DESERT AND PUNISHMENT

by

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This thesis is my own composition, and to the best of my knowledge all sources have been acknowledged.

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# CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>PREFACE</td>
<td></td>
<td>v</td>
</tr>
<tr>
<td>I</td>
<td><strong>INTRODUCTION: THE PROBLEM OF JUSTIFICATION</strong></td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>1. The Concept of Justification</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>2. 'Retributive' and 'Utilitarian'</td>
<td>19</td>
</tr>
<tr>
<td>II</td>
<td><strong>THE MEANING OF 'PUNISHMENT' AND THE SEPARATION OF QUESTIONS</strong></td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>1. Definitions and 'The Justification of Punishment'</td>
<td>25</td>
</tr>
<tr>
<td></td>
<td>2. Concerning Definitions</td>
<td>30</td>
</tr>
<tr>
<td></td>
<td>3. The Meaning of 'Punishment'</td>
<td>38</td>
</tr>
<tr>
<td></td>
<td>4. Justificatory Questions and Punishment</td>
<td>91</td>
</tr>
<tr>
<td>III</td>
<td><strong>THE CONCEPT OF DESERT</strong></td>
<td>97</td>
</tr>
<tr>
<td></td>
<td>1. Types of Desert Claims</td>
<td>103</td>
</tr>
<tr>
<td></td>
<td>2. The Deserving</td>
<td>105</td>
</tr>
<tr>
<td></td>
<td>3. The Deserved</td>
<td>108</td>
</tr>
<tr>
<td></td>
<td>4. The Grounds of Desert</td>
<td>110</td>
</tr>
<tr>
<td></td>
<td>5. The Rôle of Desert Claims</td>
<td>128</td>
</tr>
<tr>
<td>IV</td>
<td><strong>GETTING WHAT ONE DESERVES</strong></td>
<td>133</td>
</tr>
<tr>
<td></td>
<td>1. Justifying General Activities</td>
<td>135</td>
</tr>
<tr>
<td></td>
<td>2. Justifying the Infliction of Unpleasant Treatment</td>
<td>144</td>
</tr>
<tr>
<td></td>
<td>3. Justifying Particular Instances of Punishment</td>
<td>156</td>
</tr>
</tbody>
</table>
4. Appendix: 'Undeserving' and 'Ill-deserving'

V DESERT, PUNISHMENT AND JUSTICE

1. Justice and Justified Punishment
2. Justice and Mercy

VI PUNISHMENT AND RESPONSIBILITY

1. Responsibility as Alterability
2. Criteria of Moral Responsibility
3. The Elimination of Responsibility
4. Moral and Legal Responsibility

VII PUNISHMENT AND AUTHORITY

1. The Authority to Punish
2. Punishing Authorities
3. What Constitutes the Authority to Punish?

VIII GETTING AS MUCH AS ONE DESERVES

1. Is the Determination of Specific Deserts Necessary?
2. Specific Deserts and the Modes of Punishment
3. The Impreciseness of Specific Desert Claims
4. The Scaling and Determination of Specific Deserts

BIBLIOGRAPHY
This dissertation is written in the belief that the prevailing tendency to assess punishments in terms of their utility is defective in certain important respects. I have no doubt that utilitarian considerations have a significant rôle to play in ethical discussion, and, indeed, in the discussion of punishment; but their rôle in recent discussions of punishment seems to have been accentuated to the point where other considerations have been minimized, ignored, or rejected out of hand.

Punishment of course is open to discussion from several points of view. This is evident from the considerable legal, anthropological, sociological, psychological and theological literature on the subject. For the purposes which I have in mind, I shall ignore many of the problems of punishment which arise in the context of these disciplines. For example, I shall not concern myself with investigating whether punishment actually does reform, deter, educate, etc.; nor with the ideas of punishment held by judges, lawyers, prison warders, parents, members of other societies, and 'the plain man'. These are questions which for the

most part lie beyond the competence of the philosopher qua philosopher. Nor shall I attempt to give an historical survey of ideas of punishment - an interesting enough task, but bearing few philosophical fruits. As well, it will not be my purpose to discuss in detail the morality of various aims which utilitarians adduce to 'justify' the infliction of punishment. This would take me too far away from my central concern which is to present for reconsideration some neglected elements in the discussion. This dissertation, then, does not pretend to represent a comprehensive treatment of the problems of punishment but is far more limited in its scope.

The problems of punishment have usually been problems of justification, and the first Chapter is

(footnote 1 continued from p.v)


primarily intended to give a brief clarification of the notion of justification. In the light of what I say in later Chapters, this discussion assumes some importance, since it is my contention that a number of widespread confusions have arisen through failure to appreciate the nature and objects of justificatory questions.

The second Chapter, which is concerned with the meaning of 'punishment' and the distinguishing of various relevant justificatory questions, may seem, on the surface, to be covering familiar ground. And there is a certain amount of truth in this. However, even here my main emphasis has been to draw attention to features which have been neglected or confused in contemporary discussion. In the first section of the Chapter I question the common assumption that the tasks of defining and justifying are independent of each other, and in the following section my criticisms are directed against certain common assumptions about the nature of definitions. The conclusions of these two sections are then brought to bear on the final two sections, which form the subject of the Chapter.

As the title of this dissertation suggests, special consideration is given to an analysis of the concept of desert or merit, and to a re-assessment of its importance in meeting the various justificatory questions which can be raised concerning punishment. To date, very little detailed attention has been paid to the notion and rôle of desert - far less, so I contend, than it deserves. Chapter Three, then, is devoted to a general analysis of desert, while Chapters Four and Eight are directed to showing its relevance to punishment.
Chapters Five, Six and Seven are primarily concerned with meeting problems raised in the first four Chapters. In the fifth Chapter I consider some of the difficulties raised by my argument of the previous Chapter to the effect that desert is a necessary and sufficient condition for morally justified punishment. An implication of my discussion in Chapters Two and Three is that to be deserving a person must be responsible for his actions, and in Chapter Six I consider, first, in what sense a person must be held responsible to deserve punishment, and second, whether people can in fact be held responsible in the requisite sense. In the course of Chapters Two and Four I argue that it is not a defining characteristic of punishment that it be administered by some authority, and also that the fact that a person deserves punishment is not normally regarded as a warrant for its infliction by just anybody. By whom, then, should punishment be inflicted? is the basic question confronted in Chapter Seven.

For the most part the problems of punishment cannot be isolated from more general problems in ethics, and any discussion of punishment is bound at some stage to impinge on these wider issues. This becomes clear in the last three Chapters of this dissertation, where I briefly discuss the problems of freedom and responsibility, the nature and justification of social institutions, and the nature of ethical judgment, respectively. Each of these problems could justly claim a dissertation to itself. I have therefore been compelled to dogmatize, oversimplify, and even ignore
difficulties. This becomes critical in the last Chapter, where the waters run so rough and deep that I am conscious of being able to do little more than to point out how hard it is to swim. Nevertheless, I have endeavoured in each case to say enough to lend a reasonable plausibility to the views I have espoused.

Numerous people have in one way or another contributed to my thinking when writing this dissertation. My fellow Research Scholars at the Australian National University have frequently forced me to re-examine my arguments. Mr Dennis Rose and Mr Bernard Brown have patiently helped me in my legal naïveté. Professor J.A. Passmore has read through the final draft of the dissertation, and his comments have prevented me from becoming overconfident of my conclusions. Above all, I have been stimulated, demolished and rescued more times than I care to remember by my friend and supervisor, Mr Stanley Benn. He has given unstintingly of his time to reading my drafts and discussing my arguments. It is no fault of his that the final product is not better.
CHAPTER ONE

INTRODUCTION: THE PROBLEM OF JUSTIFICATION

As far back as Plato we find raised and considered most of the ethical problems relating to punishment. Time has diminished neither their relevance nor their problematic nature. Yet the problems have not always been exactly the same - more like variations on a theme, the variations provided by somewhat differing conceptions of punishment, and the theme being the justification of punishment. Punishment is said to stand in need of justification. Whether this is an unambiguous or even a proper way of speaking I shall consider later. For the time being I shall be concerned with the notion of justification, as justifications for punishment have often been sought without there being any clear idea as to the conditions under which justificatory questions arise and in what justifications consist. As will soon become obvious, these are considerable problems in themselves, claiming more attention than can be given them in the scope of this dissertation. Nevertheless, it is essential that we at least enter into the problems.

1. The Concept of Justification.

Justifying is one of a complex of activities such as proving, establishing, explaining and excusing, which are conceptually tied to the giving of reasons. Though they are related in this way, these activities
nevertheless represent answers to different sorts of questions, and hence to some extent different sorts of reasons are relevant to each of them. Here it is my task to examine the context in which justificatory questions or demands arise and to discuss the ways in which they can be met.

Requests or demands for justification are appropriate only with respect to things which people have done, are doing, or intend to do; that is, they can be demanded only of intentional activity. 1 True, a student can be asked to justify his opinions, a headmaster a rule, a philosopher an inference or argument, a doctor a diagnosis or a certain form of treatment, a judge a decision, or a conscientious objector his beliefs, but such requests are appropriate only because the things concerned are held, promulgated, put forward, stated, made, prescribed, or maintained by intentional agents or agencies (such as school councils, governments, or societies). Thus justification can not be the same as showing that something is true, effective, important, valid or coherent, as the case may be, even though in offering a justification an appeal might be made to truth, effectiveness, importance, etc.

But more can be said about justificatory requests. They are restricted to intentional activity for the simple reason that, unlike requests for causal antecedents or explanations, their purpose is to

1 Not necessarily intended activity.
eliminate an apparent discrepancy between an agent's (or agency's) intentional activity and some given norm, standard, rule or end. This apparent discrepancy can arise in a variety of ways. Sometimes it will be between an agent's verbal or non-verbal behaviour and his principles, ideals or ends (or what are taken to be his principles, ideals or ends). On other occasions it may arise between his behaviour and some generally accepted principle, ideal or end, or some principle, ideal or end adhered to or pursued by the person requesting the justification.

An important corollary of this is that grounds must be given for seeking a justification. Justificatory requests do not arise in a vacuum. Unless we can first get some idea what is bothering the questioner, a start

1 This is not always clearly seen. A.C. MacIntyre distinguishes two senses of 'justification', one 'in the field of conduct' which corresponds roughly to the sense I have outlined, and the other occurring in a discipline like geometry in which 'the justification of a theorem consists in showing how it follows validly from the axioms' (A Short History of Ethics, New York: Macmillan, 1966, p.49). This latter sense, in which 'justification' is simply equivalent to 'proof', though intelligible, is very loose and is not in fact employed by mathematicians. The same confusion is made by R.W. Newell, in The Concept of Philosophy, London: Methuen, 1967, Chapter Four: 'The Problem of Justification'. Paul Edwards also maintains that like other 'evidence-words' 'justification' is 'highly ambiguous'. However, it becomes apparent that Edwards is confusing the meaning of 'justification' with the criteria for its application in different contexts (The Logic of Moral Discourse, Glencoe, Illinois: The Free Press, 1955, pp.36-8, 130-1).
cannot be made on answering his justificatory request. This of course is not to say that justificatory requests themselves have to be justified before they can be admitted, but rather that they cannot be understood as such unless some ground of objection or alternative is specified. The history of philosophy is cluttered with the disputes of those who thought that they could keep on asking for justifications without giving any grounds for asking. As Austin pointedly reminds us:

The wile of the metaphysician consists in asking 'Is it a real table?' (a kind of object which has no obvious way of being phoney) and not specifying or limiting what may be wrong with it, so that I feel at a loss 'how to prove' it is a real one.

1 Thus Flew argues that 'a justification has to be of A rather than B, against C, and to or by reference to D; where A is the thing justified, B the possible alternative(s), C the charge(s) against A, and D the person(s) and or principle(s) to whom and/or by reference to which the justification is made' ('The Justification of Punishment', Philosophy, Vol. XXIX, 1954, p.295); cf. J Feinberg, 'On Justifying Legal Punishment', Nomos III: Responsibility, ed. C.J. Friedrich, New York: Liberal Arts Press, 1960, p.158; E.L. Pincoffs, The Rationale of Legal Punishment, New York: Humanities Press, 1966, pp.6, 64-7.

I shall argue later that much of the debate concerning punishment has been vitiated by the fact that what has stood in need of justification, and why it has stood in need of justification, have stood in need of greater specification.

Not only have many past discussions of punishment suffered from a lack of clarity, but they have often betrayed a fundamental confusion of explanatory with justificatory reasons. Vico apparently thought that the essential nature of an institution was shown by its genesis,¹ and so a number of writers have argued that retributive justifications of punishment are unsatisfactory because retribution has its origin in the primitive tribal practice of blood-vengeance.² Now whether or not retributive notions have arisen in this way, as they stand such accounts of their origins are quite independent of the question of the justifiability of retributive views of punishment.³

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Similar considerations apply to psychological and psycho-analytic accounts of why people hold particular views of punishment. To be told that retributive views of punishment are the expression of a sublimated desire for revenge does not impugn those views if independent grounds for holding them can be advanced — and, of course, this is what retributivists claim.  

Assuming that we are now clear as to the character of justificatory demands, we must consider two further distinguishable questions, namely, How are justificatory demands met? and, What is it for something to be justified? The two questions are distinguishable since it is possible for certain justificatory demands with respect to an action or general activity to be adequately met without that

1. W. Ullmann writes of retributive punishment: 'Although this theory appears at first sight tenable, it is by no means satisfactory. A closer analysis of the complex psychical mechanisms, upon which this theory is built, proves that retributive punishment is, in reality, a sublimation of the primitive lust for revenge, or to be precise, the individual, against whom or whose interests the crime was committed, conceives — for the most part unconsciously — that the crime is a personal injury against himself and endeavours to obtain some satisfaction for what he feels he has suffered; in the suffering of the delinquent he seeks to find some compensation for his own' ('The Justification of Punishment', Juridical Review, Vol. LIII, 1941, p.318); cf. H. Weihofen, The Urge to Punish, New York: Farrar, Straus, and Cudahy, 1956.
action or activity therefore being justified (or justifiable). Suppose I see a mother beating her child. Suspecting that she might be doing this simply as a sop to her frustrations I ask her to justify her behaviour. She replies that she is punishing him for hitting his smaller brother over the head with a cricket bat. This is a reasonable answer to the justificatory question I raised, but it doesn't necessarily justify her beating of the child. Someone else might very well complain that a beating was not the most appropriate way of punishing him, or, that considering the offence, she was punishing the child far too severely, or, that he was too young to know that what he was doing was wrong. The distinguishability of the two questions arises, then, from the fact that justificatory requests generally relate to particular aspects of a situation $X$, whereas to say '$X$ is justified' is to say something about the situation as a whole, and presupposes that all outstanding justificatory requests have been met.

But we are not in the clear yet. There is an objection to saying of a general activity or of a person's action simply that 'it is justified'. Such a statement is incomplete, for as it stands, it implies that there is such a thing as a neutral or all-embracing justification. But the fact of the matter is that a justificatory request is expressed in the terms of a particular sphere of discourse, and to be answered.

1 The notion of a 'sphere of discourse' is discussed below, pp. 14-15.
satisfactorily, it must be answered in terms of that sphere of discourse. The same goes for justifications. When somebody makes a statement like 'His punishment was justified', we are justified in asking 'How do you mean - legally, morally, psychologically, etc.?' Usually we can tell from the context. Nevertheless, it is important that we distinguish between these spheres of discourse, since it is quite possible for an action or general activity which is justified in the terms of one sphere to be unjustified in the terms of another. The mother might be quite within her legal rights in punishing the child, yet for various reasons such punishment may be morally unjustified. There has been much confusion of moral and legal issues in the controversy surrounding punishment. Mabbott, for example, considers that questions about the justice of a particular punishment can be settled by reference to its legality.  

1 'X is a citizen of a state. About his citizenship, whether willing or unwilling, I have asked no questions. About the government, whether it is good or bad, I do not enquire. X has broken a law. Concerning the law, whether it is well-devised or not, I have not asked... It is the essence of my position that none of these questions is relevant' to 'whether a particular punishment is just' (J.D. Mabbott, 'Punishment', Mind, Vol. XLVII, 1939, p.160). In a later article Mabbott insists that he considers questions about the justice of a punishment separately from questions about its justifiability ('Professor Flew on Punishment', Philosophy, Vol. XXX, 1955, p.261). This, however, must be a view he had gradually come to, as he identifies 'just' with 'justified' on a number of occasions in the earlier article (e.g. pp.152, 158). Furthermore, it is to be doubted whether 'justice' and 'justifiability' can be distinguished in the way Mabbott thinks. I discuss this in detail in Chapter Five, Section 1.
Even if he is intending to use 'justice' in a very restricted sense, he nevertheless (wrongly) believes that his analysis yields substantive moral conclusions.

Returning now to the two questions we set ourselves, firstly, How are justificatory demands met? The person who tries to justify his actions or some general activity against some objection has a number of moves open to him:

(a) He may attempt to show that there is only an apparent discrepancy between his actions or the activity and the standard or end which his objector invokes. Three ways of doing this can be suggested:

(i) He might argue that the standard to which the objector appeals incompletely specifies his action or the activity and that a complete specification would change its moral character. Suppose A accuses B of murdering C on the grounds that he killed C, that B was not acting in any official capacity, and that he killed C deliberately. B, to justify himself, may acknowledge each of these grounds but add that C had attacked his wife and was preparing to kill her and that there was no other way of stopping him (justifiable homicide).

(ii) Or he may argue that the standard to which the objector appeals overspecifies his action or the activity, and that a correct specification would change its moral character. Suppose A questions B's integrity after seeing him take C's umbrella from the rack. B may justify himself by pointing out that stealing
involved taking someone else's belongings without permission, whereas C had lent it to him.¹

(iii) Alternatively, he may argue that his action or the activity in question constituted one of the recognized exceptions to the standard invoked by the objector. If B is accused of evading the draft he might justify his behaviour by appealing to the clause which permits the exemption from service of those who, on religious grounds, are pacifists.

(b) Another and often more radical way in which a person may justify his actions or some general activity is by challenging the standard which is invoked against him. Suppose a Muslim or Jew accuses a pork-eating Protestant of defiling himself with unclean food, the latter, in justifying his behaviour, may agree that given their presuppositions he is defiling himself, but then proceed to criticize their presuppositions.

We can see then that there are a number of avenues available to those to whom justificatory requests are directed, and in the course of this dissertation we shall have occasion to avail ourselves of most of them.

We are now faced with the second and more difficult question: What is it for something to be justified (in the terms of a particular sphere of

¹ D'Arcy correctly points out that this way of going about matters is not always sufficient for justification. It may well serve only to decrease the gravity of a person's actions - say, from murder to manslaughter (E. D'Arcy, Human Acts, Oxford: Clarendon Press, 1963, pp.83-4). Nor is it necessary, as (iii) shows.
discourse)? At what point can we say of a person's actions or of some general activity that it is justified? I have already indicated that it does not automatically follow from the satisfaction of any particular justificatory question that that in respect of which it is asked is therefore justified. There may be other outstanding justificatory questions. This should warn us against the fallacy of confusing 'justifying an action' with 'getting an action accepted'.¹ There is no necessary connection between these two notions. Justifying an action or a general activity is not necessarily or simply a matter of satisfying a person or group of people concerning it. The mother who is beating her child may satisfy an enquirer by recounting the child's deed. But there may be other objections to her action of which she and the enquirer are ignorant—such as the cruelty of her method of punishment, or the inability of the child to distinguish between right and wrong. Alternatively, the mother may fail to satisfy any of her enquirers even though she may have succeeded in justifying her action. They may be so entrenched in certain misguided opinions that her reasons fail to count with them.

Taking these things into consideration, I want to suggest that an action or general activity is properly said to be justified (or justifiable) if no unanswerable justificatory requests can be made concerning it (in terms

of the same sphere of discourse). In this respect '... is justified' functions like '... is true' and '... is known'. It is always logically possible that the future will show us to be wrong, but until we can be given some reason for supposing that the future will show us to be wrong, it is improper to deny the legitimacy of the locution.

The distinction between 'justifying an action or general activity' and 'satisfying a particular justificatory request' does not seem to be clearly enough drawn in the contemporary debate. Take Rawls

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1 Stating matters in this way preserves the conceptual link between justification and the elimination of apparent discrepancies. It is thus more satisfactory than the analysis of J.B. Moore, who distinguishes 'complete theoretical justification' which is achieved when something 'has been deduced from the most basic virtues or a moral theory' from 'an equally acceptable sense ... according to which an action may be justified by appeals to lower order principles, ... without these principles themselves being called into question' (Retributive Justifications of Punishment, Unpublished Ph.D. dissertation, Harvard University, 1965, p.21). This analysis fails to distinguish between 'proving', 'establishing', 'giving the rationale of' and 'justifying'. The same can be said of A.P. Griffith's otherwise excellent article, 'Ultimate Moral Principles: Their Justification', in The Encyclopedia of Philosophy, ed. P. Edwards, New York: Macmillan and The Free Press, 1967, Vol. 8. pp.177-82.

2 See, for example, S.I. Benn, 'An Approach to the Problems of Punishment', Philosophy, Vol. XXXIII, 1958, pp.325-41; also the authors cited in J. Rawls, 'Two Concepts of Rules', Philosophical Review, Vol. LXIV, 1955, p.3 f/n. 2. Some of these philosophers show a vague awareness of the problem by referring sometimes to 'ultimate justification'.

for instance. He distinguishes between 'practices' and particular actions instantiating these 'practices', and then sets out to distinguish between 'the justification of a rule or practice and the justification of a particular action falling under it'. This does not seem to be a felicitous way of putting it. Rather, we cannot justify any particular action without meeting any outstanding justificatory questions concerning the 'practice' under which it falls. Even if we cannot justify a particular instance of punishment without reference to the rules which define the 'practice', this does not mean that the rules are sufficient to justify that punishment. It is only on the assumption that the 'practice' is justified that it is proper to speak of justifying a particular instance of punishment by reference to the rules defining the 'practice'.

To conclude this section on justification, I want to direct my attention more closely to the notion of 'moral justification'. This raises several important issues detailed discussion of which will have to lie for the most part outside the scope of this dissertation: What exactly is meant in speaking of 'the moral sphere of discourse'? Is there anything which can be intelligibly characterized in this way? If so, how is it to be distinguished from legal and other spheres of discourse? Although this is too large a question to be taken up now, there are a number of
relevant observations which might help us see our way round more clearly.

The language which we use to describe the world around us, including the actions of others, is not a disinterested or passive reflection of that world, but it and the distinctions it contains have evolved as a means of articulating and satisfying our needs, interests, desires and aspirations. As a natural part of this process of language-formation, a good many notions have been framed which cluster around particular sets of needs or interests. They constitute, as it were, different spheres of discourse - legal, moral, scientific, etc. The notion of lying, for example, comes from the moral sphere of discourse, bail from the legal sphere of discourse, and electron from the scientific sphere of discourse. Even though these spheres of discourse are distinguishable, they are not completely exclusive, and not only can many of our words function synonymously in several spheres of discourse (copulae, relational terms, and such words

as 'die', 'fifteen', 'good', etc.) but it is often possible for a notion framed from within one sphere of discourse to figure as legitimate currency in another sphere of discourse. Legal and moral spheres of discourse, for example, even though they have their own identity, also overlap in a complex sort of way. (Perjury, for example, can be properly understood only by reference to moral and legal spheres of discourse). Sometimes this creates problems, as when a notion framed by reference to one sphere of discourse is taken over into another sphere of discourse and is re-defined (like responsibility, when it is taken over from the moral to the legal sphere of discourse).

Our language contains a number of notions which must be explicated in terms of the moral sphere of discourse. Words like 'honesty', 'stealing', 'obscenity', 'murder', 'treachery', 'sincerity', 'lying', etc., already mark out for us, within the moral sphere of discourse, various types of behaviour. These notions tend to figure very significantly (either overtly or covertly) in justificatory disputes in the sphere of morals. More often than not, when a justificatory dispute arises, what is up for consideration is the proper description of an action or an activity. In moral disputes, each party tries, if possible, to show that the action or activity up for consideration is or is not properly described in terms of one of these moral notions. That is, he

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1 For a discussion of this, see Chapter Six, Section 4.
tries to assimilate the description of the action or activity to one or another of these moral notions. Of course we do not (as yet) have moral notions to describe every type of behaviour in which people might engage, and this complicates the problem of justification somewhat; but not irremediably. Be that as it may, these moral notions nevertheless constitute a basic ingredient in any moral argument, for unless appeal was made to them, the argument could not be understood as taking place within the moral sphere of discourse.¹

We saw how this worked in our earlier examples. To take one of them: If B kills C, he may be asked to justify his action since it constitutes a *prima facie* case of murder. It can, for example, be pointed out that B was not acting in any official capacity (executioner, soldier), and that he had deliberately killed C. To justify himself C will endeavour to show that there are relevant features of his action which make it unassimilable to murder, namely, that C was attacking his wife with intent to kill, and there was no other way of stopping him.

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¹ Sartre's well-known example of a person having to choose between serving in the resistance and fulfilling his obligations to his family is problematic largely because it is not easily assimilable to any of our existing moral notions. Not that these notions are therefore irrelevant. On the contrary. The moral problem arises and has the character it has precisely because we have these moral notions.
This account of justification in general and moral justification in particular has been necessarily sketchy and somewhat dogmatic. A more adequate discussion would need to take account of the contributions of Toulmin, Hare, and A. Phillips Griffiths, in particular, but that would take me too far beyond the task which I have set myself in this dissertation.Enough has been said to indicate what I regard to be some of the important considerations integral to an adequate philosophical discussion of punishment. Those on which I would place special emphasis are: (i) the importance of clearly specifying that in relation to which an action or general activity needs justification; (ii) a recognition that

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justificatory requests are expressed in terms of a particular sphere of discourse, and that this limits the sorts of considerations relevant to answering them; and (iii) a recognition of the fact that our language encapsulates notions framed with respect to particular spheres of discourse and in which description and evaluation are inextricably bound up.

I shall argue that on these three points in particular many discussions of punishment have come to grief. It is true that in the last few decades a much greater sensitivity has been shown to the subtleties of the justificatory questions which are relevant to punishment, but as shall become clear in Chapter Two, I do not think all or even most of the confusions have yet been removed. There, I point out the effect which the definition of 'punishment' has had on discussions relating to its justification, and then endeavour to define punishment in such a way that full justice is done to its rôle in the language. Following this I distinguish some of the philosophically interesting justificatory questions which arise. To prepare for an examination of some of the more fundamental justificatory questions in Chapters Four, Five and Eight, Chapter Three is taken up with a discussion of the notion of desert. Chapter Six, in which I discuss the concept of responsibility, is primarily a defence against objections which can be raised against the account of punishment I have presented in the preceding Chapters, and Chapter Seven, on the authority to punish, merits separate consideration in virtue of a distinction drawn in
Chapter Two between punishment as a non-institutionalized activity and punishment as a social practice or institution.

2. 'Retributive' and 'Utilitarian'.

There is a sense in which it would be fair to say that the history of discussions of punishment has been a history of the conflict and/or synthesis of 'retributivism' and 'utilitarianism'. This is not really surprising, for the history of ethics has largely been one of conflict between deontological and teleological moralities. Nevertheless, in another sense such a generalization about discussions of punishment is somewhat misleading, since it conveys the impression of a conflict between two clearly identifiable positions. This is neither historically nor conceptually correct. The words 'retributive' and 'utilitarian' (or its alternatives: 'deterrent', 'preventive', 'reformative', 'educative', 'consequential', etc.) have on some occasions been so broadly conceived that at other times they would have been practically indistinguishable from their contraries; moreover, it has often been difficult to state precisely what each of the terms has been intended to convey. 'Retributive' has been applied not only to justifications but also to definitions of punishment. Retributive justifications of punishment have been formulated in a variety of ways, the lex talionis (variously interpreted), 'annulment' (an almost unintelligible notion when applied to punishment), 'atonement', 'payment' (a formula of only limited application),
'expiation', 'vindication of the law', 'retaliation', 'denunciation', 'the right to punishment' (a very odd sort of right), 'satisfaction of resentment', and 'desert' (more frequently asserted than analysed), being among the more familiar. J.B. Moore generates no less than forty-eight distinct 'retributive' answers to the question 'Who is to be punished?' using just one of the formulations listed above. The possibilities are almost endless. D. Seligman argues that it is possible for a utilitarian to be a retributivist, and Bosanquet and McCloskey, who claim to be retributivists, adopt positions with which many so-called utilitarians would be happy to identify themselves.

It is clear that something is amiss here, and that not much is achieved by arguing for or appealing to the retributive or the utilitarian 'theory' of punishment. One reason for this is that people have engaged on the obscure and fruitless quest for the justification of punishment. I do not want to suggest that the distinction between 'retributive' and

1 J.B. Moore, op.cit., pp.41-3.
'utilitarian' is meaningless, only that if such a distinction is to be drawn, it must be drawn with care: not only because of the ambiguity of the notions but also because too much concentration on relating the discussion to such a schema may blind us to other important considerations. My own opinion is that the problems can be discussed without using either of the terms. However, since so much of the current debate is expressed in these terms, I shall have occasion to use them in the course of this dissertation. When I do so, I shall use them in the following senses: In relation to punishment, (a) a retributive justification is one whose grounds relate to the nature and circumstances of some act performed or activity engaged in, in the past; (b) a utilitarian justification is one whose grounds relate to the future consequences of that which they are intended to justify. I am not completely happy with this distinction, but as nothing in my own account hangs on it, I shall not make any further refinements to it.

One final word is in order regarding the use of the word 'theory'. For some reason there has grown up a tradition in which the various justificatory questions concerning punishment are answered in terms of this or that 'theory of punishment'. This strikes me as a very odd use of 'theory'. A theory of punishment, I would have thought, would refer to an hypothesis about why people are punished, but not to any sort of justification for punishing them.
In the circumstances it would make sense only to talk about a theory of the justification for punishing people.¹

CHAPTER TWO

THE MEANING OF 'PUNISHMENT' AND THE SEPARATION
OF QUESTIONS

One of my concerns in the last Chapter was to emphasize the importance of carefully distinguishing and formulating justificatory questions. There I indicated that discussions of punishment had continually been frustrated by a confusion of the various justificatory questions that could be raised concerning it. As well, I pointed out that what would count as a justification was very closely related both to the sphere of discourse in which the justificatory question was framed, and also to the specific grounds which provided the question's rationale. Thus, in the case of a mother called upon to justify her punishment of her child, she must determine whether the demand is concerned with, say, the morality or the legality of her act, and then the specific grounds on which the demand is based (its harshness, the degree to which the child can be held responsible, etc.).

There is another factor which is importantly relevant to the question of justification. This is the nature of the action or general activity to be justified. I noted earlier that the history of the debate about punishment took the form of variations on a theme, these variations being provided by somewhat differing definitions of 'punishment'. To a considerable extent, definitions have dictated the
nature of the justificatory questions which have been raised and the sorts of justifications which have been given of punishment.

In this Chapter I propose first to show how the definition of punishment and 'the justification of punishment' are interrelated. What will count as a justification depends to a considerable extent on what description or definition is given of the act or activity to be justified. I then go on to show that the diversity in definitions of 'punishment' is due, not so much to any vagueness in the term, but rather to different philosophic conceptions of what definitions ought to do. Here I argue that many discussions of punishment are erected on inadequate foundations.

With this background discussion I set about the task of defining 'punishment'. There has come to be accepted in the current debate a definition of 'a standard case punishment' which is expressed in terms of five 'elements' or 'conditions';

(i) It must involve an 'evil, an unpleasantness, to the victim';
(ii) It must be for an offence (actual or supposed);
(iii) It must be of an offender (actual or supposed);
(iv) It must be the work of personal agencies (i.e. not merely the natural consequences of an action);

This appears to have been explicitly recognized at last in a recent article by T. McPherson, 'Punishment: Definition and Justification', Analysis, Vol. 28, 1967-8, pp. 21-7.
(v) It must be imposed by authority (real or supposed), conferred by the system of rules (hereafter referred to as 'law') against which the offence has been committed.1

Although I do not propose to discuss this definition point by point, it will become clear that in many respects my own views are at variance with it. In the concluding section of the Chapter I will spell out what I consider to be valid justificatory questions with respect to punishment.

1. Definitions and 'The Justification of Punishment'.

The following three examples serve to show some of the ways in which the definition of 'punishment' has influenced justifications of punishment.

(a) Anthony Quinton argues that punishment is 'infliction of suffering on the guilty and not simply infliction of

In defining 'punishment' such that it logically must be of the guilty, he automatically rules out the possibility of using a person's guilt as a ground for punishing him; i.e. he rules out a priori what might otherwise have been offered as a retributive justification for his punishment. Quinton is well aware of this, for it is his aim to show that retributivism is a logical rather than a moral doctrine. Of course, Quinton's thesis does not rule out all possible justificatory questions. They can still arise at the

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2 Granted certain assumptions about the word 'punishment' to which Quinton and many others appear to subscribe. These assumptions are discussed in Section 3 of this Chapter.

3 Quinton, op. cit., p.86.

4 At the level of particular instances of punishment, Quinton seems to be reduced to asking: 'Am I justified in calling this treatment "punishment"?' In contrast to this, Hobbes includes a utilitarian element in his definition of 'Punishment': 'A Punishment, is an Evill inflicted by publique Authority on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the Law; to the end that the will of men may thereby the better be disposed to obedience' (Leviathan, Everyman edn., London: J.M. Dent, 1914, p.164). On the basis of this definition he goes on to infer that 'all evill which is inflicted without intention, or possibility of disposing the Delinquent, or (by his example) other men, to obey the Lawes, is not Punishment; but an act of hostility; because without such an end, no hurt done is contained under that name' (p.165). By this definition Hobbes rules out one possible, and indeed quite common, utilitarian justification of punishment, viz. deterrent.
level of the 'practice' of punishment. At this level Quinton appeals to utilitarian considerations.\(^1\)

(b) In contrast to Quinton, Rawls and Mabbott do not make actual guilt a logically necessary element in their definitions of 'punishment'.\(^2\) Thus, on the occasions on which an accused person is actually guilty, they are enabled to appeal to his guilt as a reason for punishing him, thereby finding a niche for retributive justifications of punishment. But they too, and Rawls especially, dictate the sort of justification appropriate to punishment by considering it to be essentially a social 'institution' or 'practice'. It is only because of this that they can draw a clear distinction between justifying punishment in general and justifying it in particular instances. Not only so, but in defining 'punishment' as a social 'practice' they make a broadly utilitarian justification of punishment appear much more plausible than it might otherwise be.

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1 Quinton, op. cit., pp. 90-1; cf. J. Laird: 'I wish to urge ... that punishment is by definition retributive, but that it is not, and cannot be, justified by its mere definition. On the contrary, in my view, retribution is never self-justifying; and therefore any justifiable retribution must be justified on other than retributive grounds' ('The Justification of Punishment', Monist, Vol. XLI, 1931, pp.353-4.)

2 J. Rawls, 'Two Concepts of Rules', *Philosophical Review*, Vol. LXIV, 1955, p.10. Mabbott does not provide a definition of 'punishment', but his frequent references to 'punishment of the innocent' make it evident that he does not make actual guilt a logically necessary condition.
(c) A further instance of the definition of 'punishment' prejudicing the matter of justification can be found in Bentham's definition of 'punishment' as 'an evil', by which he means that 'all punishment is mischief'. This goes close to reducing any retributive justifications of punishment to absurdity, for it presents a retributivist with the formidable task of combining two evils to bring forth good, where the good does not mean good consequences. Bentham himself succeeds in justifying punishment only as the lesser of two evils. G.E. Moore labours under the shadow of this Benthamite definition of punishment, and in his efforts to avoid utilitarianism at this point, he is forced to formulate his unsuccessful doctrine of 'organic wholes'.

In giving these examples I do not want it to be thought that I am suspicious of all definitions of 'punishment'. On the contrary. To define 'punishment' satisfactorily becomes a more important task when we realize how definitions can effect the sorts of justificatory questions which can properly be asked, and the sorts of answers that can properly be given to

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them. Nor do I want to give the impression that I consider it illegitimate to define 'punishment' so that certain justificatory questions or formulations thereof are ruled out. In the interests of clarity, however, it may sometimes be necessary to do so.

However, with regard to this last point it must be recognized that clarity is only the first word, and that we do not necessarily solve any moral problems by circumscribing 'punishment' in certain ways, thus ruling out certain justificatory questions. Genuine moral problems cannot be defined out of existence, even if it can be shown that they have been infelicitously expressed. In these cases definitions serve only to shift the problems from one point to another. We can see how this happens if we look again at the so-called 'definitional stop' employed by Quinton, Benn, and Laird. To their utilitarian justification of punishment they consider the objection that it could also justify

'(i) punishing the innocent, providing they were widely believed to be guilty ...; (ii) making a show of punishment, without actually inflicting it ...; (iii) punishment in anticipation of the offence.'

They reply by arguing that the question is based on a misunderstanding of what punishment is. The innocent logically cannot be punished since, by definition,

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1 Benn, op. cit., p.331. Actually (ii) is out of place, as it refers only to making a show of punishment; Quinton, op. cit., pp.86-7; Laird, op. cit., pp.366-9. C.W.K. Mundle, a non-utilitarian, produces the same argument in 'Punishment and Desert', Philosophical Quarterly, Vol. 4, 1954, p.220.
'punishment' is of the guilty. Now this definitional technique undoubtedly effectively serves to rule out a justificatory demand in one of the forms it could take, but it fails to solve the moral doubts which gave rise to the demand. For the same doubts can be re-expressed so as to avoid the force of the definitional stop: 'Won't your utilitarian position permit or necessitate us, in certain circumstances, doing to the innocent that which, when it is done to the guilty, is called "punishment"?'  

2. Concerning Definitions.

I have indicated some of the ways in which definitions of 'punishment' bear on the question of the justification of punishment. I now want to take the discussion back one stage further to a consideration of the nature of definitions. For, just as some of the confusions and problems surrounding the justification of punishment have arisen from hazy or incorrect notions of justification, so too have some of the confusions and problems surrounding the meaning of 'punishment' arisen from hazy or incorrect notions of definition. Definitions not only often reflect a philosopher's standpoint, they also betray his understanding of definition. A thorough examination of the character of definitions would take us too far afield for our

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purposes, so, as was the case with our discussion of justification, our discussion of definition will also have to be somewhat sketchy and dogmatic.

'Definition', like other function-words, is best approached by asking: What are definitions supposed to do? The possible answers are, of course, legion. But I want to suggest that the primary function of definitions is to give us rules for the use of words. They are not essentially descriptions, reports, or stipulations. On this view, the adequacy of definitions is to be judged by their success in enabling us to use a word unambiguously, comprehensively, and distinctly. This being the case, there is no reason why any one way of framing a definition should have priority over the rest. As in the case of justification, where what will count as a justification depends to a large extent on what is being justified, so also what will count as an adequate definition depends to a large extent on the general nature of what is being defined.

Now it seems to me that many of those who have discussed the meaning of 'punishment' have possessed a picture of definition which is not appropriate to it. Just as verbal definitions are not appropriate in the case of colour-words, so I want to suggest that definitions comprising a set of necessary and sufficient

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conditions are not appropriate in the case of many of the words which we use to characterize human activities. We can see the difficulties this view gets us into if we look again at Quinton's definition of 'punishment'. Quite rightly, he sees that there is a very close connection between punishment and guilt, and therefore he argues that the notion of punishment includes the idea of guilt. But because he apparently has a very rigid conception of 'defining characteristics', viz. that they must be logically necessary, he is forced into saying that 'punishment of the innocent' is a self-contradictory notion.\(^1\) He recognizes the oddness of this conclusion and tries to extricate himself from the charge of stipulation.\(^2\) But the difficulties into which this gets him are well known.\(^3\)

To take a case which tends towards the opposite extreme, Seligman is aware that sometimes innocents are punished. As well he is aware that not all punishments are inflicted by legal authorities. Nor are they all given for moral offences. However, because he too

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\(^1\) Quinton, op. cit., p.87. For other references, see p.29 f/n.1 above.

\(^2\) Pages 87-9.

appears to have the same rigid conception of definition as Quinton, he endeavours to define 'punishment' so broadly that it does not involve any 'stipulation': 'the infliction of suffering as the penalty for the doing of some deed'. However, Seligman does not realize that he has now defined 'punishment' so generally that it is practically indistinguishable from penalization. Not only this, but even by his own standards his definition is too narrow. Not every punishment causes suffering; some punishments do not involve the imposition of a penalty (generally a somewhat more sophisticated notion than Seligman seems to think); and others are meted out for the failure to do some deed.

It should now be clear that these philosophers are working with a conception of definition which will not do. It will of course do in some contexts. Sets of necessary and sufficient conditions are just the right candidates for defining logical or mathematical calculi, and the technical terms of a science. Indeed it is such terms that figure as prominent examples in the writings of those who have this rigid conception of definition. But many of the words in our language,

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2 The distinction between punishment and penalization is dealt with below, pp.61-5.

which, like 'punishment', are used to mark off one form of intentional activity from another, are circumscribed only to the extent to which they perform a specific task. This does not normally require a set of necessary and sufficient characteristics. Indeed, intentional activity is so varied that such a requirement would require a vocabulary many times larger than it now is. Thus, to look for a definition of an activity-word, comprising a set of necessary and sufficient conditions for its correct application, would most likely be to stipulate a use for it rather than to indicate how it is in fact properly used.

Most of our activity-words are defined partially in terms of features which are typically, but not always necessarily, implied in their use. What I mean by 'typically, but not always necessarily' will become clearer when we actually discuss the meaning of 'punishment'. The general idea is that they are defined in terms of a set of features which are jointly sufficient for their correct use, but some of which are necessary only in certain circumstances. It can be represented by the following schema. A is an activity-word, and is partially defined in terms of features a, b, c, d and e. It is not self-contradictory to assert that 'A is not a' or (vel) 'A is not b' or 'A is not c', etc., whereas it would be self-contradictory to assert that 'A is not a and not b and not c and not d and not e', and it might be logically inappropriate to assert that 'A is not a and not b and not c', except where A is being used metaphorically. I have said that A is partially
defined in terms of features which are typically, but not always necessarily implied in its use, because it is more frequently the case that \( a \) is always a necessary but not a sufficient condition for \( A \)'s use, and needs the supplementation of \( b, c, d, \) and \( e \) before \( A \) can be said to have been adequately defined. Except for \( a \) in this latter case, \( a, b, c, d, \) and \( e \) are what have been termed 'partially entailed characteristics'.

Now, to approach the question of definition in this way does not, I believe, preclude us from doing all the things we hope for from definitions—we can still distinguish between literal and metaphorical uses of a word, unqualified and qualified uses of a word, and are not prevented from saying of a particular word that it has, say, three distinct senses (by pointing to systematic differences). As well, we can give sufficient clarity to our terms without being reduced to vagueness or unwarranted stipulation. What our conception of definition does do, however, is to cater more adequately for the complexity of human behaviour.

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1. Cf. R.G. Robinson, 'Partial Entailment and the Causal Relation', *Mind*, Vol. LXX, 1961, pp.526-8. Wittgenstein extends this to the point where he is prepared to class two activities under the same concept, even though they do not possess any features in common. The two activities fall under the same concept in much the same way as the overlapping of short fibres goes to make up a single rope (Philosophical Investigations, trans. G.E.M. Anscombe, Oxford: Blackwell, 1953, §§ 66-7). It is evident, however, that definitions of this generality, if indeed there can be such, would have only a limited usefulness (J. Kovesi makes some telling criticisms of Wittgenstein in Moral Notions, London: Routledge and Kegan Paul, 1967, pp.22-3).
than its more technical counterpart. The mistakes that people make about definition are thus much the same as the mistakes they make about justification—the error of thinking that all definitions and all justifications have the same basic form.

I have suggested that the primary function of definitions is to give us rules for the correct use of words. We need to see this in the context of the remarks I made about language in Chapter One. The words which comprise our language, I maintained, are neither arbitrary nor disinterested reflections of the world, but presuppose our various needs, interests and desires. Not only this, but many of the words we use reflect or are related to specific interests which we have—they form, as it were, distinguishable spheres of discourse. Many of the terms which we use to describe intentional activity are framed from within the moral sphere of discourse. Examples of such are 'stealing', 'truth-telling', 'sincerity', etc. However, because they have been framed from within the moral sphere of discourse, they are already implicitly evaluative. This has not always been recognized. Generally, to say 'Stealing is wrong' or 'One ought to tell the truth' is not to express one's feelings about or to make a moral judgment upon a particular type of action. Rather, it is to make explicit what is already implicit in our conceptions of stealing or truth-telling.¹ 'Wrong' and 'ought' function in these

¹ Sometimes these judgments may be used to teach people the meaning of 'stealing'. Of course, understanding the meaning of a word does not always result in

(footnote continues on p.37)
statements as 'reminders' rather than as 'discriminators', to use Kovesi's terminology. Later on in this Chapter I shall argue that 'punishment' is a product of the moral sphere of discourse.

