

Crime, Punishment, and Understanding Justice through Injustice

David Chelsom Vogt

Thesis for the Degree of Philosophiae Doctor (PhD)
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1. Introduction

What does justice require in response to crime? The answer that our society gives in practice, through our institutions of criminal justice, is that justice requires punishment of criminal offenders. Some claim that we punish for its utility. However, our criminal justice practices would have to be organized quite differently if their purpose was only to prevent crime by deterring and rehabilitating criminals. We punish, at least partly, because it achieves justice.

Whether we are correct to presuppose that punishment does justice, and *how* punishment might achieve justice, will be the topics of this thesis. How, specifically, can punishment be said to remedy the wrong that is caused by crime? How does punishment transform an unjust situation into a situation in which we may state that justice has been done? And are there other ways of remedying the wrong in crime, besides punishing? I shall consider both common intuitions and philosophical theories in my efforts to answer these questions.

If we can identify a plausible theory of retributive justice that fits in the context of a democratic state under the rule of law, we shall have supplied a necessary premise for the moral justification of current penal practices. Whether this premise is also sufficient to justify the way that we actually sanction crime, constitutes another and more controversial matter. In the words of Allen W. Wood, “no sensible person could think that a morally justifiable response [to crime] would bear much resemblance to the organized system of brutality and abuse that is systematically practiced by existing courts and prisons”.¹ His country of reference is the United States.² The situation for inmates is considerably better in some other countries, such as my own country of Norway, but there too we can question whether actual penal practices fulfill the demands of justice to a sufficient degree.³

¹ Allen W. Wood, *Kantian Ethics* (Cambridge: Cambridge UP, 2008), 207

² The American Civil Liberties Union, which regularly reports on the conditions in American prisons and jails, concludes that “[o]vercrowding, violence, sexual abuse, and other conditions pose grave risks to prisoner health and safety”. “Cruel, Inhuman and Degrading Conditions”, (2018), [aclu.org/issues/prisoners-rights/cruel-inhuman-and-degrading-conditions](https://www.aclu.org/issues/prisoners-rights/cruel-inhuman-and-degrading-conditions).

³ Norwegian authorities have repeatedly been criticized by the European Council and the UN Committee against Torture for the excessive use of solitary confinement, see Peter Scharff Smith et al., “Isolasjon i skandinaviske fengsler”, *Kritisk juss* 39, no. 03-04 (2013).

Given actual practices, it seems that we should neither expect nor desire a retributive theory to justify these practices. A retributive theory should rather identify an ideal for how criminal justice ought to be done. This ideal might then be used to point out how current practices must change in order to be justified. A real risk exists, however, that providing such a defense of ideally just penal practices will merely serve to justify actual practices. Retributive theories, Wood remarks, stand in danger of being used in the same way that theories of just war are utilized to “silence people’s consciences over actual wars, none of which (even the ‘best’ wars) have ever come close to meeting the conditions”.⁴ A retributive theory that is to function as an ideal cannot therefore ignore the empirical realities in which the current practices apply. The theory must address those empirical conditions that threaten to undermine the relevance of the ideal theory.

One such empirical condition is the fact that a vast majority of those who are punished under current penal regimes are among the socioeconomically least privileged members of society.⁵ The poor and the socially marginalized make up a disproportionately large share of those who are punished. The same applies to those who have suffered adverse childhood experiences. In short, victims of social injustice tend to a greater degree to become targets of state punishment, which in turn tends to exacerbate social deprivation, even in the next generation.

How might a theory of retributive justice take these empirical realities into account? The difficulty, of course, is to conceive of a criminal justice system that holds offenders individually accountable while at the same time taking into account structural iniquities that tend to influence our behavior. I shall discuss this issue – the relevance of social injustice for criminal justice – in the second part of the thesis. This second part, titled “The Justice of Not Punishing” builds on and considers exceptions to the conclusions of the first part, titled “The Justice of Punishing”.

Before embarking upon the first part, I shall devote the remainder of this introductory chapter to explaining my method of inquiry, which is a *negative approach* to the topic of justice, understanding justice through injustice. The introductory chapter is divided into

⁴ Wood, *Kantian Ethics*, 207

⁵ See Part II for a discussion of empirical research on the link between social deprivation and crime and punishment.

three parts, the first asking, “What is justice?”, the second asking, “What’s wrong?”, and the third asking how we might come to identify “The right wrong” in need of remedying. Thereafter follows a one-page overview of the chapters of the thesis.

1.1 What is justice?

“To invoke justice is the same thing as banging on the table”, legal philosopher Alf Ross claimed.⁶ It is merely an emotional expression that means nothing beyond the formal demand that everyone be treated equally according to a rule. Without a material criterion that determines what constitutes equality, such a principle is empty and meaningless. Anything can be posited as the material criterion, Ross claimed. Therefore, anything can be called just as long as it is bound by rules. Justice, and more broadly natural law based on a conception of justice, is in Ross’ memorable phrase, “like a harlot, at the disposal of everyone”.⁷

Consider the many conflicting claims that are made about justice. For any hotly contested issue – taxation, university admissions, toll road rates, the Iraq war, ban on smoking – there are proponents on each side claiming to represent justice. Anything, it seems, can be called just with just the right arguments. The impression is much the same if we look beyond these current debates to more rigorously developed theories of justice. Hardly any philosophical issue has been dealt with more thoroughly since Plato set out to define justice in *The Republic*. Yet, we do not seem to be much closer to agreement. In fact, consensus on issues of justice may have become even more unrealistic as modern societies have become more pluralistic and we can no longer rely on universally respected religious and moral authorities for instruction. In the absence of a collective worldview, a common metaphysical outlook, some argue that we should seek a procedural, “post-metaphysical” source of legitimacy for ethical and political discourse.⁸ In legal discourse, the difficulty of reaching consensus on justice is a motive for avoiding the term altogether, seeking instead to ground the legitimacy of legal opinions in the correct application of legal method. Many legal practitioners will likely agree with scholar John Rawls that justice

⁶ Alf Ross, *On Law and Justice* (Berkeley: University of California Press, 1959), 274.

⁷ *Ibid.*, 261.

⁸ Jürgen Habermas, "Postscript", in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996), 448.

is a “challenging word with metaphysical overtones”, which is therefore understandably avoided in preparatory works and sentencing statements.⁹

Critics of justice have correctly pointed to the fact that if we are to have use for the term, we must be able to somehow distinguish that which is properly just from that which merely appears to be just. But in order to do so it seems that we must already have an idea of what justice is, which, of course, is what we are trying to establish. And if we claim not to already know what justice is, then how will we recognize if a theory of justice is correct? It seems that we are trapped in what is known as “Meno’s Paradox”, formulated in Plato’s dialogue bearing Meno’s name. Meno articulates the paradox when Socrates states that he will attempt to determine what virtue is and claims to not yet hold any knowledge of it:

Why, on what lines will you look, Socrates, for a thing of whose nature you know nothing at all? Pray, what sort of thing, amongst those that you know not, will you treat us to as the object of your search? Or even supposing, at the best, that you hit upon it, how will you know it is the thing you did not know?¹⁰

To avoid the paradox, any theory of justice – including the theory of this thesis – must have a solid stepping-stone from which further knowledge of justice can be reached. Without it – if we know nothing – we are caught in the paradox of not knowing where to look. Plato’s solution was *anamnesis*, the idea that we recognize virtue because our eternal souls have seen true virtue before we were born. Although most would agree that this is no longer a particularly convincing theory, it contains the important notion for a refutation of the paradox, namely, the assumption that we somehow recognize what we are searching for.

Our challenge is then: Can we recognize justice? At first view, the disagreement noted above seems to suggest that we cannot. From the fact that there is disagreement, however, we cannot deduce that there is no such thing as justice. Some of us could simply be incorrect when we try to identify justice, leaving the possibility that others are correct. The vagueness of the concept, its unclear borders and the inevitable disputes about hard cases, does not indicate that the concept is meaningless. As G. E. M. Anscombe is supposed to

⁹ Johs. Andenæs, "Prevensjon og rettferdighet i straffutmåling", in *Ånd og rett, festskrift til Birger Lassen* (Oslo: Universitetsforlaget, 1997), 11.

¹⁰ Plato, *Meno*, trans. G. M. A. Grube, *Plato Volume 2* (Cambridge: Harvard UP, 1990), 80 d, 299.

have said, “the existence of dawn and dusk does not invalidate the distinction between night and day”. In other words: Although we may experience difficulty determining the borders of the concept of justice, the distinction between justice and injustice may nevertheless be valid. The phenomenon to which the concept loosely refers may be real.

Consider for comparison another challenging concept, ‘beauty’. Like justice, the concept of beauty has “metaphysical overtones”, but also echoes and resonates with common human experiences. Although we may disagree about the definition of beauty and the borders of the concept, we nevertheless recognize some things as beautiful. Furthermore, such experiences are not completely random. For example, in the case of music that is perceived as beautiful, it usually follows certain patterns or “rules”, such as musical scales, harmonies, chord progressions that lead into other chords, etc. These rules or principles are not categorical. They do not settle once and for all the structure of beautiful music. Nevertheless, it is clear that they correspond with, or rather, strike a chord with, most people’s experience of what is beautiful.

How can we know that there are such “rules” of beautiful music? We can know this by considering music that does not follow the rules properly, that does not, for instance, have chord progressions that lead well, and that is not considered beautiful. For example, there is a very strong lead from the chords $C \rightarrow C7 \rightarrow F$, as “proven” by hit songs such as “Danny Boy”, “Hey Jude” and countless others. If, on the other hand, someone was to play $C \rightarrow C7 \rightarrow G$, it would usually not be perceived as beautiful because the $C7$ does not lead well into G . (If you doubt this, try to name a single song that uses that progression). Such “rules” are subtle, but nevertheless real. When the rules are broken more blatantly, for example by playing a note that is out of pitch or out of key, people react, sometimes strongly. The exception – the transgression – thereby confirms the rule.

Thus, a way to reflect upon and come to possess conscious knowledge of the rules and patterns of beauty in music – as opposed to merely experiencing beauty in a song – is to learn what beauty is not. Similarly, I propose that the best method for reflecting upon justice is to begin by reflecting upon what justice is not. The experience of injustice, I suggest, may be the stepping-stone from which we can reach further knowledge of justice. Injustice, I claim, provides a more secure foundation for our inquiry into justice than

contemplating justice directly. I propose, therefore, that we take a *negative approach* to justice, *understanding justice through injustice*.

There are two main reasons for this: First, because we recognize injustice in a more immediate and visceral way than we recognize justice. Second, because justice always occurs in response to a real or potential injustice, and we may gain insight into the meaning of justice by considering *the function it serves in relation to the injustice*.¹¹

(1) Regarding the first point, that we recognize injustice more immediately and viscerally than we do justice: The experience of injustice is an experience of a problem; an experience that something is *not right*, as one says. From this experience arises the need to fix the problem; to make it right. Inherent to the experience of injustice is thus the imperative to do justice. Therefore, “the experience of injustice lies at the core of ethics”, Arne Johan Vetlesen claims.¹² It is from this most fundamental experience that the motive for ethics arises: The need to do something, to react against injustice. The feeling of injustice is thus the primordial feeling, prior to a sense of justice. Nancy Fraser makes the same point, stating that “justice is never actually experienced directly”, but through pondering the unjust “we begin to get a sense of what would count as an alternative”.¹³ Eric Heinze similarly claims that experiences of injustice “largely lack any sense of antecedent or distinctly formulated concepts of justice”.¹⁴ As is well known, even a three-year-old can complain, “That’s unfair!” but usually does not react when something is fair. We tend to have gut reactions to injustice, analogous to an audience that cringes upon hearing a high note that is completely out of pitch. The reaction usually does not require that we have consciously considered the justice of the arrangement that is now broken; it does not demand an intellectual awareness, just like the audience will react regardless of whether they have been conscious of the fact that the prior singing was in tune.

¹¹ The injustice to which justice is a response may be real, for instance when somebody has committed a wrong against somebody else. Or it may be a potential or hypothetical injustice, such as when justice is a response to the possibility of (greater) injustice (for instance when existing social programs are considered just in contrast to the injustice that would occur if the programs were abolished).

¹² Arne Johan Vetlesen, *Hva er etikk?* (Oslo: Universitetsforlaget, 2007), 9

¹³ Nancy Fraser, "On Justice", *New Left Review* 74 (2012): 43

¹⁴ Eric Heinze, *The Concept of Injustice* (London: Routledge, 2013), 28

From the experience of a rupture in one's expectations may come an awareness of these expectations. The breach of the norm enables us to gain knowledge of the prior, normal state. This point is reminiscent of John Dewey and the pragmatist school's claim that the need to know something appears with a problematic situation, i.e., when our habitual conduct is inadequate for attaining the goals that we have. Knowledge, like justice, is always a response to a problem. More specifically, in Dewey's pragmatist psychology, emotions are understood as affective responses to action problems.¹⁵ If there are no problems related to doing an action, one will not react emotionally. Positive emotions, like pride and joy, arise when an action problem is successfully solved. Negative emotions, like shame and anger, arise when one's expectations are frustrated, i.e., when one's action or that of another does not live up to the norm that one holds for that type of action.¹⁶ Emotions can thus serve a cognitive function: they can make us aware of the discrepancy between our expectations and how we or others have acted or have been acted upon. In this way, our emotional experiences of injustice can serve to make us aware of the just norm for action that has been breached. The opposite does not hold, however: We tend not to have emotional responses to the norm itself – when everything is fine and uneventful, we do not react emotionally. There is, thus, an emotional asymmetry between the experience of injustice and the experience of justice. The former is prior to the latter in the sense that it informs our knowledge of the latter.

(2) However, if we understand the emotional experience of injustice as an affective response to frustrated normative expectations, this means that without the expectations, i.e., without the norm, there would not be an experience of injustice. In other words, if we did not first have a notion of how things ought to be, we would not recognize when they are not how they ought to be. Justice is, in this perspective, prior to injustice. On the other hand, as I have just argued, the imperative to do justice arises from the experience of injustice; in *this* perspective, injustice is prior to justice. Justice and injustice are thus mutually constitutive, meaning that we cannot conceive of one without the other. More specifically, they stand in a dialectical relationship: One is the *negation* of the other, to use

¹⁵ John Dewey, "The Theory of Emotion I and II", *Psychological Review* (1895)

¹⁶ We may differentiate instrumental expectations and moral or normative expectations. If you do not succeed in opening a jar of jam, your instrumental expectations are frustrated and you may become angry. If you lie to a friend about why you have not called him, your moral expectations for how you ought to behave are frustrated, and you may feel guilt for not living up to these expectations. Injustice is, of course, a matter of moral or normative expectations.

the terminology of Georg Friedrich Wilhelm Hegel, whom we shall see has stimulated this negative approach to justice.

There is, in other words, a *conceptual symmetry* between justice and injustice, but an *emotional asymmetry*. The emotional asymmetry is the first reason for applying the negative method to studying justice. However, as we see, our emotional reactions to injustice depend on our normative beliefs about justice. These beliefs are open to rational critique, which means that our emotional reactions are not merely given, but amendable in light of our deliberations, and, of course, in turn informative for our deliberations. The second reason for applying the negative method is the potential for rational critique that it yields. The conceptual symmetry between justice and injustice – their dialectical relationship – enables us to assess justice by considering how an action functions as a remedy for that which is unjust in the situation.

Consider the example of granting scholarships to university students. What is the just criterion by which a limited number of scholarships should be awarded? It may plausibly be claimed that it is just to award student scholarships according to the academic merits of the applicants. There is, presumably, a strong correlation between academic merits and the hard work and effort that the students have invested. If scholarships are awarded according to this criterion they will tend to award students who have sacrificed their leisure time in order to achieve the goal of attending university. These students might be deemed to deserve the scholarship more than those who have not made the equivalent sacrifice.

It may also plausibly be claimed that it is just to award scholarships according to the need of the applicants. Affluent students can pay their own tuition and living-expenses while attending university, while poor students do not have this opportunity. If scholarships are awarded according to a criterion of need, they will tend to even the playing field by making good grades sufficient for poor students to attend university, as is already the case for affluent students.

Take now a completely different and admittedly ludicrous criterion: Scholarships should be given to students born on a Tuesday. What is the difference between this third criterion and the first two? The third criterion does not address anything that can plausibly be asserted to be an injustice in the situation. Being born on a Tuesday has no consequences

at all for one's academic abilities or one's socioeconomic standing or anything else that might have bearing on one's possibilities of attending university. There simply is no injustice in being born on a Tuesday, at least not in our society today.¹⁷ On the other hand, it *is* plausibly unjust, all things being equal, to work harder than others without reward. And it *is* plausibly unjust to be denied the opportunity to attend university due to poverty. The first two criteria pick out these injustices and, importantly, the act in question – giving out scholarships – would go some way toward *remedying* these injustices.

There are, we see, two parts to a claim to justice: There is a claim that something is unjust, and there is a claim that a certain act will remedy that which is unjust. We might think of injustice as a divergence from a prior baseline, and justice as the act which cancels the divergence.¹⁸ If there is no injustice, as in the example of being born on a Tuesday, there cannot be justice. Justice, I will claim, is the name of the process of cancelling, annulling, or negating that which is unjust. The meaning of justice is thus to be found in the *function* it performs. Justice *is* what justice *does*:

Justice is remedying injustice.

This will be the definition of justice that I will apply throughout the thesis. I will argue that this definition is best suited not only to account for the many different theories of justice, but also to yield a potential for a normative critique of these theories. As I mentioned, the main inspiration for this definition is Hegel, who, in *The Philosophy of Right* explicated the dialectical relationship of right and wrong by which one cannot be understood without

¹⁷ By this, I simply mean that we cannot exclude the possibility that being born on a Tuesday may be considered a disadvantage (or an advantage) relative to some practice in some society in the future or unknown past. Until rather recently, nobody would consider it an advantage or disadvantage to be born early or late in the year. It turns out that one's chances of succeeding in some sports, for instance, are greater the earlier in the year one is born, because sports teams for children are usually organized by birth year and the older kids have an advantage in their physical development. It is not inconceivable, then, that somebody would suggest measures intended to remedy the unfair disadvantage of the younger kids, and such a measure would then plausibly be just. Unless one can substantiate that it makes a difference to be born on a Tuesday, any measure addressing this group cannot be just (which means that it is either unjust or neither just nor unjust).

¹⁸ I will elaborate on this dialectical structure in Section 1.3. and later in the Concluding Remarks (Chapter 15). I argue there that justice and injustice proceed from a default equality that is neither just nor unjust, what I here termed a baseline. Note how familiar this way of conceiving justice as a counter-measure to injustice is. It is, for instance, evident in Aristotle's analogy of the two lines, where corrective justice is defined as subtracting that stretch of line that has been unjustly taken from another and "returning" it to where it belongs, thereby cancelling the unjust shortening. Aristotle, *The Nicomachean Ethics*, trans. J.A.K. Thomson (London: Penguin Classics, 1953), 1132a30.

the other.¹⁹ For Hegel, right should not be understood as that which is left “when wrong has been pruned away”,²⁰ as Jeanne Schroeder and David Carlson put it, invoking the image of a sculpture that remains when surplus rock, the non-sculpture, is removed. Justice cannot be written in stone; its meaning cannot be fixed, although that is what most theories of justice have attempted. It is futile, Hegel would say, to think that one can capture the full meaning of right or justice in an objective principle. We have no such immediate access to “justice-in-itself” because justice is not a self-contained concept. We can only understand justice via its negative, for justice is the very process of negating its negative. Justice only appears when injustice disappears. Or better, justice *is* the process of injustice disappearing.²¹ Justice *happens*; it is something that occurs, and it cannot be frozen in its occurrence.

There seems to be a paradox here. Isn't Hegel's very own characterizations of right an attempt to write its meaning in stone? Am I also not positing a fixed notion of what justice is *in itself* when I assert that justice must be understood as remedying injustice? Yes, but only in the formal sense of denoting the logical structure of the concept of justice. No claims have yet been made about the material aspect of justice, in other words, about *when* justice occurs. Thus, no attempt has been made to fix the meaning of justice as it actually appears.

A purely abstract account of justice is without content because a concrete injustice must be provided for justice to be the process of remedying injustice. Accordingly, Hegel famously criticized Kant's moral theory for providing only an abstract formula, and therefore being merely “empty formalism”.²² However, this does not mean that Kant's abstract theory was incorrect as such. Even Hegel's theories of abstract right and of morality are guilty of empty formalism if taken on their own. On the Hegelian view, all

¹⁹ G. W. F. Hegel, *Philosophy of Right* (Mineola, NY: Dover Publications, 2005). Hegel uses the terms Right and Wrong, which can be understood in a more narrowly legal sense than justice and injustice, respectively (though see Chapter 9 for a discussion of Hegel's understanding of the term “Right”). See Section 1.2. where I explain my use of the words right, wrong, justice and injustice.

²⁰ Jeanne L. Schroeder and David Gray Carlson, “The Appearance of Right and the Essence of Wrong: Metaphor and Metonymy in Law”, *Cardozo Law Review* 24, no. 6 (2003): 2486

²¹ See *ibid.*, 2483. See also Hegel, *Philosophy of Right*, § 82 Addition: “[W]hen wrong vanishes, right receives an added fixity and value” (I will refer to this book's paragraphs, which are constant throughout all editions).

²² Hegel, *Philosophy of Right*, § 135 Note.

abstract theories of justice are one-sided, accounting only for one aspect of what justice is. Taken by themselves they are at best ideals, and as such, they are *utopic*, literally meaning that they exist no-place.²³ It is in the process of negating wrong that right “becomes actual and valid, whereas at first it was only a contingent possibility”.²⁴ Thus, in order to learn what justice actually is, as it exists in the real world, we have to supplement our formal understanding with an understanding of what justice concretely does.

1.2 What’s wrong? Specifying the injustice to be considered

If we are to consider justice as it actually occurs and not merely as an abstract idea, we have to consider concrete injustices and the way in which the response is accorded meaning as a remedy. I will in this thesis concentrate on one particular type of injustice: criminal wrongs. The question I will ask is: *What is a just response to a criminal wrong?* Or rephrased: *How can the injustice of a crime be remedied?*

First, a terminological clarification: I will use the words “wrong” and “injustice” interchangeably when speaking of crimes, and the same goes for the words “justice” and “right” when speaking of sanctions of crimes. It may seem somewhat idiosyncratic to talk of the “injustice of a crime”, and I will therefore usually prefer to speak of its “wrongness” or its “being wrong”. One way something can be unjust is by being a wrong committed by someone, and among such wrongs or wrongdoings, there is the subcategory of criminal wrongs, and this type of injustice will be the topic of my thesis.²⁵

The discussion of how the injustice of crime can be remedied is meant to apply to a particular context, namely modern, democratic societies, such as the one in which I live. Of the two ways of doing philosophy that Michael Walzer describes – one, in which the philosopher “walks out of the cave” and finds a vantage point from which to gain objective and universal insight, and another, in which the role of the philosopher is “to interpret to

²³ From Greek *u*: not/no + *topos*: place.

²⁴ Hegel, *Philosophy of Right*, § 82.

²⁵ We may talk of injustice without wrongs or wrongdoings – structural injustice is one example – and we may also talk of wrongs that are not instances of injustice, such as moral wrongs against oneself. In the category of crimes, however, injustice and wrong overlap on my terminology. Note that Part II will deal with injustice that is not due to wrongdoing – social injustice – but I will relate it to the discussion of how to remedy criminal wrongs.

one's fellow citizens the world of meanings that we share", without "any great distance from the social world in which I live"²⁶ – my way is the latter. I do not, in other words, aim to uncover what justice always and everywhere requires in response to wrongdoing. My approach to the topic is entirely consistent with the possibility that remedying wrongs means something different today than it did in, for instance, the ancient society of Great Zimbabwe, or in a small tribal society on the prairies of Canada. Hegel, too, noted that "[a] penal code belongs to its time and to the condition in which the civic community at that time is."²⁷ This does not mean, of course, that there are not overlapping conceptions of wrong and right in many or all cultures.²⁸ Neither does it mean that we must embrace relativism, for we do retain the possibility of critically evaluating the conceptions of our own culture, as I shall discuss further in the next section.

My starting point is the way in which crimes are usually sanctioned in modern, democratic societies.²⁹ My main concern will thus be with retributive justice, which I define as *doing justice through punishment*.³⁰ Chapter 15 will deal with an alternative to criminal trial and punishment, so-called restorative justice processes, in which victim(s), offender(s) and other directly involved parties determine the outcome of the case under the supervision of a facilitator. Several countries apply such processes as a supplement to, and to some extent as a replacement for, criminal trials for certain types of crime. Hence, both when discussing retributive and restorative justice I am considering actual practices in today's society. My method can accordingly be described as *interpretive* and *critical*; interpretive, because I attempt to develop a coherent normative rationale for those practices that are actually in

²⁶ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic books, 1983), XIV.

²⁷ Hegel, *Philosophy of Right*, § 218 Note.

²⁸ I will touch upon this issue in Chapter 7, where I discuss the wrong in undermining the mutual benefits of law. Some of these benefits are likely universally applicable to all humans, most notably because of our physical vulnerability. I will also there discuss the function of crime and punishment in sustaining the collective consciousness of the members of society. This function, Emile Durkheim says, is relative to the particular society in which it applies. For our purposes, the extent to which the functions described are pan-human or specific to a society is of less importance. I am in any case dealing with modern, democratic societies today.

²⁹ I make an exception for the death penalty, which I will not discuss for lack of capacity and space. One could argue, however, that the death penalty is not compatible with the normative constraints that ought to apply to a criminal justice system in a modern, democratic state, and that the issue is therefore irrelevant to the context I am dealing with. I will not pursue this argument further, however.

³⁰ See Section 2.2 for a distinction between retributive justice/retribution and retributivism.

place; critical, because I evaluate the interpreted rationales, asking whether these sanctions really do remedy injustice in the way proposed.

One's view on how punishment serves a just function depends, as the negative approach to justice predicts, on what one takes as the injustice entailed by crime. In Chapters 3 to 9, I reconstruct and evaluate different plausible ways in which crime can be wrong and discuss how punishment can be understood to remedy those aspects of wrong. To give but a couple of examples here: If we take the wrong in crime to be the criminal's "freeloading", i.e., benefiting unfairly from the law-abidance of others, reaping the fruits of mutual cooperation without paying the price, so to speak, punishment will remedy this injustice by conferring a burden on the offender, thereby removing this unfair benefit. If, on the other hand, we view the wrong in crime as a denial of the norm ensuring equal respect for all free and rational agents, then punishment can be seen to re-establish the norm, ensuring its actuality, by treating the criminal in accordance with the maxim of her crime and, hence, as a free and rational agent. In these and other ways, the conception of the wrongness in crime determines the way that we conceive of the just function of punishment.

However, recall that the dialectic goes both ways: One's view on how punishment serves a just function picks out what it is about crime that is wrong. Accordingly, some acts may be only slightly wrong or not wrong at all upon one theory of retributive justice, while seriously wrong upon another such theory. As we shall see, this affords us with a potential for a critique of the theories. However, this potential presupposes a standard against which a conception of the wrong in crime can be compared.

I will here take as such a standard for "criminal wrongs" those acts which are typically criminalized in modern, democratic states governed under the rule of law. The definition is admittedly formal and it is also somewhat vague, because not all states that might fit the description have criminalized the same acts. Drug crimes is one type of crime where there are considerable differences between states and where there are currently rapid developments. Another is sex crimes. Apart from some such hotly contested issues, however, there is considerable agreement among modern, democratic states about the acts

that ought to be criminalized, and there is also at least rough agreement about the relative seriousness of different types of crime.³¹

1.3 The right wrong

Assume now that a discrepancy exists between theory and practice. The aspect of wrong entailed by a conception of retributive justice does not overlap with the type of acts that are actually criminalized or does not fit with common perceptions of the gravity of different offences. Should we interpret such a discrepancy as a sign that the theory is wrong, or should we take it as an imperative to change current practices and perceptions of justice? This question goes to the heart of the problem of how to establish a critical perspective on justice. We are back, in other words, to the question of the stepping-stone from which to reach knowledge of justice.

An advantage of the concept of justice as remedying injustice is that it allows us to break down a claim of justice into analyzable parts that can each be critically evaluated. The dialectic of justice and injustice enables us to consider the internal coherence of a claim to justice, allowing us to understand how a certain act, Y, can be understood as a remedy for a problem, X. This, in turn, yields a potential for critically examining the appropriateness of both X and Y as interpretations of the acts in question.

Let us first look at how the logical structure of the concept of justice yields a potential for critique, before specifying three criteria that can help us assess which conception of wrong is most appropriate, determining *the right wrong* to remedy in a situation.

1.3.1 “The Negative Hume’s Law”

Identifying a wrong in a situation is not sufficient to draw a conclusion about what ought to be done about it. The fact that a bank robber has gotten away with a large profit does

³¹ There seems to be rough agreement, for instance, that murder is worse than rape, which is worse than assault, which is worse than theft, to name a few types of crime. There is also agreement that two robberies are worse than one. To the extent that there is popular disagreement about the ways in which crimes are sanctioned, it tends to be directed at the perceived leniency of punishments. However, in surveys where people have been asked to determine appropriate punishments for concrete cases, e.g. a robbery, a rape, a case of domestic violence, the public tends not to wish for harsher punishments. People tend, in fact, to be milder in sentencing than the control group consisting of currently serving judges. Leif Petter Olaussen, *Hva synes folk om straffenivået? En empirisk undersøkelse* (Oslo: Novus forlag, 2013). Flemming Balvig, "Danskernes syn på straff," (Copenhagen: Advokatsamfundet, 2006).

not by itself tell us whether and how we ought to respond. The fact that someone has been murdered does not entail the justice of any particular response. Hume's law forbids such inferences. 'Is' does not imply 'ought'. In the same way, the fact that someone is poor does not by itself imply that they ought to receive financial support, nor does the fact that someone has committed homicide entail that they ought to be punished.

A negative inference is possible, however. The logic of the concept of justice as remedying injustice allows us to infer that the response, Y, is only just if that to which it is a response, X, is the case. In other words, if we break down a claim of justice into two parts, an injustice X and a remedy Y, and it turns out that X is not the case in the situation, then Y is not a remedy in the situation. Consider the following example: Someone claims that it is just to deny women the right to vote. Why, we ask him? Because women are less intelligent than men, he claims. If this were a true fact, his claim of justice would be plausible; denying women the right to vote (Y) remedies the potential injustice (and unjust harm) of giving power to less intelligent decision-makers (X). Now, since we can show that it is not the case that women are less intelligent than men (if need be, we could find research to corroborate this matter of fact), we can determine that the claim of justice is false. Denying women the right to vote does not remedy an injustice and cannot therefore be called just. The 'ought-claim', Y, thus presupposes the truth of the 'is-claim', X. We might call this "*The Negative Hume's Law*": 'is-not' implies 'ought-not'.

Note that the 'ought-not' does not here apply to the act itself, but to the normative meaning that it is accorded. If an act is supposed to remedy an injustice that does not exist, we cannot understand the act as serving a just function in *this* way. There may, however, be other sufficient reasons for the justice of doing the same act. For instance, if a person has not committed a crime, incarcerating her cannot remedy the injustice of her crime. But it may still be just to incarcerate her, for example, in cases in which she poses an imminent risk to herself or others. If there are no plausible ways in which the act can be seen to remedy an injustice, then we can conclude that the act does not achieve justice, which means that the act is either itself unjust or neither just nor unjust.³²

³² The reason that we can infer the absence of justice from the absence of injustice is that the concept of justice that I apply includes within it the negative which it negates. A statement of the kind "It is just to do

Note also that “The Negative Hume’s Law” applies to the concept of justice, and not necessarily to other moral claims. One might, for instance, hold that there ‘is-not’ a relevant difference between two beggars, but we cannot therefore infer that one ‘ought-not’ give money to one without giving money to the other.³³ As a matter of justice it is different, however, for example, when the state offers financial assistance to the poor. We can then infer that if there ‘is-not’ a relevant difference between the two beggars, the state ‘ought-not’ reserve financial help for one without offering the same to the other.

The reason why we can infer this comparative criterion for justice – what I shall call *horizontal* justice – is because irrelevant distinctions cannot be just. Put positively: Distinctions between acts, between persons, and between states of affairs are only just if making them remedies an injustice. If two groups can be distinguished from one another by the criterion that doing Y will remedy an injustice X for one group but not the other, then making that distinction can be just.

We may, for instance, assert that punishment (Y) remedies an injustice for criminal offenders but not for non-offenders, because punishment remedies criminal wrongs (X), which non-offenders have not committed. In this case, there is a relevant distinction between the groups, entailing that it may plausibly be just to distribute punishment according to the criterion of committing a crime. If there were no relevant distinction between the groups, making the distinction could not plausibly achieve justice. It could not, for instance, plausibly be just to reserve punishment for offenders who are born on a

p” implies “It is just to do p because it remedies q or z or n and so forth”. E.g. “It is just to punish because it restores respect for mutual freedom, or because it creates a material balance, or because it cancels the offender’s ill-gotten gains and so forth”. The facts that make up the injustice are thus baked into the claim of justice (my concept of justice is thus a thick concept), so that if the facts can be denied, the particular claim of justice can also be denied. We are therefore not, strictly speaking, inferring an ‘ought’ from an ‘is’ or an ‘is’ from an ‘ought’ when we make a claim of justice; we are postulating an ‘ought’ which includes an ‘is’. “The Negative Hume’s Law” nevertheless has a critical advantage over Hume’s law in the following way: A critic who applies Hume’s Law could say to the person who wants to deny women the right to vote: “You cannot infer the ‘ought-claim’ that women should be denied the right to vote from the ‘is-claim’ that women are less intelligent”. This would merely amount to a *meta-ethical critique*, however. The person who is criticized would likely shrug it off as irrelevant, since we make such claims in practice all the time. Applying “The Negative Hume’s Law”, a critic would be making *normative, not meta-ethical critique*: She would be claiming that what the person claims to be just is actually not just, considering the facts of the matter.

³³ Kant’s distinction between perfect and imperfect duties is relevant here, for the latter entails that the duty to care for the beggar can be overridden by other imperfect duties, such as the duty to care for another beggar or for the duty of self-perfection.

Tuesday, since it is all but inconceivable that doing so would remedy an injustice for that group, but not for other offenders.

Another way of putting this is to say that the *default situation*, “prior” to justice and injustice, is one of equality. Equality is neither just nor unjust; it is the baseline from which claims of justice proceed. When we understand justice as remedying injustice, it means that prior to or without an injustice, there is no justice, and vice versa. One cannot, in other words, claim that treating one group one way and another group another way is just if making such a distinction does not in some way remedy an injustice that is already present. Hence, prior to injustice, there are no just or unjust distinctions. And when there are no distinctions, everything is identical, i.e. equal, like the night in which all cows are black, as Hegel put it.³⁴ Equality is thus the default from which claims of justice and injustice can be made.

I will discuss this issue in more detail in the concluding chapter, considering among other things its implications for where the burden of proof in matters of justice falls, and how we ought to consider exceptions to just rules.

1.3.2 Three criteria for critique

In some cases, as we have seen, there is no plausible wrong that a proposed action might be said to remedy. More often, however, there are several plausible ways of understanding what is wrong in a situation, and these may or may not require different remedies. Such is the situation with criminal wrongs, as we shall see in Part I. How, then, can we know which of these is the one that we ought to address? I suggest three criteria that enable a critical evaluation of the theories that we will be considering.

The first criterion is *salience*. As with all interpretations of events in the world, we may inquire of a theory of justice whether the meaning it confers upon the event accounts for the salient aspects of the facts of the matter. Specifically, does it pick out those features of the wrongdoing that stand out as the most important ones? Or are there other, more conspicuous or prominent aspects of the issue, and do these require different remedies? Formulated negatively, an injustice is salient when it cannot be ignored without onlookers

³⁴ G. W. F. Hegel, *Phenomenology of Spirit* (Oxford: Oxford UP, 1977), 9.

recognizing that the injustice lingers, i.e., that justice has not been sufficiently done. The opposite holds for an injustice that is not salient: Onlookers will tend not to recognize the injustice that the claim of justice picks out and will not react if nothing is done about it. The emotional reaction that we tend to have toward injustice is thus an important mechanism for identifying whether a claim to justice fits the facts of the matter.

This criterion yields a critical potential in the same way as “*The Negative Hume’s Law*”, although usually as a matter of degree: Failure to recognize a certain feature of a situation as an important wrong tells us that remedying that wrong is not important either. If there are several wrongs, it will be more important, all things equal, to remedy the wrongs that are most salient. The right wrong to remedy is thus the worst wrong, i.e., the wrong that we perceive as entailing the greatest injustice if left unremedied. When there are competing claims of justice, a decision must be made about which action will remedy the worst wrong, and hence, be *most just*. This problem will be especially evident in Part II, in which we see that treating like crimes alike may conflict with the claim that we ought to take into account the life situation of severely socially deprived offenders, by reducing or abstaining from punishment in such cases.

Determining the right wrong is not just a matter of considering the salience of a wrong in isolated situations. When our aim is to consider whether a theory is applicable generally, as a normative basis for our criminal justice practices, we can ask how the theory applies generally. Specifically, we can inquire whether the wrong that the theory picks out is salient not just in some instances, but for all relevant types of acts, e.g. all acts that ought to be considered crimes. *Scope* is thus a second criterion. Scope can also be considered for the punishment scale that a theory implies. We can ask whether the relative severity of punishments implied by the theory accords with actual punishment scales and with how we tend to view the severity of different crimes. Take the example of the freeloader theory again. It implies that the amount of punishment should depend on the size of the burden of self-restraint that the criminal has relieved herself of by committing the criminal act. However, much of what we normally understand as crime does not really involve a burden of self-restraint for most people. While many people will have to muster their will-power not to cheat on their taxes if they think that they can get away with it, most people do not have to restrain themselves not to commit murder and torture. Yet, everyone will

presumably agree that the latter acts deserve more punishment than tax fraud, all things equal. In this case, the discrepancy of scope between theory and practice clearly speaks against the theory.

According to a third criterion, *consistency*, a conception of justice ought to fit with the overall purpose of the practice or institution to which it applies. This criterion has a practical dimension: If the subsystems within a larger system seek diverging purposes, they may defeat each other. John Braithwaite and Philip Pettit give examples of this phenomenon within the criminal justice system and argue that a comprehensive theory of criminal justice is therefore requisite.³⁵ A more philosophical reason for this criterion stems from Aristotle, who insisted that the just distribution of something can only be determined by considering the *telos* of the practice to which the distribution applies.³⁶ In our case, it means that we can only determine which acts should be punished, how much they should be punished, and which constraints there ought to be on punishing, if we can first determine *why* we ought to punish at all. The latter question opens further questions of why we ought to have criminal law, and why we ought to have law in general, and why and how the state may exert legitimate power over citizens. Needless to say, it would take the entire thesis and more to answer these questions satisfactorily. I shall therefore be content to assert that I assume that a proper theory of retributive justice in this context must be consistent with the values of a democratic state under the rule of law: a so-called *Rechtsstaat*.³⁷ We shall see several examples throughout the thesis of theories that to varying degrees fail to meet this criterion, for instance when they would entail punishment that is inconsistent with human dignity, that is paternalistic, that is insensitive to the degree of culpability of the offender, that subordinates the rights of the individual to the common good, and so on.

³⁵ John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990), 12-25. An example of subsystems compensating for measures taken by other subsystems, can be seen, they claim, when measures are taken to limit the discretion of judges, which tends to increase the discretionary power exercised by police and prosecutors.

³⁶ This point is often shown by reference to the flute example in Aristotle, *Politics*, trans. B. Jowett, vol. 2, *The Complete Works of Aristotle* (Princeton: Princeton UP, 1984). By which criterion should we distribute the best flutes? Aristotle asks. “[T]he superior instrument should be reserved for him who is the superior artist”, he answers. (1282b35). Why? Because that is the distribution that will best serve the purpose of flutes, namely the creation of beautiful music.

³⁷ See Jørn R. T. Jacobsen, *Fragment til forståing av den rettsstatlege strafferetten* (Bergen: Fagbokforlaget, 2009) for a thorough treatment of the constraints that the *Rechtsstaat* lays on the criminal justice system.

*

This concludes my introduction to the main topics of the thesis and to the method that I will employ. It is time now to start to apply my negative approach to the question of crime and punishment. Most of the theories that I will be discussing fail along one or more of the mentioned criteria, some worse than others. This does not mean that these theories are entirely without merit, however. All of the theories that I will be discussing do describe a way of sanctioning crime that is plausibly just. They have a high degree of internal coherence. They are intuitively appealing, at least to some people sometimes. They pick out aspects of the wrongness in crimes that are salient under certain conditions. They are, in fact, the kinds of arguments that one will hear from ordinary people who are asked about the justice of punishment and alternative sanctions. All of these theories are thus part of the totality of reasons that the citizens of democratic states will give for maintaining and funding a criminal justice system wherein criminal offenders are punished. As such, they form part of the legitimacy of the criminal justice system, when legitimacy is understood descriptively, as the citizens' actual beliefs in the prestige and justice of the institution.³⁸ It is another matter, of course, whether the theories also form part of the normative legitimacy of the criminal justice system. Only if punishing offenders remedies their wrongs can the practice of state punishment be morally justified, and hence, normatively legitimate. This is the question that I will now consider in Part I: "The Justice of Punishing".

1.4 Overview of the thesis

Part I starts with an introduction to the topic of retributive justice (Chapter 2), which explains the need for a theory of why punishment is just, and not merely useful. The chapter also contains a section on the theory of retributivism, which I will argue has not been properly defined in criminal law theory. Chapter 3 discusses the wrongness of the *material imbalance* between offender and victim that a crime may cause. Chapter 4 discusses the wrongness of the *harm to the victim* and how punishment might go some way toward remedying that harm. Chapter 5 deals with the *undeserved profit* that may

³⁸ Cf. Max Weber's concept of "Legitimitätsglaube", explained in for instance Fabienne Peter, "Political Legitimacy", *The Stanford Encyclopedia of Philosophy* (2017), <https://plato.stanford.edu/archives/sum2017/entries/legitimacy>

result from crime. Chapter 6 considers whether *breaking the law* is wrong in itself, leading into Chapter 7, which considers the wrongness of *undermining the mutual benefits of law*. Chapter 8 discusses the wrongness in *freeloading* on the mutual benefits created by law-abiding citizens. Chapter 9 discusses the wrong in crime as an *infringement upon mutual freedom*. This is the longest chapter and goes into some detail on the penal theories of Kant and Hegel, as well as so-called ‘expressivist’ accounts of punishment. This ‘freedom perspective’ on crime and punishment, I argue, is best suited to account for the justice of punishing criminal offenders in a modern, democratic state. I therefore take this perspective as the basis for the further discussion in Part II.

Part II discusses the possible injustice of punishing severely socially deprived offenders. After an introductory chapter (Chapter 10), I discuss in Chapter 11 the unfairness of the *disproportionate likelihood of punishment* that socially deprived offenders face. Chapter 12 discusses the conditions under which the state may lack *moral standing to punish* severely socially deprived offenders. Chapter 13 deals with the *disproportionate difficulty of law-abidance* facing this group. Chapter 14 discusses mitigation *and the diminished need for punishment* when the offender is severely downtrodden. Chapter 15 considers *restorative justice* processes as alternative ways of doing justice after criminal wrongs.

Finally, my concluding remarks deal with *the justice of making exceptions*, a meta-issue concerning how we ought to conceive of justice in the face of competing and plausible claims.

PART I: THE JUSTICE OF PUNISHING

2. Retributive Justice

2.1 Introduction

The aim of this part is to articulate the underlying conceptions of justice used, implicitly or explicitly, to justify criminal punishment in modern democratic states.³⁹ In addition to explicating different notions of just punishment, I aim to critically examine these conceptions and consider whether they truly do justify punishing criminal offenders. My task is thus partly descriptive and partly normative. Or rather, partly interpretive, partly evaluative. I will describe different conceptions of the justice of punishment and attempt to make sense of how these theories might claim that punishment remedies injustice. However, in doing so, i.e., in making sense of retributive theories, I will also point out which parts of the theories that do not work, in other words, when the theories make a claim about justice that, upon careful consideration, is not just, or entails a further injustice. Herein lies the critical, or normative, aspect of my approach.

When assessing the different conceptions of what is wrong in crime and the way punishment supposedly remedies these wrongs, I will be referring both to moral and political philosophical arguments and theories, as well as to common intuitions, of which there is abundance on the topic of crime and punishment. I will also be drawing on actual penal practices, determining whether the different theories can account for common and cherished aspects of modern criminal law. Can, for instance, a given theory provide a punishment scale that approximates current scales and common perceptions about the seriousness of different crimes? Can the theory account for different degrees of blameworthiness and its influence on the just amount of punishment? Failing in these regards suggests that the theory is unsuitable as a stand-alone justification of current practices. It does not mean, however, that the theory cannot serve to explain aspects of our practices and our intuitions. It is also not given at the outset that current practices can be defended. A broad approach, which examines all of the most plausible theories of the justice of punishment, is therefore required.

³⁹ Though I take modern democratic states governed under the rule of law, so-called *Rechtsstaaten*, as paradigmatic examples, I am not asserting that criminal justice systems of other states are necessarily different in all relevant aspects. I simply choose to avoid a discussion of these differences, which would take me too far off track.

I leave aside questions about the investigation and prosecution of crimes, as well as procedural issues pertaining to criminal trials and the execution of punishment, even though all of these issues may potentially influence the justice of punishment. I do not, for instance, discuss the rights of inmates and the standards that must be upheld if a prison sentence is to be executed justly. Nor do I discuss the merits of different types of punishment. The question here is more fundamental: Whether *any* punishment is just. A purely utilitarian approach to punishment denies the relevance of this question, but as we shall see, the justification of modern criminal law rests on an affirmative answer.

I will start by clarifying a few key concepts and issues: What is punishment? What are the main strategies for justifying it? After showing the inadequacy of a purely utilitarian strategy, I will account for the way that so-called ‘mixed theories’ respond to these problems by combining utilitarianism with elements of retributivism. Since the justification of punishment thus depends on the correctness of an aspect of retributivism, and since, as we shall see, there is much confusion about what exactly the theory of retributivism entails, I shall afford quite a bit of space to a discussion of the essence of retributivism. After that, the majority of this part will be afforded a detailed discussion of different conceptions of the wrong in crime and the justice of remedying these wrongs with punishment.

2.1.1 What is punishment?

If punishment is understood broadly, for instance, as “negative sanctions for behavior deemed undesirable by the person punishing”, most of us can be said to receive and inflict punishment on a daily basis. We send our kids to their room for bad behavior; we ignore an annoying colleague; we uninvite a rude neighbor from a dinner party. However, such a broad definition is insufficient for the discussion I am undertaking here. My interest is in the ways in which a state-administered system of punishment is conceived of as just, and not (primarily) the ways in which we discipline each other in inter-personal relationships. I will therefore understand punishment here as: “a painful or burdensome sanction imposed

by the state upon a criminal offender, in response to a criminal offense, and intended to be experienced as painful or burdensome.”⁴⁰

A few remarks on the choice of definition: Although the definition clearly distinguishes legal punishment from the informal types of punishment mentioned, much of the following discussion will be relevant beyond legal punishment. Indeed, someone wanting to justify to herself why she snubbed her disloyal friend or demoted her lazy employee will find much ammunition for her *post hoc*-rationalizations in this thesis. Although I will limit the discussion to the defined type of punishment, I acknowledge, as H. L. A. Hart did, that there are sub-standard types of punishment that share some of the features of the standard type.⁴¹ Instances of the broad definition mentioned may be so conceived. The point of this acknowledgment is to avoid what Hart called the “definitional stop”, which is the unfruitful strategy of settling substantial disagreements about justification by definition. For this reason, I have left out from the definition any reference to the expressive function of punishment, although some consider it an essential part of what punishment is, and exactly that which distinguishes punishment from, say, tax collection.⁴² Since not all justifying theories of punishment take this view, I designate the issue to the substantial discussion below.

Finally, although informal punishments are sub-standard forms of punishment, this should not be taken to include sanctions that are informal but non-punitive, such as sanctions agreed upon through restorative justice processes. The last clause of the definition is meant to rule out such sanctions, as they are not intended to be painful or burdensome, although of course they may in fact be so.

⁴⁰ This definition is close to being a one-sentence summary of H. L. A. Hart’s five step definition of punishment in H. L. A. Hart, “Prolegomenon to the Principles of Punishment”, in *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Oxford UP, 2008), 4-6. It is also inspired by the definition in Johs. Andenæs, *Alminnelig strafferett* (Oslo: Universitetsforlaget, 1974), 8 (which was adopted by the Norwegian Supreme Court in Rt. 1977, 1207).

⁴¹ Hart, “Prolegomenon to the Principles of Punishment”, 5.

⁴² See for instance Joel Feinberg, “The Expressive Function of Punishment”, *The Monist* 49, no. 3 (1965), 400. R. A. Duff, *Punishment, Communication, and Community* (New York: Oxford UP, 2001), xv. Herbert Morris, “A Paternalistic Theory of Punishment”, *American Philosophical Quarterly* 18, no. 4 (1981), 264. Linda Grønning, Jørn RT Jacobsen, and Erling Johannes Husabø, *Frihet, forbrytelse og straff: en systematisk framstilling av norsk strafferett* (Bergen: Fagbokforlaget, 2016), 9.

2.1.2 Justifying punishment: Two strategies

The last clause of the definition also makes obvious the need for a justification of the practice of punishment. Many social practices involve infliction of pain or burdens, such as school homework or medical operations. However, punishment is the only social practice in which the pain involved is intended to be painful. The penal system is the only public institution that is created with the purpose of causing pain and suffering.⁴³ Clearly, suffering is in itself bad. Punishment, if considered in isolation, is therefore an evil, as for instance Jeremy Bentham describes it.⁴⁴ A justification is needed in order to say why the state ought to impose upon criminal offenders that which is, on its face, wrong and evil.

There are essentially two ways that this can be done: Either by outweighing the badness of the pain of punishment with some other good that may result from it, or by denying that the pain of punishment really is bad. The latter strategy does not entail denying that pain and suffering is usually bad, but it denies that it is bad in the context of punishment. This is the strategy of retributivism. The former approach to justifying punishment is utilitarian. It acknowledges that causing criminal offenders to suffer is in itself bad, but claims that this isolated badness can be outweighed by the good consequences of punishment, so that the practice as a whole, including its repercussions for crime prevention, social cohesion and more, is good.⁴⁵

Of these two strategies I will only discuss the retributivist approach in this thesis. There are several reasons for this: First, as noted above, my task is descriptive in that I aim to articulate the underlying conceptions of justice giving legitimacy to the existing penal systems of modern democratic states. As I will argue shortly, a purely utilitarian theory of punishment does not and cannot supply the basis for such legitimacy. Utilitarian theories can at most play a supplementary role in addition to a theory explaining why punishment is just in itself. The latter notion, that punishment creates justice, is, as I will argue,

⁴³ Arguably, the military is a public institution with the same purpose. However, one could also say that, to the extent that the purpose of a military operation is to cause suffering, it is a punitive mission, and hence falls under a sub-standard case of punishment.

