JUSTIFICATIONS OF PUNISHMENT

By

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Abstract

The thesis examines the various justifications for punishment, utilitarian, deterrent, retributive, corrective and expressive. In turn, each of these is considered as the sole justification for the practice. It is argued that none of these are adequate, each theory having consequences that are morally or politically unacceptable. The possibility of a non-punitive system is also briefly considered but lacking sufficient knowledge of any alternative means this cannot be regarded as a serious possibility. It is argued that it is very unlikely to become so.

The final chapters of the thesis examine a number of integrative or compromising theories that present dual justifications of punishment. These acknowledge the claims of more than one of the various justifications discussed initially and attempt to reconcile the different aims within a single framework. It is hoped that the arguments of the earlier chapters demonstrate that some such integrative account must be offered. The author concludes by briefly developing a dual justification that balances the claims of protection to members of society and the expression of society's condemnation through punitive sanctions.

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CONTENTS

Introduction

The punishment of those who break the laws of society is generally accepted as a matter of course, both by the law-abiding members of the community and by the criminal offenders. Though there may be much discussion about the nature of punishments, the form they should take and their severity, few seriously consider the possibility of a non-punitive world. In agreement with this conventional wisdom this paper argues that this is not a serious possibility in our society, though in small communities the influence of social pressures could perhaps eliminate the need for punitive institutions.

The purpose of this paper is to discuss punishment in its political context, that is: sanctions attached to breaches of the laws of the country. No attempt is made to discuss the punishment of children by parents or by schoolteachers, punishments by institutions of their members or any more metaphorical punishments.

The initial chapters of the thesis consider the various justifications commonly presented. Each is considered on its own merits as the sole justification for the practice and the shortcomings of each theory are outlined.

It is the contention of this author that no single justification is adequate, and following the initial discussion of the different theories individually, in the final chapters an attempt is made to outline a form of compromise that is both morally acceptable and practically expedient.

The thesis proceeds by examination of the various suggested aims

of a penal system. Whether or not the particular laws of a country are just is not discussed. By and large this is a completely different question. One could assume a system of perfect justice and still the questions concerning the justification of punishment would remain.

A further area of inquiry that is ignored, though it is an important topic, concerns the relationship between social and political conditions and the punitive system. It is the Marxist contention that punishment serves the interest of the dominant class by enforcing its own standards and maintaining its dominance through the supression of the other classes in society, in particular the working class. This more overtly political theory deserves separate treatment, in particular an analysis of the concepts of class and class interests.

This is a philosophical enquiry and the use of sociological statistics is kept to a minimum. Statistics about rates of recidivism and attempted analyses of the deterrent effect of different punishments and of the relative success of rehabilitative and reformative measures are used in the text and are important to the philosophic enquiry. However, as far as possible, the enquiry concerns the principles of punishment: the acceptability of moral reasoning supporting the punitive institutions of a society.

1. Definition

It will help initially to clarify what is meant by 'punishment'. In its political or legal context two main views can perhaps be distinguished. The first may be called the narrow definition of punishment. On this view punishment is only one of several measures society may take for the infringement of laws. Other measures include treatment, requiring reparations or compensation, fining and imposing restraints such as 'binding over' or probation orders. Punishment is characterised here as compulsory hard treatment for the commission of an offence.

The broad view is that all sanctions imposed by the state on individuals for the infringement of law can be regarded as forms of punishment. Punishment is here characterised as the coercion of the individual because of his or her infringement of the law. Any disposition whatsoever can be considered as punishment.

The drawing of a distinction between these two views is intended solely as a semantic matter. It is not my intention to assert that one view is correct or that it accords better with normal usage. Purely for clarity and convenience a definition should be provided.

Consider two individuals found guilty of the same offence. If one is sentenced to six months imprisonment while the other is ordered to do a year's unpaid social work of ten hours a week, can both these sentences be regarded as punishment? Similarly, an order to repair the damage for vandalism can be contrasted to a fine.

The narrow definition emphasizes the unpleasantness of punishments. If they cause no suffering they cannot properly be regarded as 'punishments'. The broad definition emphasizes the fact of coercion by

the state. It is sometimes argued that the broad definition does not thus distinguish punitive measures from other forms of coercion by the state, taxation, drafting and so on. However, central to both views is that an offence must have been committed and the sanctions are imposed for this reason. Hence the broad definition is indeed adequately distinguished from other forms of coercion.

The requirement that an offence be committed could be said to tacitly prejudice the issue in favour of the retributive theory. On utilitarian grounds it may theoretically be just to 'punish' the innocent. However, accepting the theoretical position for the moment, argument hinges upon public belief in the guilt of the victimised party so that punishment subsequent to being found guilty by due process of law does not preclude the possibility of such a system of framing. The deliberate punishment of innocents on utilitarian grounds may differ in intent but not in procedure, so the reference to the proven commission of an offence remains.

In addition, it remains possible to discuss practises sufficiently similar to punishment but not fitting the definition by framing an alternative description, such as 'telishment'. In this way a justification of punishment that also serves to justify other practises can still be examined.

The same arguments apply to a system of vicarious punishments, for example, the punishment of children of offenders and not the offenders. This is taken up in the chapter on deterrence but nevertheless the connection with proven law-breaking remains.

The reference to being found guilty by due process of law requires

elaboration since it might appear that one can be punished for an offence without trial. This might occur in small societies or simply despotic ones such as Amin's Uganda. Where there exist no legal institutions to ascertain guilt or innocence or where they are simply not used then there is a system of victimisation and not punishment.

It is therefore a matter of definition that not only must an offence have been committed but also that there must exist a legal system, an authority to maintain and supervise such a system and an acceptable procedure for ascertaining legal guilt or innocence. Whatever sanctions are carried out must be effected by the agents of this authority.

A number of political questions arise here but the abuse of legal institutions, 'mock' trials for instance, raises different questions. It is noteworthy that the deliberate attempt to create the appearance of due process displays a perverse respect for it. The recent revolutionary courts in Iran raise questions about 'due process' also, though not once endorsed by the new government after the political upheaval subsided. This alludes to the provision that punishments be administered by an authorized institution for an offence against the legal rules upheld by the authority. Clearly times of civil unrest raise difficult questions about the authorization of punishments but one hopes such times will be rare.

The narrow definition, which is adopted here, requires certain elaborations. How hard must the treatment be? Following certain writers for example Feinberg[1], the distinction can be made between punishments and penalties. One can draw a clear line here or a rough one depending on how the distinction is characterised. On one view the penalties are mild "punishments", the hard treatment not being sufficiently severe to warrant

calling it punishment. On another view the distinction emphasizes the difference between criminal and non-criminal sanctions, criminal sanctions being punishments and civil sanctions being penalties.

In general a theory of punishment does not concern itself with civil sanctions or the settlement of civil disputes. For the purposes of this paper the first view is adopted, that is, that no important distinction is made between punishments and penalties.

The main reason for this is that both are expressions of society's disapproval and this aspect might be lost if penalties pertain only to civil sanctions. Penalties for activities that are illegal but not criminal could be viewed merely as taxes. Illegal parking for instance can be viewed in this light, but it seems to me wrong to do so. Similarly a fine for the non-payment of income tax does not constitute an additional tax. When the conventional penalty is financial it is not easy to maintain the distinction but alternative penalties, a driving ban as opposed to a fine for speeding for instance, show the distinction more clearly.

2. Overview

In a civilised and rational society, or one that claims to be the deliberate infliction of suffering on certain of its citizens needs to be justified. If this is not possible, presumably, the practise should cease.

There are two main parts to the justification of punishment. Firstly there is the general justification of punishment, the justification of the practise in general. Secondly there are reasons for particular punishments, what form they should take and how severe they should be. It is quite possible that different types of answer will serve for each; therefore, the two issues must be clearly distinguished. A plausible modern view, that of Rawls and Hart,[2] is that the general justification is deterrence while particular punishments are justified on retributive grounds. In this way the two classical theories of punishment are combined in a form of compromise.

Very briefly, the retributive theory is that punishment is justified because deserved. It serves no further purpose but is an end in itself. Justice is done when an offender who has caused suffering suffers in his or her turn. Punishment looks back to the past infliction of suffering.

The deterrent theory, on the other hand, asserts that punishment is only justified when it serves some further end, that it is justified as a means to deter others and the offender from committing that offence in the future. Contrary to the retributive theory, deterrent theories refer to the future good that is achieved, not to the past harm done.

While these two views are perhaps the most important, there are other views to be taken into account, two of which will be considered in the text. There is the view that the main purpose of criminal sanctions should be the reformation of the criminal. This is more usually presented as an alternative to punishment but this need not be so. Plato advances the theory of hard treatment as reformative and this view has always had its adherents. More recently reformative techniques varying from psychiatric treatment to rehabilitative measures are in many respects alternatives to punishment. However, where they involve pain or hard treatment, such as aversive conditioning methods do, this theory can be regarded as punitive according to the definition.

The most recent view to emerge as a fully-fledged theory of punishment is the 'expressive' theory outlined by Feinberg,[3] although the concept is by no means new. According to this view the essential feature of punishment is that it is expressive of the community's condemnation of the act. This expression he calls the "reprobative symbolism of punishment".[4]

This feature is also mentioned by several important writers. For instance Professor Hart says punishment is (in part)", a formal and solemn pronouncement of the moral condemnation of the whole community.."[5] and Lord Denning says it is "emphatic denunciation by the community of the crime".[6]

Clearly one can denounce and condemn without punishing. However, perhaps punishment represents a stronger and more concrete expression of disapproval. Whether this will suffice as a justification

will be examined in the text.

Having outlined various competing justifications it might be said that the more a given account satisfies each in turn the better. Intellectually one tends to search for a single principle upon which to act but in practise this may not always be either possible or desirable. Perhaps it is the partisan attempt to prove the case for one particular justifying principle that has created so much difficulty.

Overdetermination, perhaps not so intellectually satisfying is undoubtedly practically important. Given that most punishments can be justified by each criterion, excepting reform, in some way, it is obviously a notion to be considered. If the same course of action can be justified by several different reasons this would seem more adequate rather than less. The practice is thereby more firmly established and justified.

This raises many questions. Are the theories in fact at all compatible? Even if this is so, are they all morally and politically satisfactory? The principal argument against the retributive theory rests on a negative answer to the last question. Punishments clearly can be justified retributively but it is objected that this is morally unacceptable because, for instance, it is cruel, inhumane and ultimately pointless. On the other hand it is argued against deterrent theorists that the future good intended pays no regard to the desires or interests of the criminal.

Before proceeding to a detailed analysis I should mention certain procedural points and clarify certain notions. The emphasis on humanity,

for instance, stands in need of such clarification.

The humane approach is that the crimimal be treated decently, that he or she is respected as a person as far as possible. This still requires elaboration and perhaps several notions can be distinguished here.

A first tentative approach could be made by appealing to basic human rights, which are still accorded to the criminal. One expression of these rights is the United Nations Declaration of Human Rights. Article five states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Past practices of mutilation, torture and dismemberment are considered barbaric. How far this can be carried, however, is open to debate. In theory, most Western societies have abandoned all forms of corporal punishment; the lash, birching, and generally physical punishment have come to be regarded as unacceptable. In general this represents an encouraging humanitarian trend but carried to its extreme cannot be justified purely on the grounds of cruelty. It is arguable that, for instance, the lash is less cruel than three months in gaol. The conventional disapproval of corporal punishment must be justified on other grounds.

A second humanitarian constraint concerns conditions of confinement. These should be at least reasonably hygienic; for instance, food should be adequate.

This second constraint gives expression to the point that the deprivation of rights is a deprivation of certain specific rights and not a suspension of all rights. In practise this may be hard to achieve but at least in principle the point should be made.

These considerations emphasise the material types and conditions of punishment. The humanitarian aspect appears also in another fashion, the rule of regard for the criminal, and this notion is both more important to the theories to be considered and more difficult to characterise. It is asserted to be a strength of some theories, notably retribution, that they treat the criminal as a person, as a morally autonomous individual, as a rational individual capable of free choice. The most direct statement of this view is Kant's. For him the criminal, like everyone else, must be treated as an end and never only as a means.