One further comment is necessary. When I say that many of our concepts are defined in terms of 'features which are typically but not necessarily implied in their use', I am not saying the same sort of thing as Hart when he speaks of defining 'the standard or central case of "punishment" in terms of five elements.' For Hart's 'elements' comprise the empirical or quasi-empirical characteristics of an activity. He is thus led to relegate certain activities (such as decentralized sanctions, parental and pedagogic punishments) 'to the position of sub-standard or secondary cases' of punishment. Now I have no objection to speaking of 'sub-standard or secondary cases' of punishment. What I cannot see is why, apart from the fact that Hart's examples of such do not completely accord with his 'five elements', they should be so relegated. Hart's definition is, to some extent, arbitrary. My own definition, as will be seen, relegates to the level of non-standard or secondary, only those cases of punishment


which are significantly different from the central cases. What I mean by 'significantly different' will become clear as the need to qualify 'punishment' not by the word 'non-standard' or 'secondary' but by words such as undeserved, unjust, etc. Hart focusses his attention too much on the empirical or quasi-empirical aspects of our concepts, and too little on what we are trying to do when we conceptualize.

3. The Meaning of 'Punishment'.

We come now to the actual task of defining 'punishment'. My procedure here will be fairly simple. I shall endeavour to isolate, one by one and as precisely as possible, the various defining characteristics of punishment; that is, those features which enable us to use 'punishment' correctly. At the same time I shall consider the differences made to our talk about the activity when one or more of these characteristics are lacking. One fact which will become obvious is the close relationship between the notions of justice and desert (as applied to punishment) and the defining characteristics of punishment. The importance of this will emerge later in this section. One further thing which my analysis will show is that 'punishment' is not as 'vague and "open-textured"' as Flew appears to think.¹

On certain occasions 'punishment' and its cognates are used in a clearly metaphorical sense. In such cases hardly any of the typically associated characteristics are present, and the term is used for literary effect. Such occasions might be when we speak of a batsman 'punishing the bowling', or of a boxer 'dealing out heavy punishment to his opponent', or of an athlete who 'punishes himself in training' or of a big-eater 'punishing the food'. Some philosophers have argued that 'punishment' when employed in such phrases as 'punishing the innocent',1 'collective punishment',2 or in speaking of a gang 'punishing an ex-member', of 'punishing one's colleagues for their misdemeanours', or of 'punishing a pet',3 is being used in a metaphorical sense. It will become clear that only in some of these cases do I regard 'punishment' as being used metaphorically, or even non-standardly.

(a) 'Punishment' is an activity-word. This is indicated by the fact that we speak of punishments being incurred, administered, meted out, inflicted or exacted. Punishments do not happen to or befall people. They are not occurrences or events, but treatments which

2 Flew, op. cit., p.295.
3 McCloskey, op. cit., p.315. Generally, people who speak of punishing pets rightly or wrongly ascribe certain human capacities to them.
are to be understood within the context of rule-governed (i.e. intentional) activity.

I need to distinguish this from the common characterization of punishment as a 'practice' or 'social institution'. Rawls, who champions a 'practice-conception' of punishment, defines a 'practice' as 'any form of activity specified by a system of rules which defines offices, rôles, moves, penalties, defences, and so on, and which gives the activity its structure'.

He illustrates his conception of a practice with the game of baseball. For various reasons we decide to establish a game which we call 'baseball'. This is constituted by a set of rules prescribing the number of players, bases, strikes, penalties, etc. These rules do not merely describe what goes on when people play baseball, rather they define the game. In fact, such notions as 'striking out', 'stealing a base' etc. can make sense only within the context of the game of baseball. It follows from this conception of 'practice' that if one wants to play baseball, the rules cannot be treated as 'guides as to what is best in particular cases'.

1 Rawls, op. cit., p.3; cf. Hart, op.cit., p.160. As examples of practices Rawls gives games, rituals, trials, and punishments. In a later article, he defines 'institutions' as 'those publicly recognized systems of rules which are generally acted upon and which, by defining offices and positions, rights and duties, give political and social activity its form and structure' ('The Sense of Justice', Philosophical Review, Vol. LXXII, 1963, p.282).

think that would be to misunderstand the activity in which one was engaged:

rules of practices are not guides to help one decide particular cases correctly as judged by some higher ... principle.... Neither the quasi-statistical notion of generality, nor the notion of a particular exception, can apply to the rules of practices.... An exception is rather a qualification or a further specification of the rule.¹

Apart from somewhat confusingly departing from its ordinary sense of 'custom' or 'habitual activity', Rawls' distinction between a 'practice' and particular cases falling under it seems to me to be valid and important. The question is, however, whether punishment can be fitted within this schema. And there appear to be a number of substantial objections to this.

Although it cannot be doubted that punishment is very often something like a social institution or 'practice', I find it difficult to agree that it must necessarily be so. Punishment as administered within a legal system comes closer to being a 'practice', but as we branch out into what Rawls recognizes as 'the less formal sorts of punishment' it is harder to see how his schema is applicable. Of parental punishments Rawls writes: 'a parent or guardian or someone in proper authority may punish a child, but no one else can.'² But Rawls is confusing moral with logical issues here. Certainly we are often inclined to argue that

¹ Page 27.
² Page 31.
only a parent or guardian ought to punish a child, but this does not mean that an outsider or stranger cannot punish him. Otherwise, what is Rawls to make of the complaint: 'You had no right to punish my Son.'? On his view, what was inflicted on the child was not punishment at all. Also, may not a parent forgive his child on certain occasions, or sometimes warn him instead of punishing him? That these things can go on at all consistently with the retention of parental punishment is unintelligible on Rawls' schema. On his view, these activities can go on only if they are built into the rules defining the practice of parental punishment. But obviously this is not so. Even if he were to argue that the practice of parental punishment presupposes certain discretionary powers on the part of parents whether or not to inflict punishment in particular cases, his case would hardly be strengthened. In fact, to allow that a practice could prescribe such a discretionary rule would tend to be self-defeating.

Rawls' schema, then, if it is to be applicable to all cases of punishment, must result in a certain amount of stipulation as to what will count as 'punishment'. But we can give other examples of punishments which will not fit into Rawls' schema. What about self-inflicted punishments, divine punishment, punishments inflicted by private individuals where law and order have broken down, etc. Rawls' schema, then, if it is to have more than surface plausibility, must be restricted to the infliction of punishment within a legal or quasi-legal framework.
And it is indeed a legal framework which provides the focus for Rawls' discussion. Thus he defines the institution of punishment as follows:

A person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen on the ground that he has violated a rule of law, the violation having been established by trial according to the due process of law, provided that the deprivation is carried out by the recognized legal authorities of the State, that the rule of law clearly specifies both the offense and the attached penalty, that the courts construe statutes strictly, and that the statute was on the books prior to the time of the offense.¹

But on closer examination not even legal or quasi-legal punishment will fit neatly into Rawls' schema. This is recognized by Quinton, who sees the 'practice' conception of rules as only 'a schema, a possible limiting case'. It is 'not an accurate description of the very complex penal systems actually employed by states, institutions and parents'. The 'practice' conception of punishment 'ignores an almost universal feature of penal systems ... discretion. For few offences against the law is one

¹ Page 10. Baier's definition sets out the practice conception of legal punishment even more clearly: "Punishing" is the name of only a part activity belonging to a complex procedure involving several stages. Giving orders or laying down laws, affixing penalties, etc. It follows from the nature of this whole "game", consisting of rule-making, penalization, finding guilty of a breach of a rule, pronouncing sentence and finally administering punishment, that the last act cannot be performed unless things have gone according to the rules until then' (op. cit., p.26). Does it follow from this that people cannot be punished under retrospective laws?
and only one fixed and definite punishment laid down. Normally only an upper limit is set.\(^1\) Rawls' elucidation of the practice conception of rules is convincing because he elucidates it by pointing to the game of baseball. Baseball, and games generally, are much more amenable to Rawls' schema, tending as they do to form a closed system in which all the possible moves are anticipated and dealt with. Though even in games there is room for a discretion which is not embodied in the rules. An umpire may often let minor breaches of the rules (in, say, hockey or football) go unchecked, so that the game may flow smoothly.

We can afford to follow rigidly a practice conception of rules in games, for, after all, they are only games. But the law is, by and large, a more serious business, and to be an acceptable institution it must cater more adequately than the rules of a game for the multiplicity of human behaviour and the almost infinite variety of situations into which human beings can get themselves. Therefore, although it must lay down a fairly definite pattern of laws, procedures, and penalties in order to be at all practicable, it cannot afford to be quite as rigidly enforced and definite as the rules of a game.

However, the differences between Rawls' schema and the legal institutions with which we are familiar are not limited to the matter of discretionary power. On Rawls' view, the judge's task is simply to apply

\(^1\) Quinton, op. cit., p. 91.
previously legislated rules to particular cases. But this is not a true picture of what happens in common law, for within common law the judges themselves have, by their decisions, a stake in law-making. The whole legal practice of appealing to precedents to justify decisions is unassimilable to the schema Rawls has outlined. Furthermore, under our present legal systems, not only the task of judging, but also the task of legislation, is compassed about by laws. Legislators by and large no longer decide whether there will be laws, but what laws there will be. Rawls in ascribing to legislators the task of deciding (on utilitarian criteria) whether to have laws and what laws to have, and to judges the task of applying (on a retributive basis) these already-prescribed laws has grossly oversimplified the actual structure of most legal systems and legal punishments, a structure which moreover we would find preferable to Rawls' suggested schema.

To sum up this critique of Rawls, then, I have not wanted to deny that punishment can be a social practice or institution, though I think that 'practice' and 'institution' need to be regarded far more flexibly than in Rawls' account. I do, however, want to deny that punishment as such must be conceived as a practice or social institution. Where it is defined as a practice, this is mainly because legal punishment is taken as the paradigm.

A corollary of the view that punishment is an activity is that it is administered by some intentional agent or agency (community, state, club, etc.). The unpleasant natural consequences of a person's actions are not
normally regarded as 'punishment', unless they are seen as being delivered by some divine agent. Thus, whereas we might sometimes say of the escaping criminal who is crushed in a landslide he has caused, that 'it served him right', it would be a little eccentric to regard this happening as 'punishment', unless we viewed natural calamities as the punitive instruments of God.

Contrast B. Bosanquet, who maintains that basically punishment is a 'reaction of the automatic system, instrumental to the end, against a friction or obstacle which intrudes upon it' (The Philosophical Theory of the State, Fourth edn., London: Macmillan, 1923, p.202; also Kant, who speaks of 'Natural Punishment (poena naturalis) in which Crime as Vice punishes itself' (Philosophy of Law, trans. W. Hastie, Edinburgh: T. and T. Clark, 1887, p.195). Further examples can be found in S. Hobhouse, 'Retribution', Hibbert Journal, Vol. XL, 1941-2, pp.320-1. Sir Ernest Barker writes: 'It is not the injured person who retributes or pays back; it is not even the whole community of persons considered simply as persons. It is the mental rule of law which pays back a violation of itself by a violent return, much as the natural rules of health pay back a violation of themselves by a violent return' (Principles of Social and Political Theory, Oxford: Clarendon Press, 1951, p.182). The main point that is being made rather badly here is that punishment ought to be impersonally administered. Barker's statement of this point is heavily influenced by his Idealism.

The moral degradation which may be consequent upon wrongdoing is not punishment for it, unless it is also seen as 'God's hardening of the wrongdoer's heart'.

McPherson allows that 'punishment by fate' is a legitimate locution (op. cit., p.22), but this seems to involve a personification of 'Fate'. We may, however, sometimes speak of the natural consequences of a person's behaviour as 'penalties'. Flew points out that there still remains a distinction between the natural penalties of and the prescribed penalties for, even though it is (footnote continued on p.47)
That the criminal 'brought it upon himself' is not sufficient to fulfil the requirement of intentional agency - we also think that it should have been the deliberate intention of the agent to inflict the punishment. Thus we speak of self-inflicted punishments only when the agent deliberately make himself suffer something unpleasant.\(^1\) We might, however, imagine a case in which a judge addresses a criminal whose behaviour has wrecked his marriage and bankrupted him: 'You have been punished enough. It would be cruel to punish you anymore.' But the judge could just as well have said, without any loss of meaning: 'Your evil deeds have caused you enough suffering. It would be cruel to punish you as well.' The judge may have been tempted to use 'punish' because he sees the criminal's sufferings as 'serving him right' or as 'giving him his deserts', and the relationship between the notions of punishment and desert is very close, as we shall see. Nevertheless, as I shall show in the next Chapter, the giving of deserts is not linked to intentional agency as strongly as the giving of punishment.

\(^{(footnote\ 3 \ continued \ from \ p.\ 46)}\) not clearly marked in our language. The former sense, however, probably exhibits the last vestiges of a once commonly held belief that all happenings are divinely ordered (op. cit., p.294).

\(^1\) Hart states that punishment 'must be intentionally administered by human beings other than the offender' (op. cit., p.161), thus relegating self-inflicted punishment to the status of a 'sub-standard or secondary case'. This appears to be arbitrary unless Hart's definition is taken to be, not of 'punishment' but of 'legal punishment'.
Some people have regarded remorse and 'the pangs of conscience' as punishments. But this seems to make sense only if they are believed to have been prompted by some agency such as God. Those of psycho-analytic bent also speak of conscience in this way. They are enabled to do this because they conceive of the conscience or super-ego itself as an intentional agent.

C. de Boer considers remorse and 'the pangs of conscience' to be the paradigms of punishment: "To inflict punishment as such is quite beyond the power of any person or institution. Punishment is suffered in the offender's conscience "at the hand of God", and consists in an intellectual and emotional attitude towards past character and past action in the light of the judgments of God or of Society as these are appropriated by the offender himself" ('On the Nature of State Action in Punishment', Monist, Vol. XLII, 1932, p.618). Although de Boer speaks here of punishment being suffered 'at the hand of God', from what follows, it is evident that he does not regard intentional agency as being necessary. E.F. Carritt also comes fairly close to this view when he maintains that 'remorse is the penalty that fits the crime, that which all punishment seeks to simulate and to stimulate' (The Theory of Morals, Oxford University Press, 1928, p.110); cf. J. Charvet, op. cit., p.576; Ella Wheeler's poem, 'The Punished', in Galaxy, Vol. 23, 1877, p.789; F.B. Ebersole, 'Free Choice and the Demands of Morals', Mind, Vol. LXI, 1952, pp.248-9; G. del Vecchio, 'The Problem of Penal Justice', Revista Juridica de la Universidad de Puerto Rico, Vol. 27, 1957-8, p.67 f/n. 3.

(b) Punishment involves the infliction of unpleasant or unwanted treatment. Offering a job to a penniless or unemployed thief is not likely to count as punishing him, even if it reforms him. The reason for this is that we do not intend that offering a job to him should cause him any unpleasantness. Nor do we expect him to find it unpleasant. But it is not difficult to think of cases in which punishment which is intended to be unwanted or unpleasant is not so. A masochist, for example, may commit an offence in order to get flogged or whipped. A magistrate may fine a millionaire gangster for a criminal offence knowing full well that the fine will be laughed off. A fanatic may seek to be punished in order to further his cause. During the last century it became a matter of concern that many vagrants and paupers were committing petty criminal offences in order to get the bed and food provided in prison.¹

In a recent article, J.M. Smith gives a number of literary examples of punishments which, in the circumstances, could only doubtfully be regarded as 'unwanted or unpleasant'. From this he concludes that unwanted or unpleasant treatment is not a defining characteristic of punishment. But this point would hold only against those who believe that 'if an act which we took to be an act of punishment could be shown

not to be painful or coercive, we would, or at least should, withdraw the name "punishment".\textsuperscript{1} It is because Smith himself holds this rigid conception of definition that he denies any conceptual relationship between punishment and unwanted treatment. It should be clear however that on my own conception of definition, the fact that a particular punishment does not involve unwanted or unpleasant treatment does not automatically disqualify it from being punishment. Such punishments may well be inadequate, inappropriate, misguided or inefficacious (depending on the case), but they are punishments nevertheless.

But while I do not think it to be a necessary characteristic of punishments that they are experienced as unpleasant or unwanted, I would insist on the necessity of punishments being intended to be unpleasant. Unless a person intends to inflict unwanted or unpleasant treatment on another, then what he inflicts is not punishment, whether or not it is unpleasant. This is of course closely related to what I have been arguing in (a) above.

This brings us to a distinction which has an important bearing on our discussion of the meaning of 'punishment'. Tables with broken legs or missing tops are still tables. Their being defective in some way does not make us call them something else. It would be

too inconvenient. Nevertheless, they are not 'tables' in the standard sense of the word. We could not easily teach a person the meaning of the word 'table' by using defective examples. This is because tables typically or characteristically have sturdy legs and tops - it is important that they do in order to fulfil the purposes for which they have been made (and in terms of which they are partially defined). To question whether tables with broken legs or missing tops are really tables, is unnecessary (even confusing), but to think that tables can therefore be characteristically broken-legged or topless is mistaken, as it is also mistaken to call a frame supported by four legs a 'table' or even a 'topless table' if there was never any intention of putting a top on it. The two cases are empirically similar but conceptually different, because what makes a certain empirical arrangement into a table is not simply its organization, but also the human needs, interests, etc. which have led to its organization in that way. Similarly with punishments. To question whether punishments which are not unwanted or unpleasant really are punishments is unnecessary (even confusing), but to think that punishments can therefore be characteristically 'inefficacious' is mistaken, as it is also mistaken to call treatment given to offenders but not intended to cause them any unpleasantness, 'punishment'. To give a definition is to give rules for the use of a word; it is not simply an enumeration of various empirical characteristics. What makes us call a certain piece of behaviour 'punishment' is not simply its empirical features but also the human interests and purposes which have given rise to it.
Generally, writers on punishment have characterized it as 'an evil' (Hobbes, Bentham, Flew, McCloskey\(^1\)), 'pain' (Ewing, Armstrong, D. Locke, Maclagan\(^2\)), 'injury' (Hegel\(^3\)), 'hurt' or 'hardship' (Baier\(^4\)), 'suffering' (Quinton, Feinberg, Loftsgordon, Oxford English Dictionary\(^5\)), or 'deprivation' of a good, a privilege or a right (D. Locke, J.M. Smith, Mabbott, Rawls\(^6\)).

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imposed or inflicted on someone for some misdemeanour. Most of these terms can be extended to cover the various kinds of treatment that can figure as punishment, but they tend to be too closely related to specific forms of punishment,¹ or are unsatisfactory in other ways.²

¹ 'Pain', 'hurt', and 'hardship' are probably more appropriate for physical sufferings. Some frequently used punishments, such as fining or even execution, do not necessarily involve pain. 'Suffering' is perhaps a little too exaggerated for many punishments, but it has the necessary range. 'Deprivation of a right' has a false simplicity about it as it must be understood to cover both legal and 'natural' rights.

² To speak of punishment as an evil is ambiguous, and those who have spoken of it in this way have tended to trade on the ambiguity. For example, Rashdall writes: 'A wrong has been done - say, a crime of brutal violence; by that act a double evil has been introduced into the world. There has been so much physical pain for the victim, and so much moral evil has polluted the offender's soul. Is the case made any better by the addition of a third evil, - the pain of the punished offender, which ex hypothesi is to do him no moral good whatever?' (The Theory of Good and Evil, Second edn., Oxford University Press, 1924, Vol. I, p.286); and Salmond: 'Punishment is in itself an evil and can be justified only as the means of attaining a general good. Retribution is in itself not a remedy for the mischief of the offence but an aggravation of it' (quoted in T. Sheard, 'The Theory of Punishment', University of Toronto Quarterly, Vol. IV, 1934-5, p.98).

The two senses of 'evil' (both with respectable histories) can be brought out by considering the two sentences, 'Evil befell Jones' and 'What Jones did was evil'. The substantive form bears the meaning of 'unpleasant happening', the adjectival form of 'morally wrong'. Bentham fails to see this ambiguity, and so he slides from 'punishment is an evil' to 'all punishment is mischief' (Principles of Morals, p.281). Hegel strongly criticizes the view of punishment which treats it as an 'unqualified evil', thus reducing retributive (footnote continued on p.54)
Some writers use a combination of these terms; but in all these cases the important thing about punishment is its unpleasantness or unwantedness.

Linking the aspect of unpleasantness or unwantedness with my earlier point about its deliberate infliction, it can be seen that it is not enough that the treatment received by the person punished just happened to be unpleasant (as in the case of the dentist who fails to anaesthetize the patient's tooth properly) or was even unavoidably but not intentionally so (like lancing a snakebite when no anaesthetics are available). Rather, the unpleasant or unwanted nature of the treatment must be the deliberate intention of the punisher or punishing authority.¹

(c) Punishment is meted out for moral wrongs.

Punishment is always given for something. It cannot be meted out for no reason at all or for no reason in particular. In principle it must always be possible to give reasons for punishing a person. This would seem to be a necessary rather than simply a partially entailed characteristic of punishment. If no reasons can be given, then the person has been ill-treated or victimized, but not punished.

¹ This point is accounted for by Benn and Peters' addition to the five conditions satisfied by a standard case of punishment as originally suggested by Flew (op. cit., p.174), and is incorporated into Hart's list (condition iv). Bentham makes the same point in Principles of Penal Law, p.391.
What, then, is punishment given for? Typically, it is meted out for some disobedience or failure to obey. It is usually maintained that the disobedience or failure to obey must constitute an offence against some law or rule. There is a sense in which this is true, but not in the way it is sometimes thought to be:

(i) Jurists with Austinian leanings tend to regard laws as commands backed by sanctions or punishments. However, punishments are not related to laws in this way. There are many laws which threaten no punishment, even if certain consequences follow from the failure to observe them; take, for example, constitutional, administrative, or procedural laws. ¹

(ii) Mabbott maintains that 'punishment is a corollary not of law but of law-breaking.'² But not all punishments are for law-breaking. A child may be quite properly punished for disobeying the command of his parent; the pupil, for throwing chalk, even though there is no explicit ruling against it.

Nevertheless, I want to insist that a background of rules (in the broadest sense)³ or at least an established background of rules in the broadest sense.

³ I say this because I suspect that moral rules function significantly differently from legal and quasi-legal rules, and I shall want to argue that the legal model on which many philosophers lean in their discussions of punishment is not a good one (See Rawls, 'Two Concepts of Rules',... (footnote continued on p.56)
way of doing things must be presupposed where punishment is meted out. This can be seen in the counter-examples to Mabbott which I have cited. The unpleasant treatment of the child for disobeying the command is regarded as punishment because it is viewed in the context of parent-child or family relationships which generally include a rule or understanding to the effect that children ought to obey their parents. Similarly, although there is no explicit ruling against throwing chalk, yet the unpleasant treatment which the child receives is regarded as punishment because it is seen against a background within which his behaviour is unacceptable, and the child ought to know it. This background of rules becomes more explicit when we say that punishment is meted out for an offence or wrong, rather than for an injury (in the sense of damage) of some sort. The notion of an offence or wrong presupposes a background of rules, whereas the notion of an injury does not.¹ Injuries are punishable only if they also constitute offences or wrongs. This is one of the features which distinguishes punishment from revenge or retaliation. Revenge is taken because of some hurt or injury, not because of some offence or wrong (whether or not the hurt or injury also constitutes an offence or wrong).

(footnote 3 continued from p.55)
p.10; Hart, 'Prolegomenon to the Principles of Punishment', especially pp. 160-2; Smith, Punishment: Its Nature and Justification, especially p.24). On legal models and moral rules, see J. Feinberg, 'Supererogation and Rules', Ethics, Vol. LXXI, 1960-1, pp.276-88. ¹ There is of course a perfectly respectable sense of 'injury' in which it means 'a wrongful action or offence', but it is not this sense to which I am appealing here.
I want now to suggest that typically, the disobedience or failure to obey of which the offender is guilty, must expose him to moral condemnation or blame, if the unpleasant treatment meted out on him is to be regarded as punishment. This is one of the ways in which punishment is to be distinguished from quarantine. My contention, however, goes contrary to the trend of much recent discussion of the nature of punishment, though it is more in line with classical views. Mabbott, we have seen, argues that punishment is a corollary of law-breaking, not of moral wrongdoing. 'A criminal', he writes, 'means a man who has broken a law, not a bad man'. Otherwise we would be faced with the problem of finding someone with authority to punish moral wrongdoing. This, he believes, cannot be done, God alone having the status necessary to punish moral offences. More recently, Benn and Peters have argued that 'we do not punish men for their wickedness but for particular breaches of law.' The State, they maintain, is not an agent of cosmic justice, it punishes only such acts as are contrary to legal rules, conformity to which, even from unworthy motives like fear, is considered of

1  This being the case, certain important conditions relating to the wrongdoer must first be satisfied. Some of these will be discussed in Chapter Six.
2  Mabbott, 'Punishment', pp.155, 161.
3  Page 154.
4  Benn and Peters, op. cit., p.176.
public importance. And if we offer the narrower ground, that the wicked ought not to profit from their crimes, we are bound to justify the distinction between crimes and offences against morals in general.¹

In similar vein, Hart states that punishment is a

Social institution of which the centrally important form is a structure of legal rules, though it would be dogmatic to deny the name of Punishment ... to the similar though more rudimentary rule-regulated practice within groups such as family, or a school or in customary societies whose customs lack some of the standard or salient features of law (legislation, organized sanctions, courts).²

He putatively takes over criteria for a standard case of punishment from the articles by Flew and Benn, though it is interesting to note how he alters one of their criteria from 'an offence against some law or rule' to 'an offence against legal rules'. Thus he relegates to what we have seen he calls 'sub-standard or secondary cases' of punishment, 'punishments for breaches of non-legal rules or orders'.³ Consistently with this, he argues that certain actions are made into crimes or offences.

¹ Page 177.
³ Page 161; cf. Flew, op. cit., p.293; Benn and Peters, op. cit., p.174. In his article, Flew made it quite clear that he was throwing his net wider than legal rules (pp.294-5).
to announce to society that these actions are not to be done and to secure that fewer of them are done. These are the common immediate aims of making any conduct a criminal offence, and until we have laws made with these primary aims we shall lack the notions of a 'crime' and so of a 'criminal'.

Otherwise 'we cannot distinguish a punishment in the form of a fine from a tax on a course of conduct.'

Now there is of course a sense in which legal punishments, at any rate, are for law-breaking and not for moral wrongdoing. When a man is brought before a court, what is directly up for consideration is his legal status, not his moral status. Not that his character and actions cannot come up for moral assessment and censure in the courtroom, but rather that they do so initially only in so far as they are relevant to the determination of whether or not he has broken some law.

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1 Page 163.

2 An interesting and controversial exception is, of course, Shaw v. D.P.P. ([1961] 2 All E.R. 446), in which Viscount Symons argued: 'When Lord Mansfield, speaking long after the Star Chamber had been abolished, said that the Court of King's Bench was the custos morum of the people, and had the superintendency of offences contra bonos mores, he was asserting, as I now assert, that there is in that Court a residual power, where no statute has as yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society.' (p.452). However, it must be noticed that even here, the interest is not primarily centred on the moral quality of Shaw's act, but on its tendency to 'disrupt the order of society'.
At a later stage of the proceedings they may be relevant to the penalty he is to receive, but the primary concern is still with what the law prescribes. If allowance is made for the circumstances under which a crime was committed, this is first of all because provision is made for this in the law.

But I do not think this goes deep enough. We are reluctant to call all penal sanctions 'punishments'. Such impositions as parking fines, fines for duck shooting out of season, fines for failure to have a red light showing, etc. are hardly punishments, even though they are sanctions imposed for law breaking. True, they are often called 'punishments', yet somehow we feel that the term does not fit happily here. The same goes for punishments for offences in which liability is strict. There is a tendency even within the law to shy away from calling them crimes, and to refer to them as 'regulatory offences' or some similar name instead. The concentration on a legal model in recent discussions of punishment has I think obscured this differentiation within legal sanctions. Had parental punishment been used as a model then I do not think this assimilation of all legal sanctions to punishment would have occurred so easily (though no doubt other generalizing mistakes would have been made). There are of course some jurists who recognize this differentiation and distinguish between 'condemnation sanctions' and 'other deprivations'.

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1 See below, Chapter Six, pp. 238-9.
2 To use the terms of H. Lasswell and R.C. Donnelly, 'The Continuing Debate over Responsibility: An (footnote continued on p.61)
The distinction, I want to suggest, is properly made by reference to the moral worth of the offending action. 'Punishment', I shall argue, properly applies only to those legal offences which also expose the offender to moral condemnation; otherwise he is penalized not punished. There is a stigma attached to being punished which we are usually reluctant to associate with minor traffic and other administrative offences. The distinction between penalty and punishment is an important one, yet confused in almost every recent discussion of punishment. As will be seen, it is somewhat broader than the distinction between 'condemnation sanctions' and 'other deprivations', yet they are basically the same.

If I am punished for an offence and there is a prescribed penalty for my action, the distinction between the two can be marked by saying that the penalty is the form which the punishment takes. Thus we may speak of there being a penalty of $40 with a one month's suspension as punishment for a first drunken driving offence; or of the need for heavier penalties for sexual offences; or of an option between a fine of $50 and 14 days imprisonment as the penalty for being in possession

(footnote 2 continued from p.60)


Feinberg, in the article mentioned in the preceding footnote, is one of few to have noted the importance of the distinction. The distinction is also made by McCloskey, but he does not develop it ('The Complexity of the Concepts of Punishment', pp.313-4).
of stolen goods; or we might speak of the maximum penalty for manslaughter being life imprisonment, the exact penalty being left to the judge's discretion. Since penalties are (in these cases) the form which punishments take, the imposition of an alternative penalty could constitute just as severe a punishment.

Mabbott argued that punishment is a corollary of law-breaking, not of moral wrongdoing. On the basis of the distinction I have pointed out between penalties and punishments he would have been somewhat nearer the truth had he said that penalization is a corollary of law-breaking, not of moral wrongdoing. If we can grasp the point that when a person is punished, the penalty he receives is the form which his punishment takes, we can see that what legal rules prescribe are not punishments but penalties.

Before I expand this last point further, I want to note various features of penalties both in themselves and in their relation to punishments. I have already observed that not every penalty which is prescribed by law is administered as a punishment. Often a $2 fine for overparking is not regarded as a punishment (though a refusal to pay the fine may give rise to a penalty that would be regarded as a punishment). We look at such fines more as discouragements to the breaking of certain administrative rules than as punishments. There is not the same stigma attached to them. Penalty clauses are often included in contracts, requiring certain payments should the contracted work not be
completed by a stated date.\(^1\) We also speak of penalty rates which are introduced into some wage arrangements.\(^2\) In all these cases we have examples of legally prescribed and enforced penalties, but there is no suggestion of punishment.

The notion of penalization, like that of punishment, is not limited to the law, and in such cases, as in the cases where it is legally imposed, the two may be distinguishable and separable. Penalties may be prescribed in almost any situation where rules may be broken. For example, the penalty for tackling a person round the neck in Australian Rules Football is a free kick to the opposing side.\(^3\) Yet it is clear that the penalty which is incurred here does not also constitute

\(^1\) Strictly speaking, these are referred to as liquidated damages clauses. In law they are called 'penalty clauses' only if deemed excessive.

\(^2\) The term 'penalty rates' may be peculiar to Australia. It refers to the special rates of pay appropriate to overtime work (such as time and a half).

\(^3\) Sometimes we tend to use the notion of penalty even more broadly to refer to the natural and unpleasant consequences of an act (cf. p. 46 f/n. 3 of this Chapter). Thus, if I arrive at a party after all the food has been eaten, I might be told, 'Ah well, that's the penalty for coming late.' Even here there is some notion of appropriateness which leads us to speak of the consequences of late-coming as a penalty. I would not have evoked the same response if instead I had trodden on a piece of glass left from the party.
a punishment. Nevertheless, in some circumstances we might regard the penalty incurred for a breach of non-legal rules as a punishment. If the player was sent off the field for 'foul play' or disqualified for life because of 'unethical conduct' we might justifiably regard it as punishment.

Conversely, not every punishment involves a penalty. When a mother spanks her child for stealing from the biscuit tin, the spanking can hardly be called the 'penalty' for stealing biscuits because it has not been publicly prescribed in accordance with a set of rules. Of course the mother could have laid it down that whenever anyone (or simply 'her child') was caught stealing from the biscuit tin he would be spanked, in which case a spanking would be the prescribed penalty. A penalty is essentially a specific treatment of an unpleasant nature which is prescribed by a system of rules for breaches of those rules. This is also supported by the Oxford English Dictionary which defines a 'penalty' as 'a loss, disability or disadvantage of some kind, either ordained by law to be inflicted for some offence, or agreed upon to be undergone in case of violation of a contract'. Thus we may have a legal system in which there are specified penalties for breaches of the rules but under which no one is penalized

1 R.M. Hare has drawn a distinction between 'penalty' and 'punishment', but he goes too far when he says that 'a penalty is a threat the carrying out of which is a punishment'. ('Punishment', an unpublished paper read to the Australasian Association of Philosophy [Canberra Branch], July, 1966).
or punished because no one has broken any law or has ever been successfully convicted. The fact that there are no punishments does not mean that there are no penalties either. Penalties are prescribed, whereas punishments cannot be. Punishment is an activity, not a legal or quasi-legal prescription.

I have been wanting to suggest that the penalization of a person for breaking some rule or law (which is the proper function of the law) constitutes the infliction of punishment on the person only on such occasions as he is held to be morally blameworthy. There is a stigma attached to being punished which does not attach to being merely penalized, and this stigma arises from the fact that punishment carries with it the moral condemnation of the wrongdoer's actions. Of course 'penalization' and 'punishment' are not always used in this way in the law, but then we must not confuse a word's use with its usage. 'Punishment', to put it bluntly, does not find its home in the legal, so much as in the moral sphere of discourse. This does not mean that it cannot be used (or misused) in a legal context, only that to understand it in terms of that context is to misconceive it. Law-breakers can be punished as well as penalized, but this is because many legal offences are also moral offences. The fundamental mistake of rule-utilitarian justifications of punishment is that they are not really justifications of punishment but of penalization.

The philosophers whom I have criticized for failing to distinguish between penalties and punishments also tend to analyse the notion of a crime without reference
to moral wrongdoing. To call an act a *crime* or a person a *criminal* normally has strong condemnatory overtones, and we find it very appropriate to speak of criminals deserving punishment. To define the terms 'crime' and 'criminal' is, however, no easy task. On the one hand, Fitzgerald's claim that 'whether or not any conduct constitutes a crime in English law depends solely on whether or not such conduct has been proscribed as criminal by the law', is in a sense unexceptionable.\footnote{1} On the other hand, such an unsatisfying definition may prompt us to say with H.M. Hart, Jr. that 'so vacant a concept is a betrayal of intellectual bankruptcy.'\footnote{2} Hart goes further than this to argue that such a definition 'is false to popular understanding and false also to the understanding embodied in existing constitutions'. On his view, 'what distinguishes a criminal from a civil sanction and all that distinguishes it ... is the judgment of condemnation which accompanies and justifies its imposition.'\footnote{3} A crime 'is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.'\footnote{4} Fitzgerald's definition, P.J. Fitzgerald, *Criminal Law and Punishment*, Oxford: Clarendon Press, 1962, p.7; cf. Wharton: 'A crime is an act made punishable by law.'


\footnote{2} Ibid.

\footnote{3} Page 405. I am not sure that I would choose to identify 'moral wrongdoing' with 'the moral condemnation of the community'. Nevertheless, Hart's point is clear enough. (footnote continued on p.67)
while it avoids the stipulation which jeopardizes Hart's, nevertheless fails to account for the attitudinal differences which tend to be involved in our common distinction between 'crimes' and 'civil or regulatory offences'. This Hart endeavours to do by linking crime with moral wrongdoing.

I am not convinced that analysis will help us to solve this problem. A decision is called for. We are confronted with at least two partially competing conceptions of crime, each of them having certain drawbacks. To some of those offences classed as 'crimes' under Fitzgerald's definition we feel strongly tempted to say 'They shouldn't regard B as a crime' or 'B isn't really a crime'. And we do not regard a person as a criminal simply because he persistently commits criminal offences; e.g. the businessman who repeatedly leaves his car in a half-hour parking bay as long as he likes, because it is more worthwhile to pay the fine than to find an alternative way of organizing his business. Alternatively we can object to the stipulative nature of Hart's definition, which denies the epithet 'criminal'

(footnote 4 continued from p.66)

Cf. J.F. Stephen: 'By a criminal, people understand not only a person who is liable to be punished, but a person who ought to be punished, because he has done something at once wicked and injurious in a high degree to the interests of the community' (A History of the Criminal Law in England, London: Macmillan, 1883, Vol. II, p.76); H. Rashdall: 'A crime is simply a sin which it is expedient to repress by penal enactment' ('The Theory of Punishment', International Journal of Ethics, Vol. II, 1891-2, p.30). The common identification of 'sin' with 'wrongdoing' seems to me to be incorrect and often misleading. But I shall not go into that here.
to such dubiously immoral acts as 'betting in a public house, shooting game on Sunday', both of which are criminal offences in English law.

It seems to me that if the designation of some acts as 'criminal' is going to have some point, then we must opt for some more restrictive definition similar to Hart's. Not that moral wrongdoing is the only possible candidate for discriminating between criminal and other offences. We might define criminal acts as those acts proscribed by law which cause considerable social harm. However, this does not seem as satisfactory as Hart's definition. For not only would it be difficult to class 'attempted crimes' as criminal offences on this definition, but also it ignores the fact that it is as much a criminal offence to steal a 5c stamp as to murder someone.

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1 Fitzgerald, op. cit., p.4. Many other strict liability offences would fall into this category too.

2 For classical utilitarians such as Mill, for whom social harm or welfare was the criterion of wrongness or rightness, the choice between moral wrongdoing and social harm as defining features of a crime was an unreal one. See A.R. Louch, 'Sins and Crimes', Philosophy, Vol. XLIII, 1968, pp.38-50.

3 It might be plausibly maintained that although someone's stealing a 5c stamp after hours from the office stamp reserve, because he had run out, would legally constitute a crime, we should not be willing to say that the person was guilty of a crime. This is probably because we feel that an offence of this sort would not warrant the weight of the law being brought to bear on it: \textit{de minimis non curat lex}. In these cases we might draw a further distinction between crimes and peccadilloes. This is acknowledged in Papua and New Guinea law where there is a defence of triviality (Local Courts Ordinance (1963) §20).
I do not want to enter into a discussion of the traditional distinction between those acts which are said to be *mala in se* and those which are said to be *mala prohibitā*, except to relate it to my own view. All legal offences which are *mala in se* are crimes, on my view—such acts as murder, stealing, rape, fraud, etc. (making allowance for the fact that the legal definitions of these acts are not quite coextensive with their moral definitions). But only some acts which are *mala prohibitā* could be considered crimes: those administrative directives (such as driving on the left hand side of the road\(^1\)) the neglect of which constitutes a danger or threat to the well-being of others.

Although I have been arguing that punishment is typically or characteristically meted out for some offence which exposes the offender to moral blame, it must be quite clear that sometimes people are punished and not merely penalized for offences which do not also constitute moral wrongs. This is permitted by my definition of 'punishment'. Punishments are only typically and not always necessarily meted out for moral wrongs. Nevertheless, as I indicated before, in cases where one of the typically associated characteristics is missing, we qualify the punishment in some way. In this case we would probably say that the punishment was undeserved or unmerited. This reaction would probably not have been appropriate had the person simply been penalized for his non-moral wrong. No complaint would have been made. But to regard his treatment as

\(^1\) In Australia.
punishment rather than as penalization imputes to him an unworthiness which he may rightly deny by saying that such punishment was undeserved.1

(d) Punishment is inflicted on offenders. I have argued that punishment is administered on the basis of some disobedience or failure to obey which also constitutes a moral wrong. However, more is needed for unpleasant treatment to qualify as punishment. It is also characteristic of punishment that the person to whom unpleasant treatment is meted out has committed the offence in respect of which the punishment is inflicted.

A question which immediately rises, and around which a surprising amount of controversy has gathered,2 is: Does this mean that we cannot refer to the unpleasant treatment which is inflicted upon a person in respect of some wrong which he is believed to have committed, but which he has not actually committed, as 'punishment'? Quinton, as we saw earlier, argues that 'the infliction of suffering on a person is only properly

1 This point is made in a slightly different way by a number of recent writers who link punishment with the expression of resentment or indignation; e.g. J. Feinberg, 'Justice and Personal Desert', pp. 80-4, 91-3; idem. 'The Expressive Function of Punishment', passim.; P.F. Strawson, 'Freedom and Resentment', Proceedings of the British Academy, Vol. XLVIII, 1962, pp. 207-8; O.C. Jensen, 'Responsibility, Freedom, and Punishment', Mind, Vol. LXXV, 1966, pp. 235-6.

2 Perhaps it is not surprising that so much controversy has surrounded this question, for the fate of the utilitarian position has often been thought to hang on it.
described as punishment if that person is guilty.'¹ Thus to speak of 'the punishment of the innocent' is 'in a sense a contradiction in terms', and 'applies to the common enough practice of inflicting the suffering involved in punishment on innocent people and of sentencing them to punishment with a lying² imputation of their responsibility and guilt.'³ However, people are sometimes punished for things which they have not done, and Quinton endeavours to meet this difficulty by likening 'punish' to 'performative verbs' such as 'promise', and thus distinguishing its first-person-present use from its use in the second and third persons:

By the first-person-present use of these verbs we prescribe punishment and make promises; these activities involve the satisfaction of conditions over and above what is required for reports or descriptions of what their prescribers or makers represent as punishments or promises.⁴

¹ Quinton, op. cit., p.86.
² This is odd, for it is surely possible for people to be mistakenly punished (Cf. McCloskey, 'The Complexity of the Concepts of Punishment', p.319). Probably Quinton has in mind only those cases in which it is known that the 'offender' is innocent (Cf. Rawls: 'Certainly by definition [punishment] isn't what it pretends to be. The innocent can only be punished by mistake; deliberate 'punishment' of the innocent necessarily involves fraud' ['Two Concepts of Rules', p.8 f/n. 8]).
⁴ Page 88.
Again, as we have noticed earlier, Benn also insists that 'punishment of the innocent' is a logical impossibility, and for the phrase to be understood, it must mean either "pretending to punish", in the sense of manufacturing evidence, or otherwise imputing guilt, while knowing a man to be innocent, or simply 'cause to suffer', in which case we would be using 'punish' in a secondary sense. More recently, K.G. Armstrong has drawn a distinction between weak and strong senses in which the sentence 'He was punished for something he did not do' can be understood. In the weak sense,

the sentence could simply be asserting that someone who was not in fact the perpetrator of the crime had been treated as though he were, either because those in authority held sincerely though mistakenly that he was guilty of it, or because they had deliberately tried to mislead the public.

This use of 'punish' is no more odd or unintelligible than the use of 'kill' in the familiar expression, 'They half killed him'. If, however, 'punish' is used in the strong sense, i.e., that sense in which it is being used in its 'exactly proper way', then the sentence, 'He was punished for something he did not do' is

2 Armstrong, op. cit., p.479.
3 Ibid.
self-contradictory. Flew takes a somewhat different
tack by maintaining that while

it would be pedantic [because the
term 'punishment' is vague] to insist in single cases that people (logically)
cannot be punished for what they have not done; still a system of inflicting
unpleasantness on scapegoats - even if they are pretended to be offenders - could scarcely
be called a system of punishment at all.

