is connected to the furthering of well being of both the individual members of society and of the group as a whole. It therefore follows that only a society which furthers the well being of its members and of the group as a whole is a moral society. This is because morality, civility, and well being are conceptually connected.

If no attention were paid to the question of whom we are justified in punishing, then no distinction would be made between those who deserve punishment and those who do not. Punishment of the innocent under such a system would not be morally objectionable since the theory would not determine that only those who are not innocent might be punished, for instance. If we could not be certain under which conditions we would be punishable in our society, we would have no way of directing our conduct in any way that assured our remaining unpunished. This would not further our well being, and the society would therefore not count as a civilised one; therefore, it would not be a moral society.

If we examine the theories I discussed in this thesis, we find that not all theories of punishment address this question. Retributivism and restitutionalism hold that only those who have committed a crime are liable for punishment, where the former holds that only those fulfilling the conditions of *mens rea* may be punished, while the latter, that everyone who has victimised another is morally punishable. Act utilitarianism holds that anyone may be punished when it is utility maximising to do so, even including innocent persons; rule utilitarianism holds that only when persons who are guilty are punished (and hence fulfil the requirements of *mens rea*) is it utility maximising in the long-term and hence morally justified. Rehabilitationism on its own endorses rehabilitation of anyone who could benefit from it, or who is judged likely to offend if not treated preventively.

Not just any answer to the question of whom we are justified in punishing is acceptable, however. Since morality is connected to civility and civility to the furthering of well being of the individual and of the group, where "well being" is understood as the realisation of one's potential, the answer to the question of whom we are justified in punishing is best answered by retributivism because it does not endorse the encroachment of liberty of any innocent individual and a person is only considered guilty when he or she fulfils the conditions of *mens rea*. Any theory that would not consider this question or would not provide an answer that furthers well being would not be civilised and hence would be morally deficient.

9.2.2 THE HOW TO PUNISH QUESTION

In Chapter 5, I argued that morally justified punishment must be graded (i.e. more serious offences should receive more serious punishment, *ceteris paribus)* and punishment should be administered proportionally to the severity of the crime committed (i.e. punishment should fit the crime and should therefore not be too severe or too mild for a specific crime). Any system of punishment that did not address the issue of degree would disregard the demands of morality. Let us imagine that a system answered the question of whom to punish in a morally acceptable way (only persons who fulfil the conditions of *mens rea* may be punished), but gave no account of how much those to be punished may be punished, leaving this question open to the discretion or fancies of the judges passing the sentences. Theoretically, sentences could be passed that we would consider morally wholly untenable. In Chapter 3, I argued that morality is a practical subject concerned *interalia* with the expression of one's emotions in the sense that one's actions must be in accordance with the morally acceptable emotions in the circumstances in question.

If a minor crime, such as shoplifting, would be punished with life-imprisonment, for instance, it would not be in proportion to the magnitude of our indignation. We would consider the judge as having over-reacted in the situation; we would judge him or her to have climbed the ladder of importance too far. The sentence would therefore be unacceptable to society. The opposite extreme holds true too. If a judge sentenced a first-degree-murderer to six months imprisonment, suspended for one year, we would be enraged (rather than feeling that our original anger had been addressed) by the judge's failure to recognise or acknowledge the seriousness of the crime committed and the punishment to be handed down in response. A theory that disregards the emotional needs of the members of society who are affected by the crime is not in touch with social reality. It is thus imperative for any theory of punishment to address the question of degree of punishment. Of course, this does not mean that the theory must provide a decisive answer to every crime. That is an issue to be resolved empirically, perhaps by criminologists. A theory justifying punishment must provide general principles according to which the measure of punishment is to be determined, however.

Once again, not all the here-examined simple theories adequately address this issue. Since retributivism operates only with the principle of lex *talionis*, it is incapable of taking aggravating and mitigating factors into account. Since restitutionalism converts all harms into monetary terms, it is not satisfying either. As we have seen, the wholly forward-looking approaches (utilitarianism and rehabilitationism) have no regard for proportionality: they only consider the overall outcome of the specific punishment. This is why we therefore need deterrence theory with retributive foundations as part of a hybrid approach to justify punishment only when punishments are graded according to the severity of their offences.