"For one man ought never to be dealt with merely as a means subservient to the purpose of another nor be classified with the objects of law of property. Against such treatment his inherent Personality has a Right to protect him, even though he may be condemned to lose his Civil Personality".[7]

The claim that the criminal may not simply be used for other purposes is used to eliminate certain theories, general deterrence in particular, as morally indefensible.

However, the distinction between treating the criminal as a 'means' only and treating the criminal as an 'end in himself' is difficult to characterise adequately. It has been suggested that some regard to the criminal's own desires and interests is required or else he or she is simply being used. But consider three suggested reasons for confining an offender.

Firstly, it serves as an example to others and will deter some from committing similar crimes.

Secondly, his or her incapacitation protects innocent members of

society from likely harm. (This reason applies specifically to dangerous offenders).

Thirdly, he or she deserves to be punished because of the crime committed. No further purpose is served.

At what point in any of these three justifications are the criminal's desires and interests considered? It is hard to say. However, it is only in the third case that the punishment proceeds with no reference to the good of others. In the other two cases the good to others is the primary justification. In the third case, though this lack of reference to the good of others is not, apparently, replaced by consideration of the criminal's own good, nor by any explicit reference to his or her interests or desires.

The important feature of this treatment of the criminal as a person appears to be, then, that the punishment should not serve the interests of others only. To this it can be replied that the retributive justification escapes the criticism by avoiding the issue since no purpose at all is asserted, no reference to anyone's interest, and indeed it is very unclear whose interests are being served. This will be addressed in detail later.

The other reply is that the second case represents, prima facie, the strongest of all cases for protective custody, the protection of society from a dangerous offender and yet this justification refers exclusively to the good of others. Though such cases may not be typical they are quite common. Is such a justification acceptable?

To further complicate matters, a broader definition of protection to society could encompass the first case, reasons of general

deterrence, since the good achieved can be regarded as the protection of members of society.

This notion of respect for persons must be handled very cautiously. Whether it can be regarded as a criterion of acceptability is doubtful and this will be discussed at length later. It is possible that the second case here can be regarded as a special case and that the notion of respect is a prima facie principle that can be overridden by specific considerations.

This leads to a general procedural point. The thesis will proceed from greater generality in discussing the main positions to greater attention to the variety of cases and circumstances. A considerable degree of generalisation is probably required at all levels of philosophic discussion in this field. Nevertheless, attention to detail, to particular cases, and greater emphasis on the different questions and aims will lead to greater sophistication of theory. The volume of published literature on the issue is a testament to its complexity. It is hoped some reflective equilibrium will be reached by attention both to matters of general theory and to matters of practicability.

A final procedural point. Critical points can no doubt be made against all theories. In general each, it is supposed, has certain features to recommend it, and so critical points do not necessarily invalidate the entire theory. The final chapters will sift the strengths and inadequacies of competing theories.

So far as actual systems of punishment, or alternatives to punishment, are concerned a similar point can be made. No system is

assumed to be perfect. Assessment must consider the relative merits and defects and judgement is made with respect to known alternatives. Lacking a better alternative a system is therefore justified despite its inadequacies.

3. Bentham

I propose to begin the detailed analysis with Jeremy Bentham's utilitarian account of punishment present in his Introduction to the Principles of Morals and Legislation. This is a beautifully clear and complete presentation of what is fundamentally a deterrent theory. The work is also of considerable historical importance, being one of the first, and very probably the best, attempt to outline a humane and rational theory of punishment. Most of the questions raised remain pertinent today.

Though fundamentally a deterrent account, the work can only properly be styled a utilitarian theory of punishment and as such it differs from the purely deterrent account. The non-utilitarian presenting a deterrent account is free to ignore features that the utilitarian must consider; for instance the "vindictive satisfaction of the community", a feature mentioned though minimised by Bentham, is rarely considered in deterrent accounts. The utilitarian must consider all the various satisfactions achieved and suffering caused by a particular course of action irrespective of desert. Because of this it is commonly accused of countenancing intuitive injustices or victimisation. This accusation will be examined later.

As far as possible I shall attempt to avoid general discussion of utilitarianism as this would form a lengthy and involved digression. However certain comments clearly must be made, and with reference to the general argument, it is notable that punishment is one of the topics that its critics argue it does not handle satisfactorily.

Bentham's version of the utilitarian principle is somewhat problematic. Explicitly, a course of action need only have utility to be approved and so quite possibly several actions may have utility or conversely none at all. Bentham offers no procedure for selection in such cases.

"By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question; or what is the same thing in other words, to promote or oppose that happiness."

"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."[8]

Utility is not to be straightforwardly identified with happiness or benefit but with the promotion of happiness or the diminution of unhappiness. It concerns increments toward a happier state of affairs. This answers the criticism that possibly no action may have utility, for, between the several options available whichever will likely lead to the least unhappiness has utility.

Nevertheless, such a reading remains unsatisfactory and since Bentham does not explicitly state that the course of action that results in the greatest utility is the one to be pursued, the account remains problematic. On the other hand his theory asserts that the pursuit of utility should be the single criterion of action. Lacking

other principles of equal footing that could also guide choices it is only logical that one takes Bentham's theory to advocate implicitly the maximisation of utility. Such a procedure though, is rather unsatisfactory, lacking Bentham's explicit endorsement.

Of punishment specifically Bentham says, "But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, it if ought at all to be admitted, it ought only to be admitted in so far as it promises to exclude some greater evil."[9]

The utilitarian account is forward-looking. Only the consequences of the act are to be considered. In a particular case, the evil of punishment, far from cancelling the previous evil as a retributivist might claim, compounds the evil. One punishes only to achieve some future good consequences, these being mainly a reduction in the number of crimes committed in the future through the deterrent example.

> "The immediate principle 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 by the way of reformation; or on his physical power, in which case it is said to operate by way of disablement: that of others it can influence no otherwise than by its influence over their wills; in which case it is said to operate by way of example. A kind of collateral end, which it has a natural tendency to answer, is that of affording pleasure or satisfaction to the party injured, where there is one, and in general, to parties whose ill-will, whether on a self-regarding account, or on account of sympathy or antipathy, has been excited

> by the offence. This purpose, as far as it can be answered gratis, is a beneficial one. But no punishment ought to be allotted merely to this purpose, because (setting aside its effects in the way of control) no such pleasure is ever produced by punishment as can be equivalent to the pain. The punishment, however, which is allotted to the other purpose, ought, as far as it can be done without expense, to be accommodated to this. Satisfaction thus administered to a party injured, in the shape of dissocial pleasure, may be styled a vindictive satisfaction or compensation.... Example is the most important end of all in proportion as the number of the persons under temptation to offend is to one."[10]

The element of vindictive satisfaction Bentham minimises on the grounds that the pain of punishment always outweighs the satisfaction of others. It is an empirical claim and certainly a questionable one. If one can make such comparisons at all then at what point does the entertainment of others outweigh the suffering of a single individual? It is not clear how Bentham justifies his claim that it never does. How could he argue, for instance, against someone who claimed that well-attended public executions create more satisfaction than suffering? There seems to be no criterion for choosing between the opposing views.

This introduces the very general problem of utilitarian theories, the difficulty of calculating the happiness likely to result from different courses of action. This topic has been extensively discussed in the literature of moral philosophy and remains a considerable problem for the adherents of utilitarianism.

It also serves to illustrate the other principal criticism of

utilitarianism, which is that it neglects important moral standards, by supporting the satisfaction of a majority against the claims of individuals. The point can be illustrated by the suggested case of a friendless hospital patient whose organs could be used to spare the lives of others. Would not the suffering alleviated outweigh the suffering caused by the patient's death?

With respect to punishment the latter difficulty is generally highlighted by the argument that in certain circumstances the principle of utility would propose the 'punishment' of innocents. In general the circumstances are so constructed that no moral theory could support an entirely satisfactory solution. The subject is dealt with in the next chapter since pure deterrent theories are also open to the same criticism.

The utilitarian account then, following Bentham, justifies punishment on four main grounds: general deterrence, specific deterrence, incapacitation and vindictive satisfaction. General deterrence is assigned the main role according to Bentham. It has already been pointed out that the weight to be assigned to the 'vindictive satisfaction of the community' is problematic. Deterrence and incapacitation are discussed separately in the following chapters and the criticism made will also apply to Bentham's utilitarian theory.

In recent years a more sophisticated version of utilitarianism has become popular. The basis of rule-utilitarianism is that it is sometimes more beneficial to uphold a rule even though certain applications, in special circumstances, may run counter to the dictates of utilitarian calculation. It is argued that the existence of an accepted rule of

behaviour justifies the occasional utilitarian 'injustice' because the security created by such a general rule outweighs the disutility of a few occasional instances.

This is clearly an advance in terms of handling many of the criticisms advanced against the utilitarianism of Mill or Bentham. These criticisms often take the form of constructing exceptional situations and showing that utilitarianism can run counter to some of our most deeply ingrained intuitive moral judgements. Where the utilitarian calculation concerns the adoption of a general rule it seems to be very difficult to construct examples where a rule would be adopted that ran counter to our intuitive moral judgements. By considering the general case rather than the particular case the calculations become more complex and the utilitarian response considerably more difficult to ascertain.

The development of a theory of punishment based on rule-utilitarianism digresses from Bentham's account based on his own principle of utility. Bentham's account becomes primarily a deterrent theory since the other features are 'subsidiary justifications'. Having used his account primarily for illustrative purposes, I continue in the next chapter to consider deterrence as the justification for punishment.

4. Deterrence

In the examination of a classical utilitarian theory in the previous chapter, two particular problems emerged. Firstly, who can justly be punished? Secondly, how does one assess deterrent effect?

These two problems are shared by a straightforward deterrent theory and this chapter concentrates on these two issues. In conclusion a statement of deterrent theory is presented that does not rely on uncertain empirical data. The reformulation is considered in the final two chapters of the thesis, after the alternative justifications have been examined. At this stage it is hoped only to show the inadequacies of deterrence considered as the sole justification for punitive measures while leaving open the possibility of including a principle of deterrence, among others, in the final account.

The question of the punishment of innocents has played a considerable role in the literature on the subject of punishment. The difficulty of any purely forward looking account, whether a deterrent or a utilitarian theory, is that there can only be a purely contingent relationship between the offender and the individual punished. The question of who is to be punished is answered by considerations of practical efficiency alone. One punishes the individual whose punishment serves as the most effective deterrent.

In practice one can surmise that this will nevertheless be the offender, otherwise the punishment would surely not provide any kind of disincentive. That some connection between the offender and the

punishment is required to deter others from the offence seems obvious. Nevertheless, one could realistically imagine a system of vicarious punishments where, for instance, the eldest child of the offender, when there is one, is 'punished' for the offence instead. A pure deterrence theory would necessarily countenance such a scheme if it proved a more effective deterrent, no matter how much such a system outrages our intuitive sense of justice, if indeed it does. Where there is no notion of desert, who is punished depends purely upon the pragmatic consideration of relative effectiveness.

At this point an appeal to the definition is thoroughly inappropriate. The issue is whether any individual should conceivably be used in this fashion and not the correct terminology to apply. It is quite clear that purely on consideration of deterrence the 'punishment' of innocents is not ruled out in principle. In order to do so some principle that people are not to be simply used for ulterior purposes must be introduced. The introduction of such a principle means that some notion of desert must remain. It could be limited to the extent that it simply stipulates that only the offender may be punished while all other features are decided on considerations of deterrence. The topic is examined in detail in the chapter on "Desert".

It is conceivable that some situations might occur where innocent victims must be sacrificed to spare the lives of many others. Even so any such action could only be taken with a sense of violated justice. It is inconceivable that any such practice could become generalised because unjust. Of far greater importance is the principle of deterrence when qualified by a principle of punishment only for proven offenders.

Should deterrence form the sole basis for their treatment?

The first problem concerns the practical difficulty of calculating the deterrent effect. The practical difficulties are fairly considerable. It is assumed that the more severe the punishment the greater the deterrence. Assuming the truth of the general maxim does not help with regard to the precise calculations required. One could say that punishments should be set at the level where increases in the severity of punishments have a lesser deterrent effect than the increased severity but how does one equate the quality of punishment with the effectiveness of the deterrent?