Flew thus sees no contradiction in speaking of punishment in cases where one or other of the criteria for what we call a standard case of punishment is not satisfied, so long as these cases are regarded and continue to be regarded as exceptional. In a later article, Baier takes exception to both Quinton and Flew. Quinton, he argues, is mistaken in his view that 'punish' is a 'performative verb' like 'promise', for to say 'I punish' is not to punish, whereas to say 'I promise' is to promise. Flew, on the other hand, is mistaken in thinking that the problem is simply one of frequency of occurrence. It is easy to envisage the deterioration of a legal system which results in the wrongful

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1 Pages 479-80.
3 Page 293.
4 Page 303.
5 Baier, 'Is Punishment Retributive?', p.30. An excellent discussion of Quinton's claim that the first-person-present use of 'punish' is performative is found in D. Seligman, op. cit., pp.74-80.
punishment of a majority of people.\footnote{Page 28.} What is important, Baier claims, is that people are found guilty, not that they are guilty; for punishing is part of a "game" consisting of rule-making, penalization, finding guilty of a breach of a rule, pronouncing sentence, and finally administering punishment, such that the last act cannot be performed unless things have gone according to the rules till then. It is one of the constitutive rules of this whole 'game' that the activity called punishing, or administering punishment, cannot be performed if, at a previous stage of the 'game', the person in question has been found 'not guilty'. ... If, after the jury has found the accused 'not guilty', the judge continues as if the jury had found him guilty, then his 'I sentence you to three years' hard labour' is not the pronouncement of the sentence, but mere words. If, for some reason, the administration acts on these words, then what they do to the accused is not the infliction of punishment, but something for which (since it never happens) we do not even have a word.\footnote{Pages 26-7.}

Armstrong, however, expresses some doubts as to whether Baier's analysis will do, even for his (Armstrong's) own weak sense of 'punish'; for although 'it includes everything that we would call punishment, it also includes things we would not call punishment.'\footnote{Armstrong, op. cit., p.481.} Take, for example, the case of an innocent man, who, though known to be innocent is declared to be guilty by a court that goes through the formal motions of a trial,
is sentenced, and duly executed. Would it be proper to call this 'punishment'? Or, if a schoolmaster regularly beats one of his pupils after saying the words 'Bloggs! You were laughing!' (an informal declaration of his guilt), although Bloggs never so much as cracks a smile and the teacher's eyesight is good, would we want to say that Bloggs is punished regularly? Or is he rather being victimized? Other philosophers have also taken exception to views like those of Quinton, Flew and Benn, and have maintained instead that the person punished must be believed or supposed to have committed the offence.¹ Some have gone even further and have allowed that

we call arbitrary punishments, punishments - e.g. punishments under the Nazi regime, where individuals are punished when not guilty of any offence.... If there were any suggestions of an allegation of an offence, even in the most stretched sense of 'offence' such as allows the incurring of the monarch's displeasure to count as an offence, we should, I suggest, speak of them as systems of unjust, unmerited punishments, rather than systems of pain inflictions that were not really systems of punishment but pseudo-punishment systems.²


² McCloskey, 'The Complexity of the Concepts of Punishment', p.320. In 'Utilitarian and Retributive Punishment', McCloskey interprets this as meaning that punishment is not 'conceptually tied to the fact that the person (footnote continued on p.76)
It seems to me that the root of the problems which give rise to this debate is to be found in the tendency to subscribe to the rigid conception of definition which I criticized earlier. Certainly, if 'offender', 'wrongdoer', 'guilt' or 'disobedience or failure to obey' is made a logically necessary condition for calling unpleasant treatment 'punishment', then it will not make sense to speak of 'punishing the innocent'. But if 'guilt' is only typically or characteristically involved in speaking about punishment, then it is only a logically necessary condition for speaking about unqualified punishment, and we may quite well speak about qualified punishment when the person punished is not guilty. When a person is mistakenly punished then we must speak of his punishment as 'undeserved' or 'unmerited'. Of course the situation is different when it is known that the person is innocent.

However, doubts can be raised as to whether my own suggestion can escape all the problems. For in saying that 'guilt' or 'disobedience or failure to obey' is punished is an offender' (p.105). There is an interesting proclamation preserved in the Australian National War Museum, Canberra, which reads: 'In future the inhabitants of places situated near railways and telegraph lines which have been destroyed will be punished without mercy (whether they are guilty of this destruction or not). For this purpose, hostages have been taken in all places in the vicinity of railways in danger of similar attacks; and at the first attempt to destroy any railway, telegraph or telephone line, they will be shot immediately. Brussels, 5th October, 1914. The Governor, VON DER GOLTZ.'
typically or characteristically involved in speaking about punishment, am I not committed to the same difficulty as Flew, namely, of having to deny the possibility of a situation arising in which most punishments (in our present use of the word) are wrongful? Or alternatively, am I not, like Baier, committed to including as punishments more than we would want to call punishments? (Unless I wish to go as far as McCloskey, and allow that a mere 'allegation' is sufficient to qualify unpleasant treatment as 'punishment'.) These objections, however, misunderstand the meaning which I have given to 'typically' or 'characteristically', for they are not equivalent to 'usually'. To say that 'guilt' or 'disobedience or failure to obey' is typically or characteristically involved when speaking of punishment, is to say that unless punishment is qualified in some special way, it is assumed by the speaker that this feature is present when he speaks of unpleasant treatment as 'punishment'. Also, as I argued earlier in this Chapter, we must draw a distinction between the absence of one of the features characteristically involved in employing a concept, and its deliberate exclusion. It seems to me that we shall be quite willing to speak of punishment, albeit undeserved punishment, when unpleasant treatment is inflicted on a person in respect of some offence which he is believed to have committed but which he has not actually committed. But deliberately to inflict

1 I am not convinced that 'allegation' is as non-committal as McCloskey appears to think.
unpleasant treatment on a person knowing full well that he has not committed any offence (even though he may have been 'alleged' to have committed an offence or may have been formally 'found guilty' of an offence) is not to punish him, but to victimize, take advantage of, bully, persecute, tyrannize, or oppress him, and to cover this up by making it look as though he is being punished.¹

(e) Must punishments be administered by an authority?

It is almost universally agreed in philosophical circles that one of the defining characteristics of punishment is its administration by some authority.² Punishment, ¹

It seems to me that Baier's example ('Is Punishment Retributive?', p.30) of the executioner whispering to the man being sentenced to death, 'I am punishing you for something you have not done', gains any plausibility it has from the fact that the punishing authority and the instrument of punishment (the executioner) are separated. We take the executioner to mean, and indeed he could just as well have said: 'They're punishing you for something you have not done' or 'You're being punished for something you have not done'. Seligman would not agree with this. He argues that the statement 'I am punishing you for something you have not done' is ambiguous and is absurd only if it is interpreted as 'I am punishing you for nothing'. Punishment must always be for something. But the statement is not absurd if it means 'I am punishing you for something even though you did not do this something' (op. cit., pp.72-4). This interpretation is more persuasive, though I think we would still speak of 'making someone pay' rather than 'punishing'. (But see the 'proclamation' on p.76 f/n.2 above).

² I have come across very few exceptions to this. Bentham, interestingly enough, seems to recognize this possibility. He defines punishment as 'an evil

(footnote continued on p.79)
it is said, cannot be administered by just anybody. It 'has to (be at least supposed to) be imposed by virtue of some special authority, conferred through or by the institutions against the laws or rules of which the offence has been committed.'¹ I do not believe

(footnote 2 continued from p.78) resulting to a person from the direct intention of another, on account of some act that has been [or at least appears to have been] done or omitted'. And he comments on this: 'By the denomination thus given to the act, by the word punishment, taken by itself, no limitation is put to the description of the person of the agent; but on the occasion of the present work, this person is all along considered as a person invested for this purpose with the authority of the State;' etc. (Principles of Penal Law, p.391). Filangieri, Hobbes and Locke considered that in a state of nature every man possessed the right to punish, a right, however, which had been transferred by contract to the sovereign at the formation of civil society (cf. J. Heath, Eighteenth Century Penal Theory, Oxford University Press, 1963, p.61). Others who do not make 'authority' a defining characteristic of punishment are R.B. Brandt, 'Blameworthiness and Obligation', in Essays in Moral Philosophy, ed. A.I. Melden, Seattle: University of Washington Press, 1958, p.27; R.A. Samek, 'Punishment: A Postscript to Two Prolegomena', Philosophy, Vol.XLI, 1966, pp.216, 221; P. Herbst, 'Notes on Punishment', an unpublished (duplicated) lecture delivered at the Australian National University, Canberra, June, 1966. pp.2-3; J.A. Patterson, 'Uses of "Punishment"', Unpublished paper read to the New Zealand Philosophy Conference, May, 1968.

¹ Flew, op. cit., p.294. Flew confirms his argument by appealing to the Oxford English Dictionary, which defines 'punishment' (sense 1a) in the following way: 'As an act of a superior or of public authority: To cause (an offender) to suffer for an offence; to subject to judicial chastisement as retribution or requital or as a caution against further transgression; to inflict a penalty upon.' But this definition does not support Flew - for it is intended only to be a definition of (footnote continued on p.80)
this to be the case. For unpleasant treatment to be 'punishment' it is not at all necessary that it be meted out by some special authority. Punishment which is not inflicted by an appropriate authority is by definition unauthorized, illegal, or unlawful punishment (provided that it is meted out in the context of a legal or a quasi-legal framework), yet it is still punishment. Punishments do not presuppose either a legal or a quasi-legal system: only authorized, legal or lawful punishments. Punishments may be deserved or just even when they are unauthorized. There is nothing at all odd about a father saying to a neighbour who has punished his son for fighting. 'You've got no right to punish my son'; nor do we find any logical oddity in speaking about people who 'take the law (or punishment) into their own hands'; nor are we puzzled about self-inflicted punishments, nor punishments inflicted by private citizens when the institutional authority has broken down. It is still punishment even if the punisher recognizes his lack of authority: 'I know I don't really have the authority to do so, but I'm going to punish you myself'. This is in marked contrast to the defining characteristics which I have been considering. There we saw that if a particular characteristic was deliberately excluded from the unpleasant treatment, then we no longer referred to it as 'punishment'.

(footnote 1 continued from p.79)

punishment 'as an act of a superior or of public authority', not of punishment in general. This legal or quasi-legal context is not part of the definition of punishment. This is shown by sense 1b in the O.E.D. The Shorter O.E.D. does not mention authority.
What, then, do most philosophers say about unpleasant treatment which is not imposed by some authority? Flew is as good and as representative an example as any, and I quote his views:

A parent, a Dean of a College, a Court of Law, even perhaps an umpire or a referee, acting as such, can be said to impose a punishment; but direct action by an aggrieved person with no pretensions to special authority is not properly called punishment, but revenge. (Vendetta is a form of institutionalized revenge between families regarded as individuals.) Direct action by an unauthorized busybody who takes it upon himself to punish, might be called punishment - as there is no unanimity rule about the simultaneous satisfaction of all the criteria - though if so it would be a non-standard case of punishment. Or it might equally well be called pretending (i.e. claiming falsely) to punish.¹

In contrast to Flew, the position which I wish to defend is that punishment ought generally to be meted out by some authority - parental, legal, etc. It is not the case that unpleasant treatment is punishment only if it is imposed by some authority. Flew's defence of this latter position is based on a number of confusions. (i) He states that 'direct action by an aggrieved person with no pretensions to special authority is not properly called punishment but revenge.'² It is true that

¹ Ibid.
² Flew is supported in this by G.H. von Wright, who states: 'One could say that revenge and retaliation are what punishment "logically" deteriorates into, when approximate equals try to command one another' (The Varieties of Goodness, London: Routledge and Kegan Paul, (footnote continued on p.82)
whereas we speak of having an authority to punish, it would be strange to speak of having an authority to take revenge. But to think, as Flew seems to, that the difference between revenge and punishment is a matter of authority is quite mistaken. For it is quite possible for an aggrieved party who does have special authority (e.g. a parent) to take revenge on another (his child). For the ground of revenge, and the feature which distinguishes it from punishment, is the fact that someone has hurt me or someone close to me. Revenge is the getting of one's own back; the notion of moral wrong is irrelevant to it. A father may thus take revenge on his child if the unpleasant treatment is inflicted on the child, not because of the offence or wrong which the child has committed, but because of the injury caused to the parent by the child's offence. The act of a busybody who 'took it upon himself to punish' an offence logically could not be revenge if his own interests (and those of others close to him) were not harmed in any way by the offence. Not only this, but revenge can be taken on a person whose actions are


It would be strange, but not impossible. I could imagine such an authorization occurring in countries where vendettas are recognized by the authorities (e.g. Corsica).
morally praiseworthy. If \( X \) murders \( Y \) and is gaoled for it, I, being a close friend, relative, or admirer or \( X \), may without logical oddity be said to seek revenge on the policeman who caught him or the judge who sentenced him. The same applies also to the notions of vindictiveness and retaliation.¹

(ii) If with Flew we regard vendetta as a form of institutionalized revenge, the same difficulties are faced. Vendettas will be distinguished from punishments not by the fact that they are not authorized actions, but by the fact that they are retaliatory—matters of getting one's own back. Injuries, not moral considerations, will be primary.²

(iii) Flew is double-minded on punishment by busybodies: it may be regarded either as a non-standard case of punishment or as a false claim to punish. But he does not tell us why either of these should be the case apart from the fact that 'punishment by busybodies' does not fulfil the criterion of 'imposed by some authority'. This is simply to reiterate the point that 'punishment by busybodies' is either non-standard or a false claim to punish, not to give grounds for it. As I mentioned


² Flew's characterization of vendetta as institutionalized revenge is not altogether convincing: 'institutionalized vengeance' is somewhat closer. Vengeance, unlike revenge, is specifically for wrongs done to the avenger (or those close to him).
before, there is nothing odd about the use of the word 'punish' in the sentence, 'You've got no right to punish him'. There is no suggestion that he wasn't really punished - unless it is felt that when others take punishment into their own hands, they must be merely getting their own back. Similar sorts of considerations apply to lynching - which at its best is illegal punishment and at its worst mob revenge.

As I have already suggested, the relationship of punishment to authority is moral rather than conceptual. As a rule we think that the task of administering punishment ought to be limited to someone having the appropriate authority. It is not difficult to conceive of a society whose members punished their fellows whenever they did wrong. But it is considerably more difficult to imagine persons like ourselves as members of such a society. Human nature is not like that; we cannot be trusted justly to punish our fellows if left to ourselves. We are too impetuous and fault-finding, too easily swayed by the wrong motives, too eager to excuse ourselves at the expense of others, and too ready to remove the mote from our brother's eye while neglecting the beam in our own. This is why we have blood-feuds, lynchings and revenge. This is also why we need to adopt conventions and draw up regulations for the imposition of punishment. Only so can we reasonably hope for a tradition of impartial and just punishment. But we shall say more about this in Chapter Seven.

I have now completed my enumeration of the criteria for calling something 'punishment'. We may sum up as follows: Punishment, when unqualified, must be

(i) an activity;
(ii) administered by some intentional agent or agency;
(iii) unpleasant or unwanted;
(iv) intended to be unpleasant or unwanted;
(v) for something;
(vi) inflicted for some disobedience or failure to obey which constitutes a moral wrong;
(vii) of the wrongdoer.

Of these criteria, I have suggested that (i), (ii), (iv) and (v) are logically entailed in referring to something as 'punishment' (except, of course, when it is being used metaphorically). Criteria (iii), (vi) and (vii) are what I have referred to as partially entailed characteristics. Their absence does not necessarily mean that we can no longer speak of 'punishment', only that we must at least qualify it as inefficacious, undeserved or unjust. If either (iii), (vi), or (vii) is deliberately or knowingly omitted, then it is no longer appropriate to speak of the treatment as 'punishment'.

But we have not quite completed our task yet, for although we have elucidated the defining characteristics of punishment we have not fully explained what 'punishment' means — what is its rôle in the language. To this we now come.
(f) **Punishment as a moral notion.** In his article on punishment, K.G. Armstrong writes: "punishment" is not in itself an ethical term; "punishment", like all activity words, can occur in ethical propositions, but such propositions are not made ethical by its presence.1

With this we may compare some remarks of Rawls:

> The subject of punishment, in the sense of attaching legal penalties to the violation of legal rules, has always been a troubling moral question. The trouble about it has not been that people disagree as to whether or not punishment is justifiable. Most people have held that, freed from certain abuses, it is an acceptable institution. Only a few have rejected punishment entirely, which is rather surprising when one considers all that can be said against it.2

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1 Armstrong, op. cit., p.476. Much the same sort of view was propounded by Hare in the paper mentioned above.

2 Rawls, op. cit., p.4. William Godwin was one who argued that the infliction of punishment was unjustifiable. His primary reason was that punishment, in enforcing moral behaviour, obscured the real reasons for doing right. As well, by pigeon-holing human behaviour it constituted the main cause of prejudice. A further reason for Godwin's rejection of punishment can be found in his acceptance of determinism. Despite this, Godwin still argued for the retention of punishment as a temporary expedient (Cf. D. H. Monro, Godwin's Moral Philosophy, Oxford University Press, 1953, pp.145-52). Those who reject all punishment nowadays generally do so because they subscribe to deterministic theses which lead them to repudiate the notions of 'moral wrongdoing' and 'responsibility'. We shall discuss this in some detail in Chapter Six.
Now if, as I suspect he does, Rawls has a conception of the word 'punishment' which is similar to Armstrong's, then it is not difficult to understand his surprise. For an ethically neutral concept which described an activity involving the infliction of unpleasant treatment would certainly face a number of prima facie objections. However, if the implications of my previous discussion have been grasped, it will be seen that Rawls has no real reason to be surprised, because 'punishment' is a moral notion.¹

Armstrong's remarks suggest that activity-words cannot be ethical terms; he does not argue for it. However, it is clear enough that quite a number of activity-words are ethical terms: 'promise-keeping', 'murder', 'stealing', 'lying', etc. All these words, as I pointed out in Chapter One, have been framed from within the moral sphere of discourse. It is my contention that 'punishment' belongs to this group. This is not because all activity-words are ethically loaded. Indeed, many of them are not. 'Killing', 'taking' and 'infliction unpleasant treatment' fall into this latter category. If I am asked: 'Are killing and taking things and inflicting unpleasant treatment wrong?' my only answer can be: 'It depends.' Before we can tell whether killing or taking things or inflicting unpleasant treatment are wrong we must have a fuller description of what situations are

envisaged. Supposing the descriptions are now expanded to: killing people because you bear a grudge against them; taking things that do not belong to you - without first gaining permission; inflicting unpleasant treatment for moral offences; then we are in a better position to say whether or not they are wrong. For now we have given descriptions of murder, stealing, punishment. The first two describe morally reprehensible activities, the third a morally acceptable one. If instead we had expanded 'inflicting unpleasant treatment' to 'inflicting unpleasant treatment for fun', then we would have described 'sadism', another notion framed from within the moral sphere of discourse, and by definition wrong. 'Punishment', I want to say, stands in the same relation to 'inflicting unpleasant treatment' as 'telling the truth' stands to 'saying what is the case'. 'Sadism', on the other hand, stands in much the same relationship to 'inflicting unpleasant treatment' as 'telling on someone' or 'betraying' stand to 'saying what is the case'. In each of these cases we are confronted with an activity which has not been described in terms of the moral sphere of discourse, and which therefore cannot be judged right or wrong. To judge the activity right or wrong, the activity has to be related to a context provided by the moral sphere of discourse. (That is, it most probably would not have helped us to say 'inflicting unpleasant treatment at 7.45 a.m. on Thursday'.)

Punishment, because it is a moral notion, does not stand in need of justification any more than honesty does. It makes no more sense to ask whether punishment is right
than to ask whether stealing and murder are wrong. Rawls' surprise is a philosophical surprise, a product of idling words.¹ But wait! Of course we can ask whether punishment as such is justified. The question can be given perfectly good sense. I am not denying that punishment can come up for justification. But if it does, the grounds for this must be other than that punishment involves the infliction of unpleasant treatment on people, since in calling that unpleasant treatment 'punishment', we have already distinguished it from other forms of unpleasant treatment as being morally permissible for a particular sort of reason. What is open to us is to raise the question asked by many psychologists and penal reformers - whether punishment, although referring to a morally permissible form of unpleasant treatment, is logically dependent upon a false premise of free will and moral responsibility. But more of that later.

It is true that most philosophers have asked whether punishment is justifiable, on the ground that it involves the infliction of unpleasant treatment. But then many have asked similar questions about murder and stealing.² However, such questions, in their present form, are unintelligible, for the notions answer the questions before they are asked. That a particular act is honest is the moral justification for doing it;

¹ Cf. L. Wittgenstein, op. cit., §132, p.51e: 'The confusions which occupy us arise when language is like an engine idling, not when it is doing work.'
that a particular act is one of (unqualified) punishment is the moral justification for doing it. Most of our moral disputes do not arise at this level. They arise because we cannot agree whether a particular act is best described as honesty, or telling on someone, or betraying, etc. Or in the case of punishment, they arise because we cannot agree as to whether or not an act should be regarded as unqualified or qualified punishment, victimization, or revenge, etc.

We recognize the evaluative nature of the concept of punishment in our ordinary discourse. If we see a mother beating her child, it is usually sufficient for her to answer the question 'Why are you doing that?' (a question asked to ascertain whether what she is doing is right or wrong) with 'I'm punishing him'. Any further questions we may ask of her are simply directed at finding out whether her punishment of the child is unqualified punishment – whether the child had committed some moral offence, whether he could have known that what he was doing was wrong, etc. The question of the justifiability of punishment in general does not come up. This is not because ordinary people are unreflective, but because 'punishment' is axiologically loaded. Armstrong fails to see this when he criticizes Ewing for commencing The Morality of Punishment with the assumption that, whatever it is, punishment is morally justified, and then rejects some definitions because he cannot agree that what they produce is morally justifiable (e.g. on p.30). Clearly the logical order is first to decide what
punishment is, then to decide whether this thing is morally justifiable or not.\footnote{Armstrong, op. cit., pp.475-6.}

Armstrong's criticism would have been valid had his suggestions about the ethical neutrality of activity-words been correct. But as we have seen this is not so.

Before turning to consider the various legitimate justificatory questions which can be raised in relation to punishment there is one point which must be emphasized. I do not want to suggest that with one swift definitional flick I have solved or dissolved a problem which has been passionately debated since Plato. That problem still remains. What I hope to have shown is that due to a failure to understand the way in which terms like 'punishment' function in our language, we have stated the problem in a way which has brought not clarity but confusion.


We are now in a position to specify more clearly the different justificatory questions which can be raised in relation to punishment. The question, 'What justifies punishment?' carries with it a false clarity and simplicity. In fact, as it stands, it is quite obscure, and when it is clarified, it is multifaced. It is obscure because it is without a context. We do not know what is bothering the questioner, and to meet a justificatory question we must at least know this. Justificatory questions, as I argued in Chapter One,
do not arise in a vacuum. They presuppose an apparent discrepancy between an action or activity and some standard, rule or end, and unless this standard, rule or end is made clear, the justificatory questions can be neither understood nor answered. We cannot even be sure whether the question is being raised about a specific instance of punishment, the general activity of punishing or the practices of legal, parental, pedagogic or ecclesiastical punishment.

So that we can get clear about the various possible justificatory questions, I want to sketch the outline of a possible situation so that we can consider some of the sorts of questions which might be raised with respect to punishment. In this sketch I am concerned solely with the types of justificatory question asked. I am not concerned with the adequacy of the answers given.

Suppose Black has been charged with and convicted of homosexual practices. He has been sentenced to three years imprisonment for the offence. A group of men discuss the case together.

Williams: 'Do you think they were justified in punishing him? The evidence seemed pretty thin. I wouldn't have trusted the key witness. I'm sure he had a grudge against Black.'

White: 'True enough, but the other witnesses corroborated his testimony, so it's not likely that he was lying. But even if he wasn't lying, what does that matter. Homosexuality isn't immoral; it's a psychological defect. The poor guy couldn't have helped it. He needs treatment, not punishment.'
Jones: 'In some cases this is so, but not all homosexuals are inverts. Some do it simply because the normal outlets are not available to them, and there was no real evidence of any psychological instability in Black's case. But what bothers me is that homosexuality should be punished by the law. I guess it's wrong wilfully to engage in such practices, but it's not for the law to punish. It doesn't cause any trouble.'

Macdonald: 'Well, maybe it doesn't often cause trouble. But remember that one of the witnesses mentioned that on another occasion he had seen Black trying to seduce a young boy. Imagine what the psychological and moral effect on the child would have been. Still, three years imprisonment is a bit much to give a person for an offence like Black's. It's hardly that serious. After all, if you're drunk and get involved in an accident which kills someone, you can get away with two years in gaol.'

Collins: 'It's not simply that three years is too much. It's the fact that they should imprison a person for an offence like that. Gaol sentences only aggravate matters. A good stiff fine would have been more appropriate. That would have been sufficient to deter him.'

Green: 'I agree that a gaol sentence would not necessarily have been the best thing for him. Nevertheless, isn't it wrong to think in terms of deterrence? That could lead to all sorts of unjust treatment. Shouldn't we think, rather, of punishing according to deserts?'

Davidson: 'But that's impossible. You can't measure or determine how much punishment people deserve. This is the whole trouble with punishing people. It commits you to making moral assessments of them. Psychologists have now shown that moral assessments are based on the false
assumption of free will. People are moulded by their heredity and environment. Criminals are social deviates, not immoral. Punishment is outmoded and should be scrapped and replaced by some form of treatment or cure.

Let us stop here and review the sorts of questions which are being asked. The questions of Williams and White are directed specifically at Black's punishment and are concerned with whether or not some of the formal criteria relevant to the justification of this particular instance of punishment have been satisfied: Did Black commit the offence? Was he morally responsible for the offence? Was what he did morally wrong? With Jones we find a shift from Black's particular case to a more general question. He is not concerned with whether or not Black's punishment was legal (he presumably thinks it was), but with whether there is any moral justification for the legal punishment of acts like Black's. His concern, then, is with the formal criteria which must be satisfied to justify the punishment of a certain class of wrongdoing by a particular authority. Macdonald turns the discussion from the question whether or not Black ought to have been punished, to the question of how severely he ought to have been punished. Specifically he is concerned with whether or not the formal criteria which must be satisfied to justify a particular penalty have been met. Collins's question is similar, but concerns the particular type of penalty. Green shifts the attention to the more basic question concerning the formal criteria for justifying the severity of punishment.
This question, however, presupposes that punishment in general is justified, and it is this presupposition which Davidson challenges - not by suggesting that punishment is evil or morally unjustified, but by suggesting that in punishing, the impossible is being attempted.

These questions are all intelligible enough, and we shall have occasion to look at them in the course of this dissertation. Questions like those of Williams and White will be examined in Chapters Four and Five; Davidson's in Chapter Six; Macdonald's in Chapter Seven; and Collins's and Green's in Chapter Eight.

Nevertheless, none of these justificatory questions is quite comparable to the question which has traditionally been primary in the debate, namely, 'What justifies the infliction of punishment in general?' It should be clear that on my own view, this question cannot arise, for to describe a particular type of activity as (unqualified) punishment is to give the justification for it. Does this mean that the old debate has been based on a misconception about the word 'punish'? I do not think so, even though certain aspects of the traditional debate confuse the issues. What has traditionally bothered people about punishment, and what has given rise to the justificatory questions concerning the general activity of punishing is that 'to punish a man is deliberately to do something unpleasant to him, not as a dentist does, as a regrettable accompaniment to the long-term betterment of his condition, but as a matter of deliberate
principle'.

The problem which this raises is not removed by a particular definition of 'punishment', even though its character is changed somewhat. We can acceptably express its basic thrust in the following way: 'Can we have any justification for deliberately inflicting unpleasant treatment on people?' On the basis of what I have said about the meaning of 'punishment', a short answer relevant to this question would be: 'Yes, when that deliberately unpleasant treatment constitutes "punishment"; i.e. is for moral wrongdoing.' I am not sure on what basis a further justificatory question can be raised here unless it is suggested that it needs to be shown why moral wrongdoing in particular justifies the deliberate infliction of unpleasant treatment. I shall give some detailed consideration to this and the preceding question in Chapters Four and Five. I shall do this in the context of a discussion of the even broader question 'Can we have any justification for inflicting unpleasant treatment on people?' In the meantime, I shall turn to the concept of desert, since it has a crucial place in the argument of these Chapters.

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1 Benn and Peters, op. cit., p.173.
CHAPTER THREE
THE CONCEPT OF DESERT

In Chapter One I noted that justifications of punishment had traditionally involved an appeal to either or perhaps both of two sorts of considerations, namely, retributive and utilitarian. It would be difficult to argue that either one of these has been historically dominant. Both Plato and Aristotle appeal to retributive as well as to utilitarian considerations, although Plato is probably more of a utilitarian. Bishop Butler, Richard Price, Kant, Hegel\(^1\) and Bradley are all basically retributivists, whereas Beccaria, Hume, Bentham, the Mills, and Sidgwick\(^2\) are fundamentally utilitarians. Not much therefore is achieved by any appeal to names. Nevertheless, in the last 150 years it is undeniable that utilitarian considerations have been dominant in


\(^2\) Sidgwick, however, has a definite intuitionist streak.
discussions of punishment, as they have been in ethics generally.\footnote{1} There are no doubt many reasons for this, but two can be mentioned:

(i) Utilitarianism is in many ways an appealing position. To men like ourselves utilitarian considerations possess a non-metaphysical reasonableness and persuasiveness which is not characteristic of retributive considerations: 'Our ideas of happiness and misery are of all our ideas the nearest and most important to us', wrote Butler, a philosopher of unusual sensitivity to human nature:


"though virtue or moral rectitude does indeed consist in affection to and pursuit of what is right and good, as such; yet, when we sit down in a cool hour, we can neither justify to ourselves this or any other pursuit, till we are convinced that it will be for our happiness, or at least not contrary to it.\footnote{2}

Butler himself was a non-utilitarian, yet he recognized the pull which utilitarianism has for us. Non-utilitarian considerations also have a pull for us, but in many contemporary discussions of punishment there has been a tendency to regard them as impulses or feelings belonging to our lower nature, primitive desires for revenge. Retribution, Solovyo\v{f} writes,

\footnote{1}{The recent 8 volume Encyclopedia of Philosophy (ed. P. Edwards, New York: Macmillan & The Free Press, 1967) contains no article on or discussion of the notions of desert and merit.}

is 'incompatible with any degree of developed human feeling.'

(ii) The recent philosophical disenchantment with rationalist and intuitionist theories of ethics has further detracted from the retributivist position. For it is in such theories of ethics that a basic, ultimately unanalysable or intuitively discerned fitness or desert has seemed at home. According to Butler, we

have a capacity of reflecting upon actions and characters, making them an object to our thought: and on doing this, we naturally and unavoidably approve some actions, under the peculiar view of their being virtuous and of good desert; and disapprove others, as vicious and of ill-desert.

It is not fashionable for philosophers to claim to have such perceptions any more, and if they do, there are

1 V. Solovyof, The Justification of the Good, trans. N.A. Duddington, London: Constable, 1918, p. 302; cf. de Quiros: 'The old notion of retribution, like extinct flora and fauna, has no place in our modern world' (New Theories of Punishment; quoted in Sir Leo Page, 'The Retributive Theory of Punishment', Nineteenth Century and After, Vol. 148, July-December 1950, p. 264); on May 11, 1950, Lord Justice Asquith referred to retribution as 'a theory now so discredited that to attack it is to flog a dead horse'; W. McDougall: 'The fuller becomes our insight into the springs of human conduct, the more impossible does it become to maintain this antiquated doctrine of retribution' (An Introduction to Social Psychology; the latter two quotations come from Lord Longford, The Idea of Punishment, London: Geoffrey Chapman, 1961, p. 29).

many others willing to deny it. What one age 'sees', another age cannot or will not. In fact, such is the current philosophical ethos, that it has become very hard for moral philosophers to think in anything but a utilitarian fashion. Even those discussions of punishment which find room for both retributive and

1 Take, for example, Sidgwick: 'Personally, I am so far from holding this [the retributive] view that I have an instinctive and strong moral aversion to it: and I hesitate to attribute it to Common Sense, since I think that it is gradually passing away from the moral consciousness of educated persons in the most advanced communities: but I think it is still perhaps the more ordinary view' (The Methods of Ethics, Sixth edn., London: Macmillan, 1901, p.281); Ewing: 'Now it seems to me that, instead of it being intuitively certain that punishment should be inflicted only as an end-in-itself without any consideration of consequences, the intuitive evidence is all the other way' (The Morality of Punishment, London: Kegan Paul, Trench, Trubner & Co., 1929, p.18; cf. p.20); E.A. Westermarck: 'The infliction of pain is not an act that the moral consciousness regards with indifference even in the case of the criminal' (Ethical Relativity, London: Kegan Paul, Trench, Trubner & Co., 1932, p.77); Temple also declared that he had no 'intuition ... that it is good that the wicked should suffer' (The Ethics of Penal Action, London: Clarke Hall Lectures (No. 1), 1934, p.28; and Laird: 'Exponents of the [retributive] theory seem to rely upon a self-evident intuition. I suggest that this so-called intuition is only a superstition' ('The Justification of Punishment', Monist, Vol. XLI, 1931, p.364).

utilitarian considerations almost invariably subordinate the retributive to the utilitarian considerations.¹

But retributive considerations are not so easily disposed of. They are embedded in our language, and still play a useful rôle in it.² Even the staunchest of utilitarians have not been able to ignore them, whatever they might have said about them. Mill and Sidgwick tried to give a utilitarian analysis of justice; Duncan-Jones and Nowell-Smith have endeavoured to analyse desert in utilitarian terms; Rawls recognizes the retributive nature of desert, but gives it a subordinate justificatory rôle within a broader utilitarian framework; Quinton purges guilt of any justificatory rôle and includes it in his definition of punishment.

This is clearly an unsatisfactory state of affairs, yet one to which there is no simple solution. In an endeavour to take some steps towards an answer, I shall devote this Chapter to an analysis of desert claims. I begin by distinguishing different kinds of desert claims, and then turn to a consideration of that which is said to be deserving, that which is deserved, and the grounds of desert, respectively. I conclude the Chapter with a discussion of the meaning of 'X deserves A' and the rôle of desert claims in our language.

¹ This also goes for Mabbott, despite his claim to be a retributivist.
² Whether they will continue to do so is questioned by Brian Barry in Political Argument, London: Routledge and Kegan Paul, 1965, pp.112-15. Barry's position in this regard is examined below in Chapter Four, Section 4.
'People ought to be punished because they deserve it' is one of the dominant strains in many retributive justifications of punishment as they have been put forward down through the centuries. Yet the crucial notion of desert has rarely been analysed even by its most ardent defenders. And when attempts have been made to analyse it, they have almost always been made in relation to punishment.¹ This has helped to bring

the notion into disrepute, for in this context desert has often appeared either to represent an emotional reaction or a refusal to give further reasons. In my opinion, desert claims are not properly restricted to punishment or even reward, and my discussion will for a time be directed to their broader context. I think this will illuminate the particular case of punishment.

1. Types of Desert Claims.

I think it is possible for us to distinguish three general types of desert claims:

(a) **Raw desert claims**, which have the (at least implicit) general form: 'X deserves A in virtue of B'. Raw desert claims are not dependent on any legal or quasi-legal system of rules and therefore the responsibility for their fulfilment does not devolve upon any particular person or authority. Take the following examples:

(i) 'Peters deserves to get good weather for his holidays. He's planned everything so carefully."

(ii) 'Smith deserves a break-through. He's been working at that problem for years now.'

(iii) 'Martin deserves to be punished. He lied to Jackson and Burns about ringing up yesterday.'

Although we are prepared to say quite specifically that Peters deserves 'good weather' and Smith deserves a 'break-through', there is no one whom we would hold responsible if they did not get it. Of course we may want to complain of some cosmic injustice if they
do not, but this seems hardly necessary. In Martin's case, if he is punished, then he has no grounds for complaint, but if he is not, then no one in particular is to blame for this.\footnote{I am assuming that Martin is an adult, and that 'lying' as such does not constitute a legal or quasi-legal offence.}

(b) \textit{Institutionalized desert claims}, which have the (at least implicit) general form: 'X deserves A of Y in virtue of B'.\footnote{Rescher writes as though all desert claims are of this sort (op. cit., p.62).} The deserved treatment in these cases presupposes a context of legal or quasi-legal rules - institutional or practice rules (in Rawls' sense - appropriately modified). Institutionalized desert claims are being made in the following cases:

(i) 'Nolan deserved the prize for his efforts. His painting was by far the best.'

(ii) 'McKenzie deserves to go to gaol for robbing that old lady.'

(iii) 'Menzies deserved to be honoured for his contribution to Commonwealth relations.'

In each of these cases a claim is implicitly made on some particular authority: the competition sponsors or judges, the law, and the monarchy respectively. Sometimes only the context will tell us whether or not a desert claim is institutionalized. Claims such as 'X deserves compensation' and 'X deserves punishment' need to be specified more fully before we can tell what type they are.
(c) **Specific desert claims.** These are usually of the same general form as (b), but they concern not so much what is deserved as how much is deserved. The following examples will serve to distinguish them:

(i) 'Nolan deserved every bit of the $500 he got for the First Prize.'

(ii) 'McKenzie deserved about 5 years gaol for his offence.'

(iii) 'Menzies deserved at least a K.C.M.G.'

In this Chapter I shall be concerned only with raw and institutionalized desert claims. However, an examination of the dispenser of deserts (Y) will be held over till Chapter Seven. Specific desert claims will be examined in detail in Chapter Eight.

2. **The Deserving (X).**

In his Review of the Principal Questions in Morals, Richard Price informs us that

> The epithets, right and wrong, are, with strict propriety, applied only to actions; but good and ill desert belong rather to the agent. It is the agent alone, that is capable of happiness or misery; and, therefore, it is he alone that can properly be said to deserve these.¹

By insisting that desert applies 'with strict propriety' or 'properly' only to agents, Price implicitly recognizes the fact that we do not always speak as though this were the case. For we commonly make statements like 'Nolan's painting deserved the First Prize' or 'Alexander's manuscript deserves publication.' These, Price would say, are only elliptical ways of saying 'Nolan deserved the First Prize for his painting' or 'Alexander deserves to have his manuscript published'. Now it might be possible to rephrase all such desert claims in this way, but even if it is, Price fails to distinguish cases where the grounds for desert relate primarily to qualities possessed by the agent, and cases where they relate primarily to that which the agent has produced (a painting, a manuscript, etc.). A desert claim such as 'Locke's theory of education deserves serious consideration' can (and may in fact sometimes properly) be interpreted as an expression of my estimation of Locke as a philosopher, but it need not be so. I may not have a very high regard for Locke's general philosophical acumen, and may feel that it is more in spite of himself that his theory of education deserves serious consideration. Price does not appear to see this point.

However, we may think that he was not far wrong. For in the examples we have given, non-human objects which could be said to deserve a particular kind of treatment

1 Although I have some doubts about this. How would Price rephrase the claim: 'This bill of legislation deserves to be passed'?
or consideration did not do so apart from their being artefacts or products of some intentional agent or agency.¹ Moreover, although we do not speak of a beautiful sunset deserving to be photographed, we might speak of God deserving praise for having produced the beautiful sunset. Nor do we speak of a certain type of weed deserving to be eradicated, even though we may speak of certain persons deserving to be fined for having introduced it.

But this will not quite do. We can quite properly speak of the Niagara Falls being deservedly famous or of the Western Australian coastline deserving to be as well known as that of the East. Here there is no presumption that these sights are human artefacts. Of course the fact that they are not artefacts limits the sorts of things that they can deserve—praise and fame is about all. This fact has quite an important bearing on our analysis of desert claims. It is sometimes said that desert is a moral notion—and it is true that desert claims are usually made in a moral context. However, as our analysis will show, although desert is an evaluative notion (like 'good' and 'bad'), it is not specifically tied to moral contexts.²

¹ We can accommodate this to those who speak of treatment of varying sorts being deserved by animals. If animals can in certain respects properly be regarded in the same way as humans, this would be quite legitimate: if we think animals can be immoral then it is reasonable to speak of them deserving punishment. If we do not think they can be either moral or immoral, they can deserve neither punishment nor conditioning, though they may need conditioning (training).
² E.g. R.L. Franklin, op. cit., p.173 (although Franklin's example of aesthetic merit goes counter to this); (footnote continued on p.108)
3. The Deserved (A).

If we consider the sorts of things which people might be said to deserve, we are not, as it would appear from most philosophical discussions of desert, limited to reward and punishment as its proper objects. True, some of the things which people can be said to deserve, such as prizes and honours, are, in so far as they are deserved, reducible to rewards. But there are other things which people can deserve and which cannot be subsumed under the two-fold classification of reward and punishment. We might say of someone who has suffered through another's negligence, that he deserved some sort of compensation. Or we might speak of people deserving praise and blame.

(Footnote 2 continued from p.107)
Duncan-Jones, op. cit., pp.136-41; Feinberg's article is directed to showing that 'desert is a "natural" moral notion' (op. cit., p.70), but he has previously set aside non-personal desert as 'less central' (p.69). However, it can be doubted whether all personal desert is based on moral considerations - especially in the area of prize-giving. Desert is no more centrally 'moral' than is good.

Feinberg distinguishes five major classes of treatment that persons can deserve: (1) Awards of prizes; (2) Assignments of grades; (3) Rewards and punishments; (4) Praise, blame and other informal responses; (5) Reparation, liability, and other modes of compensation (op. cit., pp.75 ff). Positions of honour and economic benefits he regards as subsumable 'under one or another or some combination of the other headings'. There are interesting differences between prizes, grades and honours, as Feinberg shows, but this does not gainsay the fact that in so far as these are deserved, they are subsumable under the heading of 'rewards'.
These categories of things which may be said to be deserved (rewards, punishments, praise, blame, compensation) are not necessarily exhaustive. Anything which is pleasant or unpleasant can be said to be deserved (by people, that is). Price correctly points out: 'It is the agent alone, that is capable of happiness or misery; and therefore, it is he alone that properly can be said to deserve these' (Italics mine). We can deserve anything which is capable of giving us 'happiness or misery', or, to put it more generally, anything which is pleasant or unpleasant. Deserved treatment is not something towards which we remain indifferent. We are glad when our arguments are given serious consideration, and upset if they are just passed off. To have a manuscript accepted for publication is an achievement, to have it rejected a disappointment. We regard passing exams as desirable. We appreciate praise, and do not like exposing ourselves to blame. We enjoy being rewarded, and dislike being punished. Of course, there will always be people who shun praise, eschew honour and despise success. But these are not typical cases, and do not complicate the issue to any great extent. Such exceptions simply mean that on the occasions when we might rightly say of such people that they deserve praise, honours or success, they will not want to say it of themselves.

In the case of institutionalized desert claims, A characteristically refers to treatment which comes as the intended result of some agent or agency. Honours, prizes, success, compensation, reward and punishment, in so far as they are institutionally based, are
characteristically given by intentional agents or agencies. This does not necessarily hold for raw desert claims; e.g. 'Peters deserves to get good weather for his holidays' and 'Smith deserves a break-through'. A.R. Manser makes much the same point. Taking as a typical way of referring to ill-desert the statement, 'It serves you right', he argues that there are cases where we might properly use this phrase even though what served the person right followed by natural law. He gives two kinds of example. The first is that of a child being told not to slide on the ice, doing so, and falling down and hurting himself (though not too seriously) as a consequence. This would 'serve it right'. The second type of case is 'that where someone "ought to have known better", where he suffers either some physical harm or material loss [though not too great] as a result of ignoring a law of nature, e.g. striking a match to see if the petrol tank is full. The resulting conflagration "serves him right".\(^1\)

4. The Grounds of Desert (B).

When we say 'X deserves A' we are implicitly committed to holding reasons for X's desert. It is logically absurd for X to deserve A for no reason in particular or for no reason at all. I may enjoy reading for no reason in particular, or may feel anxious for no reason at all\(^2\), and to say this would be quite

\(^1\) Manser, op. cit., p.301.
\(^2\) Not that no cause for my anxiety can be cited, but rather that I have no reason for being anxious.
intelligible and often sufficient\(^1\); but to say that Locke's theory of education deserves serious consideration, or that Nolan deserved the prize, or that Scott's child deserved to be punished for no reason in particular or for no reason at all, would satisfy no one. On this basis it would be inappropriate to say that they deserved anything at all. All desert claims are implicitly of the form 'X deserves A in virtue of B'.\(^2\)

Not any sort of reasons are appropriate to the making of desert-claims. Desert can be ascribed to something or someone only on the basis of characteristics possessed or things done. That is, desert is never forward-looking. This was recognized by the classical retributivists. A number of recent philosophers, however, have tried to ground desert-claims on forward-looking considerations. I shall examine one of these attempts in this Chapter, and another in Chapter Six.

If a theory of education deserves serious consideration, it does so, not on the basis of advantages which might accrue if it is a good one, but on the basis

\(^1\) Of course we usually can and do give reasons for things which we like or dislike, enjoy or find unenjoyable, but it is not necessary to give reasons in order for these notions to be intelligible.

\(^2\) There may be occasions on which we find it difficult to specify or express the grounds on which we claim that something is deserved, and to that extent, at least, those to whom the claim is made may be hesitant about whether it really is deserved. But this is very different from saying that it is deserved for no reason in particular or for no reason at all. Desert cannot be a non-rational desire or distaste for something.
either of the established reputation of the person who has propounded it, or of an adequacy which it has already been seen to possess. If a manuscript is said to deserve publication, this is said not on the basis of the impact which it is likely to make or some future benefits which it will bring, but on the basis of the quality of its contents. If a student deserves to pass an exam, he does so, not because this will encourage him or get him a scholarship, but in virtue of his performance (and his performance is not necessarily limited to the exam itself, for a student may have failed the exam, yet deserve to have passed). If a person deserves compensation for some loss, then he does so not because things will be very difficult for him if he does not get some, but because his loss has been sustained through someone else's mismanagement, negligence, or deception, etc. When a person deserves to be punished he does so, not because it will reform him or deter others, but because he has done some moral wrong. A person may deserve to be punished even though carrying it out would have disastrous effects on him and/or society. The disastrous consequences could be reasons for not punishing him, but not for his not deserving to be punished.