⁴⁴ Jeremy Bentham, *The Principles of Morals and Legislation* (New York: Prometheus Books, 1988), 170.

⁴⁵ Note that justification literally means “making just”, which, according to our definition, means remedying injustice. Justification of punishment thus involves *theoretically* making it just by remedying the injustice (or evil) of deliberately causing pain. And there are, as explained in the main text, two main theoretical strategies for remedying this evil: 1) by outweighing it, or 2) by transcending it.

essential for the legitimacy of current penal systems and, in my opinion, any morally acceptable penal system, either because it is seen as sufficient for the legitimacy of the penal system, or because it is seen as necessary, in addition to a utilitarian rationale for the penal system.

Second, I limit my discussion to the notion of punishment as creating justice because that is where I believe we can locate its proper meaning as a social practice. Put negatively, if we conceptualize punishment as a purely instrumental means toward a separate goal such as crime prevention (as a utilitarian approach necessarily does), then we misconstrue the meaning that we usually accord punishment, notably the meanings of blame, repentance, symbolic leveling, respecting autonomy, cancelling ill-gotten profits and other meanings of punishment that I will address in this chapter.

Third, since a utilitarian theory presupposes a detachment of punishment from the goals of punishment, its applicability depends on the empirical claim that punishment in fact attains its goals. Punishment then serves a purely instrumental function, unlike the function I propose where the goal of punishment is intrinsic to its practice. I do not deny that punishment may possibly serve such an instrumental function in addition to its function in remedying injustice, but since that is an empirical question I will leave it to be settled by empirical research. I will stick to that issue where philosophy only receives competition from other disciplines to the extent that they are playing the philosopher's game: The issue of what justice is. Empirical research is only capable of mapping the opinions of justice that people hold. It cannot explain their meanings and critically examine their appropriateness. That is the game of philosophy, and since justice, unlike the instrumental function of punishment, is a necessary, and for some a sufficient, condition for the legitimacy of our penal system, a tall order is put to philosophers to deliver a theory of the justice of punishment. As we shall see, many have tried, with varying success.

2.1.3 The problems of a utilitarian justification of punishment

Before I delve into the issue of retributive justice, I will briefly explain why a utilitarian theory of punishment does not and cannot by itself provide the normative basis of penal systems in modern democratic states.

Utilitarian penal theories justify punishment by its supposed positive effects on the happiness or pleasure of all members of society. The goal, which is net social gain, or “the greatest happiness for the greatest number”, is detached from the means, in this case punishment, so that the justification of punishment rests on its instrumental function in bringing about the goal. There are several theories of how punishment may serve this function, most notably through deterrence, reform and incapacitation. Deterrence is either aimed at the public at large (general deterrence) or the criminal (special deterrence). Other supposed beneficial effects of punishment are the satisfaction of victims and others from seeing the offender punished, and related to this, the oppression of vigilantism. The latter effect was most eloquently described by the Victorian judge James Fitzjames Stephen: “The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite.”⁴⁶

Either separately or as a whole, these mechanisms of punishment may supposedly have the effect of reducing crime so much as to offset the negative impact of punishment.⁴⁷ Although perhaps intuitively appealing, and certainly among the most popular theories of punishment, both among lay people, lawyers and penal theorists, these theories are faced with criticisms so devastating as to cancel the appeal of implementing a penal system in accordance with them. They cannot therefore provide the normative basis of current penal systems.

The first among these criticisms is the commonplace claim that utilitarian penal theories might approve a system in which innocent people could be intentionally convicted of crimes. It is conceivable that under certain conditions more utility would be gained from punishing an innocent defendant than from acquitting her. It might also be useful not only to punish offenders but also their children and other family members, since such a policy would likely have a considerable deterrent effect.⁴⁸

⁴⁶ James Fitzjames Stephen, *A General View of the Criminal Law of England* (London: Macmillan and Co, 1863), 99.

⁴⁷ Among the negative effects of punishment to be included in the utilitarian calculation of cost/benefit is not only the direct pain or burden of the punishment felt by the offender, but the pain to her family, the cost of administering the criminal justice system, including policing, trial and sanctioning, and the possible negative effects of punishment on the culture of a society, i.e. the “brutalization of society” that may occur when large portions of the population are socialized into prison life.

⁴⁸ Hart refers to the Roman law of *Lex Quisquis* under which the children of someone convicted of the crime

Second, a criminal law based on a utilitarian justification might prescribe draconian sentences for relatively minor crimes and mild sentences for serious crimes depending on the likelihood of the deterrent effect of punishment on that type of crime. Under Draco's laws in ancient Athens even minor offenses qualified for the death penalty. So too, a utilitarian criminal law might justify the death penalty for, say, certain traffic violations, confident that more deaths would be prevented by such draconian sentences. Conversely, punishment may have little or no deterrent effect on crimes committed in affect. A utilitarian justification could thus provide an argument in favor of reducing or abolishing punishment in such cases. Of course, other utilitarian considerations may counter these considerations, for instance the concern of vigilantism. Nevertheless, the examples demonstrate that this way of reasoning about how to administer punishment is arbitrary, sometimes in accordance with our current punishment scales and sometimes not. Moreover, when these theories do get the answer right, they seem to do so for the wrong reasons. Specifically, they do not, unlike actual punishment scales, accord importance to just proportionality between crime and punishment.

Third, reform may require long prison sentences for some offenders and a short or no prison sentences for others, which, again, results in an arbitrary amount of punishment relative to the seriousness of the crime.⁴⁹

Fourth, incapacitation may also justify a prison sentence that is arbitrary relative to the seriousness of the crime, such as when a person deemed dangerous is detained disproportionately longer than her crime justifies. If applied beyond a relatively small group of clearly dangerous offenders, such a justification of punishment would be more in

of *Majestas* could be punished, Hart, "Prolegomenon to the Principles of Punishment", 12. Such policies have also been applied in recent times, for instance during the German occupation of Norway. On a personal note: In 1944, the Gestapo in Kristiansand sought to arrest my father for distributing news from the BBC. When they could not find him, they arrested his mother and his sister instead, both innocent of crimes and subversive activities. The purpose was likely to send a deterrent message to my father and other members and potential members of the resistance movement.

⁴⁹ Like with deterrence, whenever the concern for reform does coincide with a proportionate amount of punishment, it nevertheless does so for the wrong reasons. To take Hart's example: It seems strange to claim that the reason for punishing an infringement of a state monopoly of transport is to reform the offender *ibid.*, 26. Moreover, considering the scarcity of public funding and the cost of punishing offenders, it is not at all clear that it would be fair to allocate funds toward this group's reform while other groups do not receive much needed help. Such a critique can plausibly be made against sentencing to drug treatment because non-offending drug addicts do not currently receive the help that they need.

line with the penal systems of totalitarian regimes than democratic states under the rule of law.

Fifth, a utilitarian justification of punishment cannot in principle account for the rules of excuse that all modern criminal laws contain, such as excuses due to insanity, infancy, involuntary intoxication, mistake of law, mistake of fact, duress etc. Bentham attempted to provide a utilitarian basis for excuses by claiming that punishment would not have the intended effect of deterrence on these classes of people, and therefore could not be justified. However, as Hart famously put it, Bentham's argument is a "spectacular *non sequitur*"⁵⁰. For even though the threat of punishment may not deter the insane, the young, the ignorant etc., punishing them may nevertheless deter others from following their examples. It may be perfectly consistent with utilitarianism to abolish the subjective criteria for criminal liability, making strict liability sufficient for all crimes. However, whether a utilitarian should in fact endorse such a policy constitutes, as always, an empirical matter.

Sixth, a purely utilitarian justification of punishment is inconsistent with the respect for the autonomy of citizens that is essential to the modern democratic *Rechtsstaat*. The legitimacy of the rule of law depends on the citizens' autonomous capacity to subject themselves to laws they could, hypothetically, have taken part in creating. The legitimacy of criminal liability under the rule of law thus presupposes respect for the autonomy of the offender. As the five preceding points have demonstrated, utilitarianism does not ensure such respect. If, for instance, a drunk driver is punished disproportionately harshly in order to achieve a general deterrent effect, then she is used as a means, and therefore treated without proper respect for her autonomy. To utilize punishment as a threat with the purpose of manipulating people into abiding by the law is incompatible with Kant's categorical imperative, and can be likened, in Hegel's famous phrase, "to the act of a man who lifts his stick to a dog."⁵¹

These six criticisms make it clear that if a purely utilitarian penal theory were to function as a normative basis for a penal system – if the greatest happiness for the greatest number were to be the guiding principle for the design of criminal law policy – then the resulting

⁵⁰ Ibid., 19.

⁵¹ Hegel, *Philosophy of Right* Hegel, §99 Addition

penal system would look very different from the ones that we find in modern democratic states. Not only does that mean that we have to look elsewhere to find the normative basis of *existing* criminal law policy. It also means, I believe, that the theory is so at odds with commonly held notions of what the function of punishment *ought to be* that a purely utilitarian penal system, although it may conceivably be an ideal, serves most appropriately as a dystopia.

2.1.4 Mixed theories

Although a purely utilitarian justification of punishment is seriously flawed, it does not mean that utilitarian concerns are necessarily irrelevant to the justification of punishment. Many of us share the intuition that punishment should serve some good, for instance, that it should prevent greater harm than it creates. The question is whether we can satisfy this intuition and at the same time avoid the criticisms of a pure utilitarian theory. This is precisely what mixed theories attempt.

This position was first introduced by John Rawls in his essay “Two Concepts of Rules” (1955) and developed by H. L. A. Hart in “Prolegomenon to the Principles of Punishment” (1959). “What is needed is the realization that different principles (each of which may in a sense be called ‘justification’) are relevant at different points in any morally acceptable account of punishment”, Hart writes.⁵² For both Hart and Rawls, the general justifying aim of punishment – the reason why we ought to have a penal system – is its beneficial consequences. The reason why individual criminal offenders should be punished – the answer to the questions of *who* should be punished and *how much*, what Hart calls the question of distribution – is that they deserve it. In other words, utilitarian and retributive theories answer different questions. As Rawls puts it, “the judge and the legislator stand in different positions and look in different directions: one to the past, the other to the future. The justification of what the judge does, *qua* judge, sounds like the retributive view; the justification of what the (ideal) legislator does, *qua* legislator, sounds like the utilitarian view.”⁵³ This view is also held, with some variation, by Andrew von Hirsh and Nils Jareborg, who were influential in the formation of the Swedish criminal law of 1989, which

⁵² Hart, “Prolegomenon to the Principles of Punishment”, 3.

⁵³ John Rawls, “Two Concepts of Rules”, *The Philosophical Review* 64 (1955), 6.

explicitly states that the overall aim of the penal system is general deterrence, while limiting the considerations in the application of the law exclusively to matters of desert.⁵⁴

By including desert as a limiting condition for punishment, the first of the criticisms of a pure utilitarian theory (justifying punishment of innocent offenders) is avoided. However, whether a mixed theory can defend itself against the five other criticisms I have mentioned depends on how the theory understands the notion of ‘desert’. We may distinguish between what I will call ‘minimal desert’ and ‘moral desert’. By minimal desert, I mean the desert that follows simply from breaking a specific law. Granted that the law and the consequences for breaching it have been publicized in advance, a person who breaks the law can be said to have been warned and “given a fair opportunity to choose between keeping the law [...] or paying the penalty”⁵⁵. Desert then simply means eligibility for punishment.⁵⁶ By including minimal desert as a side-constraint, a mixed theory can avoid potentially justifying punishment of the innocent. Minimal desert will not, however, suffice to ward off the other criticisms. If, say, a statute sets the death penalty for drunk driving, or declares that offenders will be held imprisoned until deemed reformed or no longer dangerous, a person committing drunk driving will then have achieved minimal desert of punishment. She would still be used as a means for a greater good, however, and the penal system so justified would appear very different from current systems in democratic states.

A mixed theory, if it is to avoid the other five criticisms of a utilitarian theory, must operate with a more substantial notion of desert. The required moral desert, I will argue shortly, must entail a notion that something morally good or positive comes from giving a person whatever it is that she deserves. If we believe that a person morally deserves punishment, she is not only legally qualified for punishment; we believe that it would be intrinsically good that she be punished. We believe, in other words, that a value is realized in and

⁵⁴ Andrew von Hirsch and Nils Jareborg, "The Swedish Sentencing Law", in *Principled Sentencing: Readings on Theory and Policy*, ed. Andrew von Hirsch, Andrew Ashworth, and Julian Roberts (Oxford: Hart Publishing, 2009).

⁵⁵ Hart, "Prolegomenon to the Principles of Punishment", 23.

⁵⁶ Joel Feinberg, *Doing and Deserving* (Princeton: Princeton UP, 1970), 57, further distinguishes between two forms of qualification: "Eligibility is a kind of minimal qualification, a state of not being disqualified". Eligibility thus means meeting the necessary conditions for qualification. Entitlement, however, is when sufficient conditions are met, giving the person a right to whatever she is qualified for, say, a prisoner being entitled to release upon having served her sentence. My use of the term "minimal desert" corresponds with Feinberg's term "eligibility".

through the practice of punishing the guilty. Without this requirement, there would be no reason not to implement the most efficient penal system possible, and the result might look more like the dystopia sketched above than our current practices.

There are, then, two main theories that justify state-administered punishment for criminal offenses: Retributivism, which views moral desert as necessary and sufficient to justify punishment, and mixed theories in which moral desert and social benefit are taken as individually necessary and jointly sufficient to justify punishment. The difference between retributivism and mixed theories is thus only the extent to which they view the notion of moral desert as providing the grounds for justifying punishment.⁵⁷ Michael S. Moore was correct to state that mixed theorists are “closet retributivists”, for they accept the main premise of retributivism: that criminals deserve to be punished.⁵⁸

It is not yet clear, however, how we ought to understand this main premise of retributivism. What does it mean to deserve punishment? We have so far distinguished moral desert from minimal desert by the moral value that punishment supposedly realizes. But what is this value, and how does it justify punishment? As the following discussion reveals, there is much confusion, also in retributivist literature, about what exactly retributivism is and which claims are essential to it. Only after we have settled these questions can we hope to bring the discussion closer to an answer about whether retributivism or mixed theories can supply the normative basis for state punishment.

⁵⁷ If we apply Hart’s distinction between general justifying aim (GJA) and distribution, we see that we are faced with two choices for each. A retributivist would hold retribution in accordance with moral desert as both GJA and as the criterion for distribution. Most mixed theorists, like Hart, Rawls, Jareborg and Von Hirsch, hold net social gain as GJA combined with “retribution in distribution” (Hart). The opposite is also possible, however, taking retribution as the GJA while requiring an expected social gain in order to distribute punishment. The only non-acceptable combination, for reasons outlined above, is social gain as both GJA and distributive principle.

⁵⁸ Michael S. Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford: Oxford UP, 2010), 83.

2.2 What is retributivism?

We are justified in punishing because and only because offenders deserve it.

Michael S. Moore⁵⁹

The quick assumption that the state is entitled to punish offenders who “deserve” it is one of the unfortunate banalities of criminal law in our time.

George Fletcher⁶⁰

Retributivism is a theory that aims to justify punishment. Beyond this undisputed fact, not much can be determined about retributivism without argument. It is hard to find agreement even on what the basic claims of retributivism are, and much less on the question of whether retributivism is capable of attaining its goal of justifying punishment. I will here consider some common conceptions of retributivism. The problem with these conceptions is not, as I see it, that their claims are incorrect, but rather that they do not make clear how retributivism could justify punishment. The definition of retributivism that I propose will make explicit the link between desert and remedying the wrong in crime, thereby suggesting how we might overcome the much-discussed logical gap between desert and punishment.

2.2.1 The paradox of retribution

The terms “retributivism”, “retributive” and “retribution” are notoriously “imprecise and multivocal”, John Cottingham claimed in his 1979 article “Varieties of Retribution”. He proved his point by showing nine different ways in which the terms are commonly understood.⁶¹ Twenty years later, Nigel Walker followed up with “Even More Varieties of

⁵⁹ Ibid., 91.

⁶⁰ George P. Fletcher, *The Grammar of Criminal Law: American, Comparative, and International Volume One: Foundations* (Oxford: Oxford, 2007), 153.

⁶¹ John Cottingham, “Varieties of Retribution”, *The Philosophical Quarterly* (1950-) 29, no. 116 (1979). Cottingham can also be said to have contributed to the confusion, as so many others have too, by not

Retribution”.⁶² John Mackie, too, reviewed different notions of retribution, identifying 4-5 proper retributive theories, which he claimed were based on ideas that are “deeply ingrained”, revealing that people are “firmly wedded to retributivist ways of thinking”. However, upon closer scrutiny, Mackie argued, “all these attempts to make sense of the principle of positive retribution, as an independent principle with immediate moral authority, have signally failed.”⁶³ We find ourselves in the situation in which our moral intuitions inform us that retribution is right, but these intuitions, Mackie believed, cannot be rationally justified. This is what he called “the paradox of retribution”. “The paradox is that, on the one hand, a retributive principle of punishment cannot be explained or developed within a reasonable system of moral thought, while, on the other hand, such a principle cannot be eliminated from our moral thinking.”⁶⁴

If Mackie is correct about this, the relevance of retributivism is seriously undermined. The theory is meant to *justify* punishment, not merely describe our intuitions. Punishment is, we remember, the only institution through which the state not only inflicts pain but does so with the intention of causing pain or a burden. The need to justify such an institution should be obvious. By most standards, simply pointing to the fact that we have intuitions about the legitimacy of punishing does not suffice to justify the practice.

In fact, a common criticism of retributivism follows along the same lines as Mackie’s paradox: Retributivism is not criticized for lack of intuitive appeal; it is criticized for not offering an independent justification of punishment that could serve to validate our intuitions. S. I. Benn formulated this critique early on: “[W]hat pass for retributivist justifications of punishment in general, can be shown to be either denials of the need to justify it, or mere reiterations of the principle to be justified, or disguised utilitarianism.”⁶⁵ The same critique is evident in Hart’s claim that retributivism is “a mysterious piece of moral alchemy, in which the two evils of moral wickedness and suffering are transmuted

distinguishing properly between retributivism and retribution. See the concluding part of this section for my distinction between these terms.

⁶² Nigel Walker, "Even More Varieties of Retribution", *Philosophy* 74, no. 4 (1999).

⁶³ J. L. Mackie, "Morality and the Retributive Emotions", in *Why Punish? How Much?: A Reader on Punishment*, ed. Michael Tonry (Oxford: Oxford UP, 2011), 276.

⁶⁴ *Ibid.*, 272.

⁶⁵ S. I. Benn, "An Approach to the Problems of Punishment", *Philosophy* 33, no. 127 (1958), 27. Nigel Walker, "Nozick's Revenge", *ibid.* 70, no. 274 (1995), 581, similarly states: “Most latter-day retributivists are crypto-utilitarians”.

into good.”⁶⁶ While Fletcher in the above quote laments the quick assumptions of retributivism as “one of the unfortunate banalities of criminal law in our time”.

As the following review of common ways of understanding retributivism will demonstrate, this criticism is well founded. The concepts of retributivism used by retributivists and critics alike are correctly criticized for not making clear why we ought to seek the goals that punishment supposedly achieves.

2.2.2 Retribution as payback

The first clue to determining what retributivism is can be found in the etymology of the word: Retributivism is derived from retribution, which in Latin literally means payback.⁶⁷ Several theorists take the notion that punishment is a ‘backward-oriented’ payback for a past crime as a defining feature of retributivism. R.A. Duff, for instance, says of retributivist theories that “they all find the sense and the justification of punishment in its relation to a past offense”⁶⁸. Joshua Greene and Jonathan Cohen, likewise, speak of “the backward-looking, retributivist account”⁶⁹, and Don E. Scheid claims “retributivism is the view that whether a person may be punished and, if so, to what extent are questions to be decided by reference to one’s past legal offence”.⁷⁰ This characteristic of retributivism is useful in contrasting it to consequentialist theories, which are often termed “forward-looking” because they take some future benefit, such as crime prevention, as that which justifies punishment. However, although the backward-orientation may constitute a defining feature of retributivism, it does nothing to justify punishment, unless it can be shown that backward-orientation is somehow good or right. The same, of course, goes for any other characteristic of retributivism. If that characteristic is to function in a justification of punishment, it must be viewed as something worth attaining or something we ought to do.

⁶⁶ H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, Second ed. (Oxford: Oxford UP, 2008), 234-5.

⁶⁷ Latin, *re*: re + *tribuo*: to pay, to grant.

⁶⁸ R. A. Duff, *Trials and Punishments* (Cambridge: Cambridge UP, 1991), 4.

⁶⁹ Joshua Greene and Jonathan Cohen, "For the Law, Neuroscience Changes Nothing and Everything", in *Why Punish? How Much?: A Reader on Punishment*, ed. Michael Tonry (Oxford: Oxford UP, 2011), 296.

⁷⁰ Don E. Scheid, "Kant's Retributivism", *Ethics* 93, no. 2 (1983), 262. We also find the notion of retributivism as backward-looking in Mitchell N Berman, "Two Kinds of Retributivism", in *Philosophical Foundations of Criminal Law*, ed. R. A. Duff and Stuart P. Green (Oxford: Oxford UP, 2011), 435.

2.2.3 Retribution as intrinsically good

Some, like Moore, locate the characteristic feature of retributivism in the claim that “punishing the morally culpable is intrinsically good.”⁷¹ Duff similarly attributes to retributivism the view that “[p]unishment is, once a crime has occurred, a good; and it is a good which the law must secure.”⁷² However, if punishment is justified by the value that it achieves, then it is unclear why this view is any more backward-looking than consequentialism. Indeed, several philosophers have noted that this intrinsic-good claim has the potential to collapse into consequentialism. As David Dolinko points out, even if a retributivist takes punishment of the morally culpable as an intrinsic good, she would likely not take it as the only intrinsic good there is. The latter view would entail the absurd claim that it would be better if a murderer were punished than if the murder never happened.⁷³ Accepting that there are other intrinsic goods, then, the retributivist would have to consider how punishment would contribute to all of these goods. In short, she would have to conduct the kind of weighing of consequences that characterizes consequentialism. Benn’s criticism of retributivism as “utilitarianism in disguise” would largely have been confirmed.

However, although this view of retributivism could be accepted, and it may be especially appealing to a mixed theorist, most retributivists do not accept that their theory is merely a species of consequentialism. An important difference, it has been argued, lies in the relation between punishment and the good that it achieves. While the good is only contingently related to punishment on a consequentialist theory, it is logically related on a retributivist theory. A retributivist thus views the good of punishment as intrinsic to its practice – the goal is achieved in and through punishment. The practice is *autotelic*, to use Aristotelian terms. For a consequentialist, on the other hand, the good is extrinsic, entailing that it may or may not be achieved by punishment. Punishment is then a *heterotelic* practice.

This distinction will not, however, by itself suffice to avoid collapsing retributivism into consequentialism. The fact that something is an autotelic practice does not justify it, unless

⁷¹ Moore, *Placing Blame*, 29.

⁷² Duff, *Trials and Punishments*, 149.

⁷³ David Dolinko, "Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment", *Law and Philosophy* 16, no. 5 (1997), 514.

one begs the question by defining autotelic or intrinsic good as that which is justified. A consequentialist could easily concede that something has an intrinsic value, yet insist that there are other, more important extrinsic values that perhaps outweigh the intrinsic value. For retributivism to be different from consequentialism, then, it must, in addition to showing that punishment is an autotelic practice, demonstrate that the goal that it achieves is sufficient to justify punishment in spite of countervailing extrinsic consequences. In short, it must show that it can be right to punish, regardless of whether it is also extrinsically good.

Before I turn to the most common claim about what the intrinsic good is that supposedly justifies punishment, I should emphasize that the discussion about whether retributivism reduces to consequentialism is inessential to the possibility of justifying the penal systems of modern democratic states. As argued in the section on mixed theories, what is essential is the notion that it is intrinsically good that criminal offenders be punished (that they morally deserve it), and not the question of whether this intrinsic good is sufficient or merely necessary to justify punishment.

2.2.4 Retribution as deserved punishment

What is the intrinsic good of punishment? The standard retributivist answer is that it is intrinsically good that criminals be punished according to their desert. “The good that punishment achieves is that someone who deserves it gets it”, Moore writes. “[R]etributivism is the view that we ought to punish offenders because and only because they deserve to be punished.”⁷⁴ C. L. Ten likewise holds that “contemporary retributivists treat the notion of desert as central to the retributivist theory, punishment being justified in terms of the desert of the offender.”⁷⁵ Mitchell Berman too acknowledges that a consensus has developed among retributivists that there is a “core retributivist contention” which he terms “*the desert claim*: punishment is justified by the offender’s ill-desert”.⁷⁶

However, the desert claim, if given no further explanation, clearly qualifies for Benn’s criticism that retributive theories are either denials of the need to justify it, or mere reiterations of the principle to be justified. The claim does not by itself explain why it is

⁷⁴ Moore, *Placing Blame*, 87.

⁷⁵ Quoted in Berman, “Two Kinds of Retributivism”, 437.

⁷⁶ *Ibid.*, 437.

that desert justifies punishment. “There is a logical gap”, Duff states, “between the claim that wrongdoers deserve to suffer – that it is good that they should suffer – and the claim that it is for us, or for the state, to ensure that they suffer.”⁷⁷ It is, in the words of T. M. Scanlon, not obvious why punishment of criminals would be “justified simply on the ground that this brings their fate more nearly in line with moral desert.”⁷⁸ Or as Dolinko says: “After all, the government, state, or ‘society’ does not automatically take it upon itself to give people what they deserve in other respects. [...] Why single out precisely this one category of persons and insist that the state must give them what they deserve?”⁷⁹

The challenge for retributivism, then, is to explain, and not merely state, the link between desert and the justification of punishment. I will now consider the strategy for moving from desert to justification proposed by Michael S. Moore, probably the most prominent contemporary retributivist. As will become clear, I accept Moore’s definition of retributivism as the theory whereby an offender’s desert of punishment is necessary and sufficient to justify punishment. But I do not believe that his retributivist theory is capable of bridging the logical gap between desert and justification.

2.2.5 An evaluation of Moore’s retributivist theory

Moore’s theory is motivated by what he regards as the failure of other retributive theories in deducing the justification of punishment from a more fundamental principle: “The battleground of theory known as the philosophy of punishment is littered with the corpses of supposed general principles from which the retributive principle is supposed to follow.”⁸⁰ He adopts instead a coherence view of justification, taking the retributive principle – which Moore defines as the principle “that offenders should be punished because and only because they have culpably done wrong” – as “first principle”, which means that it is so basic that it cannot be an instance of a yet more general principle. He states, “[r]ather, first principles are to be justified as abductive inferences from more particular principles and judgments.”⁸¹ Moore’s strategy is in other words to review our

⁷⁷ Duff, *Trials and Punishments*, 199.

⁷⁸ T. M. Scanlon, "Punishment and the Rule of Law", in *Why Punish? How Much? A Reader on Punishment*, ed. Michael Tonry (Oxford: Oxford UP, 2011), 164.

⁷⁹ David Dolinko, "Some Thoughts about Retributivism", *Ethics* 101, no. 3 (1999), 543.

⁸⁰ Moore, *Placing Blame*, 170.

⁸¹ *Ibid.*, 162.

moral judgments about particular instances of crime and punishment, and then determine what is the best explanation of these judgments.

Moore asks us to reflect upon some examples of crimes: He mentions the story from *The Brothers Karamazov* of a nobleman who sets his dogs to tear apart a young boy in front of his mother – an act so gruesome that even the mild Alyosha Karamazov, when asked what the nobleman deserves, responds: “To be shot”. Other examples are of equally heinous, but actual, crimes: A young man who hammers his girlfriend to death; a man who finds a woman with a flat tire, who rapes and murders her and drowns her three small children. We could also add, from recent history in Norway: A man who for political reasons kills 69 youths at a summer camp. Most of us, I believe, would probably agree with Alyosha, if not in method of punishment, at least in the judgment that the nobleman and those like him deserve to be punished. But a critic could respond: How can we know that these intuitions are about desert and not about the good consequences of punishing such offenders? Moore asks us to imagine a situation in which there are no non-retributive reasons for punishing in these or similar cases. He mentions Kant’s famous example of an island where the inhabitants have decided to leave and dissolve the society⁸² – in other words a situation where no future benefits would occur if the murderers in the prison were executed prior to departure. C. L. Ten similarly asks us to imagine a Nazi war criminal who escapes to an uninhabited island where 30 years later he is found leading an idyllic life. Under such circumstances – Moore aptly calls the thought experiment an “Eichmann/Kant combination” – would we not still think it correct to punish? Again, I believe many share Moore’s intuitions.

Since Moore’s coherentist approach relies on the possibility of arriving at an abductive conclusion from our particular judgments, it is decisive for his method that our intuitions are reliable and that they are relevant to the types of cases for which the retributive principle applies. A critic could challenge the relevancy of the intuitions that Moore fleshes out by questioning the representativeness of his examples. We may have such intuitions in these and other extreme cases, the critic could say, but what about in more normal cases, such as tax fraud or carrying a firearm without a license? Dolinko made this critique and

⁸² Immanuel Kant, *The Metaphysics of Morals*, The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy (Cambridge: Cambridge UP, 1996), 6:333.

concluded: “No such intuition would likely arise from contemplating, say, an Englishman visiting Los Angeles who, in the dead of night, with no other vehicles around, forgets for several minutes which side of the road he is required to drive on.”⁸³ Further, a critic could contest the reliability of basing abductive conclusions on our intuitions by challenging the emotional basis of these intuitions. The intuitions could after all be caused by contemptible sentiments on which it would be dubious to base policy. Moore devotes a considerable amount of space to what he calls the objection to the emotional base of retributivism, which he mainly derives from Nietzsche. According to Nietzsche, the common urge to punish offenders stems from *ressentiment*, which is basically a cocktail of the emotions of envy, sadism, fear, cowardice, despair, self-righteousness and others. Punishment, upon the Nietzschean view, is essentially motivated by the wish to feel strong by projecting one’s own weakness upon others. “Mistrust all in whom the impulse to punish is powerful. They are people of a low sort and stock” – thus spake Nietzsche through Zarathustra⁸⁴

Although such an emotional basis for our intuitions would not itself amount to an argument against the truth of our intuitions, it seems reasonable to be wary of moral judgments based on contemptible, rather than laudable emotions. However, the virtue of the emotional basis of retributivism is inconclusive. Nietzsche himself noted that a lack of urge to punish could also stem from weakness; the courageous and strong thing to do could actually be to react forcefully against wrongdoing. Further, Moore identifies two virtuous emotions that motivate retributive judgments: outrage at the suffering of others and guilt when one has done wrong. The latter implies, according to Moore, that one perceives the justice of being punished.

Whether retributivism is motivated mainly by virtuous emotions or mainly by contemptible emotions is difficult to determine, of course. It seems reasonable, anyhow, to conclude with Moore that the urge to punish may conceivably stem from virtuous emotions, and the fact that it may sometimes be owed to *ressentiment* does not exclude the possibility that our particular judgments usually have a sound basis.

Moore’s approach faces a more serious obstacle, however. The way that Moore constructs the coherence approach, it cannot supply the explanation needed to bridge the logical gap

⁸³ Dolinko, "Some Thoughts about Retributivism", 557.

⁸⁴ Friedrich Nietzsche, *Thus Spake Zarathustra* (New York: J. M. Dent & Sons, 1933), 91.

between desert and the justification for punishment. He does not supply an explanation of *why* it is that desert should justify punishment. For if the retributive principle is a first principle, as Moore suggests, this means that it is so basic that it cannot be derived from a more basic principle and must instead be abductively inferred from retributive intuitions. But what if someone doubts that these intuitions are morally correct? That person might acknowledge that the retributive intuitions are widespread, yet she might, like Mackie, attribute them to an evolutionary function, which she might take to undermine the normative relevance of the intuitions.⁸⁵ In addition, the person may not share the intuitions. A utilitarian who sees no point in punishing unless it achieves some further good will hardly be convinced by the fact that many other people have retributive intuitions. Moreover, as Dolinko's example of the Englishman in LA shows, there are cases in which it is likely that the retributive principle does not intuitively apply. When Moore infers the justifiability of punishment from widespread intuitions, he simply perpetuates Mackie's paradox of retribution. The problem, then, is not that Moore is necessarily incorrect about the intuitions, but that his method of justification essentially gives up explaining why these intuitions are right.

It is not clear, however, why we ought to take the retributive principle as a first principle, when doing so means accepting without argument intuitions that are challenged by many theorists who have given the issue much thought. A coherentist approach might instead argue that the retributive principle is a secondary principle, derived from a more general moral principle that we have reason to accept.⁸⁶ Moore briefly examines this possibility

⁸⁵ The evolutionary theory of retributive emotions claims that developing such emotions has given an adaptive advantage on an individual and/or a group level. Moore is right, I believe, to deny that an evolutionary explanation could by itself invalidate moral intuitions (*Placing Blame*, 178). That would amount to what the other famous Moore (G. E.) called "the naturalistic fallacy". On the other hand, Moore, the retributivist, takes our intuitions as evidence of the truth of a normative claim, and presumably doing so can at least potentially be undermined if we have reason to believe that human beings are not selected to track objective moral values. Sharon Street argues for the latter claim in "A Darwinian Dilemma for Realist Theories of Value", *Philosophical Studies* 127, no. 1 (2006). For a reply, see Thomas Nagel, *Mind and Cosmos: Why the Materialist Neo-Darwinian Conception of Nature is Almost Certainly False* (Oxford: Oxford UP, 2012). I shall not here take a stand on this meta-ethical issue, but merely point out that an evolutionary explanation may potentially affect the credence that we give our moral intuitions, and that this is especially challenging for Moore's theory, which accords intuitions a prominent place in his retributivist theory.

⁸⁶ The principles and the retributive intuitions can then be sought to form a coherent theory meant to justify punishment. The coherentist approach thus aims at reaching a "reflective equilibrium" of moral intuitions and rationally construed and criticized principles, to use the term coined by John Rawls, *A Theory of Justice*, Revised Edition ed. (Oxford: Oxford UP, 1999).

and points to a general notion of desert that applies not only to punishment, but also to property allocations and corrective justice. It is, for instance, common to make judgments about desert related to work, saying that someone *deserves* the fruits of her labor. Likewise, if damage has been done, we often assert that whoever caused the damage *deserves* to assume the expense of repairing it. A retributivist might thus show, Moore claims, “how there is an odd lacuna in our moral judgments about desert if the retributive principle is not accepted”⁸⁷.

This second approach is more promising than Moore’s first approach, since it, unlike the first, can conceivably yield a proper justification for the retributive principle. The question that we must pose is whether there is a common meaning to the concept of ‘desert’ that may: (a) illuminate what is meant by the claim that a criminal offender deserves punishment; and (b) show how we might determine whether desert of punishment justifies punishment. Before offering my own understanding of the concept of desert, I shall briefly say why Moore’s own statements about the general principle of desert do not help to answer (a) and (b).

Moore explains the general principle of desert as arising from ‘secondary’ moral rights and duties. We have primary duties not to break promises, not to injure or kill, and primary rights to most of the fruits of our labor. However, we also have secondary duties and rights that arise when primary duties and rights are violated. For instance, if I break a promise, I have a secondary duty to keep my promise, even belatedly, or to otherwise ensure that the person to whom I have given the promise does not incur a loss due to my breach.⁸⁸ It is breach of these secondary duties that warrants the judgment that I ought to be made to comply with my duties and others ought to be made to comply with my rights. “We idiomatically make this ought judgment using the word ‘desert’”, Moore states.⁸⁹ It is not obvious, however, how the notion that a criminal offender deserves punishment fits into this general principle of desert. Moore’s answer is unsatisfactory: “We all have primary duties not to do the sorts of acts that *malum in se* criminal statutes prohibit. We also have

⁸⁷ Moore, *Placing Blame*, 139.

⁸⁸ *Ibid.*, 170. If I have injured or killed somebody, I have a duty to “make amends in whatever way I can, including compensation”. And if I have been deprived of the fruits of my labor, I have a right to have those things returned to me or be paid the equivalent value.

⁸⁹ *Ibid.*, 171.

secondary duties to allow ourselves to be made to suffer if we have violated these primary duties.”⁹⁰ But why is this a secondary duty? Why is it our duty in such cases not just to compensate and repair the harm done, but also to allow ourselves to be made to suffer? Moore does not offer a justification for this supposed secondary duty, beyond the claim that feelings of guilt might include the wish to be punished.

Moore proposes another way of linking the desert claim of retributivism to the other desert claims mentioned: “The unity of the principle of desert is to be found in the common conditions of culpability and of wrongdoing (or in their praiseworthy analogues, of ‘meritability’ and of ‘right doing’).”⁹¹ He also states that “‘desert’ means culpable wrongdoing”.⁹² Indeed, there is a sense in which the desert of a person who intentionally works in order to enjoy the fruits of her labor is analogous to the desert of a person who intentionally (culpably) breaches a criminal statute. However, the concept of desert is also commonly applied to situations in which there is no culpable wrongdoing (or meritable right-doing), such as when one judges of a downtrodden person that “She deserves a break”, or of a disabled person that “She deserves help to achieve decent living conditions”. Moore’s equation of desert with culpable wrongdoing excludes such conceptions of desert, yet without offering a reason for their exclusion. Further, even if Moore was correct in claiming that culpability and wrongdoing were conditions for desert, this would still not explain why punishment is conceivably justified as a *response* to culpable wrongdoing. When Moore states that desert means culpable wrongdoing, he is committing the error of confusing possible antecedent conditions for desert with the meaning of the concept. His theory thereby fails to acknowledge and address the logical gap between these conditions for desert and what we shall call the ‘desert object’, in this case punishment.

⁹⁰ Ibid., 171.

⁹¹ Ibid., 171.

⁹² Ibid., 168. In a footnote on the same page, Moore states: “I use ‘desert’ as a synonym for the moral property, responsible”. I think that is a highly idiosyncratic use of the term, as will become clear in the main text. Moore then says: “For those [...] unable to put aside the future-oriented connotations of ‘desert’, substitute the alternative word, ‘responsible’. Nothing in my theory turns on what we call the moral property whose existence justifies liability for a retributivist.” When we do substitute the words, as Moore suggests, the point that I argue in the main text becomes even clearer: Moore’s theory does not offer any justificatory reasons for punishment – everything stands and falls on the intuitive link between responsibility and punishment.

2.2.6 The meaning of desert

The concept of ‘desert’ always points out a ‘desert object’. The verb *to deserve* is transitive, and thus it must take an object. It is part of the logic of desert that *something* is deserved, as in the sentence “She deserves a raise” or “She deserves a reprimand”. Specifically, a retributive theory must be able to justify that this *something* for a criminal offender is a certain amount of punishment.

How, then, can we understand the concept of desert so that it can be applied not only to desert of punishment, but to the other mentioned forms of desert? The answer, I believe, is to view desert as shorthand for justice. To assert “She deserves X” is the same as saying “It would be just if she received X”. Hence, if someone deserves payment for a job, it is just if she receives payment. If someone deserves to pick up the bill after an accident, it is just if she picks up the bill. If someone deserves to be punished, it is just if she is punished. It is justice, then, that is the common value of desert claims – “the broader principle of desert” in Moore’s words – to which the retributive principle relates. It is justice that is the intrinsic good that punishment is taken to accomplish, the value that is realized when someone gets what she deserves. Infliction of deserved punishment, then, achieves *retributive justice*, or simply *retribution*, according to the definition in Chapter 1.

Presumably, this is a way of understanding desert that retributivists can agree on, as is also suggested by the common combination of the terms in the notion of ‘just deserts’. The question, then, is how this definition of desert can help us understand and assess the theory of retributivism? Specifically, how does it help us bridge the logical gap between desert and justification of punishment? Some might think that I have simply substituted one vague concept (justice) for another vague concept (desert). This is not so, for the concept of justice relates, as we have seen, to the concept of injustice, and it is this relation that bridges the logical gap between a person’s desert and the desert object. Let me explain.

I have defined justice in the following way: *Justice is remedying injustice*. Applied to the current question, this means that an offender can be said to deserve punishment for her crime if we take punishment to somehow remedy the wrong of the crime. In other words, justice would be done if punishment of the offender remedies the injustice of her crime. Conversely, if an offender is not punished according to desert, this means that retributive

justice is not done. The latter entails that, unless justice can be done in a non-retributive way in the given case, the wrong of the crime remains unremedied, which, of course, is unjust. Construed in this way, the logical gap between desert and punishment appears less mystical. For as argued in the introductory chapter, implicit in an experience of wrong is a desire that the wrong be remedied. By acknowledging something as an injustice we thereby acknowledge an imperative to justice.⁹³ By acknowledging the wrong in crime, we thereby accept that justice would be achieved if the wrong was remedied. Hence, if punishment of an offender remedies the wrong of her crime, she *deserves* punishment (all things equal).

Mackie made a similar claim about wrong action giving rise to a situation in which it is “somehow generally unsatisfactory if the wrong action gets by without any proportional reaction.”⁹⁴ This, he claimed, is entailed in the concept of wrongness itself: “The central moral concept of the wrongness of an action includes [...] the synthetic judgment that what is harmful generally and intrinsically forbidden calls for a hostile response.”⁹⁵ Therefore, “the concept of wrongness [...] itself includes the principle of retributivism.”⁹⁶ As we saw, Mackie went on to deny that this could be justified rationally: We experience retributive emotions, i.e., emotions about the justice of punishment, but we cannot provide a theory to justify these emotions.

The extent to which Mackie was right about this remains to be seen. He was clearly at least half right, in the sense that we cannot justify rationally the imperative to do justice; we cannot prove that something is a wrong to which we ought to respond. In this sense, a “leap of faith” is always required. Indeed, we cannot prove that there is value in the world, and hence wrong. However, if we grant as much – and we all do in practice: value certainly has a practical reality for human beings – then there is no logical gap between acknowledging a wrong and the imperative to remedy it. It follows from the very idea of the value of justice that a negation of justice (wrong) ought somehow to be negated.

⁹³ To whom the imperative applies is another matter. One might perceive an injustice yet think it is somebody else’s responsibility to remedy it. This is especially true of punishment, where the most one could say about ordinary citizens is that a moral imperative befalls them to support institutions that remedy criminal wrongs. See *ibid.*, 154 on this point.

⁹⁴ Mackie, “Morality and the Retributive Emotions”, 276.

⁹⁵ *Ibid.*, 277.

⁹⁶ *Ibid.*, 278.

The problem of retributivism, then, is not so much the supposed logical gap of the imperative to respond to wrong – this pertains to any theory of justice. It is rather the extent to which the imperative supplies a reason for the state to administer punishment. Retributivism is the theory that accepts the imperative to do justice as sufficient for justifying state-administered punishment. Reformulated:

*Retributivism is the theory that takes retributive justice as a necessary and sufficient reason for state punishment.*⁹⁷

Mixed theories, on the other hand, take retributive justice as a necessary, but not a sufficient reason for state punishment. Both theories thus rely on the notion that punishment can function as a way of making wrong right. This must then be our next task: To examine the concept of retributive justice and determine whether it can, *contra* Mackie, be rationally justified. Only after such an inquiry can we hope to arrive at an answer to the question of whether retributive justice is to be regarded as necessary or also sufficient to justify state punishment.

2.3 Outline of the following chapters

Does punishment remedy injustice? As argued above, the legitimacy of our current penal system requires an affirmative answer to this question. A simple “yes”, however, is insufficient. The seriousness of the matter – state-administered infliction of pain – necessitates a convincing account of *how* punishment serves a just function. I will in the following chapters consider possible candidates for such a theory. I will do so by applying the negative method, *via negativa*, laid out in the Introduction, by which justice is understood in relation to its negative, injustice, for which justice is a remedy. Hence, answering the question of whether punishment is just means identifying conceptions of what it is about crime that is wrong, and explaining, for each conception of wrong, how punishment can be seen as addressing and correcting that wrong.

The following discussion will take as its starting point different conceptions of the wrong of crime that I have reconstructed on the basis of retributive theories and common-sense

⁹⁷ This definition is consistent with Moore’s definition, the only difference being that desert is now unpacked as retributive justice, which of course is logically connected with punishment.

perceptions of the justice of punishment. The conceptions can be divided into two main categories, according to where they locate the wrong of the crime: in the material consequences of the criminal act or in relation to the norm that the act breaches. This distinction corresponds with Kant's distinction between material and formal wrong, which I will return to later. It also corresponds to a distinction between retributive theories that view the just function of punishment as non-symbolic and those that view it as symbolic. Theories of the first kind emphasize the direct (or material) effects of the crime, i.e. the harm (or pleasure) it causes. Correspondingly, these theories emphasize the actual pain (or pleasure) that punishment causes. Theories of the second kind emphasize the message conveyed by the crime, for instance the superiority of the offender compared to others, or the lack of recognition of the victim. Correspondingly, these theories emphasize the message conveyed by punishment – its symbolic effect – such as the re-establishment of the victim's recognition or diminishment of the offender. The material effect of punishment, its pain, is then relevant to justice only as the medium by which the symbolic message is conveyed. We will return to the contested issue of whether this particular medium is necessary, sufficient or neither.

Chapters 3, 4, and 5 address material wrongs of crime and corresponding theories of punishment. Chapters 6, 7, 8, and 9 deal with formal wrongs and their corresponding theories of punishment. The list of aspects of wrong is not meant to be exhaustive. I have, for instance, left out all religious theories of wrongdoing. Although many people believe that some crimes constitute offenses against the will of a divine power, such theories are, for well-known reasons, irrelevant to the justification of punishment in a modern state.

I have limited my discussion to what I take to be *plausible* theories of the wrong of crime and the justice of punishment in the context of a modern democratic state. Each of the conceptions of wrong that I discuss refers in my opinion to a significant aspect of what it is that is wrong about crime. In other words, each conception identifies a genuine wrong in (some) crimes. Further, I believe that punishment can potentially be understood as remedying these wrongs. Each theory is therefore, *prima facie*, a plausible theory justifying punishment, and cannot therefore be disregarded offhand. My aim is indeed to reconstruct each theory so as to make it as plausible as possible, showing, to the extent feasible, how each can make sense as a retributive theory. I conclude in Chapter 9 that the

freedom perspective outlined there represents the most suitable framing of criminal wrongs and their just sanctions within the context of a modern, democratic state. The other theories are still important, however, because they identify aspects of wrong that are sometimes salient, and which, if not remedied, will cause injustice in the eyes of many people. This may sometimes speak to the justice of other sanctions, or for instance, paying damages in addition to punishment. By considering a wide range of perspectives on the wrongness of crimes, it enables us to also see the limitations of the paradigmatic response to crime: punishment. However, an advantage of the freedom perspective, when properly understood, is that it can incorporate some of these other perspectives. The material consequences of crime are important, for instance, because they affect the possibility of equal freedom. Let us start, then, by considering one material aspect of crime: The imbalance that it causes between offender and victim.

3. Material imbalance

I start with the simplest, and also perhaps the most common, of reasons given for punishing someone. It is the answer you might hear when you ask a child, (or an adult for that matter), “Why did you hit him?” – “Because he hit me first!” We might doubt, of course, whether this is even a proper reason. But since many seem to believe so, let us examine how it might be considered one. Implied in the statement “Because he hit me first!” is a judgment about the wrongness of the initial act. This implied wrongness is the only way the statement could be considered a reason for him to hit back. The wrongness motivated the response. But was it a just response? Any response will not do, obviously. As I have argued, a just response must be taken to remedy the wrongdoing. How could that be in this case?

If a person hits someone, he causes him physical pain and perhaps also embarrassment and psychological pain in the form of stress, fear etc. We might say that the victim’s wellbeing has been reduced from a baseline prior to the hitting, his *status quo ante culpam*. There is now an inequality between the parties because the hitter presumably retains his wellbeing at the baseline (I will consider in Chapter 5 the notion that the hitter gains from his act). By hitting back, the inequality is erased. The injustice that the unfair inequality constitutes is thus remedied. The parties now share the same, albeit lower level of wellbeing compared to *ante culpam*. I will call this the ‘balancing theory’, i.e. the theory of just punishment as canceling an unjust material imbalance.

This logic is often applied to crimes in general. A criminal deserves to “have the same thing done to him as he has done to others”, thereby restoring equality. This principle, often called Lex Talionis, is likely the oldest principle of punishment known. We find it expressed in the close to 4000 year old Code of Hammurabi, which states: “If a man put out the eye of another man, his eye shall be put out (§ 196). If he break another man’s bone, his bone shall be broken (§ 197) [...] If a man knock out the teeth of his equal, his teeth shall be knocked out (§ 200).”⁹⁸

⁹⁸ Codex Hammurabi (King translation), [https://en.wikisource.org/wiki/Codex_Hammurabi_\(King_translation\)](https://en.wikisource.org/wiki/Codex_Hammurabi_(King_translation)). The Bible, too, contains expressions of Lex Talionis, for instance in Genesis, 9.6: “Whoever sheds human blood, by humans shall their blood be shed.”

Strictly speaking, however, the Lex Talionis is a sentencing principle, determining how (and how much) a person should be punished. It does not specify for what reason the criminal should have the same done to him. One can therefore subscribe to the Lex Talionis without endorsing the notion that the just function of punishment is to re-establish equality of wellbeing between victim and offender. When Kant, as we shall see, adopts the Lex Talionis as sentencing principle, the just function it serves is to hold the criminal to the logical consequences of his own maxim, not to create an equal loss as that of his victim. Neither is Lex Talionis a necessary sentencing principle for a theory of retributive justice. Only if one subscribes to the particular theory that justice is done when the offender suffers the same harm he has caused, is Lex Talionis necessary as sentencing principle.

The reason why only the latter theory entails Lex Talionis is that punishment's just function upon this theory is its non-symbolic function of creating harm. Justice here means ensuring equal harm, quite literally, and Lex Talionis prescribes exactly that. As briefly noted, and as we shall see in detail later, other retributive theories view the function of punishment as conveying a message, for instance of the equal worth of offender and victim. Since there are several potential ways of conveying such a message, no exact sentencing principle is entailed by such a theory.

As a consequence of the fact that the balancing theory is wedded to Lex Talionis as sentencing principle, common criticisms of Lex Talionis will also affect the applicability of the balancing theory. I do not, however, count among proper criticisms the often heard and rather banal assertion that the theory amounts to condoning revenge. How can two wrongs make a right, some ask? They thereby beg their own question. The point is exactly that there aren't two wrongs; punishment is right, not a second wrong, when taken as a theory of retributive justice. The features of punishment that make it possible to view it as right, and that distinguish it from revenge, are among other things a) the notion that it serves a function in remedying the wrong created by the crime, in this case the imbalance of wellbeing between the parties, and b) its universal applicability.⁹⁹ Someone seeking revenge would not necessarily accept this. "I am revenging *my* brother, I don't care whether somebody else does or does not revenge their brother."

⁹⁹ For a discussion of the distinction between retribution and revenge, see for instance Robert Nozick, *Philosophical Explanations* (Oxford: Clarendon Press, 1981), 366-70.