The problem can be simplified by considering the different questions involved. In the first instance to assert that deterrence is the main point of having criminal sanctions for breaches of the criminal code is highly plausible. The criminal code prohibits behaviour considered socially unacceptable. Attaching sanctions to the breaches of this code ensures that it is taken seriously. At least, sanctions are attached in the belief that this will deter many who are tempted to commit crimes. The general justification for a system of punishments for the infringement of the criminal code can plausibly be the believed deterrent effect of such a system.

In the second place the question arises concerning the real effectiveness of punishment. There can be little argument that it is believed to be reasonably effective but there is in fact very little empirical evidence to support the claim. Furthermore it is not easy to see how such evidence could be obtained. The only plausible way seems to be to vary the severity of sentences over a period of time that

is long enough for the effects to be felt. This has in fact been done in a number of cases for minor offences while statistics are also available from the retrospective analysis of 'capital' offences in nations where capital punishment has been abolished and then re-introduced.

In all cases however the value of the information gained is debatable. Assessment is based upon a simple reduction or increase in the rate of crimes of the kind under examination. Any changes of sentencing policy must be made public. Other factors that may be involved must also be considered; the likelihood of apprehension, for instance, appears to be of much importance.

All such surveys concern the deterrent effects of different punishments, whether more or less severe or whether of one kind or another. Imprisonment is opposed to corporal punishment, for example, in the latter case. Information concerning the deterrent effects of having punishments at all, as opposed to having no punishments, is very scarce. Any such experiments seem ruled out politically if not also on moral grounds. During the Liverpool police strike of 1919 and similarly in Melbourne in 1949 there was widespread looting reported. The direct correlation here lies between the crime rate, particularly of theft and robbery, and the likelihood of arrest but since the deterrent effects of apprehension seem likely based to a large extent upon the punishment subsequent to arrest an inference can be made about the deterrent effects of punishment in general. It would be better though not to consider punishment on its own in this context but as one of several independent measures of crime prevention. This point is

taken up later.

There are also further complications. If the punishment is considered particularly severe then there is evidence to suggest that courts are somewhat less inclined to convict. The evidence amounts to little more than a suggestion but seems likely enough.

On the other hand the widespread looting, the increases in thefts and burglaries, during the police strikes in Liverpool (1919) and Melbourne (1949) would seem to suggest that punishment does serve as a deterrent particularly for those types of crimes. The fact that it is the likelihood of arrest that is here changed does not affect the general conclusion. Would arrest serve as a deterrent were it not for the possibility of punishment subsequent to arrest?

There is little reason to suppose that varying the sentences will have the same effect for different types of crime. A comprehensive research project would have to vary sentences for all types of crime and assess the effect in each case. There may be certain moral objections to such a procedure. It would seem to be grossly unjust for any individual to receive particularly severe sentences solely for the purpose of social experimentation. Perhaps the actual use of exemplary sentences might be objected to on the same grounds. Here the offender is given a particularly severe sentence for the purpose of providing a particularly strong deterrent.

On the other hand, the reduction of sentences for the purpose of social experimentation is hardly likely to disturb the offenders, and can be considered a possibility. Nevertheless such a policy may well disturb many in the general community as well as previous offenders who

were not so lucky. The political difficulties involved in any such experimentation are added to the statistical difficulties already mentioned, and any serious and accurate assessment of deterrent efficiency seems hard to envisage.

The lack of any accurate evidence of deterrent effects leads to an interesting consequence. Any deterrent theory must be formulated in terms of general beliefs to avoid the unanswered empirical questions.

The basic principle of deterrent theory is that the aim of punishment is to deter future offences as far as possible without introducing greater evils in the form of excessively severe punishments than are being eliminated, in the form of a reduction of crime. To supplement this a statement of belief must be added, namely, that all punishments do deter to a degree and that the heavier the punishment the more effective it is as a deterrent.

It follows that the severity of a punishment is based upon the extent to which society wishes to deter the particular crime, and this is based upon general beliefs about the seriousness of the crime by and large. The prevalence of the particular offence may also influence the calculation.

As stated in the opening paragraph of the chapter this analysis is developed further in the final chapter of the thesis. At this stage it suffices only to draw attention to the relationship between the severity of punishments and the considered gravity of offence that is shown by the reformulation. This exists so long as the empirical evidence remains sketchy and, as will be shown, so long as this relationship pertains there is a large coincidence between the practical consequences of deterrent and retributive theories.

5. Retribution

Turning now to retribution and considering this as the sole justification for punishment we find that the retributive theory is related particularly to the question of desert. Punishment proceeds purely because deserved by past behaviour. This contrasts completely with deterrent and utilitarian theories in that the consequences of punishment are not considered. The punishment expiates the crime or cancels it out. The symbolic scales of justice are thereby restored to an equilibrium, the debt to society is paid. These are the familiar metaphors of the retributive view of punishment.

To clarify the point about the irrelevance of consequences one need only refer to Kent's famous(or infamous) prescription in his Philosophy of Law.

".... the last murderer lying in the prison ought to be executed before the resolution(to abandon the island) was carried out. This ought to be done in order that everyone may realize the desert of his deeds and that blood-guiltiness may not remain upon the people; for otherwise they might be regarded as participators in the public violation of justice".[11]

The classic form of retributivism, exemplified by the metaphoric balancing of the scales of justice, is the doctrine of lex talionis the law of retaliation, expressed in the historic law, "an eye for an eye, a tooth for a tooth". The suffering inflicted in punishment should balance the suffering caused by the offender, the crime should be

repeated on the criminal. According to Kant, "All other standards are wavering and uncertain."[12]

Lex talionis, however, is a particular form of retributive thinking. As will be shown, a number of distict principles can be distinguished as retributive principles. It can be mentioned in passing that Lex Talionis is hardly appropriate or even possible to carry out with a great number of the offences of modern society but, against this, it remains a popular conviction that the criminal should suffer at least as much as his or her victim.

A pure retributive theory must be distinguished from a number of other theories with which it is associated. In the first place it must be distinguished from any correctional theories, the ethic of "teaching the criminal a lesson". Whilst it may be believed that the punishment will help prevent a repetition of the crime, were this known not to be the case the punishment would proceed anyway.

In the second place it should be distinguished from the satisfaction of the desire for revenge on the part of the community or victim. Once again the punishment may in fact satisfy such a desire but this is largely incidental. In the vast majority of minor crimes there seems little evidence that there is such a desire and this may be true of more serious offences also.

Nevertheless, those who criticise the retributive outlook do so on the grounds that pain and suffering are being inflicted to no purpose, that the theory countenances a pointless multiplication of suffering. The retributive reply to this is that the offender brought it upon himself or herself.

It is in this respect that retributive theories are said to respect offenders as persons in contrast to other theories. The assumption of choice in committing an offence makes the offender's punishment his own responsibility. Within the framework of legal rules and sanctions he or she acted voluntarily and is therefore obliged to suffer the known consequences. On this view, though, no particular framework is implied with respect to the type of laws or sanctions enforced, no particular view of the kind of consequences is implied. This notion of personal responsibility applies equally to a system where the consequences are decided purely on deterrent grounds.

This doctrine is sometimes developed into the doctrine of the right to punishment. The peculiarity of this notion is that it reverses the usual pattern of obligation. This is a right that cannot be waived; and an obligation on the community that chooses itself whether or not to carry out the obligation. Given this peculiarity it is questionable whether the concept is useful here.

Herbert Morris[13] has attempted to develop this doctrine but unsuccessfully. The right to punishment is derived from the "natural, inalienable and absolute right"[14] to be treated as a person. This is a right that cannot be waived hence the same could be true of the right to punishment. Precisely what it means to be "treated as a person" is rather difficult to specify and certainly Morris is unclear. The topic is touched on briefly later in the thesis. It seems likely that being "treated as a person" involves having certain rights respected, certainly the most plausible approach, and Morris' argument appears to rather vacuously assert the right to certain rights.

In the event Morris argues for, not the right to be punished but the right to a system of punishments.

"Now it is clear I think, that were we confronted with the alternative I have sketched, between a system of just punishment and a thorough-going system of treatment ..... we could see the point in claiming that a person has a right to be punished, meaning by this linked to punishment".[15]

There is no argument that the two claimed rights do mean the same and it is hardly surprising. The right to a system of laws and punishments implies that one should be punished for infringements but not that this is a right. On the contrary, in accepting such a system one confers on others the right to punish if one breaks the law oneself and claims the right to have the judicial system do likewise to others. Importantly, these rights can be waived, mercy can be shown. The doctrine presented by Morris is a complete confusion.

Let us return to the doctrine of pure retribution. It satisfies the requirement that only the offender be punished. This requirement remains one of the intuitive touchstones that must be satisfied. In principle only a backward-looking account can do this. To satisfy this requirement one must consider the history of the case and not only the future.

It is claimed that the doctrine also satisfies the requirement that the offender be respected as a moral agent. As we have seen, this claim is one of personal responsibility; the offender is considered responsible for his or her actions and the severity of the punishment is decided purely by considering the gravity of the offence and the

degree of culpability. The main ground for punishments on the deterrence theory is that they serve the general interests of the community by reducing criminal activity. The due punishment does not proceed purely by reference to the offender's own actions in this case.

"For one man ought never to be dealt with merely as a means subservient to the purpose of another ... He must first be found guilty and punishable before there can be any thought of drawing from his Punishment any benefit for himself or his fellow citizens".[16]

As remarked earlier in the chapter, there is still room for compromise here between deterrent and retributive philosophies, but this is dealt with later. The principle of retributive punishments, that suffering is due when suffering has been caused, commands considerable intuitive support.

Similarly, the psychological propensity to retaliate may be a fact of human nature as well as other forms of life. There is, however, no rational basis upon which this intuition can be founded, which is to say it cannot itself be justified by any appeal to other principles. At best one could claim the principle to be one of natural justice. There are, however, several notions or principles that can be regarded as retributive, and these should be distinguished and examined separately. I shall follow Nigel Walker's intelligent analysis of retributivism and the distinctions he asserts.

He outlines four alternative retributive aims:

"Aim 4: that the penal system should be designed to ensure that offenders alone by suffering for their offences".

"Aim 4a: that the penal system should be designed to exact

atonement for offences in so far as this would not impose excessive unofficial retaliation, or inhumane suffering on the offender, and in so far as it would not increase the incidence of offences".
('compromising retributivism')

"Aim 4b: the unpleasantness of a penal measure must not exceed the limit that is appropriate to the culpability of the offence".

"Aim 4c: society has no right to apply an unpleasant measure to someone against his will unless he has intentionally done something prohibited".[17]

The first aim represents a simple statement of the retributive ideal. The second qualifies this in two ways that should be distinguished. There is a condition of humanity, which has been considered in the overview, and what might be called a condition of practicality. This second condition is related not necessarily to general deterrent considerations but to the broader notion of reduction of offences characterised as 'reductivism' by Walker. The reduction of crime incidence can be achieved in a variety of ways, of which general deterrence is but one though, arguably, the most important.

As Walker points out, the uncompromising retributivist is committed to the justice of a punishment, if regarded as fitting, even if this served to increase offences.

As stated, the reductive consideration is employed as a limiting principle, similarly to that of humanity, and this position mirrors the limitation required by deterrent theories of punishment of offenders only. As such this view can barely be regarded as retributivist and those compromising views will be discussed in the next chapter.

The third aim is a classic retributivist aim. The correct punishment is to be decided by the gravity of the offence and the culpability of the offender and not by, for instance, its exemplary effect or, more generally, the consequences of the punishment.

To illustrate this, the debate over capital punishment is to concern its appropriateness as a punishment and not its efficacy as a deterrent. Again, more generally, since homicide is shown to be a rarely repeated offence it could be argued that present punishments serve little useful purpose on reformative or corrective grounds. The severity of sentence can therefore only be justified as having a general deterrent effect if justification is to concern only the consequences. As pointed out in the previous chapter, the assessment of this effect requires empirical information that we do not possess. The basis of the justification rests upon the belief that the information would be forthcoming if a research project could be undertaken. Certainly this is a generally and firmly held belief.

The retributivist would argue that the offence is one of the most serious on the statute books and should be punished accordingly. In particular, in a comparative system it should be punished more severely than a less serious offence even if in the latter case a significant reduction in crime rates would proceed from heavier punishments, unlike the former.