It is not enough to base desert claims on 'states of affairs' (which may include actions performed or things said by X) which at present exist, or have existed in the past. Not all such 'states of affairs' will serve to

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We can notice the distinction between deserving encouragement and needing encouragement.
justify a desert claim. Desert claims can be made only on the basis of characteristics possessed or things done by the subject of the claim. A painting (logically) cannot deserve a prize because it once belonged to the Royal Family, or because Sir Herbert Read thought it to be very good. 'Belonging to the Royal Family' and 'Sir Herbert Read thinking it to be very good' are not characteristics of the painting itself. Sir Robert Menzies did not deserve a knighthood because Dame Pattie happened to be a very active social worker, or because it would have fulfilled her greatest ambition for him. For these were not things done by Sir Robert himself, and although they could conceivably have been reasons for conferring a knighthood on him, they could not conceivably be reasons for his deserving a knighthood. If Wilson deserves a reward, it can be only on the basis of something he himself has done, not on the basis of what anybody else has done. If, in fact, he receives a reward on the basis of something which Grey has done, then we say that Wilson did not deserve it; he did not do anything for it - notwithstanding the fact that Wilson may be more in need of the reward than Grey. The case is similar with punishment. A person can deserve to be punished only on the basis of what he himself has done, not on the basis of what other people may have done. Vicarious and collective punishments are thus generally undeserved.¹

¹ This way of stating the basis for desert claims would need to be amended slightly if we were considering a person's desert of compensation. In such a case, (footnote continued on p.114)
A serious attempt at giving an act-utilitarian analysis of desert claims is to be found in Duncan-Jones's treatment of Butler's Moral Philosophy. We might argue, he suggests, that

When we say a man is responsible, and has certain deserts, the whole meaning of our statement can be resolved into two clauses: (1) he has done a good or bad action, or a right or wrong action; (2) it is useful to apply certain sanctions to him - useful, that is, in the way of influencing his habits and other people's.¹

Nevertheless, although these two clauses 'convey the whole of our meaning when we ascribe responsibility or desert, they are not the whole of what we have in mind'. For we 'tend to feel repugnance towards bad actions and those who do them, and to have friendly and warm feelings towards those who do good actions'. Thus,

our spontaneous feelings back up the policy which, on utilitarian grounds, ought to be adopted. But suppose in exceptional cases, it were established that penalties for the bad and rewards for the virtuous

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(footnote 1 continued from p.113) compensation would not be deserved on the basis of anything the person had done, but rather on the basis of the damage done to him. This would be closer to saying that he deserved compensation 'on the basis of characteristics possessed' - what he has had to put up with through no fault of his own. If no damage is done, no compensation is deserved.

¹ A.E. Duncan-Jones, op. cit., p.137. There is some oddity in Duncan-Jones's requirement that punishment will weaken habits of acting wrongly. Supposing it to be wrong and illegal to kill thalidomide babies, could there be utilitarian considerations to justify punishing offenders - for such behaviour would hardly become habitual, even if it became prevalent?
would do more harm than good, our sentiments would not be correspondingly apportioned: we should still wish the good to prosper and the bad to suffer. In consequence, we come to feel that there is a sort of intrinsic tie between the moral value of a man's character or conduct and the way in which he ought to be treated.1

Now Duncan-Jones's position would have been clear enough had he left it at that. But he complicates it somewhat when he contrasts Butler's analysis with that of the utilitarian:

In Butler's view, deserving is a three-termed relation between a person, his wrong act, and a penalty - A, the agent, deserves P, the penalty, because of W, the wrong act: but on this analysis the utilitarian theory will make deserving a four-termed relation - A deserves P because C, the consequences of P, tends to discourage such acts as W.2

What is not clear is how C is to be distinguished from the tendency to discourage such acts as W. Does Duncan-Jones mean that 'unpleasant treatment', the consequence of punishment, tends to discourage 'such acts as W'? But unpleasant treatment is internally related to punishment, and can hardly be called its consequence. However, if he does not mean this, it is difficult to see what he could mean if he intends to distinguish C from the tendency to discourage such acts as W. To express the difference between Butler and the utilitarian, Duncan-Jones ought to have said something like the

1 Page 139.
2 Page 140.
following of the utilitarian's analysis: \( A \) deserves \( P \) because of \( W \) and \( Y \) (\( P \)'s tendency to discourage \( W \)). A further unclarity in Duncan-Jones's analysis is the switch in his last formulation from an uncompromising act-utilitarianism to a position not easily distinguishable from rule-utilitarianism. His primary allegiance, however, seems to lie with the act-utilitarians.

But apart from these internal difficulties, Duncan-Jones's analysis is open to other objections. For one thing, it obliterates the distinction which I have been pressing, between deserved treatment and needed treatment. A person may very well deserve treatment of a certain sort without needing it, and may need it without deserving it. A rich man may well deserve compensation for some financial loss occasioned to him as a result of another's negligence, yet most probably he will not need it. In fact, the person on whom the burden of compensation falls may need it far more than the rich man. On the other hand, a child who has come from a tough background may need all the encouragement and help it can get from its teacher yet such encouragement and help can hardly be said to be deserved, even if it brings forth good results.

Furthermore, Duncan-Jones suggests that when we ascribe desert, we have in mind more than utilitarian considerations. We are also expressing our repugnance, though this does not form part of what we mean by 'deserve'. It is true that desert claims can be used as vehicles of sheer animus, especially in such phrases as 'It serves you right', and that this is detachable from
the meaning of 'desert'. On these occasions desert claims are not being used to ascribe desert but to express malice; or, as Duncan-Jones would put it, they express the fulfilment of our wish that the bad should suffer. Desert does not involve a wish that the bad should suffer. However, as Strawson has persuasively argued, the resentment or indignation which we feel towards a person who has done a wrong act is conceptually related to our judgment of his responsibility for that act and cannot be detached from it.¹ But resentment and moral indignation are not to be confused with feelings of ill-will.

We can see then, that the act-utilitarian analysis of desert will not do. The rule-utilitarian analysis will be discussed a little later. In the meantime we must tighten up our previous condition for desert, namely, that desert claims can be made only on the basis of characteristics possessed or things done (B) by the subject of the claim (x). For it is possible to think of cases in which x can be said to possess or do B without deserving A. Take the following case: Davis is being pursued by two wanted criminals (for whose capture a reward of $500 is offered). He conceals himself in the loft of a house while the criminals search for him below. But the supporting beams have rotted, and the floor of the loft suddenly collapses onto the criminals underneath. They are knocked out by the blow and subsequently taken into custody. Davis collects

the reward. But does he deserve it? I do not think so. Admittedly Davis is an intentional agent, but it was not qua intentional agent that he was instrumental in the capture of the two criminals. In so far as people are said to be deserving, the grounds on which they are said to be so (B) must be ones for which they can be held responsible. The situation is slightly different in the case of inanimate objects. If $X$ is a stalagmite shaped exactly like the Venus de Milo, having acquired this shape by natural processes over thousands of years, it might become deservedly famous as a natural phenomenon, but it could not be said to deserve prizes or awards. To deserve the latter it would need to be the work of an intentional agent.

Leaving aside cases in which inanimate objects can be said to be deserving, I want to consider in more detail the precise nature of the things done or characteristics possessed for which $X$ or $X$'s producer can be held responsible, and which support or justify the claim that $X$ deserves $A$. For it is at this point that an important confusion has crept into many philosophical discussions of desert.

W.G. Maclagan and Brian Barry have both maintained that the grounds for desert claims can be of two different sorts, and on the strength of this they have argued that there are two senses of desert. I shall endeavour to show that one of their two senses is based on a confusion.

The first sense, according to Maclagan, is that in which desert is used 'as a correlate of "moral guilt"', and the second is that in which it is used as a correlate of legal or quasi-legal guilt:
It seems clear to me that we might say of a person performing an action, whatever his motive, in the knowledge that there was a penalty annexed to it (or even without that knowledge if the fact that there was such a penalty had been 'sufficiently' published), that he deserved the penalty.1

In contrast to the narrowness of Maclagan's first sense, Barry rightly recognizes that desert works in a much wider field than that of reward and punishment. He contrasts two sentences:

(1) 'Anyone who climbs that rock deserves £50 and I hereby offer it'; and
(2) 'Since £50 has been offered for climbing the rock and I have climbed it, I deserve it.'

In (1) desert 'might be taken to prescribe specific amounts of differentials' whereas in (2) desert is used in a 'subsidiary sense', and it is claimed only that 'given the prize is so much, so-and-so deserves it more than anyone else in that he fulfils the conditions laid down better than anyone else'. Barry considers that (1) is more appropriate to wage determination and punishment, whereas (2) is more at home when used 'in connection with the contest procedure'. In such cases,

'the prize may have been set up not to reward desert but to stimulate productions of suitable kinds; nevertheless, it generates a sense of "desert" in the subsidiary sense'.

This second sense of 'desert', I maintain, is not in fact a genuine sense of 'desert' at all. Instead, what Maclagan and Barry have given us is an analysis of 'entitlement' and 'liability', and 'desert' is not a kind of entitlement or liability. Desert, unlike entitlement and liability, is not created by satisfying the conditions laid down in a system of legal or quasi-legal rules, even if some things can be deserved only because of a pre-existing system of legal or quasi-legal rules. To say that a person deserves a higher wage than he is getting is not to say he is entitled to it. This is one of the reasons for having Unions and Arbitration Courts: to endeavour to secure wages commensurate with employees' deserts. If a wage rise is refused, the employees may strike, but even if they were justified in striking this in itself would not show that they were entitled or had a legal right to higher pay. They have no such right until or unless their employers or an Arbitration Court decides in favour of their submissions. The person who is entitled to the prize for winning a competition of skill is not necessarily the person who deserves it. His win may be a fluke, or the result of moves that are shrewd though permissible (within the

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B. Barry, op. cit., p.112.
rules of the game). It is only to confuse the issue
to speak of people having a moral right or entitlement
to treatment of a particular kind. Of course we do, as
Feinberg properly points out, speak of 'moral rights',
but we do this in connection with what we consider to
be basic human rights, and not in connection with the
parochial claims involved in ascribing desert. Our moral
right to freedom from interference is not something
which we are said to deserve. Feinberg comments:

The defeated presidential candidate who
deserved to win ... is not by that token
entitled to the office, nor does he have
any right to it. These are conferred by
votes, not by deserts. And I fail to see
how matters are clarified by qualifying
the alleged entitlement as moral. The
defeated candidate has no right to the
office, moral or otherwise, unless of
course 'moral right' is simply another,
eccentric, way of referring to his deserts.

Of course there are occasions when what a person
deserves is conferred by a system of rules. The painting
that deserves to win may actually win. Someone may
claim that he deserves every penny he gets, or, if this
is too much of a colloquialism, we may claim of someone

1 Pace Hobbes: 'When a gift is given indefinitely, as a
prize to be contended for, he that winneth Meriteth, and
may claim the Prize as Due' (Leviathan, Everyman edn.,
of 'merit' is vitiated by the confusion of desert and
entitlement.

2 Feinberg, op. cit., p.96.

3 Ibid.
that what he deserves he gets, though what he gets he is entitled to by virtue of an agreement he has made on commencing his employment. Nevertheless, though entitlement and desert may coincide in such cases, the grounds of the entitlement are not precisely the same as the grounds of desert. In the case of the painting, the grounds for entitlement include the decision of the judges that this particular painting be given First Prize, and this is provided for in the conditions according to which the competition is conducted, namely, 'The judges' decision shall be final'. The judges could have chosen an inferior painting, and then that would have been entitled to the prize: though the decision may well have caused an uproar. The grounds of desert, however, are found primarily in the quality of the painting, and perhaps secondarily in the circumstances surrounding its production; e.g. the age of the artist, whether he was in some way handicapped, etc. In other words, the desert relates to what could be loosely called the 'skill' displayed in the painting. In the case of payment for labour, a person deserves what he gets by virtue of such things as his industry, efficiency, etc. But he is entitled to what he gets solely by virtue of an agreement or contract between his employer and himself. He may get sacked because he is lazy, inefficient, etc.; i.e. because he does not deserve what he is getting. But until he gets sacked, he is entitled to the pay even though he does not deserve it. The distinction between entitlement and desert enables us to distinguish the situation where the employer cheats the employee from that in which he exploits him.
The same points hold for the case of punishment. To say, 'McKenzie deserves to be punished' is not equivalent to saying, 'McKenzie is liable to punishment'. McKenzie is liable to punishment if it is believed that he has broken some legal or quasi-legal rule which exposes him to moral blame. He may nevertheless be morally blameless, and not deserve punishment. He can be said to deserve punishment, however, even if what he does is not proscribed by some institutional rule. A person may of course deserve the punishment which is inflicted upon him for some crime; but that he deserves it is not because he has broken some law.\(^1\) To confuse desert and entitlement is to make the same mistake as Urmson when he confused grading and evaluating.\(^2\)

The confusion of desert and entitlement or liability is not limited to Maclagan and Barry. Rawls (and most of those who find his views congenial\(^3\)) makes the same mistake in 'Two Concepts of Rules', where he purports to find a place for the 'retributive view ... that punishment is justified on the grounds that wrongdoing merits punishment.'\(^4\) However, in his

\(^1\) It seems to me that one of the faults of social contract justifications of punishment is that they regard the grounds of punishment as institutional in nature.


\(^3\) I.e. rule-utilitarians.

article he gives us no grounds for thinking that wrongdoing merits punishment: that a person has broken a law only renders him liable to punishment, it does not say anything about his deserts.

Barry's confusion of desert with entitlement arises mainly from his failure to distinguish properly between institutionalized and raw desert claims. He correctly recognizes that some desert claims arise independently of any legal or quasi-legal rules and that others arise only because of an already existing system of legal or quasi-legal rules. His mistake lies in thinking that the difference necessitates two different senses of desert. However, the difference lies rather in the fact that institutionalized desert claims at least implicitly prescribe a dispenser of deserts.

Having noticed this easy confusion of entitlement with desert, we can now state more clearly the type of grounds (B) by virtue of which X is said to deserve A. These grounds, I suggest, must be such as express X's worthiness or unworthiness. We must, however, clear up certain ambiguities which may arise here. 'Worthiness' is often used synonymously with 'worth'. But there are at least three senses of 'worth', two of which are not synonymous with 'worthiness'. These two are as follows:

(i) Often when we speak of something's worth, we are referring to its (usually) monetary equivalent. I might for instance enquire about a certain article: 'What's it worth?' or say of a businessman that he is 'worth' $5 million.
(ii) We can exhibit the second sense by means of the following sentence: 'Montgomery's performance is worthy of a prize, but it would not be worth your while to give it to him.' What I mean is that Montgomery's performance is of such quality that he ought or deserves to be awarded a prize, but that it would not be of any use presenting one to him (because, for example, he could not appreciate it, or would throw it away immediately, etc.). 'Worth' in this sense is a utilitarian notion referring to the usefulness of taking a particular course of action, in this case, that of presenting Montgomery with a prize. We can see from this example that to say of a certain performance that it deserves a prize is to imply that it has demonstrated a commendable level of competence in a competition the purpose of which was to match people's competence (in this particular field). What constitutes a commendable level of competence will of course vary from one activity to another.

Some examples will help us to see better what I am driving at. The sorts of considerations which will be relevant to our saying of a person that he deserves a promotion will be his initiative, efficiency, and

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1 Compare the frequent remark: 'It's not worth it'. This can be used to refer to either retributive or utilitarian worth.

2 There is another (probably secondary) use of 'worthiness', 'worth', and 'merit' in which they do not take an object and are roughly equivalent to 'value'. Take such statements as: 'He is a worthy man'; 'He is a person of worth'; 'This scheme has merit'. But for an opposing viewpoint, see Franklin, op. cit., pp.167-8.
industry. If we look at the sorts of considerations which will be relevant to saying that Wood deserves to fail his exams, we will point to such things as laziness,

(i) Even these qualities will be of only general relevance, and will not suffice to cover every case in which a person is said to deserve a promotion. If he cannot get along with people, these qualities will not be sufficient to enable us to say that he deserves promotion from a clerk's to a public relations' position. (ii) Also, there are complicating factors. Consider the following two cases. The first is one in which there is an undetermined number of vacant posts in a particular firm to which people can be promoted. Atkins is a Senior Clerk in the firm, but because of his ability to get along with people, his administrative efficiency, and his initiative, we might say he deserves to be promoted to the position of Public Relations Officer. Walsh is also a Senior Clerk, and possesses the same qualities as Atkins. However, he is even more charming, efficient and enterprising than Atkins, and we consider that he deserves promotion to Secretary of the firm (a higher position than that of Public Relations Officer). Suppose now a second case in which there is only one vacant position, that of Public Relations Officer. What if Atkins got the job in these circumstances? Did he deserve it? Do we say that Atkins did not deserve to get the job; Walsh ought to have got it? It could be argued that because there was only one vacant position, they could not both have deserved it, and that therefore only Walsh could have deserved it: in which case desert could not be based simply on worthiness. But this objection is misconceived, and there are two alternative ways of meeting it: (1) When we are dealing with institutionalized desert claims as in this case, and where there are limited benefits to be distributed, then as part of the criteria for worthiness we include the condition that only the best candidate(s) deserves the benefits. And since in this case Atkins was not the best candidate, he did not deserve it. (2) We are not forced to say this, however. We could phrase our reply slightly differently and still avoid the objection. Rather than saying that Atkins did (footnote continued on p.127)
poor performance, and cheating. Or again, the sorts of considerations which will be relevant to saying that McKenzie deserves to be punished will be that he has robbed a bank, lied, or committed some other moral offence.\footnote{1}

Earlier in this Chapter I pointed to certain cases in which a subject, \(X\), could possess certain characteristics or do certain things, \(B\), without deserving a certain form of treatment, \(A\). With certain qualifications, these were cases in which \(B\) was not the work of an intentional agent or of an intentional agent \textit{qua} intentional agent. We can now point to another sort of case in which \(X\) can possess or do certain things, \(B\), without deserving \(A\), even though \(B\) is the work of an intentional agent \textit{qua} intentional agent. We can illustrate this by varying the previous examples. Suppose now that the criminals are captured due to their betrayal by Davis (with whom they had an understanding), the reason being that Davis wanted the reward money. In this case, though Davis is indeed entitled to the

\footnote{1 continued from p.126}

not deserve the position (which in other circumstances he would have deserved), we could say that Walsh was more deserving, and therefore, that Atkins ought not to have got it. It is part of the 'logic' of desert that it allows of the comparative and superlative degrees. This second answer, however, is probably more appropriate to raw desert claims. I think these answers help us to see our way through some of the puzzles which Feinberg raises with respect to offices and positions of honour (op. cit., p.89-90).

1 We shall consider the assessment of moral worth in Chapter Eight.
reward, we would be reluctant to say that he deserved it, because he did not contribute to their capture for commendable reasons. Or, to vary the second example, suppose now that the Venus de Milo is a manufactured marble reproduction of the original. We would not say of the reproduction that it deserved praise or fame as a work of art, even though it has been manufactured by intentional agents. This is because the skills needed for the reproduction of the sculpture are not the same as those for which praise or fame (as a work of art) is given.

5. The Rôle of Desert Claims.

So far we have suggested that it is appropriate and correct to say of a certain subject, X, that it deserves A, where A is a form of pleasant or unpleasant treatment, when X possesses characteristics or has done something, B, which renders it worthy of A. Naturally the criteria of worthiness differ with different kinds of subjects. Normally, if a subject, X, is properly said to be deserving it must be, or be the intentional product of, some intentional agent. Nevertheless we do recognize a narrow range of cases in which inanimate natural objects

1 Like most judgments in aesthetics, this one is controversial. The assumption underlying my own judgment is that given similar technical skills, the merit of a copyist (reproducer) is different from the merit of a sculptor (artist), and that this difference consists in something like the 'creative imagination' possessed by the latter, but not evidenced in the work of the former.
may be said to be deserving - though the sort of things which they can be said to deserve is quite limited: praise, fame. One reason why desert can be ascribed even to inanimate natural objects is that even in its personal use it is not essentially a moral notion but rather an evaluative notion (like 'good', 'right', etc.). Nevertheless it would be a mistake to overlook the pre-eminence of its use in moral contexts.

But what do we mean when we say that X deserves A? What is the force of such a remark? What rôle do desert claims play in our language? It should be clear now that in saying that X deserves A we are evaluating or appraising X. This is evident from the fact that the characteristics or acts of X which are relevant to making desert claims must be such as express X's worthiness. This has important implications for the rôle which desert claims can properly play in the language.

I noted earlier that desert claims are sometimes used as expressions of vindictiveness: 'It served you right.' Some writers have regarded desert claims as paradigm expressions of vengefulness. But if our analysis so far has been in the right direction, we can see that this is not so, and that using desert claims to express vindictive feelings is to pervert them from their central rôle. Desert claims are appropriate in too many different contexts to be susceptible to this sort of analysis, and the fact that they are based on assessments of worthiness renders this interpretation even more impossible.
In saying that \( X \) deserves \( A \) we can be claiming any of the following things, depending on the context:

'\( X \) ought to get or suffer \( A \)';

'It would be a good thing to give \( X \) (for \( X \) to suffer) \( A \)';

'If \( X \) gets or suffers \( A \) he has no grounds for complaint'.

I do not want to suggest that '\( X \) deserves \( A \)' is always interchangeable with any one of these statements. '\( X \) deserves \( A \)' is just one formulation of '\( X \) ought to get or suffer \( A \)', etc. - such that the grounds of the claim are in virtue of characteristics or acts of \( X \) rather than in order to produce certain consequences. The latter may also constitute legitimate grounds for ought claims. Sometimes situations arise in which we say '\( X \) deserves \( A \) although \( X \) ought not to get or suffer \( A \)'. For example, if gaoling a man for theft would (because of prison conditions) endanger his life, then, provided that other possible means of punishment were also objectionable, we could argue that he ought not to be punished, even though he deserved it. We would probably ask that his sentence be suspended. Similarly, were the punishment of a convicted spy likely to trigger off a nuclear war, then we would have a ground for saying that he ought not to be punished. But this would in no way eliminate the fact that he deserved to be punished.\(^1\)

I shall argue in a later Chapter that although we mean

\(^1\) I do not want to suggest that we say '\( X \) deserves \( A \) although \( X \) ought not to get \( A \)' only when the countervailing considerations are utilitarian. This point is convincingly made by Feinberg, op. cit., pp.90-1.
'X ought to suffer punishment' when we say 'X deserves to suffer punishment' we are not contradicting ourselves when we say 'X deserves to suffer punishment but ought not to be punished', because two issues are being conflated: the grounds for X's suffering punishment and the grounds for his being punished by a particular authority or in a particular way.

Feinberg distinguishes two types of ought judgments, (a) those in which we say that X ought to get A 'all things considered', 'in the final judgment', or 'on balance' - and (b) those in which we say that X ought to get A 'pro tanto' or 'other things being equal'.

'X deserves A', he considers, entails an ought judgment of the latter kind:

A person's desert of X is always a reason for giving X to him, but not always a conclusive reason.... Considerations irrelevant to his desert can have overriding cogency in establishing how he ought to be treated on balance.

Now, were we able in practice to separate the mode of punishment and the status of the punisher from the punishment itself and think of the punishment solely as deliberately inflicted unpleasant treatment, then 'X deserves to be punished' would entail 'X ought to be punished' in the 'all things considered' sense. But of course we cannot do this in practice, and so in considering whether a particular person ought to be

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1 Page 74.
2 Ibid.
punished we must take into account not only whether he deserves to suffer punishment but also what form the punishment ought to take and what authority the punisher has. For God, presumably, unhampered by the difficulties which make the task of giving people what they deserve morally objectionable for us, 'X deserves to suffer punishment' would entail 'X ought to be punished' in the 'all things considered' sense.

I have argued, then, that desert claims, far from being claims about an intuitively perceived 'fitness of things', are ought claims, differing from other ought claims primarily in the fact that they are based on different sorts of considerations, viz. the worthiness of the deserving subject. In Chapters Four and Five we shall examine in detail the function of desert in relation to punishment.
CHAPTER FOUR
GETTING WHAT ONE DESERVES

We have now covered most of the ground preliminary to a detailed discussion of the various justificatory questions relating to punishment. It was pointed out in Chapter One that justificatory questions can properly arise only when there is an apparent discrepancy between some intentional act or activity and a standard, rule or end. These justificatory questions can be met by showing either that there is only an apparent discrepancy between the act or activity and the standard, rule or end which the objector invokes, or that the standard, rule or end which is invoked is itself suspect.

A detailed consideration was given to the notion of punishment in Chapter Two. There it was suggested that it is unnecessarily confusing to define many of the words in our language in terms of a set of necessary and sufficient characteristics. 'Punishment' is best defined in terms of a set of characteristics, only some of which are necessary, but the sum of which is jointly sufficient for its unqualified use. As well I took the view that 'punishment', like a number of other activity-words, finds its home in the moral sphere of discourse. The term is used to describe what is taken to be the morally justified activity of inflicting unpleasant treatment on people for their wrongdoing. These two factors, the flexibility and the normativeness of the concept of punishment, lead us to qualify
punishments which lack some of the partially entailed characteristics by some term which cancels out the moral endorsement of the acts which would otherwise be implied. Thus punishment inflicted upon innocent persons or for non-moral offences is undeserved or unjust.

Chapter Three was devoted to an analysis of desert claims, desert being probably the key concept in many retributive justifications of punishment. Not that desert cannot figure in utilitarian justifications. It often has. But when it does, it is given either a subsidiary rôle or a new meaning. Usually, however, it is dismissed as an unanalysable or intuitively perceived fitness of things, or as an instinctive irrational impulse. In contrast to these opinions, I argued that desert claims are a species of ought claims in which treatment of a certain sort is prescribed on the basis of worthiness rather than utility or anything else.

All these points have some bearing on the three main questions which I shall discuss in this Chapter. Firstly, what sorts of considerations are relevant to justifying a general activity? Secondly, can the infliction of unpleasant treatment on people be justified? Thirdly, assuming that the second question has been answered affirmatively, what special considerations are relevant to justifying the infliction of punishment in particular instances? As they stand these questions are not unambiguous, and, as they are discussed, further necessary distinctions will be made. They suffice nevertheless to give a useful starting
point. A short appendix is included at the end of the Chapter dealing with a general objection to desert as a justification for an activity.


In some of the traditional discussions of punishment, efforts have been made to answer all the relevant justificatory questions by recourse either to retributive or (vel) to utilitarian considerations. Sometimes this has been because there has been thought to be only one relevant justificatory question, but more often it has been thought that one sort of consideration precluded the other. Some writers have hopefully appealed to both sorts of considerations in the belief that whatever is just is useful and whatever is truly useful is just.¹ More recently it has been felt that there are certain limitations to be placed on their use, and the trend has been to answer justificatory questions concerning punishment in general by recourse to utilitarian considerations and those concerning particular punishments

by reference to retributive considerations. I have already hinted that I find this general account of the debate unsatisfactory, not simply because 'retributive' or 'utilitarian' tend to be ill-defined, but also because I do not consider the alternatives 'retributive' and 'utilitarian' to be exclusive of all other possibilities. Nevertheless the terms have become so deeply entrenched in the debate that it has become impossible to avoid using them. With this expression of dissatisfaction, then, I shall continue to use them.

The recent trend is persuasively exemplified by Rawls who, as I have already observed, takes the view that retributive considerations are appropriate to the justification of instances of a practice, and utilitarian considerations are appropriate to the justification of the practice itself. I have already raised several objections to Rawls' position. A further thing to be noticed about it is that there is nothing intrinsic to his distinction between a practice and the instances

1 The tensions raised by a simple retributive-utilitarian classification can be seen in Benn's charge of 'veiled utilitarianism' levelled at Hegel (S.I. Benn and R.S. Peters, Social Principles and the Democratic State, London: Allen and Unwin, 1959, p.177).

2 It would be a mistake to infer from this that Rawls is a utilitarian in ethics. See his 'Two Concepts of Rules', Philosophical Review, Vol. LXIV, 1955, p.32 f/n.27; though cf. pp.3-4.

which fall under it which necessitates an appeal to
utilitarian considerations in justifying the practice.
Rawls makes statements like: 'I hope to show that if
one uses the distinction in question then one can state
utilitarianism in a way which makes it a much better
explication of our considered moral judgments ... than
traditional objections would seem to admit';¹ and: 'The
suggested way of reconciling the retributive and the
utilitarian justifications of punishment seems to account
for what both sides have wanted to say.'² Evidently
Rawls thinks that his view accords with what 'intelligent
and sensitive persons' hold concerning punishment. But
this of course is no argument to show that the general
practice of punishment can be justified only on the
grounds of its utility. In contrast to this, Rawls does
adduce strong grounds for saying that once we have
understood the rules as rules of a practice, then it
is logically inappropriate to justify particular
applications of them by appeal to the utility of so
doing. Particular instances of the practice can be
justified only by reference to the rules. This is
tantamount to an appeal to retributive considerations.³
It would seem, then, that Rawls' position, rather
than strengthening utilitarianism, leaves open the
possibility of justifying both general activities and
their instances on non-utilitarian grounds.

¹ Rawls, op. cit., pp.3-4.
² Page 8.
³ Pages 24 ff.
Benn, however, takes a tougher line than Rawls on this point. According to him, the retributivist refusal to look to the consequences of punishment makes it virtually impossible for him to answer the question 'What justification could there be for rules requiring that those who break them should be made to suffer?' except perhaps in theological terms. For appeals to authority apart, we can justify rules and institutions only by showing that they yield advantages.¹

All attempted retributive justifications can be shown to be 'either mere affirmations of the desirability of punishment or utilitarian reasons in disguise.'² In a later article he states that utilitarianism has the merit, as an approach to the justification of punishment, that it provides a clear procedure for determining whether the institution is acceptable in general terms. This the retributivist approach cannot do, because it denies the relevance of weighing advantages and disadvantages, which is what we ultimately must do in moral criticism of rules and institutions.³

There are two sides to Benn's argument: (a) the vacuity of retributive justifications, and (b) the necessity of utilitarian justifications. We shall examine them in turn.

¹ Benn and Peters, op. cit., p.175. An almost identical statement can be found in Benn, 'An Approach to the Problems of Punishment', Philosophy, Vol. XXXIII, 1958, p.326.  
² Ibid.  
(a) Benn writes that retributive justifications are 'either mere affirmations of the desirability of punishment or utilitarian reasons in disguise'. To support this contention he examines several putative retributive justifications. Here I shall comment on just two:

(i) Statements like 'it is fitting (or justice requires) that the guilty should suffer' say only that 'it ought to be the case [that the guilty should suffer], and it is just this that is in question.'\(^1\) While I can agree that 'it is fitting' says no more than 'it ought to be the case', the same does not go for his alternative reading: 'Justice requires'. This latter reading is not synonymous with 'it ought to be the case' and few retributivists would claim that it was. Certainly they would want to maintain that 'Justice requires' entailed 'it ought to be the case'. However, claims such as 'Justice requires' or 'The guilty deserve' (which, in this context, is equivalent to 'Justice requires')\(^2\) do not merely entail 'it ought to be the case' or 'the guilty ought', but do so on particular sorts of grounds, and these can be adduced to back up the implied claim that the guilty should suffer. These grounds have already been touched on in Chapter Three, and I shall return to them later in this Chapter.

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2 I shall support this in Chapter Five.
(ii) 'To say, with Kant, that punishment is a good in itself, is to deny the necessity for justification. ... But it is by no means evident that punishment needs no justification, the proof being that many people have felt the need to justify it.'¹ That many people have felt the need to justify punishment proves only that they have been confused about the notion, or so I have argued in Chapter Two. For 'punishment', when unqualified, carves out from our experience a type of unpleasant treatment which we regard as being justifiably inflicted. What people have properly felt the need to justify is the deliberate infliction of unpleasant treatment on people or perhaps particular instances of punishment. They may also have wondered why wrongdoing in particular should justify the infliction of unpleasant treatment. We shall consider each of these questions later in this Chapter.

(b) Benn maintains that rules and institutions must be justified by reference to their advantages. His support for this appears in a footnote to his 1958 article where he concedes that 'a rule might be justified in the first place by reference to one more general, under which it is subsumed as a particular application.'² Thus someone might say 'It is wrong to pick flowers from public gardens because it is wrong to steal - and this is a special case of stealing'. But, Benn argues, the acceptance of the rule as an extension

¹ Benn and Peters, op. cit., pp.175-6.
² Benn, 'An Approach to the Problems of Punishment', p.326.
of a more general rule can be justified only if it can be shown to have the same advantages as those which justified the more general rule, and if it can be shown that its exception would tend to defeat these advantages. For it could be objected that stealing is concerned only with private property, not with public property. Whether this objection sticks, Benn maintains, 'must depend on the reasons for the more general rule, understood in terms of its expected advantages, and on whether to allow the exception would tend to defeat them.'

In reply to Benn's position the following may be urged: whether or not the distinction between private and public property holds depends on whether or not 'picking flowers from public gardens' can properly be described as 'stealing'. And this is determined, not by a comparison of the advantages of a rule forbidding the picking of flowers from public gardens with the advantages of a rule forbidding stealing, but by giving a fuller description of each of the activities to see whether the former amounts to a special case of the latter. Benn misdescribes the character of much of our moral reasoning which consists in an endeavour to assimilate acts or activities to the various moral

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1 Ibid. Benn makes similar points with respect to the rule 'Euthanasia is wrong because it is wrong to kill'. Here he is clearly going further than Rawls, who confesses to the 'feeling that relatively few actions of the moral life are defined by practices and that the practice conception is more relevant to understanding legal and legal-like arguments than it is to the more complex sort of moral arguments' (op. cit., p.32 f/n.27).
notions which are embedded in our language. Thus it might be pointed out in this case that public gardens are 'public' only in the sense that access to them may be had by all, not in the sense that they are owned by no one. They are, let us say, shire property. And, therefore, ignoring the possibility of picking the flowers by mistake, taking them without permission is no different from stealing them. The condemnation of stealing itself stands in no need of justification, only exceptions to it.

Of course, to say that 'stealing is wrong' needs no justification is not to suggest that reasons cannot be given for it. I am suggesting merely that they will not be justificatory reasons. We may well ground such a rule under some wider moral rule such as 'one ought to respect the property of others', and this under some further rule, and so on. The end to this is not necessarily an appeal to utilitarian considerations, as Benn suggests (apart from anything else, any workable utilitarianism always presupposes certain non-utilitarian moral rules), but may well be an appeal to some transcendental moral rule; that is, a moral rule which must be correct if moral discourse, as an autonomous and objective form of practical discourse, is to be possible at all.

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It is difficult to see how Berm would go about refuting this position. He might try to argue that we can agree that public property is of the same order as private property only if the shire can be regarded in the same way as a private individual. And this is to be decided by a comparison of the expected advantages of having the rule forbidding the picking of flowers with the moral rule forbidding stealing. But I think this manoeuvre fails since the crucial factor with respect to the shire council's actions is not whether or not they decide that unprohibited picking of flowers from the shire gardens will have the same disadvantages as unhindered 'stealing', but whether or not they permit it. It is their permission or prohibition of picking the flowers which is the important factor with regard to how one views the act.

It is worthy of note that in later writings Benn does not adhere strictly to this point of view. In Social Principles and the Democratic State and in his Encyclopedia of Philosophy article on punishment, Benn recognizes the need to supplement his utilitarian justification of the institution of punishment with 'considerations of impartiality and respect for persons'¹ (or, as he refers to them in the later article, 'principles of justice')². Nevertheless, he considers such supplementary principles to be only necessary and not sufficient to justify the infliction of punishment.

¹ Benn and Peters, op. cit., p.183.
² Benn, 'Punishment', p.31.
I must make it clear that I do not want to deny that utilitarian considerations can be relevant to moral justifications. All I have been trying to show so far is that it is too strong to say as Benn does that 'we can provide ultimate justification for rules and institutions, only by showing that they yield advantages'.¹ I shall want to argue later that as far as the justification of institutions and practices are concerned, utilitarian considerations are very important. In the next section, I shall present and support a possible non-utilitarian candidate for moral justification.

2. Justifying the Infliction of Unpleasant Treatment.

I have endeavoured to show that neither Rawls nor Benn give convincing reasons why all rules need to be justified by utilitarian considerations. We saw that a rule such as 'picking flowers from public gardens is wrong' could be justified by assimilating it to the more general rule 'stealing is wrong' without appealing to the utility of the respective rules. Nor does the rule 'stealing is wrong' stand in need of justification, since it is a standard against which other rules or actions are to be justified.² This, of course, does not preclude us from asking why stealing is wrong, but such a question is not a justificatory one. Here as well we

¹ Benn, 'An Approach to the Problems of Punishment', p.326.
² Of course it is possible to question the standards which are invoked to support a justificatory question. In this case, however, no ground of dissatisfaction with the standard has been shown.
saw that there is no necessity for an answer to be given in utilitarian terms.

This is not to say that Benn's and Rawls' views are without their persuasiveness. But their persuasiveness lies in the fact that their articles are concerned with rules which are partially justified in terms of utility, namely, those rules which constitute social institutions or practices. And it is just this structure which I have denied is essential to the rules governing the infliction of punishment. It is because punishment is usually institutionalized that their arguments are so persuasive.

With this as a background, I want now to turn to the question: 'Can the infliction of unpleasant treatment on people ever be justified?' Evidently we think that it can, yet if this is to be taken seriously (as I think it should) as a justificatory question, there must be something about the infliction of unpleasant treatment on people that permits and prompts such a question to be asked. The standard which is invoked to give the justificatory question its rationale is the basic moral right which people have to freedom from interference from others. This right is usually referred to as natural, ineradicable or inalienable, since it is one which human beings are thought to possess qua human beings.¹

¹ A close consideration of such rights is beyond the purposes of this dissertation. Interesting discussions can be found in H.L.A. Hart, 'Are there any Natural Rights?', S.M. Brown, 'Inalienable Rights' and W. K. Frankena, 'Natural and Inalienable Rights', all of which appear in Philosophical Review, Vol. LXIV, 1955, pp.175-232; G. Vlastos, 'Justice and Equality', (footnote continued on p.146)
Nevertheless, sometimes we recognize situations in which this right may properly be overridden, namely, when the exercise of such freedom constitutes an unjustified interference with the freedom of others. What needs filling out is the notion of justified or unjustified interference. In the present section I want to consider some of the grounds which we adduce to justify the interference with people's freedom which is involved in the infliction of unpleasant treatment on them.

To do this I propose to take the cases of quarantine and punishment, for I believe that we will find exemplified two different types of grounds on which the interference with people's freedom involved in the infliction of unpleasant treatment can be justified. I shall then consider why the interference should be based on different grounds in each of these cases.

(a) If people have or carry dangerous and infectious diseases, we consider it morally justifiable to restrict their freedom of movement. We do this because of the danger which they might otherwise be to others. This morally justified activity, which we refer to as 'quarantining', has become (although is not necessarily) institutionalized, and in its institutional form it is administered by certain authorities. The institutionalization of quarantining is distinct from the simple activity of isolating disease-carrying persons,

and therefore further argument may be needed to justify it. To do this, it would be necessary to show that the benefits of quarantining (a safeguard against epidemics, the introduction of new diseases, etc.) would help to fulfil the legitimate purposes of the institution concerned. Further justificatory questions relating to its implementation could also be raised. The possession of infectious and dangerous disease may morally justify the restriction of people's freedom of movement. But it would hardly justify the 'old' customs of killing disease carriers or of regarding them as 'unclean' (in a pejorative sense). Somewhat analogously to quarantining, we consider it morally justifiable to inflict unpleasant treatment on people if doing so will save their lives. Lancing snakebites in the outback without anaesthetics is unpleasant, but, like quarantining, is justified by its consequences.¹

(b) It is my contention that people can justifiably suffer the infliction of unpleasant treatment if they are guilty of some offence which exposes them to moral blame. The basis for this justifiable unpleasant treatment is their desert, and we call it 'punishment'. The unpleasant treatment may serve such useful purposes as reforming offenders, lessening crimes, etc., but it is not these things which initially justify its infliction. As in the case of quarantining, punishment is now generally administered by certain institutional

¹ Certain complications arise if the person on whom the beneficial unpleasant treatment is to be inflicted does not want it (e.g. Jehovah's Witnesses and blood transfusions).
authorities, and because of this its administration as a social institution needs to be justified by reasons over and above those which originally justified the infliction of unpleasant treatment. To do this it is necessary to show that the benefits produced by punishment (reforming of offenders, lessening of crimes, minimizing of vendettas, etc.) are such as help to fulfil the legitimate purposes of the larger institution of which it forms a part (e.g. social order and well-being).\(^1\) Naturally, justificatory questions can still be asked about the mode of punishment - it is exceedingly doubtful whether we could justify the inclusion of torture in punishment; many would claim that capital punishment is unjustifiable; and some would question the institution of imprisonment as an acceptable mode of punishment.

The question which we must now ask ourselves is: Why should quarantine be morally justified largely on utilitarian grounds, and punishment be justified by other sorts of considerations? Is the distinction which I am making quite arbitrary? It might be thought that the difference lies in the responsibility of those on whom the unpleasant treatment is inflicted for that which provides the occasion or fundamental ground of its infliction. We do not normally regard smallpox bearers as responsible for their disease. Therefore we logically could not justify isolating them on the grounds of their desert. So, if isolating them is to be

\(^1\) It is important that the purposes of the larger institution are seen to be legitimate. Social order which is achieved at the expense of justice is not good enough to justify the institutionalization of punishment.
justified at all, it must be justified on other (most probably utilitarian) grounds. But this is not good enough. Sometimes people can be held responsible for the infectious and dangerous diseases which they contract. They might be contracted as a result of moral failure (as sometimes in the case of VD) or carelessness (malaria, in some circumstances). Nevertheless, the resulting isolation is still justified by its beneficial results. The difference, if there is one, must lie elsewhere.

My own suggestion lies in the fact that whereas the unpleasant treatment involved in quarantining is a regrettable accompaniment to some future good, that involved in punishing is a matter of deliberate principle. It is of the essence of punishment that it is unpleasant treatment, but it is not of the essence of quarantine that it is unpleasant. It may one day be possible to quarantine people without inconveniencing them in any way, but without a radical change in the notion, it would be impossible to punish them without inflicting unpleasant treatment on them.

I think this is what Bradley is driving at in the well-known, misunderstood, and somewhat confused passage in his Ethical Studies:

1 According to the Australian Army Law Manual the contraction of VD is punishable if not reported. Also, in New Guinea, soldiers are liable to punishment if they contract malaria, as there is then a presumption that they have not taken the prescribed precautions against its contraction. But the punishment they would receive for the offences is over and above their quarantining.
If there is any opinion to which the man of uncultivated morals is attached, it is the belief in the necessary connexion of punishment and guilt. Punishment is punishment only where it is deserved. We pay the penalty because we owe it, and for no other reason; and if punishment is inflicted for any other reason whatever than because it is merited by wrong, it is a gross immorality, a crying injustice, an abominable crime, and not what it pretends to be.

Here Bradley is certainly not simply saying what Quinton attributes to him, namely, that 'the infliction of suffering is only properly described as punishment if that person is guilty'. Of course Bradley recognizes that there is a conceptual relationship between punishment and guilt. Nevertheless he does not conceive this relationship as strictly as Quinton does. From his discussion it would seem that he would find no great difficulty in speaking of someone as being 'mistakenly punished'. What is called 'punishment' is 'not what it pretends to be' (i.e. punishment) only when it is knowingly inflicted on the innocent. And then it is 'a gross immorality, a crying injustice, an abominable crime'. In the second sentence Bradley recognizes that punishment is a moral concept, denoting a morally justified activity. This is confirmed later when he

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speaks of punishment as 'an end in itself'. It is for this reason that he rather confusingly speaks of guilt (or desert) both as part of the meaning of 'punishment' and as its justification. His point would have been a little less obscure if he had expressed himself in the following way:

What is inflicted as punishment is punishment only where it is deserved. We pay the penalty because we owe it, and for no other reason; and if what is inflicted as punishment is inflicted for any other reason whatever than because it is merited by wrong, it is a gross immorality, a crying injustice, an abominable crime, and not what it pretends to be.  

This does not completely extricate Bradley from confusion if taken to be a general comment on 'undeserved punishment'. But it will do for the sort of case which Bradley appears to have in mind, namely, the deliberate infliction of unpleasant treatment as punishment on a person who is known to be innocent.

The view which I am putting forward, namely, that unpleasant treatment which is inflicted as a matter of deliberate principle can be justified only on the ground

1 Bradley, op. cit., p.30.
2 A.S. Kaufman also credits Bradley with more than Quinton. As well he sees the need to modify Bradley's wording somewhat. This he does by replacing 'punishment' in the first sentence with 'infliction of injuries', the first 'punishment' in the second sentence with 'infliction of injury', and 'punishment' in the third sentence with 'injury' ('Anthony Quinton on Punishment', Analysis, Vol. 20, 1959-60, p.11). My own suggested additions are less substantial than Kaufman's, and, I think, preferable.
of desert, must be clearly distinguished from its common caricatures as the infliction of pain for pain's sake,\(^1\) or punishment for punishment's sake\(^2\), or even punishment for justice's sake\(^3\). Punishment is not inflicted for anything's sake, but this does not mean that there is no reason for punishing people. If people ought to suffer punishment, it is, in the first instance, because they deserve it, and not for the sake of pain, punishment or even justice. Punishment is not a means to justice but is rather an expression of one form of justice. The means-end characterization of retributive punishment is only a caricature which results from a predominantly utilitarian way of thinking.