Actually, as a matter of historical fact, Lex Talionis, ought to be understood not as a justification for revenge, but as an attempt to curtail revenge. In times and places where blood feuds ravaged, the notion of an eye for an eye functioned as a limiting principle: *only* an eye for an eye. Or, *only* one brother for one brother. Not the entire male population of the rivaling clan. Lex Talionis achieves this limiting effect by locating the wrong in the act itself, and not, for instance, in the symbolic affront it represents to the aggrieved party's status, or to the dignity of her family or clan. As a consequence, Lex Talionis promotes an egalitarian ideal of justice: an eye is an eye, no matter who's eye it is. Whether the offender is rich or poor, or whether the victim has high or low status – by focusing on the act itself, status differences become irrelevant. With Lex Talionis justice is blind.

However, blindness is also the source of problems for the theory. What if a rich man steals \$ 100 from a poor man, should he in turn be robbed of \$ 100? Such a sum means nothing to him, yet it means a lot to the poor man. And what if the eye-poker is one-eyed? An eye for an eye would cause a greater harm to him than he has caused, making him completely blind, as opposed to only half blind. The problem then, if *justice* is blind to such individual differences, is that injustice follows.

Perhaps this can be avoided by amending the theory slightly: It is not an eye for an eye *per se*, but the harm of an eye for the harm of an eye. Kant uses this understanding of the Lex Talionis to argue that someone of high standing who causes “verbal injury” to someone of lower class, ought not merely to pay a fine, but should be compelled to apologize publicly and kiss the hand of the man of lower class, for this would cause a similar “hurt done to his pride”.¹⁰⁰ Likewise, if he commits violence against someone socially inferior to him, solitary confinement involving hardship is required, because “in addition to the discomfort he undergoes, the offender's vanity would be painfully affected.”¹⁰¹

This understanding of the principle would allow for a degree of sensitivity to the specific context, avoiding some of the most conspicuous instances of accompanying injustice. There is, however, a disadvantage of abandoning the simple principle of equivalence of act for a principle of equivalence of harm. The former equivalence is easy to determine, whereas the latter raises the problem of commensurability between the harms of crime and

¹⁰⁰ Kant, *The Metaphysics of Morals*, 6:332.

¹⁰¹ *Ibid.*, 6:333.

the harms of punishment. How might we compare, for instance, the harm of being sexually harassed and the harm of serving time in prison?

Alan H. Goldman suggests a solution: “Equivalence here is to be measured in terms of some average or normal preference scale, much like the one used by the utilitarian when comparing and equating utilities and disutilities.”¹⁰² “One right or set of rights is equivalent to another for these purposes when an average preference scale registers indifference between the loss of either the one or the other.”¹⁰³ Applied to equivalence of harm (equivalence of rights being the topic of a later chapter): The harm of punishment is equivalent to the harm of crime when the average person is indifferent to which he suffers. We might, for instance, conduct surveys to find out how much punishment is required to reach the point at which the average person would rather prefer to be the victim of a crime than to be the receiver of punishment. Needless to say, there are great epistemic problems with this scheme. How could we expect people to have anywhere near a realistic understanding of the pain resulting from a type of crime they have never experienced? And are we able to realistically imagine what it is like to serve time in prison? Presumably one’s experience would depend on why one is imprisoned (both in terms of one’s status among the prisoners – sexual offenders, for instance, are often placed lowest in the pecking order – and in terms of one’s own struggles with guilt and psychological trauma), what terms and material conditions one is serving under, and what one is confined from (presumably, serving time might be experienced quite differently for a parent of five than for somebody without dependents on the outside). Determining the average pain of these experiences is difficult, to say the least.

We might grant, however, that balancing harm is roughly conceivable on this preference-balancing scheme. There is a greater problem connected with the theory, however. The sole emphasis on balancing harm excludes from taking into account an aspect of wrongdoing of undeniable significance in the context of modern criminal law. That aspect is the subjective element of wrongdoing, the offender’s *mens rea*, literally his “guilty mind”. “An eye for an eye” obscures the important difference there is between a case where a person meticulously plots and executes a plan to cut out somebody’s eye, and another

¹⁰² Alan H. Goldman, “The Paradox of Punishment”, *Philosophy & Public Affairs* 9, no. 1 (1979), 45.

¹⁰³ *Ibid.*, 46.

case where the same harm is done, but caused by accidentally slipping on a banana peel with a pair of scissors in hand. To treat these two cases as if they were equally deserving of punishment not only goes against the most common views on moral responsibility and precludes us from noticing the symbolic aspects of crime and punishment. It also renders this conception of retributive justice unsuitable as a theory justifying current penal practices, as it would not be able to account for the ubiquitous distinctions made by the subjective element of wrongdoing in defining crimes and their associated punishment levels.¹⁰⁴ A criminal law based solely on strict liability, as this theory would entail, is conceivable, of course, although hardly desirable. A sense of precariousness would likely spread among citizens knowing that the intent to abide by the law is insufficient, and that any unlucky circumstance could render them liable for punishment.¹⁰⁵

Even though this conception of the wrong in crime is clearly deficient, it does not mean that it is entirely irrelevant. It picks out, I believe, one aspect of the wrongness of crime that, whenever present, cannot justly be ignored; namely, the imbalance that crime often creates. Crime is not wrong merely because the victim is harmed or because the offender gains from it; crime is also wrong because it creates an inequality between the parties, an inequality that is unjust in itself. Lowering the offender by the same amount as the victim thus remedies at least one aspect of the wrong in crime. As Nietzsche put it: "Shared injustice is half justice."¹⁰⁶ Let us now turn to other theories in search of the remaining half.

¹⁰⁴ It will not suffice either to merely add the subjective element to the objective harm and propose that justice means balancing [harm of punishment] with [harm + subjective guilt of crime]. The incommensurability problem will then reoccur. In fact, the only way to avoid the incommensurability problem is to either focus solely on equivalence of act or equivalence of harm (the material wrong in Kant's terms), or solely on the symbolic aspect (the formal wrong) – one cannot have it both ways at the same time.

¹⁰⁵ Hart, "Prolegomenon to the Principles of Punishment", 23.

¹⁰⁶ Nietzsche, *Thus Spake Zarathustra*, 59.

4. Harm to the victim

If we grant the point made in the last paragraph, that crime may create a material imbalance that is unjust in itself, the question nevertheless remains whether this injustice is significant enough to prioritize lowering the offender down to the level of the victim. The person whose wellbeing is brought down by the crime would, it seems, have a greater interest in being restored to her own *status quo ante culpam* rather than in creating a new equality at a lower level.¹⁰⁷ She would, in other words, be less concerned with the *horizontal* imbalance relative to the offender than with her own *vertical* imbalance, that is, the discrepancy relative to her own starting point due to the loss caused by the crime.¹⁰⁸ If the harm can be repaired, or if compensation would help to alleviate the injury, then presumably that would be the victim's priority. This, however, speaks to the justice of civil damages for harm. Is it also a reason for punishment?

The latter would require that the wellbeing/harm-relation between victim and offender be a zero-sum game, where one party's suffering harm relieves or protects the other from harm. In such a situation the harm to the offender could be justified by the comparative fairness of her harm to that of the victim. If harm is inevitable, then surely it is fairer that the person responsible for creating the harm be the one to suffer it, rather than an innocent person. Put negatively: The injustice would be greater if harm was distributed arbitrarily rather than according to fault. Joel Feinberg calls this "weak retributivism". "The principle simply asserts the moral priority, *ceteris paribus*, of the innocent party. Put most pithily, it is the principle that *fault forfeits first*, if forfeit there must be."¹⁰⁹

Again, the relevance for civil damages is clear. But how might we conceive the usual kinds of punishment, such as imprisonment, as offsetting the loss for the victim? Take the situation where an offender is deemed dangerous to another person or to society in general. Here we could say that loss is 'inevitable', either in the form of the offender's loss of freedom or a future victim's harm. The principle of weak retributivism would then justify

¹⁰⁷ Cf. the discussion in Chapter 9 of Jean Hampton's description of the emotion of *spiteful hatred*. Her claims support the notion that it is not truly in someone's interest to establish equality at a lower level, thereby confirming to oneself one's own low level, rather than raising it.

¹⁰⁸ I use the terms "loss", "harm", "dissatisfaction", "grievance", "pain" and "deprivation of pleasure" interchangeably in this section. The opposite terms are "pleasure", "relief from pain", "benefit", "gain", and "satisfaction". In this section I will only discuss these non-symbolic consequences of crime and punishment.

¹⁰⁹ Feinberg, *Doing and Deserving*, 218.

the dangerous person's imprisonment, as it would be fairer that she, rather than the innocent party, suffer the consequences of the fact that she poses a risk to others.

However, it is notoriously difficult to assess the risk somebody poses to others. If a person deemed dangerous turns out not to be dangerous, then loss would not be inevitable, and the justification for incapacitation fails. A common critique of incapacitation is thus that it entails a risk of generating false positives.¹¹⁰ The more broadly the theory is applied, the more likely it is that some of the people who are assumed dangerous and therefore incapacitated would not have offended if not incapacitated. On the other hand, one could argue from the principle of weak retributivism itself that the uncertainty related to risk assessment should not count against the innocent parties. Here, as elsewhere, they get the benefit of the doubt. A person who has committed numerous or especially serious crimes, one could argue, has forfeited the benefit of doubt with regard to his disposition to do such acts.

Note that this is not a utilitarian justification for incapacitation. The point is not that the pain of future crimes outweighs the pain of imprisonment. The point is that the person at fault deserves the pain more than the innocent party. Weak retributivism is thus a theory of distributive justice. Granted that harm is indeed inevitable, such a theory can provide a sufficient reason for imprisonment. The theory may thus be able to provide a rationale for some standard sentencing practices, such as the recidivist premium.¹¹¹ However, most offenders are not dangerous in the required sense, where harm to others is all but inevitable if they are not imprisoned. The theory is therefore irrelevant to the vast majority of crimes. And not only is the theory thus not inclusive enough; it is also too inclusive. The rationale for incapacitation would apply even when a dangerous person had not already committed a crime. The principle of weak retributivism is therefore not so much a justification for punishment as a justification for incapacitation of any dangerous person, including, for instance, those suffering from certain mental diseases. Punishment, we remember, is per definition a response to an offense. Just punishment is a remedy for (an aspect of) the wrong of the offense. Looking closer, we see that incapacitation is no such remedy; in fact,

¹¹⁰ See for instance Thomas Mathiesen, *Kan fengsel forsvares?* (Oslo: Pax Forlag A/S, 1995), 120.

¹¹¹ See discussion in Chapter 7.

the wrong of the offense is irrelevant to this theory – only inevitable *future* harm counts in a weak retributivist justification for imprisonment.

How, then, are we to conceive of a theory where punishment serves to alleviate the harm *caused* by the offense, not potential harm? Such a theory, in order to be a genuine retributive theory, must also be distinguishable from a theory of *compensatory* or *corrective* justice. It is not enough, then, that the burden inflicted on the offender should alleviate the victim's loss. The burden must also be "intended to be experienced as painful or burdensome", as the definition of punishment states. In a retributive theory, the intended suffering of the offender is thus a necessary condition for justice. In a compensatory theory the suffering is merely contingent. If, say, the victim suffers a loss of \$ 100, a compensation of \$ 100 would cancel her loss. To have to pay \$ 100 *might* be a burden to the offender, but it could also be the case that her parents or an unknown admirer decided to take the loss for her. Compensatory justice would still be done, regardless of whether the offender experienced it as painful.

For retributive justice, the offender's suffering punishment plays an essential role in remedying wrong. I will here concentrate on a straightforward, non-symbolic way in which the offender's suffering can be understood as remedying the victim's harm. The victim may simply take pleasure in seeing the offender punished. Regardless of why this pleasure occurs, it may be conceived as serving a just function in alleviating (some of) the harm suffered by the victim. Punishment might, upon this view, give the victim satisfaction equivalent to the grievance caused by the crime, thereby restoring him back to *status quo ante culpam*.

Note again that this is not utilitarianism in disguise. The kind of "satisfaction theory"¹¹² here discussed must be distinguished from the similar utilitarian theory whereupon the pain of punishment would be justified if it were outweighed by the pleasure it gave victims and others, much like the suffering of gladiators might cause so much joy to the audience that the total amount of happiness might be positive. The retributive satisfaction theory

¹¹² Cottingham, "Varieties of Retribution" and Walker, "Even More Varieties of Retribution" use the term "Satisfaction Theory", but only Cottingham distinguishes a proper retributive version from a utilitarian version of the theory. Ted Honderich, *Punishment: The Supposed Justifications* (Cambridge: Polity Press, 1989) also describes a retributive function in satisfying victims.

does not argue that the total amount of happiness will be positive, but merely that the satisfaction experienced by the victim remedies the harm she has unjustly suffered.

It is highly dubious, of course, whether the amount of satisfaction gained from seeing the offender punished comes even close to alleviating the harm of most crimes. To establish that it could, we would need a way to determine when satisfaction outweighed the harm of the crime. Goldman's average preference scales could in theory provide the method. However, the exclusive focus on pleasure over pain seems even more out of place here. Imagine the indifference level being reached when a person reasons, "I experience such an intense satisfaction from seeing my rapist suffer that I now feel that I break even, pleasure-wise." Not only does this grievance-satisfaction frame clearly fail to grasp an essential part of what constitutes the wrong of rape. Even if we did accept this 'economic' framework, we would have to conclude that the cost of the benefit is high. Presumably, if there is a direct link between the amount of punishment suffered and the amount of satisfaction of the victim (itself a highly dubious presumption), the punishment for rape would have to be harsh in order to outweigh the large pain it causes – too harsh, one could argue. Or so does Bentham, although within his utilitarian framework. "Vindictive satisfaction", as he calls the pleasure that injured parties take in the punishment of their wrongdoers, can never amount to much compared to the cost of producing it. "No such pleasure is ever produced by punishment as can be equivalent to the pain."¹¹³ Bentham is talking about the pain of punishment, and not as we are here, the pain of crime. Nevertheless, his warning that the effect upon the victim is little compared to its cost is relevant to the question of whether grievance-satisfaction ought to be a matter of retributive justice.

A related question regarding the morality of alleviating harm through punishment concerns the virtue or vice of vindictive satisfaction. Is the desired satisfaction also desirable? Recall the discussion above, in relation to Nietzsche and Moore, about the virtue of retributive emotions. If, as Nietzsche claimed, the urge to punish stems from *ressentiment*, one might conclude not only that satisfaction of the desire is morally unworthy of our pursuit. We

¹¹³ Bentham, *The Principles of Morals and Legislation*, 171 footnote. For Bentham, vindictive satisfaction could at best be considered a secondary aim of punishment. "This purpose, as far as it can be answered *gratis*, is a beneficial one." Honderich reaches the same conclusion as Bentham: "It is not seriously arguable that the deprivations imposed by punishment on offenders and others is outweighed by the grievance-satisfactions gained by victims and others.", *Punishment*, 44.

might also speculate that its short-term beneficial consequences in the form of vindictive satisfaction might be outweighed by its long-term harmful consequences for our character and peace of mind. If so, we will have undermined the premise of the satisfaction theory, that vindictive satisfaction constitutes a good for the victim.

This line of reasoning is often invoked as an argument for the virtue of forgiveness. Forgiveness, understood as the forswearing of resentment or similar negative emotions toward a wrongdoer, is usually perceived in the philosophical literature and elsewhere as a good for both giver and receiver.¹¹⁴ For wrongdoers it may facilitate the overcoming of destructive attitudes such as self-loathing and excessive feelings of guilt. For victims, carrying feelings of hatred, resentment, vindictiveness and the like over a long time may be detrimental to their wellbeing. That such emotions may be bad for us *sometimes*, does not, however, mean that they are always bad. Resentment, Murphy argues, constitutes an emotional defense of our self-respect:

[A] too ready tendency to forgive may properly be regarded as a vice because it may be a sign that one lacks respect for oneself. Not to have what Peter Strawson calls the “reactive attitude” of resentment when our rights are violated is to convey – emotionally – either that we do not think we have rights or that we do not take our rights very seriously.¹¹⁵

Sometimes, then, it may not only be understandable to retain one’s resentment toward a wrongdoer; it may be appropriate. Presumably, if resentment can be good, then vindictive satisfaction when retributive justice is done may also be good. Murphy argues: “If it is morally permissible intentionally to do X (under a certain description), then it is surely permissible to *desire* to do X (under the same description).”¹¹⁶ Put differently, if punishment is desirable, then the desire to punish is also desirable. If this desirable desire

¹¹⁴ The definition follows Bishop Butler’s sermons “Upon Resentment and Forgiveness of Injuries”, Joseph Butler, *Fifteen Sermons Preached at the Rolls Chapel* (London: G. Bell & Sons, 1953). The definition is widely accepted in the literature, though with certain amendments. For an overview see Paul M. Hughes and Brandon Warmke, “Forgiveness”, *The Stanford Encyclopedia of Philosophy (Summer 2017 Edition)* (2017), <https://plato.stanford.edu/archives/sum2017/entries/forgiveness/>. Espen Gamlund, “A Change of Heart: Essays in the Moral Philosophy of Forgiveness” (University of Oslo, 2009), 31, argues for the relevance of other emotions beyond resentment: “[p]eople often experience not only resentment when wronged, but also contempt, sadness, disappointment, etc. A compelling theory of forgiveness would have to take into account this spectrum of feelings and emotions.”

¹¹⁵ Jeffrey G. Murphy, in Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1990), 17. See also Peter F. Strawson, “Freedom and Resentment”, in *Proceedings of the British Academy, Volume 48: 1962*, ed. Gary Watson (Oxford: Oxford UP, 1962)

¹¹⁶ Murphy, in Murphy and Hampton, *Forgiveness and Mercy*, 94.

is fulfilled, that constitutes a good for the victim who holds this desire. The victim's loss is thus alleviated by the satisfaction she receives from having her desire for punishment met.

To take this as a justification for the retributive satisfaction theory would, however, amount to a circular argument. Punishment would be just because it satisfies a desirable desire; the desire would be desirable because punishment is just. In sum, desire would be desirable because desired. To escape from this vicious circle, we would need an independent argument for either the justice of punishment or for the desirability of vindictive satisfaction. The retributive satisfaction theory cannot, therefore, stand on its own. If it can be shown independently that punishment is (sometimes) just, then Murphy's point that we might appropriately take pleasure in seeing justice done, seems valid. The satisfaction theory might then be taken as a supplement to another retributive theory. As such, the theory would account for an additional just function of punishment.

The theory expounded in this chapter may thus only play a limited role. But we may nevertheless acknowledge that it emphasizes an important aspect of crime. Part of the wrong of crime *is* the dissatisfaction it creates for victims in the form of harm. Creating victim satisfaction is a remedy for this aspect of the crime and ought therefore not to be ignored when determining a just response to crime. Of course, there may be other and better ways than punishment to achieve and sustain victim satisfaction. In Chapter 15 on restorative justice, we will see that some surveys show victim satisfaction to be higher after restorative processes compared with criminal procedures. Following the logic of the satisfaction theory here expounded, empirical findings of this sort must count in favor of the comparatively greater justice of restorative processes. Nevertheless, satisfaction theory cannot stand alone as a justification for restorative justice either.

Another reason why the scope of the theory of this chapter ought to be limited is the simple fact that not all crimes have victims. One might, of course, reason that dumping garbage in a river or trading on inside information affects society at large – we are all, therefore, victims. And even when a crime does have a direct victim, we could all be said to be indirect victims due to the undermining effect crime has on the norms of society. It seems far-fetched, however, to reason that punishment somehow offsets the loss we as indirect victims incur. Indeed, even identifying the scope of the loss we supposedly incur would

be difficult. In cases where a direct victim is lacking, therefore, the victim satisfaction theory seems largely inapplicable.

Though some crimes lack victims, no crimes lack offenders – all criminal offenses are by definition perpetrated by somebody. The potential for a comprehensive theory of crime and punishment might therefore be greater if we shift our attention from the satisfaction of the victim to the satisfaction of the offender. That is, from the loss of the victim to the illegitimate gain of the offender. The following chapter will consider whether punishment's just function may lie in cancelling the offender's undeserved profit.

5. Undeserved profit

Picture a drug lord on his yacht, enjoying the sunset off the French Riviera. Or think of a corrupt judge, raking in money for his fraudulent verdicts. Or a bank robber settling back to daily life, the money safely hidden away in his garden. What is wrong in all these scenarios? For one thing, crime has paid off. The bad guy has gotten away with it. The criminal has profited, if not literally in all the cases, then metaphorically. “By the profit of the offence is to be understood, not merely the pecuniary profit, but the pleasure or advantage [...] which a man reaps, or expects to reap, from the gratification of the desire which prompted him to engage in the offence”, Jeremy Bentham says.¹¹⁷ “The value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence.”¹¹⁸ As is well known, his was a utilitarian penal theory, emphasizing the need for punishment to function as a counter-motive to the profit of the offense.¹¹⁹ Subsequent deterrence theories share this premise. There is a sense, however, in which the notion of outweighing the profit of the offence can be interpreted not (primarily) as providing a motive for law-abidance, but as remedy for the wrong in crime.

Upon this interpretation, crime and punishment form a kind of price system, where each crime has a fair price attached to it. As H. L. A. Hart put it, “The pains of punishment will for each individual represent the price of some satisfaction obtained from breach of law”¹²⁰. Though this may sound like an abstract theory concocted by a philosopher, it is actually an analogy that is common in our every-day language; a conceptual metaphor that structures our understanding of the concepts of crime and punishment.¹²¹ The way we normally speak about punishment shows that we conceive it metaphorically as a way of creating an economic balance, where justice is a form of accounting. The aim of punishment is accordingly to “balance the books”, to “settle accounts”, to “make the

¹¹⁷ Bentham, *The Principles of Morals and Legislation*, 179 footnote.

¹¹⁸ *Ibid.*, 179.

¹¹⁹ Bentham’s belief in the efficacy of punishment as counter-motive to crime is revealed, for instance, in his detailed rules on how punishment should be adjusted to the mischief of the offenses, *ibid.* Chapter XIV. He gives the example of a man who gives you ten blows: “If then, for giving you ten blows, he is punished no more than for giving you five, the giving you five of these ten blows is an offence for which there is no punishment at all: which being understood, as often as a man gives you five blows, he will be sure to give you five more, since he may have the pleasure of giving you these five for nothing.”, *ibid.*, 181 footnote.

¹²⁰ Hart, “Legal Responsibility and Excuses”, 47.

¹²¹ George Lakoff and Mark Johnson, *Philosophy in the Flesh* (New York: Basic Books, 1999), 292-95.

offender pay his debt to society”. Such economic metaphors are so common that we hardly recognize them as metaphors at all. Consider the word “Schuld” in German, no longer a metaphor, now literally meaning both “debt” and “guilt”.

In this version of retributive justice punishment has precisely such an economic purpose of accounting: Inflicting punishment on a criminal offender is a way of cancelling the undeserved benefits rendered by the crime, thereby re-establishing her pleasure-level at the baseline, *status quo ante culpam*. If a criminal were to avoid punishment she would receive a profit to which she was not entitled. In more popular terms: “she’d get away with it”, yet another common metaphor that speaks to the popularity of this conception of punishment.

The notion of justice as accounting presupposes a theory of why exactly this form of accounting is just, in other words, a justification for the price system of crime and punishment. The system itself cannot supply the grounds for why the profit of crime is illegitimate, and hence, why removing it through punishment is legitimate. We will later look at a theory attempting to supply such a reason, the so-called freeloader theory, which is similar to the profit theory here discussed, though with a horizontal concept of balancing, comparing the burdens of all members of society. The profit theory, on the other hand, entails what we might call a vertical balancing of the offender’s pleasure and pain, correcting her illegitimately high pleasure level back to *status quo ante culpam*. Profiting from crime is thus not wrong merely because it yields an advantage vis-à-vis law-abiding citizens but because the ill-gotten gains of crime are wrong in themselves. This latter claim presupposes the notion that the benefit of crime does not legitimately belong to the criminal. It is gained at the expense of another person’s pleasure. The pleasure of crime is stolen from the victim. All crime is in this sense theft.¹²² The profit of crime is therefore undeserved, or unpaid for if you will, and hence comes with the price of punishment. But how does an act entail “theft” of another person’s pleasure? If, say, two people compete at a game, we could say that pleasure is transferred from the loser to the winner, but this could hardly be called theft, and cannot as a consequence justify punishment of the winner.

¹²² ‘Crime is theft’ is thus the conceptual metaphor structuring this theory of the wrongness of crime. To be more precise, we could say that it is a structural *synecdoche* (substituting a part, theft, for the whole, crime), which is often considered a subcategory of metonymy, which in turn is sometimes considered a subcategory of metaphor.

A theory of legitimate criminalization is required, and the notion of crime as theft cannot supply such a theory, but rather presupposes it.

The same can be said of all three theories of the wrong in crime discussed so far. None of them establish the distinction between legitimate and illegitimate harm, but presuppose it when determining the just reaction to illegitimate harm. If they were supplemented by an external principle of criminalization, for instance Mill's harm principle, they could potentially account for the justice of punishing acts that are thereby defined as crimes. The claim of the profit theory could thus be formulated conditionally: If acts that typically are criminalized in a modern democratic state are perceived as wrong, it is because they entail an illegitimate theft of pleasure from another person, and this is the reason why punishment serves a just function.

In order to evaluate this claim, we must consider whether typical crimes do yield the undeserved profits supposed. For some types of crime, the undeserved profit is a salient feature, as we saw in the examples at the start of the chapter. But the profit theory seems ill suited to account for the wrongfulness of many types of crime. Where is the profit in killing somebody in a bar fight? Does a violent father really benefit from beating his kids? Does a recalcitrant youth gain from showing contempt of court?¹²³

Further, there is the issue of crimes that involve a lower degree of subjective guilt: Can you be said to have profited if you, due to criminal negligence, back your car over your neighbor's foot? There seems to be a difference here from a case where you intentionally hurt your neighbor. In the latter case you would at least get the satisfaction of fulfilling your desire. Perhaps in the non-intentional case you could be said to have benefitted by absolving yourself of the duty to exact proper care when backing your car. But then the profit would occur regardless of whether your neighbor is present or not, in other words, regardless of there being a crime or not. Hence the profit cannot be said to be "stolen"

¹²³ We might say generally that the economic framing is most suitable where it is least metaphorical. When a crime yields an economic profit, it is easy to recognize the wrongness in this undeserved profit. When there is no economic profit, the theory only fits if the profit-metaphor is suitable, which it turns out it is not in many cases.

from the victim. Another explanation of the illegitimacy of the profit would thus be required in order to justify punishment as cancelling profit.¹²⁴

Relatedly, the profit theory is incapable of accounting for the practice of differentiating between degrees of subjective guilt when determining the appropriate amount of punishment. If the profit were the same for an intended act as for an unintended act, as well might happen, the same punishment would be required in order to cancel the profit. This point alone is enough to write off the theory as a justification for current penal practices. A similar divergence from current practices would occur with regard to the objective aspect of crime. Crimes that are commonly deemed more serious, such as assault, might conceivably yield less pleasure than, say, insurance fraud, and would thus require less punishment.

Add to this the problem of determining how much punishment is required in order to cancel the profit of the crime. This problem, however, might conceivably be solved using a version of Goldman's average preference scales. Punishment would then be seen as severe enough to cancel the profit of crime when the average person would be indifferent to her pleasure level *ante culpam* and her pleasure level after experiencing the pleasure of crime minus the displeasure of punishment. However, even if we disregard the obvious problem of the temporal sequence – experiencing pleasure followed by pain cannot unproblematically be assumed to “break even” – the solution is anyhow insufficient. The amount justified by this method would be too little to constitute punishment. Take the example of a person who steals \$ 1,000. Confiscating \$ 1,000 from her would bring her back to *status quo ante culpam* financially. To say that this constitutes punishment would be misleading. The offender would not have suffered a loss. She would merely have been prevented from committing a successful crime, just like a bank robber who is caught on her way out the door. Punishment requires more than prevention of success. But since this theory does not justify anything beyond removing profit, it seems to require that we leave the criminal be after re-establishing her situation *ante culpam*.

In response to this problem a profit theorist might argue that there is more to the profit of theft than mere financial gain. There is the exhilaration of committing the crime. There is

¹²⁴ As we shall see, the freeloader theory attempts exactly such a detachment of the notion of the illegitimacy of criminal profit from the experience of the victim.

the pleasure in doing as one pleases, a gratifying sense of freedom from societal constraints. This profit too requires an equivalent displeasure, in addition to the removal of the financial gain. Presumably, though, this would merely amount to an endpoint at which the criminal is slightly worse off than before the crime, hardly sufficient to constitute what is normally meant by just desert.

I suggest another solution for the profit theorist: She might argue that crime is like an investment; it yields a potential for a profit that you can walk away with, that is, a potential for an unpunished gain. The statistical likelihood of getting a return on the investment is normally quite big, since most crimes go unpunished. This potential gain must also be paid for; otherwise crime would yield an undeserved profit in the long run. The investment, like all investments, must have a price. If, say, there is a 20 % chance of being punished for a crime, one might on average commit four crimes for every time one is punished. The gain of these four crimes would render the set of five crimes profitable if punishment for the fifth crime was only sufficient to cancel *its* profit. In order to ensure that a rational criminal could not outsmart the system and get away with long term profit we would have to multiply the punishment required to cancel each specific crime by the sum total of the ratio of offences to convictions for that type of crime, in this case by five. Crime would be unprofitable when a rational person would not bet against the law, that is, when pleasure *ante culpam* is greater than the pleasure of crime divided by the likelihood of conviction minus punishment (e.g. Crime Type X yields pleasure = 2, divided by 20 %, = 10, which is cancelled by a punishment of 10 units of displeasure). Thus, I suggest, incorporating the price of prospective gains solves the profit theory's problem of justifying punishment beyond that which is required to establish the offender's *status quo ante culpam*.

Of course, applying the theory still presupposes the possibility of determining the profits of different types of crime. Average preference scales could theoretically be helpful for this task, though one would have to assume that people are able to imagine what the pleasure of vandalism and rape is like and compare that to the displeasure of the loneliness and shame of a prison sentence. Anything beyond an approximation cannot realistically be expected. Nevertheless, the economic framing of crime and punishment does have the advantage of rendering the values on each side of the equation commensurable to each other. By abstracting from the details of each type of act, including the details of the

experience of it, and assigning it a value in an economic calculation of pleasure, we achieve a simple equation for justice: Justice after wrongdoing = undeserved pleasure minus equivalent amount of pleasure.

The high abstraction level makes the theory applicable in a wide variety of cases, which can perhaps partly account for the widespread diffusion of the theory. We might also point out that there is a close affinity between the profit theory of punishment and the tendency today of applying market logic beyond the market sphere. The economic framing of non-economic issues seems to be characteristic of today's *Zeitgeist* and is displayed in many areas of society.¹²⁵ Whatever the reason, this much is clear: The theory points out an aspect of crime that most people recognize as wrong whenever present. Witnessing a wrongdoer resume his daily life as if nothing has happened, having enjoyed the fruits of his deeds while somebody else bears the cost, will trigger a sense of injustice in most people. Punishment serves the function of remedying this injustice.

However, the abstraction of crime and punishment into tokens of pleasure and pain, while necessary for the notion of justice as cancelling undeserved profit, is also the cause of problems for the theory. Seeing crime primarily as a source of pleasure suppresses other meanings we attribute to crimes. Symptomatically, the theory cannot properly account for the importance of subjective guilt for understanding the wrong in crimes. Nor can it account for the fact that many crimes do not seem to be characterized by profit at all. Indeed, even when crimes do render an economic or hedonistic profit we can question whether they also render a more profound or "existential" profit. Going back to Plato and Aristotle, we find the notion that crime does not really pay off. Plato argued that "a man who is unjust, is thoroughly miserable"¹²⁶, while the same can be implied from Aristotle's definition of happiness as the "activity of the soul in accordance with virtue"¹²⁷. Morality is thus a resource for one's happiness, a habit that one is lucky to have been taught from an early age. To be a well-functioning, law-abiding member of one's community is thus the truly profitable and enviable position to be in. As we shall see in Part II when looking at statistics on the group of society that commits most crime, Plato and Aristotle's views

¹²⁵ See for instance Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets* (New York: Farrar, Straus and Giroux, 2012)

¹²⁶ Plato, *Gorgias*, ed. John M Cooper, trans. Donald J. Zeyl, *Plato Complete Works* (Indianapolis: Hackett Publishing, 1997), 472 e.

¹²⁷ Aristotle, *Nicomachean Ethics*, 1098a17.

do seem to fit with the overall picture of this group. The criminal group generally shows few signs of profiting in any substantial sense from their crimes. Criminal activity is correlated with low social status, poverty, adverse childhood experiences, chronic illness and other signs of scarcity and deprivation rather than profit. Thus, even when a particular crime has rendered a profit, the overall impression of an offender may be that punishing him is more like kicking somebody who is lying down than like cancelling his undeserved profit.

To conclude, the profit theory is deeply ingrained in our deliberations on justice and is relevant whenever somebody truly has gained from crime. But the theory does not account for salient aspects of many types of crime, and it does not fit well in situations where the offender is generally characterized by a deficit rather than by profit. The theory can therefore at best account for one aspect of why punishment is just and cannot function as a general justification of the practice of punishment in a modern, democratic state.

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We have so far looked at three ways in which the material consequences of crime make it wrong; first, due to the imbalance it creates between victim and offender, second, due to the harm it causes for the victim, and third, due to the pleasure it creates for the offender. We have thus concentrated on the effects of crime upon the parties directly involved in the act. The wrong in crime has been located in the dyadic relationship of victim and offender. We have not yet considered how crime affects third parties, that is, society at large. Crime is also a breach of a norm, and the norm applies to all, and has consequences for all. A full understanding of the wrong in crime must therefore consider its effect on the entire triadic relationship of victim-offender-society. Let us start by looking at the idea that breaking the law is wrong in itself.

6. Breaking the law

Does the law prohibit acts that are wrong, or are acts wrong because they are prohibited by law?¹²⁸ Clearly, the first alternative, that law prohibits wrong acts, is correct. The theories we have discussed so far show but a few ways in which an act can be wrong irrespective of its status as crime. Some criminal acts, however, are not wrong in themselves, *mala in se*. There is nothing inherently wrong in driving on the right in England; it is wrong only because the law says drive on the left. There are, then, some acts that are wrong simply because they are illegal – hence, the second alternative is also correct. But in what sense are these *mala prohibita* crimes wrong? Does the fact that an act is prohibited make it not only legally wrong, but also morally wrong?

If we answer this question affirmatively we will by implication be claiming that there is a (*prima facie* at least) duty to obey the law.¹²⁹ Though this is likely a common assumption among most people, it is philosophically controversial. “Citizens have no moral obligation to obey a law just because it is law”, Moore claims.¹³⁰ M. B. E. Smith similarly asserts, “although those subject to a government often have a *prima facie* obligation to obey particular laws (e.g. when disobedience has seriously untoward consequences or involves an act that is *mala in se*), they have no *prima facie* obligation to obey all its laws”.¹³¹ Smith asks us to consider the following situation:

[L]et us assume that while driving home at two o’clock in the morning I run a stop sign. There is no danger, for I can see clearly that there was no one approaching the intersection, nor is there any impressionable youth nearby to be inspired to a life of crime by my flouting of the traffic code. Finally, we may assume that I nevertheless had no specific *prima facie* obligation to run the stop sign. If, then, my *prima facie* obligation to obey the law is of substantial moral weight, my action must have been a fairly serious instance

¹²⁸ Philosophers and theologians will recognize this as a variation on Plato’s Euthyphro paradox: “Is the pious loved by the gods because it is pious, or is it pious because it is loved by the gods”, Plato, *Euthyphro*, 10a

¹²⁹ I am following M. B. E. Smith’s definition of “*prima facie* obligation” in “Is There a *Prima Facie* Obligation to Obey the Law?”, *The Yale Law Journal* 82, no. 5 (1973), 970: “To say that a person S has a *prima facie* obligation to do an act X is to say that S has a moral reason to do X which is such that, unless he has a reason not to do X that is at least as strong, S’s failure to do X is wrong.”

¹³⁰ Moore, *Placing Blame*, 72.

¹³¹ Smith, “Is There a *Prima Facie* Obligation to Obey the Law?” 950

of wrongdoing. But clearly it was not. If it was wrong at all – and to me this seems dubious – it was at most a mere peccadillo.¹³²

The example shows an act that has no serious untoward consequences nor is mala in se. In such a situation, Smith claims, it can hardly be called wrong to break the law. If the same violation is committed on a busy street, however, it would clearly be different. The act would then put people in great danger, which is wrong regardless of whether it is prohibited. As Moore says: “The moral wrong is thus not so much created by the legislation as it is a result of there being an antecedent moral obligation of all of us to solve co-ordination problems that if unsolved risk harm to all.”¹³³ Driving on the right in England is thus wrong because, given the existing, albeit arbitrary, practice of driving on the left, it would risk harm to many. Upon this view, then, even mala prohibita acts can be explained under the first alternative above, as constituting independent wrongs that law prohibits. In Moore’s words, “the passage of a law prohibiting certain conduct adds nothing to our antecedent moral obligations with respect to that conduct”.¹³⁴

Yet, when considering punishment for a particular act, the fact that the act is prohibited certainly adds something with respect to the justice of the punishment. Even when an act flouts a serious moral obligation of the kind Moore refers to, it is insufficient in a particular case to warrant punishment. An “extra wrong” is required, namely breach of law. H. L. A. Hart brings out this point by considering cases where there are no antecedent moral obligations not to perform certain illegal acts:

[E]ven where the laws themselves are hideously immoral as in Nazi Germany, e.g., forbidding activities (helping the sick or destitute of some racial group) which might be thought morally obligatory, the absence of the principle restricting punishment to the offender would be a further special iniquity; whereas admission of this principle would represent some residual respect for justice though in the administration of morally bad laws.¹³⁵

Though the person hiding Jews from the Gestapo fares morally better than the law-abiding citizen of the Nazi Germany, it would nevertheless constitute an extra injustice if the latter,

¹³² Ibid., 971.

¹³³ Moore, *Placing Blame*, 73. See also H. L. A. Hart, *The Concept of Law* (Oxford: Oxford UP, 2012), 134 on the importance of the coordinating function of law.

¹³⁴ Moore, *Placing Blame*, 72.

¹³⁵ Hart, "Prolegomenon to the Principles of Punishment", 12.

rather than the former, were punished for hiding Jews. The reason, according to Hart, is that “[r]etribution in the Distribution of punishment has a value quite independent of Retribution as Justifying Aim”.¹³⁶ In other words, restricting punishment to those who deserve it according to pre-announced criteria laid down in the law has a value irrespective of whatever other value that punishment may realize. The value at stake here is justice, of course. Punishing only the guilty is just independently of other just functions that punishment may serve, such as cancelling the offender’s ill-gotten gains etc. Hence, (again applying the negative approach to justice), there is an additional injustice to punishing those who have not broken the law.

What may this added injustice consist of, for which the “residual respect for justice” is a remedy? Only those punished according to law can be said to have been duly warned. Only then does punishment appear as “a price justly extracted because the criminal had a fair opportunity beforehand to avoid liability to pay”.¹³⁷ The added injustice of punishing a person who has not broken a law consists of the fact that she, as opposed to the guilty person, was not given the choice to avoid punishment. The possibility of making a choice is a morally relevant difference between them. If this difference were ignored, at the very least, a comparative iniquity between lawbreakers and compliers would occur. A horizontal injustice would arise, because those who have been warned and have chosen to breach the law deserve punishment *more* than those who have not made such a choice.

This desert of punishment that stems solely from the breach of a criminal prohibition is what I earlier called “minimal desert”. Minimal desert is a basic requirement of the rule of law, as expressed in the legal principle *nullum crimen sine culpa, nulla poena sine lege*. Through this requirement, the rule of law protects, in T. M. Scanlon’s words, “the value

¹³⁶ Ibid., 12. In *The Concept of Law*, 161, Hart expresses the distinction between the justice of law and its just application in the following way: “Indeed there is no absurdity in conceding that an unjust law forbidding the access of coloured persons to the parks has been justly administered, in that only persons genuinely guilty of breaking the law were punished under it and then only after a fair trial”. John Rawls refers to the section from which Hart’s quote is drawn when he distinguishes between the concept of justice and conceptions of justice: “Those who hold different conceptions of justice can, then, still agree that institutions are just when no arbitrary distinctions are made between persons” *A Theory of Justice*, 5. Non-arbitrary thus means justly applied in the formal sense that Hart describes.

¹³⁷ Hart, “Prolegomenon to the Principles of Punishment”, 23. In “Postscript”, *The Concept of Law*, 250, Hart similarly notes that “enabling individuals to identify in advance the occasions for coercion, help to justify its use in the sense that it will exclude one moral objection to its use.”

of having a fair opportunity to avoid falling afoul of the law”.¹³⁸ One of the purposes of law is thus understood as safeguarding against the injustice of punishing people who are not given the freedom to choose not to be punished. Indeed, one might argue that this function is so fundamental to the concept of a legal system that without it there would not be a legal system.¹³⁹

This requirement of minimal desert is sometimes applied as a justification for punishment, and then goes by the name “minimalism”, “rule theory” or “negative retributivism”.¹⁴⁰ However, as several have remarked, minimalism cannot possibly function on its own as a justification for punishment, nor is minimal desert sufficient in combination with a utilitarian theory. As I noted above, minimal desert is insufficient to avoid five out of the six mentioned criticisms against a utilitarian penal theory. Unless we are willing to accept potentially wide-ranging changes to current penal practices, such as draconian punishment levels whenever they yield a net social gain, we have to presuppose a richer notion of desert. Desert cannot simply mean qualified or eligible according to a rule. We must presume what I called “moral desert”, where something morally good (i.e. justice) is realized when the guilty are punished.

The following example by Richard W. Burgh will illustrate this point:

Suppose a group of people are taken hostage by terrorists. Each person is told that if he attempts to escape, he will be beaten. Suppose further that no hostages are made any better off than any other hostage. Insofar as the terrorists restrict the beatings to those who attempt an escape, they act fairly with regard to whom they beat. Conversely it would be true to say that each hostage was given a fair opportunity to avoid being beaten. Contrast this with a situation in which the terrorists impose a system of strict liability. Each hostage is told that if he attempts to escape, some other hostage will be beaten. Now, it is, I think clear that the former situation is morally

¹³⁸ Scanlon, "Punishment and the Rule of Law", 170.

¹³⁹ Lon Fuller argues to this effect in *The Morality of Law*. He proposes a procedural natural law theory that distinguishes eight desiderata of a legal system, among which are 1) the existence of laws, which are 2) publicized and 3) prospective, all of which ensure the fair opportunity to avoid breaking the law. “A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all.” Lon Fuller, "The Morality of Law", in *Law and Morality: Readings in Legal Philosophy*, ed. David Dyzenhaus and Arthur Ripstein (Toronto: University of Toronto Press, 2001), 88.

¹⁴⁰ These terms are applied by Cottingham, "Varieties of Retribution", Walker, "Even More Varieties of Retribution", Mackie, "Morality and the Retributive Emotions", who all criticize the notion that this theory can supply a justification for punishment.

preferable to the latter. Yet it is false that in the former situation the beatings are justly extracted.¹⁴¹

If, as in the example, punishment does not serve a just function, the fair distribution of it will not make it just. If we presume at the outset that suffering is bad, it will not become good by bestowing it according to a predetermined rule. As Burgh says: "If people have the right not to be made to suffer, they do not lose this right by being given a fair opportunity to avoid suffering."¹⁴² Hart was right that fair distribution does exhibit a residual respect for justice. But it is a horizontal justice, distinguishing between morally relevant qualities of those partaking in a practice and those who do not. The practice itself is logically prior to the principle of fair distribution that applies to it and cannot therefore be grounded on that principle.

Breaking the law is therefore at most a necessary, but not a sufficient condition for the justice of punishment. Put differently: If punishment does not remedy injustice beyond the potential horizontal injustice that would occur by indiscriminate use of punishment, then punishing a lawbreaker is like beating a rule-breaking hostage. Saint Augustine of the 21st century would probably have put it this way: *What are states without justice but terrorist groups enlarged?*

The examples above, like that of running a stop sign on an empty street at night, show that there are instances when breaking the law is hardly wrong at all. And we can go further: There are instances, even in a well-functioning democracy, where breaking the law is not simply innocuous, but laudable, at least when done in the open, as a protest against an unjust law or ruling. Civil disobedience, many will agree, can under certain circumstances be not only not-wrong, but morally right.¹⁴³

Does this mean that breaking the law is not in itself wrong? Perhaps somewhat surprisingly, the concept of civil disobedience suggests otherwise. Consider the following: We do not always view civil disobedience as right; it is not justifiable *whenever* a law is unjust or whenever a more just result could be achieved by breaking the law. Suppose you believe homelessness is an injustice. Presumably, you could do more to remedy this

¹⁴¹ Richard W. Burgh, "Do the Guilty Deserve Punishment?", *The Journal of Philosophy* 79, no. 4 (1979), 199.

¹⁴² *Ibid.*, 199.

¹⁴³ I will discuss civil disobedience further in the next chapter.

injustice by giving money directly to homeless people or by helping to fund affordable housing for them, than by paying the same amount in taxes. Would you be justified in making such a choice? Or suppose you think the law prohibiting use of marihuana is wrong, because using it does not interfere with the freedom of anybody else. Would you be right to flout this, in your (reasonable) opinion, unjust law?

Arguably not. One reason is provided by what we may call the epistemological objection: You may be mistaken about the injustice of a particular law or about the effect you may achieve by breaching it. Part of the reason for adopting majority rule is to minimize the chance of making mistakes. You can't fool all the people all the time, as they say. By ourselves, however, each one of us is susceptible to a number of biases, of being swayed by undue sympathies, of falling under the spell of a clever demagogue. A certain humility regarding one's ability to determine what is just is therefore called for.

But let's assume that you are quite sure that a particular law is unjust and that your opinion is well-founded. Should you then breach an unjust law? Again, the answer may be no. In Rawls' words: "The injustice of a law is not, in general, a sufficient reason for not adhering to it any more than the legal validity of legislation (as defined by the existing constitution) is a sufficient reason for going along with it."¹⁴⁴

Why is it that the injustice of a law is not a sufficient reason for breaching it, even when doing so promotes a more just alternative? The answer must be that abiding by the law sometimes does have an independent value, and that respecting that value overrides the reasons we have for always maximizing justice in each particular case. The fact that there are certain necessary criteria for the justice of civil disobedience (a discussion of which I will conduct below) goes to show that civil disobedience, in quite a literal sense, is the exception that confirms the rule; or rather, confirms the legitimacy of having rules. Rawls makes the same point, I believe, when he says, "[t]he problem of civil disobedience [...] arises only within a more or less just democratic state for those citizens who recognize and accept the legitimacy of the constitution. The difficulty is one of a conflict of duties".¹⁴⁵

¹⁴⁴ Rawls, *A Theory of Justice*, 308.

¹⁴⁵ *Ibid.*, 319. A similar point is made by John Ladd, "Law and Morality: Internalism vs Externalism", in *Law and Philosophy*, ed. Sydney Hook (New York: New York UP, 1964). This discussion also overlaps with the discussion in Chapter 12, where I consider, among other things, when a society is so unjust that "all bets are off" and the law does not bind anyone.

Those of us who acknowledge that civil disobedience is sometimes right and sometimes wrong, even when the result of abiding by a law is unjust, implicitly recognize that the law itself can be a source of value, and that breaking the law may thus constitute a *malum in se*.

Why it is so – in other words, from where the rightness of law-abidance and the wrongness of law-breaking stems – will be the topic of the next chapters.

7. Undermining the mutual benefits of law

This chapter considers the idea that crime is wrong because it undermines the mutual benefits that are realized through law. The issue is comprehensive, encompassing a range of questions that I will deal with in three sections. In the first section I elaborate some of the valuable social functions that law serves. I have organized these under the headings, *security*, *flourishing*, *solidarity* and *freedom*. The topic is much discussed in legal philosophy and sociology, and, needless to say, I can only briefly consider some of the most important theories on the issue. The discussion of the first section will nevertheless suffice to make clear some of the ways that law attains value, and this enables us to return in the second section to the question I left unanswered above: What is wrong about breaking the law? The answer to that question is partly developed through a discussion of civil disobedience, where the wrong in *undermining legal authority* becomes evident. Finally, the third section, “Punishing for the Common Good”, considers the function of punishment in light of the mutual benefits that are undermined by crime. Specifically, punishment upon this view creates *assurance* that law will be upheld and ensures *moral education* of offenders. I end the chapter by discussing a challenge facing these two retributive functions, namely how to avoid collapsing into utilitarianism. Though both functions can avoid utilitarianism, they nevertheless assume an *instrumental function of punishment*, which means that they cannot provide grounds for considering punishment just in itself.

7.1 The mutual benefits of law

What would life be like without law? Would humans live free, as noble savages uncorrupted by civil society?¹⁴⁶ Or would we live in a constant aggressive state, *homo homini lupus*, where life was “nasty, brutish, and short”?¹⁴⁷ There is a long tradition of

¹⁴⁶ The term “noble savage” has come to denote the ideal type of a primitive, yet good and happy human being. It first appeared in John Dryden’s play “The Conquest of Granada” in 1672:

I am as free as nature first made man,
Ere the base laws of servitude began,
When wild in woods the noble savage ran.

Jean-Jacques Rousseau did not use the term (*bon sauvage*), though his view of man in the state of nature is associated with this idealized character.

¹⁴⁷ Thomas Hobbes, *Leviathan* (Baltimore: Penguin, 1968), 186.

philosophical speculation on this subject, of trying to imagine life in a state of nature, prior to the establishment of a legal order; thought experiments and myths meant to illicit, *via negativa*, the functions of law by imagining their absence. A more empirical approach is also taken: historical research aimed at uncovering the driving forces behind the early development of law, thus displaying the functions of law. A standard historical model of this development, the so-called self-help model¹⁴⁸, describes the stages of development as a gradual curtailment of vengeance and vendettas, culminating in what Max Weber famously coined the state's monopoly on the legitimate use of violence. A motivating factor behind the emergence of the legal order is thus the insecurity and destruction caused by blood feuds and spiraling private vengeance.¹⁴⁹ Incidentally, the same narrative underlies the well-known myth of the establishment of the Athenian homicide courts, as portrayed in Aeschylus' *Oresteia*: Athena tamed the vengeful Furies, transforming them into the kindly Eumenides presiding over criminal trials. Thus, the state tamed the unruly aggression of the state of nature, transforming vengeance into retribution.

7.1.1 Security

Law, accordingly, serves the function of *curtailing violence* and *providing security*. But is law necessary for security? Historical sources cannot answer this question for us but can merely show that law provided security under the given historical circumstances. Could we imagine humans living in peace and security without law, if not in a pre-legal society, then perhaps in a post-legal society? If the answer is yes, then we have yet to find an answer to what is inherently valuable in law.

One possible reply comes from considering certain basic facts about human life. We might argue, as H. L. A. Hart did with his "minimum content of natural law"¹⁵⁰, that given the way we happen to be constituted as humans, law is necessary for our survival. These basic facts are:

¹⁴⁸ James Q. Whitman says of this self-help model: "It remains very nearly unanimously endorsed by the literature of archaic law", James Q. Whitman, "At the Origins of Law and the State: Monopolization of Violence, Mutilation of Bodies, or Fixing of Prices?", *Chicago-Kent Law Review* 71, no. 41 (1996), 43.