I think this is a principle of punishment that we in general would be loath to relinquish and so I shall develop this retributivist point more fully.

Firstly it must be clearly distinguished from the doctrine of

Lex talionis. It is indeed hard to see this doctrine as anything but systematic revenge. It is also hard to see how this doctrine could be practically employed and, when practical, hard to see how any civilized society would practise it. Repaying the criminal in his own coin is hardly a condemnation of the behaviour.

Secondly, the practical assessment of the degree of suffering of the victim and the offender is barely conceivable. All the arguments that can be levelled against practical employment of the utilitarian principle can equally be levelled here. Certainly certain rules and conventions can be employed to ease this assessment and, given the bewildering variety of cases, such generalisation is entirely legitimate. Nevertheless, the equation in terms of suffering alone seems inadequate to the task. Moral judgements, not necessarily related to degrees of suffering, seem to be involved too.

Given this required emphasis on rules and conventions and given the limitations of humanity, example and practical assessment, the doctrine of Lex talionis appears unacceptable. Importantly, it is also entirely unnecessary. It is one specific retributive thesis amongst others.

The alternative retributive position with respect to the severity of punishments is that the severity of punishments must vary in proportion to the gravity of offences. This is a thesis that makes no attempt to match the suffering of victim to offender. It asserts only that between offenders, equally culpable for different offences, the more serious offence should be punished more severely.

In its simplest form it asserts that, for instance, robbery and assault should be punished more severely than mere robbery. This principle

was used to justify the severe sentences imposed on the Great Train Robbers in Britain (1965) of up to 30 years. At the time it was often argued that these sentences placed a higher value on money than on human life when contrasted with typical sentences for murder. The assault on one of the train guards that led to his subsequent death some considerable time later was used to deny this accusation. It would have been very interesting, had the robbery gone entirely to plan and no injuries occurred, to consider the sentences imposed. The validity of any conclusions here though would depend upon suggestions of alternative sentences.

The retributive thesis here asserts a scheme of punishments that must be filled out by considerations of particular circumstances and conventions. It provides a partial answer to the question of amount. There are various ways this framework could be made substantial. It could be done by reference to reductivist or deterrent considerations, which would form another type of compromising retributivism, or it could be done with reference to other practical considerations, finance for instance, or else purely with regard to considerations of appropriateness. This can be dealt with later but this thesis of due proportion in punishment would seem to be one that is firmly rooted in our intuitive conception of justice and consequently demands strong arguments to reconsider. Furthermore, the public acceptance of an alternative scheme is an issue that must be addressed as well as the philosophical arguments, assuming, as I do, an existing public acceptance of such a scheme.

The final aim characterised by Walker addresses two matters.

Firstly, punishment should be of an offender only. Secondly, the offender must have acted intentionally.

The first has been considered already. Walker claims this is a retributive aim and quite rightly. The point made is that one can embrace this aim without thereby being committed to a completely retributivist account. This is minimal retributivism. It could be adopted as an ethical side-constraint by a general deterrence theory without compromising the theory too much. The purity of theory would be lost but it is questionable if this is of any importance.

The second claim, also with regard to the question of who should be punished, is one that would present difficulties to a deterrence theory if accepted. In practice it is one that is accepted, pleas of mitigating circumstances, provocation, diminished responsibility and insanity, the special status of crimes of passion; in general what are termed 'exculpatory' claims. These are claims that it is not simply what is done, the commission of the offence, that is important but that the offender's state of mind, speaking very generally, is also important. A purely deterrent account would find this hard to justify. Why should this matter if general deterrence would be improved by assumption of strict liability for all crimes? It could be argued that no deterrent purpose would be served by punishing unintentional offences. This is arguable but I know of no empirical research on the effects of introducing a strict liability clause for any particular offence.

More important to this is the question of principle, should exculpatory claims be admitted? If so this is a retributive principle, it looks back to the conditions surrounding the deed and not forward

to the consequences of the sentence.

Walker's approach to this principle of retribution, which again commands great intuitive support, is to consider the problems of its strict application. The problems concern two types of situation. The first concerns preventive measures, the second cases of negligence and offences of strict liability.

A rigid adherence to this principle would mean that the law was unable to act even where "it is as certain as it can be that a man will commit serious and irreparable harm - such as murder or mutilation - to another person (he may, for instance, be a jealous and violent husband whose wife has eloped with another man). The only method of ensuring that the harm is not done may well be to put him in custody for a while".[18]

On our definition this does not count as a punishment and indeed this is consistent with common language. It is of course hard treatment but this alone is not enough. As Walker points out various expedients have been introduced to overcome the problem. Offences such as 'loitering' and 'carrying an offensive weapon' are examples of this as well as being 'bound over to keep the peace'.

There is indeed a difficulty about the acceptibility of such offences but their existence in current statutes is a testament to the strength of this retributive principle, and in practise these offences do not arouse much opposition though they are open to abuse. Since I intend to avoid discussion of the morality of particular laws then, in these cases, punishment does proceed from the commission of an offence and the principle is not overridden.

The second type of case, strict liability and negligence, is more

difficult. It does again concern the justification of a particular law since punishment does again proceed from an offence. In these cases the difficulty is not that nothing has been done but that there was no intention on the part of the offender.

In all these cases there are three courses of action available to society. Firstly, it could do nothing, rigidly adhering to the letter of the principle. Secondly, it can create offences, as has been shown, and so respect the principle with this expedient. Thirdly, it can deny that the principle is inviolable, and so weaken the retributive basis of punishment or reject it totally as a basis.

Offences of strict liability, such as employers being held responsible for the mistakes of employees, revolve around a particular notion of responsibility. The acceptibility of such offences(as offences) depends upon the philosophical analysis of the notion and then seeing that certain types of circumstances are suitable to its application. I do not intend to attempt such a task but see no reason why it should present too much of a problem. The idea of 'taking responsibility for' as with an officer and his men in the forces, with parents and their children, is not one that in practise people find difficult. Given this, the main problems concern where it should be applied legally, not whether it should be applied at all.

This very brief sketch does no justice to this issue but shows a reasonable case can be made for having these types of offence on the statutes. It may be an expedient or even a 'subterfuge' as Walker seems to suggest but it enables the principle to be maintained. As Walker says, to admit this principle is sometimes contrary to common sense "seems a

dangerous step on to a slippery slope"[19]

The final objection to this principle concerns the effects on dependents of punishments, the suffering of innocents. Once more, on the definition, they are not being punished. Secondly, it could be replied that this suffering is caused by the offender and not the state. Thirdly sentences can be mitigated and material assistance provided for dependents. This would be a humane expedient but since the suffering of dependents cannot count as punishment the objection that it is not only the offender who is punished fails. It is quite true however that not only the offender suffers in such cases.

It is at least a plausible argument that such suffering offends the spirit of retributivism if not the letter. The great difficulty here concerns the accepted social roles and responsibilities of parents and husbands and wives with respect to their dependents, but it seems clear that if no material assistance is provided when needed it could be argued that more suffering is caused than is consistent with the retributive justification of punishment. However, justification purely on deterrent grounds need not consider the alleviation of this suffering either if it is believed to provide greater deterrent effects, but it does not conflict with the deterrent principle in any way. For the retributivist, the provision of adequate assistance to dependents does seem the most consistent solution but clearly involves greater expense. I think that a full discussion though would require an analysis of the role of the family in society and this would be a considerable digression.

In conclusion, Walker suggests that, in the light of these objections, the principle be accepted as "practically desirable" rather

than "morally binding" as such occasional exceptions can be made. I find this distinction curiously phrased since he seems to suggest that the principle itself is merely a matter of expediency though the examples discussed are clearly special cases. In actual fact, the only category of offences not included are those of strict liability and these offences are clearly defined as such. To reduce the principle to practical desirability on this basis alone seems insufficient since he has done little to undermine the firm moral foundations of the principle in general. However, perhaps this is a matter of wording, a means of pointing out that this is not an exceptionless moral principle. The practicality of the principle clearly is a matter of much importance.

Lest it be felt that this represents a misunderstanding, Walker remarks that the abandonment of the principle is "politically out of the question".[20] This is no doubt true but nevertheless his critique does not suffice to show that the principle is not a well justified moral position.

To summarise, the strength of Walker's analysis is to show that there are a series of logically distinct retributive principles. In this he has taken his lead from H.L.A. Hart, whose views will be considered in the chapter on Compromising Solutions. This is of importance if one feels that, as far as possible, consideration should be given to all or some of the various suggested justifications. The final two chapters consider some attempts to do so but first some further suggested justifications must be examined.

Summary

The two preceding chapters have examined the two main traditional justifications for punishment. Considered as the sole justification for the practice each is open to criticism for ignoring crucial factors. The deterrent account, by considering only the consequences of punishment, the future good to the community and perhaps the offender also, can be criticised for not taking sufficient account of the history of each particular case. It becomes a purely contingent matter that it is the offender who is punished rather than the hard treatment befalling a dependent or some complete innocent.

The retributive account by considering only the history of the case can be criticised for ignoring the wider social consequences of punishment. In so doing it can be criticised for being solely a system of ritualised retaliation.

A compromising solution to this antagonism between theories that readily suggests itself in the light of this analysis is the one suggested by Professors Rawls and Hart.

Deterrence, which more appropriately concerns the effects of punishment in general, is taken to be the justification for punishment in general. The system of imposing sanctions for breaking the law is justified because of the general reduction in law-breaking that is a consequence, in other words, because of the general deterrent effects.

Retribution, concerning itself with the history of the case, is taken as the appropriate justification for particular punishments. In

this way there is no question of who is to be punished and the level of punishment allotted can accommodate exculpatory claims more easily.

This is a tidy and promising solution and will be examined in the final two chapters. There are other suggested justifications that must be considered before any conclusions can be reached though. These are examined in the next three chapters. Once again, each will be considered as the sole justification for the practice where possible.

6. Subsidiary Justifications-Incapacitation

We turn now to a more detailed examination of the justifications presented by Bentham, the two subsidiary justifications of disablement and reformation. In outlining "properties given to punishment" they occur seventh and eighth in order, though it is not clear that this is an ordinal sequence of importance.

Of disablement he says, "The inconvenience is, that this property is apt, in general, to run counter to that of frugality: there being, in most cases, no certain way of disabling a man from doing mischief, without, at this same time, disabling him, in a great measure, from doing good, either to himself or others. The mischief therefore of the offence must be so great as to demand a very considerable lot of punishment, for the purpose of example, before it can warrant the application of a punishment equal to that which is necessary for the purpose of disablement".[21]

Disablement, or incapacitation, is a punitive measure of a particular kind. Incapacitation is here defined as measures applied by the governing authority that physically restrain or prevent an individual from the commission of particular offences. In general these measures will be punitive, that is, will involve hard treatment for the commission of an offence. However, both preventive detention and internment, as practised in Northern Ireland recently, for instance, are incapacitative measures and, because of their similarity to punitive measures, will be discussed here.

The common form of incapacitation is confinement in an institution such as prison. However other forms of incapacitation are

not uncommon, for example, house arrest, deportation and such barbaric measures as cutting off hands and other forms of mutilation still practised around the world.

According to Bentham incapacitation is a measure of great severity only to a small percentage of offenders. Since it does involve considerable deprivation of rights it would indeed seem inappropriate treatment for the majority of minor offences. No precise criteria are offered here, though perhaps they will become clearer in discussing the rationale of disablement. However the swelling prison populations of the Western world indicate its greater use. If the use is indeed growing it is an interesting empirical question whether this is due to the increase in serious crimes or to changes in sentencing policy.

The primary rationale of incapacitation is clearly the physical prevention of a repetition of the offence for a definite or indefinite period of time

The practice can also be justified as a measure of general deterrence but this must remain a secondary consideration. It may be the case that alternative practices would prove more effective deterrents in which case the primary preventive justification takes precedence.

It is quite clear though that both aims can be served simultaneously. Society is protected by the incapacitative measures which serve as a deterrent at the same time. This concurrence of aims serves equally with other justifications than deterrence. Incapacitation could be considered retributively appropriate as well as protective of society, and confinement for the purposes of reform may also form a

combined justification. This compatibility of different aims is discussed later. Where incapacitation is discussed purely on its own merits its justification is taken to be the protection of society.