Where utilitarian considerations are adduced to justify activities in which the infliction of unpleasant treatment is a matter of deliberate principle, then an injustice is done.\(^4\) In the case of punishment, if we try to justify the infliction of unpleasant treatment on

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4. Unless a person volunteers to undergo unpleasant treatment, say, as part of an experiment to test the effects of such on the human person. Nevertheless, the useful results which might be obtained from such an experiment would not justify its infliction upon unwilling subjects.
wrongdoers by the amount of good which it will do to themselves and others, then we violate the principle of respect for persons. 'Good utilitarian punishment', as Bradley argues, 'is the treating a man like a dog.'

Desert, I have suggested, is necessary and sufficient to provide a moral justification for having to suffer some kind of deliberately unpleasant treatment. But, as I tried to indicate earlier, it does not automatically justify its infliction by just anybody or just anyhow. In practice, the ground, the executor and the mode of punishment are very closely related, and so it is important to ascertain exactly for what and why justification is being sought. The punishment which X suffers may be morally justified ('I guess I had it coming to me'), though perhaps Y ought not to have inflicted it ('but you had no right to do anything about it'). Or perhaps X's suffering punishment would have been morally justifiable, but not if it involved killing his family in front of him. I have considered particular instances of punishment here, but this does not affect the point in any way.

There is one final problem which confronts us in this section. We can state it thus: Even if punishment is defined as unpleasant treatment meted out on offenders in virtue of their wrongdoing (desert), no justification has been given for saying that they deserve the unpleasant treatment involved in suffering punishment. Why should not wrongdoers deserve blame instead? Then

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Bradley, op. cit., p.32. I shall give further consideration to the notion of respect for persons in Chapter Six.
punishment will require a justification over and above that which justifies the blame.

This objection, I shall endeavour to show, is based on a confusion about the nature of blaming. Except to note that we often blame inanimate objects for some untoward event, I want to limit my discussion to situations in which we blame people.¹

First we must distinguish between 'X is to blame for C' and 'X deserves to be blamed for C'. These are not always distinguished, but when they are, the first signifies simply that X is causally responsible for some untoward event C (in which no evaluation of X is implied), and the second expresses X's moral responsibility for C. This being the case, the objection we have outlined becomes well nigh unintelligible. For to say 'wrongdoing deserves blame' would then be tantamount to saying 'wrongdoers deserve to be held morally responsible for their wrongdoing'. This is odd on two related counts: (i) typically, in calling people wrongdoers we are ipso facto holding them morally responsible for some wrong. Thus holding them morally responsible for some wrong (i.e. blaming them) is not something extra which they can be said to deserve; (ii) in normal speech, to

say 'wrongdoers deserve blame' is odd in a way in which 'wrongdoers deserve punishment' is not. Normally we would say 'Ward deserves the blame' (because he is a wrongdoer) or 'Ward is blameworthy', the 'blame' here being something extra not entailed by the subject.

However, there is a rarer sense of 'blame' in which blaming a person for some wrong is not so much to impute to him the responsibility for it, but is rather to censure, reprove or reproach him for it; e.g. 'He wrote to me, blaming me for my part in the affair'. But in this case blame is itself the infliction of unpleasant treatment, and we could almost say with Stevenson that it is 'a kind of verbally mediated punishment'.¹ As a general characterization of blame, Stevenson's view is undoubtedly wrong. Nevertheless, his statement does appear to fit one limited sense of 'blame'.²


² Some philosophers have argued that in no sense of blame could it be regarded as punishment since punishment requires an authority for its infliction whereas blame does not (e.g. Squires, op. cit., p.54; R.L. Franklin, op. cit., pp.170-4). I have already rejected the view that punishment implies authority in Chapter Two.

(footnote continued on p.156)

In Chapter Two I presented an imaginary discussion concerning the conviction of a person (Black) for homosexual practices. Two of the contributions went as follows:

Williams: 'Do you think they were justified in punishing him? I wouldn't have trusted the key witness. I'm sure he had a grudge against Black.'

White: 'True enough, but the other witnesses corroborated his testimony, so it's quite likely that he wasn't lying. But even if he wasn't lying, what does that matter? Homosexuality isn't immoral; it's a psychological defect. The poor guy couldn't have helped it. He needs treatment, not punishment.'

In this discussion both Williams and White are questioning the justifiability of this particular punishment. The significant thing about these, and other questions asked with reference to the moral sphere of discourse, is that they can be settled by showing that the features typically or characteristically involved in punishment are present in the particular case. In the present

(footnote 2 continued from p.155)
Interestingly enough, Mabbott argues that 'blaming people ... that is, expressing adverse verdicts upon them - requires a status' ('Freewill and Punishment', in Contemporary British Philosophy, Third Series, ed. H.D. Lewis, London: Allen & Unwin, 1956, p.300). In this he follows Nowell-Smith, who states: 'If a man deserves blame, someone would be justified in blaming him. Not necessarily you; for you may be in no position to cast the first stone or to cast any stone at all' (Ethics, Harmondsworth: Penguin, 1954, p.271). Nowell-Smith and perhaps Mabbott are using 'blame' in the last sense I pointed out.
instance William's and White's questions are met by showing that Black had committed an offence, and that this offence had exposed him to moral blame.

Although this procedure would normally be sufficient to settle any justificatory questions directly related to a particular instance of punishment, this is not necessarily the case. For although 'Black deserves to suffer punishment' entails that Black ought to suffer punishment, the moral consequences of Y's punishing Black by means D may be such as to make it wrong for anyone (or at least Y) to punish him. 'Wrong', not because he ought not to suffer punishment, but because the mode of punishment (e.g. imprisonment) or the exercise of a particular punishing authority (the state) would lead to morally unacceptable consequences (his death, or revolution). This type of reasoning, however, does not enter into the justification of punishments suffered in particular cases. What it justifies is the withholding of a particular type of punishment by a particular authority. As I said earlier, these questions are not easily separable, though they are distinguishable. But they are consistent with a person deserving to suffer punishment even though no one had the right to punish him; and were someone to take it upon himself to punish him he would be acting in a morally offensive way, even though the wrongdoer would have no grounds for complaint with respect to the punishment.

Of course, not only moral justificatory questions can arise with respect to particular instances of punishment. When punishment is meted out within a legal
context, questions can arise concerning the legality of the punishment. Did Black's actions fall within the legal definition of homosexual practices? Was the trial properly constituted? What was the legal status of the evidence? and so on. These questions, however, concern not so much whether Black ought to have suffered or deserved punishment, but whether the punishment which he may or may not have deserved was rightly administered by a particular authority.

4. Appendix: 'Undeserving' and 'Ill-deserving'.

Some writers have suggested that 'desert' or 'merit' could never be sufficient to justify morally the distribution of pleasant or unpleasant treatment because it rides roughshod over the inequalities of capacity which human beings display: 'Is it just that one man should earn more than another because he possesses natural abilities which fit him to achieve much more than the other?' This objection is usually raised only when desert is suggested as a criterion for the distribution of goods, but if true it would cast doubt on the sufficiency of desert as a justification for the punishment which a man suffers. It is my belief that the objection rests on a confusion between 'undeserving' and 'ill-deserving'.

In a sub-section entitled 'The Revolt Against Desert' Brian Barry states that

in examining the concept of desert we are examining a concept which is already in decline and may eventually disappear. 'Desert' flourishes in a liberal society where people are regarded as rational independent atoms
held together in a society by a 'social contract' from which all must benefit. Each person's worth can be precisely ascertained - it is his net marginal product and under certain postulated conditions ... market prices give each factor of production its net marginal product. Life is an obstacle race with no special provision for the lame but if one competitor trips up another, the state takes cognizance of this fact; thus compensation is given only when there is negligence on one side but not on the other.¹

Workmen's compensation, provision for the 'undeserving poor', and the attention paid to the rehabilitation of criminals rather than to seeing that they get their 'just deserts' are seen by Barry as welcome changes in this direction. Furthermore, with Bernard Shaw, he finds 'something ridiculous in trying to compare the "worth" of different jobs; and ... something degrading about a court having to decide whether some victim of a ghastly accident was "negligent" or not and whether or not he therefore "deserves" compensation.'²

There are a number of difficulties in Barry's contentions, but I mention the one which is relevant to my purposes. In failing to distinguish between the undeserving and the ill-deserving Barry invalidly infers from 'X does not deserve to get A' to 'X ought not to


² Barry, op. cit., p.114.
get A'. To be valid, his premise would need to have been 'X deserves not to get A'. If a workman does not deserve to get $1,000 a year which is the minimum subsistence level, it does not follow that he ought not to have this $1,000 provided for him. In fact it can be argued that a government has a duty to supply the basic needs of its citizens and that this is a right which they have as human beings. This is a right which they have quite independently of their deserts and which could be foregone only if they deserve not to have such basic needs met. It is difficult to see how this could come about unless they showed themselves completely unworthy of human society (by murder?).
I have argued that if punishment is inflicted on someone who does not deserve it, then it must be qualified as 'undeserved' or 'unjust'. And if deliberately unpleasant treatment or punishment is unjust, then its infliction is morally unjustified — or so I have implied. I have thus committed myself to the view that moral ill-desert is a necessary condition for the justifiable infliction of deliberately unpleasant treatment on people. I have suggested more than this, however. In the last Chapter I took the view that a person's moral ill-desert is sufficient to justify his suffering punishment.

These views are not without their difficulties, and in the remaining four Chapters I propose to examine my conclusions in the light of some of them. To be deserving a person must in some sense be held responsible for his actions, and in Chapter Six I shall ask, first, in what sense must a person be held responsible to deserve punishment, and second, whether people can in fact be held responsible in the requisite sense. I have already noted in a number of places that the fact that a person deserves punishment is not usually regarded as a warrant for its infliction by just anybody. By whom, then, should punishment be inflicted? is the question I set myself in Chapter Seven. Desert justifications of the infliction of unpleasant treatment have traditionally
founered when extended to the determination of how much punishment is deserved. I look at this problem again in Chapter Eight.

In the present Chapter, however, I want to examine some of the difficulties which are engendered by arguing that desert is a necessary and sufficient condition of morally justified punishment. We shall see that in fact the situation is a little more complex than I have so far made it out to be.

There is nothing very new in the argument that if punishment is undeserved it is unjust and hence unjustified. In fact, the key objection to utilitarian 'justifications of punishment' has traditionally been that they cannot exclude the possibility of justifying unjust punishments.¹ Generally, utilitarians have regarded this as a serious objection to their views, and much of their discussion has been devoted to arguing that, rightly understood, utilitarian 'justifications' can avoid this consequence.² Nevertheless, in a number


of recent discussions a less defensive position has been taken, and the validity of the argument 'undeserved therefore unjust therefore unjustified', as it relates to punishment (or unpleasant treatment), has been seriously challenged.

It will not be my task to discuss every possible challenge which may be presented. For example, I shall not examine the classical utilitarian view which maintains that each of the terms in the argument can be given a utilitarian analysis. \(^1\) To some extent I have argued against this possibility in Chapters Three and Four, but apart from that, there is a considerable literature which shows fairly clearly that any attempted utilitarian analyses of these terms ('desert', 'just', 'justified') need at the very least to be supplemented by non-utilitarian principles, and a further discussion does not seem to me necessary at present. \(^2\)

In the first section of this Chapter I shall be concerned to give a brief analysis of 'justice' as it is

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\(^1\) I refer especially to the views of Hume, Bentham and J.S. Mill. Sidgwick also follows in the tradition of the classical writers, but he recognizes the non-utilitarian undergirding of his position.

used in relation to punishment. This will be followed by a consideration of the objection that not all unjust punishments are unjustified. Some classical utilitarians, who gave 'justice' a utilitarian analysis, and modern utilitarians, who give 'justice' a non-utilitarian analysis, argue that the fact that a punishment is just is only one (albeit an important) element to be taken into consideration when determining its justifiability. The disutility of injustice must be weighed against the utility of punishing. Here I will consider in some detail the force of saying that something is just. The second section of the Chapter will be devoted to the following problem: if desert is necessary and sufficient for the punishment which a person suffers to be morally justifiable, is there any room left for mercy? Will it not be unjust and hence unjustifiable to treat the wrongdoer mercifully? And is not this morally repugnant?

1. Justice and Justified Punishment.

The Greeks traditionally viewed justice essentially as rendering to every man his due, and they were perceptive enough to recognize that what a man's due was, depended to a large extent on what aspect he was viewed under. The great advantage of this general account of justice was and is the fact that it is able

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So Simonides, as reported by Plato in The Republic, 331e. The earlier part of this section has benefited from Ch. IV of D. Seligman, Justice and the Role of Retribution in Punishment, Unpublished Ph.D. dissertation, New York: Columbia University, 1966.
to accommodate naturally the several different species of justice which we recognize - divine, poetic, commutative, social and retributive justice. But the formula, 'Justice consists in rendering to every man his due', does not itself define justice. It simply provides a broad conceptual framework for the different species of justice. Perelman and others speak of it as 'formal or abstract justice' and regard it as the common element in the various conceptions of justice.¹

Some regard the central notion of justice not as rendering-to-every-man-his-due but rather as equality. Frankena, for instance, while primarily concerned with social justice, nevertheless extends his analysis to justice in general, which he sees essentially as involving the allotment of substantially equal treatment to people, except as unequal treatment is justified by just-making considerations in the circumstances.² This


² W.K. Frankena, 'The Concept of Social Justice', in Social Justice, pp.10, 13. This is a modification of Brandt, who speaks of 'moral' rather than 'just-making' considerations as justifying inequalities of treatment (footnote continued on p.166)
right or claim to equal treatment he takes to be ultimately derivable from 'the intrinsic dignity or value of the human individual'. Thus, in considering the particular case of social justice, he argues that its grounding in individual human worth makes for a conception of the just society as one which considers and protects 'the good life of each man equally with that of any other no matter how different these men may be, and so it must allow them equal consideration, equal opportunity and equality before the law.'

Now, as an account of social justice, Frankena's egalitarian position has much to be said for it. It is only when an attempt is made to apply it to penal or retributive justice that its artificiality and stipulative nature become clear. Thus, in his only attempt to relate equality to retributive justice, he writes:

'Retributive justice - for example, punishment - must also be considered. Aristotle and others have brought it under the principle of equality by contending that the retribution restores the equality between the offender and the injured which had been disturbed. It might also be contended that, having violated the principle of equality, the criminal may justly be regarded as having forfeited his claim to a good life on equal terms with


1 Page 23.
2 Page 20.
others, and even his claim not to be pained. Critics of the retributive theory of punishment might prefer to argue that punishment is made just, and perhaps also obligatory, by the fact that it tends to promote the most equality in the long run by preventing people from infringing on the claims of others.¹

Frankena himself inclines to the latter view. It is difficult however to spell this out in practice. Take the case of a down-and-out who steals money from a philanthropist. It would appear from Frankena's account that this act of stealing would result in a greater equality of distribution of goods than there would otherwise have been, and it is not implausible to add: 'in the long run'. Would the punishment of such a man therefore be unjust? I hardly think so. Even a rule-utilitarian account would not completely overcome this difficulty.² Or, alternatively, suppose an otherwise law-abiding citizen takes revenge on an underworld leader for some act committed by that person. The removal of the underworld leader could quite conceivably result in more equal benefits for all; nevertheless, it would hardly be unjust to punish his assassin (even granting that there might be mitigating circumstances). In fact, one might argue that a rule prescribing the punishment of such people

¹ Pages 16-17.
² Rule utilitarianism, as has often been pointed out, only minimizes but does not dispel the difficulties of act-utilitarianism. On this, see especially H.J. McCloskey, 'An Examination of Restricted Utilitarianism', passim.
would be to deter others from the same sort of action, and so to curtail further equalization of the distribution of goods.

Frankena's mistake has been to use what is to some extent true of social justice\(^1\) as a model for a general account of justice. The ancient formula, however does more justice to the facts, as it easily accommodates the several species of justice. As Frankena points out, social justice rests on a recognition of certain fundamental rights which people have *qua* people - rights to such things as life, liberty, and well-being. These are rights which men can claim as their *due* simply because they are men, and any society which ignores such claims is an unjust one.

These rights, however, like other human rights, are not absolute, but are susceptible to justifiable exceptions. In the realm of retributive justice, what is *due* to a man is determined by his deserts. These deserts may constitute a sufficient ground for overriding the claims to life, liberty and well-being which a man has *qua* man. But retributive justice, in overriding such claims, nevertheless presupposes the value of the human individual (respect for persons).

This has an important bearing on the way an individual is to be treated even when he deserves the loss of life, liberty or well-being. He is not to be degraded to the level of an animal or tool. To use Seligman's schematic representation, life is like a game in which starters are given a number of value-points which they keep all their lives, but which may be completely overshadowed by the points of value or disvalue accumulated by subsequent acts.¹

As I have so far explicated the notion of justice, I have considered it as an evaluative and primarily as a moral notion. This account seems to me to be essentially correct, although it needs to be recognized that there are other uses of 'just' which do not fit neatly into this pattern.² To speak of a 'just appraisal' for instance is to evaluate the appraisal, but not necessarily morally. As much on the periphery are

¹ Seligman, op. cit., pp.168-9. W.B. Gallie seems to argue that desert and human rights (need) belong to two radically opposed moralities - liberal and socialist ('Liberal Morality and Socialist Morality', in Philosophy, Politics and Society, First Series, ed. P. Laslett, Oxford: Blackwell, 1956, pp.116-33). While it is clear that in the history of moral and political thought each of these two elements - basic human rights (or needs) and desert - has on occasion been emphasized to the exclusion of the other, I do not see any necessary opposition between them. Plato takes an exclusivist line in The Republic, where he argues that if a person's illness permanently prevents him from carrying out his tasks, then he has lost the right to live (406e-407a).

² Examples can be found in Gewirth, op. cit., p.112; Brandt, Ethical Theory, p.410.
certain conceptions of legal justice, which, while they accord with the general formula 'To every man his due', are peripheral precisely because what is due is not decided on moral criteria. Thus we find a use of 'just' which simply indicates that something has been done according to law, and this use operates fairly independently of the notions of human worth and desert. This is the sense in which Mabbott speaks of just punishment:

X is the citizen of a state. About his citizenship, whether willing or unwilling, I have asked no questions. About the government, whether good or bad, I do not enquire. X has broken a law. Concerning the law, whether it is well-devised or not, I have not asked.... It is the essence of my position that none of these questions is relevant to whether a particular punishment is just.¹

Thus, every time the law is properly administered, justice is done. There is something strange in saying this. The fact that the law has been properly administered does not entail that the person has been justly punished. Are opponents of apartheid in South Africa justly punished by the State? There is more to just punishment than the impartial administration of the law. This fact has often led people to distinguish two senses of 'just', one in which we can speak of a law being justly administered or of a just judge, and the other in which we speak of

the law itself being just. Now, I think that the first sense of 'just' is parasitic on the second sense, and though it can be used in both these senses, it is sometimes misleading to do so.\footnote{Pace R.A. Samek, 'Punishment: A Postscript to Two Prolegomena', \textit{Philosophy}, Vol. XLI, 1966, p.217 f/n.1.} This can be seen by contrasting the naturalness of speaking of a just law being unjustly administered with the oddity and pointlessness of speaking of an unjust law being justly administered. 'Just' has the wrong connotations for the secondary use to be taken too seriously. In such cases, we tend to replace 'justly' by 'impartially' or some other more neutral term.\footnote{Cf. S.I. Benn: 'A judge may enforce a racial segregation law with strict impartiality and yet commit injustice if the distinctions embodied in the law are not themselves relevant' (art. 'Justice, in The Encyclopedia of Philosophy, ed. P. Edwards, New York: Macmillan and The Free Press, 1967, Vol. 4, p.299; also R.B. Brandt, Ethical Theory, pp.409-10; W.K. Frankena, op. cit., p.5). We tend to speak of 'strict justice' being administered where morally extenuating circumstances are not allowed by a basically just law which lacks the subtlety appropriate to true justice.}

In sum, we can see that generally to call a punishment unjust is to qualify the moral endorsement of the act, which would otherwise be conveyed, and to indicate instead that the person has not been treated as he deserves. But what exactly is the force of saying that a punishment is unjust? Does it mean that such punishment is also unjustified? As I pointed out earlier, it has often been
assumed, especially by retributivists, that this is so. Nevertheless, quite early in the recent debate it was made clear that this inference (assuming that it is an inference) could not be taken for granted. It was thought that there might be occasions on which an unjust punishment would be morally justified. In 1954 Flew warned against the 'easy but mistaken assumption' that 'to show that something is just (or unjust) is ... always and necessarily to show that it is justified (or unjustified). As Flew is arguing here against Mabbott, there is some point to his warning, since, as we have seen, Mabbott conceives justice in purely legal terms, and it is therefore clearly possible that not all just (unjust) punishments will be justified (unjustified).

Perhaps Flew would still have argued in the same manner had Mabbott used 'just' in its primary sense. Whether or not he would have, quite a number of philosophers have argued in this way. In a symposium on punishment, H.J. McCloskey criticised utilitarian justifications of punishment for their inability to accommodate the notion of justice. Justice, he argued,  


cannot be reduced to utility, and, indeed, is often opposed to it. Nevertheless, he conceded that sometimes it is morally permissible and obligatory to override the dictates of justice. The retributive theory is a theory about justice in punishment and tells only part of the whole story about the morality of punishment.¹

T.L.S. Sprigge, the other symposiast, rightly in reply objected that 'to determine that a punishment ought to be inflicted is to determine that it is morally obligatory, and not simply that it is permissible'.² In a later article McCloskey conceded this point,³ and argued for the following two propositions:

(footnote 2 continued from p.172)⁴


McCloskey, 'A Non-utilitarian Approach to Punishment', p.251.

² Sprigge, op. cit., p.267.

³ McCloskey, 'Utilitarian and Retributive Punishment', pp.102-3.
[i] To be just, punishment must be of an offender for an offence and not in excess of what is commensurate with the offence, where 'offence' and 'offender' are to be interpreted in the morally relevant senses of those expressions.

[ii] To be morally justified, unjust punishment must not simply be useful; rather, the good it achieves must be so great that it outweighs the evil of the injustice involved.1

His disagreement with utilitarianism is that it 'does not take account of the relevance of the claims of justice when determining whether a punishment is morally right. For the utilitarian, the utility of the punishment is the only morally relevant consideration.'2

In a recent book, J.R. Lucas also allows that justice, 'as one among many other political goods'3, may be compromised with 'Equity, Equality, Legality, Humanity, Rationality, Public Interest, or the Common Good'.4 Both he and McCloskey illustrate their contentions with a number of examples.

McCloskey presents a sophisticated version of the now familiar case in which a sheriff frames an innocent yet 'worthless' Negro in order to prevent race riots developing in a race-torn community in which a white woman has been raped by a Negro. Sprigge had said of

1 Pages 91-2.
2 Page 93.
3 Lucas, op. cit., p.238.
4 Page 242.
this example that if it had been qualified so that greater good would result from the sheriff's action than if he had done otherwise, then it would not be rejected by 'the plain man' after all, but accepted, though with regret. On this McCloskey comments:

Whether it was so accepted would depend on how much good is promoted and evil prevented by the injustice, and also on the character and nature of the victim. However, the important point is that, whether or not it is accepted by the plain man, its injustice would be a factor of which the plain man would and ought to take account. If he accepted it, it would be in spite of its injustice. The regret he would experience if he did accept such punishment would be at having to override the claims of justice; on the other hand, it is also true that if the plain man rejected the punishment because of its injustice, he would experience regret at being unfree to prevent suffering. It is hard to see how, on the utilitarian theory, there is any room for the former regret, for it is regret at having to do something that is evil of its nature and not by virtue of its consequences.1

McCloskey suggests that there may also be situations in which the punishment of parents for the offences of their children, collective punishment, punishment of the insane, and excessive punishment, are rightly administered, for 'the claims of justice are simply one sort among

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1 An elusive creature, appeal to whom is philosophically suspect. Is Sprigge's contention based on a survey of what 'plain men' have said? Do all 'plain men' think the same? And if they do, does this make them right?

2 McCloskey, 'Utilitarian and Retributive Punishment', p. 96.
prima facie claims, and ... may on occasion be overridden'. However, he does not specify the sorts of occasions on which this may be so.

Lucas draws a number of examples from the law:

A law, like a particular decision, may be open to criticism on the score of injustice, yet be defensible on other grounds. We may, quite properly, compromise our ideal of justice in order the better to secure ease of administration, the maintenance of law and order, or for the sake of Freedom, Equality, or Public Interest.

In the last war, people with German names in Britain were more likely to be security risks than other people, and legislation was carried out accordingly. Laws were formulated in terms of features that were 'partly or contingently relevant but easy to define or determine', in preference to features that were 'totally and necessarily relevant, but difficult to describe or in actual cases to apply'. The same applies to laws in which liability is strict. As well, Lucas suggests that when law and order are in serious danger of breaking down (as after an earthquake or riot), it might be justifiable to inflict severe and exemplary punishments.

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1 Page 102.
2 Lucas, op. cit., p.237.
3 Page 240.
4 Page 241.
This is a formidable array of objections to the view that if punishment is unjust it is unjustified, and I am not sure that they can be met by analysis alone. And this can be expected, for, as I argued in Chapter Two, genuine moral problems cannot be solved by mere definitions. Analysis can take us so far, but not all the way. There comes a point at which a moral decision must be made. Nevertheless, there is some value in enquiring into the force of saying that something is just.

Mill writes thus:

As we do not call anything justice which is not a virtue, we usually say, not that justice must give way to some other moral principle, but that what is just in ordinary cases is, by reason of that other principle, not just in the particular case. By this useful accommodation of language, the character of indefeasibility attributed to justice is kept up, and we are saved from the necessity of maintaining that there can be laudable injustice.¹

For Mill, an act, policy, law or punishment is just only if it is morally right and unjust only if it is morally wrong. As I shall argue, there is a good deal to be said for this view, for just and unjust are evaluative notions which find their primary use in the moral sphere of discourse.

Moral notions are of varying degrees of generality, from very broad notions such as right and wrong, good and bad, to more precise notions such as murder, lying etc.

As well, moral notions may be of varying degrees of completeness. A complete moral notion is one whose application automatically and consistently carries with it commendation or (vel) condemnation (on moral grounds), whereas an incomplete moral notion lacks this consistency. To take two examples: there may be special circumstances in which we would regard lying as justifiable — as in cases where telling a lie would save an innocent person's life. Lying is thus not a complete moral notion. We could make it more complete by distinguishing those cases in which lying would be justifiable and calling them by some other name. To some extent this is discernible in our references to 'white lies'. Murder, on the other hand, comes closer to what we would regard as a complete moral notion. Actions to which the name 'murder' would apply except for one or two morally relevant features which render them justifiable, we refer to as justifiable homicides instead.

How do 'just' and 'unjust' fit into this schema? To call an act or activity 'unjust' is not quite the same sort of thing as calling it 'fraudulent', even though each is a moral notion. 'Fraud' is somewhat more specific than 'injustice'. Only a relatively narrow

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2 Kant, of course, thought otherwise.

3 Or, in different circumstances, capital punishment, acts of war, etc.
range of acts or activities can be characterized by the former, whereas the latter can cover a great range of acts or activities, as is evidenced by the different species of justice. Some of the Greeks went so far as to identify justice with virtue, especially when considering 'the just man'.\(^1\) But this is somewhat broader than our general use. Nevertheless 'just' and 'unjust' do give a moral characterization of a large range of intentional behaviour, or, more specifically, of that intentional behaviour concerned with the distribution of those things which intentional agents can claim as their due.

The more significant question, however, is whether or not 'just' and 'unjust' are complete moral notions. Perhaps this is a question which we cannot decide in advance, since we cannot envisage all the possible situations in which the question of the justifiability of compromising justice might arise.\(^2\) But even if this is so, we can still consider the various candidates which have been put up, and thus get some impression of its completeness.

I take first McCloskey's example of a sheriff tempted to frame a certain undesirable negro for the rape of a white woman. McCloskey argues that whatever happened in such a situation, 'the plain man' would

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2 One of the inadequacies of Kovesi's discussion is that he gives no criteria for deciding whether or not a particular moral notion is complete.
feel regret, for either way there would be a sacrifice. I do not need to dispute the fact that there would be regrets, whatever happened. But I cannot as easily concede that in sacrificing justice the sheriff would be doing the right thing. For one thing, though this is not decisive, certainty is often impossible to obtain in these kinds of situations (Munich, 1938, is evidence for that), and where this is so, justice would be preferable even from a utilitarian viewpoint. But it is no doubt possible to construct a situation in which it would be the height of scepticism to doubt the consequences of refusing to 'punish' the innocent negro: when, for example an unruly and near-hysterical mob confronts the sheriff demanding the offender or threatening to go out and get a scapegoat instead. Even here the broadly utilitarian case does not seem to me to be convincing. On my view, the morally right thing for the sheriff to do would be to refuse to dirty his hands, and then to do everything in his power to prevent the mob from carrying out its threat. Should he fail to stop them (as is almost certain), and another negro is lynched, the blame rests on their shoulders, not his. He has done the right thing and cannot be held responsible for the immoral demands and behaviour of others. The responsibility would have been his only if he had framed the innocent negro.

Undoubtedly my view will not convince everyone. For example, it is not likely to convince a person who gives more weight to the principle of utility than to justice. But even those who agree with the standpoint I have expressed here may not be convinced that all unjust
acts must be unjustifiable. And there is some truth in this. It might be said that this example prejudices the issue because the injustice which would be involved would be of far greater moral significance than the disutility of the alternative. But if the disutility of justice were multiplied, would the same argument still hold? What if the mob threatened 'to get every negro in town' unless the actual offender was immediately produced? Or to take an even more extreme case, what if one country threatened to destroy another, unless a certain one of its (innocent) citizens was fined $5? Surely in such cases it would be right to sacrifice justice to utility?

But such examples, while they make their point, tend, if taken seriously, to be self-defeating. A country which really meant to destroy another unless a certain minor (in comparison) injustice was committed, could hardly be trusted to be dissuaded if such a demand was acceded to. For the demand is not such as one could expect from rational men, in which case prediction of consequences becomes well nigh impossible. Nor could there be much guarantee that a near-hysterical mob, seriously threatening to lynch every negro in town unless the 'offender' was immediately produced, would be satisfied should the sheriff (unknown to them) frame an innocent negro. It is precisely as the magnitude of the injustice diminishes in relation to the threatened disutility of justice that the genuineness of the alternatives becomes less certain. The more irrational the demands, the less appropriate becomes the rational calculation of consequences which lies at the heart of the utilitarian's position.
What does this show? I do not think that it shows that no act of injustice could ever be justified. It does however indicate the difficulty of showing that any act of injustice would ever be justified. If 'just' is not a logically complete moral notion, it is nevertheless about as close as we are going to get to a complete moral notion. It may not follow absolutely necessarily that if an act is unjust it is therefore unjustified, but it will need a lot to show that in fact a particular unjust act is not also unjustified.1

1 See the discussion by G.E.M. Anscombe, who asserts that 'if someone really thinks, in advance, that it is open to question whether such an action as procuring the judicial execution of the innocent should be quite excluded from consideration - I do not want to argue with him; he shows a corrupt mind'. In a footnote to this passage she considers the case in which 'a government is required to have an innocent man tried, sentenced and executed under threat of a "hydrogen bomb war". It would seem strange to me to have much hope of so averting a war threatened by such men as made this demand. But the most important thing about the way in which cases like this are invented in discussions, is the assumption that only two courses are open: here, compliance and open defiance. No one can say in advance of such a situation what the possibilities are going to be - e.g. that there is none of stalling by a feigned willingness to comply, accompanied by a skilfully arranged "escape" of the victim' (Modern Moral Philosophy, Philosophy, Vol. XXXIII, 1958, p.17). Anscombe's views are challenged, to my mind convincingly, by Jonathan Bennett, who argues that she confuses two positions: (i) 'In no situation could it be right to procure the judicial execution of the innocent: political probability aside, the judicial execution of the innocent is absolutely impermissible in any possible circumstances'; and (ii) 'It is never right to procure the judicial execution of the innocent: a situation in which this would be right has never arisen, isn't going to arise, and (footnote continued on p.183)
But perhaps I have prejudiced the case with the sort of example which I have chosen to discuss. Would similar considerations work for the sort of examples adduced by Lucas, namely, strict liability laws (or what amount to such)? I think so, though here the position is a little more subtle. It is an important feature of a good law that it is easily administered, and there is a tension between this requirement and the requirement that only the deserving be punished. Consequently, it sometimes happens that the undeserving are convicted of some offence. Nevertheless, it would not be quite accurate to say that such laws were unjust—it might be better to say that on occasions they 'work a "certain injustice"'.

Putting it this way, we can explain our feeling that it is better to have some law rather than no law here, as well as our feeling that as it stands the law is not quite satisfactory. We can see this in practice where, over the years, strict liability laws have become susceptible to certain defences. In Australia, for example, it is now possible to make a defence of reasonable mistake or ignorance of fact.

(footnote 1 continued from p.182) cannot even be described without entering into the realm of political fantasy.' He goes on to argue that only the latter position is viable; the former must be based either on obedience to authority or on muddled thinking ('"Whatever the Consequences"', Analysis, Vol. 26, 1965-6, pp.83-102).

1 R.B. Brandt, Ethical Theory, p.409.

Certain other manoeuvres are also possible, such as the subsequent suing of the party who was really at fault (say, of a manufacturer or a supplier by a convicted retailer).

For these reasons I find it difficult to view justice as just one among several *prima facie* claims relevant to a morally satisfactory law or legal system. Justice is, to all intents and purposes, a necessary condition of a morally acceptable law or legal system, and although laws have legitimate social functions as well, which sometimes bring them into tension with the requirements of justice, we cannot rest morally content with them until they discriminate adequately between deserving and undeserving.

However, there still remains a case in which injustice may appear to be justified. And to this we now turn.

2. Justice and Mercy.

The following objection might be raised against the thesis I have advanced: if moral ill-desert is (to all intents and purposes) a necessary and sufficient condition for the justified suffering of deliberately unpleasant treatment, am I not committed to the view that mercy and clemency\(^1\) are wrong? Does not mercy become a form of injustice? This conclusion would seem to follow from K.G. Armstrong's statement that 'to be merciful is to let someone off all or part of

\(^1\) Clemency, unlike mercy, is restricted to offenders.
a penalty which he is recognized as having deserved;¹ and D.C. Hodges' similar claim that 'mercy is the pardon or mitigation of retributive justice'.² J.R. Lucas sees two possibilities: 'Joseph, being a just man, was minded to be merciful towards what he took to be Mary's fault: often, however, Justice does not include Mercy, but is opposed to it'.³ It would thus appear that my refusal to countenance any actual departures from justice goes counter to our ordinary moral convictions. Who, except the Shylocks of this world, could fail to accord with Portia's claim that

... earthly power doth then show likest God's
When mercy seasons justice?⁴

Indeed does not mercy 'triumph over' justice, which is, as someone has put it, a rather 'shabby virtue'?

It would take me too far out of my way to attempt a comprehensive analysis of mercy, for it is a complicated notion with somewhat different criteria of application in different contexts. The core idea, however, seems to be that of treating with compassion those who are in need, distress, debt or under threat of some sort, and who have no claim to such compassionate

⁴ Shakespeare, The Merchant of Venice, Act 4, Scene 1, lines 193-4.
treatment. I have purposely left the notion of a claim ambiguous as between desert and entitlement, since the possession or lack of either may provide an appropriate context for mercy.

Mercy is not something which can be shown indiscriminately. There are proper grounds for mercy. If a jury recommends that mercy be shown to a condemned man, its recommendation is not simply the expression of fellow-feeling for him, but it is a call to take into account various factors of the situation which would make a strict adherence to the letter of the law result in harshness or cruelty to the man.

The Royal Commission on Capital Punishment (1949-53) brings together a great variety of grounds which have been used to support recommendations for mercy in cases where the judge has no alternative but to pass the death sentence. It is pointed out that such recommendations are almost invariably successful where mercy killings, survivors of suicide pacts and infanticide are involved. Some of the other cases in which the plea for mercy can sometimes be successfully entered are

unpremeditated murders committed in some sudden excess of frenzy, where the murderer has previously had no evil animus towards his victim, especially if he is weak-minded or emotionally unstable to an abnormal degree; murders committed under provocation which, though insufficient to reduce the crime to manslaughter, may be a strongly mitigating circumstance; murders committed without intent to kill, especially where they take place in the course of a quarrel; murders committed
in a state of drunkenness falling short of a legal defence, especially if the murderer is a man of hitherto good character; and murders committed by two or more people with differing degrees of responsibility.¹

Here it can be seen that mercy is not opposed to justice as such, but to what I have called 'strict justice', justice which has been solidified in a system of legal rules.² Since it is one of the functions of law to give a practical and efficient means of judgment, it must be expressed in terms of relatively clear-cut rules which, while they usually deal adequately with standard situations, are often unable to cover fairly the multiplicity of human behaviour. Pleas for mercy, then, are intended to have taken into account such extenuating circumstances as mitigate the offences as they are defined and sanctioned by the law. It is for this reason that we usually speak of mercy 'tempering' or 'seasoning' justice rather than opposing it. And the prophet of old could claim without inconsistency that God required of the people they 'do justly, love mercy and walk humbly' with their God.³

When we consider the distribution of welfare, true justice and mercy come together even more clearly. To show mercy to the widow, fatherless and destitute is to

² See above, p.171, f/n 2.
³ Micah 6:8.
see that they are not deprived of that welfare which is their due as human beings but which they cannot claim on the basis of their deserts. The paradigm case is that of a creditor waiving his right to a debt which the debtor is unable to pay.

The Stoics showed considerable interest in the relation of justice and mercy, since for them they comprised the two fundamental duties of man in relation to his fellow-men:

On the one hand, they required from their wise men that strict justice\(^1\) which knows no pity and can make no allowances; and hence their ethical system had about it an air of austerity, and an appearance of severity and cruelty. On the other hand, their principle of the natural connection of all mankind imposed on them the practice of the most extended and unreserved charity, of beneficence, gentleness, meekness, of an unlimited benevolence, and a readiness to forgive in all cases in which forgiveness is possible.\(^2\)

Though the relation between the two exercised them considerably, they did not see an ultimate conflict, and Zeller reports Seneca as concluding that not severity, but only cruelty, is opposed to mercy; for no one virtue is opposed to another: a wise man ... will not remit punishments in cases

\(^{1}\) Here 'strict justice' is more like 'absolute impartiality' than 'strict justice' as I have defined it.

in which he knows them to be deserved, but, from a sense of justice, he will take human weakness into consideration in allotting punishments, and make every possible allowance for circumstances.¹

This conclusion is very similar to my own, for it sees mercy in conflict not with justice, but with 'strict justice'. The opposite of justice is not mercy but injustice, the opposite of mercy is not justice but harshness, cruelty and lack of compassion. 'Mercy without justice is the mother of dissolution,' wrote Aquinas; 'justice without mercy is cruelty.'²

In this Chapter I have examined two possible objections to the thesis that for the deliberately unpleasant treatment suffered by a person to be morally justified it is necessary and sufficient that it be deserved. To the view that the possibility of an unjust yet justified punishment could not be ruled out I conceded that as a logical possibility it could not, but that to all intents and purposes it remained simply a logical possibility. And to the view that my position excluded the exercise of mercy, I replied that this objection involved a misunderstanding of the notion of mercy, and a confusion of justice with so-

¹ Page 316.
called 'strict-justice'. But there are even more fundamental difficulties with the position I have taken, and, for that matter, with most theses concerning punishment. These we shall now consider.

CHAPTER SIX
PUNISHMENT AND RESPONSIBILITY

Punishment, I have maintained, is inflicted for moral offences. However, if a man goes berserk and kills several people, we do not punish him. Nor do we punish the kleptomaniac who persistently steals nylon stockings. What is more important, punishment is not considered appropriate in such cases. If asked to give a reason for this, we would most naturally say that no matter how bad a deed done by a person was, unless he was responsible for his action, he could not be blamed for it, and hence did not deserve to be punished. Therefore, he ought not to suffer punishment.

Of course, there is a secondary sense in which the madman and the kleptomaniac are 'responsible for' their deeds, namely, that in which \( X \) is responsible for \( B \) is equivalent to \( X \) did \( B \) or \( X \) caused \( B \) to happen. Used in this sense, 'responsible for' imputes no blame to the madman or kleptomaniac, but simply indicates a causal relationship between them and their respective deeds. It is a secondary use because 'responsible for' generally

\[1\] There are some contexts in which \( X \) did \( B \) and \( X \) caused \( B \) to happen contextually imply \( X \) was responsible for \( B \) in the stronger sense I shall soon discuss, but they can be ignored for the present purposes (See G. Pitcher, 'Hart on Action and Responsibility', Philosophical Review, Vol. LXIX, 1960, pp.230-1).
does not depict a scientific or quasi-scientific relation holding between two objects, events, etc., but characterizes their relationship in a manner appropriate to the evaluative (and centrally the moral) sphere of discourse.¹ This is true even when 'responsible for' is used in relation to the inanimate world; e.g. 'The winter frosts were responsible for the poor crops'. Here there is not only a clear-cut causal relation between the winter frosts and the poor crops, but also an imputation of blame (of a non-moral variety) to the frosts.²

In what sense must a person be or be held responsible for something in order to be deserving of punishment?³ I shall tackle this question in four


3 Questions of responsibility usually rise only when something untoward has happened or some wrong has been done. Indeed, disregarding the case in which 'responsibility' means 'duty', some have analysed the concept as though this were the only context in which 'responsible for' could be used (e.g. M. Schlick, Problems of Ethics, trans. D. Rynin, New York: Prentice-Hall, 1939, p.151; G. Ryle, The Concept of Mind, (footnote continued on p.193)
stages; first, by examining what I take to be an unsatisfactory account of this responsibility; second, by presenting what I believe is a more satisfactory account; third, by considering the objections of psychological revisionists; and finally, by comparing legal and quasi-legal responsibility with moral responsibility.

1. Responsibility as Alterability.

On more than one occasion P.H. Nowell-Smith has tackled the question of responsibility, and especially 'the relation of "fittingness" that is held to obtain between voluntary actions and moral judgement'.

(Footnote 1 continued from p.192)


P.H. Nowell-Smith, 'Freewill and Moral Responsibility', Mind, Vol.LVII, 1948, p.52. He seems to be guilty of a confusion here, for the relation of fittingness he discusses is not between voluntary actions and moral judgments, but between moral judgments and blame (in Nowell-Smith's sense, i.e. 'censure') or punishment. But this confusion, we shall see, is typical of the confusions which beset his position. A later discussion of the same issues is found in his Ethics, Harmondsworth: Penguin Books, 1954, Chapters 19, 20, and modifications to his earlier view on freewill are contained in 'Determinists and Libertarians', Mind, Vol.LXIII, 1954, pp.317-37.
early article he presents an analysis of moral responsibility, voluntary action, and merit or, as he usually speaks of it, fittingness. He begins with the familiar idea that if moral responsibility for an action is properly to be imputed to me, my action must be voluntary, and that it can be considered voluntary only if I could, had I so wished, have acted otherwise. The apodosis is, of course, the stumbling block, but he summarizes his own view with a quotation from Ayer:

To say that I could have acted otherwise is to say, first, that I should have acted otherwise, if I had so chosen; secondly, that my action was voluntary in the sense in which the actions say of the kleptomaniac are not; and, thirdly, that nobody compelled me to choose as I did; and these three conditions may very well be fulfilled. When they are fulfilled, I may be said to have acted freely. But this is not to say that it was a matter of chance that I acted as I did, or, in other words, that my action could not be explained. And that my actions should be capable of being explained is all that is required by the postulate of determinism.2

But while Nowell-Smith considers this sufficient to show what the determinist means when he speaks of voluntary

1 It seems clear from his discussion in Ethics that for Nowell-Smith 'fittingness' is a much more general term than either 'desert' or 'merit' (pp.186-8). The latter have the status of particular applications of fittingness (p.302; cf. 'Freewill and Moral Responsibility', pp.56, 60-1).

actions, it does not by itself answer the more important question concerning the sense in which it is 'rational or just or moral to praise or blame voluntary actions but not involuntary ones .... We need to explain the relation of "fittingness" that is held to obtain between voluntary actions and moral judgement.' In an endeavour to clarify this, Nowell-Smith distinguishes between value judgments and moral judgments. The former concern events (and their consequences, but not their causes) which we are concerned to promote or to prevent, and the latter, while presupposing the former, make an additional empirical claim to the effect that the agent's actions are caused by his voluntary decision. The explicandum thus stands: "Good" and "bad" events that are also moral actions are fit subjects for praise and blame, while other good and bad events are not." After discussing and dismissing positivist and intuitionist accounts of the matter, Nowell-Smith notes that the class of voluntary actions coincides 'roughly' with the class of actions caused by characteristics which

1 'Freewill and Moral Responsibility', p.52.