9.2.3 PUNISHMENT AND THE EXPRESSION OF ANGER AND INDIGNATION

I have argued that one of the objectives punishment must have is to serve as a recognised channel through which anger and indignation experienced by members of the society at offenders can be expressed. A theory that does not have this objective as one of its components fails to acknowledge an important need of society, cannot really be said to promote the well being of society to the greatest extent, and hence we would probably not consider that society to have the right to be called "civilised," or at least not civilised to a high degree. If punishment does not serve as an adequate channel through which society can express its anger and indignation at offenders, then society will not respect the institution of punishment and will not rely on it to satisfy this need. It follows that if members of society feel that this need is not being met because punishment is not perceived to be administered properly (because hardened criminals are prematurely released, for instance), victimised members may have the propensity to take the law into their own hands, thereby often inflicting greater harm than is justified in return. Vigilante activities thrive in environments where the legal and penal institutions are perceived to be wholly inept. Not only does this fail to serve the interests of justice and is not constitutive of a civilised society, but the very institutions that should ensure these interests are undermined. Therefore, it follows that morally justified punishment ought to strive towards the goal of fulfilling this need of society.

In a pure form, retributivism and deterrence theory with retributive foundations are the only theories examined here that can be said to adequately address this point. Utilitarianism would do so only when so doing would be utility maximising, rehabilitationism does not address this need at all, and restitutionalism does so only in an unsatisfactory

way because it attempts to undo all harms through monetary means. Retributivism is therefore required to cover this point too in my hybrid theory because it demands that the guilty be punished so that society is able to express its anger and indignation at the guilty and therefore that these emotional needs are met.

9.2.4 PUNISHMENT AND CRIME REDUCTION

Although this might seem obvious, we need to understand why punishment should have this objective and what would happen if it did not. Let us imagine that punishment did not reduce crime, but had the contrary effect of increasing it. Although none of the theories examined in this thesis can be accused of increasing crime, some are not committed towards crime reduction, as I shall point out shortly. Supposing that a given approach increased crime, it would certainly harm society and its members, and thus not serve their well beings.

What if punishment did not increase crime, but neither brought about a reduction, however? Let us imagine a society with a stable population with X number of criminals committing Y number of crimes per year. Let us imagine that Y is a fairly large number, large enough to be disturbing for the law-abiding society to be seriously vexed by it and to desire a decrease in crime. Let us imagine further that the crimes being committed are minor ones for which only short-term sentences can be given. If X continues to commit Y number of crimes annually, no more and no less, the law-abiding society, irritated by the persistent level of crime, will come to question the justifiability of the system of punishment in use. The search for a more effective means of dealing with criminals, one that promises to bring about a reduction in crime too, is bound to be sought because bringing about a reduction in crime furthers the well being of society which, it must be stressed again, characterises a society's level of

civilisation. Thus, punishment that does not strive towards bringing about a reduction in crime is not a civil response to crime: the opposite, by contrast, is. Consequently, bringing about a reduction in crime must also be a necessary condition of any theory justifying punishment.

I have shown how crime reduction is pursued by utilitarianism, deterrence theory, rehabilitationism, and in theory but not in practice by restitutionalism. I have also argued why retributivism does not have the goal of crime reduction at all. It seems that rehabilitationism is probably best able to pursue this objective, since it promises ultimately to be most successful in reducing crime because by rehabilitating offenders, one enables them to acquire more socially acceptable modes of behaviour and be able to live productive, crime-free lives in society, which ultimately reduces the recidivism rate and therefore also the crime rate.