Precisely that justification is offered for the more controversial practices of preventive detention and internment. These are both incapacitative measures but do not follow up the proven commission of an offence.

Preventive detention, the less controversial of the two, is enforced when the legal agencies consider that there is strong possibility that the individual concerned will commit an offence, generally a relatively serious offence. The topic has already arisen in the chapter on Desert but the point made was that, in certain cases, offences can be created that are preventive and hence the retributive principle, that an offence must have been committed before action can be taken, is maintained. This is not always the case however and, in any event, the existence of such laws remains a contentious matter.

The justification of preventive detention is the protection of certain members of society likely to be harmed by the particular individual. Prima facie, the protection of society is a justifiable aim and hence detention, when truly preventive, is justifiable if this is the sole criterion of justification. It is, however, never known for certain when such detention is truly preventive, but it is clearly a requirement that the legal agencies have good evidence that the individual is likely to commit an offence. Such evidence should certainly be publicly available since the practice is clearly open to abuse.

A second reasonable restriction would be that the offence

to be committed be a serious offence. Though this may mean that minor offences are committed that might otherwise be prevented the use of such a controversial practice is less controversial and less open to abuse under such a restriction. Incapacitation is a serious matter and quite obviously the offence to be committed must be a serious one or more harm is done in prevention than if the crime had been committed.

A further requirement is that the confinement be as short as possible and a system of regular reviews be maintained.

Perhaps other restrictions should be enforced also. The necessity for stringent restrictions is the lack of certainty that an offence will be committed, and the relative ease with which such a system could be abused. There nevertheless appears to be a justifiable place for preventive detention, if the protection of society alone is sufficient justification.

Internment, as practised in Northern Ireland, raises more serious objections. The practice is justified by the seriousness of the offence committed, the difficulty of procuring evidence and the dangers involved to those participating in trials. The inability of the usual legal process to control the situation in any measure is taken as reasonable justification to by-pass the usual process.

In this case the special difficulties that create the felt need for some measure such as internment also ensure that the restrictions to be placed on the use of preventive detention cannot be met in this case. The difficulty of obtaining evidence to convict is likely the same with evidence to intern. Such evidence as does obtain cannot be made public without endangering any civilians involved in giving evidence. The

conditions for fair practice do not obtain.

On the other hand it can be argued that society is not being adequately protected. The situation appears to present a forced choice between fairness to individuals and protection to society. In any particular case many other factors will be involved. Where, as is likely, the emergency stems from racial, religious or political divisions then the use of internment may represent an additional exacerbation of the situation and hence, arguably, the putative aim of protecting society is not being fulfilled.

When the society is divided in this manner then very special political problems arise which cannot be discussed briefly here. Precisely who is being protected in such cases? Do the legal institutions and enforcement agencies represent the whole society or a group within it? If internment is ever justified such questions must be tackled though it is unlikely any adequate solution will be found. In the case of preventive detention it was argued that, under special circumstances and stringent restrictions, purely protective measures may justifiably overrule considerations of fairness. The same principle obviously can apply to internment, but whether the measure is ever genuinely protective and whether reasonable restrictions can ever be maintained is debatable.

The third case involving incapacitation concerns the treatment of habitual offenders and the practice of confining such offenders although the offence in question does not normally warrant such severe punishment. On retributive grounds this practice is clearly unacceptable for the offender is taken to have been sufficiently punished already for

previous offences and therefore there are no grounds for increasing the sentence. Similarly, on deterrent grounds it is not so easy to justify since the only deterrent effect it will have is on habitual offenders.

The main justification for confinement here is to remove the offender from the community, to incapacitate him or her. The justification for the increase of sentence is then the same as for preventive detention, the confinement is justified because of the strong likelihood that the offender will commit another offence. In this case, though, the type of offence is one that would not be considered serious enough for preventive detention proper so the subject remains problematic.

A plausible alternative is to regard the confinement as a measure of specific deterrence, the additional punishment, as well as incapacitating the offender, also presenting a stronger deterrent to future criminal activity. Whether it does serve as such can be easily researched by considering rates of recidivism for such offenders.

Rather similar problems arise in the case of indefinite disablement. At present, public feeling runs high over the release of those who have committed serious offences, murder, rape, child abuse and so on. There is an understandable anxiety that offenders may repeat their crime, though the well-publicised cases where this has happened tend perhaps to exaggerate the fears, since those released who do not repeat the crime generally do not receive publicity.

Once again there is a serious conflict between the mainly retributive consideration of appropriate sentence and the protection of society. As with the other cases discussed, any punitive measures taken against an individual in the interest of protecting society need to be

carefully restricted to ensure the interests of the individual are also maintained. In the wider political context such restrictions can be seen as an important part of the maintenance of the rights of individuals against the rights of the state to legislate and enforce in the name of 'the public interest'. The vagueness of the concept 'public interest' rules for caution in its employment.

Incapacitation is termed a 'subsidiary justification' by Bentham and clearly this is the case, referring to a particular type of punitive sanction. Unlike the other justifications discussed, while it can be considered one of the justifications for particular punishments or one of the general justifications of punishment in society, it cannot be considered as the sole justification. It does not have sufficient generality for this purpose.

Its importance as one element of a scheme of justification has grown recently. Following the lack of evidence of successful general and specific deterrence (see appendix) it can by contrast be regarded as a reliably effective method of reducing the incidence of crime by physically constraining a proportion of the criminal population. In the type of compromising theory presented in this thesis it can be considered as one of the justifying elements of punishment in general and in particular.

7. Reformation

The second subsidiary justification presented by Bentham is reform. This is offered as a justification for punishment and not an alternative to it as it has sometimes been presented in modern times. Considered as the primary aim of criminal sanctions, whether the measures imposed were punitive or not would depend upon the particular theory of reformation. One can draw the distinction between reform by punishment, of which Bentham was an adherent, reform as well as punishment, a compromising solution, and reform instead of punishment. While any of these could be presented as the 'correct' single solution one could also adopt the position that the type of measures imposed should depend upon the individual to be 'treated'. In other words, in the particular case, the measures considered most likely to reform should be adopted.

Stating an adequate criterion of reformation is difficult because of different opinions on the subject. For some reformation is only genuine when the criminal no longer desires to repeat the offence when he or she 'has seen the error of his or her ways'. Reference to the criminal's desires after release is hardly a satisfactory criterion and the only clear criterion is that he or she commit no more offences for whatever reason this might be. On this definition measures of specific deterrence are also reformative measures, reform based on intimidation perhaps rather than more internal reform of character.

Bentham offers a fairly straightforward account of correction by punishment.

"Now any punishment is subservient to reformation in proportion

to its quantity since the greater punishment a man has experienced, the stronger is the tendency it has to create in him an aversion toward the offence which was the cause of it".[22]

In many ways this remains a conventional view but the psychological suppositions of this view do seem suspect. The aversion to the punishment may be associated with the being caught and convicted rather than the commission of the offence. Assuming there always remains some chance of being caught there may still be a deterrent effect but hardly that created by an aversion to committing the offence.

The correctional effectiveness of punishment certainly is empirically suspect. Were punishment effective one would expect few to repeat their offence after punishment but high rates of recidivism in many countries apparently contradict this. Such evidence however is used by some to demand stiffer punishments in contrast to those who claim it shows punishment to be ineffective as a correctional measure. The ambitious conclusions drawn from the inconclusive evidence of past successes and failures are well illustrated by H. Wheeler.

"Punishments, despite the claims for Bentham's pleasure-pain calculus, no longer detet crimes. Prisoners do not expiate their crimes and they are not rehabilitated. Thrown together with other criminals, they learn chiefly how to be more intrepid, if not more skilful, criminals".[23]

The alternative to punishment is education.

"1) Punitive institutions will tend to give way to educational institutions(educational in the sense that persons can be taught how to avoid deferred aversive effects through operant conditioning)

2) The overall punitive, or legalistic, environment will be reduced and

somewhat supplanted by positive-reinforcement practices, with a resulting decrease in repressive measures".[24]

There is much to take issue with here. The predicted changes are based upon a speculative psychology and expressed in a language that is persuasively obscure. The 'educational' establishments, employing methods yet to be determined, teach the avoidance of 'deferred aversive effects'. What are the 'aversive effects'? One assumes those are punishments, in which case the system is hardly nonpunitive. When is the 'education' complete and who decides this? What of those who cannot or will not be 'educated"? When are the 'deferred aversive effects' used?

Until the psychology of aversive conditioning and behaviour reinforcement is clearer its use in practices of reformation cannot be considered. However, many of the questions raised are pertinent to any system of criminal sanctions where reformation is a priority.

The first question concerns the principle of reform. It can be justified as being in the interest of both the offender and the society. It is in the offender's interest in that he or she avoids future punishments and, arguably, that he or she will be happier through conformity to society's standards. The latter is a dubious suggestion and so the offender's interest is served primarily through the avoidance of future punishments. Society's interest is served by the reduction of the number of offences committed.

Against this it can be argued that reformative or rehabilitative measures do not sufficiently satisfy the expressive criterion. Clearly the attempt to reform indicates disapproval of the previous behaviour but, arguably, treatment must be sufficiently unpleasant to express this

adequately.

It can also be argued that reformative measures may reduce the deterrent effect of criminal sanctions and that the crime rate might increase. In other words, the benefit to society may be less than a system of deterrent punishments. It does become a problem how one defines benefit to society. The most tangible criterion is the number of offences committed but other criteria can be advanced, in particular, that society is enriched and improved by displaying the more caring approach of reformation rather than the 'harder' approach of deterrent or retributive punishment. For the moment, the latter claim must remain unresolved.

It is clear that a system where reform is the primary aim cannot function without some associated system of punishment for those who continually resist efforts to be reformed. It also seems clear that reform is not an appropriate response to all kinds of offences. In the case of minor offences, parking offences, libels, petty thefts, and so on, efforts to reform appear rather pointless and time consuming. In the case of serious offences, murder, rape, crimes of violence generally perhaps, there are reasons that can be advanced that such offenders stand in need of reform. Precise criteria would be hard to specify but in the case of minor offences the argument would be that these offences are not sufficiently important to justify the expense and effort of a campaign of reformation.

Limiting a policy of reformative treatment to serious offenders only, we should consider some of the questions raised in connection with Wheeler's article about indefinite sentences and about different sentencing of similar offences.

It could be argued that the principle of similar treatment for similar offences, though based on a well-entrenched notion of justice as treating like cases alike, merely reflects conventional attitudes and could, in time, be supplanted by the different conception of a reformative ethic. Similarity of treatment, considered as a retributive principle, could be replaced by individualised treatment when the priority of reformative measures was conventionally acknowledged. This is speculative but is possible in principle.

The problem of indefinite sentencing raises more difficulties. Where reformation is the single aim then, prima facie, sentences apply until there is sufficient evidence for reform. In cases where the offender is confined until reformed then wildly disparate periods of confinement of different offenders can be envisaged. It would appear that, in (retributive) definitive terms, a determinate punishment for the offence is replaced by an indeterminate punishment of particular traits of character, such as recalcitrance, stubbornness or independence. Where reformative measures are genuinely non-punitive, i.e. do not involve hard treatment, this does not apply; however, strictly non-punitive measures are hard to envisage.

There are considerable problems concerning the decision to release confined offenders because reformed. Clearly many offenders will attempt to convince the psychiatrist and parole boards with varying degrees of success. No completely reliable predictions can be made one way or another. Certainly a system of supervision can be devised to minimise risks. The use of hostels, open gaols and probation is a similar attempt to gradually restore the offenders' freedom to ascertain

the likelihood of generally law-abiding behaviour. However, this existing system retains a strong punitive element.

The obvious uncertainties of diagnosis, of evidence of reform, indicate great caution. This applies not only because of an interest in protecting society but also from a concern for the criminals who remain confined who would not repeat their offence.

The impossibility of sure prediction suggests that there must be constraints on a policy of reform derived from other principles. On the other hand, it is possible that fairly reliable predictions can be made, something that could, in principle, be empirically confirmed. If so, then a reformative policy, where minimum and maximum periods of confinement are laid down by law for each offence punishable by confinement, seems appropriate. Within these limits the actual period of confinement is determined by assessment of the behaviour and progress of the offender. Such a system represents a compromise between reform and punishment but, as seen, the principle of reform as a single aim is inadequate.