¹⁴⁹ Richard Dagger, "Republicanism and the Foundations of Criminal Law", in *The Philosophical Foundations of Criminal Law*, ed. R. A. Duff and Stuart P. Green (Oxford: Oxford UP, 2011), 54.

¹⁵⁰ Hart, *The Concept of Law*, 193-200.

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- i) Human vulnerability (we are easily injured)
 - ii) Approximate equality (even powerful people are defenseless when they sleep)¹⁵¹
 - iii) Limited altruism (making a system of mutual forbearance necessary and possible)
 - iv) Limited resources (requiring the protection of property)
 - v) Limited understanding of strength and will (requiring sanctions)

If we were like shrimp, armored by exoskeletons, laws against battery would perhaps be unnecessary. If we were like plants, capable of self-nurture through thin air, perhaps we would not need property laws. But since we are not like that, and until we eventually evolve such capacities, a legal order with certain minimal features is necessary to ensure our security and future survival. Law is thus inherently valuable for us *as we happen to be – geworfen*, as we are, into *this* particular world.

Even if for no other reason, law thus has value because it is necessary for security. When Rawls says that all constitutional arrangements “would determine social conditions that I judge to be better than anarchy”¹⁵², he is likely right at least in this regard. Even hideous regimes, such as Nazi Germany, provide a minimum of security, say, against being murdered in your sleep by a burglar. But this example also reveals that security is hardly exhaustive of the value of law. What Nazi Germany did not achieve, but which a legal order may contribute to, is our flourishing as human beings.

7.1.2 Flourishing

This understanding of the purpose of law goes back at least to the ancient Greeks. Aristotle claimed that the state may have originated “in the bare needs of life”, but that its continuing existence is “for the sake of a good life”.¹⁵³ The aim toward which the laws ought to be

¹⁵¹ Or as Hobbes put the same point: “Nature hath made men so equall [...] the weakest has strength enough to kill the strongest”, *Leviathan*, 183.

¹⁵² John Rawls, “Legal Obligation and the Duty of Fair Play”, in *Law and Philosophy: A Symposium*, ed. Sydney Hook (New York: New York UP, 1964), 12.

¹⁵³ Aristotle, *Politics*, 1252b29.

directed is “justice, in other words, the common interest”.¹⁵⁴ Similar statements on the link between law and the good of society are offered by legal philosophers today.¹⁵⁵

If the purpose of law is our flourishing, how might law achieve that aim? According to Aristotle, the good for man is a life of virtue. Might the purpose of the law thus be to instill virtue in the people? Although some legal moralists will find this notion attractive, there is quite a bit to be said against it, and it is anyhow a view that cannot be attributed to Aristotle without qualification. First, there is the empirical question of whether and to what degree the law may successfully inculcate virtue. Aristotle himself was skeptical. “We should probably be content”, he says, if we by all the external influences that are supposed to make us good are able to attain a “tincture of excellence”.¹⁵⁶ Some scholars, among them Johs Andenæs, have advocated the so-called *positive general prevention theory*, according to which the criminal law has a general preventive effect not only through deterrence, but by supporting and strengthening moral judgments. However, as Andenæs himself concluded, the empirical basis of this theory is dubious, partly because the vagueness of the theory impedes its assessment¹⁵⁷, and partly due to negative results.¹⁵⁸ A review of the research by Karl F. Schumann concludes, “the criminal law’s influence on common morality is widely exaggerated”.¹⁵⁹

¹⁵⁴ *Ibid.*, 1282b16.

¹⁵⁵ See, for instance, Duff, *Trials and Punishments*, 276: “The law aims to serve the common good – which is the good of rational and autonomous agents.” Therefore, “the obligations which the laws of my community impose on me are aspects of my moral obligation to care for the good of that community”, *ibid.* 93. Nicola Lacey states about criminal law specifically that its “central end [...] will have to do with the very reasons for the existence of the society as such – with the advantages and goods which human beings might reasonably have come to hope and indeed expect to attain through their social interactions in political society.” *State Punishment* (New York: Routledge, 1988), 101. Ekow Yankah, who advocates the kind of “Athenian republicanism” associated with Aristotle, argues that “[b]ecause we are naturally social animals, the function of law is to permit us to flourish in a society as a community” “Crime, Freedom and Civic Bonds: Arthur Ripstein’s Force and Freedom: Kant’s Legal and Political Philosophy”, *Criminal Law and Philosophy* 6, no. 2 (2012), 267. The specific purpose of criminal law, Yankah states elsewhere, is to prohibit acts that “make it impossible for each individual to continue sharing the project of living together.” “Republican Responsibility in Criminal Law”, *Criminal Law and Philosophy* 9, no. 3 (2015), 465.

¹⁵⁶ Aristotle, *Nicomachean Ethics*, 1179b19.

¹⁵⁷ Johs. Andenæs, *Straff, almenprevensjon og kriminalpolitikk* (Oslo: Universitetsforlaget, 1990). See also Markus D. Dubber, “The Promise of German Criminal Law: A Science of Crime and Punishment”, *University of Toronto Faculty of Law* (2004), <https://ssrn.com/abstract=508643>, 22.

¹⁵⁸ Nigel Walker, & Argyle, Michael, “Does the Law Affect Moral Judgements?”, *The British Journal of Criminology* 4 (1964), 570. Andenæs, *Straff, almenprevensjon og kriminalpolitikk*, 117.

¹⁵⁹ Karl F. Schumann, *Positive Generalprävention: Ergebnisse und Chancen der Forschung* (Heidelberg: Forum Rechtswissenschaft, 1989), 51. Translated by me. See also Jørn Jacobsen’s overview in Jørn R. T. Jacobsen, “Diskusjonen om allmennprevensjonen sin faktiske verknad”, *Tidsskrift for Strafferett* 04 (2004).

Second, even if the law did significantly influence our moral judgments, the question remains whether these judgments are correct, and thus conducive to our virtuous living. Andenæs does not presume that they are, and notes that the law may indeed instill immoral values in people, for instance in racist regimes such as that of South Africa during apartheid.¹⁶⁰ Merely acting in accordance with values promoted by law does not suffice, then. The ability to reflect upon the morality of one's actions, what Aristotle calls the intellectual virtue of *phronesis*, is necessary for virtuous living, especially when external influences such as law get it wrong.

Yet, for Aristotle, the aim of law is the common good. How might that be achieved if not by making each one of us good? Though skeptical of the effectiveness of using law to mold good men, he did see a proper function of law in molding good *citizens*. A distinction is thereby made between private virtue and civic virtue, the latter pertaining to one's role as a citizen of the polity. "Hence it is evident that the good citizen need not of necessity possess the excellence which makes a good man."¹⁶¹ To be a good citizen, the only thing that matters is one's relationship with the community, i.e. with others. Private virtues, such as one's temperance, pride, good temper and so on, though essential to a good man, are not required for being a good citizen.

Another way of putting this is to say that as a citizen one's virtue is that of justice: "justice is the only virtue that is regarded as someone else's good".¹⁶² Injustice, accordingly, is a failure to exhibit proper concern for others. To be more precise, injustice is taking more than one's share, i.e. to prioritize oneself at the expense of others, a kind of greed (what the Greeks called *pleonexia*).¹⁶³ Oppositely, civic virtue can be defined as placing the good of the community before one's private needs by displaying a "willingness to respect and support the civic rights and duties that are critical to the continued project of living together as equals"¹⁶⁴. Abiding by law, especially when it would be in one's best interest to defy it, is thus integral to civic virtue.¹⁶⁵

¹⁶⁰ Andenæs, *Straff, almenprevensjon og kriminalpolitikk*, 107.

¹⁶¹ Aristotle, *Politics*, 1276b34.

¹⁶² Aristotle, *The Nicomachean Ethics*, 1130a4.

¹⁶³ *Ibid.*, 1130a20.

¹⁶⁴ Yankah, "Republican Responsibility in Criminal Law", 471.

¹⁶⁵ *Ibid.*, 465. Ekow N Yankah, "Legal Vices and Civic Virtue: Vice Crimes, Republicanism and the

To the extent that the state ought to concern itself with the virtue of its citizens, the primary concern, according to Aristotle, should be civic virtue. “[J]ustice is the bond of men in states.”¹⁶⁶ Relations among citizens should be regulated by that which is relevant for the well-functioning of the polity, for instance when distributing offices:

[I]t is evident that there is good reason why in politics men do not ground their claim to office on every sort of inequality [...] rival claims of candidates for office can only be based on the possession of elements which enter into the composition of the state.¹⁶⁷

Every sort of inequality, and, hence, every sort of virtue, is not relevant in political relations; only “bonds of justice” between citizens are.¹⁶⁸ Civic virtue is appropriately the state’s business because it concerns others; it is a prerequisite for the very existence of the state. Without civic virtue – i.e. the ability to put the concern for others ahead of one’s own needs – society would be impossible. And without society, nobody would flourish either as men or citizens. The *telos* of the state – mutual flourishing of its members – thus necessitates civic virtue and makes it a proper concern in state matters.

But how does civic virtue enable a flourishing society, and how does law enable civic virtue? We have yet to see a detailed answer beyond these rather vague claims about appropriately giving others their due. I will now turn to Emile Durkheim’s theory of *social solidarity*, which has some important features in common with the Aristotelian notion of civic virtue, and which may be useful in this regard.

7.1.3 Solidarity

For Durkheim, as for Aristotle, society is made possible by social bonds between its members. Durkheim calls these bonds solidarity. “Doubtless society cannot exist if its

Corruption of Lawfulness”, *Criminal law and philosophy* 7, no. 1 (2013), 63.

¹⁶⁶ Aristotle, *Politics*, 1253a37.

¹⁶⁷ *Ibid.*, 1238a11-15.

¹⁶⁸ Aristotle’s theory thus emphasizes the need for a space for each to freely develop a virtuous character beyond the reach of the political community. This follows from the same reason that inculcating private virtue through law is ineffective: Virtue requires *phronesis*, which requires a certain autonomy in deliberating on the morality of one’s actions. Aristotle devotes the first five chapters of the second book of his *Politics* to argue against the excessive unity of Plato’s *Republic*, where the autonomy required for personal flourishing would be severely restricted. Without private property, for instance, generosity becomes impossible. Without a private household, likewise for virtues such as temperance, love and friendship. *Politics*, 1261b15-1264b25. For an elaboration of this point, see Yankah, “Legal Vices and Civic Virtue”.

parts are not solidly bound to one another, but solidarity is only one of the conditions for its existence.”¹⁶⁹ Solidarity, in turn, is for Durkheim equivalent to morality: “Man is only a moral being because he lives in society, since morality consists in solidarity with the group, and varies according to that solidarity.”¹⁷⁰ We see here an affinity between this general notion of solidarity as morality and Aristotle’s civic virtue of justice (which he says is complete virtue).¹⁷¹

We may say that what is moral is everything that is a source of solidarity, everything that forces man to take account of other people, to regulate his actions by something other than the promptings of his own egoism, and the more numerous and strong these ties are, the more solid is the morality.¹⁷²

Like Aristotle, Durkheim thus emphasizes as a condition for human society the capacity to look beyond one’s private needs and take account of other people. Durkheim further nuances the concept of solidarity according to its sources in the social conditions of society. More specifically, he distinguishes between two types of social solidarity according to the ways in which labor is divided in society.

Societies in which there is little division of labor, where members tend to have the same occupations and are largely self-sufficient, are characterized by what Durkheim calls *mechanical solidarity*. Members feel solidarity with each other based primarily on the fact that they share many of the same social conditions and beliefs. It is a form of solidarity that stems from the *collective consciousness* of the members.¹⁷³ As we shall see, Durkheim views the function of punishment as upholding this type of solidarity, and therefore claims for punishment a necessary function in preserving society.

When there is much division of labor, social solidarity stems not from the collective consciousness – not, in other words, from the common perception that members are alike in the most important respects – but rather from the *interdependence* which arises due to one’s differences. Durkheim calls this *organic solidarity*, for it is a form of solidarity that results from each member’s dependence on the well-functioning of the whole social

¹⁶⁹ Emile Durkheim, *The Division of Labour in Society* (London: Macmillan, 1984), 332.

¹⁷⁰ *Ibid.*, 331.

¹⁷¹ Aristotle, *The Nicomachean Ethics*, 1129b26. Note, however, the above-mentioned point that for Aristotle morality consists in more than civic bonds of justice, i.e. more than Durkheimian solidarity.

¹⁷² Durkheim, *The Division of Labour in Society*, 331.

¹⁷³ *Ibid.*, 64: “[I]t can be seen that a social solidarity exists which arises because a certain number of states of consciousness are common to all members of the same society.”

organism. A blacksmith, for instance, is not self-sufficient, but depends on farmers, doctors, insurance agents and so on for her survival and flourishing. She depends more on others than does a hunter-gatherer who provides most or all of life's necessities for herself and her family. Ironically, the freedom to choose one's way of life comes at the price of greater dependence upon others.

As societies become more advanced, i.e. with a higher degree of division of labor, the solidarity which binds its members together takes a more organic form, though no society manifests either form of solidarity completely.¹⁷⁴ Even in highly diverse modern societies there is, when these are well-functioning, a sense of solidarity due to the perception of similarities rather than difference: a collective consciousness which manifests itself in traditions, historical knowledge and rituals such as national holidays, ceremonies – and trials and punishment. Criminal law is a manifestation of this mechanical solidarity, as it demarcates that which is opposed to our shared norms, thereby providing, *via negativa*, an elucidation of these norms. Crime defines the outside, so to speak, which is necessary for the existence of an “inside” of society. Hence, Durkheim famously claimed, crime is an inevitable feature of any healthy society.¹⁷⁵

However, when a society is bound together organically, through differences rather than similarities, law also manifests and supports this form of solidarity.¹⁷⁶ Contract, tort law, property rights etc. create the conditions for people to pursue their individual projects in ways that contribute to the social organism on which all depend. Take a few examples: Without a legal regulation of copyright, composers, writers and inventors could not make a living from the reproduction of their works. Without legal enforcement of contracts, most business transactions would be risky, if not impossible. Without a system of licensing, dentists would not retain the exclusive right to perform dentistry. Law thus regulates the

¹⁷⁴ Within a society, too, there are smaller “societies”, in the sense of long-term associations, such as golf clubs or philosophy departments, to which the Durkheimian forms of solidarity can be applied, cf. Randal Collins, “The Durkheimian Tradition in Conflict Sociology”, in *Durkheimian Sociology: Cultural Studies*, ed. Jeffrey C. Alexander (Cambridge: Cambridge UP, 1988), 109.

¹⁷⁵ Emile Durkheim, *The Rules of Sociological Method* (New York: The Free Press, 1982), 63.

¹⁷⁶ Durkheim distinguishes between *repressive law* of mechanical solidarity and *restitutive law* of organic solidarity. Restitutive law is characterized by the way it sanctions breaches of law: by reparations rather than by punishment. Durkheim, *The Division of Labour in Society*, 68.

division of labor, thereby sustaining the interdependence on which organic solidarity is based.

While Aristotle's distinction between private and civic virtue serves to mark an autonomous sphere beyond the reach of law, it is with Durkheim's organic solidarity that we now observe the positive function that law must have in creating the conditions for individual freedom. We see, then, that there are essentially two ways in which law promotes freedom: By enabling *interdependence* and by enabling *independence*. The first by creating the conditions for mutual cooperation necessary for each individual to realize her projects; the second by creating an autonomous sphere beyond intrusion by others.

7.1.4 Freedom

How are we to understand this latter form of freedom? At the start of this section I noted the indispensable role of law in protecting our security, without which life would be nasty, brutish and short. "Liberty", Hobbes wrote, is "the absence of externall Impediments"¹⁷⁷. With this understanding of freedom, which has become the hallmark of the liberal tradition in political philosophy, it is easy to see that law, by protecting our security, protects our freedom from external impediments. On the other hand, if freedom simply means non-interference, law must also limit our freedom. Criminalizing a certain conduct creates an external impediment to our choice of that conduct. Law thus diminishes the sphere in which we retain an absence of external impediments. This point is illustrated by Hobbes in the following passage:

There is written on the Turrets of the city of Luca in great characters at this day, the word LIBERTAS; yet no man can thence inferre, that a particular man has more Libertie, or Immunitie from the service of the Commonwealth there, than in *Constantinople*. Whether a Commonwealth be Monarchicall, or Popular, the Freedome is still the same.¹⁷⁸

Hobbes is right that freedom is still the same if freedom means non-interference, for laws interfere with our choices in a democratic republic as well as in an absolute monarchy. But

¹⁷⁷ Hobbes, *Leviathan*, 189.

¹⁷⁸ *Ibid.*, 266.

on a different understanding of freedom, there is a significant difference between the laws of a tyranny and the laws of a republic.

Specifically, the republican theory sees freedom not as absence of interference, but as absence of dominion. The concept of dominion hails back to the theory's roots in the Roman republic and the distinction between *dominus* (master) and *servus* (slave).¹⁷⁹ In contrast to a slave, a free citizen, a *liber*, was a man over whom nobody held dominion, meaning power to treat as one's own property and to interfere with at will. A free citizen might experience many external impediments to the pursuit of his projects. Conversely, a slave, if she was lucky, might have a benevolent master who let her pursue her projects without interference. The distinction between *liber* and *servus* could therefore not be made by reference to the actual absence or presence of interferences in their choices. Like a horse that is given free rein and can go wherever it wants, a slave may happen to enjoy non-interference from her master. But just like the rider can pull the reins at any time and steer the horse at his pleasure, so the master can rein in his slave if he has a change of mind.¹⁸⁰ It is this possibility that makes even the lucky slave unfree.

Freedom, upon the republican view, requires that nobody holds dominating power over you, regardless of whether that power is actually exercised or not. And this is where law comes in. Only if protected by law can the citizen be assured of her freedom as non-domination. In his book *Republicanism*, Philip Pettit quotes Hobbes' contemporary James Harrington, who in his reply to the quoted passage in the *Leviathan* makes just this point:

For to say that a Lucchese hath no more liberty or immunity *from* the laws of Lucca than a Turk hath from those of Constantinople, and to say that a Luchese hath no more liberty or immunity *by* the laws of Lucca than a Turk hath by those of Constantinople, are pretty different speeches.¹⁸¹

Freedom *by* law means that law protects from arbitrary power. Arbitrary power may come in the form of one person's *dominium* over another, as we have just seen. And arbitrary power can also be wielded by the state over its citizens, in which case it is termed

¹⁷⁹ The theory is for this reason sometimes called "Roman" or "New-Roman" republicanism.

¹⁸⁰ Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (New York: W. W. Norton, 2014), 1.

¹⁸¹ Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997), 38.

imperium. Guarding against *imperium* means on the one hand granting freedom *from* law, by according each a personal sphere beyond public reach. And on the other hand, it means that power over citizens must be exercised in a non-arbitrary way, that is, *by* law. As the republican slogan demands: There must be an *empire of laws, not of men*.

This ideal, in turn, puts constraints on the creation and application of laws, as well as on their content. The division of power is an essential tenet of republicanism, precisely to avoid the arbitrary empire of men. Popular contestation of state power is another essential feature of republicanism, again because arbitrary power must be curtailed. Finally, regarding the content of laws, the ideal of freedom as non-domination is more demanding in terms of social justice than the liberal ideal of non-interference. Non-domination requires that there be a public “safety net” preventing poverty, exploitation on the labor market, lack of health care, gender inequality, etc., all of which would otherwise result in dependence on the arbitrary goodwill of others. Freedom is thus a “gateway good”, opening the door, so to speak, to other social goods.¹⁸² “Justice is freedom, freedom justice”¹⁸³, Pettit argues – a claim that will find resonance in my discussion of the philosophies of Kant and Hegel in Chapter 9.

7.2 The wrong in undermining law

We have now seen some of the ways that law serves a valuable social function. Let us return, then, to the question of whether breaking the law is morally, and not merely legally wrong in itself. Presumably, if law is valuable for at least one of the reasons outlined above, each of us ought, all things equal, to uphold law. And if we ought to uphold law, as a consequence, breaking the law is *prima facie* wrong. Yet, as we have seen, several philosophers deny this, and have offered some rather convincing examples to support their views. Why is it wrong, they ask, to run a stop sign in the dead of night with nobody in sight? Why is it wrong to smoke home-grown marihuana if nobody knows and nobody is harmed? One answer might be that you can never be one hundred percent sure that you have assessed the situation correctly. Perhaps there is a pedestrian hidden in the dark, ready

¹⁸² *Ibid.*, 49. Pettit, *Just Freedom*, xiv. According to Pettit, it was non-domination’s implications for social justice that motivated the shift to the less ambitious, and therefore less radical, ideal of non-interference when access to freedom was demanded by ever-increasing groups of society in the 18th and 19th century.

¹⁸³ Pettit, *Just Freedom*, xvii.

to step into the road in front of your car. We ought to follow the law for the simple reason that much harm would be avoided if people did not take it upon themselves to assess the risks and benefits of each situation anew. Valid as this point may be, it still seems somewhat exaggerated to say of someone that she committed a wrong if she ran a stop sign on a deserted street without causing any harm.

But let us suppose now that she was caught on surveillance camera and then fined for her violation. Though we are hard pressed to say what was wrong about running the stop sign, it would anyhow be wrong of her to refuse to pay the fine. The reason is that the latter wrong clearly undermines *the authority of law* itself, and thus challenges more directly the above-mentioned values stemming from law.

Edmundson brings out this point by distinguishing between *background* and *foreground* (in)justice. Individual conflicts of justice usually occur against a background of pre-determined legal rights and pre-established procedures for adjudicating conflicts. "What is mine and what is thine are sometimes natural facts, but are more usually institutional ones."¹⁸⁴ Stealing a car, for instance, presupposes the institution of property and its application to cars (accordingly, you cannot steal somebody's air, since, under normal circumstances, ownership does not apply to air). The legitimacy of foreground justice (i.e. the justice of individual cases) usually depends on the legitimacy or justice of its background justice.¹⁸⁵ What grounds the legitimacy or background justice of the legal order is obviously much debated. I will be content, for now, to say that the *values* obtained by the legal order (such as the ones mentioned in the section above), and certain *constraints* upon the achievement of these values (such as the universal and equal application of law) form the background justice of the legal order. While individual conflicts are usually about foreground (in)justice, some acts challenge directly the background justice of the legal order itself.

There is an almost palpable difference between ignoring a traffic law or traffic sign, on the one hand, and ignoring a traffic ticket or traffic cop, on the other. What is called in question in the latter instances is not, what was

¹⁸⁴ William A. Edmundson, "The Virtue of Law-Abidance", *Philosopher's Imprint* 6, no. 4 (2006), 16.

¹⁸⁵ The exception being matters of natural or innate rights that presumably are just or unjust irrespective of the background justice of any legal order. I will return to this possibility in the discussion of Kant in Chapter 9 and his postulate of an innate right to freedom that applies even in a state of nature.

it safe to do in the circumstances, but the very legitimacy of a system assigning a special moral role to officials.¹⁸⁶

Running a stop sign with nobody around does not create foreground injustice (at most a mere peccadillo). Refusing to pay the fine, however, is wrong because it negates the background justice pertaining to law enforcement in general and traffic law in particular. Viewed in isolation, then, the offense does not merit punishment, but refusing punishment may nevertheless be unjust.

Socrates famously reasoned accordingly when Crito visited him in prison and tried to convince him to escape before his execution. Though Socrates believed that he had been wrongly convicted, he nevertheless claimed it would be wrong to undermine the authority of the legal system by escaping. In a memorable use of the rhetorical figure *prosopopeia*, Plato lets the laws make the point for themselves:

Tell me, Socrates, what are you intending to do? Do you not by this action you are attempting intend to destroy us, the laws, and indeed the whole city, as far as you are concerned? Or do you think it possible for a city not to be destroyed if the verdicts of its courts have no force but are nullified and set at naught by private individuals?¹⁸⁷

Even though it was “the laws” that perpetrated the injustice against Socrates, it would nevertheless constitute a bigger injustice if those same laws lost their force. Recall Rawls’ point that having any constitution is better than anarchy, because, he says, “[u]p to a certain point it is better that the law and its interpretation be settled than that it be settled rightly”.¹⁸⁸ Put differently: The fallibility of law in creating foreground justice in a particular case does not negate the background justice of the legal system.

But what if law fails systematically in creating foreground justice in certain cases, for instance by showing insufficient regard for the interests of racial minorities or future generations and their environment? Would a refusal to comply with such law be unjust? Not necessarily. In such cases, civil disobedience may be justified. By distinguishing between justified civil disobedience and ordinary crime, it shall become clearer why and

¹⁸⁶ Edmundson, “The Virtue of Law-Abidance”, 16.

¹⁸⁷ Plato, *Crito*, 50 a.

¹⁸⁸ Rawls, *A Theory of Justice*, 341.

when it is wrong to break the law.

7.2.1 Civil disobedience

Civil disobedience is, according to Rawls' widely accepted definition, "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government".¹⁸⁹ If civil disobedience is to be legitimate, certain criteria must be met, pertaining both to the injustice toward which it is a response, and to the way in which it is conducted. There must be a "substantial and clear injustice" against which civil disobedience is a last resort, meaning that lawful ways of overturning policy have been exhausted.¹⁹⁰

On the one hand, this criterion specifies that civil disobedience must address an injustice; it does not suffice that the protested law has bad consequences.¹⁹¹ On the other hand, the injustice must be "substantial and clear". An unjust tax system does not normally justify a refusal to pay taxes. If, however, the tax code is unduly biased against a permanent minority, such a systematic injustice might conceivably be substantial and clear enough to justify disobedience.¹⁹² All authority is fallible; injustice is therefore inevitable. However, we owe a duty to uphold the authority of law only if "in the long run the burden of injustice should be more or less evenly distributed over different groups in society, and the hardship

¹⁸⁹ Ibid., 320.

¹⁹⁰ Ibid., 326-327.

¹⁹¹ Rawls, "Legal Obligation and the Duty of Fair Play"13: "Our obligation to obey the law [...] cannot be overridden by an appeal to utility, though it may be overridden by another duty of justice." In *A Theory of Justice*, 326, Rawls specifies that civil disobedience presumably ought to be restricted to "serious infringements of the first principle of justice, the principle of equal liberty, and to blatant violations of the second part of the second principle, the principle of fair equality of opportunity". What are we then to make of one of the most common displays of civil disobedience, environmental protests against oil pipelines, dumping of toxic waste, etc.? On the one hand, if framed as a matter of good and bad consequences – say, of biodiversity versus creating jobs – such an issue ought not be resolved using civil disobedience. On the other hand, if framed as a matter of rights, say, of the right of future generations to a sufficiently healthy environment, presumably civil disobedience might be legitimate according to Rawls' criterion.

¹⁹² The example of unjust tax laws is Rawls' own, and he writes that unless they are "clearly designed to attack or to abridge a basic equal liberty, they should not normally be protested by civil disobedience", *A Theory of Justice*, 327. Incidentally, one of the most famous examples of civil disobedience is Henry David Thoreau's refusal to pay taxes in protest of the Mexican-American War and against slavery. Thoreau defended his actions in his now classic essay "Civil Disobedience", originally published as "Resistance to Civil Government" in 1849, in which the term "civil disobedience" is coined. Henry David Thoreau, *Civil Disobedience and Other Essays* (New York: Dover Publications, 1993).

of unjust policies should not weigh too heavily in any particular case”.¹⁹³

Applying the concepts of background and foreground justice, we might say that long-term, systematic discrimination implies not only a failure to create foreground justice, but a failure to provide background justice. As such, it is a failure of the legal order to fulfill the functions that give it legitimacy. Protesting this failure by civil disobedience is a way of holding law to the standard on which its legitimacy rests. Civil disobedience thus “expresses disobedience to law within the limits of fidelity to law, although it is at the outer edge thereof”.¹⁹⁴

Certain constraints upon the way in which civil disobedience is conducted must be met if it is to express loyalty to background justice.¹⁹⁵ Many hold that *non-violence* is a necessary feature of civil disobedience, thereby expressing one’s loyalty to peaceful conflict resolution and the state’s monopoly on violence. *Publicity* is another requirement. Thus, Gandhi proclaimed when he was brought before a British judge in Ahmedabad in 1922: “I am here [...] to invite and cheerfully submit to the highest penalty that can be inflicted upon me for what in law is a deliberate crime and what appears to me to be the highest duty of a citizen.”¹⁹⁶ Finally, *conscientiousness* is a necessary feature of legitimate civil disobedience, as is also conveyed in Gandhi’s quote. The dissenter must be motivated by and express a sincere concern about the injustice of the practice she is protesting. She must be driven not by self-interest, but by earnest moral conviction.

The latter requirement is likely the most striking feature distinguishing a civil disobedient from a typical criminal. The conscientious objector responds to what she considers an injustice; the criminal, on the other hand, exempts herself from the demands of justice. As we shall see in more detail in Chapter 9, the notion of exemption from what applies universally is a defining feature of crime according to Kant and Hegel. Crime, Hegel says, is a negation of the universal, an opposition between the particular will and abstract

¹⁹³ Rawls, *A Theory of Justice*, 312.

¹⁹⁴ *Ibid.*, 322.

¹⁹⁵ An overview of the common criteria of civil disobedience is found in Kimberley Brownlee, “Civil Disobedience”, *The Stanford Encyclopedia of Philosophy* (2016), <https://plato.stanford.edu/archives/win2016/entries/civil-disobedience>

¹⁹⁶ Quoted in Milton R. Konvitz, “Civil Disobedience and the Duty of Fair Play”, in *Law and Philosophy: A Symposium*, ed. Sydney Hook (New York: New York UP, 1964), 25.

right.¹⁹⁷ Civil disobedience, on the other hand, does not merit being called a negation of the universal. On the contrary, the motive behind legitimate civil disobedience is for law to properly exhibit its universality by refraining from arbitrary discrimination. When Rosa Parks took a seat at the front of the bus it was not merely for her own convenience; it was an appeal for law to apply universally, that is, equally for all, regardless of skin-color.

In his discussion of the Greek tragedies in his lectures on *Aesthetics*, Hegel indirectly supports this distinction between crime and civil disobedience. What characterizes the tragedy, he says, is that the characters hold opposing claims that collide, but where both claims are justified.¹⁹⁸ The best example of this, Hegel says, is in Sophocles' *Antigone*, where "the public law of the state is set in conflict over against inner family love and duty to a brother; the woman, Antigone, has the family interest as her 'pathos', Creon, the man, has the welfare of the community as his".¹⁹⁹ Antigone, in what is essentially an act of civil disobedience, buries her brother Polynices in defiance of the order of Creon, king of Thebes, who considered Polynices an enemy of the state. Hegel's point is that both the right to honor one's dead and the right to protect the state are justified. But taken by themselves they are one-sided, representing only parts of justice. The tragedy of the situation is that one side of justice cannot persist without negating the other, that is, without creating injustice.²⁰⁰

In civil disobedience, too, we might say that there are two opposing, but justified claims. A dissenter may rightly be challenging a legal injustice. But by doing so, she undermines the authority of law and, in democracies, undermines majority rule. In societies where laws legitimately command authority, civil disobedience thereby creates injustice as well.²⁰¹

¹⁹⁷ Hegel, *Philosophy of Right*, § 15 Addition, § 81, § 82, § 95.

¹⁹⁸ G. W. F. Hegel, *Aesthetics: Lectures on Fine Art*, vol. 2 (Oxford: Clarendon Press, 1975), 1212: "In Greek tragedy, [...] the occasion for collisions is produced by the moral justification of a specific act, and not at all by an evil will, a crime".

¹⁹⁹ *Ibid.*, 464.

²⁰⁰ The cathartic resolution in the Greek tragedies, Hegel says, required that both one-sided claims of justice perish, as when Antigone is killed and Creon in consequence suffers the suicide of his son, Antigone's fiancé, and in turn his wife. The whole of justice is thus vindicated by denying the sufficiency of its single aspects. Or as Hegel explains it, there is a "sense of reconciliation which the tragedy affords by the glimpse of eternal justice", *ibid.*, 1198.

²⁰¹ Cf. the above-mentioned point made by Rawls that "[t]he problem of civil disobedience [...] arises only within a more or less just democratic state for those citizens who recognize and accept the legitimacy of the constitution. The difficulty is one of a conflict of duties." *A Theory of Justice*, 319. Ronald Dworkin, "On Not Prosecuting Civil Disobedience", *The New York Review of Books* 10, no. 11 (1968), discusses more concretely how the courts ought to deal with these types of cases.

This is the tragedy of civil disobedience. One side cannot triumph without creating injustice. If the dissenter is acquitted, the justice of majority rule is negated. If she is punished, it is without having committed a wrong, in the sense that there is no opposition between her particular will and the universality of law. Punishing her thus wrongly justifies the lack of universality of law by treating the act as if it were a mere expression of her particular will.

Having thus distinguished between civil disobedience and regular crime, I conclude that breaking the law *can* be wrong in itself. This means that even when an act does not violate any independent moral norms – e.g. it does not cause harm and does not put anybody at risk – it may violate the moral norm that commands obedience to reasonably just laws. Hegel’s theory, which I shall discuss in more detail in Chapter 9, makes explicit *when* it is that breaking the law is morally wrong in itself: It is wrong when there is an opposition between the lawbreaker’s particular will and the universality of legitimate legal authority.²⁰² That is not always the case with civil disobedience, as the examples of Gandhi and Rosa Parks showed. The hard cases are the ones where the background justice of the legal system commands obedience, but where the foreground injustice of a matter is grave enough to imply that law is not universally valid in the case. I will return to this issue in Chapter 12, where I shall claim that similar hard cases arise in states that are so socially unjust that they do not retain the moral standing to punish some offenders, even when the offender does not, unlike the civil disobedient, reveal morally laudable motives.

7.3 Punishing for the common good

I have so far in this chapter discussed the mutual benefits of law and the injustice of undermining the legal authority that provides these benefits. The question now is whether punishment can serve to remedy this injustice.

“[T]he community as a collective concept, is entitled to take such steps as are necessary to ensure its own continued existence and development”, Lacey states. Although the criminal law only represents a “small part of such a strategy”, she says, it is “logically entailed by a commitment to the value of community”.²⁰³ The implication is that punishment is not

²⁰² This is still rather vague, but Hegel’s theory affords us with more concrete criteria, see Chapter 9.

²⁰³ Lacey, *State Punishment*, 177.

merely a response to individual wrongs (foreground injustice if you will). Punishment is an answer to threats against collective interests. “[I]t is the attack upon society that is repressed by punishment”, Durkheim says. “[S]ociety [...] is harmed even when the harm done is to individuals.”²⁰⁴ How, then, can punishment defend and uphold these collective interests? How does punishment serve *the common good*? I will consider two main answers to this question.

The first and most obvious way that punishment serves a socially beneficial function is by providing *assurance* to all that breach of law will be sanctioned. Punishment thereby creates trust in mutual adherence to law. And without trust in the compliance of others, contract and other forms of cooperation would be all but impossible. The notion is familiar from the game of “Prisoner’s Dilemma”: Each person is (presumably) better off by breaking the law, but all benefit more if all comply, hence the need for mechanisms to ensure compliance.

The second and more controversial social function of punishment that I will consider is achieved by inculcating the proper moral and legal norms in the offender. Proponents of the so-called moral education theory assume that punishment may have the effect of ‘teaching a lesson’ to the criminal. Jean Hampton supported such a theory, which she explained with the following analogy:

Punishments are like electric fences. At the very least they teach a person, via pain, that there is a ‘barrier’ to the action she wants to do, and so, at the very least, they aim to deter. But because punishment ‘fences’ are moral boundaries, the pain which these ‘fences’ administer (or threaten to administer) conveys a larger message to beings who are able to reflect on the reasons for these barriers’ existence: they convey that there is a barrier to these actions because they are morally wrong.²⁰⁵

Moral education, then, is not (just) a matter of deterrence. It sees punishment as a way of communicating to the criminal the wrongness of her act and hopefully bringing her to want to do what is right. Robert Nozick describes it as an attempt to “re-link” the criminal with

²⁰⁴ Durkheim, *The Division of Labour in Society*, 48.

²⁰⁵ Jean Hampton, “The Moral Education Theory of Punishment”, *Philosophy & Public Affairs* (1984), 212. Hampton later expanded her theory of punishment, as we shall see Chapter 9, but she stressed that she retained the view that the moral education theory is part of the justification for punishment.

correct values. A criminal, he says, is someone who has chosen not to let value have causal effect upon her choices; she has flouted the values which she ought to have respected. "Correct values are without causal powers. Criminals choose not to give them effect. Therefore others must give them effect on him through punishment."²⁰⁶ His theory, he says, rests on three simple premises: 1) the existence of values 2) that they can be linked with, and 3) that it is valuable to link with them. The latter premise can also be taken to mean that it is valuable for the person who is punished. This notion goes back at least to Plato, who suggested that the criminal harms herself by committing injustices, leaving scars on her soul. Since doing wrong is bad for the wrongdoer, learning a moral lesson that would prevent her from doing wrong is by implication good for her.²⁰⁷ As Herbert Morris put it, "remorse implies comprehension of evil caused. A person's blindness about such matters [...] is that person's loss".²⁰⁸ Moral education through punishment accordingly means *opening the eyes* of the criminal to the wrong she has done and letting her see how she ought to behave in the future.

Of course, not all share the implicit Socratic faith in the causal relationship between right knowledge and right action. Recidivism rates well above 50 % in most countries certainly do not give reason for optimism in this regard. Many have pointed out that prisons tend to be more like crime schools than penitentiaries, in the literal sense of the word. As Oscar Wilde wrote:

The vilest deeds like poison weeds
 Bloom well in prison-air.
 It is only what is good in Man
 That wastes and withers there.²⁰⁹

A further critique can be raised against the moral education theory for implicitly focusing on the criminal's character, in opposition to liberal dogma, whereby the state's legitimate interest is limited to external action. The difference is one of fitting punishment to the criminal's need of reform versus fitting punishment to criminal deeds. The same criticism can be brought against the function of creating assurance. In general, when the purpose of

²⁰⁶ Nozick, *Philosophical Explanations*, 375.

²⁰⁷ Plato, *Gorgias*, 524d-525b. See also my discussion of Plato's claim in Chapter 5.

²⁰⁸ Morris, "A Paternalistic Theory of Punishment" 265.

²⁰⁹ Oscar Wilde, *Ballad of Reading Gaol* (New York: Start Classics, 2014). Wilde wrote the poem after experiencing prison life first-hand, serving two years in Reading for "homosexual offences", 1895-1897.

punishment is to protect the common good that stems from mutual adherence to law, criminals are easily viewed in terms of their *dangerousness* from which they ought to be cured or against which we ought to be protected.

The premise is the following: Criminals display in their willingness to commit crimes an anti-social disposition. Society has a legitimate interest in this disposition because it is this disposition that puts society at risk of being harmed again. Put differently: If you accept as the purpose of punishment the protection of the mutual benefits of law, it makes sense to distribute punishment according to how it may attain that purpose. Since character traits reveal (at least to some degree) one's likelihood of committing a crime, punishment ought to be distributed according to how it may either morally educate or protect against people with these character traits.²¹⁰

Some features of modern criminal law seem to fit particularly well with this notion that punishment ultimately serves to protect the common good. Indeed, the theory can better explain some common practices than rivaling retributive theories whereby punishment serves to remedy isolated criminal deeds. This applies, for instance, to the practice of the so-called retributivist premium.²¹¹ Why should the tenth robbery be considered worse than the first? From the perspective of protecting mutual benefits of law, the recidivist can be said to have displayed a deeper commitment to undermining law. "The recidivist demonstrates greater disdain for the project of law itself", Yankah writes. "[R]epeatedly ignoring the law or, worse yet, unjustified attempts to undermine the law where it in fact pursues the common good, represents hostility to our joined civic project and its more

²¹⁰ The purpose of punishing for the common good might thus suggest adopting a Humean theory of blameworthiness as distributing principle for punishment. Lacey calls it 'The Character Conception of Responsibility', for according to Hume "actions render a person criminal, merely as they are proofs of criminal passions or principles in the mind". David Hume, *A Treatise of Human Nature* vol. 1 (Oxford: Clarendon Press, 2011), 264. This stands in contrast to what Lacey calls 'The Capacity Conception', whereby criminal responsibility requires that the criminal had a genuine capacity to choose to do otherwise. I will not here go further into the discussion of these conceptions of responsibility, though the points I mention in the main text regarding responsibility for one's character are relevant. See more generally Lacey, *State Punishment* and also Michael D. Bayles, "Character, Purpose, and Criminal Responsibility", *Law and Philosophy* 1, no. 1 (1982).

²¹¹ See, for instance, the discussion of the recidivist premium in Michael Tonry, "Fairness, Equality, Proportionality, and Parsimony: Towards a Comprehensive Jurisprudence of Just Punishment", *Minnesota Legal Studies Research Paper* 17, no. 4 (2017). Tonry concludes that the recidivist premium is morally unjustifiable.

forceful repudiation is warranted.”²¹² In Nozick’s terms, the recidivist has not only displayed a disposition to flout correct values repeatedly; she has flouted the value of punishment itself, that is, the value of re-linking with value, which therefore calls for greater efforts to give value a causal force in the recidivist’s life.²¹³

Another example is increased punishment for hate crimes compared to similar acts with different motives.²¹⁴ Why should it matter whether somebody attacks another because the person is Jewish or simply because she does not like him? Why is it a hate crime if it is done because the victim is Muslim, but not because he is, say, a chess player or a computer scientist? Again, the difference can be explained in terms of the criminal’s disposition to undermine collective values protected by law. While hate crimes against ethnic and religious minorities is a real threat to the possibility of living peacefully together as equals, there is to my knowledge no society in which the equal status and protection of chess players or computer scientists are threatened. One person’s hate of the latter groups is not relevantly different from another person’s hate of his neighbor or colleague. Hate against minorities is different, however, when viewed from the perspective of society as a whole. Such hate reveals a threat to the flourishing of all in *this* society *today*, because discrimination against these minorities do actually occur. That does not mean, of course, that we can exclude the possibility of a future society in which it is computer scientists who are in special need of the protection of law.

Though the examples show that the theory of punishing for the common good may provide a good explanation of some common criminal law practices, a more fundamental criticism can be raised about its implications for moral responsibility: If punishment is determined not only on the basis of the deeds a person has committed, but on the extent to which the deeds display an anti-social character, the person is partly punished for who he *is* rather than what he has *done*. This could ultimately suggest that this retributive theory will have trouble accounting for the *act requirement* of criminal liability. For if we take crime as proof of criminal passions (i.e. what he is), then we could imagine a situation where we do not need more proof: We already know that the person has a criminal disposition, so why

²¹² Yankah, "Republican Responsibility in Criminal Law" 470.

²¹³ Nozick, *Philosophical Explanations*, 393.

²¹⁴ See discussion in Yankah, "Republican Responsibility in Criminal Law", 470.

not incarcerate him *before* he commits any crimes?

One reply might take as its starting point the mentioned distinction between private and civic virtue. For on a republican view, the state takes a legitimate interest in civic virtue only, that is, virtue that concern others. You may, in other words, think whatever and be as immoral as you wish; your virtuous or vicious character is only relevant to others if it results in action. Hence, only if you actually commit a crime do you display the relevant lack of virtue. A similar answer might be made from a moral education standpoint. In Nozick's terms, punishing is re-linking with value, which presupposes, he says, that a person is *anti-linked* with value, and not merely *unlinked*.²¹⁵ We are all unlinked with value every time we sleep, Nozick remarks. But only if we act so as to flout value are we anti-linked, and only then can punishment re-link us with value. In short, only if we have committed a moral wrong is there a moral lesson to be taught by punishment.

However, even if the theory can thereby succeed in properly accounting for the act requirement, there still remains the troubling notion that it entails that a criminal offender is held responsible for who she happens to be. What if she has become who she is because of an earlier character defect? For instance, she turned to criminal activities when she made the choice to drop out of school, which in turn was a result of her lack of work ethic, which in turn came from not experiencing the rewards of mastering her schoolwork early on, and so on ad infinitum. Is she then responsible for how she became?

Yes, Nozick says, because even if she is not responsible for the chain of character defects that resulted in her current character, she is nevertheless responsible for letting the character defect persist.²¹⁶ This way of reasoning goes back to Aristotle, who likewise claimed that virtuous and vicious actions reflect one's virtuous or vicious character, and one's character, in turn, is the result of habits one has acquired through previous actions. But these actions are the result of choice, meaning that they are not merely voluntary in the sense that they are not forced or due to ignorance; they are the result of deliberation. In order to become virtuous, it is not sufficient that we develop virtuous habits merely voluntarily; we must deliberate upon our choices, thereby developing the earlier-mentioned intellectual virtue of *phronesis* or prudence. A vicious person is one who has

²¹⁵ Nozick, *Philosophical Explanations*, 382.

²¹⁶ *Ibid.*, 396.

failed to develop a virtuous character by failing to make deliberate choices that gradually become good habits. Every time she has chosen to satisfy her immediate desires instead of doing what is right, she has ever so slightly contributed to her own poor character. Therefore, says Aristotle, “they are themselves by their slack lives responsible for becoming men of that kind”.²¹⁷

7.3.1 The instrumental function of punishment: Promoting justice or utility?

However, even if the theory can account for moral responsibility for one’s criminal tendencies, a further criticism can be raised against the theory: If we punish in order to maintain the mutual benefits of law, does that not mean that the theory I have so far considered as a theory of retributive justice is merely utilitarianism in disguise? Is there any difference between providing assurance and preventing crime through general deterrence? Is there any difference between moral education and preventing crime through reform?

The questions are pertinent, because clearly these theories could be construed in such a way as to erase the distinctions between them, in effect collapsing all into utilitarianism. And without rehearsing once again the problems of utilitarian penal theories, suffice it to say that a consequence of a collapse into utilitarianism could be punishment that is unjust, for instance by ignoring the act requirement when doing so serves social utility. There are, however, ways of construing these theories that distinguish them from utilitarianism, as we shall now see.

Non-utilitarian assurance

In the article “Political Theory and the Criminal Law”, Matt Matravers employs Rawls’ concept of ‘the original position’ to argue for the justice of punishment.²¹⁸ The question Matravers poses is: Would we opt for a system of punishment if we found ourselves in the original position, behind a veil of ignorance, knowing not who we were and our own

²¹⁷ Aristotle, *Nicomachean Ethics*, 1114a4

²¹⁸ Rawls himself did not believe his theory could be applied to the question of punishment, however. See for instance, *A Theory of Justice*, 277: “To think of distributive and retributive justice as converses of one another is completely misleading”.

criminal dispositions, i.e. our own risk of “falling foul of the law”?²¹⁹ Yes, he answers, it is in everyone’s blind self-interest to have a system of punishment if one assumes, as both Rawls and Matravers do and as I have accounted for above, that punishment is necessary in order to secure a stable constitutional arrangement. “The function of the system of punishment would be to address an assurance problem”.²²⁰

But assuming that one’s character and social environment greatly effect one’s chances of being punished: Could someone punished not rightly claim, as above, that she is punished for her bad luck? And if the answer she gets is simply that doing so is necessary for ensuring the mutual benefits of law, how is that any different from utilitarianism?

This is where the Rawlsian twist comes. The function of ‘the original position’ in Rawls’ theory is to effectively sever the tie between justice and moral worth. Justice is determined irrespective of talents, intelligence, work ethic etc. – you do not know about the distribution of these from behind the veil of ignorance. From the perspective of justice, all one’s abilities and dispositions may just as well be due to pure luck – whether this is true or not is irrelevant to justice. Such “natural facts”, Rawls says, are “neither just nor unjust [...] What is just and unjust is the way that institutions deal with these facts”.²²¹

On the Rawlsian scheme, Matravers points out, “there is no justification for allowing inequalities in natural facts (or social luck) to be reflected in the principles of justice”.²²² However, once a just system is established, natural facts will legitimately influence one’s outcome. Talented persons will do better and receive bigger shares of goods than untalented persons, *ceteris paribus*. But the person who does well does not deserve (as a matter of justice) to reap these benefits; he is merely *entitled* to them. Applying this to criminal law, Matravers says

[I]nert natural facts ought not to dictate the shape of the principles of (retributive) justice. However, once these principles are in place, such facts may well play a role in where, within the scheme, a given person ends up. Just as the talented (and socially lucky) will tend towards the better-off

²¹⁹ Matt Matravers, “Political Theory and the Criminal Law”, in *Philosophical Foundations of Criminal Law*, ed. R. A. Duff and Stuart P. Green (New York: Oxford UP, 2011), 75.

²²⁰ *Ibid.*, 69. Rawls similarly states in *A Theory of Justice*, 277: “In a well-ordered society there would be no need for the penal law except insofar as the assurance problem made it necessary.”

²²¹ Rawls, *A Theory of Justice*, 87.

²²² Matravers, “Political Theory and the Criminal Law”79.

groups – not because justice requires rewarding the talented, but because rewarding the talented maximally benefits the least well off – those who are disposed to break the criminal law (for whatever reason) will tend towards the group who are punished, but again not because justice requires principles that punish those who act on such a disposition, but because only by punishing them will the system provide the assurance needed to be stable.²²³

Upon Matravers' Rawlsian theory, then, it does not matter for the justice of punishment whether criminals are punished due to bad luck in their social circumstances and their dispositions, or if they truly had the capacity to do otherwise. Be that as it may. A person is punished solely as a matter of entitlement. The institution of punishment is just, however, not because it maximizes social utility, but because "free and rational persons concerned to further their own interests would accept [it] in an initial position of equality"²²⁴. In this way the assurance theory of punishment can avoid collapsing into utilitarianism.²²⁵

Non-utilitarian moral education

Upon one interpretation, moral education theory is indistinguishable from utilitarianism. Punishment serves to teach the criminal a moral lesson with the aim of bringing her back on the narrow path, thus contributing to crime prevention. However, as Nozick emphasizes, this teleological version of the theory can be distinguished from a non-teleological version such as his own. The first seeks an effect 'in the wrongdoer', while the second seeks an effect 'on the wrongdoer'. Upon his theory the aim is not that the criminal should repent and change her ways, but merely that she should experience the causal power of correct values. The 'lesson' taught by punishment, in Nozick's words, is that correct values can have force, thus "making it impossible to remain as pleased with one's previous anti-linkage [with value]".²²⁶

Antony Duff has similarly proposed a theory whereby punishment is meant to communicate to the offender the wrongness of her act in the hope that she should accept its moral lesson and decide to undertake penance for her wrong. However, the justice of

²²³ Ibid., 76.

²²⁴ Rawls, *A Theory of Justice*, 10.

²²⁵ I shall later discuss how assurance also forms part of a Kantian theory of punishment.