9.2.5 PUNISHMENT AND THE IMPROVEMENT OF OFFENDERS

Why must punishment work towards the improvement of offenders if it is to be morally justified? Is it not enough to ensure that they do not commit further crimes? The reason that this is inadequate is that only if we improve offenders, can we further their well beings. And since a moral response to crime is to have a civilised response (which means that one ought to promote the well being of both individuals and of the group, including the well being of offenders), it follows that any theory that does not have this as one of its goals can not be said to fulfil the requirements of a civil society. If punishment did not strive towards improving offenders, i.e. towards making them better persons, then it would not further their well beings and hence it would not be a civil response to crime and those responsible for criminal behaviour. Even if we imagine that punishment would not allow criminals to deteriorate further, but did not improve them, this would not

be doing enough since it would not be furthering their well beings in such a manner so as to allow them to actualise their potential as human beings in a more meaningful way. A medical example here may be illustrative again: we would hold it to be immoral not to treat those who are in need of assistance. If medical experts were to be content with stabilising a patient's condition so that no further deterioration occurred, but exerted no effort to cure him or her, we would judge the conduct as immoral. Of course, if no treatment is available to improve a specific patient, medical conduct would not be judged immoral if all were done that could be done under the circumstances. The same holds true for criminals. If criminals can be improved, then the only moral course to take is to improve them: if they cannot be improved under the circumstances, all efforts should be directed towards doing the best possible.

The only approach that has the improvement of offenders as one of its explicit goals is rehabilitationism, having it as one of its central concerns. None of the other simple approaches makes any effort to improve offenders in any way; hence, it follows that we must adopt a system that includes a strong element of rehabilitation.

9.2.6 UNDOING THE HARM

Punishment must attempt to undo the harm done through crime in whatever way possible. Of course, it is not possible to undo all harms inflicted through crime, but punishment ought to have a restitutional element that strives towards restoring victims to the state they were in before they were victimised (insofar as possible). The rights of crime victims have been violated. A society that did not care for its injured, and therefore for its crime victims too, would not be a caring, compassionate society. Such a society would not further the well being of its victims by actively promoting the

alleviation of the harm and injury done to them. Therefore, such a society would not readily be described as civilised. A society that cared for its victims, on the other hand, would further the well being of its victims, thereby deserving the label "civilised." Undoing the harm done through crime is hence a necessary condition for morally justified punishment.

The only theory that has the undoing of harm to victims as one of its objectives is restitutionalism. This theory does not fulfil all other necessary conditions, however; and hence the restitutional element should be only one part of a complex theory justifying punishment. None of the other here-examined theories pursues this goal in a satisfactory way. Retributivism, deterrence theory, and rehabilitationism do not address it at all, while utilitarianism would be compelled to endorse it only if it were utility maximising.

9.2.7 PUNISHMENT SHOULD BE ECONOMICAL

Why must morally justifiable punishment also be economical in the sense that the cost of the punishment does not put an unbearable financial burden on the society? Let us imagine that punishment fulfils all the necessary conditions mentioned so far (i.e. it is administered only to those who fulfil the requirements of *mens rea*, is administered proportionally to the severity of the crime committed, serves as a recognised channel through which society can express its anger and indignation at offenders, brings about a reduction in crime, improves offenders, and does everything possible to undo the harm done to victims), but that it strains the financial resources of the state to such an extent that it has to scale back on other essential services (such as housing, healthcare, education, welfare services, etc.) to meet these objectives. It follows that the citizens of that country will more than likely become disgruntled at the huge cost of the punishment services. Subsequently, they may demand a reform of the

punishment system so that it becomes less costly so allowing them to enjoy the benefits of better health and welfare services. This, however, may very well be at the expense of justice. They may, for example, demand executions without lengthy trials for severe felony cases, detentions, and appeal processes. Alternatively, they may resist long sentences for which the citizens themselves ultimately have to pay the bill. These outcomes would not, however, be in the interests of justice since a punishment system should punish only those who are guilty, and punishments should be graded proportionally to the severity of their crimes, so severe crimes require lengthy sentences. Furthermore, even if the death penalty would cost less than say, life-imprisonment, the other necessary conditions would not all be fulfilled by it, especially the demand that punishment improve offenders. Punishment ought therefore to cost no more than is required for attaining the six other necessary conditions mentioned above.