A second major concern is the type of measures employed to reform criminals and the constraints required here. Wheeler, quoted earlier, refers to a type of treatment called 'operant conditioning,' a practise associated particularly with B.F. Skinner. Very simply, operant conditions attempts to change behaviour through the use of reinforcements or rewards in controlled enviroments. A general account would be a lengthy and difficult diversion. More commonly the types of treatment known as "aversive conditioning" and behaviour "reinforcement" are suggested as effective means of reforming criminals. The question is whether any methods used are justified or whether respect for the

person requires limits to be imposed. Are the use of drugs, of electric shock treatment, or of surgery, acceptable for instance?

Certainly before any such measures can be used the full consequences and effects of the treatments should be known with reasonable certainty. This is certainly not the case at present with many suggested theraupeutic techniques, this applies particularly to techniques that may have serious consequences on the behaviour and personality of the offender. It is again difficult to specify a precise principle here since most changes of practice are likely to be experimental to a degree but those with potential to cause serious permanent changes are particularly worrying.

Should such techniques be even considered? It is illuminating here to consider current practices of involuntary commitment to mental institutions. The British Mental Health Act(1959) stipulates the conditions for involuntary commitment in Britain. These are summarised in the 1976 Review.

"At present compulsory admission to hospital for treatment where court proceedings are not involved (i.e. under section 26) requires the following conditions to be satisfied:

(i) The disorder from which the patient is suffering has to be one of the following - mental ilness, severe subnormality, subnormality or psychopathic disorder-

(ii) The mental disorder must be of a nature or degree which warrants detention in a hospital for medical treatment.

(iii) It has to be necessary in the interests of his own health or safety or for the protection of others that he be detained;

(iv) If the patient is suffering only from subnormality and/or psychopathic disorder he must be under 21 years of age".[25]

In cases where criminal proceedings are involved only the first two conditions apply. That they do apply shows that the current practise in Britain requires that the involuntary treatment of criminal offenders is acceptable only if they were liable to be committed anyway. They must be diagnosed as suffering from a recognised mental disorder sufficient to warrant detention in a medical institution. In effect this legislation denies the need for any special treatment, or conditions, for criminal offenders.

There seems to be no convincing argument that criminal offenders should receive any form of compulsory psychiatric treatment except when the conditions that apply generally pertain. This leads to the conclusion that while facilities should be available for the criminal to reform himself or herself, facilities for education and for acquiring skills and interests, involuntary treatment should not be generally permitted. This would apply only to those criminals suffering from recognised mental disorders of a nature to justify commitment in any case. The theory that criminality as such constitutes a mental disorder is too absurd to consider. It is very easy to construct cases where committing a non-violent crime is the most rational course of action available.

Other considerations should also be mentioned. The priority of reform as a criminal sanction may involve considerable expense practically in the employment of skilled staff. It is a serious consideration how much of the community's resources should be employed in reforming its criminal population. Available resources are always

limited and other social needs and interests must be considered in the allocation of resources. It seems likely that reformative practices will involve far greater expense than purely punitive ones and it is pointless to discuss the subject as if resources were unlimited. It has already been mentioned that a reformative policy for minor offenders involves considerably more effort and expense to society than is caused by the offences. It is an important point that resources are limited.

The arguments presented in the chapter show that reformation considered as the single aim of criminal sanctions leads to many difficulties. It is argued that an associated or conjoined punitive system must remain and that reformation is not always an appropriate response at all. It is interesting also that the concern for a reformative policy which has grown this century and which has tended to make punitive sanctions more humane by simulating concern for the criminal may also threaten to deny the concern and respect fostered.

The evidence for the success or failure of reformative policies is difficult to ascertain but results certainly cannot be said to be encouraging. A policy of reform and not punishment cannot be conceived until reasonable evidence is available that we are able to effect reforms in a humane and acceptable fashion. Until such time reform must remain primarily the offenders' own concern with as much assistance to their voluntary efforts as is possible. The offender thus remains responsible for his own acts and future.

There is still considerable public hostility to assistance of this kind. The provision of libraries, workshops and teachers for prisoners is regarded as unfair because such training is unavailable

to some others in the community, and unjust in that the confinement is considered not sufficiently punitive.

However, it remains the case that rehabilitative measures are in the interest of society if they are at all successful. They can certainly be justified on the grounds of protection to society or reduction of the number of offences committed. It is true that they may conflict with retributive notions of justice.

8. Respect for persons/Principle of respect

The question of respect for persons has emerged as a crucial topic in the discussion of punishment. In the chapter on deterrence it is used to dispute a principle of sentencing that is based solely upon the effect the sentencing will have on others. It is claimed that the offender is being treated purely as a means and not as an end, in Kantian terms, or is simply being used. In the chapter on reformation the principle of respect is used to impose limitations upon justifiable methods of treatment. To a certain extent also the constraints of humanity, discussed in the overview, are related to this principle of respect.

Defenders of the retributive theory claim that the great strength of the theory is that the offender is treated as a person. By holding the individual responsible for his or her behaviour, and hence punishable according to desert, the individual is being respected as an autonomous moral agent. It is ironic that the philosophy of deterrence and reformation that historically can claim a considerable influence in making punishments more humane should be criticised on such grounds.

However, the retributivist need not be blamed for the barbarities of the past and present. As seen, various retributive notions can be distinguished and the view should not be associated particularly with cruel or severe punishments. It is a mistake to suppose that retributive punishments need be more severe than deterrent punishments.

It was mentioned in the chapter on reformation that the concept

of respect here is a formal concept. There is no implication that the criminal be respected in the ordinary sense of the word. It is a matter of respect of the offender as a person, rather than respecting any of his or her qualities, but this obscure formulation clearly will not do.

Morris briefly attempts to characterise this notion of respect implicit in the retributive philosophy. The central concept is that of respect for the choices of people. As Kant says, "No one undergoes Punishment because he has willed to be punished, but because he has willed a punishable action". Still, one could say the same of reformation instead of punishment, and we are given no reason why such actions are "punishable". I think it is clear that at the root of this thinking is the view that adults are responsible for their own actions and their consequences and that their actions, good or bad, remain their own. The principle of respect is mainly directed against attempts to deny personal responsibility or accountability. In the case of compulsory treatment in prisons or mental institutions, the disquiet aroused is that certain methods of conditioning make it impossible to regard the individual's actions as his or her own.

B.F. Skinner's book, Beyond Freedom and Dignity, quite explicitly claims that 'personal responsibility', 'moral autonomy' and similar concepts are myths. We prefer to use ineffective methods of control, such as punishment, in the belief that this preserves individual freedom and dignity. A full discussion of this view would be too lengthy a diversion of this thesis.

The irony of Skinner's philosophy is that neither can the conditioners be held responsible for their actions. Such a world is a

frightening prospect. There is a clue to the concept of respect required in this. It refers to the values we display or express in our treatment of others, whoever they are. If criminal sanctions have become more humane it is because we thereby display more humanitarian values. Punishment is expressive in two ways. It is a condemnation of behaviour. As such, no particular form of punishment is implied, though generally the more severe the punishment the greater the condemnation. This applies within a consistent system of laws and punishments only, for different systems may operate with different standards.

Besides this expression of reprobation, the nature of the punishment applied expresses values about the treatment of individuals generally. The question of desert and responsibility can be put aside here to some extent. The punishment administered reflects the principles of those who punish regardless of the question of desert.

In this light the principle of respect becomes a reformulation of the principle of humanity outlined in the overview. A precise specification of this latter principle, the detailing of certain basic human rights, is beyond the scope of this work and remains a largely intuitive concept. It was argued that this principle serves as a constraint upon all theories of punishment and does not directly compete with these central theories.

It can be objected here that too much is being required of the principle of humanity. The main purpose of this principle is the humane treatment of offenders once convicted and a humane approach to the form and severity of punishments. Its concern is primarily with physical treatment.

The principle of respect presented by the defenders of a retributive justification is meant to serve a different purpose. In punishing a criminal his or her voluntary choice to commit an act known to be punishable is respected. It is precisely where such voluntary choice is felt to be absent that pleas of insanity and diminished responsibility are considered.

It is clear that this loses much force when reduced to a principle of humanity. However, this is precisely the point. While one can accept that there is much value in this principle of respect it is too strong a statement of the point. There is surely something misleading in the argument that punishment shows respect for the offender. Nevertheless, there seems to be something valid in the argument too. The acceptance of the principle of humanity clearly requires a more general concept of respect for persons and is sufficient for the purpose without raising all the problems of the justification of punishment. It is an attempt to loosely frame a principle of respect that does not presuppose a retributive theory of punishment.

9. The Expressive Function of Punishment

The final justification to be discussed separately is that presented by Joel Feinberg. This is what he terms the expressive function of punishment. What is important about punishment, he claims, and what distinguishes punitive treatment from other forms of hardship, is that the treatment expresses the judgement of the community. The sanction, imprisonment for instance, symbolically expresses the community's condemnation of the behaviour. The thesis he presents is that "both the "hard treatment" aspect of punishment and its reprobative function must be part of the definition of legal punishment, and that each of these aspects raises its own kind of question about the justification of legal punishment as a general practice".[26]

He illustrates the case by drawing attention to a number of circumstances that clearly show the symbolism of punishment.

"The condemnatory aspect of punishment does serve a socially useful purpose: it is precisely the element in punishment that makes possible the performance of such symbolic functions as disavowal, non-acquiescence, vindication, and absolution".[27]

He provides examples to illustrate each circumstance. A case of disavowal would be a country punishing a pilot for an unauthorised act of aggression. The country thereby disavows the act. A refusal to punish could be taken by the injured nation as condoning the act.

The example of non-acquiescence he provides concerns the 'paramour' killings in Texas where the law explicitly excuses husbands who kill their

wive's lovers if they find the wife and lover in delicto flagrante. As Feinberg says, in denying punitive sanctions completely the state shows an acquiescence to the act.

Vindication concerns the need to punish offenders in order to emphasize the seriousness of the particular statute. Refusal to punish weakens the credibility of the law. Absolution concerns the need to punish where the reputation of others is at stake. Once again, a refusal to punish may tend to call into question the innocence of other parties involved.

There can be little question that the expressive function is an important consideration for any theory of punishment. That punishment expresses the condemnation of the community is quite clear.

In conclusion Feinberg considers the possibility of emphasizing the symbolic, condemnatory aspect. As he points out, certain types of hard treatment come to symbolize punitive sanctions. In the past it was often mutilation or flogging, at present it is generally imprisonment. Is it possible to further soften the hardship of punishments while maintaining the symbolic condemnation?

It seems to me to answer this question the other points raised while discussing the other justifications must be considered. It is not clear to what extent the reprobative judgement and the hard treatment of the punishment can be distinguished. Feinberg does point out that the punishments themselves form a symbolic expression of the community's condemnation. The more severe the punishment, the greater the condemnation. Whether this condemnation can be expressed through milder sanctions is hard to answer. To the extent that punishments form a

conventional expression then further relaxation seems possible. But whether, in so doing, the other aims of punishment can be carried out is debatable. If the expressive function is considered the sole aim of punishments it remains a controversial matter whether or not the hard treatment is required in order for punishments to be adequately expressive. It seems unlikely that a solemn pronouncement of condemnation with no subsequent hard treatment would be generally acceptable, for the community could argue that such a system offers little general protection.

While the expressive function must clearly be included in any theory of punishment it seems clear that the other considerations must be included in an overall theory. This reaffirms the general trend of the thesis, for the expressive theory is very similar to the modified retributivist position outlined previously. The modified account asserts that punishment must be of an offender only and that punishment must vary in accordance with the severity of the crime.

The same two principles can be derived from the expressive theory. In order to condemn the act it would seem that only the offender can be punished. It is not clear how the act is condemned if anyone else is made to suffer. In order to express the degree of condemnation the severity of punishments must vary according to the gravity of offences.

This is developed further in the next chapter where it is argued that Feinberg's analysis, though inadequate as a complete justification for punishment, offers a better partial justification than any retributive analysis.

However, it is argued that considerations of protection to the community must also have a place in the overall justification of punishemnt.