²²⁶ Nozick, *Philosophical Explanations*, 384.

punishment does not depend on whether the criminal repents or not. Repentance must be voluntary; a criminal trial cannot force the offender to undertake penance. It can merely communicate to the offender that she ought to do so. The trial must respect the autonomy and rationality of the defendant, inviting her to be a participant in, and not merely the object of, moral judgment. Like Nozick, Duff finds the use of prepositions helpful in eliciting this distinction: [W]hereas a judicial or psychiatric inquiry may be held *on* a person, a criminal trial [...] is conducted *with* the defendant [...] verdict is passed not just *on* the defendant but *to* him.²²⁷

This emphasis on the communicative function of punishment makes it possible to separate two aspects of the goal of punishment: One is the aim that the offender genuinely accepts the wrongness of her act and voluntarily communicates through penance that she has learned a moral lesson. In this sense, Duff's theory is teleological. The other is the aim of publicly communicating that the crime was wrong. "If the offender remains unrepentant, his punishment has thus failed in one of its aims: but it can still succeed as a communication with him."²²⁸ In this sense, Duff's theory is non-teleological; the communication itself is justified, whether or not the offender accepts the message conveyed.

I will discuss in more detail other communicative or *expressive* theories of punishment in Chapter 9. I will here consider only Emile Durkheim's theory, as it too displays both a teleological and a non-teleological aspect. The recipient of the 'lesson' of punishment upon Durkheim's theory is society at large: "[W]ithout being paradoxical, we may state that punishment is above all intended to have its effect upon honest people."²²⁹ The reason is that both crime and punishment concern the collective consciousness of society. Crime, we recall from above, is for Durkheim an attack upon society and its shared norms: "[A]n act is criminal when it offends the strong, well-defined states of the collective consciousness."²³⁰ Indeed, he says, "we should not say that an act offends the common

²²⁷ Duff, *Trials and Punishments*, 35.

²²⁸ R. A. Duff, "Response to von Hirsch", in *Debates in Contemporary Political Philosophy: An Anthology*, ed. Derek Matravers and Jon Pike (Taylor & Francis, 2005), 424.

²²⁹ Durkheim, *The Division of Labour in Society*, 63. Joshua Kleinfeld makes the same point in "Reconstructivism: The Place of Criminal Law in Ethical Life", *Harvard Law Review* 129, no. 6 (2016), 1516.

²³⁰ Durkheim, *The Division of Labour in Society*, 39.

consciousness because it is criminal, but that it is criminal because it offends that consciousness".²³¹ When a society holds any norm as collectively valuable, no matter what that norm may be, it will necessarily thereby define something as conflicting with that norm to the degree of being a crime. A positive norm can only be posited if there is a negative contrast. And since no society can exist without collectively held norms, crime, by implication, is an inevitable part of any society.

Thus crime is necessary. It is linked to the basic conditions of social life, but on this very account useful, for the conditions to which it is bound are themselves indispensable to the normal evolution of morality and law.²³²

Crime nevertheless requires a reaction that denies that the attack upon society will succeed. Punishment's "real functions", Durkheim says, "is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour".²³³ Drawing on Durkheim's later work in *The Elementary Forms of Religious Life*, we could say that punishment functions as a 'ritual' which marks that which is 'sacred' in the collective consciousness – in this case, our shared moral beliefs.²³⁴ As such, punishment, like crime, is useful for the existence and flourishing of society.

Does that mean that Durkheim's theory is ultimately utilitarian, justifying punishment by its social benefit? His answer is that the dichotomy of utility and justice is false, that utility is served by justice and vice versa:

[...] the one sees in punishment an expiation, the other conceives it as a weapon for the defence of society. Certainly it does fulfill the function of protecting society, but this is because of its expiatory nature. Moreover, if it must be expiatory, this is not because suffering redeems error by virtue of some mystic strength or another, but because it cannot produce its socially useful effect save on this one condition.²³⁵

What are we to make of this for the justice of punishment? Since Durkheim's theory is descriptive (at least upon one interpretation of it), the question of justification does not

²³¹ Ibid., 40.

²³² Durkheim, *The Rules of Sociological Method*, 63.

²³³ Ibid., 63.

²³⁴ Emile Durkheim, *The Elementary Forms of Religious Life* (Oxford: Oxford UP, 2001). Durkheim also noted the affinity between criminal law and religion in the earlier work *The Division of Labour in Society*, 56.

²³⁵ Durkheim, *The Division of Labour in Society*, 63.

arise.²³⁶ However, for our purposes, the takeaway from his theory is that we can conceive of the expressive function of punishment as not directly linked to utility in each instance (as a deterrence theory or a reform theory would). Instead, like Nozick and Duff and other non-utilitarian moral education or expressive theorists, Durkheim emphasizes the intrinsic value of denouncing clear violations of our shared moral norms. Society is inconceivable without such condemnation. Censuring crime is therefore both right and useful.

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We see, then, that the charge of utilitarianism can be avoided, and we can conclude that the theory of this chapter is a proper theory of retributive justice. It still remains a consequentialist theory of retributive justice, however. Punishment serves a purely instrumental function, promoting the goal of maintaining a just social order, whereby the security, flourishing, solidarity, cooperation and freedom of society and of citizens are ensured. More specifically: Punishment is the means by which assurance and moral education or censure is achieved, which, as we have seen, serves to negate efforts to undermine the mutual benefits of law.

However, even if assurance and moral education serve a just function upon this theory, we have not thereby showed that *punishment* is necessary for providing assurance and moral censure. If assurance and moral censure can be achieved by other means, punishment may be redundant and even unjustified, all things considered. A reply to this could be that surely the empirical realities are such that assurance and moral censure cannot be properly achieved without punishment. Be that as it may (I will return to these questions in Chapter 9). Punishment serves an instrumental function nevertheless. We have, in other words, yet to argue that punishment itself is just, and not merely that its possible effects are just.

This will be the topic of the next two chapters, both of which relate in different ways to the main idea argued in this chapter, that law is valuable. The first takes as its premise that law is socially beneficial and proposes that as a matter of distributive justice punishment

²³⁶ Though Durkheim's theory is sociological, he seems to take for granted certain normative premises, such as the distinction between healthy and pathological societies. Likewise, it seems rather clear that the concept of social solidarity is value-laden, if only because it is closely linked to the very existence of society and hence human survival and flourishing. By implication, it would not require much adaptation to consider Durkheim's theory of punishment as a normative justification for punishment. See Kleinfeld, "Reconstructivism".

is fair for those who receive the benefits of law without contributing to its maintenance. The second expounds Kant and Hegel's theories, whereby punishment is seen as an inherent and necessary part of law itself.

8. Freeloading

To explain this theory, I will start with an example from the housing cooperative where I live. There are 60 houses gathered together around a common area. At one end there is a parking lot where all residents are required to park. If you are transporting a heavy load, the rules of the coop allow you to drive on the pathways all the way to your house to unload, before returning to the parking lot with the car – a distance of up to a hundred meters. The benefit to all is obvious: peace and quiet around the houses, children playing safely in a traffic-free environment. However, a few neighbors do not respect the parking rules and often park their cars in front of their houses instead of at the common parking lot. Other neighbors find this irritating, myself included. But why? Only a few people break the rules, so the tranquility of the neighborhood is practically unaffected. The rule-breakers do drive carefully, so we cannot claim any real risk to the children in the neighborhood. For all practical purposes the benefits of the parking rules remain. What is it, then, that causes our vexation? What constitutes the wrong in the actions of the rule-breakers?

The answer, according to a theory proposed by Hart, and later advocated by Rawls, Morris and others, is that the rule-breakers do not contribute their fair share to the good from which they benefit. Hart says that, “when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission”.²³⁷ Rawls develops this into what he first calls the ‘principle of fair play’ and later ‘the principle of fairness’, according to which it is unfair to “gain from the cooperative labors of others without doing our fair share”.²³⁸ By enjoying without sacrificing, rule-breakers create an unfair discrepancy between themselves and those who comply with the rules. In the example, the rule-breaking neighbors get the benefit of the car-free neighborhood, but they do not undertake the efforts that others do in order to produce the benefit. They enjoy the peace and quiet, but they do not make those dreadful walks through rain and sleet. They are, in short, freeloaders.

The notion of freeloading is not unfamiliar in a criminal context. As mentioned above in

²³⁷ H. L. A. Hart, "Are There Any Natural Rights?", *The Philosophical Review* 64, no. 2 (1955), 185.

²³⁸ Rawls, *A Theory of Justice*, 96.

the chapter on the profit theory, we often speak metaphorically of punishment as a way of “balancing the books” by making the offender “pay his debt to society”. The notion of debt implies that the criminal has gained something for which he hasn’t paid; he is “a *parasite* or *freerider* on a mutually beneficial scheme of social cooperation”.²³⁹ These common sentiments received a rational defense in Herbert Morris’ article “Persons and Punishment” in 1968²⁴⁰, where Morris developed Hart and Rawls’ theories into a penal theory. The theory became, according to David Dolinko in 1991, “what is probably the most influential contemporary defense of retributivism”.²⁴¹

The argument goes as follows: Everybody benefits from the protection of law (as we also saw in the preceding chapter). The benefit only occurs, however, as a result of individuals respecting the law.

Making possible this mutual benefit is the assumption by individuals of a burden. The burden consists in the exercise of self-restraint by individuals over inclinations that would, if satisfied, directly interfere or create a substantial risk of interference with others in proscribed ways. If a person fails to exercise self-restraint even though he might have and gives in to such inclinations, he renounces a burden which others have voluntarily assumed and thus gains an advantage which others, who have restrained themselves, do not possess.²⁴²

Punishment remedies this injustice by cancelling the unfair advantage that the criminal has required vis-à-vis law-abiding citizens. The theory is thus quite similar to the profit theory, but the difference is that the wrong of the crime is here a *horizontal* injustice. That is, it is the unfairness of the *distribution* of burdens and benefits that is remedied through punishment (and not each criminal’s benefits relative to her baseline *ante culpam*).

A person who violates the rules has something others have—the benefits of the system—but by renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage. Matters are not even until this advantage is in some way erased. Another way of putting it is that he owes something to others, for he has something that does not rightfully belong to him. Justice—that is punishing such individuals—restores the equilibrium of benefits and burdens by taking from the individual what he

²³⁹ Jeffrie G. Murphy, "Retributivism, Moral Education and the Liberal State", *Criminal Justice Ethics* 4, no. 1 (1985), 7.

²⁴⁰ Herbert Morris, "Persons and Punishment", *The Monist* 4 (1968).

²⁴¹ Dolinko, "Some Thoughts about Retributivism", 545.

²⁴² Morris, "Persons and Punishment" 477.

owes, that is, exacting the debt.²⁴³

Before considering the details of this argument, which benefits are gained and how punishment is supposed to cancel them, we ought first to pause at the question of whether the freeloader theory can appropriately be applied to a criminal law context.

It is not obvious that the criminal setting resembles sufficiently that of a joint venture like a housing cooperative to make the terms of fair cooperation that apply to the latter also apply to the former. Rawls argued originally that the theory did apply to a legal context: "My thesis is that the moral obligation to obey the law is a special case of the prima facie duty of fair play."²⁴⁴ However, in *A Theory of Justice*, he had abandoned the view, now saying that obedience to law is required by the 'natural duty of justice'. 'The principle of fairness', on the other hand, only applies when two conditions are met: (1) the institution to which it applies is just, and (2) "one has voluntarily accepted the benefits of the arrangement".²⁴⁵

If some friends have decided to share a taxi home after a night out, one may reasonably say that they have voluntarily accepted the benefits of the arrangement and so are obligated under the principle of fairness to pay their share of the fare. How about the rule breaking neighbors? Since they did not live in the housing cooperative when it was established they have never explicitly consented to the parking rules that were adopted at the outset. Nevertheless, they were aware of the rules when they bought their houses. By becoming part of the cooperative, they might be said to have given their *tacit consent* to the rules that apply there. For Rawls this would probably be sufficient to assume obligations under the principle of fairness, since he holds that the criterion of voluntariness is met "if one has accepted the benefits of its working and intends to continue doing so".²⁴⁶

In *Anarchy, State and Utopia*, Nozick offers several counterexamples to the notion that one can assume obligations simply by enjoying the benefits of a cooperative venture. Suppose, he says, that a group of neighbors decide to institute a system of entertainment

²⁴³ *Ibid.*, 478.

²⁴⁴ Rawls, "Legal Obligation and the Duty of Fair Play"³. However, on page 17 he specifies that "[t]he duty of fair play is not, of course, intended to account for its being wrong for us to commit crimes of violence, but it is intended to account, in part, for the obligation to pay our income tax, to vote, and so on."

²⁴⁵ Rawls, *A Theory of Justice*, 96. Obligations must be voluntarily accepted, unlike natural duties.

²⁴⁶ Rawls, "Legal Obligation and the Duty of Fair Play", 9.

for the neighborhood where each day a neighbor is required to take a turn reading or playing records over a loud speaker system. If after 138 days it is finally your day, are you obligated to take your turn? “You have benefitted from it”, Nozick writes, “occasionally opening your window to listen, enjoying some music or chuckling at someone’s funny story. The other people *have* put themselves out. But must you answer the call when it is your turn to do so? As it stands, surely not”.²⁴⁷ I agree with Nozick’s conclusion, and even more so for some of his other examples: “One cannot, whatever one’s purposes, just act so as to give people benefits and then demand (or seize) payment”, such as by giving somebody a book (which she might enjoy) and then grabbing money for it. However, the examples all seem to point out situations where there really is no consent at all, in other words, where it is unreasonable to impute tacit consent to the person receiving the benefit. That such situations exist does not mean that there are no other situations where tacit consent is reasonable to assume. In determining whether there is tacit consent, we might consider, for instance, whether the recipient of the benefit had ever protested the arrangement or otherwise expressed disapproval. And we might consider the extent to which the person actively has sought the benefits and the time she has remained in the arrangement without leaving. I assume, like Rawls, that sometimes one’s consent is clear enough even though it was never explicitly stated.

How does this apply to a legal context? Can we say that somebody who has benefitted from the legal order has thereby acquired an obligation to obey the law? Yes, according to Socrates, who did not let himself be convinced by Crito to escape from prison before his execution. Again, Plato let ‘The Laws’ speak for themselves, making the point that Socrates owed allegiance to the city that had been so good to him.

Socrates, we have convincing proofs that we and the city were congenial to you. You would not have dwelt here most consistently of all the Athenians if the city had not been exceedingly pleasing to you. You have never left the city, even to see a festival [...] So decisively did you choose us and agree to be a citizen under us.²⁴⁸

This is likely the first example of the idea of a social contract being invoked to ground the obligation to obey the laws. As Kymlicka notes, when the social contract theory started

²⁴⁷ Robert Nozick, *Anarchy, State, and Utopia* (New Jersey: Blackwell Publishing, 1974), 93.

²⁴⁸ Plato, *Crito*, 52 b-c

gaining ground during the Enlightenment, it was based on this notion of consent or promise.²⁴⁹ The problem with this approach was that it only pushed the question of obligation one step back: If you claim that we should obey the laws because we should keep our word, you would still, as Hume put it, “find yourself embarrassed when it is asked, *Why we are bound to keep our word?*”²⁵⁰ The existence of a promise is insufficient to ground obligation unless there is an obligation to keep promises, which in turn would require a promise to keep promises, and a promise to keep promises to keep promises, *ad infinitum*.

The conundrum is equivalent to Wittgenstein’s famous rule-following paradox: If the meaning of a word were determined by the correct application of a rule, this would require another rule for determining correct application, which in turn would require another rule *ad infinitum*. Indeed, the solution that the principle of fairness provides for cooperative endeavors is also reminiscent of Wittgenstein’s answer to the rule-following paradox: “‘Following a rule’ is a practice”, Wittgenstein says.²⁵¹ In other words, meaning is determined by use. Equivalently for cooperation: We obligate ourselves to doing our fair share not by promising to keep a promise to do so (and so on), but by partaking in a *practice* wherein our obligation is implicit.

As I said above, there are indeed practices where such obligation seems to be implicit. But can this solution save the social contract theory? That would require that living under a set of laws is such a practice from which it is reasonable to assume consent. “You have had seventy years during which you could have gone away if you did not like us”, ‘The Laws’ say to Socrates.²⁵² And true enough; there is often an element of choice to where you live. But hardly for all, and hardly a choice so clear as to constitute tacit consent. Hume said it best:

²⁴⁹ Will Kymlicka, “The Social Contract Tradition”, in *A Companion to Ethics*, ed. Peter Singer (Malden, MA: Blackwell Publishing, 1993), 186-96. Kymlicka concludes regarding the problem of basing obligation on promise: “The very considerations which put people in doubt about the naturalness of their political obligations to obey rulers soon put them in doubt about the naturalness of their personal obligation to keep promises”, 188.

²⁵⁰ David Hume, “Of the Original Contract”, in *Modern Political Thought: Readings from Machiavelli to Nietzsche*, ed. David Wootton (Indianapolis: Hackett Publishing 1996), 394.

²⁵¹ Ludwig Wittgenstein, *Philosophical Investigations*, trans. P. M. S. Hacker and Joachim Schulte (New Jersey: Wiley-Blackwell, 2009), 89.

²⁵² Plato, *Crito*, 52 e.

Can we seriously say, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives, from day to day, by the small wages which he acquires? We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean and perish, the moment he leaves her.²⁵³

Socrates' arguments are thus effectively countered, and the conclusion ought to be, I believe, that it is futile to try to apply the freeloader theory as a theory grounding the obligation to abide by law. As noted above, Rawls abandoned the theory for a theory of the 'natural duty of justice'. He thus moved closer to Kant's social contract theory, as we shall see in the next chapter.²⁵⁴ Before turning to Kant, however, it is still worth considering whether the freeloader theory can account for (an aspect of) how justice is served by punishment. For even though the freeloader theory cannot function as a comprehensive theory justifying law in general or criminal law specifically, it could perhaps function as part of a mixed theory where the general justifying aim is supplied by another theory, for instance utilitarianism. That is, it might function as a theory of retributive justice, even though it cannot by itself justify retributivism. Unfortunately for the theory, even this more modest function is wrought with problems.

In order to assess the function of punishment in restoring a fair equilibrium, we must consider what is meant by 'the unfair benefit' that the criminal supposedly gains from crime. Richard W. Burgh offers four different interpretations of the benefit Morris' theory might be referring to, of which I will discuss the two most plausible: (1) the benefit consist of "not bearing the burden of self-restraint, hence having a bit more freedom than others"; (2) the benefit is "the sphere of non-interference which results from general obedience to the particular law violated, e.g. each person benefits from property laws insofar as he is free from interference with his property".²⁵⁵ The latter assumes that the benefit is gained from law, and shared by all citizens; the former assumes the benefit is gained by the

²⁵³ Hume, "Of the Original Contract", 391.

²⁵⁴ The current chapter, together with the preceding chapter and the next, can roughly be said to deal with the three main types of social contract theories identified by Kymlicka, "The Social Contract Tradition": In the current, a theory based on consent; in the previous, a theory based on mutual advantage, what Kymlicka calls "Hobbesian contractarians"; in the next, a theory based on impartiality, what Kymlicka calls "Kantian contractarianism".

²⁵⁵ Burgh, "Do the Guilty Deserve Punishment?", 203. The other two are the ill-gotten gain and the satisfaction from committing the crime, both of which are more properly classified under profit theory, Chapter 5.

criminal, as something extra vis-à-vis the benefits that all enjoy. Both interpretations seem to find support in Morris' text. On the one hand, he speaks of (1) "renounce[ing] a burden which others have voluntarily assumed and thus gains an advantage". On the other hand, he speaks of (2) "the benefits of the system" and the criminal as having "something that does not rightfully belong to him".

Each interpretation yields a different conception of how punishment serves justice. If we take number (1) as the benefit, justice is served by inflicting a burden so as to *cancel the relief* of the burden of self-restraint, thus restoring to *status quo ante culpam* the equal amount of benefits and burdens. If we take number (2) as the benefit, justice is served by removing the benefit that *law* ensures by protecting a sphere of non-interference, thus restoring to *status quo ante culpam* the fair relationship between benefits received and the price paid.

A problem with number (1) is that we would have to assume that abiding by law does require a burden of self-restraint. In some cases, that seems reasonable. Many of us would probably indulge in a little theft or a little voyeurism if we were wearing *The Ring of Gyges*. Self-restraint may be the only thing stopping us sometimes. However, it requires no self-restraint from most people to stop them from murdering somebody, or torturing them, or molesting them. They simply do not want to do such things. A system of punishment that assumes that people shoulder a burden when they refrain from pimping or assaulting or raping is, as Murphy put it, "too creepy to be right".²⁵⁶ And further, since there is obviously little correlation between the seriousness of a crime and the burden of self-restraint required to avoid it, a punishment scale based on this theory would diverge widely from current scales. Most people probably feel a stronger inclination to cheat on their taxes or to commit insurance fraud than they do to rape or kill someone. More punishment would thus be required in the former instances than in the latter in order to counter-balance the larger relief of these crimes.

A problem with number (2) is that we would have to assume for each just punishment that the criminal has received a benefit, not from the crime itself, but from the law that she

²⁵⁶ Quoted in Jean Hampton, "The Retributive Idea", in *Forgiveness and Mercy*, ed. Jean Hampton and Jeffrie G. Murphy (Cambridge: Cambridge UP, 1988), 116.

broke. This prompts Burgh to ask the question: “Are there criminal laws that do not provide a sphere of noninterference for *all* persons?” His answer is yes, and he mentions rape laws and laws against embezzlement.²⁵⁷ The first example is poor. Men, too, get raped, and hence the idea that only women benefit from the protection of rape laws is wrong. However, we could modify the example slightly to make the point: Child molestation laws are to the benefit of children, whereas adults are by definition not protected by them. The example of embezzlement is meant to show that such laws protect only people who are in a position where they can become victims of embezzlement. Presumably, poor people have nothing to gain from such laws, a point reminiscent of Anatole France’s famous quote: “In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread.” If there are laws which do not benefit some, those people could not have the benefit erased in order to restore a fair equilibrium.

But perhaps Morris’ theory can be salvaged if we apply it at a higher abstraction level: The criminal may not have benefitted from the particular law she broke, but she will have benefitted from law in general. The problem with this framing is that there would be no way of distinguishing more serious crimes from less serious crimes. They would all entail that the criminal no longer should benefit from the protection of law, period – a truly Draconian system, in the historical sense of the word, meaning same punishment for all crimes.

Another, more plausible, solution would identify the type of right that the particular law protects, e.g. embezzlement laws protect the right to noninterference of property, rape laws protect the right to noninterference of physical and sexual autonomy, homicide laws protect the right to life. Since the benefits of these spheres of noninterference are taken to be increasingly valuable, punishments would be proportional when, *ceteris paribus*, murder is punished more severely than rape, and rape more severely than embezzlement.

As we shall see, this solution is reminiscent of Kant’s penal theory, by which the criminal act is understood as a unilateral withdrawal from the universal protection of the specific right breached. Indeed, Murphy argued at one point that Kant’s theory could be rationally

²⁵⁷ Burgh, “Do the Guilty Deserve Punishment?”, 205.

reconstructed as a freeloader theory. He abandoned this view, however, noting that there really is no reason to impute to Kant the principle of fairness that underlies the freeloader theory. For Kant, punishment is a matter of respect for human freedom and rationality; it is not a matter of cancelling undeserved benefits. Kant thereby avoids a problem that the freeloader theory faces: Why require state punishment? Why not simply withdraw the benefit of the protection of law, thereby in effect licensing everyone to treat the offender in whatever way he or she wishes with impunity? Morris' theory, Dolinko concludes, "amounts to a kind of outlawry – declaring the criminal fair game for anyone who wishes to harm him or his interests – far different from the forms of criminal punishment we actually employ and which Morris' approach was intended to justify morally".²⁵⁸

To conclude, the freeloader theory, though intuitively plausible for some cooperative endeavors, and also in accordance with some common ways of framing punishment in daily life, is nevertheless ill suited to account for the justice of state punishment.

Some institutions and practices are such that partaking in them entails a form of consent from which an obligation to do one's fair share can be deduced. The same form of consent cannot reasonably be imputed to people who merely live their lives under a legal order. And without consent, no obligation.

Further, even if we assume that the problem of obligation could be resolved by combining the freeloader theory with another theory, the framing of punishment as a way of restoring a just distribution of burdens and benefits clearly misconstrues its function in cases of serious harm to others. It is hard to understand why we should primarily view a murder or a rape as a relief for the offender. In short, the freeloader theory does not pick out the most salient aspect of the wrong in crime, except perhaps for some economic crimes where benefit is due to cooperation. I turn now to Kant and Hegel, whose framing of crime as an infringement of autonomy has much greater potential to yield a comprehensive theory of criminal law and punishment.

²⁵⁸ Dolinko, "Some Thoughts about Retributivism", 549.

9. Infringing upon freedom

I will in this final and longest chapter of Part I discuss what I call the freedom perspective on crime and punishment. This perspective identifies the wrong in crime as an infringement of the freedom of the victim and of everybody's equal right to freedom. It sees in punishment a way of negating this infringement. My starting point is Kant and Hegel's theories of punishment, but I expand the theoretical input in the latter part of the chapter. I will there discuss expressive theories that supplement Kant and Hegel's theories, while remaining within the Kantian-Hegelian framework.

Discussing these theories together as versions of an overarching freedom perspective risks downplaying important differences between them. This worry is less relevant here, however, than when the aim is exegeses of Kant and Hegel's theories for their own sake. Kant and Hegel agree sufficiently in the way of framing the problems related to crime and punishment that it is proper, I believe, to talk of a common Kantian-Hegelian framework or a freedom perspective when discussing these issues.

However, as we shall see, there are some differences between Kant and Hegel's theories that are important for our discussion. Most notably, their conceptions of freedom, and therefore of right, are only partly overlapping. Axel Honneth thus notes,

Hegel means something far more comprehensive by "right" than other philosophers of his time: unlike Kant or Fichte, to whom "right" meant human coexistence regulated by the laws of the state and who relied most of all on the coercive power of the state, he understands that term to cover all those social conditions that can be proved to be necessary for the realization of the "free will" of every subject.²⁵⁹

That means, more specifically, that Hegel sees institutions other than the legal system, and forms of recognition other than legal rights, as indispensable aspects of freedom. The relevance of this wider concept of freedom shall become especially clear in Part II where I discuss the links between social (in)justice and criminal justice. However, once again the importance of the differences between Kant and Hegel should not be exaggerated. If we adopt, as I do, a Republican reading of Kant's legal and political philosophy, Kant too

²⁵⁹ Axel Honneth, *The Pathologies of Individual Freedom: Hegel's Social Theory* (Princeton Princeton University Press, 2010), 16.

must be understood as recognizing a link between legal and social justice.²⁶⁰

9.1 Right as mutual autonomy

To understand Kant and Hegel's penal theories it is necessary to place them within the broader framework of their legal philosophies.²⁶¹ The function that Kant and Hegel ascribe to punishment can only be understood, and no less defended, in light of the purpose that they ascribe to law and the legal order generally. The purpose is freedom. "The idea of right is freedom", Hegel writes.²⁶² More specifically, and with Kant's words: "Right is therefore the sum of conditions under which the choice of one can be united with the freedom of the other in accordance with a universal law."²⁶³

This "Universal Principle of Right" entails that an action is right as long as it can coexist with the equivalent freedom of everybody else. We can say for short that it is a principle of *mutual freedom*. An action's *legality* depends solely on its being externally compatible with everybody's mutual freedom – in contrast to an action's *morality*, which for Kant entails that the universal law of freedom is also the internal motivation for the action.²⁶⁴ My legal freedom thus extends to where your sphere of freedom begins. Freedom can only legitimately be constrained by freedom. This means, ultimately, that the right to freedom is also a right to coerce. Put negatively: If I do not have a right to prevent a wrongful hindrance of my freedom, then I have no freedom. Freedom and coercion are thus inseparable aspects of right. In the same way that minus minus is plus, the right of

²⁶⁰ See Helga Varden, "Immanuel Kant: Frihetens politiske filosof", in *Politisk filosofi: Fra Platon til Hannah Arendt*, ed. Jørgen Pedersen (Oslo: Pax, 2013) for an overview of different readings of Kant's legal and political philosophy. She distinguishes between three main traditions, a Hobbesian or absolutist tradition, a Lockean or libertarian tradition, and a Republican tradition. I largely follow Arthur Ripstein, *Force and Freedom* (Cambridge, MA: Harvard UP, 2009) in his Republican reading of Kant, and I also draw on Allen W. Wood, *Kantian Ethics*, another Kant scholar in the Republican tradition.

²⁶¹ A Norwegian version of Sections 9.1 and 9.2 has previously been published in *Norsk filosofisk tidsskrift*. David Chelsom Vogt, "Med rett til å bli straffet: Om Kant og Hegels teorier om straff som respekt for forbryteren", *Norsk filosofisk tidsskrift* 51, no. 3-4 (2016)

²⁶² Hegel, *Philosophy of Right*, § 1 Addition

²⁶³ Kant, *The Metaphysics of Morals*, 6:230.

²⁶⁴ *Ibid.*, 6:214. See also Øyvind Lundestad, "The Realm of Right: On the Development and Final Formulation of Kant's Legal Philosophy" (NTNU, 2013) for a discussion of the distinction between legality and morality and the development of this distinction throughout the authorship of Kant.

“hindering of a hindrance to freedom”²⁶⁵ is the right of freedom. “Right and authorization to use coercion therefore mean one and the same thing.”²⁶⁶

Most fundamentally, the right to coerce is a right to prevent violations of one’s physical integrity. Freedom, understood as “independence from being constrained by another’s choice”²⁶⁷, is for Kant an innate right; a pre-legal right that humans have as a consequence of being human. Even outside a legal order, in a state of nature, one would have the right to protect oneself against violations of one’s body and one’s immediate sphere of movement. An equivalent right of self-defense pertains to things over which one has physical control – Kant’s example is an apple that one holds in one’s hand. This right does not extend to external things over which one does not have direct physical control, however. It makes no sense to claim that one has the right to protect such objects against violations by others in a state of nature. To be able to claim such a right, for instance over an apple tree standing in the forest, there has to be a legal order that makes possible acquisition of and respect for property.²⁶⁸

Without a legal order, my freedom will be limited. I cannot cultivate the land, I cannot build a house, I cannot enter contracts etc. without others being able to reap the fruits of my projects with equal right. For this reason, Kant says, we would “do wrong in the highest degree by willing to be and to remain in a condition that is not rightful, that is, in which no one is assured of what is his against violence”.²⁶⁹ One’s possibility for exercising one’s freedom increases dramatically when one can set aims outside one’s immediate vicinity with protection against interference from others. The rightful condition, i.e. a state governed under the rule of law, is thus necessary for remedying the lack of freedom that follows from the dependence on the will of others in the state of nature. The state does so by (1) ensuring rules that everyone can make valid for themselves, (2) by ensuring an impartial adjudication process, and (3) by guaranteeing that the law is upheld. The

²⁶⁵ Kant, *The Metaphysics of Morals*, 6:231

²⁶⁶ *Ibid.*, 6:232.

²⁶⁷ *Ibid.*, 6:237.

²⁶⁸ See *ibid.*, 6:255: “I am therefore not under obligation to leave external objects belonging to others untouched unless everybody else provides me assurance that he will behave in accordance with the same principle with regard to what is mine.” As we shall see, this premise is important for justifying the crime preventive or prospective function of punishment on Kant’s theory.

²⁶⁹ *Ibid.*, 6:307.

legislative, the judiciary and the executive branches of government can thus be considered remedies against different sources of lack of freedom in the state of nature.²⁷⁰ With the establishment of the rule of law comes a system for the protection of everybody's freedom of choice to the extent compatible with the equivalent freedom of choice of others. Wrong is then understood as infringements of mutual freedom, and this is the basis for criminalizing certain actions in a rightful legal order.

9.1.1 Consenting to being punished

What is the right reaction when an infringement of mutual freedom occurs? Since right is defined as mutual freedom, the right reaction to legal offences must obviously be consistent with mutual freedom. The reaction must, in other words, respect the freedom of choice of the offender to the extent compatible with the freedom of choice of everybody else. Since punishment is per definition painful, most criminal offenders will likely not actually choose to be punished. Without such consent to punishment, how can it be claimed to be consistent with the offender's freedom of choice? First of all, it is not the punishment itself that the offender would have to consent to: "No one suffers punishment because he has willed *it* but because he has willed a *punishable action*"²⁷¹. It is thus the criminal law, not the concrete punishment, that has to be such that the offender could have chosen to make it valid for himself and others. Secondly, it is not empirical consent Kant is concerned with. The criminal is ascribed an ideal, that is, pure reason, and it is from this pure reason that the consent must be deduced.

Consequently, when I draw up a penal law against myself as a criminal, it is pure reason in me (*homo noumenon*), legislating with regard to rights, which subjects me, as someone capable of crime and so as another person (*homo phenomenon*), to the penal law, together with all others in a civil union.²⁷²

This is not to be understood as a denial of the empirical circumstances that motivate and influence criminals in real life. There is nobody, criminal or not, who manifests pure practical reason completely. We are nevertheless assumed to have the possibility to transcend our empirically given needs and wishes. We are assumed capable of making rational choices, even if we do not always do so in practice. The criminal offender is

²⁷⁰ Ibid., 6:318. Ripstein, *Force and Freedom*, 145-81.

²⁷¹ Kant, *The Metaphysics of Morals*, 6:335.

²⁷² Ibid., 6:335.

viewed from the perspective of freedom, knowing well that this perspective does give a full picture of him or her.

Whether we are justified in making such assumptions is a controversial philosophical question, as is well-known.²⁷³ It is worth noting, however, that for Kant our freedom is not a fact that can be verified or falsified, but something we simply must presuppose that we have. We cannot theoretically prove that we are free; freedom, in the Kantian system, is not a phenomenon that can be subsumed under categories. In the very moment that we were to capture and comprehend freedom, freedom would vanish, like a bubble of soap that bursts when we catch it. But we must presume the practical reality of freedom. We cannot rationally deny that we are free without thereby denying that the denial is rational. Our judgment would then amount to a *performative inconsistency*²⁷⁴: If we did not presume that we have an autonomous rationality we would not retain the possibility of making judgments about anything, including the possibility of rendering a negative judgment on our own freedom.

Law must be omnilateral if it is to be consistent with the freedom of those who are subjected to it, not unilateral, as that would entail that one was under the choice of another. What does it mean that law is omnilateral? Kant defines omnilateral as “derived from the particular wills of each”²⁷⁵. Law must be such that each and every one could have rationally willed that it be valid for herself and everybody else. Only then does law entail legitimate constraints upon our freedom, that is, constraints that are consistent with mutual freedom. This is clearly expressed in a formulation of the Universal Principle of Right that Kant gives in *Toward Perpetual Peace*: “My external (rightful) *freedom* is [...] to be defined as follows: it is the warrant to obey no other external laws than those to which I could have given my consent.”²⁷⁶

If we interpret this antithetically, it means that we do not have the right to disobey laws that we could have given our consent to. We have all, in light of our pure practical reason, subjected ourselves to the criminal law, if it is consistent with the Universal Principle of

²⁷³ In the context of criminal law theory, a central article on this topic is Greene and Cohen, "For the Law, Neuroscience Changes Nothing and Everything".

²⁷⁴ Svein Eng, *Rettsfilosofi* (Oslo: Universitetsforlaget, 2007), 381.

²⁷⁵ Kant, *The Metaphysics of Morals*, 6:259.

²⁷⁶ Kant, *Toward Perpetual Peace*, 8.350.

Right. The use of coercion against criminals is legitimate, then, because coercion is a hindering of a hindrance to freedom, and therefore a manifestation of freedom. Kant thereby establishes that the right of the polity to punish follows from the idea of right as mutual freedom. If one accepts the premise that right is mutual freedom, then it follows that coercion can rightfully be applied in order to assure mutual freedom. Freedom and coercion are two faces of the same coin. Formulated negatively: Nobody can claim a right not to be punished if she denies through her actions the validity of right. The criminal gives up her legal protection against coercion by denying the law's protection against coercion.

A critic might reply: "If Sarah steals Peter's bicycle, she denies Peter's right to own the bicycle, but she has no intention of denying the law's protection against coercion generally". Kant could then reply by referring to his distinction between material and formal wrong.²⁷⁷ The theft of the bicycle entails a material wrong against Peter. This was the empirical intention of Sarah's action. But if we consider Sarah's deed as an act of a free and rational person, the theft of the bicycle also entails a formal wrong against the legal order.

9.1.2 The function of punishment according to Kant

The argument goes as follows: To the extent that the offender's action is a serious expression of her rationality, in other words, to the extent that she has freely chosen to commit the action, it must be rational for all other free and rational persons; it must be omnilaterally valid. The only way that Sarah's appropriation of the bicycle could be omnilaterally valid was if the right to property was invalid. But Sarah cannot annul the right to property for all – that would entail a unilateral imposition of her own will on others. Her act can only be rational if it is exclusively self-imposing: She does not deny property rights generally, but only for herself.

This is how we can make sense of Kant's enigmatic claim that "whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself".²⁷⁸ The function of punishment is to turn

²⁷⁷ Kant, *The Metaphysics of Morals*, 6:308.

²⁷⁸ *Ibid.*, 6:332. See also 6:321 and Ripstein, *Force and Freedom*, 311.

the crime against the criminal – to “bring his misdeed back upon himself”²⁷⁹ – by taking his message of denial of law seriously as a rational maxim. It is rational, and hence consistent with mutual freedom, to refrain from a right, but not to force others to refrain from their rights.

Many have interpreted the above quotes as expressions of a primitive form of retribution: The objective harm of the crime is to be balanced with an equivalent harm in the form of punishment. Such an interpretation does find some support in other passages in Kant. He says, for instance, in the same place: “But only the *law of retribution (ius talionis)* [...] can specify definitely the quality and the quantity of punishment.”²⁸⁰ Kant likely did not mean a material equality between crime and punishment, however. He says, for instance, that the punishment for someone of high standing who strikes an innocent person should be solitary confinement involving hardship, because that would affect the vanity of the offender, “so that through his shame like would be fittingly repaid with like”.²⁸¹ The punishment for theft ought also to be forced labor, because, as described above, the thief relinquishes his right to protection of property, which means that the state must provide for him, and he ought to pay for it through his forced labor.

The critique that some have made against Kant’s penal theory claiming that it entails torturing the torturer or raping the rapist, interprets the law of retribution too literally.²⁸² Such punishment would not be consistent with the humanity of the offender, since it is degrading and therefore not something to which the offender could rationally consent. Allen W. Wood, for one, claims that Kant’s theory of punishment is inconsistent with Kantian ethics because it cannot be rational to universalize such actions as rape in this way. As Wood says, it cannot be the case that “someone (presumably, the state’s executive authority) is entitled to act toward the criminal in a manner that accords with what his maxim *would* imply *if it were universalizable* (which it necessarily is not)”.²⁸³ But this misconstrues the way in which the criminal’s act is taken to be universalizable. Abstaining from one’s rights *is* universalizable, unilaterally changing other’s rights is not. The latter

²⁷⁹ Kant, *The Metaphysics of Morals*, 6:363.

²⁸⁰ *Ibid.*, 6:332.

²⁸¹ *Ibid.*, 6:333.

²⁸² See for instance Atle Måseide, “Kants teori om straff: Lar den seg forsvare?”, *Norsk filosofisk tidskrift* 44, no. 1 (2009), endnote 36. Wood, *Kantian Ethics*, 216-23.

²⁸³ Wood, *Kantian Ethics*, 217.

constitutes a (formal) wrong; the former constitutes consent to punishment (or more precisely consent to abstaining from the right not to be punished). The act of “bringing his misdeed back upon himself” is thus a way of treating the criminal as rational while upholding the rational legal order; a way of respecting the pure rationality entailed by the criminal deed while hindering that the offender’s hindrance to freedom is left standing, as if it were omnilaterally valid.

We see, then, that it is the crime against the legal order itself (i.e. against mutual freedom) that justifies coercion against the coercion that violates freedom. Kant’s theory ought therefore to be understood as *legal retributivist*, as opposed to the material theories I have discussed. The retributive function of punishment is “legal” in the sense that it is the violation of law that motivates punishment and that is sought re-established through punishment.²⁸⁴

Herein lies a potential for a critique of Kant’s theory. If it is the violation of law that justifies punishment, a central party is left out of the theory: *the victim*. The person who has been most significantly affected by the crime, who has suffered its consequences, is absent from the justification of the sanction. Punishment finds its justification solely in the relation between the actions of the offender and the rational principle of the legal order. Its function is to hold the offender responsible, but the responsibility is in one sense solipsistic: It is a responsibility not toward the victim, but toward the offender’s own rationality. Punishment ensures that the offender is treated consistently with his own maxims.²⁸⁵ One might wonder, of course, whether this function is sufficiently important to justify the resources that we as a society spend on punishing offenders. Is it the job of the community to ensure that everybody lives through the logical consequences of one’s actions? Presumably, punishment must serve a function beyond this if society is to have

²⁸⁴ See Alan Brudner, *Punishment and Freedom* (Oxford: Oxford UP, 2009), 35-58 for a discussion of legal retributivism. Allen W. Wood would be right in his denial of the compatibility of Kant’s theory of punishment with Kantian ethics if Kant’s penal theory was a form of moral retributivism that took the suffering of criminals as a good in itself. That would be inconsistent with the duty of virtue requiring us to make the happiness of others our ends. But Wood’s argument fails because Kant’s penal theory does not take the suffering of criminals as the end of punishment. The end is the instantiation and realization of mutual freedom.

²⁸⁵ His own maxims are universally valid to the extent that they are rational, and the solipsism of the offender’s responsibility toward his own rationally is transcended in that sense, though the victim is still absent from the discussion.

not only a right to punish, which Kant's theory in my opinion succeeds in establishing, but also a sufficient reason for exercising the right.

I turn now to Hegel, whose penal theory builds on Kant, but who also sees crime and punishment in relation to the victim and therefore, in my opinion, better succeeds in establishing a sufficient reason for punishing.

9.2 Right as recognition

For Hegel, as for Kant, freedom is the purpose of law. Hegel accepts the Universal Principle of Right, but he gives it a new formulation: "Be a person and respect others as persons."²⁸⁶ This formulation is consistent with Kant's formulation, but in light of Hegel's broader philosophy it reveals a difference in the way Kant and Hegel view the relationship between right and freedom. While Kant postulates our innate freedom from which right is inferred, Hegel views right and freedom as mutually constitutive. Put differently: According to Kant, we possess pre-legal freedom; for Hegel right is necessary for freedom and *vice versa*.

This will become clearer if we look closer at Hegel's understanding of right as being and respecting persons. What is a person? Hegel answers: "The other, as an abstract and pure I, has itself as its end and object, and is therefore a person."²⁸⁷ The first part, that the person is an abstract I, fits well with an ordinary understanding of the word. That is evident also from the etymology of the word: The Latin word "*persona*" referred to the mask that actors wore, and is possibly derived from *per sonare*, "to sound through" (the mask).²⁸⁸ To be a person means, metaphorically, to wear a mask: One's idiosyncrasies are hidden; the individual is abstracted from its concrete circumstances and peculiarities. And precisely because right entails such an abstraction (this part of the *Philosophy of Right* is indeed called "Abstract Right") it is for Hegel a one-sided realization of freedom. As we shall see, Hegel thereby opens a room for critique of a purely juridical understanding of crime and its sanctions.²⁸⁹ But Hegel emphasizes that abstract right is nevertheless a necessary aspect

²⁸⁶ Hegel, *Philosophy of Right*, § 36.

²⁸⁷ *Ibid.*, § 35 Note.

²⁸⁸ Online Etymology Dictionary, etymonline.com

²⁸⁹ This notion of the insufficiency of abstract recognition is especially important for understanding Hegel's

of freedom. “Negative freedom [...] is one-sided, yet as this one-sidedness contains an essential feature, it is not to be discarded.”²⁹⁰

The second part of Hegel’s definition of a person is more difficult to grasp immediately. What does it mean that the I has itself as its end and object? Hegel’s answer can be found in *The Phenomenology of Spirit*, in the famous chapter on self-consciousness. To have oneself as one’s object means to be self-conscious: the object of consciousness is oneself. “Self-consciousness exists in and for itself when, and by the fact that, it so exists for another; that is, it exists only in being acknowledged.”²⁹¹ Hegel’s point, briefly explained, is that self-consciousness is achieved through interaction with other persons who are self-conscious. Hegel shows the way this happens and the different aspects of self-consciousness in the famous Master-Slave dialectic, which also has been interpreted as Hegel’s version of the allegory of the state of nature.²⁹² While Kant postulates our freedom in the state of nature, Hegel claims that the Kantian innate freedom, denoting separate and self-sufficient individuals, cannot be more than a moment in full self-consciousness. *In itself* consciousness of oneself is merely negative, as separate from everything else. “I am *not* the other”. This is the consciousness of the *Master*: The world is the other that the *I* can consume, as if everything else were things to be used for the *I*’s own desire. To transcend this self-sufficient self-consciousness, it is necessary to experience that something among other things is *the Other*. In other words, that I experience another as self-conscious, like the *Slave* experiences the dominating Master as self-conscious. Only then can I recognize my own, equivalent self-consciousness. When I then experience myself as separate from this other self-consciousness, so that I am for the Other like the Other is for me – thereby transcending the consciousness of the Slave – I achieve (universal) self-consciousness. That is when I have consciousness of myself as something – as a man, as a philosopher, as a violinist, as anything at all.

This short summary is sufficient for our purpose here. We can now see that it is only with the recognition of and from the other person that one becomes a person. It is only when

view of criminal motivation, which I will discuss at some length in Chapter 13. It is also relevant for the discussion of restorative justice as a sanction for crime that potentially addresses other forms of recognition than the abstract form, see Chapter 15.

²⁹⁰ Hegel, *Philosophy of Right*, § 5 Addition

²⁹¹ Hegel, *Phenomenology of Spirit*, 111.

²⁹² Robert C Solomon, *In the Spirit of Hegel* (Oxford: Oxford UP, 1983), 436.

one acknowledges that there are limits to what one can do to others – that others are not *things* but are persons with the capacity for having rights – that one can become conscious of oneself as a person with the capacity for having rights. In other words: Freedom occurs with right and is not prior to it. In yet other words: Right *is* mutual recognition.

9.2.1 Hegel's concept of wrong

Let us now look at what this means for Hegel's concept of *wrong*. While Kant simply views wrong as violation of mutual freedom, Hegel distinguishes between three types of wrong. The first is civil wrong or "unpremeditated wrong", which might occur, for instance, in a property conflict. Such wrong entails a violation of a person's concrete or particular right: One makes the claim that the person does not own something that he or she actually owns. It does not constitute a negation of right as such, however. The right of property is recognized, there is simply disagreement about who has it. "This is a purely negative judgment, in which the predicate "mine" negates only the particular."²⁹³ The second type of wrong is fraud. It entails a semblance of respect for particular right, but universal right is not respected – in other words, opposite of civil wrong.²⁹⁴ The third type of wrong is crime, where both particular right and universal right is negated.

Crime is the negative-infinite judgment in its complete sense. It negates not only the particular object of my will, but also the universal or infinite which is involved in the predicate 'mine', the very capacity for possessing rights.²⁹⁵

The distinction between civil wrong and crime is thus that the former entails, in Hegel's terminology, a negative judgment, while the latter entails a negative-infinite judgment. Hegel explains these terms in his *Logic*: A negative judgment is expressed in a statement of the kind "the rose is not red". Such a judgment "still leaves the connection of the subject with the predicate subsisting".²⁹⁶ The subject is thus still *something*. The rose is not red, so it must be yellow, white, or another color. A negative-infinite judgment on the other hand, is expressed in statements such as "the mind is no elephant" and "the lion is no table" (Hegel's examples). From these statements nothing can be inferred. It makes no sense to

²⁹³ Hegel, *Philosophy of Right*, § 85. The term "negative judgment" is explained shortly in the main text.

²⁹⁴ *Ibid.*, § 87 Addition.

²⁹⁵ *Ibid.* § 95.

²⁹⁶ G. W. F. Hegel, *The Logic of Hegel*, trans. William Wallace (Oxford: Clarendon Press, 1874), § 173, p. 263.

reason that if the lion is not a table, it must be a sofa or some other piece of furniture. There is no connection between subject and predicate at all.

Applied to the domain of right: To have rights means that there is a positive connection between subject and predicate. Hegel says about property rights, for instance: “The object taken into my possession receives the predicate ‘mine’”.²⁹⁷ A civil dispute about property would entail a negative judgment, a denial of the particular connection between the subject and the predicate; a denial that the thing is “mine”. Theft, on the other hand, would entail a negative-infinite judgment, that is, a denial of any connection between subject and predicate. It is a denial that anything has the predicate “mine”; a denial of my capacity for having rights at all. The crime thus entails a denial of the victim’s status as person, because “[p]ersonality implies, in general, a capacity to possess rights”.²⁹⁸

Another way of explaining this is through a description of ownership. For Hegel acquiring property, for instance by purchasing a bicycle, means that you manifest your will in that thing. You make it *yours*, and you thereby *negate* the thing’s independence: “the will is related to it positively. Yet in this identity the object is established as something negative”.²⁹⁹ You deny that the thing has a positive, independent will, so to speak. It is the exact same that happens in a crime. The offender negates the victim’s will by making it his own. The victim is for the offender like a thing he can use, instead of an independent person with a positive will. The criminal’s consciousness is thus like that of the *Master*. For the Master, his surroundings consist of things that he can consume in order to satisfy his desire. He does not recognize the *Slave* as a self-conscious Other, just like the criminal offender does not recognize the freedom of the victim. But that is why the Master does not achieve self-consciousness. Without mutual recognition one cannot become a free and self-conscious person. The analogy is the following: Just like the Master’s use of the Slave is destructive for his own freedom, so is the crime destructive for the freedom of the offender. For this reason, punishment, as we shall see, serves a function for the offender’s own freedom.

²⁹⁷ Hegel, *Philosophy of Right*, § 59.

²⁹⁸ *Ibid.*, § 36.

²⁹⁹ *Ibid.*, § 59.

9.2.2 The function of punishment according to Hegel

Wrong is the negation of right. As we have seen, Hegel distinguishes between three ways that wrong can negate right – by negating a particular right, by negating universal right, and by negating both. Depending on which type of wrong it is, a legal reaction is required so that “right by negating this negation of itself restores itself”.³⁰⁰ If it is a civil wrong, for instance if I unknowingly back my car over my neighbor’s bicycle, then the wrong against the particular right of the neighbor can be negated by compensating her for her loss.³⁰¹ If, on the other hand, I damage my neighbor’s bicycle purposefully, it will be different. That would be a crime, and hence a violation of my neighbor as a person, and not merely of her property. Punishment is then required in order to negate the wrong, according to Hegel: “The doing away with crime is retribution, in so far as retribution is in its conception injury of an injury”.³⁰²

The different functions that Hegel accords punishment and compensatory damages in negating wrong can be explained by the distinction we saw in Kant between formal and material wrong. The function of damages is to negate material wrong. The function of punishment is to negate formal wrong. Hegel, like Kant, is therefore a *legal retributivist*. The *form* of a criminal action is incompatible with universally valid law. It is this formal wrong that constitutes the extra dimension of wrong that separates crime from civil wrong. Punishment is thus aimed at the negation of right itself.

This is reflected in Hegel’s claim that “[a]n injury done to right as right is a positive external fact; yet it is a nullity. This nullity is exposed in the actual negation of the injury and in the realization of right”.³⁰³ The crime has a positive existence in the sense that it has material consequences, that is, as material wrong. Or as Hegel says: “By crime something is altered, and exists as so altered.”³⁰⁴ But crime is “nothing” in a different sense, before it is negated by punishment and thereby exposed as a nullity. What might Hegel mean by this?