The cost of punishment is ultimately dependent on the pursuit of the other objectives, however. If the cost of punishment were to be reduced to such an extent so that the other necessary conditions could no longer all be fulfilled, then punishment would no longer be morally justified. It is to be expected that the personnel entrusted with the rehabilitation of offenders (psychiatrists, psychologists, social workers, philosophers, and other experts) would cost a fair deal, especially in the initial stages when the long-term fruits of rehabilitation, namely crime reduction, are not yet forthcoming to a high degree, but this expense would ultimately be both in the interests of society and more economical in the long run, if it helps to reduce crime as well as fulfil the other conditions.

9.3 DEFENDING THE SUFFICIENT CONDITION

Having discussed the necessary conditions, we now have to ask ourselves what is meant by "sufficient condition" and why it is important to specify the sufficient condition for morally justified punishment. X is a sufficient condition for P if P comes about in the presence of X. If persons need merely fulfil the conditions of *mens rea* in order for society to hold them responsible in a court of law for a crime committed, then *mens rea* is the sufficient condition for holding someone responsible in a court of law. Often multiple conditions together constitute the sufficient condition. X and Y fulfil the sufficient condition for P if P can come about merely by the presence of X and Y. P might come about too when X, Y, and Z are present, but this would be going beyond the sufficient condition since it would have already come about without Z. Air, earth, water, and sunlight together constitute the sufficient condition for the flowers on the windowsill to flourish. They may do better in some shade, but this is not part of the sufficient condition since they do quite well in the sun too. In this case, this is an empirical sufficient condition. A logical sufficient condition has a similar form. Having four angles and sides of which the opposite ones are parallel, together fulfil the sufficient condition for a figure to be a rhombus. Necessary conditions of conceptual claims, such as that punishment can be morally justified, also have such a form - I have argued throughout this thesis that the sufficient condition for the moral justification of punishment is constituted of seven necessary conditions (each of which I discussed in the previous section). In other words, if all of these obtain, then we need not have any more conditions for morally justified punishment.

The necessary conditions together also cannot be more than the sufficient conditions. If X, Y, and Z are each necessary

conditions for P, then X and Y cannot be the sufficient condition for P since the third necessary condition would be lacking, and if X and Y together are sufficient, then Z cannot be necessary.

To justify something is to give a good reason for that something or to give a sufficient reason for it. To give a sufficient reason for something is to have justified it. It follows that to give a sufficient reason is to provide adequate support, but to give a sufficient condition for punishment is to do more. It is to establish beyond any doubt what is required for punishment to be justified. Therefore, I find it important to identify the sufficient condition for morally justified punishment because by doing so complete vindication of morally justified punishment is attained.

In the previous section, I argued that each of the seven conditions I identified and argued for are necessary for the moral justification of punishment. The question that now arises is whether they are jointly sufficient, or whether there are other conditions that must still be identified as necessary conditions for the sufficient condition to be fulfilled. I assert that the necessary conditions identified jointly fulfil the sufficient condition for the following reasons: the question of whom we are justified in punishing clearly identifies the group of people eligible for punishment. The question of how much they may each be punished identifies the magnitude of the punishment to be administered. Each of the five goals is concerned with furthering the well being of society in general, offenders, or victims. In order to be civilised, a society must further the well being of all its members, the law-abiding citizens, the criminals, and the victims. The goals that punishment must serve as a recognised channel through which society can express its anger and indignation at offenders, that punishment must bring about a reduction in crime, and that punishment must be economical, all further the well being of

the law-abiding society in general. Rehabilitation furthers the well being of criminals directly, and indirectly the well being of society if offenders do not become recidivists. The goal of undoing the harm done is concerned with the well being of victims. Therefore, the well being of all parties involved is addressed by the conditions identified; and since we need not add any more conditions to these for legitimately claiming that punishment can be morally justified, it follows that the seven conditions are jointly sufficient and that no further condition need hence be identified for the sufficient condition to be satisfied.