10. Compromising Solutions

These last two chapters will endeavour to pull together the tentative conclusions of the preceding chapters and establish that though none of the competing justifications is singly sufficient they each have some place in the complete theory of punishment. Though it has long been recognised that punishments can be justified in various ways, the same sentence amenable to both deterrent and retributive justifications for instance, it has been felt that, as a matter of principle, one or other must take precedence. J.D. Mabbott's article, though a defence of retributivism, is perhaps the first attempt to transcend this polarity where the opposing justifications are argued to be morally unacceptable.

He develops his argument by focussing on the criminal law as a system of conventional rules. The system prescribes a code of behaviour by means of prohibitions. As Lord Devlin says "the law is concerned with the minimum and not the maximum".[28] Merely abiding by the law is not a prescription for good behaviour. The system will also lay down sanctions to be applied when the rules are broken and, generally, procedural rules for determining when the rules have been broken and further rules concerning the various authorities involved.

Given this sytem of rules and given that penalties attach to breaches of these rules, then providing all parties know and accept this system, there is little more to be said. Punishments are legally retributive in that they refer back to the commission of the offence but not morally retributive, in that they make no moral judgements explicitly

about the offence or offender. Just as in a game the participants accept penalties for breaking the rules so in the community there are punishments for breaking the law.

"No punishment is morally retributive or reformative or deterrent .... The only justification for punishing any man is that he has broken a law".[29]

Within this framework, which, as we have seen, is minimally retributive, it is possible to justify punishments on any of the moral grounds considered. It is possible to justify punishments on several grounds at once, perhaps that it is retributively appropriate, will deter others, will incapacitate the offender, when applicable, and will tend to correct the offender. In such cases punishments are overdetermined.

Mabbott's concept of overdetermination however differs from this account. What is overdetermined is not the punishment but "the public sentencing of a man to prison visited by prison chaplains and string quartets".[30] He adds to this, "I completely agree that while punishing a man we ought to make every effort to use this opportunity in order to try in addition(italics) to reform him and deter others".[31]

It is not clear what can be done to a man in addition to punishing him that will deter others and Mabbott appears to be confused here, in attempting to make deterrence and reform secondary considerations to be accommodated where possible. One suspects he means that punishments ought primarily to be retributively appropriate but also to serve as deterrents where possible. I do not think this is the only type of overdetermined theory available nor does it seem to do justice to the

multiple claims presented. The main aim of this chapter is the elucidation of the various alternatives of overdetermined theories.

Mabbott rightly considers overdetermination and contradetermination together. In the first case competing claims are complementary, in the second case conflicting. Such situations will arise when different moral principles will apply to the same circumstances. For example, honesty as a moral principle may conflict with the moral prohibition against causing suffering. One or other of these principles must be overriden. The possibility of such conflicts has little to do with the justification of either of the claims, says Mabbott. On the one hand one can justify honesty as a general policy, on the other hand one can justify not causing suffering. What is important, in his view, is that a principle is not invalidated because it can be overridden on occasion and that such circumstances do not feature in the justification of the principle.

Overdetermination is the contrary situation where different moral principles determine the same course of action. One may tell the truth, not only because one does so as a rule but also because, in the circumstances, the best consequences follow.

To a large extent this issue involves the distinction between justifying a rule and justifying a particular application of the rule. Exceptions to the rule are permitted when conflicting with another rule that takes priority. The question of priority may in turn refer to the justifications in each case but is not necessarily a straightforward matter. Most moral dilemmas occur when it is not. If the acceptance of each rule implies prima facie obligations that conflict in a particular

case, whether or not the overridden obligation remains as such is a notoriously difficult matter.

Both Rawls and Hart present a theory of punishment that relies upon the distinction between justifying a rule and its application in a particular case. Hart's formulation is that the general justifying aim of punishment is that it serves as a deterrent while the justification for particular punishments is based on desert. i.e. is retributive. Rawls, making the same point, puts it slightly differently in saying that deterrence is the concern of the legislator who attaches penalties to offences, retribution that of the judge who sentences convicted criminals. One could add that, if one wished to include correction as an aim, then correction is the concern of the gaoler who carries out the sentence.

This provides a more sophisticated account of an overdetermined theory than presented by Mabbott. Punishments are directly retributive and indirectly deterrent in the particular case. In the general case, the system of punishment is directly deterrent and indirectly retributive.

On this account neither retribution nor deterrence can be considered as more important or taking precedence overall since each applies differently. In essence each consideration, deterrence and retribution, underdetermines what happens in a particular case.

It is necessary to clarify the role each consideration plays to avoid confusion between the justification of whether punishment should be applied and the justification of the amount of punishment to be applied. In the former case the system of having punishments is justified on deterrent grounds while the decision whether or not to punish is judged

on retributive grounds.

A similar dual justification applies to the amount of punishment. The scale of punishments attached to different offences concerns the general case. The more a particular offence is to be discouraged the heavier is the punishment available to the courts. Whether or not this punishment is allotted in the individual case is decided on retributive grounds. On such a system deterrent concerns affix a punishment that provides limits within which the actual punishment must fall. These limits can be both maximum and minimum punishments though more commonly legislators affix maximum sentences.

This dual justification of amount does not necessarily follow from the dual justification of whether punishments be applied at all. If a determinate sentence is affixed to all offences then this could be decided on either deterrent or retributive grounds. It would be more consistent if sentences were decided on deterrent grounds, otherwise the claim that deterrence is the general justifying aim of punishment is not supported in any way by the sentencing policy. It becomes a rather hollow claim.

It also remains a possibility that the determinate sentences of such a system are based on some consideration of both the general deterrent effect and retributive appropriateness.

The view presented by Rawls and Hart is not entirely clear on the question of amount. Hart is in agreement that the question of amount is a separate issue.

"....though we may be clear as to what value the practice of punishment is to promote we will have to answer the question of

distribution 'Who may be punished?" Secondly, if in answer to this question we say "only an offender for an offence" this admission of Retribution in Distribution is not a principle from which anything follows as to the severity or amount of punishment, in particular it neither licenses nor requires as Retribution in General Aim does more severe punishments than deterrence or other utilitarian criteria would require".[32]

This last point has already been seen in the analysis of retribution. The precise criteria for the determination of amount are not made clear but it seems a form of compromise between deterrent and retributive considerations is accepted.

The view presented by Rawls and Hart offers a tidy and plausible analysis but perhaps not an entirely adequate one. In the first place the many doubts about the actual deterrent efficiency of punishments and the difficulty of any accurate assessment discussed in the chapter on deterrence still remain. Secondly, perhaps a more broadly-based account should be offered, the criterion for the legislator being the protection of society rather than the narrower criterion of deterrence. In this way the 'subsidiary' justifications discussed, incapacitation and reformation, could also have a role though the overall theory is no longer so tidy.

The practical working of an apparently untidy philosophical position need not be so difficult. The practicality of satisfying multiple aims is shown in Canada by the statement of objectives of the Ministry of Correctional Services in Ontario. The main aims quoted are:

"to carry out the legal duties imposed upon the Ministry by the

courts for the protection of society, and

to attempt to modify the attitudes of those in its care and to provide them with the kind of training and treatment that will afford them better opportunities for successful personal and social adjustment to the community".

In other words, the aim is assistance (as opposed to reform) within the constraints of protection to the community. It has not yet been completely established that a satisfactory policy of sentencing can be founded purely on the criterion that the punishment is protective to the members of the community. For instance, if research were to show that murderers are rarely, if ever, deterred by the threat of punishment and also rarely repeat the offence, so that incapacitation would not be justified, then if society continued to punish murder severely it is out of deference to retributive justice. Perhaps the example is too far-fetched or perhaps, under these circumstance, murder should not be heavily punished. The example serves to introduce the final aspect of punishment not yet dealt with in this chapter, its expressive function. It is this aspect that is emphasised by Joel Feinberg and it is an important aspect.

Feinberg emphasizes what he calls the reprobative symbolism of punishment. The crucial feature of punishment, on this view, is that it symbolically expresses the community's condemnation of the crime.

It was argued in the chapter on deterrence that, lacking accurate empirical data, more severe punishments are attached to offences considered more serious, since these are precisely the offences the community wishes most to deter. Similarly, in considering Nigel Walker's

analysis of retributive aims, two principal points were established as defensible and important. The first is that punishments be of an offender only, the second that punishments be proportionate to the gravity of the offence. These two principles similarly express the community's condemnation of the crime, for once again the severity of the punishment is determined by general beliefs as to the seriousness of the crime. However, if empirical evidence about deterrent effects becomes available, the coincidence of views may no longer hold.

It has been suggested recently that differences of sentencing apparently have little deterrent effect though at present general beliefs have not been much influenced by these suggestions. It remains an unlikely thesis but nonetheless must be taken very seriously. It may perhaps be related to the type of crime. In particular, much of the research has been conducted on serious crimes, or 'index' crimes, and for many of the lesser crimes the evidence may not agree. One problem here is the acceptable limits to the variance of sentencing required to conduct the relevant research.

The apparent coincidence of policy between deterrent and retributive sentencing would also be affected by differing risks of conviction for different crimes. A crime with a low risk of conviction would warrant a stiffer sentence than one with a high risk on deterrent grounds since the likelihood of arrest, when known, obviously inversely affects the overall deterrent effect. The similarity of policies would therefore very likely cease as more evidence of this nature is produced.

It remains the case that the expressive theory of punishment is largely the same as the modified retributive position that embraces

the two principles of proportion and punishments to be only of an offender for an offence. The advantage of the expressive theory is that it avoids the stigma of traditional retributive theories, particularly the 'eye for an eye' variety. When one moves away from absolute values of appropriate punishment to conventional ones, as the thesis of due proportion does, the two come to the same thing. The further advantage is a clearer statement of the justifying principle, namely that the community expresses its scheme of moral values through punishment. At the same time it could be said to cultivate these values. Changes of sentencing policy are unlikely to reflect a complete change of values in the community since there is rarely such a uniformity of attitudes, but such policy changes are likely in turn to influence prevailing beliefs. The analysis of this interdependence is a complex task perhaps comparing conceptually to the conundrum of the chicken and egg. It is claimed, with considerable justification, that all such changes of law and policy merely reflect the changing attitudes of the dominant class which simply enforces its own ethic. Certainly a Marxist analysis would take this form; however, it would involve a lengthy diversion to discuss this topic.

The expressive theory could also embrace the remarks in the chapter concerning the expression of respect for persons and of a humanitarian outlook. As was pointed out in that chapter, punishments are expressive in this two-fold way.

The final chapter offers a pluralistic account that attempts to summarise the points developed in this chapter. Nigel Walker quotes the Yugoslav Code of 1951 where the aims of punishment are declared and

it is interesting that most of the claims of this chapter are neatly summarised here.

"Purpose of Punishment"

Article 3

"The purpose of punishment is:

to prevent activity perilous to society;

to prevent the offender from committing criminal offences and to reform him;

to exercise educational influence on other people in order to deter them from committing criminal offences;

to influence development of social morals and social discipline among citizens"

It is clear that the extent to which all these aims can be achieved must be examined, as must the question of priority when they conflict.[33]

Conclusion

The previous chapter argues for the acceptance of two primary justifications for punishment, the protection of society and the symbolic expression of reprobation. Each of these in turn embraces a number of aims, protection embracing measures of deterrence, incapacitation and rehabilitation, and the expressive function embracing both condemnation and humanitarian concerns. Perhaps the humanitarian principle should be kept entirely distinct since this dictates constraints upon the conditions and severity of punishments and so acts as a general constraint on the practices justified by the pursuit of the other aims. It does regulate the form of symbolic expression of reprobation but clearly has no connection with the reprobative aspect of expression. Its inclusion would require a broader expressive theory than presented by Feinberg.

If we accept this duality of aims it remains to discuss their compatibility and the resolution of conflicts between them. Reservations are expressed about the Rawls/Hart formulation despite its apparent and tidy plausibility. It is not clear that the legislator's concern should be solely the protection of society and not also the reprobative expression. Consider again a particularly rare offence. It seems unlikely that conclusive evidence will be forthcoming concerning the consequences of the punishment with regard to the protection of society. It may be the case that the degree of punishment little affects the incidence of the crime though the main point is that the consequences

are simply uncertain. In such a case the justification for the sentencing policy would be that it represents a statement of the community's attitudes.