³⁰⁰ Ibid., § 82.

³⁰¹ Ibid., § 89 Addition and § 98.

³⁰² Ibid., § 101.

³⁰³ Ibid., § 97.

³⁰⁴ Ibid., § 97 Addition

One reasonable interpretation is that the action *as a legal offense*, i.e. as formal wrong, does not exist before it is declared (or “exposed”) as an offense. An action might, for instance cause the death of somebody, but it does not exist as a *homicide* until there is a conviction. Only then is it a negation of right.³⁰⁵ But, then, if the action is classified as homicide, it does exist as *something*, namely as homicide. What might Hegel mean when he says that it is exposed as a nullity?

The action is a nullity in the sense that it is bound to fail as a negation of right. The offender cannot possibly make it so that right is invalid and his particular right is given existence as right. “But right, as absolute, is precisely what refuses to be set aside.”³⁰⁶ Again, this is fairly intuitive: No matter how many homicides occur, the law against homicide will not become invalid. We recognize the same argument from Kant: The offender, as a rational person, cannot unilaterally force a change in the rights of everybody. The project is bound to fail, because right per definition is omnilaterally given. With Hegel this takes on an intersubjective dimension, as described above: The freedom of the offender is dependent on recognition by and of other, free persons. If mutual freedom is negated, so is the offender’s own freedom, and hence the basis for right.

The function of punishment is to display this impossibility; to manifest that the action of the offender cannot be left standing. Punishment is thus a denial of the validity of the denial of the freedom of others *and* the freedom of the offender. Hegel thus famously claimed that punishment of an offender “expresses his own inherent will, is a visible proof of his freedom and is his right [...] a right of the criminal himself”.³⁰⁷ The right to be punished is a right to have rights, that is, a right to be a person with the capacity for possessing rights and not merely a thing. Punishment serves the symbolic function of reinstating the criminal as a mutually recognized person.

But if the primary function of punishment is a kind of restoration of the offender’s status as person, the same critique can be made against this theory as against Kant’s theory. The critique of Kant was that the victim’s role is underemphasized. Punishment is justified by its function of negating the formal wrong against the legal order, and not the material

³⁰⁵ There are, of course, legal ways in which one can cause the death of somebody. See similarly Schroeder and Carlson, “The Appearance of Right and the Essence of Wrong”, 2501.

³⁰⁶ Hegel, *Philosophy of Right*, § 97 Addition.

³⁰⁷ *Ibid.*, § 100.

wrong suffered by the victim. This critique does not apply to Hegel's theory, however. With Hegel we see that the formal wrong that punishment negates is also a wrong against a specific victim. The victim does not merely suffer material wrong, but also a formal wrong by the negation of her capacity for having rights. When the state uses resources in order to negate this formal wrong, it is not merely to ensure that the offender experiences the rational implications of her own actions, but to deny the denial of the victim's freedom. The punishment serves a symbolic function as recognition of a concrete person. And by acknowledging the victim's equal right to freedom, so is everyone else's equal right to freedom recognized. Thus, the message conveyed by the crime is denied; it is manifested as false, as a nullity.

9.3 Supplementing Kant and Hegel's Theory

This reconstruction of Hegel's penal theory has made clear what he takes to be the proper aim of punishment: the re-actualization of mutual recognition, which has been negated through crime. The details of how punishment may achieve this aim are not as clear, however. By supplementing Kant and Hegel's theory with the insights of the so-called *expressive* or *communicative* penal theories, I believe we can fill in some of these details, while rendering the Kantian-Hegelian framework all the more convincing.³⁰⁸

As legal retributivists, both Kant and Hegel subscribed to the notion that punishment negates the formal wrong of crime. Formal wrong, understood as a negation of right, is necessarily symbolic. It has no positive existence; as we saw, only the material aspect of crime has positive existence. Material wrong is remedied by compensation, not punishment. Punishment is exclusively directed against a wrong that is symbolic and whose negation must therefore also be symbolic.

What does this mean? Very rudimentarily, it simply means that crime and punishment carry meaning. They entail certain messages. Put negatively, if an event does not have meaning – if it does not involve communication – it is not a crime, and hence, cannot be

³⁰⁸ Not all expressive theorists would applaud my co-opting of the theory into a Kantian-Hegelian framework. However, the expressive theory may easily collapse into utilitarianism. The most promising strategy for avoiding that, I believe, is to link the expressive function of punishment to the Kantian-Hegelian notion that punishment can inherently express respect for equal worth. Accordingly, I find most use for Jean Hampton's expressive theory, which she occasionally explicitly relates to Hegel.

symbolically negated. An earthquake, for instance, does not communicate anything. It is therefore neither just nor unjust. Human action, on the other hand, can be meaningful, and hence potentially right or wrong.

To this someone might object that many peoples have viewed earthquakes and the like as punishments from God. We even find a curious example of the opposite, a human punishing nature for *its* crimes, in the story of the Persian king Xerxes who whipped the sea for its failure to obey him. These are not counterexamples, however. They merely show that people have attributed meaning to nature and to the Cosmos at large, thus including them within the realm of justice and injustice. Indeed, the very notion of justice was originally inseparable from nature, as is evident, for instance, in the oldest remaining text on justice in Greek philosophy. In *Anaximander's Fragment*, the life-giving and destructive changes in nature are said to "give justice and make reparation to one another for their injustice, according to the arrangement of Time". Another example from ancient Greece is the notion of *hubris*. Anybody who displayed *hubris* by going beyond his rightful place within the cosmic order might rightfully meet an unhappy fortune. His downfall, i.e. his *nemesis*, would put him back into his place. Today we might call this *poetic justice*: the notion that eventually, through the workings of the universe, vice will be "punished" with misfortune. Again, this merely shows that when we apply to nature or to random events such terms as justice and punishment, it is because we read them as if they had meaning – as if they were poetry.

The first to coin the term 'the expressive function of punishment' was Joel Feinberg, in the article by the same name. He there outlines a few ways that punishment communicates to the public at large. First, it can communicate *authoritative disavowal*. If, for instance, a corrupt police officer is punished, the state effectively communicates that what the police officer did, he did not do 'in our name', that is, as a representative of the state. Somewhat linked to this, is *absolution of others*. If the policeman is convicted and punished it communicates that it was he, and not somebody else, who was responsible for the crime. Likewise, there may be situations in which "the absolution of an accuser hangs as much in the balance at a criminal trial as the inculpation of the accused."³⁰⁹ If, for instance, a person is convicted of rape, the conviction communicates that the person accusing him is

³⁰⁹ Feinberg, "The Expressive Function of Punishment", 408.

not guilty of perjury.

Punishment can also express what Feinberg calls *symbolic non-acquiescence*, communicating that the criminal act committed is not something society will condone. Feinberg offers a contrasting example, the so-called ‘paramour killings’ under The Texas Penal Code (Art. 1220), which states: “Homicide is justifiable when committed by the husband upon one taken in the act of adultery with the wife, provided the killing takes place before the parties to the act have separated.” By not punishing such killings, Feinberg says, “the law expresses the judgment of the ‘people of Texas’ in whose name it speaks, that the vindictive satisfaction in the mind of a cuckolded husband is a thing of greater value than the very life of his wife’s lover”.³¹⁰ I might add that a premise of this judgment is the belief that husbands have the right to control the sexuality of their wives; that the wives are in this way the property of the husbands. The same premise underlies the practice in many countries whereby inter-marital rape is legal. Conversely, punishing such acts communicates the opposite, that husbands do not have property rights to wives, that both retain their sexual autonomy in marriage.

Failure to ‘symbolically non-acquiesce’ can also result from leniency in sentencing. If a sentence is conspicuously low, the courts may thereby signal that they do not emphatically condemn the crime. A good example is the case of now infamous William Zantzinger, a wealthy, white tobacco heir convicted of killing Hattie Carroll, an African-American barmaid and mother of ten. The sentence: six months in jail, conveniently deferred until after Zantzinger’s tobacco harvest. The story of the case was made immortal by Bob Dylan’s 1964 song “The Lonesome Death of Hattie Carroll”, which conveys the outrage many felt at the court’s *acquiescence*.

In the courtroom of honor, the judge pounded his gavel
 To show that all’s equal and that the courts are on the level
 [...]
 And handed out strongly, for penalty and repentance
 William Zantzinger with a six-month sentence

It is precisely the irony of the notion that “all’s equal” before the law in the Jim Crow south that is effectively revealed in the “strong” sentence of six months.

³¹⁰ Ibid., 406.

Feinberg argues that it is the idea of symbolic non-acquiescence that really underlies Kant's famous example of an island community that is about to be dissolved. Kant writes,

[...] the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice.

Kant has drawn much critique for the reference to 'blood guilt' (rightly, of course). However, in light of Feinberg's 'symbolic non-acquiescence' a charitable interpretation of this otherwise extreme claim is possible: The failure to punish reflects on society at large. We are all in some sense collaborators to injustice if we do not act to remedy the injustice. If we let fellow citizens go hungry for lack of money; if we return asylum seekers to an all but certain death; if we fail to punish offenders against minorities as we normally would – in all these cases we would fail in our duty to uphold justice and would thus be guilty of an injustice. Indeed, as we shall see shortly, these are all examples of injustice according to the Kantian Universal Principle of Right.

The fourth and final way that punishment serves an expressive function according to Feinberg is by *vindication of law*. Again, it is easiest to illustrate with negative examples. Sometimes, Feinberg says, the criminal law may be clear enough in its condemnation of certain conduct, but "official evasion and unreliable enforcement, gives rise to doubts that the law really means what it says".³¹¹ If, for instance, prohibition of marijuana use or drinking in public parks is not enforced, as is the case in many jurisdictions, the lack of enforcement communicates to the public that the prohibition is not to be taken seriously. Conversely, if the prohibition is enforced, law is vindicated. As with symbolic non-acquiescence, vindication of law is an expressive function of punishment that fits nicely with the Kantian-Hegelian framework outlined above, especially if by law we mean not merely positive law as it happens to be, but law as it ought to be, that is, in accordance with mutual freedom.

Feinberg has thus shown that punishment serves an important expressive function in (at least) these four ways. He then raises the following challenge: Could not the same

³¹¹ Ibid., 407.

expressive function be achieved by other means? And would that not mean that the expressive function could not justify the necessity of punishment?

One can imagine an elaborate public ritual, exploiting the trustiest devices of religion and mystery, music and drama, to express in the most solemn way the community's condemnation of a criminal for his dastardly deed. [...] Such a device would preserve the condemnatory function of punishment while dispensing with its usual physical forms – incarceration and corporal mistreatment.³¹²

If we wanted to communicate, say, that all have a right to sexual autonomy, could we not instead of punishing a rapist hold a parade in honor of the victim, with banners and speeches denouncing the crime and expressing to the victim her equal worth?³¹³ In fact, could we not do without any ritual at all, perhaps beyond a simple statement conveying the wrongness of the crime? Feinberg's answer: "Perhaps, but when [the state] speaks by punishing, its message is loud and sure of getting across."³¹⁴ His point is that as things are, punishment is the most effective way of communicating condemnation.

[C]ertain forms of hard treatment have become the conventional symbols of public reprobation. This is neither more nor less paradoxical than to say that certain words have become conventional vehicles in our language for the expression of certain attitudes, or that champagne is the alcoholic beverage traditionally used in celebration of great events, or that black is the color of mourning.³¹⁵

We might compare it to the custom of giving gifts: If a person does you a favor you can certainly express your gratitude with a simple "Thank you". But the message will get across better if you also give a bouquet of flowers or a bottle of whisky. Feinberg's answer to his own challenge is thus that punishment is necessary for the achievement of the mentioned expressive functions, not because there is anything inherent in the act of punishment making it indispensable to this aim, but as a matter of convention.

Durkheim's answer to this challenge is slightly different, but with a similar conclusion. As

³¹² Ibid., 420.

³¹³ The parade example is much discussed in the literature, for instance in Jean Hampton, "Correcting Harms Versus Righting Wrongs: The Goal of Retribution", *UCLA Law Review* 39 (1991) and Heather J Gert, Linda Radzik, and Michael Hand, "Hampton on the Expressive Power of Punishment", *Journal of Social Philosophy* 35, no. 1 (2004).

³¹⁴ Feinberg, "The Expressive Function of Punishment", 408.

³¹⁵ Ibid., 402.

we saw above, Durkheim too held that punishment serves a communicative function: “it is a sign indicating that the sentiments of the collectivity are still unchanged”³¹⁶ And the ultimate purpose of giving this ‘sign’ through punishment is “to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour”.³¹⁷ Why could not this purpose be achieved without punishment? Why not, for instance, simply have the courts make a statement about the crime’s failure to change the collective consciousness?

The answer has to do with the nature of the collective consciousness. Durkheim defines it as: “The totality of beliefs and sentiments common to the average members of society.”³¹⁸ From these shared beliefs and sentiments arises the mechanical form of social solidarity, the fellow feeling which is due to the sense of being alike (or in more colloquial terms: the feeling of being in the same boat). Precisely because social solidarity has an emotional basis in our shared sentiments it will not suffice to counter attacks against it with a mere statement. Rituals, Durkheim stresses, play a vital role in maintaining the collective consciousness. But why the ritual of punishment, why not an elaborate public ritual such as the one Feinberg sketches above? Because crime speaks to us emotionally, an emotional reaction is required, and punishment, which “constitutes an emotional reaction”³¹⁹ is particularly apt to “react vigorously against the cause of what threatens such a lowering of the consciousness”, Durkheim says.³²⁰

A mere re-establishment of the order that has been disturbed cannot suffice. We need a more violent form of satisfaction. The force that the crime has come up against is too intense for it to react with so much moderation. Indeed it could not do so without becoming weakened, for it is thanks to the intensity of its reaction that it recovers, maintaining the same level of vitality.³²¹

Violent emotions such as anger are resources, Durkheim says, for mobilizing a defense of our shared convictions. “[F]ar from shaking our convictions, [it] has the effect on us of strengthening them even more.”³²² Much like a fight against a common enemy will bring

³¹⁶ Durkheim, *The Division of Labour in Society*, 63.

³¹⁷ *Ibid.*, 62.

³¹⁸ *Ibid.*, 38.

³¹⁹ *Ibid.*, 44.

³²⁰ *Ibid.*, 53.

³²¹ *Ibid.*, 55.

³²² *Ibid.*, 55.

people together, crime can unite people in the response against it, reinforcing social solidarity at a deeper level. Recall from above Durkheim's remarkable conclusion: Crime serves a useful function in any healthy society.

Joshua Kleinfeld, who has recently defended a Durkheim-inspired penal theory, stresses the importance of the emotional aspect of punishment:

Having these emotions is thus part and parcel of being bonded to one another, and acting on them by punishing is what helps keep us bonded to each other. Indeed, punishment must be emotional if it is to have solidaristic effect; nothing wholly cerebral could produce the feelings of attachment that are one of punishment's objects.³²³

We see, then, that both on this Durkheimian 'emotional theory' and on Feinberg's 'conventional theory', punishment serves an important expressive function. On both theories, however, the medium (punishment) is contingently bound to its goal (expressing condemnation, reinforcing social solidarity). It is conceivable, in other words, that the goal could be achieved by other means than punishment. Both Durkheim and Feinberg argue for what we might call the 'empirical necessity' of punishment: As the world happens to be, punishment is necessary for achieving the expressive function accounted for, either because it is the (most effective) conventional way of expressing condemnation, or because it is the (most forceful) emotional response to attacks upon our shared convictions. Both these claims may be true as it is, but things may change so that they are no longer. We might develop other conventions whereby we express condemnations. We might find other responses that are as emotionally potent; or perhaps the need for an emotional response will diminish as society develops.³²⁴

Because we might achieve the goals by other means, we must justify that we ought to use punishment instead of other medias of communication. Feinberg concludes, correctly I believe, that "[t]he problem of justifying punishment, when it takes this form, may really be that of justifying our particular symbols of infamy".³²⁵ Since punishment involves the intentional infliction of pain, the cards are stacked against it at the outset. Only if it can be

³²³ Kleinfeld, "Reconstructivism", 1530.

³²⁴ Hegel suggested such a gradual decrease in punishment in *Philosophy of Right*, § 96 Addition: "By the progress of civilization the estimate of crime becomes milder, to-day the criminal being punished less severely than he was a hundred years ago."

³²⁵ Feinberg, "The Expressive Function of Punishment", 421.

shown that punishment is so much more effective in achieving the desired goals that the ‘price’ of causing pain is worth it, will punishment be justified. However, we then have a consequentialist justification, which requires that we must show not only that the chosen means are the most effective, but that the goal attained is so valuable as to justify the means. Most would agree that condemning crimes is valuable, but for what reasons? Is absolution of others, authoritative disavowal, symbolic non-acquiescence and vindication of law so valuable as to justify the method that achieves it best, regardless of other negative effects of the method? Feinberg indicates that in addition, the expressive function might have a crime preventive effect.³²⁶ Durkheim’s ultimate goal for the expressive function is strengthening social solidarity, which in turn is a prerequisite for human flourishing within a society. It seems this version of the expressive theory is very close to collapsing into utilitarianism, notwithstanding Durkheim’s own claim to be transcending the dichotomy of justice and utility.

In any case, we are far from providing an expressive account of punishment that fits the Kantian-Hegelian justification of punishment. The latter would require a theory of how punishment inherently expresses mutual respect for freedom, because punishment itself entails this meaning, and not because it is a conventional *instrument* for conveying such meaning. Jean Hampton’s expressive theory may here be helpful.

9.3.1 The natural meaning of crime and punishment

Hampton applies a Gricean theory of meaning to show different ways in which a criminal act can convey meaning. H. P. Grice distinguished between what he called natural meaning and non-natural meaning.³²⁷ The latter would include the kind of meaning by convention that Feinberg attributes to punishment: In the same way that giving a gift or saying “Thank you” are conventions for expressing the attitude of gratefulness, punishment is the conventional way that the state expresses condemnation. Hampton acknowledges that punishment may convey meaning in this and other non-natural senses, but asserts in addition that punishment is meaningful in Grice’s natural sense. Natural meaning can be understood as something akin to “evidence of” or “shows”. We say, for instance, “dark clouds *mean* rain is coming” or “a higher mortgage *means* we will have less money to

³²⁶ Ibid., 405.

³²⁷ H. P. Grice, "Meaning", *The Philosophical Review* 66, no. 3 (1957).

spend". We are clearly not talking about the linguistic meaning of the words uttered, but rather about an actual or epistemic connection between the two phenomena referred to on each side of the word "mean(s)". Human actions can also be meaningful in this natural sense. Hampton's example is of an art expert who slits the canvas of a painting, an act that *means* that she thinks the painting worthless.³²⁸ Why can we infer this meaning? Because, Hampton says, to consider an artistic object valuable *means* "to preclude many kinds of treatment with respect to this object". She discusses as an example the Book of Kells. If somebody spray-painted over its pages we would be furious. "[I]ts *value generates certain entitlements*. For as long as the Book of Kells has that value, it has these entitlements, which include being preserved, treated with care, and so forth."³²⁹

In the same way, Hampton holds, a criminal act *means* that the offender demeans the worth of the victim. "By victimizing me, the wrongdoer has declared himself elevated with respect to me, acting as a superior who is permitted to use me for his purposes."³³⁰ The implicit message the offender is sending: "I can do with you whatever I want. I can dominate you." This false claim is the target of punishment. Punishment "negates the evidence of superiority".³³¹ "The retributive punisher uses the infliction of suffering to symbolize the subjugation of the subjugator, the domination of the one who dominated the victim."³³² Or as Hampton says in a clear reference to Hegel: "The lord must be humbled to show that he isn't the lord of the victim."³³³

The wrong in crime is thus the offender's elevation of herself by demeaning the victim. As Hampton observes, many crime victims feel degraded. Their sense of self-worth is threatened by the crime. They feel low, and some come to think that they deserve their low status; that the offender did not cause them to be degraded, but rather that their prior worth was undeserved and that the offender merely put them in their right place. Many victims, for instance after sexual abuse, feel this sort of shame and self-loathing. Indeed, these

³²⁸ Hampton, "Correcting Harms Versus Righting Wrongs", 1675.

³²⁹ *Ibid.*, 1674.

³³⁰ Hampton, "The Retributive Idea", 125.

³³¹ *Ibid.*, 129.

³³² Jean Hampton, "An Expressive Theory of Retribution", in *Retributivism and Its Critics*, ed. Wesley Cragg (Stuttgart: Franz Steiner Verlag, 1992), 13.

³³³ Hampton, "The Retributive Idea", 125.

emotions can be seen as psychological self-defense mechanisms.³³⁴

Though such acceptance of being demeaned may be a natural self-defense mechanism, it is nonetheless undeserved, and the recovery and justice of the victim requires that the claim be denied. Remedying this wrong means elevating the victim through negating the offender's claim to superiority. Implicit in this aim is a distributive principle for the amount of punishment required: "The more severe the punishment, the more he is being brought low; and how low we want to bring a criminal depends on the extent to which his actions symbolize his superiority and lordship over the one he hurt."³³⁵ This also means there is an upper limit to how low it is appropriate to bring the offender. The aim is to negate the evidence of superiority, not to elevate the victim above the offender, creating a new inequality. If punishment is so harsh as to demean the offender it may actually be counter-productive to elevating the victim.

Applying a Hegel-inspired theory of recognition, Hampton shows the futility of re-establishing one's self-esteem (i.e. one's perception of having worth) at the expense of another's worth. If trying, for instance, to bolster one's image of oneself as a superior tennis player, it will not suffice to win over poor tennis players, say, one's seven-year-old child. Only if one respects the worth of one's opponent (in this case as a tennis player), can one possibly take winning over her as *evidence of* one's own ability. Or take Hampton's example: A philosophy professor who only surrounds himself with students who look up to him will not successfully convince himself that he is well-respected among his peers. This 'superstar recognition-strategy', as Hampton calls it, is bound to fail because recognition is a two-way street. If the professor does not recognize his students as his peers, their recognition will not suffice. This is, essentially, the problem of the Master in Hegel's dialectic.

Hampton also shows that hatred is a self-defeating emotional strategy for elevating oneself

³³⁴ As Ronald Fairbairn pithily put this point, referring to the self-loathing of many victims of child abuse: "It is better to be a sinner in a world ruled by God than to live in a world ruled by the Devil." In other words: It may be psychologically easier to blame yourself than to accept that your world, your parents, everything, is evil, and thus throwing into question the entire meaning of your existence. Self-loathing is thus an effective defense against such a devastating conclusion, and may even be a healthy first, and temporary, stage on a victim's path to recovery. Fairbairn was quoted in Stephen A Mitchell, "You've Got to Suffer if You Want to Sing the Blues: Psychoanalytic Reflections on Guilt and Self-pity", *Psychoanalytic Dialogues* 10, no. 5 (2000), 721.

³³⁵ Hampton, "The Retributive Idea", 134.

after having been brought low. Many crime victims experience hate of whoever has demeaned them, sometimes in combination with self-loathing, as mentioned above. Whether the hatred is malicious, taking pleasure in the other's lowness relative to oneself, or spiteful, taking pleasure at having "company at the bottom", i.e. not being alone in being worthless, one will not thereby achieve the sense of objective worth that one seeks. Rather one confirms one's own lowness through hating. Hampton quotes John Donne, who put this point succinctly:

Lest my being nothing lessen thee
If thou hate me, take heed of hating me.³³⁶

Hampton thus warns against punishment that is cruel and based on hatred. The aim cannot be to 'bring the offender low'. His lowness is not a goal in itself – such a hateful purpose would be self-defeating for elevating the victim. 'Bringing low' or 'humbling the lord' must be understood as 'negating the evidence of superiority'. 'Bringing low' thus has merely instrumental value; it is just *to the extent that it establishes equality*.

However, even this instrumental function of 'bringing low' may be problematic. It seems to rest on the assumption that the offender actually succeeds in elevating himself and lowering the victim. Punishment, by "domination of the one who dominated the victim" then re-establishes their equal worth. But does that not mean that the ability to dominate bears on one's worth? Interpreting Hampton in this way, Gert et al. conclude that she proposes an "offensive equation of power with value".³³⁷ Dolinko makes the same point when he asks why somebody should take a crime against her as evidence of her inferiority. "If you find your home burglarized, you may experience anger, or a sense of defilement, or fear that it will happen again, or all of these - but will you feel that the burglar has demonstrated that his moral value is greater than yours? Surely not!"³³⁸

Hampton objects, of course, to an interpretation of her theory that equates moral value with strength, as we shall shortly see. It is worth noticing, however, that if the theory was about power, it could still make sense as a retributive theory. In other words, if we saw crime as wrong because the offender's power over the victim *makes her superior*, this

³³⁶ Hampton, "Forgiveness, Resentment and Hatred", 73.

³³⁷ Gert, Radzik, and Hand, "Hampton on the Expressive Power of Punishment", 87.

³³⁸ Dolinko, "Some Thoughts about Retributivism", 554.

wrong would be remedied by applying punishment as a counter-power. In societies in which moral worth is equated with power, this interpretation of Hampton's theory would likely accord with common opinions on the justice of punishment. However, Hampton points out that if you accept an inegalitarian theory of worth then you will not, as a consequence, accept the principle of proportionality of crime and punishment. An inferior's crime against a superior will require a more severe punishment to restore the "correct" balance than a superior's crime against someone who is already inferior – simply due to the inequality of the *status quo ante culpam*. And indeed, historically, the rich and powerful have been punished less severely than the poor and powerless for similar crimes, and this practice persists to some extent in modern societies. The difference is that now such practices are viewed as unjust. Most of us react to the injustice of cases like that of William Zantinger. Part of what we find offensive is precisely that his low punishment makes sense only against a background where his worth at the outset is superior to that of Hattie Carroll. This premise is unacceptable, but if it were acceptable, the theory that Gert et al. and Dolinko attribute to Hampton would still function as a theory of retributive justice. In other words, we have here an instance of a retributive theory that is internally coherent, but where the premise that it rests on is unacceptable.

We need, then, an alternative account of the wrong in crime – it cannot be that power over another makes that person morally inferior. One possibility is to drop the notion of superiority and inferiority entirely, focusing instead on the wrongness of the power imbalance itself: It is unjust that one person should hold power over another; this wrong is remedied by applying punishment as a counter-power. Notice that this version addresses only the material aspect of power. It is not, therefore, an expressive account of punishment. And for the same reason it is insufficient as a comprehensive theory of punishment – it could not, for example, account for a wrong committed against a more powerful person, where the crime has not made the offender superior to the victim in terms of power. Neither can it account for the injustice of punishment when a person does hold power over another, but has not committed a crime. However, as I have stressed before: The fact that the theory is not comprehensive does not mean that it does not sometimes account for an aspect of what makes punishment just. Crimes do sometimes create an unjust power imbalance that ought to be remedied.

Hampton's answer is different, however, preserving the expressive element of punishment. Crimes do not actually cause the victim to be inferior to the offender. Their real value is unchanged by the crime. Crime is merely an *appearance* of degradation. Hence, Hampton says, "the retributive motive for inflicting suffering is to annul or counter the appearance of the wrongdoer's superiority and thus affirm the victim's real value".³³⁹

What is the victim's real value? The answer: Her value is infinite. She is, as Kant put it, "raised above all price and therefore admits of no equivalent [and hence] has a dignity".³⁴⁰ Compare this to Hobbes' claim that "The Value, or Worth of a man, is as of all other things, his Price".³⁴¹ Hampton, as most others today, adopts the Kantian view of persons as *ends-in-themselves* and rejects the Hobbesian instrumental view of human worth. That means that for Hampton, human value is inalienable. A victim cannot lose value, and an offender cannot have more value. The Kantian view is precisely that human value is beyond more and less, i.e. raised above all price.

How are we then to interpret the meaning of crime? Crime creates an appearance of degradation (as opposed to a real degradation). Punishment, in turn, negates the evidence, exposing the appearance as just an appearance. But Hampton has not thereby showed how crime and punishment create and negate these appearances. Her position is therefore vulnerable to the kind of critique that Dolinko makes: "But why should we care about nullifying precisely those claims?"³⁴² Why should we care about something we know to be merely an appearance? All kinds of false moral claims are made every day; should it be the state's responsibility to negate these claims? Take the example of Randy Newman who had a huge hit singing: "Short people got no reason to live" – should he have been punished in order to show the claim to be merely an appearance of the value of short people?³⁴³

Further, unless the theory specifies how crime and punishment create and negate the appearance of degradation, it will not be able to answer Feinberg's challenge from above. It cannot provide a reason why punishment is not merely a *conventional instrument*

³³⁹ Hampton, "The Retributive Idea", 130.

³⁴⁰ Kant, *Groundwork of the Metaphysics of Morals*, 4:434.

³⁴¹ Hobbes, *Leviathan*, 151.

³⁴² Dolinko, "Some Thoughts about Retributivism", 551.

³⁴³ Perhaps the bridge of the song would have been enough to acquit him: "Short people are just the same as you and I."

whereby condemnation is expressed. And it cannot, then, avoid the problems I associated with Feinberg's and Durkheim's theories, namely that punishment would have to be given a consequentialist justification, which it is uncertain that the expressive theory could provide.

Hampton's own views on this issue are not entirely clear. She held at one point that punishment is "uniquely suited to the vindication of the victim's relative worth".³⁴⁴ Later, however, she claimed that even turning the other cheek could serve the same "retributive" function as punishment. She quotes St. Paul to this effect: "[I]f your enemy is hungry, feed him; if he is thirsty, give him drink; for by so doing, you will heap burning coals upon his head."³⁴⁵ Presumably, such "kind" acts may evoke feelings of humiliation and shame in the offender, thereby "humbling" her. Likewise, throwing a parade for the victim or giving a sincere apology may, according to Hampton, serve the retributive function "to nullify the wrongdoer's message of superiority". But defining "retribution" so widely as to include such non-punitive acts does not answer the above challenges. We still only have an account of the conventional meaning of punishment. The problem merely shifts to which among the different means of conveying this conventional meaning, if any, is justified.

I will now try to answer these challenges by giving an account of the Gricean *natural meaning* of crime. The aim is to show the inherent connection between the natural meaning of crime and the retributive function of punishment, thereby providing an understanding of the expressive function of punishment that accords with the Kantian-Hegelian theory of punishment. My proposal is based on H. L. A. Hart's account of rights and a similar insight provided by Hampton's example of the art critic who slits the canvass of a painting. The art critic's act *means* that for her the painting is worthless. The reason the act has this natural meaning is because it is entailed by the meaning of artistic value. 'An object having artistic value' *means* 'certain treatment of it is precluded'. As Hampton put it, the object has *entitlements* as long as it is viewed as valuable. Vandalizing the object means disrespect of these entitlements, and hence disrespect of its value.

Hart's theory of rights, as he lays it out in "Are There Any Natural Rights?" similarly

³⁴⁴ Hampton, "The Retributive Idea", 128.

³⁴⁵ *Romans* 12:20

asserts a necessary connection between valuing the autonomy of the individual and according her moral rights. One's value as a free and equal person is entailed by the concept of rights and vice versa. "There is no place for a moral right unless the moral value of individual freedom is recognized."³⁴⁶ Hart does not argue that this *natural right to freedom* is part of an eternal natural law; he is making the conditional assertion that "if there are any moral rights then there must be this one natural right".³⁴⁷ The moral codes of ancient Greece, for instance, did not include the concept of a right, Hart argues. The concept of rights arose during the Enlightenment with the explicit value placed on individual autonomy. When Kant distinguished between the morality and the legality of an act, Hart claims, it was precisely to isolate a sphere within morality where the individual could not be coerced even if doing so would contribute to the overall Good. "His point is, I think, that we must distinguish from the rest of morality those principles regulating the proper distribution of human freedom which alone make it morally legitimate for one human being to determine by his choice how another should act"³⁴⁸ With the concept of a right one could thereby distinguish that which is good and/or just from that which is within one's right to enforce. Something might then be good, but beyond limits. I might think, for instance, that it would be good to take away my nephew's iPhone, since he seems to be enslaved by it; however, it is not my right to do so. Likewise, it would be good if people gave more to charity, but we all have a right not to be forced to do so.

How, then, is the natural right to freedom entailed by the concept of moral rights? Hart distinguishes between *special rights* and *general rights*, which are mirror images of each other. Special rights arise out of transactions or special relationships and accord the right to something that would otherwise be within another person's sphere of autonomy. "[T]he claimant has some special justification for interference with another's freedom which other persons do not have ('I have a right to be paid what you promised for my services')."³⁴⁹ General rights apply to all and accord the right not be interfered with unless somebody has a special right to do so. "[G]eneral rights [...] are asserted defensively, when some unjustified interference is anticipated or threatened, in order to point out that the

³⁴⁶ Hart, "Are There Any Natural Rights?", 177 footnote.

³⁴⁷ *Ibid.*, 176.

³⁴⁸ *Ibid.*, 178.

³⁴⁹ *Ibid.*, 183.

interference is unjustified. 'I have the right to say what I think.' 'I have a right worship as I please.'"³⁵⁰

Hart's point is that both special rights and general rights can only be understood against a background where all have a natural right to be free. It does not make sense to claim a special right to interfere unless persons by default have the general right not to be interfered with, that is, unless we are by default free. To claim, for instance, "I have a right to your services according to our contract" only makes sense if but for the contract you were rightfully free not to render the services. Further, the very possibility of according me special rights presupposes your autonomy. "For we are in fact saying in the case of promises and consents or authorizations that this claim to interfere with another's freedom is justified because he has, in exercise of his equal right to be free, freely chosen to create this claim."³⁵¹ Both types of right thus presuppose the autonomy of the individual: 1) for transferring rights to another, and 2) as the negative against which a positive right to interfere is conceivable.

Robert Nozick objects to this argument, and attempts to show its flawed logic by turning it on its head:

If there were cogency to Hart's claim that only against a background of required nonforcing can we understand the point of special rights, then there would seem to be equal cogency to the claim that only against a background of *permitted* forcing can we understand the point of *general* rights.³⁵²

Nozick's point is the following: If I say that we all have a general right to take a walk or to eat dinner or to speak our minds, it only makes sense, applying Hart's logic, if but for this general right, others could legitimately force us not to do so. In conclusion: Only if we do not have a natural right to be free can we understand our general rights to do such things as taking a walk or eating dinner.

Nozick's argument does not work, however, for he has missed the fact that general rights are negative. We do not have general rights to do anything in particular; we have general rights to not be interfered with when others do not have special rights to do so. Admittedly,

³⁵⁰ *Ibid.*, 187.

³⁵¹ *Ibid.*, 190.

³⁵² Nozick, *Anarchy, State, and Utopia*, 92.

Hart could have been clearer about this. His examples of general rights are “I have a right to say what I think” and “I have a right to worship as I please”. However, he does say that these sentences are asserted defensively, when an unjustified interference is anticipated. The general right is not really ‘the right to speak your mind’, but ‘the right not to be hindered in speaking your mind, save for justifiable reasons’. Likewise, the general right is really ‘to not be hindered in worshipping’.

Turning this on its head is implausible and in conflict with the way we normally conceive rights. We do not normally think we are prohibited to do everything except that which we have a right to do. That would require an infinite amount of positive general rights – for instance, the general right to climb a tree on a Wednesday, which we would otherwise be prohibited in doing because we are by default unfree. And how could we even conceive the notion of special rights as overriding general rights without confirming Hart’s point? If you have a general right to climb trees on Wednesdays unless I have a special right to force you not to, then you are in fact free. Nothing has then changed from Hart’s theory except that the name of general rights is misleadingly assigned to ‘the right to climb trees on Wednesdays’ instead of ‘the right not to be hindered in climbing trees on Wednesdays’.

Instead of an infinite amount of positive general rights, we have one negative general right to freedom, and many positive special rights. The latter make exceptions to the general right to non-interference, but, importantly, exceptions that confirm the rule, i.e. our natural right to freedom (by presupposing our autonomy in creating special rights). This is essentially the same claim that Kant makes when he says that we have one innate right to freedom from which all positive rights stem. Under the Universal Principle of Right, we have a general right to unrestricted freedom to the extent compatible with everyone else’s equal freedom. Special rights may override the general right not to be interfered with, but these rights must be compatible with mutual freedom in order not to be illegitimate restrictions on our freedom.

Another way of putting this is to say, as Kant did, that we can only have rights against beings that have rights as well as duties. We cannot have rights against beings that have neither rights nor duties, nor beings that have only duties but no rights.³⁵³ The three main

³⁵³ Kant, *The Metaphysics of Morals*, 6:241.

types of (special) rights that Kant distinguishes thus have in common that upholding them respects the rights of the person against whom the right is held.³⁵⁴ If I consent to your use of my bicycle, your interference in my property respects my rights. This is the principle of *volenti non fit injuria*. Without consent, however, your use of my bicycle would be wrong. It would not be a case of a special right overriding the general right to non-interference, because one cannot have a special right without respecting rights. In other words, one cannot have rights against someone who is treated as a being with neither rights nor duties – like a thing – or as a being with only duties but no rights – like a slave.

Thus, because respecting rights *means* respecting that person's equal right to freedom, disrespecting rights *means* disrespecting her freedom. We have identified, then, a *natural meaning* of crime. Of course, not all will recognize this meaning. Hart's point is valid: If you do not have a concept of rights, you will not have a concept of a natural right to freedom, and neither will you then conceive crimes as entailing a denial of this concept. This does not mean, however, that we have here merely a conventional meaning of crime. If a man in, say, ancient Egypt raped his wife, the act would mean a denial of her freedom, even though he and others at the time would not conceive it as such.

In modern societies, where we are accustomed to think in terms of rights and hence to value individual freedom, this natural meaning of crime as denial of equal freedom is much closer to an established meaning of crime, though as the preceding chapters have shown, we often do accord other meanings to crimes as well. What this chapter has shown, however, is that *if* we accept the concept of rights, we thereby accept the value of individual freedom, and we cannot then fail to accept that a denial of a person's rights means a denial of equal freedom. Unlike the other aspects of the wrong in crime identified in the preceding chapters this meaning of crime is not optional *once we accept the value of freedom*. We could, of course deny the value of freedom, but at the cost of giving up the notion of rights, and hence, the democratic *Rechtsstaat* itself. The freedom perspective on crime is thus not

³⁵⁴ There are three types of (special) rights according to Kant, and a fourth type of interference which is wrong. 1) A right to a thing, i.e. property rights; 2) a right against a person, i.e. rights to a person's actions according to a contract; and 3) "a right to a person akin to a right to a thing" – the third category designates the right to 'act for another', for instance one's children or others in a fiduciary relationship, deciding for that person, but not contrary to that person's own ends. This right is akin to property rights, for one is allowed "to make direct use of a person as of a thing, as a means to my end, but still without infringing upon his personality", *ibid.*, 6:359. The fourth alternative, "a right of thing against a person" is inconceivable; things cannot have rights, 6:358 and 6:247.

only intuitively appealing because we value freedom highly in our culture – it is also implied by something else we do and ought to value highly: The rule of law. With the risk of sounding very Hegelian, I would suggest that to give up the value of freedom once it has been acknowledged would constitute an unwanted (and perhaps impossible) regression.

Accepting, then, that the denial of mutual freedom constitutes a natural meaning of crime, does this answer the challenge posed by Feinberg regarding the expressive function of punishment? In other words, is punishment more than merely a conventional instrument for condemning crimes? The Kantian-Hegelian theory of punishment permits an affirmative answer, seeing punishment as inherently expressing respect for mutual freedom. With Kant, we saw that punishment *means* treating the criminal as a free and rational agent. The justice of turning the crime against the criminal is entailed by mutual freedom, for it is the only way the crime can be taken as an expression of the criminal's rationality. With Hegel, we saw that crime is also a specific denial of the victim's personhood, and since one's own personhood depends on the recognition of other equals, treating the criminal as an equal (as shown by the Kantian theory of punishment) *means* restoring mutual recognition for both victim and offender. Treating the offender as an equal *means* denying the appearance of her superiority over the victim and others, to put it in Hampton's terms. Thus, in the same way that the natural meaning of crime is a denial of equal freedom due to the meaning of the concept of rights, so the natural meaning of punishment is a negation of unequal rights and hence an affirmation of mutual freedom.

9.4 Conclusion: The duty of justice

This brings us to the conclusion to this chapter and the part on the justice of punishment. After having reviewed all the plausible theories of the wrong in crime and the function of punishment in remedying these wrongs, I conclude that the best theory of retributive justice is one built on Kant and Hegel's fundamental insight of the wrong in infringing upon the equal right to freedom. This is not to say that other aspects of wrong are unimportant and ought not to be remedied. But the Kantian-Hegelian theory has some advantages over the others.

First, the wrong that punishment remedies is an intuitively salient and ubiquitous aspect

of crime, while the previously discussed wrongs – freeloading, undeserved profiting, undermining the common good etc. – are salient in some types of crimes, but absent in others, and therefore unsuitable as comprehensive theories of the wrong in crime. Indeed, some crimes can hardly be understood without seeing them as infringements of autonomy. There is no obvious harm in sexually touching a sleeping person who never finds out about it. But it is clearly a denial of her rights, treating her as if she were an object to be used for one’s own ends.

Note that the republican theory of Pettit and Braithwaite that identifies wrong as domination has the same scope, and is at first sight indistinguishable from the Kantian-Hegelian wrong as infringement of autonomy.³⁵⁵ The subtle difference is that the latter is a non-consequentialist theory, while the former is consequentialist with freedom as non-domination as the goal to be promoted.³⁵⁶ This brings us to the second advantage of a retributive theory based on Kant and Hegel: Punishment, upon this theory, instantiates the value it seeks to achieve. It is not merely a conventional instrument for attaining a goal outside of itself. Thus, the answer to Feinberg’s challenge is not that punishment is more effective than other means and “worth the price”. Rather, punishment is just in itself *once we accept as wrong the infringement upon mutual freedom*.

There is an important caveat here, however. The fact that punishment is sufficient for re-establishing recognition of mutual freedom does not mean that there cannot be other ways of achieving the same. There may be other sanctions that achieve justice by remedying the same injustice. As a practical matter, then, there may be little difference between the consequentialist and the non-consequentialist version of wrong as domination: On either theory one ought presumably to take into account the downsides of the specific sanctions if more than one can achieve the same goal.

There is nonetheless an important difference: Whereas a consequentialist might conclude that no sanctions are worth it in a given case, i.e. that the overall good of freedom as non-domination is best served by doing nothing about a particular wrong, a non-consequentialist will insist upon the duty to do justice regardless of the overall effects. The

³⁵⁵ Recall Kant’s definition of freedom as “independence from being constrained by another’s choice”, in other words, non-domination. *Ibid.*, 6:237.

³⁵⁶ Braithwaite and Pettit, *Not Just Deserts*, Chapter 3.

Kantian-Hegelian non-consequentialist theory I propose, unlike the consequentialist version, will say the following:

If, in a given case, other ways of restoring mutual freedom is impossible, punishment, since it is sufficient for restoring mutual freedom, is necessary for achieving justice.

This claim has two important consequences for the version of the Kantian-Hegelian theory I am adopting: First, it rejects Kant and Hegel's own *retributivist* views, but accepts their theories of *retributive justice*. Second, it accepts the duty to do justice that Kant and Hegel insisted upon.

The duty to do justice implied for Kant and Hegel the duty to punish. They held, in other words, the retributivist position that punishment is necessary and sufficient for justice. "The law of punishment is a categorical imperative"³⁵⁷, Kant says, and Hegel notes "the necessary connection between crime and punishment"³⁵⁸. If, however, there are other ways of restoring recognition of mutual freedom, and if these other ways have additional benefits, there is no reason to accept this Kantian-Hegelian duty to punish. There is a conditional here, and it will therefore be of importance for my theory to determine whether there are in fact other ways of restoring mutual freedom and when, if ever, they are practically feasible. I will later discuss restorative justice as one potential way of restoring mutual recognition.

Even if we abandon Kant and Hegel's duty to punish, we cannot abandon their duty to do justice without abandoning their theories all together. As Kant famously put it: "For if justice goes, there is no longer any value in human being's living on the earth."³⁵⁹ In other words, the duty of justice is inherent to the fundamental value of human life: Freedom. In yet other words, the duty to right wrongs is built into the very system of mutual freedom under universal law.³⁶⁰

How so? As we saw, even in a hypothetical state of nature, the innate right to freedom

³⁵⁷ Kant, *The Metaphysics of Morals*, 6:331.

³⁵⁸ G. W. F. Hegel, *Philosophy of Right*, trans. T. M. Knox (Oxford: Clarendon Press, 1952), § 101 Remark. I refer here to Knox' translation instead of Dyde's because the former is clearer at this point.

³⁵⁹ Kant, *The Metaphysics of Morals*, 6:332.

³⁶⁰ See for instance *ibid.*, 6:362: "The mere idea of a civil constitution among human beings carries with it the concept of punitive justice belonging to the supreme authority."

entails the right to hinder a hindrance to freedom. From the outset, freedom and coercion are two faces of the same coin. Likewise, for acquired rights, to property for instance: Such rights are entirely vacuous unless there is assurance that they will be respected. “No one is bound to refrain from encroaching on what another possesses if the other gives him no equal assurance that we will observe the same restraint toward him”, Kant says.³⁶¹ The problem is that outside of a legal order, such assurance is impossible. I might promise you to refrain from picking apples from a tree you have planted if you promise to leave the strawberries I have planted alone. But if I one day change my mind and I am physically capable of enforcing my will, your “right” to the apples is effectively nonexistent. In the same way that a slave who depends on the goodwill of his master is still dominated, so a person is unfree outside of a legal order, for one does not have rights if these depend on the unilateral will of other persons.

Now, a unilateral will cannot serve as a coercive law for everyone with regard to possession that is external and therefore contingent, since that would infringe upon freedom in accordance with universal laws. So it is only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance.³⁶²

Hence, it is built into the very concept of mutual freedom under universal law that it is a collective responsibility to protect the right to freedom. That, in turn, means that a legal order is only legitimate if it fulfills its duty to protect the equal freedom of all. Otherwise the legal order itself is in conflict with the Universal Principle of Right.

From this duty to secure everyone’s equal freedom flows several substantial duties of the state. One such duty is the duty to “maintain those members of the society who are unable to maintain themselves”.³⁶³ If the state does not provide for the poor, people without property will be dependent on the goodwill of other people for their survival. While in a state of nature everyone would be free to hunt and gather anything they came across, the establishment of property rights excludes all but the right-holder from enjoying the specific good. As Ripstein explains it: “If all land is privately held, then any person who does not

³⁶¹ Ibid., 6:307.

³⁶² Ibid., 6:256.

³⁶³ Ibid., 6:326.

own land would only be entitled to be anywhere at all with the permission of the person who did own the land.”³⁶⁴ Such a situation is not consistent with everyone’s equal freedom. Hence, if property rights are to be legitimate at all, they are so only within a legal order that ensures everyone property enough not to depend on anyone.³⁶⁵ A similar argument can be made for the right to seek asylum: The division of the world into separate states is only legitimate if everyone is ensured citizenship of a country where they can exercise their freedom. If a person is persecuted in her own country, she has the right to protection in another country, for without this right the very system of states “owning” land would afford her no place to be, and hence, would not be consistent with mutual freedom.³⁶⁶ The same logic accounts for the necessity of public spaces and public roads, and the police power to ensure that these are not appropriated for private purposes. One can, for instance, legitimately be fined for emptying sewage in a public area. Indeed, public infrastructure, such as a sewage system, is required in order to assure everyone’s access to the public domain. Other duties of the state include providing public health care and education, without which it would be impossible to uphold the lawful order.³⁶⁷

We see here that the Kantian ideal of mutual freedom functions at least to an extent as the sort of “gateway good” that Pettit attributes to this understanding of freedom. The reason why the ideal is demanding, inviting substantial duties on a legitimate state, is because freedom as non-domination requires that everyone *realistically* has access to freedom, and not merely potentially. That is, others must not be allowed to potentially dominate you; it does not suffice that they actually do not. Hence, we cannot rightly turn away an asylum seeker if doing so poses a realistic chance that she will lose her freedom or die, even though there is a chance that she will survive. Likewise, we cannot deny a poor person aid even though she could potentially catch fish with her bare hands and thereby survive. If her access to equal freedom is not assured without aid, aid is owed to her as a duty. Or take

³⁶⁴ Ripstein, *Force and Freedom*, 280.

³⁶⁵ Taxing those who have in order to supply for the have-nots is legitimate because without such an arrangement nobody would legitimately have anything. The legitimacy of redistribution is thus internal to the laws by which wealth comes into existence: “The wealthy have acquired an obligation to the commonwealth, since they owe their existence to an act of submitting to its protection and care”, Kant, *The Metaphysics of Morals*, 6:326.

³⁶⁶ Ripstein, *Force and Freedom*, 295-98.

³⁶⁷ *Ibid.*, 293. For a critique, see Yankah, “Crime, Freedom and Civic Bonds”, 263, claiming “the concept of freedom is being over-worked” in order to justify spending on public health, public parks, arts etc.

the example of emptying sewage on the street. Sewage will not physically hinder people from enjoying a stroll on the sidewalk, but realistically one's access to a public good will thus be restricted, and hence it must be prohibited.³⁶⁸

In the same way, sanctioning crime is also a matter of *assuring realistic access to equal freedom*. If crime were not sanctioned, we would only have our unilateral self-defense to ensure our rights, which would effectively make our rights void. That is, we would still retain our rights *normatively*, but they would not have effect in space and time, i.e. *empirically* or *realistically*. Recall Hegel's equivalent distinction for crime: "An injury done to right as right is a positive external fact; yet it is a nullity."³⁶⁹ In other words: One's rights cannot be damaged by crime. Crime is a nullity in the normative realm. Empirically, however, crime does damage.

But what sort of damage? I have, with Kant, distinguished between material and formal wrong. Clearly, many crimes cause material wrong, physical injury, damage to property etc. However, crime can do real damage not only materially, but also formally. It does so by denying the actual access to equal freedom. The formal right to freedom is effectively denied when one's faith in its empirical reality is undermined or it is otherwise made realistically inaccessible.

If crime is rampant, people will feel unsafe. The right, for instance, to walk home at night will still be valid, but realistically one's choice to do so will be constrained. Similarly, for crime victims: As Hampton stressed, one cannot actually be degraded by crime when one accepts a Kantian concept of moral worth. Crime is normatively inconsequential; hence, the lowering of the victim's value is merely an appearance. But sometimes the crime "damages the realization of her value" by effecting "a state of affairs in which the victim is unable to secure that to which his value entitles him – where that can include his

³⁶⁸ Naturally, there will be some disagreement as to exactly what is required in order to meet the demand of realistic access to mutual freedom. The Kantian framework, which, remember, is a *metaphysics of morals*, leaves much room for political considerations, i.e. considerations about the matter as opposed to the form of law. However, as we see above, the form itself, mutual freedom under universal law, gives rise to non-optional substantial demands upon legislation, and these demands are indisputable at least in core cases. That is, one might disagree about how comprehensive public health care provision must be, or how much aid must be provided for the poor, but very little or no health care and very little or no aid for the poor is clearly insufficient.