9.4 SUMMARY AND PERSPECTIVE

In this chapter, I undertook to justify each of the necessary conditions and substantiate my claim that the necessary conditions jointly constitute the sufficient condition. I have now provided a defence of my theory. In the next chapter, I shall briefly restate the main conclusions of my arguments to facilitate clarity. I shall then briefly discuss notions closely related to punishment. Subsequently, in the final section of this thesis, I shall indicate that my theory is not only of theoretical interest, but can also be easily put into practice.

CHAPTER 10

CONCLUSION AND PRACTICAL APPLICABILITY

10.1 INTRODUCTION

In this, the final chapter of this thesis, it is useful to briefly recapitulate what the main objectives of this thesis have been, what has been achieved, and why my thesis can be seen as a progressive synthesis between punishment and therapy. I shall briefly point out what was achieved in critically evaluating each of the theories I examined. Subsequently, I will discuss the relationship between punishment and notions such as blame, praise, reward, mercy, forgiveness, and justice. In the final section, I shall then show that the theory here expounded is not only of theoretical interest, but can also easily be practically implemented, concluding with a justification of this thesis' title.

10.2 BRIEF RECAPITULATION

I shall briefly mention what I set out to argue and which main route my argument took throughout this thesis. I shall not repeat any of the arguments, however, as that would be mere distractive repetition.

At the beginning of this thesis, I pointed out that deliberately inflicting harm upon others is usually held to be morally wrong, but that we seem to agree that punishment, which is a deliberate infliction of harm upon others, is acceptable and can be morally justified. In this thesis, I argued however that the mere infliction of harm upon others is not morally justifiable, even when those upon whom the harm is imposed are guilty of crimes. I argued that punishment, which can be seen as a harm being imposed, is morally justifiable

only when it benefits those against whom it is directed, as well as society in general and crime victims in particular. I argued that morality is inextricably linked to civility and civility is concerned with the furthering of well being. Therefore, morally justified punishment must further the well being of all parties involved. To do so, I argued that a theory of punishment must have seven necessary conditions and three restraining principles. The seven necessary conditions are: it must answer who is subject to punishment, it must determine how much they are to be punished. Punishment must serve as a recognised channel through which society can express its anger and indignation at offenders, bring about a reduction in crime, improve offenders, aim at restoring victims to the state they were in before they were victimised, and be economical, i.e. it must not waste social resources. I argued that these seven necessary conditions jointly constitute the sufficient condition for morally justified punishment.

The first simple theory to be critically evaluated was retributivism. I argued that retributivism morally justifies the expression of anger and indignation by society at offenders through the process of punishment. Such expression is only justified at offenders, however, i.e. only against those who are guilty of having violated a morally acceptable law and who fulfil the requirements of having a guilty mind. Retributivism therefore fulfils two of the necessary conditions - it answers the question of whom we may punish and it justifies punishment as a recognised channel through which society can express its anger and indignation at offenders. Retributivism does not adequately fulfil any of the other necessary conditions, however, and therefore is inadequate as a simple theory for the justification of punishment. But because it most adequately fulfils two of the conditions, it should be part of a more complex hybrid theory.

I then turned to deterrence theory in pursuit of a means to adequately answer the question of how much to punish. Because utilitarianism is often connected with deterrence, I examined it critically, but found that I have to reject it as an unacceptable theory for justifying punishment because it has morally untenable implications, such as not aiming at justice and endorsing disproportionate sentencing. Abandoning utilitarianism did not lead me to the abandonment of deterrence too, however. I argued that deterrence theory can be defended because it rests on retributive foundations. General deterrence is retributivistic because fulfilling the requirements of *mens rea* is a sufficient condition for using offenders in a way we would not use innocent persons, even if doing so would be socially beneficial. Having argued that general deterrence is a form of weak retributivism, the important issue of how much criminals may be punished could be addressed. I concluded that we ought to proclaim a category scale in which categories of punishments are linked to categories of offences, taking the severity of offences and punishments into account. Our punishing according to categories of offences is less than desirable under optimal conditions, but I argued that this is the only feasible way in which sentences can be passed without neglecting aggravating and mitigating factors, and without permitting vastly disproportionate sentences. The defence of general deterrence also yielded three restraining principles, namely, no one should deliberately and intentionally violate another's rights where there is a feasible alternative; the severity of punishment ought to be graded according to the severity of the offence, *ceteris paribus*; and if the rights of individuals are to be threatened, the threat should fall more heavily on wrong-doers (the guilty) than on others (the innocent). Even though deterrence theory satisfactorily answers the question of how much to punish offenders, it does not adequately fulfil the other necessary conditions for the justification of