A different case, already discussed, concerns offences of strict liability. As seen, the justification here is that the policy protects members of the community rather than expressing a condemnation of the convicted party. It is suggested that the general justification for punishment incorporates both these elements. This is perhaps seen most clearly by considering offences with widely differing risks of conviction. It was observed in the previous chapter that such differences, if known, will affect the severity of punishments if based on deterrent considerations but not if based on retributive or expressive ones.

The acceptance of both aims as joint justifications makes both the theoretical and the practical resolution of such conflicts difficult. If neither is accepted as taking precedence generally, though this may happen in a particular case, then each can perhaps be regarded as setting constraints upon the employment of the other. The expressive principle could limit a policy of mild sentences when it was felt that little protective purpose was served by stiff sentences but where the offence was considered serious or conversely limit the severity of sentences imposed because the risk of conviction was low. Considerations of fairness or retributive justice impose such a limitation since the offender cannot be held responsible for the low risk of conviction. There is room for compromise and, if both are taken seriously, a compromising solution is indicated though this rarely satisfies the

search for philosophical rigour.

Though it remains the case that those offences the community wishes most to protect itself from are precisely those that are considered most serious and so, in general, there will be a fair compatibility between the different aims, for the reasons outlined in the text the two should be considered distinct.

It can be argued that a great majority of the offences in complex modern societies are what might be called 'civil' rather than 'moral' offences and that the reprobative aspect only applies seriously to the 'moral' offences. The category of civil offences could include traffic offences for instanct. Difficult questions are raised here and the suggested distinction is merely illustrative but, though the punishment retains its reprobative element, as all punishments do by definition, the punishments and penalties attached seem to serve primarily as deterrents. However, punishments attached here are still constrained by beliefs about retributive appropriateness that limit their severity.

In practice, the author suggests that the general criterion of protection of the community affords the better basis for the formulation of sentencing policy, being founded on clearer practical consideration than an assessment of general community feelings, a notoriously difficult task. Deterrent and rehabilitative measures may be hard to assess but form clear criteria while incapacitation as an aim can be accomplished with relative certainty.

The role of expression of retributive appropriateness seems more suitable to the assessment of a policy or a change of policy, rather than to its formulation. In practice then its role is more appropriate as a

constraint. It is not suggested that it is of secondary importance in principle by serving as a constraint but it is suggested that in practise it is perhaps of lesser importance.

There is a definite logic to such a conclusion. Suppose the protection of the community, the prevention of crime, is taken as the principal aim of the legislator. The degree of protection required by the community will depend upon how serious the crime is considered. The more serious it is considered to be the more the community will wish to be protected. However, it has been remarked that the level of protection provided depends upon many factors, criminal sanctions being one but not necessarily always the most significant, and the pursuit of a policy of protection by the imposition of punishment has many uncertainties.

There must clearly be constraints upon the measures the community is prepared to impose upon its offenders in order to obtain a level of protection considered satisfactory. Indeed, the notion of a satisfactory level of protection is rather obscure and certainly such limitations might prevent a 'satisfactory' level of protection. The limitations prevent the cure causing more suffering than the restriction of the offence warrants. The beliefs that adjudge the seriousness of the crime, and hence the level of protection required, should be the same as those that assess the appropriateness of the sanctions imposed, whether more strict than is merited by the offence or not. It is not suggested there will be a uniformity of views on this but rather that there will be general agreement on constraints, and, as pointed out, it is in the nature of the case, of the system of laws and sanctions, that such agreement must be accounted for.

It would perhaps be interesting to construct a much tighter framework to illustrate the conclusion but its operation does seem pre-eminently to involve practical decisions of policy, constraints of finance, of overcrowding in gaols, and others. In practice the conclusion resembles the theory presented by Hart and Rawls excepting that the general aim of deterrence is replaced by the broader aim of protection of the community and that this aim is constrained by consideration of retributive appropriateness. Within this framework, particular punishments are justified mainly on retributive grounds. The admission of exculpatory claims, for instance, though justifiable on deterrent grounds, is important because of retributive considerations.

The breadth of the topic has meant leaving many questions unresolved and its difficulty and complexity render these conclusions tentative. They are certainly neither new nor original.

Appendix

Some thorough research of criminal research projects and statistical analysis would be interesting and helpful to the thesis. Such research however would fall more into the domain of criminology than philosophy and would be a time consuming task.

The purpose of this appendix is to provide a very brief survey of such empirical research as exists that relates to specific factors mentioned in the thesis. Not too much weight has been attached to any conclusions currently derived from this evidence in discussing the various aims of punishment; rather there has been a tentative or conditional acceptance of findings where relevant. This is not to cast doubt upon the validity of any conclusions based on statistical research of criminal sanctions, though indeed few can be considered conclusive, but guards against an uncritical acceptance of such research.

The two primary projects relating to the thesis are those concerning rates of recidivism and the general deterrent effects of different sentences. Some research has also been done on the effects of incapacitation but such research tends to be particularly speculative.

All that is presented here is evidence that is relevant to certain claims and observations in the thesis. Readers are left to draw their own conclusions.

Recidivism

Recidivism concerns the specific deterrent effects or reformative effects of sanctions. The recidivist is an offender who offends again after being sentenced. The term "recidivist" is applied particularly to regular re-offenders, those with long criminal records, the multiple recidivists, but can also be used for those with only one reconviction, the 'primary' recidivists. The assessment of rates of recidivism for offences must specify a definition of recidivism to be clear, the length of the follow-up period and possibly the types of offences considered.

A considerable number of research projects on this subject have been made and details of a few are provided here.

From U.S. Uniform Crime Reports - 1968; Table 2 - 8 presents the percentages of all persons released in 1963 who were arrested again for the same offence by 1968

Table 2 - 8

Auto Theft	80%
Burglary	77%
Assault	74%
Narcotics	69%
Forgery	68%
All offences	63%
All other offences	62%
Robbery	60%
Larceny	59%
Liquor laws	46%
Fraud	46%
Gambling	43%
Embezzlement	23%

The second table gives, by type of release, the percentages of persons released in 1963 who were re-arrested by 1968.

Table 2 - 9

Acquitted or dismissed	91%
Mandatory release	74%
Fine	74%
Total	64%
Parole	61%
Suspended sentence and/or Probation	55%
Fine and probation	36%

By far the most interesting statistics are those that pertain to the reconviction rates subsequent to different types of sanctions, imprisonment, fining or probation.

Referring to Dr. W.H. Hammond of the British Home Office Research Unit (1960 and 1966), whose study followed the record of 4,000 offenders of all ages, Nigel Walker quotes the following findings.

"(a) in general, fines are followed by fewer reconvictions than other measures.

(b) heavy fines are followed by fewer reconvictions than light ones.

(c) in general, next to fines, the measure followed by fewer reconvictions seemed to be discharge (absolute or conditional). The exceptions were the old 'first offenders' aged thirty or more who received a discharge; these tended to have abnormally high reconviction rates.

(d) imprisonment was followed by more reconvictions than fines or discharges.

(e) but imprisonment compared better with other measures when applied to offenders with previous convictions than when applied to first offenders.

(f) probation was followed by more reconvictions than imprisonment.

(g) probation compared rather better with other measures when it was applied not to 'first offenders' but to offenders with previous convictions (but was still the least often effective).

(h) for some reason, however, 'first offenders' convicted of house breaking showed lower reconviction rates than any other kind of probationer when placed on probation". [34]

The interpretation of these data does require careful attention. The ability of the courts to select the appropriate sentence would clearly make a great deal of difference and certainly sentencing is not indiscriminate.

The data on recidivism does suggest possible changes of policy that could be undertaken experimentally. It is obvious that many other factors are involved and consequently there can be little assurance that any such changes will successfully reduce reconviction rates. There is at least a scientific basis for the formulation of sentencing policies that aims to provide the most effective system of deterrents.

The figures given on Table 2 - 8 appear to show that car thieves are harder to deter than embezzlers. However, it is obvious that embezzlers, once convicted, have far less opportunity to repeat the offence because it is less likely that they will be able to regain a position of financial trust. Similar arguments may apply to all the offences

with the lower rates of recidivism.

On the other hand, still considering purely the deterrent aspect, no conclusions can be drawn about the severity of punishments since the general deterrent effect cannot be ascertained from these figures. Similarly, in considering rates of recidivism and types of punishments, the evidence given by Nigel Walker's analysis in general suggests the efficacy of fines over other types of sentence. Leaving aside all other considerations it would be necessary to know also whether fines provide sufficient deterrents to others who might commit some offence but might be deterred by the possible punishment if apprehended.

While the habitual offender may regard the punishment, whatever it is, as an occupational hazard, the stigma of imprisonment may present a far more effective general deterrent. This is very speculative but no other observations can be made. Slightly less speculative conclusions can be made when these data on recidivism are considered alongside the data on general deterrence.

Assessment of the general deterrent effect

All evidence is drawn from Daniel Nagin, "General Deterrence: A review of the Empirical Evidence:" [35]

From a series of analyses in the 1960s and 70s (e.g. Gibbs 1968, Title 1969, Leibowitz 1965, Becker 1967) all except one (Frost 1976) show inverse associations between crime rates and several sanctions measures, primarily clearance rates (arrests/crimes), imprisonment probability and time served. In other words, increases in likelihood of apprehension, likelihood of imprisonment and length of sentence all serve to reduce crime rates.

The individual analyses, almost all using the same data, come to differing conclusions, each finding significant associations between differing factors. A great deal depends upon the initial assumptions of the analysis, and the statistical procedures adopted. It is beyond the scope of this thesis to review all these analyses. They do almost entirely agree on the above "inverse associations".

Leaving aside all the uncertainties about the way these conclusions are derived and assuming their validity it is still not possible to draw any firm conclusions.

Consider the conclusion that length of sentences inversely affects crime rate. It can be argued that the reduction in crime rate is due to the effects of incapacitation rather than the general deterrent effects.

An increase in sentence length may well mean more offenders

imprisoned and so a reduction in the criminal population at large. The same argument could apply to the increase in likelihood of imprisonment which in turn means more are imprisoned.

A cyclic relationship between the crime rate and likelihood of imprisonment can also be argued. An increase in the crime rate leads to an increase in the likelihood of imprisonment. This means that more are imprisoned, reducing the criminal population at liberty and consequently the crime rate falls.

Once again these claims are speculative and the complexity of the social factors involved allows for widely differing interpretations of the available research. To illustrate this two entirely different suggestions are offered by some researchers in this field of the way society reacts to an increasing crime rate. Frost suggests that an increase in crime rate leads to an increase in sentences. Society adopts a 'get tough' attitude. Blumstein and Cohen on the other hand suggest the reverse because society is willing to deliver only a certain amount of punishment and also perhaps because it can only confine a limited number.

All that is certain is that no definite conclusions can be drawn from the evidence of research projects to date. With specific reference to punitive sanctions and their general effects, the research shows that these effects cannot be assessed independently of other factors, such as likelihood of arrest.

Incapacitative Effects

The final projects mentioned here are the small number of speculative projects that attempt to assess the effects of incapacitation on the crime rate. The general conclusion drawn are highly speculative and widely divergent and all that is done here is to quote the individual conclusions reached.

J. Cohen [36] provides the following summaries of four studies:

1. Clark: Philadelphia 1972 on Juveniles

   Estimates that only 1 to 4% of all known index crimes are avoided by incapacitation of juveniles.

2. Greenberg: 1975

   Estimates elimination of prisons would involve only a 1.2 to 8% increase in index crimes taking only the incapacitative effect into account.

3. Marsh and Singer: 1972, New York Robberies:

   Estimates a significant incapacitative effect of 35% - 48%.

4. Erlich: 1974

   On the assumption of a 50% reduction in time served estimates 5.6% increases in all index offences.

Summary

The appendix provides a very brief summary of some of the research projects undertaken in connection with the subject. In the text it is pointed out in the chapters on deterrence, incapacitations and reformation that there is very little firm evidence to support the empirical assumptions required by these justifications for punishment. It is also the case that there is little firm evidence that denies that types of punishment are effective to these ends.

This is to state the case very generally. It is hoped that the appendix, by briefly outlining the general conclusions of many of the relevant analyses, illustrates this general inconclusiveness.

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