2 Page 55. As I have noted above (p.193f/n.1), Nowell-Smith does not use 'blame' in its usual sense of 'ascribing responsibility for something untoward or wrong'. As he uses it, blaming is like censuring. We must not underestimate the importance of this ambiguity to his position, for it enables him to conflate two quite different questions: (1) What justifies our judging people's actions with respect to their morality? and (2) What justifies our overt expression of those moral judgments? Nowell-Smith uses 'blame' in the sense relevant to (2) to answer (1). Cf. S. Moser, 'Utilitarian Theories of Punishment and Moral Judgments', Philosophical Studies, Vol. VIII, 1957, pp.15-19.
can be strengthened or inhibited by praise or blame, and then concludes that 'moral characteristics, as opposed to intellectual [sic] and physical ones are just those that we believe to be alterable in this way'.¹

It is not quite clear how Nowell-Smith intends to relate 'moral' and 'alterable by praise or blame'. Sometimes (as in the last quotation) he appears to suggest that 'alterable by praise or blame' is what we mean by 'moral'.² But if this is the case, he is committed to including in morality a much wider range of actions than we would normally regard as appropriate. Etiquette, for example, would be included in morality, since we can alter people's manners by punishing them, or reinforce their manners by rewarding them. To some extent, so would such things as adherence to the rules of games and carefulness in grammar. The inclusion of these within the domain of morality is not convincingly ruled out by Nowell-Smith's later requirement that morality implies 'a rough community of pro- and con- attitudes'.³

¹ Page 56. Cf.: 'Rewards and punishments are means of varying the causal antecedents of actions so that those we desire will occur and those we wish to prevent will not occur' (p.59).

² Cf.: 'When we remember that the purpose of moral verdicts and of punishment is to strengthen or weaken certain traits of character it is not difficult to see that this feature, so far from being synthetically connected with the notion of a "moral" characteristic, a virtue or a vice, is just what constitutes it' (Ethics, pp.303-4); 'Pleasure and pain, reward and punishment are the rudders by which human conduct is steered, the means by which moral character is moulded; and "moral" character is just that set of dispositions that can be moulded by these means' (p.304).

³ Page 301.
We could, however, strengthen Nowell-Smith's position by insisting that 'alterability by praise or blame' is only a necessary and not a sufficient condition of calling a characteristic 'moral'. It would then be possible for him to avoid the objection that his definition includes too much. But even this would need further refinement, for if 'alterability' is to figure as part of the definition of 'moral', a distinction must be made between the person, or perhaps class of persons, whose behaviour will not be altered by praise, blame or punishment (the habitual or persistent offender, and the recidivist) and the person (or class of persons) whose behaviour cannot be altered by praise, blame or punishment. Nowell-Smith does not tell us how these two persons (or classes of persons) are to be distinguished, and therefore, to this extent, at least, alterability is inadequate even as a necessary condition of moral behaviour. But apart from this there is something very odd about including 'alterability by praise or blame' as part of the meaning of 'moral', for it seems to make nonsense of the idea of a society in which everyone always acted morally (or immorally) but in which no one was ever overtly praised or overtly blamed. Unrealistic perhaps, but hardly nonsensical.

But there is another strand in Nowell-Smith's position which could fare better. And this is that 'alterability by praise or blame' is simply a criterion of moral behaviour. In other words, because moral behaviour is necessarily voluntary behaviour, and 'the class of actions generally agreed to be voluntary coincides roughly with the class of actions that are
caused by characteristics that can be strengthened or inhibited by praise and blame,' then alterability is a reliable guide as to whether or not behaviour is moral.\textsuperscript{1}

If this were simply a negative principle, I would have no real objections to this, though I doubt whether it would then truly represent Nowell-Smith's position. Admittedly, the distinction between those whose behaviour would not and those whose behaviour could not be altered by praise or blame would still need to be drawn clearly, but apart from that the behaviour excluded by the principle could confidently be called 'non-moral'. But whether the principle could serve as a positive criterion is much more doubtful. For it would then be susceptible to the objection I raised earlier, namely, that breaches of etiquette, and of the rules of grammar and of games could be included in the class of 'moral behaviour'. But whether as a negative or as a positive criterion, 'alterability by praise or blame' seems to be impractical, for we want to know whether or not a person's behaviour is moral as a preliminary to the decision whether or not to praise or blame him. We do not first praise or blame him and then decide whether or not his behaviour was moral. This objection, however, is relevant only to the act-utilitarianism of the earlier article and does not count as easily against the rule-utilitarian position which Nowell-Smith espouses in \textit{Ethics}.\textsuperscript{2}

\textsuperscript{1} 'Freewill and Moral Responsibility', p.56.
\textsuperscript{2} \textit{Ethics}, pp.305-6.
We have not yet commented directly on Nowell-Smith's 'analysis' of fittingness or merit. 'Fittingness', he writes, 'is a causal relation, discoverable neither by a special "moral sense" nor by intuition nor by a priori reasoning, but by reflection on experience'. There are difficulties in this position, not the least of which is to understand how fittingness is a 'causal relation'. Obviously to say that \( X \) is fittingly punished is not to say that \( X \) or \( X \)'s immoral behaviour causes punishment (to be inflicted on him?). All it could intelligibly mean, and this chimes in with Nowell-Smith's original statement of intention, is that the causal relation which putatively exists between punishment and altered behaviour explains why we think it fitting that immoral behaviour be punished. But does it? Punishment may well be effective without being merited, and merited without being effective. Nowell-Smith seems to be aware of this difficulty. This is reflected in the somewhat stronger rule-utilitarian position he adopts in the later Ethics, and also in an unresolved ambivalence he displays in both 'Freewill and Moral Responsibility' and in Ethics. For sometimes he takes the extreme view that \( X \) acts voluntarily and is morally responsible only if his act can be prevented from recurring by punishment (in which case recidivists

1 Freewill and Moral Responsibility', p.55. This statement is obviously meant to be taken seriously, but is hardly consistent with everything Nowell-Smith says about fittingness - e.g. his intention 'to explain the relation of "fittingness" that is held to obtain between voluntary actions and moral judgment' (p.52; cf. p.193 f/n.1 supra).
and hardened criminals present problems,¹ and on other occasions he takes the more moderate view that X acts voluntarily and is morally responsible only if punishment tends to prevent the recurrence of such acts.²

But even the moderate view, as Mabbott points out, does not succeed in acquitting the kleptomaniac:

for kleptomaniacs do not steal when they see a policeman or shop assistant watching them and do take ingenious steps to avoid detection. Their behaviour therefore is 'affected' by fear of punishment. The reason for regarding them as irresponsible

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¹ E.g.: 'If it is true that praise and blame are means employed to bring about good events and prevent bad ones, they are appropriate not to all good and bad events, but only to those they can in fact bring about or prevent. Since a moral action is one that can be fitfully praised or blamed, it follows that a moral action is one that can be brought about or prevented by these means' ('Freewill and Moral Responsibility', p.55); 'Pleasure and pain, reward and punishment are the rudders by which human conduct is steered, the means by which moral character is moulded; and 'moral' character is just that set of dispositions that can be moulded by these means. Moral approval and disapproval play the same rôle. It is not just an accident that they please and hurt and that they are used only in cases in which something is to be gained by pleasing or hurting' (Ethics, p.304).

² E.g.: 'the fear of punishment will affect the future behaviour of the thief.... If he expects to be punished, then in addition to the motive that tends to make him steal there will be a powerful motive tending to make him refrain' (Freewill and Moral Responsibility', p.60); 'the point of blame is to strengthen some motives and weaken others' (Ethics, p.296). This of course makes it much more difficult to speak of a 'causal relation' between the punishment and the altered behaviour.
is not that this fear has no effect but that they show independent signs of motiveless irrationality. They steal vast numbers of silk stockings or suspenders, which they then proceed to hoard and not to resell.¹

In itself, it is no criticism of Nowell-Smith's analysis of 'fittingness' or 'merit' that it is totally at variance with the analysis I gave in Chapter Three. He seems to be aware of the fact that he is recommending a use for the term rather than reporting how it is in fact used. Nor does the unorthodoxy of his analysis of 'moral responsibility' by itself constitute a criticism of it. However, it is a criticism if his recommendations serve to confuse distinctions which ought to be made. And this, I have argued, is the case. For satisfactory criteria of moral responsibility we must look elsewhere.


Even if Nowell-Smith's alterability criterion is not successful, we are still left with his view that our actions are voluntary if we could, had we so wished, have acted otherwise, and that only if our actions are voluntary can we properly be held morally responsible. 'Being able to do other than one actually did' is, of course, highly problematic and ambiguous, and for this reason a perennial chestnut in the philosophical fire. Only certain uses of the phrase serve to impute moral

responsibility, and a proper discussion of it would require a dissertation in itself. Rather than involving myself too deeply in these issues, I shall simply sketch an outline of our concept of moral responsibility which I believe to be adequate for the ascription of desert (especially in relation to punishment). I shall therefore prescind from much of the contemporary debate.

To hold X morally responsible for some action or event B is to presuppose that X could, in some sense of 'could', have done other than B. Despite its categorical grammatical form, the expression 'could have done otherwise' is negatively specified, and signifies the absence of certain impediments. These impediments can arise on different levels, and the presence of any one of them is sufficient either to absolve a person from blame or at least to mitigate it. I shall endeavour to isolate these impediments as best as I can.


2 Cf. J. Plamenatz: 'What...do we mean when we say that a man is responsible for what he does when he could have chosen not to do it? We mean that, at the time that he acted, he was not beyond the reach of certain kinds of influence' ('Responsibility, Blame and Punishment', in Philosophy, Politics and Society, Third Series. ed. P. Laslett and W.G. Runciman, Oxford: Blackwell, 1967, p.179; also Benn and Peters, Social Principles and the Democratic State, London: Allen and Unwin, 1959, Chapter 9).
(a) A person is absolved from moral responsibility if through no fault of his own he is incapable of considering rationally various possible courses of action and of making rational decisions concerning them. This is clearly an impediment which absolves a person from moral responsibility and hence desert, since the ability to consider rationally differing courses of action and to make rational decisions concerning them is what qualifies a person as a moral being. It is for this reason that moral responsibility is not imputable to infants or to the insane. Infants cannot do other than they do in the sense that they do not have the capacity to make moral judgments (and hence are incapable of making morally significant choices). This incapacity is due to their not being in a position of sufficient maturity to have any reasons for doing what they do (that is, reasons which are relevant to the making of moral judgments). In the case of the insane man (I use 'insane' in a rather broad sense to cover the kleptomaniac, hypnotic, etc.), these reasons are defective in that (even if they correspond) they do not depend on the facts of the case. The kleptomaniac can give no rational explanation of why he steals and hoards (usually kleptomaniacs are financially secure); the obsessive's reasons for washing his hands (their dirtiness) is not dependent on the truth of his claim and cannot be defeated by showing its inapplicability; the hypnotic can give a coherent account of his actions but it does not correspond with facts which he could reasonably be expected to know.
I have qualified this exculpating condition with 'through no fault of his own', for there are circumstances in which a person's inability to make rational decisions only partially absolves him from moral responsibility or maybe does not absolve him at all. For example, if two battleships on exercise collide through the inability of one of the captains to discern the consequences of his orders, then, if his inability to make rational decisions based on the facts of the case results from his being drunk at the time, he can be held responsible for the disaster which follows. Because we believe that people in such positions can and should make rational decisions, we do not allow such inabilities to exculpate.

(b) Even though a person may qualify under (a), yet he may be absolved from moral responsibility if he is unable to form or to carry out an intention to do other than he did due to some physical impediment. Once again inabilities arising under this head do not always exonerate a person from blame or exculpate him; sometimes they serve only to extenuate his offence. His responsibility is said to be diminished. Generally speaking, if his inability to form or to carry out an intention to do other than he did results from some dereliction of duty on his part, then his inability can serve only to extenuate his offence and not to exonerate him.

The following illustration will indicate the range of exculpating and mitigating factors which are included in the condition 'inability ... due to some physical impediment'. Suppose that Jones drowns. Assuming that the right thing to do for anyone who was standing nearby
would have been to take steps to save him we ask Peters, who was nearby, why he did not save him. A sampling of Peters’ possible reasons, some inculpating, some exculpating, and some extenuating, could have been:

(i) 'Jones was no friend of mine, so why risk my life.'
(ii) 'I cannot swim, and though I looked, I could find no others in the vicinity who could have helped.'
(iii) 'I had a broken leg at the time, and was unable to attract the attention of others who could have helped.'
(iv) 'I tried to save him, but could not reach him in time.'
(v) 'I was helping to save Smith, who was also in difficulties.'
(vi) 'I was asleep at the time, and did not realise anyone was in distress.'
(vii) 'I was very drunk, and so unable to do anything about it.'

Applying the criterion I have outlined, we can see that reason (i) would serve only to inculpate Peters, and reasons (ii) - (vi) would usually exculpate him; (vii) is more difficult and we shall need to discuss it in some detail.

Reason (i) is inculpatory because in no way does Peters’ indifference to Jones render him unable to form or to carry out an intention to do the right thing, namely, to take steps to save Jones. Reasons (ii) - (vi) are exculpatory for a variety of reasons. Reason (ii) is exculpatory because, despite a good intention (indicated by the fact that Peters made some effort to find others who could have helped), he lacked the skill
necessary to enable him to implement his intention. Provided that his failure to acquire the skill was not itself a dereliction of duty (as in some cases it would be), then he cannot properly be held in any way morally responsible for Jones' death. Reasons (iii) - (v) are exculpatory because, irrespective of any good intentions which Peters had or would have had, he was or would have been physically prevented from carrying them out. Reason (vi) indicates an inability to form an intention to save Jones, because of a physically based lack of knowledge. Provided that his lack of knowledge was not morally reprehensible (as it would almost certainly have been, had Peters been a lifesaver on duty), then his inability would serve to exculpate him.

Before we can decide (vii) we need to know the answer to some other questions. First: Is drunkenness morally reprehensible? If so, then would Peters' inability to help Jones because of his drunkenness be sufficient to render him even partially responsible for Jones' death? Or does his morally reprehensible action need to be of a certain sort, namely a dereliction of duty, before he can be inculpated? For the sake of argument we shall assume that drunkenness is in fact morally reprehensible. It does not seem to me that by itself an inability arising from a moral reprehensible act can render a person at all responsible for some untoward occurrence which would not have otherwise occurred, unless one can be said to owe it to one's neighbour not to get into a position where help could not be given should the need arise. I think
we do recognize such a duty, though there are
circumstances such as the present in which it becomes
rather attenuated. The situation would have been
very different, for example, if in his state of
drunkenness, Peters had pushed Jones into the water.
Nevertheless, his action would probably still not have
inculpated him to the same extent as (i).

However, incapacitating reasons are not always as
simple as these. It is not too difficult to see how
various sorts of physical inabilities to carry out an
intention can exculpate or lessen blame. But not all
claims of inability to do otherwise refer to physical
impediments. What if Peters had given as his reason
for not going to Jones' aid:

(viii) 'Green said that he would kill my
wife, if I went in and saved Jones.'?

Normally we would regard this as sufficient to absolve
a person from moral responsibility. To cater for it
we need to add a further criterion:

(c) Even though a person may qualify under (a) and
(b), yet he may be absolved from a moral responsibility
if he is unable to carry out an intention to do other
than he did because the cost of doing so would have been
greater than could and should reasonably be expected of
him. In (viii) it is physically possible for Peters
both to form the intention to save Jones, and also to
carry it out - though at great cost to himself and
another. What can and ought to be reasonably expected
of a person? In answering this, it is difficult to see
how one can avoid taking up a moral standpoint. Not everyone would have identical criteria of 'reasonable expectations'. Suppose Peters gave as his reason:

(ix) 'Green threatened to kill me if I saved Jones.'

Someone might argue that Peters was being selfish in preferring his own life to that of Jones, and, in not being willing to risk it, was to some extent morally responsible for Jones' death. Others would argue instead that although it would have been commendable in such circumstances had Peters tried to save Jones, nevertheless, he was under no obligation to save him. Even though it was physically possible for him to carry out an intention to save Jones, it could not reasonably be required of him. Had he saved Jones, he would have gone beyond the call of duty - to be classed with heroes, saints and martyrs. Such people will argue that it is not really selfish (in a bad sense) to want to save one's own life, even if it will almost certainly be at another person's expense, in circumstances such as those outlined. General obligations such as 'Help those in distress' can, on occasions, be overridden by other considerations, so that on such particular occasions we no longer ought to do what we are generally obliged to do. Arguing in this way, as contrasted with the first

1 Of course this was also the case in (a) and (b), but not as obviously so.

2 It is not that there is in fact no general obligation to help others in distress, or that the rule is only of a summary nature, or that it is only a prima facie (footnote continued on p.209)
approach I mentioned, presupposes a conception of morality similar to that outlined by Urmson:

Morality, I take it, is something that should serve human needs, not something that incidentally sweeps man up with itself, and to show that a morality was ideal would be to show that it best served man - man as he is and as he can be expected to become, not man as he would be if he were perfectly rational or an incorporeal angel. In the only sense of 'ideal' that is of importance in action, it is part of the ideal that a moral code should actually help to contribute to human well-being, and a moral code that would work only for angels (for whom it would in any case be unnecessary) would be a far from ideal moral code for human beings. There is, indeed, a place for ideals that are practically unworkable in human affairs, as there is a place for the blueprint of a machine that will never go into production; but it is not the place of such ideals to serve as a basic code of duties.¹

However, to accept this conception of morality is already to take up a moral standpoint, and even if we consider it preferable to the first position, we must recognize that what are 'reasonable expectations' are

¹ Urmson, op. cit., pp.210-1.
not such apart from a particular moral standpoint. To get further embroiled in this issue, however, would go too far beyond the needs of this dissertation.

One final point which can be noticed in this connection is that what we can reasonably expect of a person tends to differ from situation to situation. Were Jones a person of strategic importance in some worthwhile cause, then our expectations of Peters would be correspondingly raised. However, this point too must be viewed in the light of what was said in the last paragraph.

We have, then, three varieties of impediments which are sufficient to absolve a person from moral responsibility or at least to diminish his responsibility. In such cases, people do not deserve to suffer punishment, or, if they do, they do not deserve to suffer as much punishment as they would were there no impediment. We might observe that the criteria for the impediments which we have outlined are not simple empirical ones, but are delineated by the moral conception of 'what one could reasonably expect of such a person in such circumstances'. This is a far cry from the sort of criteria adduced by Nowell-Smith.

3. The Elimination of Responsibility.

So far, all I have done is to outline the central paradigms of excuses or impediments which absolve a person from moral responsibility. I have also hinted that these paradigms are themselves subject to debate and qualification. Our notion of responsibility, since it is part of a living language which is constantly
modified by new configurations of circumstances and
new discoveries, must, if it is to remain useful, take
account of such contingencies. Psychological studies,
especially, have thrown much light (and darkness) on
the question of responsibility. No longer do we regard
the insane as wicked, but at the same time we have
become less certain of the appropriate criteria for
insanity. In fact, so unsatisfactory has criterion (a)
appeared to some, that Barbara Wootton, after a survey
of the criteria of criminal responsibility, concludes:

Any attempt to distinguish between wickedness
and mental abnormality is doomed to failure; and ...
the only solution for the future is to allow the concept of responsibility to
'wither away' and to concentrate instead on
the problem of the choice of treatment,
without attempting to assess the effect of
mental peculiarities or degrees of
culpability.  

Despite the difficulties involved in formulating adequate
criteria of responsibility, I doubt whether Lady Wootton's
counsel of despair is justified. Nevertheless, there is

1 For an interesting discussion of the sort of challenge
which the techniques of modern commercial advertising
and of political propagandists present to our concept
of 'free action', see S.I. Benn, 'Freedom and
Persuasion', Australasian Journal of Philosophy, Vol.45,
1967, pp.259-75.

idem. Social Science and Social Pathology, London:
Allen and Unwin, 1959, Chapter 8.

3 Criticisms of her position can be found in H.L.A. Hart,
Punishment and the Elimination of Responsibility, London:
Athlone Press, 1962; idem. The Morality of the Criminal
(footnote continued on p.212)
a school of thought, strongly influenced by modern psychology, which reacts to these difficulties by denying the applicability of 'responsible' to human behaviour. Such views tend to go somewhat as follows: Modern psychological researches have shown us that people's behaviour is determined and can be completely explained in terms of hereditary and environmental factors. This being the case, people cannot be held responsible for their actions, for moral responsibility assumes that people could have done other than they did. Punishment for offences (or deviations), therefore, is inappropriate, as it presupposes responsibility and hence free agency. Thus it is appropriate for us only to treat (or cure) such offenders (or deviants). This argument, then, amounts to the claim that the practice of punishment is based on concepts which have no application.

The following quotations can serve as examples of such a view:

Criminal behaviour is an unconsciously conditioned psychic reaction over which [criminals] have no conscious control.... We have to treat them as sick people which in every respect they are. It is no more reasonable to punish these individuals ... than it is to punish an individual for

(footnote 3 continued from p.211)

breathing through his mouth because of enlarged adenoids, when a simple operation will do the trick.  

It seems not too much to expect society gradually to accept the thesis that the criminal also is socially ill and needs diagnosis and some sort of treatment other than punishment.... Most real criminals are so warped by their inherited defects or undesirable life habits that their crimes are as natural an expression for them as law abiding conduct is for the rest of us.  

While no man in his right mind would think of blaming a ten year-old car for a bad performance, an adult criminal is everywhere considered responsible for his crimes, with only a partial bow toward the inherited, environmental and other passively acquired characteristics which, together with a possible soul, in fact entirely account for his waywardness. Man's variegated character and wide capacities have blinded us to the fact that he is in fact as passive to his creation and development, and hence as unaccountable for his actions, as an inanimate machine.  

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The view that the wrongdoer or criminal's behaviour is such that he cannot be held responsible for it can form part of either a moderate or an extreme position. According to the moderate position, it is the behaviour of only the wrongdoer which is susceptible to a responsibility-defeating explanation. His wrongful behaviour is taken as a sign or as evidence for psychological abnormality. There is a modicum of intelligibility in such a thesis, and perhaps a grain of plausibility, but it is only a grain. Its crucial failing is the inability of its supporters to produce a criterion of non-responsibility other than that of the person's wrongdoing. It is almost impossible to say what a criterion which accounted for all wrongdoing, and only wrongdoing, would need to be like. It would have to denote a class of actions not merely very varied, but also varying with place and time. Among other things it would have to permit an explanation of the fact that different legal systems differ in their catalogues of criminal offences; it would need to cover such diverse offences as perjury and rape, and such unlikely candidates as failure to stop at a stop sign and manslaughter. It would also need to give similar types of explanation of the offences for which parents punish their children.

However, it is the extreme view which is more commonly held, namely, that the actions of every person are in some sense conditioned by his hereditary and environmental background. The difference between the offender and the non-offender is that whereas the former has been so conditioned by his total background
as to act (generally or in a particular situation) in a socially unacceptable way, the latter has been conditioned by his total background to act (generally or in a particular situation) in a socially acceptable way.

In meeting the claims of this position, it will be worthwhile first of all to see whether the exponents of this view are making the relatively simple point that investigation has shown that behaviour for which we once thought we could be held morally responsible has been shown to be susceptible to one of the responsibility-defeating explanations I put forward in the last section. This does not seem to be the case. To take an example: It is Friday night, and I have been invited to a film. It is quite a good film, and had it been showing tomorrow, I would have jumped at the opportunity of going to see it. However, I have promised that I will stay home and help my wife. Should I break my promise? I decide to break it. Could I have done other than I did? Could I be held morally responsible for my course of action? It seems fairly clear that my actions were rational in the required sense. Whichever course of action I had chosen to take, it could have been rationally supported, even if not convincingly so (from a moral standpoint). It would also be difficult to deny that my actions were free from physical impediments which would have prevented me either from forming or from carrying out an intention to stay at home. I was neither asleep nor unconscious. Nor was I dragged to the film. Nor does the applicability of criterion (c) appear any easier to maintain. The cost of staying
home to help my wife was not greater than the cost of seeing the film, let alone greater than could reasonably be expected of me. It appears, then, that the psychological revisionists' arguments, whatever they are, do not involve an obvious denial of our ordinary criteria of moral responsibility.

But perhaps to think that they should is to misunderstand the revisionist character of their claims. Perhaps they are claiming access to information which will amount to a denial of at least one of our ordinary criteria of moral responsibility. I shall consider the strength of this claim by considering, first, in what sense the psychological revisionist is employing the term 'responsible for'; and second, whether the sense in which he uses the term is relevant to questions of blame, desert, and punishability. Naturally there are other questions which might be asked, but these two are sufficient for the purposes in hand.

Prima facie, it would appear that the psychological revisionist is using the term in the same way as we use it when we excuse a person because of his background or because of some mental defect. But it is not as simple as this. To say, 'Nobody is responsible for his actions' is not to make a straightforward remark like 'Nobody is responsible for all his actions', despite their grammatical similarity. We have learnt what it is like to give the cash value of the latter. We mean that sometimes our actions are inadvertent or accidental as contrasted with intended or deliberate, compelled or forced as contrasted with willing or chosen, and the like. True, we have considerable difficulty in finding
an 'umbrella' to characterize these diverse factors which absolve us from responsibility for our actions (we tend to characterize them ambiguously as factors which prevent us from doing other than we actually do), yet the broad contrasts between these general types of behaviour are clear enough to us. We can even make quite good sense of the statement, 'Not everybody is responsible for his actions'. For we know that there are some people, who, by virtue of their infancy or mental condition, are not in a position to make morally significant choices, and therefore not able to do other than they actually do.\textsuperscript{1} They are unable to appreciate the character of moral arguments. We contrast their behaviour with the behaviour of the generality of us who, by and large, can and do take account of arguments and moral considerations with respect to our behaviour. But to give some cash value to the first statement is a different matter. What would we need to understand such a remark? One essential, if a statement is to be informative, is that it is possible to say what it would exclude. 'There are seven chairs in this room' is informative because there is some way of distinguishing chairs from non-chairs. But when we say 'Nobody is responsible for his actions', we are not saying anything like this - we have not yet been told what it would be like for somebody to be responsible for his actions.\textsuperscript{1} The ambiguity of 'being able to do other than one actually does' is especially noticeable here. Of course there probably is a sense in which they could have done otherwise - but not as a result of a morally significant choice.
for his actions. 'Nobody is over fifty stone in weight' is an informative remark, not because there is anybody who is over fifty stone in weight, but because we know what it would be like for there to be somebody who was over fifty stone in weight. But until we are told by the psychological revisionist what it would be like for someone to be 'responsible' in his sense, then we cannot be impressed by his claim. It is not good enough for him to say that a person who was 'responsible' (in his sense) would be a person who had not been completely determined by his heredity and environment, because we would then want to know how we could distinguish between a person who had been completely determined by his heredity and environment and one who had not. Too often, what psychological revisionists seem to have done is to have illegitimately used explanations of recognisably non-responsible behaviour as a model of explanation for all human behaviour.¹

There is nothing odd in speaking of all of a person's actions being determined by his heredity and environment (though there would be very few people of whom we would say this). This is because we know what it is like for a person's actions not to be so determined - when he acts rationally² (although even rational action shows

¹ A further discussion of psychological and psychoanalytic explanation can be found in my The Concept of Conscience in the Writings of Butler and Freud, Unpublished M.A. thesis, University of Western Australia, 1965, pp.90-2, 144-50.

the influence of one's environment). If the psychological revisionist claims that it is because of his heredity and environment that a man acts rationally (and hence that he is not responsible for his actions), then in the sense in which he wants to use his terms, his claim becomes uninteresting. It is uninteresting because whatever sense of 'responsibility' is being employed by the revisionist, it is not our ordinary sense of 'moral responsibility', and there is therefore no guarantee that it is relevant to the question of punishability.¹ For his claim to be interesting the revisionist would need to show that what we took to be rational action was not really so, and it is difficult to see how he could make his claim good. For once again we would first want to know what it would be like for actions to be really rational as contrasted with only apparently rational. Not only so, but the revisionist's thesis would be self-defeating for he could not on his own logic be taken to have proved his case, for

¹ On slightly different lines, A.C. MacIntyre concludes: 'To try and include my reasonableness in a story about causal factors is to try and produce a story about my behaviour sufficiently comprehensive to include everything. This means that whereas the contention that my behaviour is determined by causal factors is normally taken to mean "determined by causal factors as contrasted with rational appreciation, etc."', here "causal factors" have nothing to be contrasted with and hence the expression "determined by causal factors" has been evacuated of its customary meaning' ("Determinism", Mind, Vol. LXVI, 1957, p.40). Further substantial objections to the psychological revisionist can be found in A.R. Louch, 'Scientific Discovery and Legal Change', Monist, Vol. XLIX, 1965, pp.485-503.
proof in such matters involves the adduction of relevant reasons, and it is difficult to see how this would be possible on his view.

It is not uncommon for psychological revisionists to use medical terminology to describe immoral or criminal behaviour: wrongdoing and crime are looked at as 'diseases' which need to be 'treated' or 'cured',1 or

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1 For this sort of talk, see S. Butler, Erewhon, New York: The New American Library, 1961; F. Paulsen, A System of Ethics, Fourth edn., ed. and trans. by F. Thilly, London: Kegan Paul, Trench, Trübner and Co., 1899, pp.465ff; H. von Hentig, Punishment, London: William Hodge and Co., 1937, pp.127ff; W. Ullmann, 'The Justification of Punishment', Juridical Review, Vol. LIII, 1941, p.326; N. Morris and D. Buckle, 'The Humanitarian Theory of Punishment: A Reply to C.S. Lewis', Res Judicatae, Vol. 6, 1952-4, pp.231-3 (though Morris and Buckle insist that such an approach should never 'deny the fundamental humanity of even the most depraved criminal'). As well as the articles and books referred to on pp.211 f/n.2, 213 f/n.1-3 supra, compare also the following statement of Lady Wootton: 'Once the grossly and persistently anti-social can claim to be treated as medical, and not as moral cases, it is surely only a question of time before the mildly anti-social claim the same privilege.... To say that A must be judged guilty and punished because the doctors do not yet know what to do with him, while B must not be held responsible for his actions because he can be reformed by medical attention, is really to dig the grave of the whole concept of responsibility: for A, poor soul, is being punished not for his offence but for the limitations of medical knowledge. In a year or two's time, when medical science has advanced a little more, people like him will also rank as psychopaths and be treated as sick, not as wicked' ('Neither Child Nor Lunatic', The Listener, Sept. 24, 1959, quoted in D. Bazelon, 'The Concept of Responsibility', Georgetown Law Journal, Vol.53, 1964-5, pp.16-7). An exposure of some of the fallacies involved in either identifying crime with disease or appealing to crime as a symptom of disease can be found in A.G.N. Flew, 'Crime or Disease?', British Journal of Sociology, Vol. V, 1954, pp.49-62.
they are regarded as anti-social actions which need to be 'deterred' (where deterrence is looked at as a brand of conditioning). \(^1\) It is important to recognize that what is being recommended is not a more humane and efficient method of punishment, but the abandonment of punishment altogether. Whereas punishment is inflicted for what people have done or have failed to do, for disobeying or failing to obey some rule, therapeutic treatment is administered because of the physical or mental state of the person concerned. And whereas therapeutic treatment logically must be administered in order to procure some desired state of affairs, it is not necessary that punishment be inflicted with any further purpose in mind. \(^2\) Moreover, in punishing people for their actions we imply that they could be held responsible for them, whereas we do not imply this when we treat them. As well, punishment necessarily involves the infliction of unpleasant treatment, whereas therapeutic treatment does not. Only if we do not obscure these conceptual differences can we avoid the somewhat persuasive confusions characteristic of much contemporary psychological writing.

As well, we will be in a better position to rebut those who, perhaps because of a misguided humanitarianism, have taken over some of the conclusions of the psychological revisionist, to arrive at something like the moderate

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\(^2\) Pace Hobbes.
thesis I briefly discussed earlier. Of these, C.S. Lewis had some rather trenchant words to say:

Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive.... Their very kindness stings with intolerable insult. To be cured against one's will and cured of states which we may not regard as disease is to be put on a level with those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals. But to be punished, however severely, because we have deserved it, because we 'ought to have known better' is to be treated as a human person made in God's image.

The objection to this 'humanitarian' view is variously stated: it treats people as means and not as ends; it involves a denial of the principle of respect for persons; it denies people their rights as human beings, etc.

Plamenatz suggests that the therapeutic approach is also misguided because it makes the mistaken assumption that 'the less we punish and the more we seek to cure... the better' (op. cit., p.187).


This objection is levelled by many not only at those who would replace punishment with therapeutic treatment, but also at those who make deterrence and reform the primary 'justifying considerations' in punishment. See, for example, Kant, Fundamental Principles of the Metaphysic of Morals, in An Introduction to the Metaphysic of Morals, trans. T.K. Abbott, Sixth edn., London: Longmans, Green and Co., 1927, pp.46-9, etc.; Hegel, Philosophy of Right, trans. T.M. Knox, Oxford: Clarendon Press, 1942, pp.70-1 (§100), 246; A.C. Ewing, (footnote continued on p.223)
Generally, following Kant, this criticism is based on a recognition of others as rational beings

(Footnote 3 continued from p.222)
having interests or claims.\(^1\) To treat a man's wilful actions as manifestations of a disease - as something which (in a sense) he could not help - is to treat him as a less than a rational moral being. The 'kindness' which one shows in treating him like this is in actual fact an insult - for it is only on a par with the kindness one shows to infants, imbeciles and animals. However, Maclagan departs from the predominantly Kantian justification of the principle embedded in this criticism for two reasons.\(^2\) First, the importance which we attach to rationality is only because rationality makes moral goodness possible - its value is therefore derivative. Second,

> What is mistaken for an axiological estimate, having practical import, of persons as rational will is really the confusion of an axiological estimate of a form of goodness of which only such a will can be the locus with ... cosmic wonder at the ontological mystery of there being such a will at all.

Maclagan's first criticism is, I think, well taken; I am not sure how one would go about assessing the second. His positive suggestions, however, are more interesting. He finds the key to the concept of respect for persons in agapaeic love:


\(^2\) Maclagan, op. cit., pp.198-201.
It is in Agape that we see the significance of persons, and we could say with equal truth and, so long as we attend carefully to our meaning, with equal safety that Agape is warranted by the apprehended worth of its object or that Agape provides its own warrant.¹

Agape is made possible by two conditions:² (a) our general consciousness of obligation; and (b) sympathy (in the sense of practical concern for others) as a de facto part of our human endowment. Considered simply as a moral, or practical, principle the 'fusion' of (a) and (b) constitutes what we mean by the principle of respect for persons.³ Now, treating wrongdoing as no more than disease, instead of representing a humanitarian attitude towards a person, 'amounts to a denial of responsibility altogether. It insults the wrongdoer under the guise of safeguarding his interests. It treats him as though he were not a person, and falls foul accordingly of the very principle of respect to which it appeals'.⁴ The reason for this is that it does not see the 'others' of (b) as having, like ourselves,

not only a natural interest in their own happiness but a moral interest in values, and thus in the dignity of life: and, further, that this latter interest,

¹ Pages 208-9.
² Pages 209-12.
³ Page 216.
⁴ Page 301.
precisely because values are values and it is a moral interest, must by them as by us be accorded a general priority. How ... could we more grossly insult our fellows than by implying, in our treatment of them, that while we indeed have such an interest they do not?¹

I have suggested then, that despite a certain fluidity and even uncertainty in our notion of responsibility, we are not therefore 'set upon a slippery slope which offers no real resting place short of the total abandonment of the whole concept of responsibility.'² The psychological revisionist, if he has a case to make out, has not succeeded in doing so in any way which absolves all wrongdoers from moral responsibility and therefore renders them undeserving of punishment.


As I noted in my discussion of the meaning of 'punishment', there is a tendency among many philosophers to conceive punishment wholly in legal terms. Punishment is meted out for legal offences, and can be avoided if various legal excuses can be successfully appealed to. If not, then, provided that the law is such that its enforcement generally promotes social welfare, its infliction is morally justified. The question of responsibility in such views seems to have become a purely legal matter. This seems to me to be an inadequate

¹ Page 293.
² Barbara Wootton, Social Science and Social Pathology, p.249.
view of the matter, and in what follows I shall endeavour to show in what ways legal and moral responsibility can differ, and that punishment is morally justified only if a person can be held morally responsible for some wrongdoing. Legal responsibility legally justifies the infliction of legal punishment, it does not necessarily justify it morally.

But before we show this, two things need to be said. I do not want to suggest that the criteria for legal and moral responsibility are necessarily different, except in the rather uninteresting technical sense that whereas legal responsibility is defined with reference to law, moral responsibility is not. There are, I believe, no insurmountable reasons why the criteria for legal and moral responsibility should not coincide; in fact, we might even argue that insofar as their criteria cannot be reconciled, so much the worse for moral responsibility.¹

Second, it is perhaps misleading to speak of legal responsibility as though it were a simple thing. It is not, of course. Criteria for ascribing responsibility which are good enough with respect to some offences are not good enough with respect to others. This is perhaps one of the more striking distinguishing features of the law of torts and criminal law as they stand in the Anglo-American legal tradition. In this section I shall confine myself to the criteria of responsibility

as they figure in criminal law, though even here there is no single conception, but conceptions which differ somewhat in different legal traditions, and even within the one tradition at different times. Yet they are all valid conceptions of legal or criminal responsibility. Often enough jurists and legal historians have endeavoured to trace one single conception, or even a movement towards one single conception, of criminal responsibility through the historical development of the law, but without any real success.¹ The doctrine of mens rea,² which has tended to form the backbone of legal conceptions of responsibility, is by no means a necessary or a sufficient condition of criminal responsibility, as I shall soon show.³ Furthermore, it is itself subject to differing interpretations. Jerome Hall, for example, maintains that though they are distinguishable, criminal responsibility is founded on moral culpability, because mens rea means, essentially, 'the intentional or reckless doing of a morally wrong act'.⁴ This view is rejected by other jurists, who maintain instead that mens rea merely means 'a guilty

³ Whether it ought to be is another matter.
mind', and not 'a wicked mind', and that any coincidence that there might be between a guilty mind and a wicked mind, while desirable, is only contingent.¹

H.L.A. Hart, arguing for a separation of law and morals, has on a number of occasions pointed to three respects in which moral and criminal responsibility differ - objective liability, criteria of insanity, and strict liability - and these will provide the framework for my discussion of differences between moral and legal responsibility.

(a) One way in which the law can differ from morals in its conception of responsibility is in its admission of 'objective liability' as a rule of evidence. Like the doctrine of strict liability, that of objective liability does not require knowledge of the actual knowledge or intention of the accused as a presupposition of responsibility. Unlike the doctrine of strict liability, that of objective liability permits the imputation to the accused of the knowledge or intention which an 'average' or 'reasonable' man would have had.²


Hart sees objective liability as a compromise between competing claims, only one of which being that the accused is morally responsible. In allowing objective liability, the law abandons 'the attempt to discover whether a person charged with a crime actually intended to do it'.

In speaking of objective liability as the law's abandonment of 'the attempt to discover whether a person charged with a crime actually intended to do it', Hart appears to overstate the case. It is true that the

(footnote 2 continued from p.229)

1 Hart, Punishment and the Elimination of Responsibility, p.21. Compare Oliver Wendell Holmes, Jr.: 'While the terminology of morals is still retained, the law... by the very necessity of its nature, is continually transmuting those moral standards into external objective ones, from which the actual guilt of the party concerned is wholly eliminated' (The Common Law, Boston: Little, Brown & Co., 1881, p.38).

2 Hart's interpretation gains some support from the extreme statement of the former Lord Chancellor, Viscount Kilmuir, in D.P.P. v. Smith: 'once... the jury are satisfied [that the accused was unlawfully and voluntarily doing something to someone], it matters not what the accused in fact contemplated as the probable result or whether he even contemplated at all' ([1961] A.C. 327). This is an extreme statement of the doctrine because Lord Denning, one of the Lords who assented to the Lord Chancellor's speech, afterwards claimed that notwithstanding the decision, 'ultimately the question is: Did he intend to cause death or grievous bodily harm?' (Responsibility Before the Law, Jerusalem:

(footnote contined on p.231)
doctrine of objective liability, as Holmes originally propounded it, did involve such an abandonment and that for him it was 'not an evidential test, but a substantive standard of behaviour',\(^1\) but it is not easy to find criminal cases in which such a standard has actually been applied.\(^2\) **D.P.P. v. Smith** is the closest we have to an embodiment of the principle, but even here I think it is too strong to say that the law abandoned the attempt to discover the intention of the accused. For here there was a conflict between the evidence and the accused's avowal of intention, and therefore the court took the view that since the accused was a reasonable man (not legally insane - and not suffering from diminished responsibility), he should be regarded as if the evidential burden (of demonstrating that his intention was other than that which should be expected in the circumstances) lay on him. This seems to be a fairer interpretation than Hart's, for, were his correct, then a person logically could not be

\(^{(footnote\ \text{2} \ \text{continued from p.230})}\)
Magnes Press, 1961, p.30; referred to in Hart, *Punishment and the Elimination of Responsibility*, p.21. Furthermore, the criterion used in **D.P.P. v. Smith** has since been rejected by the Australian High Court (see Parker (1963) *A.L.J.R.* 3, 11-12), and abrogated by Section 8 of the English Criminal Justice Act, 1967. Perhaps Hart has overstated the case to emphasize the differences between legal and moral responsibility. But the differences still obtain on my own view. In another place, however, he comes closer to my interpretation (*Punishment and Responsibility*, Oxford: Clarendon Press, 1968, pp.241-2).

\(^1\) *Punishment and Responsibility*, p.243.

\(^2\) Brett and Waller, op. cit., p.707.
wrongly convicted if he could be shown to be responsible by 'objective' standards - even though his actual intent was other than that imputed to him. Nevertheless, the doctrine of objective liability does make it difficult for a person to show his intention was other than that imputed to him, and even when correctly applied may lead to the conviction of a person who is morally blameless (or not as blamable as he is made out to be).

(b) A second way in which the law can differ from morals in its conception of responsibility is in its concentration 'almost exclusively on lack of knowledge rather than on defects of volition or will' as an admissible excuse. This, of course, has been a standard criticism of the M'Naghten Rules, and it is only in recent years that account has been taken of these criticisms in legal practice. However, because of this concentration on lack of knowledge rather than on defects of will, there have been occasions on which the law has been correctly applied and a person

1 It might be argued that it is this very fact which makes objective liability so obnoxious, and which has led to its abrogation. This may be so, but it still seems to presuppose a stronger interpretation of D.P.P. v. Smith than is necessary.

2 Hart, Punishment and the Elimination of Responsibility, p.21. The M'Naghten Rules maintain that for a person to be exempt from criminal responsibility, he must, at the time of the act, have suffered from a defect of reason arising from a disease of the mind, with the result that he did not know the nature of the act or that it was wrong.

3 For example, in the English Homicide Act of 1957.
convicted of some crime despite the fact that he clearly acted from 'irresistible impulse'.

In passing, it is worthwhile commenting on the intended relation between the legal and moral criteria for insanity. Hart interprets the M'Naghten Rules as excusing from criminal responsibility the person who did not know that his act was 'illegal', whereas Lord Chief Justice Tindal had actually said that they served to excuse the person who did not know that 'he was doing what was wrong'. By this the Lord Chief Justice did not imply that every morally reprehensible act was punishable by law, for, as he said a little later, 'if the accused was conscious that the act was one which he


3 M'Naghten, (1843) 10 Cl. & F. 210. The words of Dixon J. in Porter are relevant: 'What is meant by wrong is wrong having regard to the everyday standards of reasonable people' [(1933) 55 C.L.R. 190; compare Sodeman, (1936) 55 C.L.R. 215; and the discussion of M'Naghten in Stapleton, (1952) 86 C.L.R. 367].
ought not to do, and ... if that act was at the same
time contrary to the law of the land, he is punishable'.  
Hart's interpretation of the M'Naghten Rules is
clearly correct as an account of what the Rules in fact
excuse; though in accepting his formulation of the
Rules there is some danger of removing them from the
sphere of moral criticism. It would be more satisfactory
to regard the M'Naghten Rules as an attempt to formulate
in a legally satisfactory way some of the grounds on
which a person can be absolved from moral responsibility.
Moral criticism of the Rules has come, of course, but
there has been a reluctance to revise or supplement
them until recently, for fear that such revisions would
eliminate responsibility altogether.  Nevertheless, the
important point for my purposes is that the criteria
for legal insanity are at present not perfectly
consistent with the criteria which absolve from moral
responsibility.

The person who is insane does not qualify for
consideration under the criminal law. The same applies
to infants and those with diplomatic status, and here
again we can see significant differences between the

1 M'Naghten, at 210.
2 Thus Lady Wootton maintains that 'once we allow any
movement away from a rigid intellectual test of
responsibility on M'Naghten lines, our feet are set upon
a slippery slope which offers no real resting place
short of the total abandonment of the whole concept of
responsibility' (Social Science and Social Pathology,
p.249). She, of course, sees this not as a reason for
retaining the Rules, but as a reason for eliminating
questions of responsibility from criminal proceedings
altogether. See also J. Hall, op. cit., Chapter XIV.
criteria of legal and moral responsibility. In section 2(a) I maintained that infants are not held morally responsible because, in some significant sense, they are unable to consider rationally various possible courses of action, and to make rational decisions concerning them. As it stands this criterion is not easily serviceable, and so the law prescribes a simpler expedient: it automatically excludes from criminal responsibility children below a certain age. Now, although the figures prescribed are not arbitrary, they are not adequate to distinguish those who can be regarded as moral infants from those who cannot. It is not difficult to point to cases in which people have deserved punishment but have been legally non-accountable.