punishment. Even when combined with deterrence it does not fulfil all. Therefore, deterrence and retributivism, I argued, need to be part of a more complex hybrid theory.

Because the wholly punitive system does not function optimally, I turned to rehabilitationism. I argued that even though not all crimes are the result of illnesses of some sort, offenders should all be treated nonetheless since this promises to benefit criminals and society in general most, and hence furthers their well beings. Preventive detention of criminals and former criminals is morally justified, I argued. I contended further that rehabilitationism is best able to pursue three of the five objectives, thereby fulfilling three of the seven necessary conditions, namely bringing about a reduction in crime, improving offenders, and being economical in the long run, i.e. not wasting social resources. We saw, however, that a rehabilitative system on its own is morally untenable too because it would lead to disproportionate or indeterminate sentence or treatment lengths. Nevertheless, it should not be wholly ignored: it should also be combined with the other approaches already mentioned because it is best able to fulfil three of the seven necessary conditions. Since rehabilitation would almost certainly have to be imposed on at least some criminals against their wills, which would result in paternalism, I found it necessary to argue that paternalism is morally acceptable when it is imposed in order to correct evaluative mistakes even of adults, i.e. paternalism is justified when the subjects upon whom it is imposed would also choose the treatment being imposed upon them if they could make an informed, rational decision regarding it. Since treatment of offenders promises to further the well being of criminals more than any other approach examined does, this paternalistic measure is morally justified.

None of the approaches I examined had considered the plight of victims at all; therefore, I deemed it necessary to consider restitutionalism in pursuit of a theory that

fulfilled the remaining necessary condition. I argued that restitutionalism is commendable for focusing on crime victims, but just as all other simple theories examined in this thesis, it too does not qualify as a morally acceptable theory on its own because it fails to fulfil the other necessary conditions, or does so less effectively than do other approaches. Because it is the only approach that fulfils the necessary condition that punishment should seek to undo the harm done through crime, it should also be part of a more complex hybrid theory of punishment.

Crime is a highly complex phenomenon having many different causes and explanations. To insist that such a phenomenon require a simple, one-dimensional response is to over-simplify the matter. I have argued in this thesis that none of the simple theories I examined, or found in the literature, is capable of yielding a comprehensive justification of punishment; therefore, I have argued for a complex hybrid theory. The theory I expounded synthesises the positive elements of each of the examined theories (retributivism, deterrence theory, rehabilitationism, and restitutionalism) into a unitary theory, a hybrid theory that I claim does justice to the complex problem of vindicating punishment. Seven necessary conditions together constituting the sufficient condition and three restraining principles may initially have seemed superfluous or cumbersome for a justification of punishment; however, I endeavoured to successfully and convincingly argue that this is the minimal requirement for the moral justification of punishment.

Before indicating how my theory can also be put into practice, and thereby is more than of mere theoretical interest, I shall briefly discuss other notions closely related to the justification of punishment, thereby showing that my theory relates to these notions as well.