³⁶⁹ Hegel, *Philosophy of Right*, § 97.

autonomy, his bodily integrity, the possession of property, and even his life".³⁷⁰ This may be straightforward, as when somebody is crippled by a crime: The damage is not merely material (e.g. the pain of having your legs cut off). The crime also damages that person's ability to realize her choices, for example precluding her from holding her previous occupation. Other times, the damage could be effected psychologically, for instance by causing a disabling fear that prevents the person from going out, from having normal, trusting relationships etc. As mentioned above, Hampton also points to the all too common phenomenon where the victim starts to believe the degrading message of the crime, effectively preventing her from claiming her rights. This may also have social repercussions, where "[t]he misrepresentation of value [...] threatens to reinforce belief in the wrong theory of value by the community"³⁷¹, thereby encouraging similar acts by other people. Hate crimes thus threaten to damage minority groups' realization of freedom.

This emphasis on the actual harm to mutual freedom caused by crime implies an equivalent emphasis in the aim of sanctioning crime: The purpose of sanctioning crime is not only to assert the correct norm and to display the falsehood of the meaning entailed by crime. The purpose is also to ensure the empirical reality of our equal right to freedom. As Ripstein states the same aim: "Punishment upholds the supremacy of law in space and time."³⁷²

This, in turn, means that there is both a prospective and a retrospective dimension to sanctioning crime. The latter requires that re-establishing mutual freedom must instantiate mutual freedom. As I have shown above, Kant explains this in terms of turning the crime against the criminal, thereby respecting her rationality. The former is more controversial and seems at first sight to collide with Kant's warning against the criminal theorist who "crawls under the windings of eudaimonism", i.e. who attempts to justify punishment by its benefits.³⁷³ If punishment is justified by a prospective gain, it usually entails treating the criminal as a mere means, cf. the common critique of deterrence theories. Upon the Kantian theory, however, crime prevention is not an independent goal, but is inseparably

³⁷⁰ Hampton, "Correcting Harms Versus Righting Wrongs", 1678.

³⁷¹ Ibid., 1678.

³⁷² Ripstein, *Force and Freedom*, 318.

³⁷³ Kant, *The Metaphysics of Morals*, 6:331. Sharon Byrd was the first to challenge the traditional reading of Kant's theory punishment as solely backward-looking, arguing that Kant saw deterrence as the purpose of threatening punishment, a claim that Ripstein largely accepts. B. Sharon Byrd, "Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution", *Law and Philosophy* 8, no. 2 (1989).

linked to the retrospective dimension of respecting the criminal's autonomy.

To see why this is so, imagine a society where there is no crime. In such a society there would be no need to use punishment to deter criminals, as there would be none. If crime prevention is an independent goal, the empirical circumstances will thus determine whether and how much punishment is required to reach the goal. Upon a Kantian theory, however, the threat of a sanction is necessary "however well disposed and right-loving human beings might be", i.e. independently of empirical circumstances.³⁷⁴ The reason is the same as for why aid for the poor must be available regardless of whether there currently are any poor: It is necessary to safeguard against the domination of others. Regardless of whether my rights are currently respected, there must be a guarantee that they will continue to be respected in the future. Hence it does not matter whether people are well disposed at the moment, or whether anybody is actually poor: Freedom requires assurance against the *potential domination* of others. This prospective function is thus achieved to the extent that law is upheld, in other words, through the retrospective function of sanctioning crime. To sanction crime is to assert retrospectively that an interference of mutual freedom has been committed, and prospectively that this and other interferences will not stand. In other words, that wrongs will be made right, that law is supreme in space and time.

*

Thus, according to the Kantian-Hegelian framework, justice after wrongdoing is achieved if a sanction both instantiates respect for mutual freedom and realizes mutual freedom. Of these two dimensions, the former has traditionally been associated with Kant and Hegel's theories of punishment. Many have therefore seen these theories as overly focused on "punishment for punishment's sake". Indeed, some theorists limit their discussion of these theories to a cursory reference to Kant's infamous island-example, intending thereby to show just how categorical and even bloodthirsty Kant's defense of punishment was. Others, who see in these theories something of value in the respect they display for the dignity and freedom of the individual, nevertheless see them as too lofty and detached from the realities of modern society. Thus, Karl Marx concluded:

[T]here is only one theory of punishment which recognizes human dignity

³⁷⁴ Kant, *The Metaphysics of Morals*, 6:312.

in the abstract, and that is the theory of Kant, especially in the more rigid formula given to it by Hegel [...] Looking, however, more closely into the matter, we discover that German idealism here, as in most other instances, has but given a transcendental sanction to the rules of existing society.³⁷⁵

To the extent that Kant and Hegel's theories are used to justify penal practices in severely unjust societies today, Marx' point is valid. The resurgence of retributivism from the 1970's and onwards has similarly been associated by some with an uncritical acceptance of individual just desert at the expense of addressing structural injustices and causes of crime. It seems, however, that Marx and others have underestimated the critical potential of the Kantian-Hegelian framework. The second dimension of justice, the realization of mutual freedom, requires more than a superficial regard for the autonomy of the criminal. The just sanction must also address the empirical conditions for freedom, including the "damages to the realization of freedom" caused by the crime. Once we abandon the retributivism of Kant and Hegel, their theories can be applied to evaluate different sanctions along these two dimensions. As we shall see later, Hegel's other forms of recognition, which have not been dealt with here, give us additional analytical tools that may further contribute to the critical potential of the Kantian-Hegelian framework. The following chapters will consider some of the social issues that may influence the justice of punishment, some of which may indeed suggest that Kant and Hegel cannot readily be used to justify the status quo of modern penal practices.

³⁷⁵ Quoted in Jeffrie G. Murphy, "Marxism and Retribution", *Philosophy & Public Affairs* 2, no. 3 (1973), p. 217.

PART II: THE JUSTICE OF NOT PUNISHING

10. Introduction to Part II

Punishment, we have seen, is just when it remedies the wrong in crime and thereby re-establishes *status quo ante culpam*. But what if the status quo is itself unjust? Is justice served if it restores an unjust situation prior to the crime? And what if the status quo is itself a contributing factor to the crime? I will argue in this part that such a situation may undermine the justice of punishing. And the same follows if there are alternative ways of remedying the wrong in crime that avoid some of the problems of punishment. The following five chapters present four negative arguments – arguments for why punishment may not under certain conditions serve the just function it purports to serve or do so with a lower amount than is normally required – and one positive argument for an alternative way of remedying the wrong in crime, restorative justice processes. I take as my starting point the Kantian-Hegelian framework laid out in Chapter 9. The justice of not punishing will thus be considered against a background where the just purpose of punishment is to re-establish mutual freedom.

The Kantian-Hegelian framework distinguishes between the material and the formal (or symbolic) aspects of crime and punishment – or, in more colloquial terms, between the medium and the message. The framework thus opens for the possibility that a different medium might achieve an equivalent message. In this case, the question is whether the symbolic function of restoring mutual recognition may be served by alternatives to punishment. I will argue this point in Chapter 15, *contra* Kant and Hegel's own retributivist views. I thereby supply a positive argument for the justice of not punishing.

Let us start, however, with the negative arguments of the first four chapters. The arguments take as their starting point the familiar notion that there are sometimes exceptions to a rule which undermine its application in a given case. This notion is itself uncontroversial. Even retributivists, who hold the principle that punishment is a necessary and sufficient condition for justice after crimes, will recognize that there are circumstances under which this principle does not apply, notably when an offense can be justified or excused, or when there is reason for mitigation, or a bar to trial applies to the case. The following four chapters will deal with these commonly acknowledged types of exceptions from the justice

of punishing, but I will concentrate on one particular reason for making these exceptions: *The deprived social background of the offender.*

Does the social situation of the offender have implications for the justice of punishing her? Is, in other words, social justice relevant to retributive justice? If so, how? As we shall see, scholars greatly disagree about the reason for and the extent to which the offender's social background should be relevant to the justice of punishment. Legal practice also differs. In some jurisdictions, severely disadvantaged social conditions may to some extent be taken into account in sentencing.³⁷⁶ In other jurisdictions, such considerations are barred. The United States Federal Sentencing Guidelines, for instance, explicitly state that "socio-economic status" and "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing" are both "not relevant in the determination of a sentence".³⁷⁷

While the standard justifications, excuses, bars and mitigating factors are easily considered exceptions which do not undermine the justice of punishment since they do not apply to the vast majority of offenders, a much larger portion of offenders have deprived social backgrounds. Rather than being exceptions, socially deprived offenders are closer to the norm, which means that the reasons against punishment proposed in the following chapters potentially apply to a large portion of those who are actually punished today. The potential impact of these arguments may indeed be one of the reasons why these arguments are controversial. In all societies, the prison population is exceedingly recruited from the least privileged classes. This fact applies in inegalitarian societies such as the United States, as well as in more egalitarian societies such as Norway. "The prison is the magnifying mirror which reflects and enlarges the unresolved social problems of the society which it serves", Vivien Stern asserts.³⁷⁸ Jeffrey Reiman and Paul Leighton similarly state that "[a] criminal justice system is a mirror in which a whole society can see the darker outlines of its face".³⁷⁹ Or as Nils Christie puts it: "If the ideals of equality had been maintained, they

³⁷⁶ See for instance Grønning, Jacobsen, and Husabø, *Frihet, forbrytelse og straff*, 694, which discusses the extent to which "personal circumstances" can be taken into account in sentencing in Norwegian courts. See also Michele E. Gilman, "The Poverty Defense", *University of Baltimore Legal Studies Research Paper*, no. 2 (2013), which shows that poverty is recognized as a defense in child neglect cases in the United States.

³⁷⁷ United States Federal Sentencing Guidelines, § 5H1.10 and § 5H1.12

³⁷⁸ Vivien Stern, *A Sin Against The Future: Imprisonment in the World* (Boston: Northeastern UP, 1998), 114.

³⁷⁹ Jeffrey Reiman and Paul Leighton, *The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice*, 11th ed. (London: Routledge, 2017), 1.

would have been reflected in our prison population. The composition of the prisons gives a bleak picture of fundamental inequalities in our society.”³⁸⁰ A look at the statistics of the prison population lends support to these assessments.³⁸¹

In the United States, the median annual income of incarcerated men prior to their incarceration is 48 % of the median annual income of non-incarcerated men of similar ages.³⁸² The least educated are greatly overrepresented in prisons and jails.

In 1980, around 10 percent of young African American men who dropped out of high school were in prison or jail. By 2008, this incarceration rate had climbed to 37 percent, an astonishing level of institutionalization given that the average incarceration rate in the general population was 0.76 of 1 percent. Even among young white dropouts, the incarceration rate had grown remarkably, with around one in eight behind bars by 2008.³⁸³

Becky Pettit and Bruce Western conclude: “The significant growth of incarceration rates among the least educated reflects increasing class inequality in incarceration through the period of the prison boom.”³⁸⁴ Further, there are glaring racial and ethnic disparities in incarceration rates. While blacks make up 13 % of the general population in the United States, they constitute 40 % of the prison and jail populations. The equivalent percentages for whites are 64 and 39.³⁸⁵ According to the Bureau of Justice Statistics, among the general population, “[n]early 3% of non-Hispanic black males and 1% of Hispanic males were serving sentences of at least 1 year in prison at yearend 2014 compared to less than 0.5% of non-Hispanic white males”.³⁸⁶ The compounding disparities of race, class, gender and age have normalized “incarceration as a new stage in the life course of young low-

³⁸⁰ Nils Christie, *Hvor tett et samfunn?* (Oslo: Universitetsforlaget, 1975), 92. Quote translated by me.

³⁸¹ I will mainly use statistics from the United States and from Norway. The reason for this is primarily practical, in order to limit the data to a manageable amount. But since these countries are very different in relevant aspects – size, economic inequality, punitive culture, homogeneity of the population – the findings from these countries show that the social iniquities that correlate with crime and punishment apply to disparate types of society.

³⁸² Bernadette Rabuy and Daniel Kopf, "Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned", *Prison Policy Initiative* (2015), <https://www.prisonpolicy.org/reports/income.html>

³⁸³ Becky Pettit and Bruce Western, "Incarceration and Social Inequality", *Dædalus* 131, no. 3 (2010), 10.

³⁸⁴ *Ibid.*, 10.

³⁸⁵ Peter Wagner and Bernadette Rabuy, "Mass Incarceration: The Whole Pie 2016", *Prison Policy Initiative* (2016), <https://www.prisonpolicy.org/reports/pie2016.html>

³⁸⁶ U.S. Department of Justice Bureau of Justice Statistics, "Prisoners 2014", (2015), https://www.bjs.gov/content/pub/pdf/p14_Summary.pdf

skill black men” according to Pettit & Western.³⁸⁷ Their research determines the lifetime chance of imprisonment for an African American high school dropout at 64 %.³⁸⁸

If we look at the prison population in Norway, we see a similar overrepresentation of the socioeconomically least privileged members of society. According to a 2015 study, only 36 % of inmates were employed at the time of incarceration, compared to 82 % in the general population reference group.³⁸⁹ Only 34 % of inmates had an education beyond 10 years primary school, while 75 % of the reference group had completed high school or college.³⁹⁰ 27 % of inmates had an income above 300,000 NOK (approximately 35,000 USD), while 72 % of the reference group had a higher income. 27 % of inmates had an income below 100,000 NOK, and 14 % under 50,000 NOK.³⁹¹ When asked to rate their own social status in society on a scale from 0 to 10, 41 % of inmates put themselves at levels 3 or below, while only 4 % of the reference group rated their own status equally low.³⁹²

In addition to socioeconomic deprivation, the prison population has disproportionate psychosocial challenges and health problems. In Norwegian prisons, 55 % say they suffer from a chronic health condition, compared to 37 % in the reference group. For instance, 51 % of inmates have suffered from insomnia during the last three months, versus 12 % in the reference group. 39 % have felt depressed, versus 8 % in the reference group.³⁹³ 56 % of inmates have used drugs during the last year, compared to 7 % in the reference group.³⁹⁴ 81 % of inmates have had one or more adverse childhood experiences (ACE’s), such as abuse, neglect, witnessing domestic violence, mental illness in the home, substance abuse

³⁸⁷ Becky Pettit and Bruce Western, "Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration", *American Sociological Review* 69, no. 2 (2004), 151.

³⁸⁸ Pettit and Western, "Incarceration and Social Inequality", 11. The lifetime chance of imprisonment for a white high school dropout is 28 %. In contrast, if you have a college degree, your lifetime chances of imprisonment are 1.2 % if you are white and 6.6 % if you are black.

³⁸⁹ Mathias Killengreen Revold, "Innsattes levekår 2014: Før, under og etter soning," (Oslo: Statistics Norway, 2015), 24. A similar study from 2004 yielded largely corresponding results (three out of ten inmates were employed at the time of incarceration). Christine Friestad and Inger Lise Skog Hansen, "Levekår blant innsatte," (Oslo: FAFO, 2004).

³⁹⁰ Revold, "Innsattes levekår 2014: Før, under og etter soning," 23. Friestad and Hansen, "Levekår blant innsatte," 30.

³⁹¹ Revold, "Innsattes levekår 2014: Før, under og etter soning," 28.

³⁹² *Ibid.*, 30.

³⁹³ *Ibid.*, 38-39.

³⁹⁴ *Ibid.*, 52. Friestad and Hansen found that 60 % of inmates used drugs, "Levekår blant innsatte," 61.

in the home, suicide attempts in the home, parental separation or divorce and incarcerated household member.³⁹⁵

Looking beyond the Norwegian context, studies on ACE have shown “a graded dose-response relationship between ACE’s and negative health and well-being outcomes across the life course”, for instance related to alcoholism, drug use, depression, suicide attempts, adolescent pregnancy, homelessness and more.³⁹⁶ Ports et al. found that as ACE scores increased, so did the risk of sexual victimization in adulthood, and the strongest predictor was childhood sexual abuse.³⁹⁷ Whitfield et al. found that childhood physical or sexual abuse or growing up with a battered mother increased the risk of perpetrating intimate partner violence two-fold, and if all three ACE’s were present, 3.8-fold.³⁹⁸ Being the victim of crimes or witnessing crimes in the home as a child thus substantially increases the likelihood of perpetrating crimes as an adult and of being victimized. And not only do crimes in one generation increase the chance of crimes in the next; *punishment* of parents and family members causes adverse experiences in children, thereby “transmitting the penalties of a prison record from one generation to the next”.³⁹⁹

Social marginality is deepened by the inequalities produced by incarceration. Workers with prison records experience significant declines in earnings and employment. Parents in prison are likely to divorce or separate, and through the contagious effects of the institution, their children are in some degree “prisonized,” exposed to the routines of prison life through visitation and the parole supervision of their parents. [...] As adults, these children will be at greater risk of diminished life chances and criminal involvement, and at greater risk of incarceration as a result.⁴⁰⁰

Thus, we see from this brief survey of empirical research on the prison population that

³⁹⁵ Revold, "Innsattes levekår 2014: Før, under og etter soning," 18. Friestad and Hansen found that 29 % of inmates had experienced physical, emotional and/or sexual abuse as a child, 30 % had parents with alcohol or drug addictions, 30 % had been in contact with Child Services before the age of 16, 28 % had family members who had been incarcerated, Friestad and Hansen, "Levekår blant innsatte," 28.

³⁹⁶ CDC-Kaiser Permanente Adverse Childhood Experiences (ACE) Study, "Major Findings", (2016), <https://www.cdc.gov/violenceprevention/acestudy/about.html> D B Herman et al., "Adverse Childhood Experiences: Are They Risk Factors for Adult Homelessness?", *American Journal of Public Health* 87, no. 2 (1997).

³⁹⁷ Katie A. Ports, Derek C. Ford, and Melissa T. Merrick, "Adverse Childhood Experiences and Sexual Victimization in Adulthood", *Child Abuse & Neglect* 51 (2016).

³⁹⁸ Charles L. Whitfield et al., "Violent Childhood Experiences and the Risk of Intimate Partner Violence in Adults: Assessment in a Large Health Maintenance Organization", *Journal of Interpersonal Violence* 18, no. 2 (2003).

³⁹⁹ Pettit and Western, "Incarceration and Social Inequality", 12.

⁴⁰⁰ *Ibid.*, 16.

socioeconomically disadvantaged persons and persons who have had a difficult upbringing are *overrepresented* among the punished. The question then, is what relevance these findings have for the justice of punishment. Before I begin to answer this question in the following chapters, two points should be noted in order to establish the *potential relevance* of social deprivation to retributive justice.

1) Presumably, it will not be the mere fact that these groups are overrepresented that makes belonging to these groups potentially relevant to one's punishment. Approximately 90 % of inmates are men, but few would argue that because men are overrepresented this should somehow influence the justice of their punishment. If, however, a considerable *share* of those belonging to a group end up in prison, it seems safe to say that this increases the potential relevance of belonging to that group. While most inmates are men, most men are not inmates. On the other hand, most African American high school dropouts are indeed inmates at some time during their lives. We might take this as an indication that there are social structures that influence the chance of going to prison *to a greater degree* in the latter group, and that this degree of influence from social structures is a fact of potential relevance to the justice of punishment.

2) Belonging to a relevant group may to a greater or lesser degree be a matter of choice. Take poverty as an example. Students are often poor. But their poverty is usually self-imposed and temporary. The same cannot be said of those who are born into poverty and who have few realistic ways of escaping it. The former have to a greater extent chosen to be (temporarily) poor and have therefore ultimately chosen the disadvantages and troubles that follow.⁴⁰¹ The latter have not to the same degree chosen the disadvantages and troubles that they suffer, including their disproportionate risk of being punished. They are victims of *social injustice*. Only where there is social injustice, I hold, is deprivation potentially relevant to the question of retributive justice.

A problem with injustice as a necessary criterion for relevance is its vagueness. Determining the extent to which poverty is due to choice is a notoriously contentious political question. Further, there is well-known theoretical disagreement in political philosophy about the injustice that has befallen the poor. While a luck egalitarian might

⁴⁰¹ Recall Aristotle's argument that we are responsible for our characters, discussed in Chapter 7.

consider much poverty unjust, a right-libertarian like Robert Nozick would deny that the poor have suffered any injustice, unless, of course, they are poor due to direct denial of their property rights. Hence, normative pluralism in the field of social justice may have a spillover effect on criminal justice. Depending on the theory of social justice one accepts, the socioeconomic conditions of a certain group may or may not be deemed relevant. William C. Heffernan argues that this pluralism may enrich scholarly debate, but that it undermines the possibility of judges taking social justice into account, because “no criterion exists that can enable judges to arbitrate between the different versions of the term”.⁴⁰² There is, I believe, a way of circumventing this problem.

Both 1) and 2) suggest that the potential relevance of belonging to a socially deprived group will be greater the narrower we define the group. Simply put: 1) Among those who are severely socioeconomically disadvantaged and among those who have a severely adverse upbringing, *a bigger share* will end up in prison, compared to those who are merely slightly disadvantaged or have had fewer and less serious adverse childhood experiences. 2) Though there is ample disagreement about the social injustice pertaining to slightly disadvantaged groups, one can hardly deny that the most deprived members of society are victims of injustice, whether due to socioeconomic structures or due to neglect and abuse during childhood.⁴⁰³

For these reasons, I will limit the following discussion to clear instances of social deprivation, for which I will use the term *severe social deprivation* (henceforth, SSD). I take this to cover core instances of socioeconomic disadvantage as well as core instances of adverse upbringing. In this way, I will circumvent the difficult question of *how* socially deprived one must be for it to have relevance to one’s punishment, and instead focus on the question of *whether* social deprivation is relevant at all. The latter question is, of course, logically prior to the former. And the best way to answer the latter is by looking at the most severe cases of social deprivation. If relevance cannot be established there, it cannot

⁴⁰² William C. Heffernan, "Social Justice/Criminal Justice", in *From Social Justice to Criminal Justice*, ed. William C. Heffernan and John Kleinig (New York: Oxford UP, 2000), 55.

⁴⁰³ Though Robert Nozick would deny that being economically deprived is in itself an injustice, he would not deny that those who have experienced abuse during their childhood are victims. A right-libertarian may presumably take non-economic deprivation of this sort as relevant for criminal justice and may therefore follow the arguments in the proceeding chapters at least part of the way.

be established at all.

For current purposes, then, we simply have to be able to invoke core instances of SSD. Stuart Green, in his discussion of “Just Deserts in Unjust Societies”, gives the following “clear and uncontroversial examples of disadvantage”⁴⁰⁴: 1) Denial of property rights as a result of social caste, 2) Denial of political rights for the same reason, and 3) Denial of right to basic state protections. It is easy to see that these criteria would include, among others, oppressed minority groups in seriously unjust societies, such as Jews in Nazi Germany and people of color in apartheid-South Africa. More controversially, Jeffrey Howard reaches the same conclusion about a group closer to home: “Whether the policy regime that prevails in many of the West’s urban ghettos is the result of injustice is not, to my mind, subject to reasonable disagreement.”⁴⁰⁵ Victor Tadros applies a less specific criterion, arguing that it is sufficient that there are people who are “worse off than they ought to be, and that this is criminogenic”⁴⁰⁶. Duff is even less specific, saying about his arguments that “there are contexts in which each of these explanations would be plausible”.⁴⁰⁷

I suspect most readers can easily supplement the broad categories mentioned by Green and others with personal knowledge of individuals whom most would agree are severely socially deprived. Perhaps a person who has had a truly ‘rotten social background’, to use a term that is often applied in the debate on social and retributive justice.⁴⁰⁸ Perhaps an individual who has suffered abuse and neglect, and who has, to little surprise to his surroundings, followed along an increasingly destructive path of drinking and doing drugs, dropping out of school, hanging with the wrong crowd, committing petty crimes, and eventually ending up in prison. The more we sense that the outcome was predetermined by the person’s social circumstances, the stronger we sense the unfairness of our different

⁴⁰⁴ Stuart P. Green, “Just Deserts in Unjust Societies: A Case-specific Approach”, in *Philosophical Foundations of Criminal Law*, ed. R. A. Duff and Stuart P. Green (New York: Oxford UP, 2011), 365.

⁴⁰⁵ Jeffrey Howard, “Punishment, Socially Deprived Offenders, and Democratic Community”, *Criminal law and philosophy* 7, no. 1 (2013), 129.

⁴⁰⁶ Victor Tadros, “Poverty and Criminal Responsibility”, *The Journal of Value Inquiry* 43, no. 3 (2009), 391.

⁴⁰⁷ R. A. Duff, “Blame, Moral Standing and the Legitimacy of the Criminal Trial”, *Ratio* 23, no. 2 (2010), 137.

⁴⁰⁸ Richard Delgado, “Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation”, *Law & Inequality: A Journal of Theory and Practice* 3, no. 1 (1985).

starting points in life. In the words of William Blake:

Every night and every morn,
Some to misery are born.
Every morn and every night,
Some are born to sweet delight
Some are born to sweet delight
Some are born to endless night.⁴⁰⁹

If we recognize the truth of these lines – as I suspect most of us will when we consider core cases – what are the normative implications for punishment? Should we punish those who are born to endless night as much as those who are born to sweet delight? Should we punish them at all?

I have divided the answers to these questions into four chapters, where each chapter discusses one way in which SSD may potentially have implications for retributive justice. Thereafter follows the chapter on restorative justice.

Chapter 11: Disproportionate likelihood of punishment: This chapter discusses the unfairness that stems from the fact that low-class offenders tend to be punished more and more often than high-class offenders. This tendency holds both when low-class and high-class offenders have committed the same type of crimes, and when they commit different types of crime. If we compare the harm caused by different types of crime, high-class offenders are punished more leniently than low-class offender for equivalently harmful acts.

Chapter 12: Justification and lack of standing to punish: This chapter discusses whether SSD can under certain circumstances provide a justification for acts that would otherwise be unlawful. The discussion is linked to a related debate about the conditions of the state's moral standing to punish.

Chapter 13: Disproportionate difficulty of law-abidance: This chapter assesses different reasons why severely socially deprived offenders tend to face greater difficulties in abiding by law. These reasons make it plausible that SSD may qualify as an excuse, though I do not discuss how SSD might be implemented as an excusing condition in criminal doctrine.

⁴⁰⁹ William Blake, *Auguries of Innocence* (Taurus Press, 1970).

Chapter 14: Diminished need for punishment: This chapter considers whether SSD ought to be a mitigating factor in sentencing. It does so by discussing reasons why less than normal amount of punishment may be required in order to remedy the wrong in crimes perpetrated by severely socially deprived offenders.

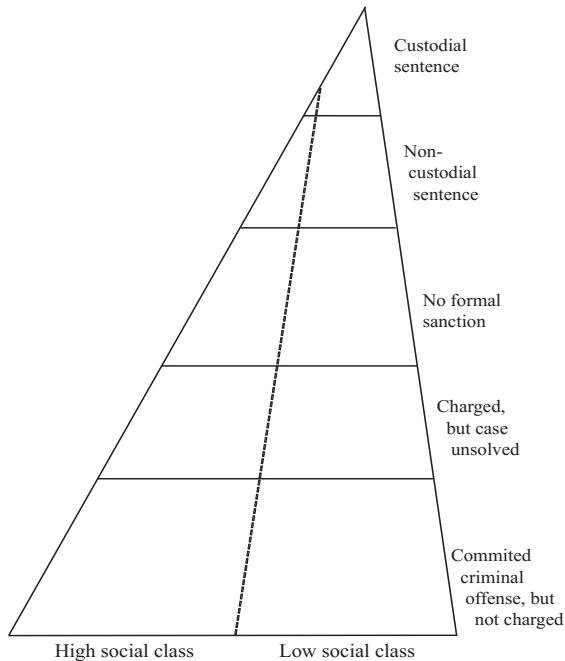
Chapter 15: The justice of restorative justice: This chapter asks whether restorative processes can potentially remedy the wrong in crime upon a Kantian-Hegelian theory of criminal justice. The chapter does not relate especially to the issue of SSD, but asks instead whether and under which conditions restorative justice can be a general alternative to retributive justice.

11. Disproportionate likelihood of punishment

As we saw in the previous part on the justice of punishment, some conceptions of justice remedy what I have called horizontal injustice, injustice that is due to an unfair imbalance between relevant parties. Other conceptions of justice remedy injustice that pertains to a situation as viewed in isolation from other cases. Examples of the first kind were freeloading and material imbalance between victim and offender, and examples of the latter were undeserved profit and causing suffering to victims. In this part, too, I will identify both kinds of injustice, but this time relating to punishing when there is SSD. I will start with a horizontal injustice that is due to the increased risk of punishment of those who belong to the lowest socioeconomic class.

The claim is the following: Persons from the lowest socioeconomic class are disproportionately likely to be punished, all things being equal. This holds irrespective of any discrepancy that might stem from an increased tendency to commit more or worse crimes. There is, thus, a structural injustice built into the criminal justice system. Criminologists have shown this element of “class justice” to be reinforced at several levels in the criminal justice system. A well-known model is “Christie’s crooked pyramid”, showing that offenders from the lower classes are increasingly overrepresented at each stage in the criminal process.⁴¹⁰

⁴¹⁰ Christie, *Hvor tett et samfunn?*, 293. Translation by me.



There are several reasons why the pyramid is crooked, of which I will mention three.

11.1 Low class persons are more often targets of investigation

First, members of the lowest classes are to greater extent targets of investigation for some types of crime. Dorothy Roberts notes that domestic crimes in poor families are disproportionately investigated because poor families are more often in public housing and in contact with welfare services that gain access to their homes. “Because poor parents are in closer contact with government agencies than wealthier families, their neglect is more likely to be detected and reported.”⁴¹¹ Robert Hampton notes that “[s]everal studies have found that children from poor and minority families are more likely to be labeled ‘abused’

⁴¹¹ Dorothy Roberts, “The Ethics of Punishing Indigent Parents”, in *From Social Justice to Criminal Justice*, ed. William C. Heffernan and John Kleinig (New York: Oxford UP, 2000), 161.

than children from more affluent and majority homes with comparable injuries”.⁴¹² For typical street crimes, such as drug crimes, carrying illegal firearms, burglary etc., disproportionate investigation of lower class offenders result from profiling, “stop and frisk”-policies, and enhanced policing in poor neighborhoods. Ironically, the statistics showing that people with SSD are overrepresented among criminal offenders make it rational to target such individuals for preventive reasons, thereby feeding a self-fulfilling feedback mechanism.⁴¹³

11.2 Low status crimes are more easily investigated and convicted

Second, the types of crime mostly committed by members of the lower classes are easier to investigate and convict than the types of crimes mostly committed by members of the upper- and middle classes. As Christie states: “Low status crime is an individualized crime. High status crime will to a larger extent take place within and by complex organizations.”⁴¹⁴ White-collar crime is difficult and costly to investigate and convict, both because it is typically intricate, with several actors and numerous opaque transactions, and because offenders typically can muster a stronger defense, even contriving complexity into the case so that the investigation will be prolonged, not least because offenders know that “justice delayed is profits retained”.⁴¹⁵ Blue-collar crime, on the other hand, is typically less complex, for immediate gain, by fewer actors with less opaque roles and less power to delay and defend against conviction.

⁴¹² Robert Hampton, quoted in *ibid.*, 172.

⁴¹³ Barbara Hudson remarks that “it is only under a desert model that discrimination is problematic; indeed, it is only under a ‘justice as fairness’ model that the idea of discrimination has any meaning. If the goal of penal policy is to reduce reoffending, or to protect the public from the dangerous, then more severe punishment of those whose personalities and circumstances make them more liable to reoffend, is not just legitimate, it is desirable”. Barbara A. Hudson, “Justice and Difference”, in *Principled Sentencing: Readings on Theory and Policy*, ed. Andrew von Hirsch, Andrew Ashworth, and Julian Roberts (Oxford: Hart Publishing, 2009), 366.

⁴¹⁴ Christie, *Hvor tett et samfunn?*, 94. Translated by me.

⁴¹⁵ John Braithwaite, “Retributivism, Punishment and Privilege”, in *Punishment and Privilege*, ed. W. Byron Groves and Graeme Newman (New York: Harrow and Heston, 1986), 58. I will, like Braithwaite, adopt the definition of white-collar crime proposed by Edwin Sutherland, who coined the term in 1939: “a crime committed by a person of respectability and high social status in the course of his [or her] occupation”, *ibid.*, 56.

Braithwaite concludes that members of the lower classes are overrepresented in all types of crimes, “apart from those for which opportunities are systematically less available to the poor (i.e. white-collar crime)”.⁴¹⁶ Conversely, some crimes are systematically less attractive to members of the upper- and middle classes. Recall from above the classic quote from Anatole France: “In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread.” Obviously, only the poor have incentive to do such things. W. Byron Groves and Nancy Frank argue that as a matter of rational economic choice, poor people have greater reasons for seeking immediate cash gains, characteristic of street crimes, rather than larger, but deferred and not easily disposable sums resulting from white-collar crimes.

[T]he increased marginal value of the dollar makes attractive to lower class persons those forms of criminality which yield the cash form of money (e.g. robbery, burglary, larceny), and these crimes are more easily discovered and more severely punished than are crimes of the powerful.⁴¹⁷

11.3 Criminal law disproportionately targets the poor

Third, while the crimes of the lower classes are punished, the transgressions of the rich are more often sanctioned in other ways or punished less. This is partly due to discrimination in the application of law.

Studies of criminal justice processing through arrest/prosecution/bail/sentencing stages consistently show that discretion is exercised on behalf of the white, the educated, the employed, and the conventional, and against the black, the poor, the disturbed, and the unconventional.⁴¹⁸

A study of 77,236 federal offenders in the U.S. concluded that “blacks, males, and offenders with low levels of education and income receive substantially longer sentences” and are also “less likely to get no prison term when that option is available; less likely to

⁴¹⁶ John Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989), 48.

⁴¹⁷ W. Byron Groves and Nancy Frank, "Punishment, Privilege and Structured Choice", in *Punishment and Privilege*, ed. W. Byron Groves and Graeme Newman (New York: Harrow and Heston, 1986), 78. I will later discuss other possible motives for crime, beyond the economic incentives here mentioned, pertaining especially to persons with SSD.

⁴¹⁸ Barbara A. Hudson, "Punishing the Poor: Dilemmas of Justice and Difference", in *From Social Justice to Criminal Justice*, ed. William C. Heffernan and John Kleinig (New York: Oxford UP, 2000), 198.

receive downward departures; and more likely to receive upward adjustments and, conditioned on having a downward departure, receive smaller reductions than whites and females".⁴¹⁹ Another study found that "African Americans have 20 % longer sentences than whites, on average, holding constant age, gender, and recommended sentence length from the guidelines".⁴²⁰ Contributing to this discrimination are perceptions of blameworthiness and dangerousness that are stereotypically associated with socially deprived groups. For instance, Anna L. Tsing found among women charged with perinatal endangerment that courts made distinctions according to race and class, treating young college women leniently because they were viewed as innocently immature, as opposed to poor white women and colored women who were viewed as obstinate and cunning.⁴²¹ Likewise, stereotypical assumptions about unemployment may figure in explanations of an offender's criminal dispositions and blameworthy motives, which in turn increase the perceived need to protect society from him or her. An employed offender, on the other hand, is more likely to be viewed as someone who has temporarily swayed from his path, and who will return to a law-abiding life if spared a long sentence.⁴²²

In addition to discrimination in application of law, disparity in punishment stems in part from a "division of labor" between criminal law and other forms of sanctions. The types of harmful and wrongful behavior committed mainly by the upper- and middle classes are to a much larger extent regulated by tort law, inspections, amnesties, warnings etc. Richard Posner says it in no unclear terms: "[T]he criminal law is designed primarily for the non-affluent; the affluent are kept in line, for the most part, by tort law."⁴²³ Hudson similarly concludes:

⁴¹⁹ David B. Mustard, "Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts", *Journal of Law and Economics* XLIV (2001), 285. On average blacks received 12 percent longer terms than whites, and males received 12 percent longer terms than females. Having no high school diploma resulted in an additional sentence of 1.2 months. An income of less than \$5,000 resulted in 6.2 months longer sentences than people who had incomes between \$25,000 and \$35,000.

⁴²⁰ Shawn D. Bushway and Anne Morrison Piehl, "Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing", *Law & Society Review* 35, no. 4 (2001), 733.

⁴²¹ Anna L. Tsing, "Monster Stories: Women Charged with Perinatal Endangerment", in *Negotiating Gender in American Culture*, ed. Faye Ginsburg and Anna L. Tsing (Boston: Beacon, 1990), 282.

⁴²² Hudson, "Punishing the Poor", 199. Steven Box and Chris Hale, "Economic Crisis and the Rising Prisoner Population in England and Wales", *Crime and Social Justice* 17 (1982).

⁴²³ Richard Posner, "An Economic Theory of the Criminal Law", *Columbia Law Review* 85, no. 6 (1985), 1204. Posner, known for his conservative political views, goes on to say: "This may seem to be a left-wing kind of suggestion ('criminal law keeps the lid on the lower classes'), but it is not. It is efficient to use

The wrongdoings of the affluent are paid for mainly by money. Their characteristic transgressions – income tax evasion, corporate fraud, neglect of health and safety regulations, industrial pollution, and so on – are dealt with largely by financial penalties.⁴²⁴

The criminal law, on the other hand, is primarily aimed at the poor, while “uphold[ing] the rights of the affluent (property rights rather than a right to shelter, for example)”.⁴²⁵

But what does it mean, precisely, that criminal law disproportionately targets the poor? I will now look closer at two possible interpretations of this claim and the implications for the question of horizontal injustice between rich and poor. The claim can be taken to mean either 1) that criminal law is designed to target the non-affluent, or 2) that criminal law is designed to target acts that are disproportionately committed by the non-affluent. The first claim has been argued by critical theorists who have emphasized the social and economic function of punishment in modern capitalist societies. This function is revealed, they claim, if we look at the historical development of different forms of punishment. Georg Rusche and Otto Kirchheimer’s *Punishment and Social Structure* (1939), a seminal work in Marxist criminology, traced the development of different forms of punishment to the economic basis of the historical epoch.⁴²⁶ There was a surplus of labor in Europe in the early modern age, permitting the permanent exclusion of criminals from the labor force by the use of corporal punishment such as mutilation and the death penalty. In the mercantilist period, there was shortage of labor due to wars and famine, and the forced labor of criminals became a valuable economic asset in the first and labor-intensive factories. Then, as machines started to replace human labor and populations grew during The Industrial Revolution, forced labor became increasingly unprofitable, and the modern prison system was born, in which offenders merely served time. Though serving time is itself unproductive, the prison system as a whole served the dual function of providing a worse alternative for disgruntled factory workers and for mitigating the problem of mass unemployment.⁴²⁷

different sanctions depending on an offender’s wealth.”

⁴²⁴ Hudson, “Punishing the Poor”, 199.

⁴²⁵ *Ibid.*, 197.

⁴²⁶ Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure* (New York: Russel & Ryan, 1939).

⁴²⁷ For a study that corroborates the labor market hypothesis, see Bernard Laffargue and Thierry Godefroy, “Economic cycles and punishment: Unemployment and Imprisonment”, *Contemporary Crises* 13, no. 4

Michel Foucault's *Discipline and Punish* expands on the notion that the forms of punishment are determined by the economic and ideological conditions of the historical epoch. In particular, the modern prison system satisfied an increasing demand for control of the citizens in the new industrial economy. Mass production, mass education, bureaucracy and industrial warfare all required systematic knowledge of and power over the individuals within these systems. The prison system, especially exemplified in Bentham's *Panopticon* prison, which was designed to facilitate the surveillance and control of prisoners, produced but one form of discipline that gradually also permeated classrooms, the military, factories, and daily life in an increasingly 'panoptic' society. "Thus discipline produces subjected and practiced bodies, 'docile' bodies. Discipline increases the forces of the body (in economic terms of utility) and diminishes these same forces (in political terms of obedience)", Foucault writes.⁴²⁸ Jeffrey Reiman and Paul Leighton make a similar claim, inviting us to

look at the American criminal justice system as if it were aimed, not at protecting us against crime, but at keeping before our eyes – in our courts and in our prisons, in our newspapers, and on our TVs – a large criminal population consisting primarily of poor people. This serves the interests of the rich and powerful by broadcasting the message that the real danger to most Americans comes from people below them on the economic ladder rather than from above.⁴²⁹

These two highly influential theories, the labor market theory of Rusche and Kirscheimer and Foucault's discipline theory, thus explain why it would serve a useful socioeconomic function to target the economically marginalized. Of course, the rich, too, are targets of discipline when they transgress. But they can more easily be disciplined with financial sanctions. The poor cannot provide monetary payment for their transgressions and must therefore be made to "pay" by other means.⁴³⁰ The most valuable economic asset of the lower classes in a capitalist economy is their time. Time *is* money in a capitalist economy.

(1989), 371, which found "a significant correlation between variations in unemployment (in volume and rate) and the evolution of prison populations, all else being equal in terms of recorded crime".

⁴²⁸ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1995), 138.

⁴²⁹ Reiman and Leighton, *The Rich Get Richer and the Poor Get Prison*, xv. Note that neither Reiman and Leighton's thesis, nor Foucault's thesis nor the labor market thesis entail that the effect is consciously contrived by the rich and powerful. Changing the system is difficult, however, because it serves powerful interests.

⁴³⁰ Recall the dominant economic metaphors structuring the way we think and speak of punishment today: "Punishment is paying debt", "Punishment is balancing the books", "Punishment is settling accounts", cf. discussion in Chapter 5.

The two are merely different currencies of the same thing, economic value, making it possible to exchange one for the other, as when workers are paid for their hours. Viewed in this light, criminal law stands to tort law as the dollar to the euro. They are just two different forms of payment. Criminal law exacts payment in the form of time from those who cannot pay with money.

To the extent that this framing is appropriate, then, the first claim is correct: Criminal law is designed to target the non-affluent. But there is one obvious objection that shows this claim to be overly reductionist: When affluent people commit murder or robbery, they too are punished. True, they have more resources to avoid punishment, but in clear cases, even these resources are insufficient and they become targets of criminal prosecution. The reason why more poor people are punished is not because they are targeted, but simply because they commit more crimes. Hence, criminal law is designed for the non-affluent in the sense that it is designed to target acts that are disproportionately committed by the non-affluent.

This, however, is not obviously unjust, unlike the first claim. If crimes deserve punishment in a way that torts do not, those who commit crimes are justly punished, while those who commit torts are justly not punished, regardless of their socioeconomic status. It is only if criminalization does not track desert of punishment that there is a potential horizontal injustice between the targets of criminal law and tort law. If, for instance, some types of torts are more harmful and more wrongful than some types of crimes, those who commit the latter will, according to these criteria, be punished unfairly *compared to* those who commit the former. The question, then, is whether crimes that are typically committed by the poor are indeed more harmful and wrongful and deserve punishment more than non-criminal acts typically committed by the rich.

“What is a picklock to a bank share? What is the robbing of a bank to the founding of a bank?” With these questions, posed in the final scene of *The Threepenny Opera*, Bertolt Brecht expressed a sentiment that has found resonance among Marxists, anarchists, and critical theorists more broadly: The rules of capitalist society are themselves more harmful than their breaches. The oppression resulting from free trade and accumulation of private property – sweatshops, mass unemployment, poverty – is worse than simple theft of property. Indeed, “property *is* theft”, the anarchist slogan (illogically) asserts. Those who

are branded criminals in this society are not the *real criminals*. Capitalists do more damage and deserve punishment more than the typical criminals from the lower classes. Nonetheless, *The Rich Get Richer and the Poor Get Prison*, as the title of Reiman and Leighton's book states. And this constitutes a horizontal injustice.

We are blind to this injustice because we are accustomed to define crime on the basis of the social norms of our society. Recall Durkheim's claim from above: "[W]e should not say that an act offends the common consciousness because it is criminal, but that it is criminal because it offends that consciousness."⁴³¹ In a capitalist society, the norms that support private ownership and accumulation of wealth makes shoplifting a crime, while high interest rates on mortgages is perfectly legal, even when the latter results in foreclosures and families evicted from their homes. But if our collective consciousness were different, so would our definitions of crime be. Brecht's questions thus remind us of the arbitrariness of our definitions of crime when measured against alternative criteria, such as the tendency of an act to cause suffering and oppression.

Of course, the premise of the "Brechtian" claim is highly controversial. Do capitalists cause harm, or do they create jobs and wealth that benefit society as a whole? Are banks primarily oppressive, or do they facilitate investments and "grow the pie", so that even the least well off increase their share? Clearly, people have diverging views on the extent to which each of these claims are true. But even if we take the view that capitalism and its legal institutions (e.g. protection of property) on the whole are both good and right, we might still recognize that *some* legal acts cause more harm and infringe more upon the autonomy of others than some of the crimes of those who are incarcerated. In which case the horizontal injustice alluded to by Brecht arises.

Now consider acts that are in fact illegal and offensive to our collective norms. Are those committed in and by businesses less harmful and wrongful than the typical crimes of the lower classes? While robbery and rape are strongly condemned, triggering the kind of visceral response to injustice described in the introductory chapter, business offences are often talked of in terms of "cutting corners", a euphemism that suggests that such acts are indeed less offensive to the collective consciousness in capitalist societies. Perhaps people

⁴³¹ Durkheim, *The Division of Labour in Society*, 40.

can more easily empathize with someone who “bends the rules” in order to get ahead, something most of us likely have done to some extent in our lives. Physically attacking someone, on the other hand, is inconceivable and inexcusable for most of us. Because street crimes like assault cause victims and others to feel unsafe and to mistrust strangers, many hold that these crimes are more serious and more detrimental to society than the non-physical economic crimes of the upper- and middle classes. James Q. Wilson, for instance, writes:

[M]y conviction, which I believe is the conviction of most citizens, [is] that predatory street crime is far more serious than consumer fraud, antitrust violations [...] because predatory crime makes difficult or impossible the maintenance of meaningful human communities.⁴³²

However, if we look at the amount of harm that business offenses cause, the conclusion may well be the opposite. Braithwaite states:

[I]f objective harm (property lost, numbers of persons seriously injured or killed) is a central determinant of desert, as most retributivists insist, I have shown that the evidence is overwhelming that business offenses cause much more objective harm than common crimes.⁴³³

Not only are the financial costs of white-collar crime much higher than the financial costs of other crimes combined.⁴³⁴ So is the harm to life and health.

[If] one counts up the lives lost through offenses against consumer product safety, occupational health and safety and environmental laws, even in a society with a homicide rate as extraordinary as the United States, it is the former which cost more lives.⁴³⁵

⁴³² Quoted in Hudson, "Punishing the Poor", 200.

⁴³³ Braithwaite, "Retributivism, Punishment and Privilege", 62.

⁴³⁴ "Owing to the concealed nature of many frauds and the fact that few are reported even when discovered, their cost is impossible to estimate precisely, but in the United States it is thought to be at least 10 times the combined cost of thefts, burglaries, and robberies." Laurie L. Stevenson, "White-Collar Crime", *Encyclopædia Britannica* (2017), <https://www.britannica.com/topic/white-collar-crime> James C. Helmkamp, Katie J. Townsend, and Jenny A. Sundra estimate annual losses from white-collar crime at up to 1.7 trillion dollars. "How Much Does White Collar Crime Cost?", (1997), <https://www.ncjrs.gov/App/publications/abstract.aspx?ID=167026> These sums are likely much higher, according to the findings of The Association of Certified Fraud Examiners, "2016 Report to the Nations on Occupational Fraud and Abuse ", (2016), <https://www.acfe.com/rttn2016/docs/2016-report-to-the-nations.pdf> They found that "the typical organization loses 5% of revenues in a given year as a result of fraud".

⁴³⁵ Braithwaite, "Retributivism, Punishment and Privilege", 62.

Reiman and Leighton found that in the U.S. between 1992 and 2006 the average annual number of occupation-related deaths as a direct result of employer negligence was 55,325. The average annual number of homicides was around 14,000.⁴³⁶ The quantity of business related crimes and other economic crimes committed by the upper- and middle classes is also vastly higher than for other types of crime.⁴³⁷ A recent study of tax evasion in Scandinavia, utilizing data from the so-called “Swiss Leaks” and “Panama Papers”, found that tax evasion is common among the richest members of society, and increasingly so as wealth accumulates. “On average about 3% of personal taxes are evaded in Scandinavia, but this figure rises to about 30% in the top 0.01% of the wealth distribution, a group that includes households with more than \$40 million in net wealth.”⁴³⁸

The upshot of all this is the following: The lower classes, and particularly the severely socially deprived, are overrepresented in the prison population; the offenses of the upper- and middle classes are punished less and more often dealt with as tort cases or otherwise regulated by inspections, warnings etc. Yet, according to the research we have just cited, the offenses of the upper- and middle classes cause the most harm and are most widespread. This has lead Braithwaite to conclude that the following general theorem of criminal law holds: “Where desert is greatest, punishment will be least.”⁴³⁹ In other words: The criminal justice system creates a horizontal injustice between white-collar criminals of the upper- and middle classes and blue-collar criminals of the lower classes.

11.4 Remediating this horizontal injustice

How, then, can this horizontal injustice be remedied? There are only two possibilities: Either the crimes of the upper- and middle classes can be punished more, thereby establishing a fair balance at a high punitive level. Or the crimes of the lower classes can be punished less, thereby establishing a fair balance at a low punitive level. The problem with the first alternative is that it is both difficult to achieve and may cause more harm than it prevents. As noted, white-collar crime is often complex, requiring a lot of resources

⁴³⁶ Reiman and Leighton, *The Rich Get Richer and the Poor Get Prison*, 87. The difference between these numbers are actually higher if we consider that only about half the population work.

⁴³⁷ Braithwaite, "Retributivism, Punishment and Privilege", 63.

⁴³⁸ Annette Alstadsæter, Niels Johannesen, and Gabriel Zucman, "Tax Evasion and Inequality", *Working paper* (2017), <http://gabriel-zucman.eu/files/AJZ2017.pdf>

⁴³⁹ Braithwaite, "Retributivism, Punishment and Privilege", 64.

from police, prosecutors and courts to investigate and convict. A significant increase in convictions would likely be very costly and, considering the enormous amount of white-collar crime, would only affect a small portion of offenses.

Braithwaite argues that the most effective way to ensure that businesses comply with law is to enlist their voluntary cooperation. If businesses take it to be in their best interest to openly acknowledge safety deficiencies etc., these will be much easier to expose and to remedy. Providing immunity from prosecution and giving warnings prior to fines are but a few policies that would encourage businesses to let safety inspectors freely talk to employees and otherwise disclose potential risks and near accidents. Air traffic is a good example of an industry where safety has been achieved in part due to a policy of voluntary disclosure of safety breaches. Conversely, if businesses try their best to hide their missteps, they will likely succeed to a large extent, and appropriate remedies will be difficult. A punitive approach, Braithwaite argues, will likely foster resistance and concealment, and therefore achieve less than government inspectors will achieve “by adopting a diagnostic and catalytic role”.⁴⁴⁰

Dissipating the motivation of business to strive for compliance with the law is a disastrous consequence because the punitive law enforcement alternative can never fill the gaps left by the failure of persuasion and education as compliance strategies.⁴⁴¹

Hence, if we attempt to remedy the horizontal injustice of punishment between rich and poor by adopting more punitive measures for business offenses, we will likely cause more harm to the public and to worker’s safety. Braithwaite suggests instead that we remedy the horizontal injustice according to the second alternative above, i.e. by punishing low class criminals less. He acknowledges, however, that for some types of white-collar crime, increased punishment will not have a detrimental effect on compliance, and in some cases will increase compliance. Presumably, embezzlement and fraud are examples of such crimes. We might therefore adopt a dual strategy for remedying the horizontal injustice: Increasing punishment for some white-collar crimes, while keeping punishment as low as

⁴⁴⁰ Ibid., 57.