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1 In Australia, children below eight years of age are irrebuttably non-accountable. Between the ages of eight and thirteen inclusive, a child can be found guilty of committing a crime, 'but only upon proof that, as well as possessing the appropriate state of mind for the crime, ... he knew that his act was wrong' (Brett & Waller, op. cit., p.406). The ages of irrebuttable and rebuttable legal responsibility vary from country to country.

2 The following extract from a news report in The Auckland Star, 1965, is a good example: 'Mr Albert Clarke has a toyshop in Fulham, London. And, at frequent intervals, a half-brick crashes through the window of the shop. He knows who does it. So do the police. But they can do nothing about it ... just yet. The culprit is a boy only nine years old. And under English Law, no child under the age of 10 can be prosecuted. The boy knows it. Twice, he has been caught by the police, escaping with toys from the shop. But they had to let him go, for he reminded them: "You can't touch me!" With every crash, Mr Clarke's insurance premium rises .... "Scotland Yard can't help me", he said. "My solicitor has told me I

(footnote continued on p.236)
Diplomatic immunity is another clear example of the possible divergence of criteria for criminal and moral responsibility.  

(c) A further respect in which legal and moral responsibility differ is found in the presence of legal offences for which responsibility is strict; that is, offences for which neither knowledge nor negligence is required for conviction.  

 Generally, these are minor offences concerned with the endangering of public welfare, and are symptomatic of the practical difficulties of demonstrating responsibility for certain types of  

(footnote 2 continued from p. 235)  

can do nothing myself - I can't even hold the boy's parents responsible. I could sue the boy in the County Court for the damage. But a judge could not order a nine-year-old to repay more than a few shillings a week, if that". Actually, Clarke could probably have claimed damages from the boy's parents. But this does not vitiate the main point of the example.  

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'The person of a diplomatic agent is inviolable and he is immune from any form of arrest or detention and from all criminal proceedings' (J.L. Brierly, The Law of the Nations, Sixth edn., ed. Sir Humphrey Waldock, Oxford: Clarendon Press, 1963, p.256). Of course the immunity of the diplomat from criminal proceedings is not the same as the immunity of the infant and insane from such, but it amounts to the same.  

2  

Hart, Punishment and the Elimination of Responsibility, p.22. Hart says that offences of strict responsibility have been admitted into the law in the last hundred years. While it is true that the modern doctrine of strict liability is generally taken to have stemmed from Woodrow, (1846) M. & W. 404, Tay points out that historically the notion goes back much further (op. cit.). Nevertheless, in the U.S.A., at least, most (though by no means all) offences of strict liability arise in civil law, not in criminal law (see Howard, Strict Responsibility, Chapter 1).
As I mentioned in the last Chapter, it is not easy to give an unambiguous account of what is entailed by the notion of strict responsibility. While its basic ingredient appears to be that proof of \textit{mens rea} is not necessary, there has been a development over the years as to what is necessary. From a notion of absolute responsibility, whereby conviction followed simply on the proof of \textit{actus reus}, there has developed a notion of strict responsibility (in Australia, at least) under which certain defences are possible – e.g. reasonable mistake or ignorance of fact. However, be that as it may, the fact still remains that there have been numerous valid convictions \textit{via} offences of strict responsibility where the defendants have not been morally at fault; and insofar as this is the case, there remains a hiatus between the notions of criminal and moral responsibility. To take an example, in \textit{State v. Lundgren}, the defendant was convicted for selling intoxicating liquor to a minor, even though he proved that the sale was made by his bar-keeper without his knowledge or consent and contrary to his orders. The basis of his conviction was a Minnesota statute providing that

1 Cf. B.M. Quigg: 'The reason for the elimination of the operative fact of intent from the Statutes imposing criminal liability ... [is that] to permit such a defense would be to allow every violator to avoid liability merely by pleading lack of knowledge and thus, practically, nullify the statute, and defeat the purpose and intent of the legislature. The general public interest ... is considered a sufficient justification for imposing such absolute liability ...' ('Comment', \textit{Michigan Law Review}, Vol.43, 1943-4, p.1106.)

2 See Chapter Five, p.183 f/n.2.

3 \textit{State v. Lundgren} (1913) 124 Minn. 162; 144 N.W. 752.
Any sale of liquor in or from any public drinking place by any clerk, bar-keeper or other employee authorized to sell liquor in such place shall be deemed the act of the employer as well as that of the person actually making the sale; and every employer shall be liable to all the penalties provided by law for such sale, equally with the person actually making the same.1

Cases such as this, in which the doctrine of respondeat superior has been applied, and other strict liability offences, have led some, like Sayre, to draw a distinction between 'true crimes' and 'offences for which a person is held criminally liable',2 or others, like Lasswell and Donnelly, between 'condemnation sanctions' and 'other deprivations'.3 The justification given for these distinctions is that although such cases come within the province of the criminal law, yet because moral guilt is not necessarily involved, they

1 (1905) Minn. Rev. Laws, 1565. For similar cases, see Commonwealth v. Sacks, (1913) 214 Mass. 72; 100 N.E. 1019; Gutch (libel), (1824) Moo & M. 433; Walter (libel), (1799) 3 Esp. 21. In the latter, Lord Kenyon maintained 'that the proprietor of a newspaper was answerable criminally as well as civilly, for the acts of his servants or agents, for misconduct in the conducting of a newspaper'. Walter was living away from London, the place of publication, and confined by illness when the paper was published. Compare also Slatcher v. Smith, [1951] 2 K.B. 631.

2 F.B. Sayre, 'Criminal Responsibility for the Acts of Another', Harvard Law Review, Vol. XLIII, 1929-30, pp. 689-723; cf. G.W. Paton, op. cit., p.319. Paton notes that in the case of '"true crimes" ... the penalty is serious and there is a real stigma attached to convictions.'

3 Lasswell & Donnelly, op. cit.
cannot be treated as crimes, but only as regulatory or public welfare offences.\footnote{1} There is, of course, much to recommend this move, and nowadays there is a generally recognized distinction between 'crimes' and 'regulatory offences'. Nevertheless, linguistic distinctions, while they may alleviate, do not solve genuine moral problems, and until the law is able to exempt from responsibility those who have been neither wilful nor negligent, it will not be immune from moral criticism.

These, then, are some of the ways in which law and morality may differ, and in some cases do differ, in their criteria of responsibility. I do not want to make the differences to appear too great. More often than not, if a person is criminally responsible for an offence, he is morally responsible for it as well. This is because as far as practicable the criteria for legal and moral responsibility are the same and thus criminal offences tend to incorporate moral wrongdoing. As a system of social control, the law must formulate procedures which are not only morally acceptable, but also readily implemented. And in accommodating these sometimes competing claims, certain compromises are made. As a result of these compromises, the law is on certain occasions justifiably open to moral criticism—sometimes because it permits the punishment of those

\footnote{1 Sometimes referred to as 'public torts', 'prohibitory laws', 'administrative misdemeanours', 'quasi crimes', 'civil offences', 'violations', etc. See Howard, op. cit., p.1 f/n.3.}
who do not deserve it, and sometimes because it absolves from responsibility those who deserve to be punished, and who, for the benefit of all, ought to be punished by law.
CHAPTER SEVEN
PUNISHMENT AND AUTHORITY

If a person receives the punishment which he deserves, then he has no grounds for complaint - at least, not about the rightness of punishment. But this does not mean that there is no ground of complaint open to him. He may state his grievance thus: 'You have no right to punish me; punishment is not yours to inflict'. This is, in fact, the criticism which can characteristically be levelled at the lynch mob. It is not necessarily the case that by taking punishment into their own hands the participants are inflicting on someone a punishment which he does not deserve (in fact, in a corrupt administration, the lynch mob may be the only means of obtaining justice), but that punishment is not theirs to inflict. This complaint, then, is directed not so much at the rightness of punishment, nor at the status of the punishers' act (i.e. whether it is 'punishment'), but at the status of the punishers. They have acted without the requisite authority, so it is alleged.

It will be recalled that in Chapter Two I argued against the view that punishment 'has to be (at least supposed to be) imposed by virtue of some authority, conferred through or by the institution against the laws or rules of which the offence has been
committed.¹ I pointed out that punishment could be inflicted by someone who was not authorized to do so without its status as punishment being affected. There is nothing inconceivable or even logically odd about punishment by one's peers, though we may have certain general moral objections to such a practice. Nor is there anything strange in speaking about self-inflicted punishments; in fact, even the morality of the latter is not normally suspect.

1. The Authority to Punish.

Not only did I indicate in Chapter Two that there is no conceptual link between punishment and authority, but I also pointed out that we usually consider that punishment ought to be administered by some authority. I enumerated various facts about human beings and human nature which together constitute our primary justification for restricting the task of administering punishment to certain authorities.

The basic reason is that if we did not generally confine the power or competence to punish to special authorities (be they legal, parental, ecclesiastical, or pedagogic, etc.), what should be occasions for punishment would quickly degenerate into occasions for revenge, or would result in excesses or other injustices. The end of civil government, so Locke tells us, is

¹ A.G.N. Flew, "The Justification of Punishment", Philosophy, Vol.XXIX, 1954, p.294; See supra, Chapter Two, Section 3(e).
to avoid and remedy those inconveniences of the state of Nature which necessarily follow from every man's being judge in his own case, by setting up a known authority to which every one of that society may appeal upon any injury received, or controversy that may arise, to which every one of the society ought to obey.  

He points out that 'man ... hath by nature a power ... to judge of and punish the breaches of that law [of Nature] in others, as he is persuaded the offence deserves'.  

This power is resigned when man enters into political society with others:

But though every man entered into society hath quitted his power to punish offences against the law of Nature in prosecution of his own private judgment, yet with the judgment of offences which he has given up to the legislative, in all cases where he can appeal to the magistrate, he has given up a right to the commonwealth to employ his force for the execution of the judgments of the commonwealth whenever he shall be called to it, which, indeed, are his own judgments, they being made by himself or his representative.

Being the sort of men we are, it is only by restricting the responsibility for inflicting punishment to an impartial person or body of persons that we can hope for a tradition of just punishment. It is natural for most of us to hit back or to retaliate if hurt or injured by

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2 §87, pp.158-9.
3 §88, pp.159-60.
someone else. Our judgment is easily clouded by emotion, and our knowledge is very often inadequate. To ensure justice we usually need some impersonal agency with a detachment and with resources of knowledge beyond those which we have ourselves. Even the ancient Hebrew system, in which punishment for murder was inflicted by the dead man's next of kin, had to be supplemented by cities of refuge to which a man who had accidentally killed a person could betake himself. For there was no guarantee that the dead man's relatives would wait to assess the assassin's guilt or would be pacified by the knowledge that the death was accidental. Punishment by special authority is not as susceptible to these sorts of abuses.

Even T.H. Green, whose organic conception of society permits him to recognize that there can be societal or legal indignation, maintains that this indignation is 'inseparable from the interest in social well-being'. In fact, 'the conception of vengeance is quite inappropriate to the act of society or the state on the criminal. The state cannot be supposed capable of vindictive passion.' However, these last remarks need to be kept in perspective. In claiming that the state is incapable of 'vindictive passion', Green acknowledges

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his debt to Hegel rather than his dependence on the facts. Apart from some fairly obvious examples in treason and espionage trials, the state, through its judicial agencies, has often forsaken justice for the satisfaction of an unrighteous indignation. Nevertheless, it is true that a public authority such as the state generally possesses a competence and a detachment of which private individuals are only rarely capable. Needless to say, were this not the case it is doubtful whether we would (if we had the choice) tolerate such an institution.

It is this need for impartiality and competence to judge which helps us to understand why we generally think that punishment ought to be taken out of the hands of private individuals, and placed in the hands of some impersonal body or authority. It also helps us partially to understand why we do not argue that a person has no right to punish himself, and why we generally have no objections to fathers punishing their own children. A person may sometimes judge himself severely, but we do not expect him to judge himself unjustly, and we acknowledge that people are often better judges of their own actions and motives than others who have no acquaintance with them. Of course, it is not difficult to cite numerous exceptions to these statements. But, unless we are Freudians, we do think of them as exceptions rather than as the rule.
2. Punishing Authorities.

To point out our natural inclinations to retaliate and avenge ourselves takes us only part of the way in our justification of the institutionalization of punishment. For what has been presented so far does not give anything like a justification of the actual authority structure which we recognize in our society. A person authorized to punish does not have the right to punish any wrongdoing. A father may have authority to punish his children, but this does not extend to punishing people for their crimes. He is not entitled to punish the intruder he apprehends. We recognize the authority of the state to punish crime, but do not recognize this as extending to the excommunication of heretics. Of course, it is not difficult to recount cases in which fathers have considered themselves as possessing the authority to punish criminal actions (independently of legal authorization), and in which states have excommunicated heretics, but these are things which nowadays we would regard as undesirable. It is the aim of the following discussion to suggest why this should be so.

To attempt to justify particular systems of authority is far too large a task to take on here; and, moreover, it would be of only secondary importance to the central issues of this dissertation. Consequently, what is presented here is only the barest outline, a mere schema, for justifying the diversification of punishing authorities. I have therefore ignored completely many of the important problems which arise in such a venture.
Naturally, not every culture has the same or as clearly differentiated systems of authority as our own Western European one, but it is the one with which I am most familiar, and can serve as well as any to illustrate my points. It is not essential to my discussion that our tradition be regarded as the best or even a good one, since I wish only to give the rationale for the diversification of authority, and not to endorse a particular social system.

In our own culture, the basic social unit is still the family, even though it does not possess quite the same importance and range of functions as in former times. Even though we tend to regard the family as an institution, it is generally constituted as such, not so much in virtue of the prescriptions of legal rules, as by consanguinity and deeper emotional and moral ties.¹ The structure of the family tends to be somewhat fluid, perhaps comprising only husband, wife and child(ren), but sometimes extending to include a great number of relatives. As well, partly because the family is not structured by a set of precise legal rules, there is no fixed locus of authority. 'Parental' authority is of a somewhat traditional nature, having as its basis 'the sanctity of the order and the attendant powers of control as they have been handed down from the past',

¹ Of course, there are situations in which the family unit is held together almost solely because of legal and economic pressures, but this does not invalidate my point.
to use Weber's definition. The sanctity of the attendant powers of control is also partly based on personal credentials, and this helps to account for some of the diversity in authority within the family structure. Sometimes it resides in the father alone; sometimes it is shared jointly with the mother. On other occasions it may be found in one of the relatives - e.g. the grandparents or mother-in-law (though not so commonly in our own society).

The functions which the family unit fulfils also tend to be diffuse. There was a time when education was regarded as one of the responsibilities of the family, later it was thought to belong to the Church, and now it seems to have been largely taken over by the state. Consequently, the function of the modern family tends to be centred in its provision for the more intimate expression of human emotions and the moral education and rearing of children. It is not my task to assess these trends, only to note the way in which they affect our understanding of the proper sphere of parental punishment. It is because we have a certain conception of the legitimate functions of the family that we see its legitimate punishing authority only in relation to these functions. Thus, in our own society there is a tendency to regard as proper the punishment of children for moral offences such as lying, swearing, and the repudiation of parental authority, but only till such

time as the child is thought mature enough to make balanced decisions of his own, capable of 'standing on his own two feet'. At this point the time of parentally enforced moral education is thought to have ended.\textsuperscript{1} It is to be noticed that because the task of moral education is thought to belong to the family unit, punishment of wrongdoing by those outside the family is often regarded as unacceptable: 'You had no right to punish my son, even if he did break your window. You should have come and told me' is not an uncommon complaint. In cases where the young offender comes from an undisciplined home, punishment by those other than the father (e.g. the aggrieved neighbour) might not be looked at askance (except, perhaps, by the father).

A more formally structured institution is the school,\textsuperscript{2} having not only its own special educational functions, but nowadays also having functions which to some extent overlap with those of the family. The schoolmaster is usually empowered to punish not only the lazy pupil, but also the refractory or mendacious one. But this authority is confined roughly to school hours and school activities, and the master who claims more than this is usually thought to have exceeded his

\textsuperscript{1} Once again, I recognize that there are considerable differences of opinion about this, but these do not affect the point of my argument, which is to show the interrelatedness of the justifiable scope of parental authority with what are taken to be the legitimate functions of the family.

\textsuperscript{2} For a more detailed discussion, see R.S. Peters, \textit{Ethics \& Education}, London: Allen \& Unwin, 1966, Chapter X.
authority. In the school situation, the authority structure is more highly formalized than in the family, prescribed as it is by quasi-legal rules (probably promulgated by a central educational authority). Nevertheless there is no single authority structure which holds for all schools. It used to be the case that any teacher could inflict corporal punishment on a pupil, but in many schools this is no longer so, and the authority to inflict such punishment resides in the headmaster alone (and sometimes not even in him). One reason for this discrimination in authority can be found in the abuses to which this type of punishment is subject, the very abuses which had led to the restriction of punishment to authorities in the first place.

Churches, too, generally have certain provisions for the punishment of those formally connected with them, the range of offences being closely related to what are conceived to be their proper functions. Churches in mediaeval times punished a far greater range of offences than they do today, largely because the functions of the Church were seen to be more extensive than they are now. Some of the functions of the Church are significantly different from those of the family and the school, and consequently some of the offences which it is seen as legitimately

1 Unless, perhaps, the misdemeanour is committed while in school uniform.
2 Perhaps another reason can be found in a prevalent hostility to corporal punishment.
punishing are different. Excommunication for heresy belongs uniquely to the Church, for the teaching and promulgation of sound doctrine is considered to be a specific task of the Church. The Church may also censure or excommunicate people for certain moral offences which are thought to frustrate or hinder other proper tasks which it has. As in the case of schools, the authority to punish is carefully prescribed by rules, although different churches may have different rules.

The need for a general and publicly enunciated system of rules prescribing and proscribing certain kinds of social behaviour, such as is found in the laws of a state, has arisen largely because of the increasing complexity of social relationships. Human beings living together generally are not merely individuals 'living their own lives', but they interact with one another in various ways, not only as individuals, but also as members of various societal groups, the tasks and interests of which may come into conflict. There is a need for some institution to mediate between these individuals and groups and to regulate their behaviour and relations with each other. This is achieved primarily through the legal system of the state, which not only proscribes behaviour which is thought to damage the interests of others, but also limits the authority of different societal groups in various ways. To take just one example, Section 59 of the New Zealand Crimes Act (1961) stipulates the following:
(1) Every parent or person in the place of a parent, and every schoolmaster, is justified in using force by way of corrective towards any child or pupil under his care, if the force used is reasonable in the circumstances;

(2) The reasonableness of the force used is a question of fact.

Here the authority of a parent or schoolmaster to punish his child or pupil is recognized (not given), but is limited by considerations intended to be in the interests of all.

The task of mediation is by no means the only function of the state, or even the best expression of it. Some see the task of the state largely in economic terms - the provider of benefits and securities which the individual is unable to provide for himself (roads, police, etc.). Ross, on the other hand, writes that

we have come to look upon the state as the organization of the community for a particular purpose, that of the protection of the most important rights of individuals, those without which a reasonably secure and comfortable life is impossible; and to leave the promotion of other good ends to the efforts of individuals and of other organizations, such as churches, trade unions, learned and artistic societies, clubs.¹

Yet others see the task of the state in terms of the maximization of liberty, while others look to the

state to provide conditions for and to promote the realization of

goods such as privacy, self-determination, self-perfection (including moral excellence), rationally held belief, true knowledge, enjoyment of rights, justice, equality (in so far as it is dictated by justice), happiness, and, in so far as they differ from the foregoing, well-being and perfection of self.¹

Each of these statements of the proper task of the state is different, and what behaviour is regarded as properly punished by the state will depend on which conception is presupposed. For example, under the last conception I mentioned, a place might be found for the proscription of and punishment for such things as organized gambling, fornication, the enjoyment of pornography, etc.,² whereas this is unlikely if Ross's statement is followed.

Again I want to emphasize that I am not necessarily endorsing the descriptions which I have given of the functions and authority structure of the family, school, Church and state. Nor do I want to suggest that these are the only institutions within which the authority to punish is recognized. The armed forces, sporting bodies, clubs and lodges nearly always recognize some

² McCloskey, op. cit.; and also 'Mill's Liberalism - A Rejoinder to Mr Ryan', Philosophical Quarterly, Vol.16, 1966, pp.64-8, by the same author.
internal punishing authority. And sometimes we grant the propriety of punishment inflicted in even more informal relationships. For example, workmates might punish a fellow worker who had continually lied to or about them by refusing to mix with him or by subjecting him to public shame.¹ In the more formalized relationships we can see that there is a very close relation between the functions which the institutions have and the sorts of offences which they are seen as legitimately punishing.

3. What Constitutes the Authority to Punish?

So far we have noted some of the considerations which lead us to restrict the task of punishment to authorities. As well we have shown some of the factors which go towards justifying the diversification and limitation of punishing authorities. However, we have not yet considered the exact nature of the authority to whom the right to punish has been given. This is important, for it brings to light a tension in my view which we have not considered as yet. This tension is forcibly brought out by Mabbott:

My fundamental difficulty with [the traditional retributive] theory is the question of status. It takes two to make a punishment, and for a moral or social wrong I can find no punisher. We may be tempted to say when we hear of some brutal action 'that ought to be punished'; but I cannot see how there can be duties

¹ Compare the practice of sending a blackleg or scab to Coventry.
which are nobody's duties. If I see a man ill-treating a horse in a country where cruelty to animals is not a legal offence, and I say to him 'I shall punish you', he will reply, rightly, 'What has it to do with you? Who made you a judge and a ruler over me?' I may have a duty to try to stop him and one way of stopping him may be to hit him, but another way may be to buy the horse. Neither the blow nor the price is a punishment. For a moral offence, God alone has the status necessary to punish the offender; and the theologians are becoming more and more doubtful whether even God has a duty to punish wrongdoing.1

Mabbott's viewpoint stands in opposition to the thesis I have advanced so far, namely, that punishment is properly meted out for moral wrongdoing. Not that Mabbott denies that wrongdoing deserves punishment. Whether or not it does is a question which does not arise for him, for the question which concerns him is: 'What justification can be given for the punishments which we actually mete out?' And this question he believes he can and must answer without reference to moral wrongdoing.

But for all its persuasiveness, there are some fairly deep-seated difficulties in Mabbott's position. For one thing, it does not always take two to make a punishment, as he claims, self-inflicted punishment being a case in point. Self-inflicted punishments do not require a legal or quasi-legal authorization to be

morally acceptable, and as we shall come to see, the reasons for this contribute to our understanding of what we expect of a punishing authority.

In making punishment so dependent on the presence of an appropriate authority, Mabbott is also led to beg the important question. He concludes from the fact that he can find no one with the status necessary to punish moral wrongdoing, that punishment is therefore not justifiably inflicted for moral wrongdoing. To this conclusion he is not entitled, for it could very well be the case that none of the punishments which we actually mete out are justifiable, God alone having the requisite authority.

What Mabbott should have made, but does not make, clear in this passage is why God has the authority to punish wrongdoing and others do not. From the general drift of Mabbott's argument one would imagine that if cruelty to animals, lying, gossiping and prurient thoughts had been legislated against, then appropriate human authorities could be cited. For he 'cannot see how there can be duties which are nobody's duties', and they are nobody's duties only because they are not legislated against. To the person who threatens punishment for wrongs which are not legal offences Mabbott answers: 'What has it to do with you? Who made you a judge and a ruler over me?' Although he

1 For Mabbott, moral wrongdoing is not even a necessary condition for justified punishment. All that is necessary is that there is a law or rule and that it has been broken by the accused.
does not say so, Mabbott presumably thinks that God qualifies as having the requisite status because God stands in relation to morality as legislators and judges stand in relation to the law.

Even supposing this to be true, it is nevertheless still too superficial to account adequately for the not infrequent claim that only God has the authority to punish moral wrongdoing. Such authority is not likely to be or to remain de facto unless certain other conditions are fulfilled. In other words, we are not likely to be convinced that God should have the authority to punish moral wrongdoing unless other requirements than that of being 'authorized' to do so are also fulfilled. The authority to punish moral wrongdoing is thought to be properly God's partly because only he is seen to be in a position to look into the human heart and to take adequate account of all the factors relevant to a correct moral assessment:

As modern psychological research continues we must find it harder and harder to satisfy ourselves as to the extent of the moral failing in any particular case. We must find it harder and harder to believe that there is even the roughest approximation between the penalties we mete out to the wrong-doer and those which God would award him. In other words between human and Divine

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justice. It is at this point that the very sharp issue of practical justice arises, as to whether in practice the idea of retribution can properly be retained at all in an enlightened penal system. When I talk of retaining the idea of retribution, I mean retain some connection between the supposed heinousness of the offence, the degree of moral failing on the part of the culprit on the one side, and the severity of the punishment on the other.¹

It is thought, therefore, that it is beyond the competence of humans to assess moral wrongdoing. Consequently punishment, if it is to be justly administered, must be for different sorts of offences, namely legal or quasi-legal, in which we have workable measures of guilt. Of course, since it is in the interests of justice that we confine the task of punishment to authorities, we expect judges to be competent and discerning in those things pertaining to their office. To some extent these expectations are built into the qualifying conditions for election or appointment to the judiciary. Perhaps coupled with these expectations is our demand that judges be men of exemplary character. We would be loathe to recognize the authority of a judge who had a criminal record or was notorious for his loose-living. With such a man we would feel that there was no guarantee that justice would be done.

It seems to me that to some extent the hiatus drawn between human assessments of moral guilt and

¹ Longford, loc. cit.
the assessments of which God is supposedly capable is unjustified. Not only do we continually attempt such assessments, but often there is no reason to think that such assessments are far wide of the mark. And in Chapter Eight I shall discuss some of the criteria which are appropriate to the determination of moral guilt.

On the other hand I do not want to deny that we often do have objections to punishing moral wrongdoing simply qua moral wrongdoing. It is not simply in the interests of justice that we expect of a judge or punisher that he be a man of exemplary character, but we feel that there is a presumptuousness or self-righteousness about punishing others for offences of which one is most probably guilty oneself: 'Let him who is without sin cast the first stone'.¹ This is what really gives the strength to Mabbott's retort: 'What has it to do with you? Who made you a judge and a ruler over me?'² It is for this reason as much as

¹ From John 8:7; cf. Nowell-Smith: 'If a man deserves blame, someone would be justified in blaming him. Not necessarily you; for you may be in no position to cast the first stone or to cast any stone at all' (Ethics, Harmondsworth: Penguin Books, 1954, p.271).

² This can be seen from the context in which the retort was originally made: 'One day, when Moses had grown up, he went out to his people and looked on their burdens; and he saw an Egyptian beating a Hebrew, one of his people. He looked this way and that, and seeing no one he killed the Egyptian and hid him in the sand. When he went out the next day, behold two Hebrews were struggling together; and he said to the man that did the wrong, "Why did you strike your fellow?" He answered, "Who made you a prince and a judge over us? Do you mean to kill me as you killed the Egyptian?"' (Exodus 2: 11-14).
any other that there is a tendency to ascribe to God alone the authority to punish moral wrongs which do not harm the legitimate functions of the various social institutions and associations.

Mabbott mistakenly thinks that because only God has the necessary status to punish moral wrongdoing, therefore no justified punishments which we inflict could be for moral wrongdoing. He overlooks the distinction which Ross and others have made between wrongdoing as such and wrongdoing as profitably legislated against. Ross writes:

We do not claim that laws should be made against all moral offences, or even against all offences by men against their neighbours. Legislation should be guided to a great extent by such matters as the possibility of enforcing a given law if it were made, the question whether a certain type of offence is important enough to make it worthwhile to put the elaborate machinery of the law at work against it, or is better left to be punished by the innocent person or by public opinion; and by other similar considerations. ¹

Normally we look upon particular punishments as justified only if the wrongs for which they are inflicted are such as also frustrate the legitimate purposes of the institutions which enclose the wrongdoer, and as well if they are inflicted by the appropriate authorities

¹ W.D. Ross, 'The Ethics of Punishment', Journal of Philosophical Studies, Vol.IV, 1929, p.207. This also constitutes a reply to Benn and Peters' criticism, op. cit., p.177.
within those institutional structures. Thus homosexuality is usually regarded as properly punished by legal authorities only if it tends to cause harm to others, the prevention of such being one of the legitimate functions of the state. If punishment is not primarily inflicted for wrongdoing, but for something like law-breaking instead, then there is no longer any guarantee that our legal system will be just, except perhaps in the secondary sense of 'impartially administered'. The interests of justice can be secured only if punishment is meted out for, and is commensurate with, moral wrongdoing.
CHAPTER EIGHT
GETTING AS MUCH AS ONE DESERVES

In Chapter Seven I returned to a distinction which I had made earlier between what a person deserves and what a particular authority is justified in giving him. In justifying social institutions we need to be able to point to their legitimate advantages and possible alternatives. Within such institutions authorities are properly empowered to act only in such a manner that these general justifying aims are not violated. The situation may therefore arise in which a particular authority is not justified in giving to a wrongdoer the punishment which he deserves. This distinction needs to be kept in mind as we proceed with our discussion in this Chapter.

It will also be recalled that in Chapter Three I distinguished between raw, institutionalized, and specific desert claims. There I took the view that specific desert claims are usually of the same general form as institutionalized desert claims, viz. 'X deserves A of Y in virtue of B'. The difference lies in the fact that, whereas institutionalized desert claims are basically concerned with what treatment is

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deserved, specific desert claims refer to the quantity or degree or amount of treatment which is deserved. As examples I gave the following:

(i) 'Nolan deserved every bit of the $500 he got for the First Prize.'
(ii) 'McKenzie deserves about five years gaol for his offence.'
(iii) 'Menzies deserved at least a K.C.M.G.'

As can be clearly seen, each of these statements presupposes an institutional framework. Prize-giving, knighthoods, and imprisonment are social institutions, and as such we can expect and require them to be at least partially justified in terms of the benefits which would accrue from their adoption and perpetuation. But only partially. My discussion in Chapter Four was devoted to showing that their primary justification must be that they are deserved, since each of them necessarily involves the awarding of deliberately pleasant or unpleasant treatment.\(^1\)

\(^1\) Including so-called moral goods (not a particularly felicitous locution).

\(^2\) Cf. Kant: 'Now the notion of punishment, as such, cannot be united with that of becoming a partaker of happiness, for although he who inflicts the punishment may at the same time have the benevolent purpose of directing this punishment to this end, yet it must be justified in itself as punishment, i.e., as mere harm, so that if it stopped there, and the person punished could get no glimpse of kindness hidden behind this harshness, he must yet admit that justice was done him, and that his reward was perfectly suitable to his conduct. In every punishment, as such, there must first be justice, and this constitutes the essence of the (footnote continued on p.264)
However, it is one thing to justify the giving of prizes, the conferment of honours, and the imposition of gaol sentences; it is another to justify their amount. It is with the latter problem that we shall be concerned in this Chapter. Two main justificatory questions immediately come to mind: (A) By what criteria can we determine the amount of pleasant or unpleasant treatment which a person deserves? and (B) By what criteria can we decide the prizes, honours, penalties, etc. which a particular authority is justified in giving? Justificatory question (B) naturally divides into at least two justificatory questions: (B₁) By what criteria can a particular authority determine the prizes, honours, or penalties it is justified in awarding for different sorts of deserving actions? and (B₂) By what criteria can a particular authority determine the prize, honour, or penalty which ought to be awarded for a particular deserving action? Other justificatory questions are possible (depending on whether or not we are limiting ourselves to moral justification), but we shall ignore these. Our main concern in this Chapter will be with (A), though I shall make a few observations relevant to (B₁) and (B₂) at the end of the Chapter. It is question (B₁) which has usually absorbed the attention of philosophers, though this is partly because it has been confused with (A). One further restriction on this Chapter is that I shall confine myself largely to a

(footnote 2 continued from p.263)

notion. Benevolence may, indeed, be united with it, but the man who has deserved punishment has not the least reason to reckon upon this' (Critique of Practical Reason, I.1.viii; quoted in E.L. Pincoffs, The Rationale of Legal Punishment, New York: Humanities Press, 1966, pp.6-7).
discussion of these questions as they relate specifically to punishment.

Problem (A) has usually been considered to pose insuperable difficulties for many so-called retributivist justifications of punishment. It is said to be impossible to determine how much of a particular kind of treatment a person deserves. Only on utilitarian criteria can determinations be made of the amount of unpleasant treatment a person can justifiably undergo, so it is argued. But to argue in this way is to put the cart before the horse, for the suggestion that utilitarian criteria are more appropriate to the determination of what amount of unpleasant treatment is justified because they are easier or possible to apply is of no value unless it has previously been decided that such criteria are morally acceptable. Only then does the question of practicability arise. If it turns out that specific desert determinations are impossible for us to make, this will not necessarily indicate that utilitarian considerations are appropriate, it may indicate only that no one would be justified in inflicting punishment.

The plan of this Chapter will be as follows: In the first section I consider the importance of specific desert determinations in the infliction of justified punishment. This is followed by a short section on the relation between specific deserts and different modes of punishment. Section Three is devoted to a refutation of one common objection to the possibility of specific desert determinations. Finally, in Section Four, which forms the main part of the Chapter, I discuss the scaling and determination of specific deserts. The
argument of this last section, by virtue of the magnitude of the problems on which it touches, is of necessity highly schematic.

1. Is the Determination of Specific Deserts Necessary?

From my previous discussion it would appear to follow naturally that desert considerations ought to be primary in deciding how much punishment could justifiably be inflicted on a wrongdoer. While it is true that punishment which is administered within an institutional framework must take account of utilitarian considerations, we would be mistaken if we thought these were the sole or even primary considerations. What is of fundamental concern to us is what amount of unpleasant treatment a person ought to suffer for his misdeeds, and the suffering of deliberately unpleasant treatment can be justified only by desert. What punishment a particular authority is justified in inflicting is a distinguishable secondary issue. This is supported by the fact that it is not necessary for specific desert claims to presuppose an institutional framework (though they usually do). The statement, 'Peters deserves to get good weather (but not a trip around the world) for his holidays' can be construed as a specific desert claim, yet no institution which can supply such treatment is presupposed.

Nevertheless, there have been those who have argued that although desert considerations are relevant to whether or not a person ought to suffer punishment, how much punishment a person ought to receive is determined by reference to utilitarian considerations.
It will be worth our while to look at the consequences of such a position.

Bradley is sometimes thought to have taken this view. He writes: 'Having once the right, we may modify the punishment according to the useful and the pleasant, but these are external to the matter; they cannot give us the right to punish'. But Bradley never says that we determine the punishment to be awarded by appeal to utilitarian and other non-retributive considerations: he says merely that they 'may modify it', and this is a different matter. Bosanquet, however, puts forward a view very much like the one we are considering. While maintaining that punishment is the wrongdoer's 'right, of which he must not be defrauded',


he also insists that the state 'cannot estimate either pain or moral guilt.... The graduation of punishments must be almost entirely determined by experience of their operation as deterrents.'¹ This view, however, has a number of unwelcome consequences.

For one thing, it is artificially stipulative and restrictive, since it necessitates our discarding a number of significant locutions relating to the severity of punishment. Except in the secondary legal sense, it is open to us to speak of penalties as just or unjust only if we can also determine whether or not they are deserved. If we succumb to the view that the determination of specific deserts is either impossible or unnecessary, then we remove from ourselves the possibility of criticizing penalties inflicted on wrongdoers from the point of view of their justice or,

(footnote 3 continued from p.267)


rather, injustice. This is a high price to pay. Bosanquet's view would also rule out the possibility of our speaking of some people deserving greater penalties or heavier punishments than others.

Second, if utilitarian considerations are used to determine how much punishment a person ought to suffer, then the possibility is left open that a person will suffer appreciably more or less punishment than he deserves—witness the case of exemplary punishments. Such punishments are unjust. To obviate this objection, Bosanquet would need to show either that utilitarian considerations would never lead to a person's suffering more punishment than he deserved, or, alternatively, why utilitarian considerations cannot override desert in the determination of whether or not a person ought to suffer punishment, whereas they can in the determination of how severe a punishment a person ought to suffer. However it is clear that neither of these possibilities has much to commend it.

Third, Bosanquet's concession is damaging even to the claim that desert must determine who ought to suffer punishment. If taken seriously, it reduces the original desert claim to the purely negative one that a person ought not to suffer punishment unless he deserves it. Thus it now says very little, if anything, about who ought to suffer punishment, for a person who deserves punishment can be exempted from it on utilitarian grounds. Bosanquet's position would have been more

1 Ewing draws similar conclusions from the view that retributive considerations impose a duty to punish, (footnote continued on p.270)
acceptable had he distinguished between the punishment which a person ought to undergo, and the punishment which a particular authority is morally justified in inflicting on him. For then he would have been able to preserve the positive nature of desert claims,\(^1\) while yet allowing the possibility that a particular authority would not be justified in inflicting punishment in all cases in which it was deserved.

We can conclude from our discussion in this section that if we forgo the necessity of making and justifying specific desert claims, then we lose the ability to criticize penalties attached to crimes or wrongs on the ground of their injustice. And this we are not prepared to do.

2. Specific Deserts and the Modes of Punishment.

Before we consider the determination of specific desert claims in more detail, we must draw attention to two possible sources of confusion. The one which we shall discuss in this section arises largely from the institutionalization of specific deserts.

(Footnote 1 continued from p.269)

though utilitarian considerations determine how much punishment: 'It makes very little difference whether we admit that, if utilitarian considerations ever required it, we ought to let off a murderer, or deny this, but admit that we might for those reasons lower his penalty to any extent, say, to a fine of one shilling'(op. cit., p.41).

\(^1\) This is at least implicit in Bosanquet's claim that punishment is a right of which the wrongdoer cannot be defrauded.
There is some ambiguity in the examples I have given as to what, exactly, is said to be determined by desert. We can distinguish somewhat artificially the following four elements in example (i) above. First, there is the pleasant treatment which is involved in awarding Nolan the $500 as First Prize. Pleasant treatment, as we have seen, is a proper object of desert. Second, since the statement presupposes an institutional context, it is quite appropriate to speak of the deserved treatment as a prize. Third, a specific amount of money and a specific grade of prize are said to be deserved, and there is no linguistic impropriety in this. These three elements correspond to the distinctive features of raw, institutionalized, and specific desert claims. But there is a fourth element which can be discerned, and which might be thought to constitute a legitimate desert, namely that Nolan deserved to get five hundred dollars as First Prize, rather than, say, a cup, an overseas trip, or a scholarship. It seems to me that the determination of what sort of deserved treatment to give a person is, within certain limits, settleable on utilitarian grounds. For example, in an Art Competition a money prize might act as a greater incentive than possible alternatives.

The same sort of point applies also to the other two examples of specific desert claims which I gave. It might be argued that a knighthood would not be the best way of giving Menzies what he deserves — perhaps a statue would be more lasting or a sizable pension more useful. Again, it could be argued that although McKenzie deserved the amount of unpleasant treatment
which five years in gaol would constitute, yet he ought not to be imprisoned but fined, deported, or sent to some rehabilitation centre, because these modes of punishment would produce greater benefits. What many prison reformers fail to realize is that their proposals for the enlightened treatment of criminals do not necessarily come into conflict with giving them the punishment they deserve.¹ The enforced attendance of criminals at rehabilitation centres may itself constitute punishment.²

I noted that the utilitarian determination of modes of punishment was subject to certain limitations. One of these limitations is the fairly obvious one that certain methods of punishing, such as torture, are in themselves immoral and so unacceptable, even though they might serve a useful purpose. A further limitation is that some modes of punishment do not allow of sufficient realistic variation, and so would be unsuitable for deserts of a certain magnitude. For example, it would be unrealistic to fine a person for wilful murder or to deport someone for a minor case of shoplifting. It would be pointless to expect people

¹ Cf. J.B. Moore, who points out the difficulties in making a clear practical distinction between punishment and its accompaniments (Retributive Justifications of Punishment, Unpublished Ph.D. dissertation, Harvard University, 1965, p.62); A.C. Ewing, 'Punishment as Viewed by the Philosopher', Canadian Bar Review, Vol.XXI, 1942, p.120.

to be able to pay the fine which wilful murder might
deserve, and deporting is too high-pitched for offences
like shoplifting.

3. The Impreciseness of Specific Desert Claims.

The second misconception to which I want to draw
attention is the inference that if specific desert
claims are possible, they must be precise. On the
contrary. Even though desert claims may be specific,
they are not necessarily precise, and where they are
precise, it is because of special institutional
reasons. What I mean is that where a specific amount
of something is said to be deserved, it is not to
be taken that precisely that amount is deserved, unless
this is prescribed by the rules of the institution. The
$500 which Nolan deserves is a precise amount, and it
might look as though this precise amount was determined
by desert considerations. But this is not so. Had
the First Prize instead been $400 or $600, then it is
not unlikely that we could have just as truly said:
'Nolan deserved every bit of the $400/$600 he got for
the First Prize'. This does not make it impossible
for us to say that Nolan got more or less than he
deserved. Had the prize been $10 and the same
painting entered, we would claim that a painting like
that deserved a better prize. Also, we would complain
that Nolan got less than he deserved had the First
Prize been fixed at $500 and Nolan given only $400.¹

¹ Also in this case he would get less than he was
entitled to.
Similar considerations would apply in the case of McKenzie's gaol sentence. Were he given four years or six years imprisonment we would probably not complain unless he was thereby being treated significantly differently from others in a similar position, or unless there was a fixed penalty of five years for his offence (and he had no mitigating circumstances to plead). As well, we would complain of injustice if the same offence were to be given seven days or life imprisonment, for although specific desert claims are not usually precise, there are limits to their imprecision.

It is important to notice this inherent imprecision in specific desert claims, since many critics of retributivist justifications of punishment have used the fact that it is impossible to relate offences and penalties in a mathematically precise way as a substantial objection to such justifications. Strangely enough, the difficulties of doing the Benthamite hedonistic calculus are not allowed to count against utilitarian justifications of punishment.¹

Ewing is one philosopher who interprets retributivism as maintaining that 'punishment should be just, and every excess over the just must be in the

¹ That is, if looked at as a quasi-mathematical procedure. The hedonistic calculus suggested by Bentham was completely unsatisfactory, though more recent writers have attempted to make it workable. See, e.g., H. Rashdall, 'Can there be a Sum of Pleasures?', Mind, Vol.VIII, 1899, pp.357-82; idem. 'The Commensurability of All Values', Mind, Vol.XI, 1902, pp.145-61; R. McNaughton, 'A Metrical Concept of Happiness, Philosophy and Phenomenological Research, Vol.XIV, 1953-4, pp.172-82.
same ethical position as punishment of "the innocent", an injustice which seems much worse than non-punishment of the guilty.¹ But because he conceives retributive justice as having mathematical preciseness he goes on to claim that

it is certain that either this injustice or the opposite one of inflicting too slight a penalty will be perpetrated in nine cases out of ten, nay in 999 cases out of a thousand, so great are the difficulties in the way of securing the right proportion between the punishment and the guilt of the offender.²

Qualitative notions, even when qualified by apparently quantitative adjectives, are not measurable or comparable on an ordinary interval scale. To think that they are is to commit a category error. The notion of 'precise measurement' is thus inappropriately used in relation to desert. It is not simply that with a little sharpening up of our criteria for specific deserts we might be able to determine how much punishment wrongdoers deserve with mathematical preciseness. The two scales are logically different.

¹ It is at least questionable whether punishing a man slightly more than he deserved would be in exactly the same ethical position as punishing an innocent man, for the former at least deserves punishment whereas the latter does not.

Oddly enough, Hegel appears to recognize the intrinsic imprecision of specific desert claims, yet he argues that because of this it is almost impossible to avoid injustice. He states:

Reason cannot determine, nor can the concept provide any principle whose application could decide whether justice required for an offence (i) a corporal punishment of forty lashes or thirty-nine, or (ii) a fine of five dollars or four dollars ninety-three, four, &c., cents, or (iii) imprisonment of a year or three hundred and sixty-four, three, &c., days, or a year and one, two, or three days. And yet injustice is done at once if there is one lash too many, or one dollar or one cent, one week in prison or one day, too many or too few.¹

But if there is logically no way of telling whether justice requires forty lashes or thirty-nine, then it logically cannot be said that injustice is done if one lash too many has been given. The only contexts in which it can be said that one lash too many has been given are where one more than a prescribed number is given (without special reason), or where a particular wrongdoer is given one lash more than others from whom he cannot be morally differentiated.

4. The Scaling and Determination of Specific Deserts.

We are now in a better position to tackle the main problem of this Chapter, namely, the determination of how much punishment a particular wrongdoer can be said

¹ Hegel, op. cit., §214, p.137.
to deserve. It is a problem which, to my knowledge, has never been solved, and to the solution of which I shall lay no claim. For the issues it centres on concern not only retributivism but go right to the heart of ethics. Nevertheless, I shall endeavour to show schematically that the claims which I make in this section are open to substantiation.