10.3 PUNISHMENT AND RELATED NOTIONS

In the introduction to this thesis (1.4), I pointed out that the moral centrality of the concept of "punishment" requires that it be dealt with to gain a firmer grasp on notions such as blame, praise, reward, mercy, forgiveness, and justice in relation to punishment. I would therefore be neglecting an important corollary if I ignored this, although it is not part of the aim of this thesis to explain the relations between just punishment and these concepts in detail. I shall therefore briefly mention how my hybrid approach accommodates all of these:

(1) To blame someone is to hold him or her responsible or think of him or her as being at fault. He or she is thus seen as responsible or guilty. It involves holding someone responsible for a right violated or a duty neglected by imposing censure upon him or her. By imposing censure, the responsible are condemned for the right violated or duty neglected. By insisting that criminals be punished for their crimes, my theory supports censure or punishment of all those who have violated the right of another, or have neglected to perform a duty, and fulfil the requirements of *mens rea*, i.e. have a guilty mind.

(2) Praise is an expression of warm approval or admiration. We admire those who have achieved something under difficult circumstances, those who exhibit great courage, determination, persistence, or any similar virtue. Victims who overcome fear, shame, or diminished self-esteem, as a result of being victimised, by coming forward to report crimes and assist in the prosecution of criminals, deserve praise and society does look favourably upon them and their actions. People involved in law-enforcement, those who work for the judiciary, for penitentiaries, and all involved in rehabilitating offenders, often under difficult conditions, deserve praise from society too for their efforts to combat

crime. But praise is also due those potential offenders who manage to withstand environmental factors that could draw them into becoming criminals, such as those who come from severely impoverished communities, and make real successes of their lives, such as becoming community leaders or favourable role models for others of their communities. They deserve admiration for having made successes of their lives in ways that may often be obvious in other communities.

(3) A reward may be seen as a satisfying result or outcome. In this respect, the implementation of my theory promises to reward society as a whole, crime victims and criminals in particular to a greater extent than do any of the simple theories I discussed in this thesis. Punishing criminals and rehabilitating them while they are being punished rewards society because it sees justice being done and it yields positive results if those who are rehabilitated are prevented from becoming criminals. Victims are rewarded too in a way because they are not overlooked or ignored by the justice system, as is the case in wholly punitive or rehabilitative systems. With my system, they would receive restitution for injuries or harm suffered. But criminals too are rewarded in the right sort of way under my system. This is by no means to suggest that crime pays. By being rehabilitated, they can be taught ways of living more productive lives in socially acceptable ways. In doing so, they are able to realise more of their potential in a meaningful way.

(4) Mercy may be described as the compassionate treatment of someone under one's power: it suggests that less force is exercised over subjects than would be permissible. Since my theory connects categories of crimes to categories of sentences with ranges between upper and lower bounds within which criminals are to be sentenced after taking mitigating and aggravating factors into account, mercy is accommodated in a regulated, institutionalised way. To go beyond this, by

10.4 PRACTICAL APPLICABILITY

In the previous chapters, I indicated why I hold the different simple theories I discussed to be inadequate as moral justifications of punishment. However, as I have argued, each does have some contribution to make. My hybrid approach therefore incorporates retributivist, deterrence, rehabilitative, and restitutional elements into a unitary theory, which I believe overcomes the shortcomings of each of the simple approaches. But this approach would be of theoretical interest only if it could not be practically implemented. One of the strong points of my theory, I have argued, is that it is not only morally acceptable, but that it is also not difficult to put into practice.

Persons who are found guilty of an offence, i.e. who fulfil the requirements of *mens rea*, should be imprisoned, given suspended prison sentences, or ordered to pay fines, depending on the severity of the crimes committed.

The magnitude (or the range between an upper and a lower boundary) of each sentence is to be determined by the legislature, with more serious crimes receiving more serious sentences and vice versa, *ceteris paribus*. The perceived severity of a given offence may vary through time and from state to state; hence, this is to be empirically determined by criminologists, sociologists, or other experts. The legislature should determine the severity of punishments for crimes in accordance with an ordinal ranking determined by the experts. It must be borne in mind that punishment ought to serve as a recognised channel through which society can express its anger and indignation at offenders; but it can only be expected to be perceived as a recognised channel if punishment is judged by society to be neither too mild nor too harsh. The severity is therefore somewhat determined by the emotional involvement of society. A more liberal society that tolerates prostitution, for instance, will not be satisfied