To determine specific deserts we need first of all to map out the 'projections' of specific desert claims. I have already noted that it is logically inappropriate to weigh or measure deserts on an ordinary interval scale. Qualities are not amenable to such treatment. Nevertheless it is true that there is some sort of scale discernible in our use of the term. At first glance it might appear that this would be a simple ordinal scale ('X deserves more/less than Z'). However, this representation does not quite do justice to the situation. For not only do we order deserts, but also (partially) the intervals between them. To say that McKenzie deserves five years imprisonment for armed robbery rather than seven days, is not merely to say that he deserves more than seven days, but also to give an idea of how much more. But this cannot be expressed as a precise mathematical relation. McKenzie's offence is not 5 x \( \frac{365}{7} \) times more serious than one deserving seven days imprisonment (or even some more sophisticated formula which gives a diminishing value to each day as the length of the sentence increases). The same point holds even when specific desert claims are made in conjunction with a simple ordinal scale such as 'First Prize, Second Prize, Third Prize, etc.'.

In Art Competitions it not infrequently happens that no
First Prize is awarded, because none of the entries is thought to merit it. In such cases, the best painting is probably given Second or even Third Prize.

This isn't to say that people always or even often get their deserts in such Competitions. Once again it is easy to confuse desert and entitlement claims. We must not suppose that because a particular painting is given Second Prize, it deserves it. Suppose that Richardson entered the same Competition as Nolan. Nolan's painting undoubtedly deserved the First Prize and Richardson's was next best, but is so much poorer than Nolan's and so far below the standard we have come to expect in this particular Competition, that there is really no comparison. Clearly Richardson's painting did not deserve the Second Prize, but provided that the rules of the Competition stated that the two best paintings should be given prizes, then his painting would have been entitled to it. The criteria of entitlement are not the criteria of desert.

The type of scaling which is reflected in our specific desert claims is neither ordinal nor interval, but something in between. It is what is usually referred to as an 'ordered metric scale'. This is a scale in

1 Consider the more frequent case of an athletic event in which there is only one entrant. So he gives a token performance to fulfil the conditions for winning the event and thus being entitled to the prize. But he does not therefore deserve it.

which not only different objects are ordered but also the intervals between them. This scale allows us to rank wrongs in order of their seriousness - say, A, B, C, D, E and F, where A is the least serious and F is the most serious. But more than this it caters for judgments of the sort: 'The difference between A and B is greater than the difference between D and E, and the difference between A and C is greater than the difference between C and F.' This type of scale accords with the way in which we commonly talk about different wrongs or offences. We compare shoplifting and loitering with rape and murder and argue that the difference in seriousness between the former two is not as great as the difference in seriousness between them and the latter two. It is on the basis of judgments such as these that we make our specific desert claims.

In the last seven or eight years advances in psychometrics have enabled the relations between qualities to be given a quantitative representation. All that is necessary for such a representation to be worked out is that it be possible to make judgments of proximity in relation to pairs of qualities. Thus, in order to give a quantitative representation of the relations between different wrongs or offences, we need only to be able to make a number of judgments like those above concerning shoplifting, etc.

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This is much more easily said than done. It is made even more difficult by the fact that a combination of such scales is required in making specific desert claims. Thus we shall need to know at least the following things: (a) criteria whereby wrongs can be ordered in terms of their seriousness; (b) criteria adequate to ordering the intervals between different wrongs (these may or may not be the same as those appropriate to the initial ordering of wrongs); (c) criteria which will enable us to order penalties or punishments in terms of their relative severity; (d) criteria for ordering the intervals between different penalties or punishments; and (e) some formula whereby we can relate a wrong of a certain seriousness with an appropriate penalty.

These are all difficult (some would say impossible) demands, but ones which must be fulfilled if any reliance is to be placed on specific desert claims. Moreover, unless such demands can be fulfilled, we cannot complain of the injustice of certain punishments or seek to make them just, except in the sense of not punishing the innocent. Our problem, then, while of considerable theoretical difficulty, is of great practical importance. What follows, however, will have to be very sketchy and oversimplified.

Our first concern shall be with (a) - the criteria relevant to determining that one wrong is more serious and hence deserving of more punishment than another. Various criteria have been suggested as appropriate to such determinations. The three which I shall touch on here are (i) the public indignation or resentment
produced by an offence, (ii) the amount of damage an
offence causes, and (iii) the moral turpitude involved
in committing a wrong. I shall argue that only the
last of these is appropriate to the determination of
the seriousness of wrongs and hence to the determination
of specific deserts.

(i) In his discussion of punishment, Durkheim
recognizes the utilitarian considerations by which it
is now commonly 'justified'. Nevertheless, he insists
that in fact these aims are essentially alien to
punishment, which 'consists in a passionate reaction
of graduated intensity'.\(^1\) Others too have looked at
punishment as the legitimate satisfaction of feelings
of resentment. Thus Stephen writes that

the infliction of punishment by law gives
definite expression and a solemn ratification
and justification to the hatred which is
excited by the commission of the offence, and
which constitutes the moral or popular as
distinguished from the conscientious sanction
of that part of morality which is also
sanctioned by the criminal law. The criminal
law thus proceeds upon the principle that
it is morally right to hate criminals, and
it confirms and justifies that sentiment
by inflicting upon criminals punishments
which express it.\(^2\)

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\(^1\) E. Durkheim, The Division of Labor in Society, trans.
G. Simpson, Glencoe, Illinois: The Free Press, 1933,
p.90.
\(^2\) J.F. Stephen, A History of the Criminal Law in
And again:

In cases which outrage the moral feelings of the community to a great degree, the feeling of indignation and desire for revenge which is excited in the minds of decent people is, I think, deserving of legitimate satisfaction. However, it is not difficult to see that the intensity of indignation which is felt toward an offence or offender is hardly an adequate measure of the seriousness of the wrong. Hence it is an inadequate measure of desert. The intensity of indignation which is felt toward an offender is too affected by considerations such as mood, temperament, political conditions, and the face of the offender, all of which are extraneous to the determination of desert.

Ewing recognizes these difficulties, and argues instead that the severity of punishment should be determined by the degree of moral condemnation which is felt towards a particular kind of crime. In this way we are absolved from the impossible task of determining guilt in each individual case. Ewing, however, does not link his view so much to desert as to moral education. His argument is 'By linking a

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particular punishment with a particular kind of crime we bring home to people just how serious that crime is rather than 'By linking a particular punishment with a particular kind of crime we are giving people what they deserve' - though the latter never quite fades out of the scene. For Ewing, the admission of extenuating circumstances is justified by this aim of moral education.1

However, Ewing's view is not without its problems. If his task of moral education is to be properly aided by punishment, it will not be sufficient to determine the severity of punishment by the degree of moral condemnation which is felt towards a particular kind of crime, for, as Ewing admits, 'some thefts are no doubt worse acts than some murders'.2 If justice is to be done in such circumstances, the former ought to be punished more severely than the latter. But this is ruled out on Ewing's account, since 'a murder ... generally deserves more [disapproval] than a theft' and therefore ought to be punished more severely. Yet the just punishment of criminals is important to Ewing's thesis, since he sees it as 'a presupposition of punishment doing its work effectively'.3 To some extent Ewing could escape the force of this objection by distinguishing between different kinds of murders and thefts - those murders which are more serious than

1 Ewing, op. cit., p.106.
2 Ibid.
3 Page 107.
some kinds of theft, those which are less serious, etc. This, while it might serve to bring the punishments inflicted on crimes more in line with the moral condemnation felt towards them, does so at the expense of the simplicity which was intended to recommend his view. Furthermore, since the disapproval which we naturally show to wrongdoing is not always appropriately or well-grounded, criteria would need to be adduced to distinguish well-grounded from ill-grounded indignation.\(^1\) And these criteria, surely, would need to be such as determine the moral turpitude involved in the offence – a task which Ewing considers impossible.

(ii) Montesquieu and others have argued that punishment ought to be proportioned to criminal damage (either to individuals or to society).\(^2\) One reason they give for this is that men meaning to commit a crime may thereby be induced to choose the least harmful way of pursuing their end.\(^3\) But another reason

\(^1\) For a starter on this, see G.E. Hughes, 'Moral Condemnation', in Essays in Moral Philosophy, ed. A.I. Melden, Seattle: University of Washington Press, 1958, pp.108-34. Hughes, however, endeavours only to supply criteria for distinguishing moral from non-moral indignation.


\(^3\) Ibid. Sir James Stephen, on the other hand, maintained that 'it gratifies a natural public feeling to choose out for punishment the one who actually caused great harm', but not the equally guilty person who has had 'the good fortune to do no harm' (op. cit., Vol.III, p.311).
which is sometimes given is that the damage done by an offence provides an adequate criterion of the punishment which it deserves - as seems to be the case with so-called poetic justice. There may be public advantages in a policy of this sort, but it fails to provide a necessary or sufficient condition for the adequate gradation of a person's deserts. Were this view to be taken seriously and exclusively, we would be committed to punishing a person whose intended criminal act resulted in unforeseeable bad consequences as severely as one who intended to bring about those bad consequences. For example, we would be required to punish a person who, in holding up a shop assistant with a toy gun, frightened her to death, as severely as a person who intended to shoot the shop assistant to protect his identity. Only in exceptional circumstances (e.g. if the first person knew the shop assistant had a weak heart) could the two wrongs be said to be equally deserving.\footnote{Further difficulties arise in the case of group crimes, in which the proportioning of penalties to the damage caused seems quite inappropriate.} On the other hand, on Montesquieu's view, we would be committed to letting off, or punishing only minimally, those who had attempted but failed to commit criminal acts, while punishing far more seriously their moral similars who had been 'fortunate' enough to succeed.\footnote{A further difficulty which this view faces when simply stated is that sometimes it is indistinguishable from compensation. See Hart, 'Intention and Punishment', printed in Punishment and Responsibility, Oxford: (footnote continued on p.286)}
Ferri adopts a somewhat weaker method of determining punishments which obviates my last objection. He contends that

The State and its system of criminal justice can do no more than adopt such measures to defend the community against criminals as are reasonable in themselves, and proportionate to the danger threatened to society.¹

By taking the danger threatened rather than the harm actually done to society as the criterion for determining punishment, Ferri's view has the advantage of putting the successful and the unsuccessful criminal on the same footing. However, as Ferri well recognizes, even this criterion will not be sufficient to determine specific deserts. It needs to be at least supplemented by some criterion relating to the responsibility of the offender.²

(Footnote 2 continued from p.285)

² Ferri's criterion becomes more relevant when we come to consider the proper limits of the state's authority to punish.
(iii) It should be fairly clear from my discussion in Chapter Three that criteria relevant to the determination of specific deserts will have to centre round the wrongdoer's moral turpitude or moral guilt. It is just this which has often been said to be impossible to determine, and which has consequently been replaced by (i) and (ii) above. Yet determine moral turpitude we must if we are to assess the justice of punishments.

Putting it rather schematically and dogmatically, assessments of moral turpitude or guilt are hybrids of two further sorts of assessments: (1) those of the responsibility of the wrongdoer for his deed; and (2) those of the nature of the deed committed or attempted by the wrongdoer. Often the separation of (1) and (2) is somewhat artificial, since a proper description of the nature of a particular wrong can include a reference to the nature of the wrongdoer's responsibility; e.g. as in manslaughter and wilful murder. Nevertheless, I shall consider each of these two factors separately, as I think this can be done with profit.

(1) In Chapter Six I discussed a number of criteria which are relevant to the determination of a person's responsibility for his misdeeds. I indicated there that people could be held responsible in varying degrees for such acts, depending on our expectations of what they could and should undergo. Such factors as duress, drunkenness and provocation, for example, we generally
recognize as diminishing a person's responsibility for his acts.

However, the task of assessing the degree of a person's responsibility for his acts is no easy one. In fact, many philosophers have regarded an accurate assessment as well nigh impossible. Ewing, for example, writes:

In the first place, in order to find the degree of wickedness involved in the commission of the offence, the offender's exact state of mind at the time would have to be ascertained, and how that could be done even very roughly, without introspective knowledge of the criminal, I cannot see. But this introspective knowledge can only be possessed by one man, the criminal himself, and he would not be likely to tell the truth about it. Even if he would, he could hardly do so to much effect. That a man cannot properly estimate even his own motives is a platitude, and a man about to commit a crime is not likely to be introspecting carefully at the moment. In the second place not only his state of mind at the time of committing the offence, but also a great deal of his previous psychological development, would have to be ascertained in order to estimate the moral guilt even of the particular act by itself, for we must know how much or how little excuse he had, and this knowledge could only be acquired by examining a psychological

As well, in assessing a person's guilt we need to take into account the motives with which he acts. A man's motives may lead us to take a more lenient view of an otherwise bad act. However, good motives do not necessarily exonerate a person from blame for bad acts.
process lasting over years. For instance, how far was the abnormal difficulty he had in resisting a particular kind of temptation congenital, and how far was it due to his having formerly yielded to that temptation when resistance would have been as easy as it is for the average man? How far was his mental outlook at the moment when he committed the crime due to bad education?  

This is hardly a fair criticism of the attempt to assess a person's responsibility for his wrong. Apart from anything else, it demands from the retributivist an exactitude which he does not need to claim for himself.  

Provided that the offender can rationally consider the alternatives before him, and can make moral decisions with respect to them, there does not seem to be any necessity to make anything like the psychological investigation which Ewing insists must be made. As well, Ewing defeats his own purposes when insisting on the impossibility of determining the criminal's state of mind at the time of the crime. He insists that such knowledge can be obtained only by introspection. But then he goes on to argue that this is not sufficient, because we are often unable to estimate our own motives properly. This may well be true, but it can be asserted only if there are criteria for ascertaining a person's motives independently of his

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2 Although Ewing's criticisms, if valid, would count equally against some utilitarian justifications of penalties.
own introspection of them. And if this is the case, introspection is not necessary to their determination. And this would seem to be the case. Often a man's motives can be correctly ascertained from the circumstances surrounding his acts, and sometimes the onus of proof to the contrary must lie with the man himself.

If all Ewing means is that the task of ascertaining a person's moral guilt is too complex and difficult for the present machinery of the law to accomplish adequately, he is probably right. The law must be practicable, and at present its practicability involves it in stating in hard and fast terms what is not always hard and fast. Nevertheless, the necessity for the law to be practicable does not exempt the state from seeking practicable ways of determining moral guilt more adequately, and where punishment has been inflicted upon the innocent, and severe penalties have been imposed on the person with morally mitigating circumstances to plead, injustice has been done.

If we grant that the determination of responsibility is not rendered impossible by the sorts of difficulties which Ewing brings up, then we shall be in a position to make rational decisions concerning the degrees of responsibility of wrongdoers for their offences. We shall not, for example, expect a young child or an insane person to make responsible moral choices. We shall hold more responsible for a homicide a drunken person who knew that alcohol tended to make him violent than one who had previously shown no such tendencies. We shall be more inclined to treat leniently a person
who has come from a bad background than one who has always had the opportunity and encouragement to behave morally. These judgments of responsibility are relatively simple to make. In real life they are not quite as simple as this, for we often have to take account of several different factors in determining the responsibility of a single offender. And we need to have criteria to decide whether a bad family background has greater value as a mitigating factor than drunkenness. Furthermore, there is still considerable controversy about the criteria for responsibility, even in cases where we are fairly sure about our conclusions - e.g. psychopaths. I do not want to underestimate these and other difficulties in the determination of the degrees of responsibility of wrongdoers for their offences. For my purposes it is sufficient to show that these are questions which we can discuss rationally and to which we can give rational answers. The answers may be controversial, and it may be that we are not yet in a position to appreciate all the relevant factors involved, but we are nevertheless able to discuss these questions intelligibly.

(2) When we come to consider the criteria by which we determine, morally, the nature of the deed committed or attempted by the wrongdoer, we are again faced with considerable controversy. As often as not such controversy often reflects differences in basic moral standpoint, for the problem is one which forces us to take a stand on the fundamental questions of ethics.
There is, of course, a sense in which there is no general answer to questions like 'How serious a wrong is murder, theft, etc.?' and 'How much more serious is murder than theft?', because their seriousness depends very largely on the context in which they are committed. Words such as 'murder', 'theft', 'assault', etc., which belong primarily to the moral sphere of discourse, each encapsulate for us a great variety of empirically different situations which, although they bear certain moral similarities to each other, are by no means morally identical. To look for general answers to these questions, then, would be pointless. Nevertheless, we sometimes do make judgments of the sort, 'Murder is worse than theft', and 'Rape is worse than lying', and we mean something by them. It is the criteria for making such judgments which interests us here.

Benn suggests that

part of what we mean when we call an offence 'relatively trivial' is that we do not care so much about people committing that one as we do about others, and that in turn implies that we should be unwilling to inflict so much suffering to prevent it. Similarly, relatively serious crimes are those that are relatively intolerable; and to describe them in this way is to say that we feel justified in going to much greater lengths to prevent them. If this is so, the proposition 'Trivial crimes do not deserve severe penalties' is analytic, being necessarily the consequence of the way we use 'trivial' in this context.¹

¹ Benn and Peters, op. cit., p.190.
Thus, to say that murder is worse than theft is to say that we are prepared to go to greater lengths to prevent it, and an ordered metric scale of different kinds of offences will be a scale showing the lengths to which we would be prepared to go to prevent such offences.

This account, however, will not do. For one thing, the most which Benn is entitled to conclude from his argument is that trivial crimes ought not to be given severe penalties. Our inability to justify going to great lengths to prevent them does not necessarily have anything to do with what they deserve. It is true that when we talk about 'trivial crimes', 'minor offences', and such like, we are often referring to those which, because of the little social harm they cause, we are not greatly concerned to prevent. But this is not equivalent to saying that, from a moral point of view, they are less objectionable than those which are referred to as 'serious crimes' or 'major offences'. It does not seem unreasonable to suggest that racial snobbery, pride, fornication and meanness of spirit are in general morally no less objectionable than the failure to pay one's radio and TV licence, the failure to report an accident, limited tax evasion, the use of offensive language in public, and vagrancy, yet we are prepared to go to some lengths to prevent the latter, whereas we generally take no action against the former - not in law, anyway. What Benn has done is to confuse the question of how much punishment wrongdoers deserve with the question of how much punishment a particular authority would be justified in inflicting for some wrong
or offence. Benn's position is persuasive for two reasons. First, he confuses 'Trivial crimes do not deserve severe penalties' (with which, with the qualification to follow, I am inclined to agree) with 'Trivial crimes ought not to be severely penalized to prevent them' (with which also with the qualification to follow, I am inclined to agree). Second, he trades on an ambiguity in the phrase 'trivial crimes'. As often as not, when we speak of a crime as trivial, we are thinking of its social repercussions rather than its moral gravity. It is the former which is relevant to the question of prevention and the latter which is relevant to desert, but Benn relies on the former to draw conclusions about the latter. The criteria we are looking for, then, will have to lie elsewhere.

There is one other direction in which we might look, and which I want to criticize, before I make some more positive suggestions. This is McCloskey's view that judgments about the relative seriousness of various wrongs are basically intuitive. He writes: 'the issue of the seriousness of the crime, like that of the degree of goodness of an intrinsic good, impresses me as a matter of intuitive insight'.

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There probably is a sense in which many of these judgments are matters of intuitive insight, but it is the sort of intuitive insight of which Butler speaks when he writes that 'in all common ordinary cases we see intuitively at first view what is our duty, what is the honest part.... In these cases doubt and deliberation is itself dishonesty.'\(^1\) What Butler means is that just as simple multiplications and additions have become so familiar to us that we do not have to go through a process of reasoning to do them but just 'see' the answers, so the perception of our duty in most ordinary cases is not something which we must work out afresh. The same may well apply to many of our common comparative moral judgments. Deliberating about them or requesting reasons for them may be a sign of what Butler calls an 'unfair mind'.\(^2\) Nevertheless we can uncover the rationale of our simple multiplications and additions, and, it would seem, if such are not to be subjective and arbitrary, it must be logically possible for such a rationale to be given. This becomes critical in the case of our moral reasoning, for here we are frequently confronted by situations which do not obviously conform to any one of our moral paradigms. In such cases it is necessary for us to explicate our paradigms before we can determine whether the situations under consideration

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2 Page 133.
can be assimilated to them. In taking the view that grounds are inappropriately required of comparative moral judgments, McCloskey is effectively able to end any argument, but in so doing he encumbers himself with all the problems of ethical intuitionism. Apart from the fact that intuitionism removes from ethics the possibility of testing the adequacy or truth of comparative moral judgments, it leaves us helpless in a world of diverse and opposing moral values.

1 See the discussion in Chapter Four, pp.141-3.
2 See, for example, W.D. Hudson's recent study, Ethical Intuitionism, London: Macmillan, 1967.
3 A recent public opinion survey on the seriousness with which various offences were regarded produced the result that a majority placed rape before murder, and murder before theft. Only 25% of the respondents placed offences involving death at the head of the list (reported in Punishment, published for The Church Assembly Board for Social Responsibility, Westminster: Church Information Office, 1963, p.10). Rose and Prell also report an investigation in which university students were asked to rank in seriousness thirteen different crimes as defined by California statutes - including bigamy, forgery, theft, assault with a deadly weapon, and attempted burglary. They rated as most deserving of punishment serious child-beating by a father. Of a group of Californian prisoners serving sentence, the actual average punishment meted out for this offence was less than for eleven of the other crimes, and the longest average sentence was for injuring electric or telephone lines, which the students rated twelfth in seriousness ('Does the Punishment Fit the Crime? A Study in Social Valuation', American Journal of Sociology, Vol.LXI, 1955-6, pp.247-59; reported in H. Weihofen, 'Retribution is Obsolete', in Nomos III: Responsibility, ed. C.J. Friedrich, New York: Liberal Arts Press, 1963, p.119). These particular studies obviously have their limitations, but they are enough to indicate that intuitionism is an unhelpful solution to problems in this area.
There does not seem to be any single criterion whereby kinds of action are denominated right or wrong and can be ranked according to their goodness or badness. Or, if there is such a criterion, it possesses no general recognition. What we have instead is a multiplicity of criteria of varying levels of generality to which we appeal as the occasion warrants. For example, the criteria to which we might appeal in justifying the statement 'Murder is worse than theft' are likely to be different for the most part from those to which we appeal in justifying a statement like 'Rape is worse than lying'. Or, if the criteria coincide, it is likely to be at such a high level of generality, that there is no obvious or clear relationship between them and the statements they are intended to justify. Furthermore, often, if not always, these criteria are themselves dependent on the prior acceptance of particular and competing moral standpoints. Whether there are any criteria which are neutral with respect to standpoint is a controversial matter, and is not likely to be settled until we are more clear as to the precise nature of moral discourse.

A.P. Griffiths, in a recent article, puts forward a transcendental argument to the effect that if there is to be a form of discourse which is 'practical, universal, objective, and autonomous', then the following three principles must be accepted:

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Cf. my discussion on p.142 supra.
One ought to treat similar cases similarly;
One ought in action to consider the interests of all rational beings;
One ought not to interfere, without specific justification, in the chosen course of any rational being or impose on any rational being conditions which will prevent him from pursuing his chosen courses of action.

These principles are very general, and there is no straight line between them and the denomination of any particular kind of action as right or wrong, or the ranking of such kinds of action according to their goodness or badness. Further principles are needed to indicate what makes cases 'similar', what the 'interests' of rational beings are, and what 'interferences' are allowable. It is also to be noted that these three principles depend on the prior acceptance of moral discourse as 'practical, universal, objective, and autonomous'. Whether all these characteristics are necessary to moral discourse is itself a matter of debate.

Nevertheless, Griffiths' arguments are not implausible, and as I wish to use them only for heuristic purposes, it is not necessary that we discuss them in detail. Let us now consider how we might justify a statement like 'Murder is worse than theft'. First

we would need to show the sorts of considerations which lead us to characterize some acts as 'murder' and others as 'theft'. Using the above three principles as a background, we could point out that in both cases people who were similar in relevant respects would be treated differently, their interests would be ignored, and their chosen courses of action unjustifiably interfered with. Discussion here would centre round the identification of relevant similarities, interests, and justifiable interferences. Agreement on such issues is not easy to reach, but there is no reason why it should not be reached by rational discussion. At the second stage of our justification we would need to show that at least some of our criteria for calling these kinds of action wrong could be scaled, thereby enabling a comparison to be made. This does not seem an unreasonable request. Murder involves the more radically different treatment of moral similars than theft (although, as it is, Griffiths' first principle is only marginally relevant to the statement in question); we recognize some human interests as being more important and more basic than others, and murder involves the violation of a more basic human interest than theft; and the unjustified interference with a rational being's course of action is irremediable and total in the case of murder, but not in that of theft.

Admittedly this account has been very sketchy, and it would take me too far out of my way to explore all the issues that are here raised. But if my argument appears to rest on too many unquestioned or even question-begging assumptions, it is, I think, partly
because it is difficult to see what could be wrong with such assumptions - to know what they need justifying against.

We can sum up so far as follows. Assessments of moral turpitude are generally hybrids of two further sorts of assessments: (1) those of the responsibility of the wrongdoer for his deed; and (2) those of the nature of the deed committed or attempted by the wrongdoer. It is possible for us to adduce criteria which will enable us to make comparative judgments with respect to each of these assessments. Comparative assessments of moral turpitude will then involve comparing the deeds committed or attempted by the wrongdoer and modifying these comparative judgments (if necessary) by reference to his responsibility. The criteria enabling us to make comparative moral judgments are not uncontroversial, but there is no reason to suggest that discussion of them should be anything but rational. Furthermore, these criteria make possible an ordered metric scale of moral turpitude or guilt, for they allow us to compare pairs of wrongs and also pairs of impediments in terms of their 'proximity'.

In making specific desert claims we need to be able not only to scale moral turpitude in an ordered metric fashion, but also, as I mentioned earlier, unpleasant treatment or penalties. This too seems a

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1 Again I would emphasize the fact that the distinction between (1) and (2) is somewhat artificial.
possible task. In fact, were all punishments of the one sort, the formation of an ordered metric scale would be a relatively simple matter, being based on expressed preferences for one amount of unpleasant treatment rather than another. Here it would probably be found that as the amount of punishment increased, each unit of unpleasant treatment decreased in value. Judgments of proximity would show the rate of diminution and thus allow the formation of an ordered metric scale. For example, taking one year's imprisonment as the unit of unpleasant treatment, the following preferential judgment might be made: 'It would be more unpleasant to have a sentence increased from one year to two years than for one to be increased from five years to six years.' If enough of these preferential judgments are made, the techniques are available to scale the penalties in an ordered metric fashion.¹ If, however, a variety of penalties is administered (such as imprisonment, fines, and corporal punishment), complications set in, for we must first be able to compare these in terms of their unpleasantness. As well, especially in the case of fines, the unpleasantness of the same penalty will vary considerably with different people, or different types of people. A $20 fine may mean almost nothing to a rich man, but be an almost intolerable hardship for a poor man with a large family to support.² Nevertheless, these complications do not

¹ See the references in f/n.1 on p.279 supra.
² Perhaps they ought to be graduated like income tax.
render the formation of an ordered metric scale impossible, though they do point to the need to give discretionary powers to judges who are administering justice.

There is one more problem on which we will comment in this section, namely, the provision of some formula whereby moral turpitude of a certain magnitude can be related to an appropriate penalty. It is not enough to say that the punishment which a person deserves is determined by his moral turpitude. We must also say how it determines it. We say that one deserves the other, but what sort of a relation is that?

It is sometimes said that there must be some proportion between the guilt of the offender and the punishment he receives, and that this is all there needs to be. But, as Bentham notes, the idea of proportion is 'more oracular than instructive'.\(^1\) We need to know how this proportion is to be determined. Mundle, for example, interprets it simply as meaning that the greater a person's guilt, the more severe a penalty he deserves:

In order to supply the principle of proportion, all that is necessary is that we should be able (a) to compare different offences in respect of their relative gravity, and (b) to compare different penalties in respect of their relative unpleasantness — and surely we can make such comparisons in many, if not all, cases.\(^2\)

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However, as simply stated as this, Mundle's view faces serious difficulties. For the following two possibilities are consistent with his thesis:¹ Let us assume that we regard offensive language as the least serious of wrongs, and that one day's imprisonment is the lightest penalty that we can efficaciously inflict. Then, for the next more serious wrong we could give two days gaol, the next three days, and so on, concluding our catalogue of wrongs with 385 days gaol as punishment for a particularly offensive murder. This would be consistent with Mundle's view. So also would the following: Suppose that we take death as the maximum penalty which we can humanely inflict, and that we keep this for particularly offensive murders. Then we could award the next less serious wrong life imprisonment, the next twenty-five years imprisonment, and so on, finishing up with twenty-three years and 348 days for offensive language. This, too, would display the sort of proportioning between moral turpitude and severity of punishment which is permitted by Mundle's view. Both of them immediately strike us as unsatisfactory and unjust. What is more, there is no way of choosing between them and between countless other possibilities as well.² Even if a more sophisticated

¹ For illustrative purposes I have presented these examples in a simplified legal context.

scale than the simple ordinal scale implied in Mundle's account is used, the difficulties are not overcome. The ordered metric scale which I have suggested is appropriate to the determination of specific deserts would be useful in arranging the intervals between the different penalties, but this could be done within the limits set by the two examples, and would not touch the major difficulty which I have pointed out. Simply having scales of turpitude and penalties is not enough; there must be ways of relating them as well.

Some writers, therefore, have spoken not merely of a proportion between the moral turpitude of an offender and the punishment he deserves, but of an equivalence between them. And there does seem to be some plausibility in this view when we consider the intimate logical connections between desert and justice.

But how is this equivalence to be conceived and determined? To many of the objectors to retributivism, the notion of such an equivalence is unintelligible. Maclagan, for example, writes:

The retributive principle is impossible of application unless in the act of retribution it is possible to secure an equivalence of guilt and punishment, and that is not the case. I do not mean by this simply that we are not in fact in a position to form a

*(footnote 2 continued from p.303)*

precise idea of equivalence of which we can none the less form an idea; nor even that we are not in fact in a position to form a precise idea of an equivalence that is none the less in principle possible. I mean that the very notion of such an equivalence is an impossible one. The two things that are to be measured against each other are in their very nature incommensurable.¹

Maclagan does not make it very clear why he thinks that the idea of an equivalence between moral guilt and punishment is an impossible one. Practically all he says in this regard is that 'those who think that the difficulty is not one of principle but only of the practical application of a principle are ... using as the standard of measurement of the guilt the actual thing done'.² As well, he finds the idea of degrees of moral guilt a very puzzling ('though I certainly cannot say an obviously absurd') one. His problem, then, seems to be not so much one of scaling moral guilt and punishments, but of scaling them in such a way that they can be compared. This is made a little more clear by Rashdall, who takes a similar line to Maclagan. 'How can moral guilt be expressed in terms of physical pain?', he asks. He answers: 'The idea of expressing moral guilt in terms of cat or birch-rod, gallows or

² Ibid.
pillory, hard-labour or penal servitude seems to be essentially and intrinsically unmeaning. There is absolutely no commensurability between the two things'.  

Rashdall prejudices the issue somewhat by expressing the problem as one of weighing guilt against physical pain; nevertheless, the point he appears to be making, namely, the logical disparateness of the two scales, is intelligible enough. As Ferri puts it: 'one cannot determine an absolute criterion of proportion between punishment and crime, because they are heterogeneous entities, not commensurable with one another'.

Not everyone has been convinced by this argument. Some have thought instead that the achievement of an equivalence between two such apparently incommensurable things was possible by an appeal to some version of the lex talionis: 'eye for eye, tooth for tooth, etc.' By this formula it is sometimes believed that an equivalence is made possible.

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It is very difficult to find anyone who has held this doctrine in the form in which it is usually criticized. For, as can readily be seen, a literal interpretation lands one in insuperable difficulties: what penalty would you infrlict on a rapist, a blackmailer, a multiple murderer, a dope peddler, a sodomite, a smuggler, or a toothless fiend who has knocked somebody else's teeth out? Or, as Laird says even more pointedly, 'What genuine equivalence is there between an old eye and a young one, or between a shortsighted eye and an emmetropic one?' The trouble with the lex talionis, taken literally, is that it reflects the impossible attempt to secure some mathematical or quasi-mathematical equivalence between moral guilt (or, more often, injury actually caused) and punishment.

Yet, as I said, it is doubtful whether proponents of the lex talionis have ever meant it to be taken quite literally. Certainly in the Old Testament, where it is possibly first enunciated, it was not understood in a literalistic fashion, but rather as a simple demand for equity or as a limiting principle in the distribution of punishment; for the principle is

1 J. Laird, 'The Justification of Punishment', Monist, Vol.XLI, 1931, pp.359-60. Solovyof writes that the arguments supporting the principle of exact retribution are so feeble that no doubt they will be an object of astonishment and ridicule to posterity' (op. cit., p.307); cf. Blackstone, Commentaries on the Laws of England, Fifth edn., Oxford: Clarendon Press, 1773, Book IV, Chapter 1, §3.
2 Exodus 21:23-5.
immediately exemplified in these terms: 'When a
man strikes the eye of his slave, male or female,
and destroys it, he shall let the slave go free for the
eye's sake. If he knocks out the tooth of his slave,
male or female, he shall let the slave go free for the
tooth's sake'.  

Of those who have appealed to the lex talionis,
Kant comes closest to holding it in a literal form.
According to him, 'RETALIATION (jus talionis) ... is
the only principle which ... can definitely assign
both the quantity and the quality of a just penalty.'
Thus he sees the lex talionis as determining both
the quantity and the quality of punishment. It is not
surprising then that he insists that the 'sentence
pronounced over all criminals [be] proportionate to
their internal wickedness', and that 'the state of
mind of the Agent or Doer of the deed makes a
difference in imputing its consequences'.

1 Exodus 21:26-7. A somewhat similar, more literally
understood, principle can be found earlier in the Code
of Hammurabi (c. 2100 B.C.).
2 Kant, Philosophy of Law, trans. W. Hastie, Edinburgh:
T. and T. Clark, 1887, p.196. Ewing too willingly takes
Kant at face value here, and presents this passage as
expressing Kant's whole doctrine (The Morality of
Punishment, p.16). E.L. Pincoffs draws a distinction
between jus talionis and lex talionis, but it does not
affect our argument at all (The Justification of Legal
Punishment, Unpublished Ph.D. dissertation, Cornell
University, 1957, pp.34, 131).
3 Philosophy of Law, p.198.
4 Page 39.
surprising is that he still clings to the principle of 'Like for Like'. This is especially so when we consider the other significant qualifications he makes to the principle. First, he recognizes that 'the application may not in all cases be possible according to the letter', though 'as regards the effect it may always be attained in practice'.¹ Second, although Kant considers death to be the only appropriate penalty for murder,² he makes a number of exceptions to it; for example, when a great number of the population are accomplices to murder (as in a rebellion),³ in the case of maternal infanticide, and for killing a fellow-soldier in a duel.⁴ Third, in special cases, such as rape, paederasty, and bestiality, in which there can be no external likeness between the offence and the punishment, Kant appeals to a variation of the lex talionis: *Per quod quis peccat per idem punitur et idem*. The rapist and the paederast are to be castrated, and the sodomite to be banished from human society.⁵ It is clear that Kant has so qualified the lex talionis that it completely loses the definiteness and simplicity which is its peculiar attraction.

¹ Page 197.
² Page 198.
³ Pages 200-1.
⁴ Pages 202-4.
⁵ Pages 243-4.
Hegel, who in many respects agrees with Kant, is far more convinced of the fruitlessness of appealing to the lex talionis as it stands. In fact, he refers to it as an absurdity.¹ Punishment, on his view, is the annulment of crime, which is 'retribution in so far as (a) retribution in conception is an "injury of the injury", and (b) since as existent a crime is something determinate in its scope both qualitatively and quantitatively, its negation as existent is similarly determinate.'² Punishment, then, involves some sort of equality. However, 'the two injuries are equal only in respect of their implicit character, i.e. in respect of their "value".'³ Equality is to be found only in the internal form of the crime and the punishment. In respect of their external form,

there is a plain inequality between theft and robbery on the one hand, and fines, imprisonment, &c., on the other. In respect of their 'value', however, i.e. in respect of their universal property of being injuries, they are comparable.... It is a matter for the Understanding to look for something approximately equal to their 'value' in this sense.⁴

Like Kant, Hegel too has a quasi-mathematical conception of equality in the back of his mind, and this leads him

¹ Hegel, op. cit., §101, p.72.
² §101, p.71
³ Ibid.
⁴ §101, pp.72-3.
to the strange position I noted earlier in which reason is unable to determine this equality with exactitude, even though the slightest inequality leads to injustice. Equality, he thinks, is an ideal to which we can only approximate in the sphere of externality:

in the field of the finite absolute determinacy remains only a demand, a demand which the Understanding has to meet by continually increasing delimitation - a fact of the greatest importance - but which continues ad infinitum and which allows only of perennially approximate satisfaction.¹

We can see, then, that neither Kant nor Hegel succeed in breaking away from a quasi-mathematical conception of the 'equality' or 'equivalence' of moral guilt and punishment, despite their recognition of the fact that they are dealing with qualities. Their inability to break away is partly due to the metaphysical nature of their theories of crime and punishment, in which crime, in some mysterious sense, carries its punishment within itself.

In suggesting an alternative which I believe to be more satisfactory, I want to return again to Mundle's suggestion that all that is needed is that punishment and moral gravity be paired off according to their placings in their respective scales. I can agree with his view that we can and do scale both moral gravity or turpitude and penalties or punishments in order of their seriousness or severity. Where Mundle's view

¹§101, p.72.
falls down is in its failure to propose a means of fixing one scale to the other. It seems to me that the fixing of one scale to the other is basically a simple matter. Our human condition places certain limits, upper and lower, on both the wrongs we can commit and the punishments we can inflict. There is a limit to the depths which human depravity can reach, as there is also a point beyond which we do not speak of behaviour as morally wrong. So too, there is a limit to the severity of the punishment which can be humanely inflicted upon a wrongdoer, as there is also a point beyond which we do not speak of treatment as punishment. Very roughly, a mild censure and a pang of bitterness would come close to the bottom of the scales of punishment and moral gravity respectively, and death and murder would come close to the top. In relating punishments to offences, we simply reserve the mildest punishment we can give for the least serious wrong which can be committed, the most severe punishment we can humanely give for the most wicked deed which can be committed, and scale other wrongs and punishments in between in an ordered metric fashion. On this view, moral guilt and punishment can and ought to be equivalent in the sense that they possess the same relative position on their respective scales.

1 Though as we know the atrocities of war-time may lead us to revise our ideas about human depravity and the severity of punishments which can be acceptably inflicted.
There will, of course, be some disagreements about the identity of the most and the least serious wrongs, just as there will be disagreements about the lightest treatment which can figure as punishment and the most extreme unpleasant treatment which can be humanely inflicted on a person. But by and large these disagreements occur within a relatively small area. Even where they are substantial they are amenable to rational discussion. Some people find the death penalty morally unacceptable, and for these, the maximum amount of unpleasant treatment which could be justifiably inflicted on a person would probably be life imprisonment. Even those who enjoin the death penalty recognize that it cannot legitimately include the cruel and inhumane treatment involved in torture. Thus Kant insists that the murderer's 'death ... must be kept free from all maltreatment that would make the humanity suffering in his Person loathsome or abominable'.

To conclude this section, I want to make a few observations on a utilitarian account of penalty-fixing. Benn considers the equivalence sought by retributivists as impossible of achievement. This is partly because he mistakenly conceives this equivalence in a quasi-mathematical way. The retributivist view,

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he thinks, involves the attempt to make a quantitative comparison of the harm done to the community with that done to the criminal.¹ His own view, however, simply involves the expression of a preference, a preference, say, between a certain degree of harm to the community plus a certain amount of suffering to a roughly ascertainable number of offenders, and a smaller amount of harm to the community, but a greater amount of suffering to fewer offenders. Presumably Benn thinks that reasons could be given for preferring one course of action over the other. To do this he would need first to compare the harm done to the community with the suffering caused to offenders. Do the two sufferings have the same value? On what basis can they be compared? Presumably they could be compared by relating them to a schedule of human interests. But even when such a comparison has been made, we do not have enough for a rationally based preference of one course of action over another. We would still need to determine how much more important one interest was than another. I think it would be possible to make these comparisons. The point I want to bring out, however, is that Benn's additions are no easier to make than the retributivist's comparisons. In fact, up to a point, precisely the same sorts of determinations have to be made.

I have tried to show then, that the task of determining a person's deserts, even though fraught with difficulties, is not an absurd, much less an impossible one. Not only so, but the difficulties it faces are shared also by some of the more acceptable utilitarian approaches.

It must be remembered, however, that what I have been concerned with in this section has not been so much with how a particular authority ought to go about determining the severity of the punishments which it awards, but simply with the determination of how much punishment a person might be said to deserve. Whether people ought to be given their deserts by a particular authority is a further question to be considered.

When an authority considers the principles by which it ought to determine the penalties it is justified in awarding for different kinds of deserving actions, it must take into account not only the deserts of the offenders but also the morally permissible advantages which will accrue from the prescription of such-and-such a penalty for their offences. The state can serve as our example. In fixing maximum penalties for different kinds of offences, the state will properly take into account the importance of law for the preservation of social order and well-being, and so it should take into account as a prime consideration the scaling of penalties according to deserts. For if the law becomes an instrument of injustice it is likely to lose the respect and obedience which is fundamental to its own justification.
Sometimes, however, the state is not justified in punishing offences to the extent to which they deserve. Apart from the cases of wrongs in which no public harm is produced, we have a good example in the punishment of attempted crimes. On my view, a person intending to and succeeding in murdering someone else is no worse morally than a person who is similarly-minded but who fails to achieve his goal. Ceteris paribus such people deserve to suffer punishment of similar severity. This, however, does not reflect what we often regard as an acceptable feature of our legal system, viz. that attempts are generally punished less severely than successful crimes. Admittedly there is nothing sacrosanct about the law as we have it, and in fact Section 2 of the French Code Pénal fixes the same kind and measure of punishment both for an attempt and for a completed crime. In practice, however, this is usually ignored, and attempted crimes are punished less severely than successful ones.

While it is possible, I think, to envisage social situations in which attempted crimes ought to attract as much punishment as successful ones, it is also possible to provide a rationale for our present practice of punishing attempts less severely.

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1 The notion of 'public harm' is of course, very tricky. See H.L.A. Hart, Law, Liberty and Morality, Oxford University Press, 1963.

Broadly conceived, the authority of the state to punish is taken to be grounded on the conduciveness of punishment to the fulfilment of the state's task of preserving and promoting social harmony, well-being and good. This is most successfully accomplished when the state punishes people according to their deserts, for the law is respected as just, and obedience to it tends to be morally based rather than externally imposed. However, the law's concern, basically, is not so much with morality as with the social aspect of human behaviour. As long as human behaviour is socially acceptable the law is not particularly concerned with the question of motives. Its interest in the motivation of human behaviour is aroused only when that behaviour is or threatens to be socially harmful. Where a person has attempted but failed to commit a crime the state is justified in taking steps to discourage such acts because of their potential danger to social well-being.

However, an important feature of most attempted crimes (a feature which tends to distinguish them from successful crimes) is the fact that punishing them less severely than they deserve does not weaken their deterrent value, since 'the criminal who embarks on a crime contemplates success and will not be less deterred if he knows that the punishment in the event of failure will be less than if he succeeds.' And since the

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H.L.A. Hart & A.M. Honoré, *Causation in the Law*, Oxford: Clarendon Press, 1959, p.355. In a footnote on the same page they report Wechsler and Michael's concession that 'whenever (as in treason and some homicides) the probability of conviction is greater in the event of failure than in the event of success the threat of an equally severe penalty for attempts may increase the deterrent efficacy of the law.'
state's authority to punish is related to its ability to deter socially harmful behaviour, there are grounds for treating attempted crimes more leniently than successful ones. Of course, if a person who attempts but fails to commit a particular crime is punished as severely as a person who succeeds, then he has no grounds for complaint — he cannot complain that his punishment was undeserved.¹ It is significant to note that in cases where an authority is justified in giving a person less punishment than he deserves, we do not speak of it as unjust, though it is clearly not just either. We speak of injustice only when the authority can be given no good reason for awarding less punishment than the offender deserves. This again serves to corroborate our discussion in Chapter Five about the indefeasibility or completeness of the notion of justice.

I cannot claim in this Chapter to have dealt adequately with a fraction of the issues which have been raised, for a discussion of specific desert claims is like a stone dropped in the pond of ethics, whose ripples reach its farthest periphery. Nevertheless, I hope that there has been some achievement, even if it has been the limited one of showing that positions generally regarded as absurd are in fact intelligible and amenable to rational consideration. And, indeed, this is what one would expect to find, for the determination of specific deserts forms a significant part of our day-to-day evaluative behaviour.

¹ For a somewhat different account which, however, is not inconsistent with my own, see G. Dworkin and D. Blumenfeld, 'Punishment for Intentions', Mind, Vol.LXXV, 1966, pp.396-404.
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