rate of recidivism should bring down the cost of crime prevention, law-enforcement, and the judicial and penitentiary services, and allows former criminals to become productive members of society, rather than to become recidivists or mere burdens on the state while they languish in gaol). At the end of their sentences, criminals are to be released back into society, even if their rehabilitations have not been successfully completed according to the estimates of rehabilitation experts. Only when these experts judge criminals to pose a serious threat to others or themselves may they preventively be detained beyond the date of their release in accordance with the justification for preventive detention. In such cases, this is not primarily for the rehabilitation of criminals, but for the protection of society or the criminals themselves. Rehabilitation ought to continue for as long as required under such circumstances, however. As soon as preventively detained criminals no longer fulfil the conditions for preventive detention, they are to be released. If criminals have been successfully rehabilitated before they have served the minimum time foreseen, they are to remain imprisoned until they have served the minimum length so that their punishment satisfies society's anger or indignation.

Punishment ought also to strive towards the undoing of harm done through crime as far as possible. Therefore, criminals should work in their detention centres (if they are imprisoned) when they are not undergoing rehabilitation, so that they can make restitution to their victims or pay into a restitution fund. Once again, the restitution requirement is not to be determinative for the length of prison sentences. If they have not completed restitution when they are released from prison, they ought to be required to continue making restitution from their future incomes.

What holds for prison sentences also holds for suspended prison sentences. Offenders who only receive fines could also be required to undergo rehabilitative treatment for a number

of hours, the practical efficacy of which has to be determined empirically by rehabilitation experts. Restitution should be required even of those who only receive fines, either in the form of direct restitution or by payment into a restitution fund.

Before concluding, I wish to address four possible criticisms against the theory here expounded:

(1) How is one to respond, for instance, if, in order to deter criminals, the state must inflict greater punishment than criminals deserve? It should be clear from what I have argued that the goal of deterrence cannot morally override any of the other necessary conditions. If punishment cannot be administered proportionally in accordance with the principles derived in Chapter 5, then punishment is not morally justified. It may be legally justified, but legal justification by no means necessarily entails moral justification.

(2) Is there not a conflict between rehabilitating actual offenders and deterring potential offenders? The more rehabilitation benefits people, by improving their interpersonal skills and training them for certain jobs, for instance, the less it will deter potential offenders. Would rehabilitative punishment still deter if potential criminals need not fear the consequences? Punishment will still have an element of deterrence because it would not just be a process of being rewarded. It would not only involve benefits and pleasures. The punishment system here defended entails retributivism too, which ought to deter potential offenders. Criminals being rehabilitated would not be seen as mere ill persons needing treatment, and therefore as persons not requiring punishment. They would be seen as persons held responsible for crimes committed, but who can be improved so that they do not reoffend. My theory therefore seeks a balance between mere punishment and mere therapy.

(3) What if society's need to express its anger at an offender requires that punishment be administered in such a manner so as to make any rehabilitation impossible, executing the criminal, for example? The rehabilitative component can never override any of the other necessary conditions. None of the five goals can override any of the others if punishment is to be justified. Just punishment requires that all seven necessary conditions be jointly fulfilled.

(4) Does this not mean that punishment is counter intuitively rarely justified, given that punishment must always fulfil all seven necessary conditions? Does being required to pursue each of the five goals every time punishment is administered not make it difficult to administer morally justified punishment? It means that punishment is typically unjustified as it is administered in systems throughout the world today. It is usually legally justified, but it is rarely morally justified. However, as I have shown in this section, this need not be the case. This theory provides a moral justification of punishment, which, as I have argued, can and ought to be put into practice.

The theory of morally justified punishment I here expounded is one which I see as a progressive synthesis between punishment and therapy, between punitiveness and rehabilitation. This hybrid approach argues for more than mere punishment as it is usually conceived or mere therapy as it is usually conceived; it is a progressive synthesis between them. I hold it to be progressive because it strives to further the well being of the whole society - victims, criminals, and the law-abiding. It is more than a mere reaction to crime: it is a proactive response in pursuit of the well being of all involved.

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