⁴⁴¹ Ibid., 57.

possible for other types of white-collar crime and for blue-collar crime, without sacrificing compliance.

However, if we adopt this strategy, it will exacerbate another horizontal injustice, the one between those who are punished and those who get away with the same crimes. Since conviction rates are low for embezzlement and fraud (and are bound to be so, for reasons explained above), there is already an unjust disparity between the relatively few offenders who are singled out for punishment, and the rest who are not. If we increase punishment for the convicted, this horizontal injustice will increase. Conversely, lowering punishment will contribute toward remedying this horizontal injustice.

This is the argument that Braithwaite and Pettit make in their book *Not Just Deserts: A Republican Theory of Criminal Justice*:

There are two states of complete criminal justice equality. One is where every guilty person is equally punished. The other is where every guilty person is granted mercy. The sociological and fiscal realities of criminal justice mean that every society is always closer to the latter state of equality (zero enforcement) than it is to the former (100 per cent punishment). If we lived in a world where 90 per cent of the guilty were punished, then the way to make the system more equitable would be to pursue the 10 per cent who were getting off. But the reality of societies we know is the opposite. We are lucky to punish 10 per cent of the guilty, leaving 90 per cent of crimes unpunished. It follows that the more of the currently punished 10 per cent that can be extended mercy, the more equitable the criminal justice system will become.⁴⁴²

Hence, increasing punishment for some white-collar criminals may contribute to remedying the horizontal injustice between rich and poor offenders, but it will at the same time exacerbate the horizontal injustice between the few rich offenders who are punished and the rest who are not. From the perspective of horizontal injustice, then, we ought on the one hand to lower punishment for blue-collar crime without increasing punishment for white-collar crime. In fact, by the same logic, we ought to go further and abolish all punishment, thereby treating all offenders alike. However, we would thereby treat offenders and non-offenders alike, which, when we hold that the former and not the latter

⁴⁴² Braithwaite and Pettit, *Not Just Deserts*, 197.

deserve punishment, would create a new horizontal injustice. Thus, we ought, on the other hand, to pursue horizontal justice by punishing according to desert.

We see, then, that if we were to take horizontal justice as the sole aim of criminal justice, it would leave us at an impasse, with no specific policy to pursue. Treating everybody alike according to a rule, giving each his due, *suum cuique tribuere*, is meaningless without a material principle for determining what each person is due. Thus, unless we ascribe to punishment an independent valuable function, there is no way of concluding that the state in which all offenders are punished according to desert is better than the state in which no offenders are punished. There is, in other words, no way of answering the question of how we ought to remedy the above-mentioned horizontal injustices if we merely consider the question in isolation, irrespective of the overall purpose of the criminal justice system.

We are again reminded of Aristotle's point that just distribution depends on the *telos* of the practice in which it takes place. Just distribution (horizontal justice) is not itself the *telos* of punishment, but is secondary to the *telos*. Put differently: We cannot justify punishing an offender solely by appeal to the fact that we punish other offenders, as if such fairness was the purpose of punishment. Recall the example in Chapter 6 of a terrorist group beating hostages fairly according to a predetermined rule. If horizontal justice was a sufficient condition for justice, even such practices would be just, which they are not.

The upshot is that other concerns must necessarily be part of deliberations on justice, and it is not given that remedying horizontal injustice ought to take priority. We recognize this point intuitively when we disregard as a serious defense the claim that "I should not be punished for my offense unless others who have done the same are also punished". Similarly, we do not merely accept that we should not punish as many as possible according to their deserts, even though we are bound to fail in giving everybody their due, and hence will inevitably create horizontal injustice. And for the same reason, it is not given that we ought to reduce punishment of low-class offenders below what their crimes deserve merely because high-class offenders do not get what they deserve. We might understandably hesitate to let a low-class person off the hook for his burglary simply because a high-class person is let off the hook for his neglect of work-place safety regulations.

To conclude, the systemic horizontal injustice between high-class and low-class offenders discussed in this chapter must be taken as one of potentially several relevant injustices to be remedied. Here, as elsewhere, justice requires that we deliberate and “negotiate” between competing concerns, remedying the most salient and pertinent injustices of the issue at hand. An example is Braithwaite and Pettit’s “negotiation” between what they take to be the telos of the criminal justice system – maximization of freedom as non-domination – and the horizontal injustice that stems from low conviction rates: We ought to remedy the latter by lowering punishment levels and applying alternatives to punishment. But doing so must not happen to a degree that undermines the overall purpose of criminal justice. Thus, we ought not to lower punishment beyond the point where it can be shown that doing so increases crime, and hence, decreases freedom as non-domination. We ought not, as I put it, to pursue a distribution that is counterproductive to the purpose of that which it distributes.

12. Justification and lack of standing to punish

This chapter discusses whether SSD may provide a justification for breaking the law and whether the state may lack legitimate authority to punish offenders with SSD. I apply a Kantian theory of legitimate authority to investigate the conditions under which a criminal prohibition lacks authority and the state's right to punish an offender seizes to apply. Legal philosophers often discuss this topic as a matter of the state's *moral standing to blame*, following work by Antony Duff. I will examine his theory, but will ultimately return to the Kantian framework, which has the advantage, I will argue, of connecting the state's lack of standing to punish with the citizen's lack of duty to abide by law (i.e. her justification). The Kantian framework thus allows us to analyze *when* the situation occurs in which the state loses its standing to punish.

12.1 Justification

If a person as a matter of self-defense kicks somebody, the act will be considered justified and the agent free of blame. Though kicking somebody is normally a blameworthy criminal offense, it is not in this particular case. The reason, as Jeremy Waldron explains the logic of justification, is that the particular instance is deemed outside the scope of the proper application of an otherwise valid rule. In other words, the rule is over-inclusive if applied to this instance.⁴⁴³ Why? Because the value that the rule protects – in Kantian terms, the mutual right to physical integrity – will not be served if the rule against assault is applied in this case. On the contrary: The act of self-defense serves the purpose of the rule, by *hindering a hindrance* to said purpose, to use Kant's phrase.

Can the crimes committed out of need by a severely socially deprived person be construed in the same way? The classic example is Jean Valjean who steals a loaf of bread to feed his sister's starving children. Or in William C. Heffernan's updated example: "Jeanne

⁴⁴³ Jeremy Waldron, "Why Indigence Is Not a Justification", in *From Social Justice to Criminal Justice*, ed. William C. Heffernan and John Kleinig (New York: Oxford UP, 2000), 98. Waldron's theory is useful for my purpose of connecting justification with the value that the legal rule instantiates, and so with a discussion on Kantian terms of when law is legitimate. There is, of course, a large debate on how we ought to understand the concept of justification which I will not go further into here, for instance relating to whether justification ought to be considered a defense, or whether it is a negation of the criminal offense. I will here mainly consider the latter concept of justification, though we shall see an example of the former in the discussion of Kant's famous example of necessity.

Valjean”, an indigent single mother who commits Medicaid fraud to secure medical benefits for her one-year-old son with a heart condition.⁴⁴⁴ In both cases, the Valjeans acquire what does not rightfully belong to them, presumably reasoning that doing so amounts to a lesser of two evils. Such a necessity justification can successfully be made by someone who finds himself trapped in a storm while hiking in the mountains, and who breaks into a cabin in order to save his life. In such a case, however, the person will have to pay for the damages when he returns to safety. An indigent person who steals to survive cannot be expected to pay in retrospect. Hence, another person (or a corporation or the state) will have to bear the loss, in effect robbing that person (or corporation or state) of their property rights.⁴⁴⁵

According to Waldron, examples like these show an important difference between justification from indigence and the self-defense justification. Only in the latter case can the justified action be understood as promoting the value that the law is meant to protect; i.e. only in the latter case does the justification merely challenge the scope of the application of the law. “By contrast, if indigence were accepted as a justification, it would tend to call into question not just the application but the general legitimacy of the rule that was broken (usually a rule of property).”⁴⁴⁶ In other words, by denying a person protection of her property against those who are in need of it, the very concept of property rights is undermined. Unlike acts of self-defense, the theft committed by the Valjeans or other indigent people in need is not a hindering of a hindrance to the purpose the law. It is rather a denial of the law and therefore not a proper justification, according to Waldron. He compares it to the case of rape: It is inconceivable that in order to avoid rape it would be legitimate to rape the rapist. The value that rape law protects – i.e. sexual autonomy – would not be promoted but would instead be undermined. Using Kantian terminology, we can say that the law against rape instantiates the value it protects, and we cannot therefore separate the adherence to the law and the promotion of its purpose.⁴⁴⁷

⁴⁴⁴ William C. Heffernan, "Social Justice/Criminal Justice", *ibid.*, 47

⁴⁴⁵ We could, of course, imagine a rule whereby the indigent offender would be liable for damages in the event that she became economically solvent. Since there will be many cases where this never occurs, the debate I am here conducting will be relevant regardless of whether such a rule is in place.

⁴⁴⁶ Waldron, "Why Indigence Is Not a Justification", 98.

⁴⁴⁷ Waldron formulates the same point slightly differently: "The possibility of genuine justification as a defense in criminal law presupposes that there is some sort of looseness between the aim of the law and the

However, this example reveals, contrary to Waldron's claim, a disanalogy between the cases. Unlike in the case of rape, it *is* conceivable that denying property rights could promote the purpose of property laws. If, say, I stole the keys to a bank robber's getaway car while he was filling his bags with cash, my theft of his property would indeed be hindering a hindrance to the purpose of property laws. My action would thus be justified by precisely the same logic that Waldron ascribes to self-defense. Convicting me of theft would amount to an over-inclusive application of the law against theft.

Can the same be said of theft from need by a severely socially deprived person? If we once again adopt a Kantian framework it will allow us to answer this question in the affirmative, under certain further specified conditions. Recall from Chapter 9 that according to the Kantian theory of right, the purpose of all law is to make effectual in space and time the Universal Principle of Right, i.e. mutual respect for freedom to the extent compatible with everyone else's equal freedom. This means, as we saw, that a law, and more generally, a legal system, is only legitimate according to this framework if it does not itself amount to a hindering of mutual freedom.⁴⁴⁸ More specifically, it means that if laws of property are to be legitimate, there must be in place a system of public support for those who are not by themselves able to acquire property, and also a public domain where all have equal right to be. Otherwise, those who do not have money and who do not own land would be hindered in their self-preservation. There would be no place where they could freely go to hunt or to grow crops, for instance. They would depend entirely upon the goodwill of others who do hold property in order to survive. And such a situation is not, of course, compatible with mutual freedom.

prohibition – looseness which is unthinkable in the case of rape law, but not unthinkable in term of our ordinary understanding of the law of homicide." *Ibid.*, 103.

⁴⁴⁸ Upon a Kantian conception, 'legitimacy' means 'justification of coercive political power'. Coercion is legitimate only if it accords with the Universal Principle of Right. Recall that "Right and authorization to use coercion therefore mean one and the same thing", Kant, *The Metaphysics of Morals*, 6:232. However, as I shall discuss below, a state that is less than fully legitimate may still give rise to political obligations for its citizens. We might explain this, as Fabienne Peter does, by saying that for Kant, "political obligations arise even from illegitimate authority" (where such authority must then be understood as instantiating or promoting at least some moral value, though it is unclear what this is), Peter, "Political Legitimacy". Or we might, as I prefer, say that political obligations arise when the state can make claim to at least a measure of legitimacy (I discuss this below as the threshold between barbarism and despotism). The discussion could naturally invoke the longstanding debate between 'legal positivism' and 'natural law', but doing so would take too much space, and I believe it sufficient for my purposes here to limit myself to the Kantian framework.

The answer to the question of whether an offense can be justified when committed out of need by an indigent person requires thus that we look at the actual circumstances under which it takes place. If the offender has been effectively denied legal access to something which is necessary for his equal right to freedom, the laws which deny him such access are not compatible with his equal right to freedom.⁴⁴⁹ Imagine for instance that there were no public toilets and no public homeless shelters. A law that prohibits sleeping and defecating in public places would not be compatible with everybody's equal right to freedom, because a homeless person would be denied legal ways of survival. Of course, in reality homeless people often have access to private shelters, and many compassionate restaurant owners let homeless people use their bathrooms. But that does not suffice. A law which makes people dependent on the goodwill of others for their survival is not compatible with the Universal Principle of Right.

If under such conditions a homeless person were to break what is an illegitimate law, his justification would not merely challenge the scope of its application. It would, as Waldron pointed out, amount to "an *indictment* of the rules that have been broken"⁴⁵⁰. Similarly, if sufficient public help for the poor is not in place, an indigent person who steals in order to survive can be said to challenge the very legitimacy of the current legal order which grounds the allocation of property. His justification would be that a law is not compatible with his innate freedom if he is forced to break it in order to survive. The distinction Waldron makes between the self-defense justification and the justification from indigence is not, then, as clear as he suggests. In the first case, the act of self-defense is compatible with the purpose of the law against assault; it amounts to a hindering of a hindrance to the mutual right to physical integrity. But in the second case, the same logic applies, the only difference being that the law itself is here the hindrance to the mutual right to freedom. Here too, then, the crime is compatible with the ultimate purpose of a legitimate law, i.e. mutual freedom.

This, in turn, means that Waldron's analogy between theft and rape does not apply. The crime of rape can never be compatible with mutual freedom. It involves, per definition, a

⁴⁴⁹ Notice that I stipulate here that the person has been denied access to mutual freedom, in other words, that she is a victim of injustice. The point made in the main text would not apply if a person was assured access to mutual freedom (for instance, if she was provided with food and shelter), but out of a choice of her own did not utilize these means.

⁴⁵⁰ Waldron, "Why Indigence Is Not a Justification", 110.

negation of the freedom of the victim, who is treated as a mere object and not as an autonomous subject. Property rights and the right not be raped are different in this respect. While property rights for Kant are ‘*acquired rights*’ that *can* be legitimate, e.g. if the legal order of which they are part is compatible with the Universal Principle of Right, the right not to be raped follows directly from the innate and inalienable right to freedom (e.g. directly from the Universal Principle of Right), and is therefore valid without exception, even in a supposed state of nature.⁴⁵¹ The same goes for other crimes that instantiate disrespect for innate freedom, such as torture.⁴⁵²

Granted then that there are situations where property rights do not comply with the criteria of legitimacy because they form part of a legal order that does not sufficiently ensure the access to mutual freedom for all – what does this mean for the justice of punishing a person for theft under such circumstances? The most radical proposal would be that theft does not even exist in such a situation, in other words, that property laws ought to be considered invalid and everybody free to help themselves to whatever they want as long as it is not in the direct possession of another. A slightly less radical proposal would be that only those who have been denied access to mutual freedom under the current legal order are free to disregard property laws that have not been properly extended to them. A further narrowing is possible too, where the latter group might only justifiably help themselves to the bare minimum of what is required for their subsistence.

At first glance, it seems that Kant would deny all of the above proposals. The fact that an actual legal order does not comply perfectly with the ideal of a rightful condition does not give subjects a right to resist and overturn the legal order. To disregard laws that are given by a state which fulfills the minimal criteria of a lawful condition, means unilaterally imposing one’s will against others.⁴⁵³ As we have seen, the use of force is only legitimate, according to Kant, if it is omnilaterally authorized. This means that for Kant, once a legal

⁴⁵¹ The conditionality of acquired rights to ‘external objects’ is explained in Kant, *The Metaphysics of Morals*, 6:255, under the explanatory heading “It is possible to have something external as one’s own only in a rightful condition”.

⁴⁵² Violence is different from rape and torture in that it, when it is not excessive, does not necessarily instantiate disrespect for innate freedom. Recall that coercion (e.g. violence) is legitimate when it functions as a counter-power to a threat to mutual freedom. Self-defense, like punishment by the state, instantiates respect for the *homo noumenon* of the attacker, as explained in Chapter 9 above.

⁴⁵³ Exactly what these minimal criteria are is debatable, but one criterion might be what Hart calls “the residual respect for justice”, i.e. a formally correct application of law.

order has been established, legality is a precondition for the moral authorization to use force.⁴⁵⁴ A ‘right’ to revolt against unjust laws would thus be self-contradictory: “For a people to be authorized to resist, there would have to be a public law permitting it to resist”⁴⁵⁵ And further: “For someone who is to limit the authority in a state must have even more power than he whom he limits [...] In that case, however, the supreme commander in a state is not the supreme commander; instead, it is the one who can resist him, and this is self-contradictory.”⁴⁵⁶ An extralegal challenge of legal authority would thus have to presume the authority (and hence, the legality) of the challenge, which by definition is impossible when it is extralegal. Therefore, Kant concludes, “the sovereign has only rights against his subjects and no duties (that he can be coerced to fulfill)”⁴⁵⁷.

Though this conclusion may seem extremely anti-democratic, the impression is at least partly due to the form of the Kantian argument rather than its content. For according to Kant, the sovereign, i.e. the state, has an *internal duty of right* to improve itself in accordance with the Universal Principle of Right. The notion of an internal duty of right simply means that the state is required, in order to be legitimate, to pursue as its end the establishment of a rightful condition. To the extent that it is defective in this regard, the state is required by a duty of right to remedy its defects in accordance with its regulative ideal, the Universal Principle of Right. Since every individual has the right to freedom in accordance with the Universal Principle of Right, and since the state has an internal duty to provide such conditions for its subjects, the state thus indirectly has a duty toward individuals. But individuals cannot demand their rights by force, but only by lawful means, i.e. “by complaints (*gravamina*) but not by resistance”⁴⁵⁸. For, as Ripstein explains, “[l]ike all duties of right, the state’s duty to improve its laws can only be carried out by using means consistent with the Universal Principle of Right”.⁴⁵⁹ Kant thus famously dismisses the right of a people to overthrow an unjust sovereign (though, as we shall see, these arguments against revolution are not as conservative as they may seem at first).

⁴⁵⁴ Ripstein, *Force and Freedom*, 333.

⁴⁵⁵ Kant, *The Metaphysics of Morals*, 6:320.

⁴⁵⁶ *Ibid.*, 6:319.

⁴⁵⁷ *Ibid.*, 6:319. I.e. coercion from outside the legal order is illegitimate, and any coercion from within is not coercion, but the self-imposed improvement of the legal order.

⁴⁵⁸ *Ibid.*, 6:319.

⁴⁵⁹ Ripstein, *Force and Freedom*, 203.

But what about the more specific right of a person in need to acquire enough goods to survive? Kant also denies such a right of necessity, for as he says, “there could be no necessity that would make what is wrong conform with law”.⁴⁶⁰ The argument against the right to necessity is somewhat similar to the argument against the right to revolt, in that both ‘rights’ would have required the legality of a unilateral imposition of one’s will. If an indigent person were to have the right to, say, take food from a grocery store or to occupy a vacant house on a cold winter night, this right would imply a correlative duty on behalf of the owner of the grocery store or house to give up ownership. But if such a duty could be imposed upon the owner without her consent, her right would be left vulnerable to the wishes of other people. This would not be consistent with right, according to Kant, because “[t]he concept of right [...] does not signify the relation of one’s choice to the mere wish (hence also to the mere need) of the other [...] but only a relation to the other’s choice”.⁴⁶¹ In other words, right concerns the coexistence of each person’s choice with everybody else’s choice. Hence, it concerns only the *form* of people’s choices, ensuring that each choice is consistent with an equivalent freedom of choice by another, regardless of the *matter* of choice, i.e. the concrete needs and wishes motivating the choices. As a matter of *virtue*, but not of right, the owner of the grocery store or the house has an imperfect duty of beneficence to help those in need.⁴⁶² Duties of virtue are *imperfect* according to Kant, meaning that they are permissively limited by other duties, e.g. a duty of beneficence toward yet another person or the duty of self-perfection toward oneself.⁴⁶³ A particular imperfect duty cannot legitimately be enforced; only perfect duties of right can. Hence, neither the state nor a person in need has a right to force the owner to give up her property for the sake of the particular ends of another.

However, even though Kant denies that there exists a right of necessity, he asserts (in a much-discussed example) that a person in a shipwreck who saves his own life by pushing another off a plank should not be punished. In such a case, he states, “a penal law [...]

⁴⁶⁰ Kant, *The Metaphysics of Morals*, 6:236.

⁴⁶¹ *Ibid.*, 6:230.

⁴⁶² Hence, we have an imperfect duty of virtue to make the ends of another our own. Duties of virtue thus concern the matter of choice (the concrete needs or ends of another), whereas duties of right concern the form of choice. See especially, *ibid.*, 6:393, 6:395 and Kant, *Groundwork of the Metaphysics of Morals Groundwork*, 4:423.

⁴⁶³ Kant, *The Metaphysics of Morals*, 6:390.

could not have the effect intended”⁴⁶⁴. In other words, it is impossible under such circumstances to uphold the supremacy of law in space and time. “There is no supremacy to uphold”, as Ripstein puts it, because a person in desperate need will not defer to a supreme law, but is rather “a law unto himself”.⁴⁶⁵ Since punishment cannot serve the function of upholding law in such cases, the act is *unpunishable*, Kant says, though not inculpable.⁴⁶⁶

Here, then, is a fourth proposal about the justice of punishing an indigent person who steals from need. The proposal entails that the right to punish such an offender does not apply even though the offender does not have the right to steal (or otherwise break the law).

12.2 Moral standing to blame

A version of this latter claim has been argued by Antony Duff, but from a different theoretical vantage point than the Kantian theory I have proposed here. The state does not retain the necessary *moral standing* to communicate blame through punishment, Duff argues, when the same state has not previously fulfilled its responsibilities vis-à-vis the offender.

Suppose that he has been excluded – politically, materially, and normatively – from an adequate share in the community’s goods; and that his exclusion has not been recognized as a wrong done to him. Could he not with justice say to the court that, whether or not he is bound by the criminal law, the court lacks the standing to call him to answer for his alleged crime?⁴⁶⁷

⁴⁶⁴ *Ibid.*, 6:235.

⁴⁶⁵ Ripstein, *Force and Freedom*, 322.

⁴⁶⁶ Kant, *The Metaphysics of Morals*, 6:236. Necessity might here be construed as an excuse (as opposed to a justification): A person clinging to his life is not capable of rational choice, and ought therefore not to be deemed culpable, though his deed is wrong. Or necessity can be construed as a claim that the law in the given case cannot fulfil its purpose, in accordance with Waldron’s view of justification. We could not, however, say that the act amounts to a hindering of a hindrance to freedom, and is therefore right. Rather, the act is beyond right and wrong, as if committed in a kind of state of nature.

⁴⁶⁷ Duff, *Punishment, Communication, and Community*, 186. Note that the argument applies “whether or not he is bound by the criminal law”, i.e. whether or not he did wrong in committing the act for which he is called to answer. Green, “Just Deserts in Unjust Societies”, 363, makes the following comment about this aspect of Duff’s theory: “Indeed, what is striking about Duff’s account is his lack of concern, one way or the other, with the moral status of the offender. Rather, his focus is on the moral status of *society* in judging the offender.” As we shall see, the Kantian approach differs from Duff’s theory at this point, because it supplies a theoretical framework for determining the moral obligations for individuals in conditions when the state’s exercise of power lacks even a minimum of legitimacy (a condition of ‘barbarism’).

Communication of blame is an essential part of the just function of the criminal trial and subsequent punishment, Duff holds. If such communication is not possible, the trial cannot fulfill its just function. When the circumstances surrounding a case do not allow for a trial to fulfill its just function, there is a so-called ‘bar to trial’, the most common of which are due to the condition of the defendant (e.g. when mentally impaired or otherwise ‘unfit to plead’). But there are also other bars to trial that arise when the criteria for initiating a just trial are not fulfilled, for instance due to the court’s lack of jurisdiction, either territorially or temporally, because of a statute of limitations, because of double jeopardy, or, in other cases, due to misconduct toward the defendant by the state (coerced testimony, entrapment etc.). According to Duff, when the social injustice suffered by a defendant is sufficiently severe, this too ought to qualify as a bar to trial, because the circumstances preclude proper communication of blame.

The argument is based on an analogy with non-legal ways of communicating blame. “The trial”, Duff argues, “can be seen as a formal, legal analogue of the informal, moral process of calling another to answer for an alleged wrong, and blaming her for it if she cannot offer a suitably exculpatory answer”.⁴⁶⁸ When criticized for doing wrong in our everyday lives, we are not usually prepared to answer to just anybody. If a person is *meddling* in our affairs, we might think a proper response to be, “That’s none of your business”. If that person is being *hypocritical*, or worse, if she is *complicit* in the same act that she criticizes, we might think it sufficient to respond, “Look who’s talking”.⁴⁶⁹ In such cases, the person blaming does not have the required *moral standing to blame*. Her criticism may be objectively correct (i.e. the criticized conduct really *is* blameworthy), but she is not in a position to call the other person to answer for that conduct.⁴⁷⁰ As G. A. Cohen explains,

⁴⁶⁸ Duff, "Blame, Moral Standing and the Legitimacy of the Criminal Trial", 130.

⁴⁶⁹ The Stanford Encyclopedia of Philosophy’s entry on “Blame” lists these three ways in which moral standing to blame is undermined, *meddling*, *hypocrisy* and *complicity*. There is a fourth way, dubbed “moral fragility”, which expresses the common notion that “There but for the grace of God, go I”. The authors astutely call this “subjunctive hypocrisy”, for it undermines one’s position to blame similarly to hypocrisy, but in the following way: “If I were as bad as him, I’d have no standing to blame him. But the difference between us is simply a matter of luck, and surely my good moral luck can’t serve as the basis for my moral standing to blame. So I lack the standing to blame even though I’ve never done the terrible things in question.” Neal Tognazzini and D. Justin Coates, "Blame", *The Stanford Encyclopedia of Philosophy* (2016), <https://plato.stanford.edu/entries/blame/> I will discuss themes that are relevant to this type of diminished standing to blame in the next two chapters.

⁴⁷⁰ Cf. my discussion in Chapter 9 of the point H. L. A. Hart made with reference to Kant, claiming that the

Admonition may be sound, and in place, but some may be poorly placed to offer it. When a person replies to a critic by saying: “Where do you get off criticizing me for that?”, she is not denying (or, of course, affirming) the inherent soundness of the critic's criticism. She is denying her critic's right to make that criticism, in a posture of judgment.⁴⁷¹

Analogously, Duff claims, the state lacks moral standing to hold offenders who are victims of severe social injustice accountable through punishment. Let us look closer at the analogy to see if it holds. Of the three mentioned reasons for lack of moral standing, *meddling* is not relevant here, as we are concerned with criminal offenses, which are not simply ‘one’s own business’. There is more reason to claim that the state is guilty of *hypocrisy* and *complicity* when it holds severely socially deprived persons criminally liable. Victor Tadros argues to this effect in “Poverty and Criminal Responsibility”: “The state is complicit insofar as the economic injustice it perpetrates creates criminogenic conditions.”⁴⁷² In other words, when the state is responsible for economic injustice, it is complicit in creating the conditions under which we know that more crime will occur. If it were not for the state’s role in economic injustice, then, some of the crime that is being committed would not have been committed. Hence, when the state calls a person to answer for crime that would not have occurred but for the economic conditions for which the state is partially responsible, it is complicit in the crime and therefore lacks standing to blame. Further, Tadros argues, the state is hypocritical:

One reason not to perpetrate distributive injustice is that distributive injustice is criminogenic. In perpetrating distributive injustice, the state shows itself to have insufficient concern for the victims of crime. Hence, in holding the poor responsible for what they do, the state claims that the poor should be held responsible for violating their moral obligations while denying the entitlement of the poor to hold it responsible for failing to adhere to those very obligations.⁴⁷³

If the state shows insufficient concern for victims of crime, it lacks standing, therefore, to hold others accountable for *their* insufficient concern for victims of crime. We might,

concept of rights enabled a distinction between what is objectively good and what it is within one’s right to enforce. I have elsewhere discussed meddling and hypocrisy in more detail, David Chelsom Vogt, “Et forsvar for hyklerin: Klima, moralisering, liv og lære”, *Norsk filosofisk tidsskrift* 52, no. 3 (2017).

⁴⁷¹ G. A. Cohen, “Casting the First Stone: Who Can, and Who Can’t, Condemn the Terrorists?”, *Royal Institute of Philosophy Supplement* 58 (2006), 118.

⁴⁷² Tadros, “Poverty and Criminal Responsibility”, 405.

⁴⁷³ *Ibid.*, 405.

however, question just how relevant this analogy between the private, moral lack of standing to blame and the state's lack of standing to blame is. For starters, it is not entirely obvious that what applies in the blaming-relations of two private individuals necessarily applies in the blaming-relations of the state and its citizens. One issue concerns *who* the state represents. Peter Chau has argued that the courts might be thought of as acting only on behalf of those who do retain the standing to blame. The courts might thus reply to a deprived offender: "You may not owe a duty to account for your crimes to the polity as a whole now, but you still owe a duty to account to the just citizens, and I am now calling you to account on behalf of them."⁴⁷⁴ Against Chau's view, however, Jeffrey Howard has argued that such a claim to act only on behalf of some citizens is illegitimate under normal circumstances: "State officials are morally permitted to see themselves as acting on behalf of a subset of the citizenry, I argue, only in circumstances of *democratic crisis*: circumstances in which a moral community can no longer be plausibly said to exist."⁴⁷⁵ Further, Matt Matravers points to the potential difference it makes that in a public setting, as opposed to a private setting, a person acts in the capacity of an official role. Hence, it is unclear whether the hypocrisy of the person filling the role is sufficient to cause the institution she is part of to lose moral standing. Does it, for instance, affect a university's standing to hold students accountable for not upholding deadlines if a member of the disciplinary committee does not herself uphold deadlines? And what if the institution has failed to react against staff members who do not uphold deadlines – should that affect the institution's standing to hold students responsible for, say, plagiarism? Presumably, loss of standing requires the institution to flout the *same values* that it would hold others accountable for, and in the case of plagiarism, the fact that the institution is tolerant with breaches of deadlines is therefore irrelevant. This is a general characteristic of hypocrisy. An adulterer has standing to criticize somebody for being stingy but not for being an adulterer – i.e. it is only in relation to the act of adultery that he would be hypocritical, not for all immoral acts. Likewise, a state that fails to provide economic safety for all will presumably retain its moral standing to hold somebody accountable for rape, but not, possibly, for theft.

⁴⁷⁴ Peter Chau, "Duff on the Legitimacy of Punishment of Socially Deprived Offenders", *Criminal Law and Philosophy* 6 (2012), 249.

⁴⁷⁵ Howard, "Punishment, Socially Deprived Offenders, and Democratic Community", 121.

It seems, then, that flouting the same value is *necessary* for loss of standing to blame – but is it also *sufficient* for loss of standing? Matravers offers the following example: Assuming that it is true that the UK Government lied about the facts that were provided as grounds for the Iraq War, does that mean that the UK Government lacks standing to hold a person accountable for lying to her insurance company about the goods stolen from her in a robbery?⁴⁷⁶ In both cases, the value of truthfulness in legal relations has been flouted, and the state is thus being hypocritical. Yet, intuitively, this fact does not seem to supply a sufficient reason for not holding the person committing insurance fraud accountable.

The complicity-claim is stronger, as Tadros also says. But here, too, we can question whether the analogy is entirely fitting. Crime caused by economic injustice could be viewed as a “proportionate foreseen harm”⁴⁷⁷: We would hardly call the state complicit in a plane crash because it allows air traffic, even though few or no plane crashes would occur if air traffic were prohibited. In the same way, one might argue that the state is not complicit in crime caused by those who lose out in the free market simply because it allows a free market. Free-market proponents would likely argue that *more poverty*, and therefore *more crime*, would result if the market were restricted so as to prevent any poverty at all. Put differently: The state does not do wrong by allowing a free market, and if it does not do wrong, it cannot be complicit in wrong.

For the analogy to work, then, one must argue that the state does do wrong toward the poor and is therefore complicit in their crimes. We need a theory of the state’s responsibility for poverty, in other words. There are, of course, several plausible theories of why a state that allows poverty does injustice toward the poor. The advantage of the Kantian approach developed above, is that it can provide a link between poverty, standing to punish and justification. For if the state creates a hindrance to mutual freedom by setting up a system of property rights that exclude some from access to property, a person so excluded might be understood as *hindering a hindrance* to her access to mutual freedom when breaking those laws. The state, we might say, is complicit in the offender’s need to break the law in such cases, because the *law* is a hindrance to her freedom. And for the same reason, the indigent person may be justified in breaking the law. This argument simply requires that

⁴⁷⁶ Matt Matravers, “‘Who’s Still Standing?’ A Comment on Antony Duff’s Preconditions of Criminal Liability”, *Journal of Moral Philosophy* 3, no. 3 (2006), 325-26.

⁴⁷⁷ Tadros, “Poverty and Criminal Responsibility”, 408.

one accept the premise that law is legitimate only to the extent that it accords with the Universal Principle of Right – in other words, a premise that is inherent to the Kantian project of justifying legal authority.

12.3 A state of barbarism

Of course, for the Kantian theory as well, there arises the problem of how far from the regulative ideal of the Universal Principle of Right a legal order must stray before it loses its legitimacy. As we saw, Kant denied that the defects of an actual state would provide its citizens with the right to revolt against it. For all its failures, the state, by the mere existence of laws, provides some degree of omnilateral authority. Even where there is merely a formal respect for law, what Hart called “a residual respect for justice”, there is at least some claim to legitimate authority. A right to revolt, on the other hand, is conceptually impossible according to Kant, because it would require the legitimacy of a unilateral will to oppose (the imperfect expression of) the omnilateral will.

As long as the state retains some legitimacy, then, it has standing to hold citizens accountable for breaches of law. Perhaps the reason why the example of the UK Government lying about the Iraq War undermines the intuition about the relevance of hypocrisy, is simply because the UK Government is otherwise perceived as sufficiently legitimate to have moral standing to blame. It would be no wonder, then, if Duff and Tadros’ theory is not intuitively applicable in situations where the state, but for some defects, is largely legitimate. The same conclusion would follow from Kant’s theory.

Duff does not pursue the question of exactly how bad the situation in a state must be before the state loses standing to blame, but clearly the theory will be most relevant if we consider situations of grave, systematic injustice against specific groups of society. In such states, some groups are excluded from full membership in the polity, while at the same time they are being held accountable before the polity, and hence are only then included as members. Such an inconsistency is clearly unjust, and if we consider the examples of the Jews in Nazi Germany and people of color in Apartheid-South Africa, this injustice is extreme. These groups were systematically excluded from full membership in the polity, and as such, they did not owe the polity anything, least of all an explanation for *their* breaches law.

But was there not even in Nazi Germany “a residual respect for justice”, a sliver of formal respect for law sufficient to provide the state with some legitimacy? For the Jews, the answer is clearly no. They were so entirely excluded from the polity that their rights were not even minimally protected. There was, in other words, a situation of almost complete lawlessness for the Jews. And this is the reason, if we again adopt a Kantian perspective, why we might say that the courts had no legitimacy against the Jews. There was in reality no law that expressed the omnilateral will of the Jews, i.e. law that Jews rationally and consistent with their humanity could have given to themselves.⁴⁷⁸ Hence, there was no law before which the Jews could be morally required to answer. For non-Jews, on the other hand, the conclusion might conceivably be the opposite. Their property rights and some other rights were indeed protected to a large extent. Perhaps they might therefore be said to owe the polity respect for the rights of others, and thus would legitimately have to answer to the polity if they were charged with theft or other crimes.

The lawlessness under which the Jews in Nazi Germany lived is consistent with what Kant defines as ‘barbarism’ in *Anthropology from a Pragmatic Point of View*. Barbarism, Kant says, is when there is “Force without freedom and law”. This, in turn, is opposed to ‘despotism’, which he defines as “Law and force without freedom”⁴⁷⁹. While the latter is a defective form of state, it retains at least some element of legality and hence has the potential to represent, in a minimal way, the omnilateral will of the people.⁴⁸⁰ Barbarism, on the other hand, exists where there is not even this minimum of legality. It is, in effect, like the state of nature, where all that exists is a multitude of unilateral wills. In such a situation, the argument against the right of revolt does not apply. There is no omnilateral will against which revolutionaries would unjustifiably exert their unilateral wills. On the contrary, if the revolutionaries attempt to put in place a state which does in fact express the omnilateral will, they act in accordance with right, for to “remain in a condition which is not rightful” is to “do wrong in the highest degree”.⁴⁸¹ As mentioned, Kant’s denial of a

⁴⁷⁸ Cf. Kant’s formulation of the criterion of self-legislation in *An Answer to the Question: What is Enlightenment?*, 8:39: “The touchstone of whatever can be decided upon as law for a people lies in the question: whether a people could impose such a law upon itself.”

⁴⁷⁹ Immanuel Kant, *Anthropology from a Pragmatic Point of View* (Cambridge: Cambridge UP, 2006), 7:330. The other two combinations of force with freedom and law are: “Law and freedom without force (anarchy)”. And “Force with freedom and law (republic)”.

⁴⁸⁰ See also Ripstein, *Force and Freedom*, 339.

⁴⁸¹ Kant, *The Metaphysics of Morals*, 6:307.

moral right to revolt is thus less conservative than one might at first think, for he too would acknowledge that there are some situations in which ‘all bets are off’ and nobody holds legitimate power.⁴⁸²

Hence, we might conclude that for Jews living in Nazi Germany there was no state to which they owed allegiance. They could legitimately view themselves as being in a situation equivalent to a state of nature where no institutions or persons had the right to use force against them, except defensively. They had thus *a moral right to revolt* against the Nazi state. The argument could arguably be extended to everybody in the Reich, non-Jews as well, if we grant that the situation was so far removed from the ideal of a legitimate state that it did not even fulfill the minimal criteria of a despotic regime. But we might also want to differentiate between these groups, claiming that for Jews and other clearly repressed minorities, the moral right to revolt applied *tout court*, but for others the moral right to break the law only applied if it amounted to a hindering of a hindrance to freedom. Hence, it would not be morally justified to steal food from one’s neighbor simply for one’s own satisfaction, but it would be justified to hide Jews or to work with the resistance movement.⁴⁸³

12.4 Wrong against victims

The last example points to an issue that I have briefly touched upon above in the example of the grocery store owner, and that constitutes a problem for any theory claiming that members of an oppressed group are unpunishable for breaches of other people’s rights. If a Jew in Nazi Germany stole food from his neighbor, the state would not retain the standing to hold him to account. But could one argue that the neighbor had nevertheless suffered a wrong? In other words, that the neighbor had rights vis-à-vis the state to have her property

⁴⁸² The fact that a state holds power over a territory is thus merely a necessary, but not a sufficient condition for legitimate authority.

⁴⁸³ This latter distinction between morally acceptable types of legal offences accords with the concept of legal authority that Alan Brudner develops based on Hegel. The simplest form of authority is “De Facto Authority”, then the concept progresses through stages to “De Jure Authority”, “Legitimate Authority” and finally to “Constitutional Authority”. At each stage of authority, the duty to obey excludes offenses that challenge that part of full (Constitutional) authority that is lacking at that stage. Hence, any offense will not be morally acceptable even though the state lacks full moral authority; only offenses that drive the dialectic of authority to a higher stage are acceptable. Civil disobedience can presumably often be defended on such a “gradual” theory of authority. Alan Brudner, “Hegel on the Relation between Law and Justice”, in *Hegel’s Philosophy of Right*, ed. Thom Brooks (West Sussex: Wiley-Blackwell, 2012), 180-208.

protected, even though Jews in Nazi Germany did not have any obligations toward the state to uphold property rights? This discrepancy is increasingly plausible if we consider acts that infringe directly upon the neighbor's innate right to freedom, such as rape or assault. Such acts would constitute a wrong for the victim even in a state of barbarism or where the law does not legitimately apply to the offender due to his near complete exclusion from the polity. There would not in such cases exist a legitimate way of holding the offender accountable, and the wrong against the victim would thus be left unremedied by the state. In effect, the state would not protect her innate right.

A related issue regarding the wrong against victims comes up in cases closer to home. If the victim is herself socially deprived, as victims of crime excessively tend to be, the injustice she has suffered will be further exacerbated. The socially deprived are generally more insecure and less protected by law than other groups. As Tadros notes:

First, poverty [...] is almost certainly a cause of an increase in the crime rate, particularly in poor communities. Second, because the poor have less wealth than they ought to have, they have less money to spend on enhancing their security [...] Therefore, failing to prosecute and convict the offender of a security based offence might compound the injustice done to others who are already victims of injustice.⁴⁸⁴

There is, then, a potential irony in applying a theory that proposes to let social injustice toward an offender override the criminal justice of prosecuting her: The result may be even greater social injustice. Those who live under socially unjust conditions, whether in the *banlieues* of Paris or the *favelas* of Rio, might wish for the exact opposite of what this well-meaning theory proposes: More police, more prosecutions, harsher punishments of offenders – in short, a clearer manifestation of the supremacy of law in their community, ensuring people there the rightful access to freedom. Nevertheless, as we have seen, there are some situations where the exclusion of certain groups is so fundamental that holding members of these groups accountable before the polity from which they have been excluded would amount to an independent injustice. We have then a *tragic situation*, where criminal justice cannot be done to victims without perpetrating injustice to

⁴⁸⁴ Tadros, "Poverty and Criminal Responsibility", 412. See also Green, "Just Deserts in Unjust Societies", 373, who notes that "a disproportionate percentage of the victims of property crimes in the United States are impoverished", and relates as reasons for this that they live in neighborhoods with more crime and have fewer opportunities to ensure their safety from crime.

offenders, and vice versa. Tadros concludes in the same way: “In some cases, however, while failing to prosecute and convict the offender will cause some injustice to the victim or to other citizens, the injustice is insufficiently grave to outweigh the injustice of holding the offender responsible for what he has done.”⁴⁸⁵

12.5 When does a tragic situation arise?

The Kantian approach I have taken allows us to analyze *when* the tragic situation occurs: Only when the offender is beyond reproach from the state *and* the victim is in fact wronged is there potentially a tragic situation.⁴⁸⁶ I will now briefly consider how this applies to different types of crime, before concluding with a suggestion about how we may seek to mitigate the tragic situation when it occurs.

As we saw above, the injustice done to the victim is clear when it infringes upon her innate right to freedom. Our duty to respect innate right does not follow upon the fulfillment of other criteria, unlike our duty to respect acquired rights, which, on a Kantian theory, depends upon the legitimacy of the legal order of which they are part. For Kant, then, there are some acts which are categorically wrong, meaning that there are no conceivable circumstances under which an institution can legitimately make them right. If a person who is beyond reproach from the state commits such a ‘natural’ wrong, the mentioned tragic situation will arise with necessity, for the wrong against the victim cannot then be publicly recognized through a legitimate criminal trial and punishment. The injustice is bound to remain unremedied.

When a person who is beyond reproach from the state breaches ‘acquired rights’, such as property rights, the act will only be wrongful upon a Kantian theory if the right in question is provided by a legitimate legal order. In a state of nature such rights do not exist. Hence there is no such thing as theft. The ‘victim’ has no legitimate grievance. The same applies in a state of barbarism, devoid of legitimate law. Only in a state that shows at least the

⁴⁸⁵ Tadros, "Poverty and Criminal Responsibility", 413.

⁴⁸⁶ Notice how this question cannot be answered with Duff's theory, for he does not treat the question of the binding force of the laws for the severely socially deprived (and hence the wrongness of breaching law), only the moral standing of the state to punish breaches of law – i.e. only the first of the two parts of the tragic situation.

potential of representing the omnilateral will of citizens do we have a ‘natural’ duty to support and comply with the state’s institutions and laws.⁴⁸⁷

The difficult situation to consider, then, is when the state retains at least a minimum of legitimacy, but where some groups are excluded from equal access to freedom. I am thinking of a type of state that is *tolerably unjust*, to use Rawls’ term, meaning that the natural duty to comply with its laws is still valid.⁴⁸⁸ The difficult situation arises if in such a state there are *some* citizens that are excluded to the extent that the duty does not apply to them, at least for some types of offenses. The example mentioned at the outset is illustrative: A city that does not provide homeless shelters or public bathrooms excludes a homeless person from a life consistent with mutual freedom. Nevertheless, we could not say of that city that all its laws are void. We could likely not even say that the bylaw prohibiting sleeping and defecating in public places is void, but merely that it does not legitimately apply to a homeless person who has no legal alternatives. Now, if the homeless person were to sleep in somebody’s private garage without permission, we could say that the owner of the garage had been wronged, for property laws are valid in this tolerably unjust society. Similarly, if an indigent person with no legal means of acquiring food would steal food from a grocery store, the owner would have been wronged. Yet, since in both these cases the government did not supply sufficient assistance to assure them legal access to mutual freedom, the laws which prohibited these necessary actions created a hindrance to their freedom.

Since the laws hindered the indigent person’s freedom, breaching these laws amounts to a hindering of a hindrance to his freedom. His actions are thus justified *qua* breaches of law, that is, *vis-à-vis* the state. But the very same law protects the freedom of the grocery store owner and the garage owner. Hence, we have a tragic situation. But we see more clearly now that it is a tragic situation *for the state*, and not for the parties, who both do right and not wrong. The state is the one that cannot avoid doing right *and* wrong at the same time. That is, it cannot avoid failing to protect the rights of either the victim or the offender. If the offender is punished, the state treats as wrong what is in fact a negation of the state’s

⁴⁸⁷ Kant, *The Metaphysics of Morals*, 6:307.

⁴⁸⁸ Rawls, *A Theory of Justice*, 4: “[I]njustice is tolerable only when it is necessary to avoid an even greater injustice.” The “natural duty of justice” requires us “to support and comply with just institutions”, *ibid.*, 99.

wrong. If the offender is not punished, the state treats as right the negation of the property rights of the owners (who have not done anything to lose their rights).⁴⁸⁹

The state must then try to mitigate the situation, by reducing the severity of the injustice that it cannot avoid doing. I suggest that it do so in the following way: By not prosecuting the offender and compensating the victim. This way of mitigating the situation is also the one that is most compatible with the Kantian framework I have proposed here. For Kant, property rights, like all acquired rights, come with a price. The price is the cost of ensuring that the rights are consistent with the access to freedom for all. The price is usually paid ahead of time, through taxes that are redistributed to the poor, ensuring that they too can hold sufficient property. And here is the point: If the price has not been paid ahead of time, the property-holding citizens have unjustly benefitted from this illegitimate property scheme. They might thus be said to “owe a debt to society”, as the phrase goes. Hence, it would not be unjust to make them pay the price of property in retrospect, as compensation to those citizens who by poor luck were victimized and hence forced to provide the means for the survival of those who could not provide for themselves. The grocery store owner could thus be said to have paid the price of property on behalf of the polity and should therefore be reimbursed by the polity.

Compensation is not equivalent to righting a wrong (recall that for Kant, the material aspect of wrong can be compensated, while the formal must be punished). Even with compensation, the property rights of the owners have been negated. That wrong has not been rectified simply by covering the owner’s losses. Nevertheless, in the kind of tragic situation outlined here, compensation and amnesty are likely the least unjust alternatives.

⁴⁸⁹ If we applied a ‘fair play’-theory of obligation, as developed by Hart and Rawls (see discussion in Chapter 8), we might conclude that an indigent person does not owe an obligation to respect the property of an owner who is complicit in the indigent person’s poverty. The owner could then be said to have acted so as to lose his right of compliance from the indigent person in the cooperative endeavor of maintaining property rights. Stuart Green thus concludes: “For this reason, I am inclined to say that D should be viewed as non-culpable only when he steals from those who are in some way complicit in causing his unjust impoverishment.” Green, “Just Deserts in Unjust Societies”, 373. Herbert Morris similarly makes it clear that his freeloader-justification of punishment applies only when there is a fair distribution of benefits and burdens: “To the extent that the rules are thought to be to the advantage of only some or to the extent there is a maldistribution of benefits and burdens, the difference between coercion and law disappears.” Morris, “Persons and Punishment”, 492.

13. Disproportionate difficulty of law-abidance

This chapter discusses the extent to which severe social deprivation makes compliance with law disproportionately difficult. A person's SSD is not something for which she is responsible (cf. the stipulation above, that we consider only cases where the offender is a victim of social injustice). If breaches of law can (in part) be ascribed to the difficult conditions facing people with SSD, punishment will entail holding people responsible for circumstances beyond their control. If the difficulty is so considerable that we take it to negate the culpability of the offender, SSD should qualify as an excuse.⁴⁹⁰ If the difficulty of law-abidance is believed to lessen, though not negate, the culpability of the offender, SSD is grounds for mitigation of punishment. I will discuss mitigation in the next chapter, but the discussion there will build on the extensive discussion on the link between criminal behavior and SSD in this chapter.

The aim here is to assess the reasons we have for believing that SSD makes compliance with law disproportionately difficult. Providing such reasons is necessary if SSD is to qualify as an excusing condition. Only if we can establish that SSD does actually tend to make law-abidance disproportionately difficult, can it plausibly be argued that SSD ought to be grounds for excuse.⁴⁹¹ I will not, however, discuss the doctrinal implications of the disproportionate difficulty of law-abidance facing offenders with SSD. Put differently, I will not set out to determine the criteria for when SSD is sufficient to excuse an offender. Given the complexity of the matter, a theory of how to operationalize SSD as an excusing condition would require deliberations beyond what I can conduct in this context. My contribution to such a theory is here limited to an argument for its necessary premise: The difficulty persons with SSD face in abiding by law. Built into this premise is the notion that the difficulty *can* for some offenders be so severe as to negate their criminal

⁴⁹⁰ This type of excuse is sometimes called the "rotten social background-excuse", stemming from a famous dissent by Judge Bazelon in the 1973 case, *U.S. v. Alexander*. The dissent concerned the jury instruction by another judge to disregard "whether a man had a rotten social background". Judge Bazelon's dissent has spawned considerable discussion, see especially Delgado, "Rotten Social Background".

⁴⁹¹ Gilman, "The Poverty Defense", 499, similarly claims, when speaking of the poverty defense in child neglect cases in U.S. courts, that it "has not fulfilled its potential because many courts lack a sophisticated understanding of how poverty is related to neglect". Such an understanding, which I will here try to contribute to with SSD more generally, is in other words necessary for the defense to apply. Though the poverty defense has not fulfilled its potential, Gilman claims, child neglect cases is nevertheless an area of law that clearly recognizes a parent's poverty as an excusing condition for conduct that would otherwise constitute neglect, *ibid.* 496.

responsibility – hence, the need for further theoretical clarification of how to establish this threshold in legal doctrine. The threshold will in any case have to be set at an extreme degree of SSD (without here determining how extreme), in keeping with the criminal law’s overall purpose of respecting everybody’s equal freedom. Many offenders with SSD will therefore not reach the threshold for excuse upon any plausible doctrinal theory, but may be eligible for mitigation, as we shall see in the next chapter.

Criminological research has long identified sources of criminal behavior connected with social deprivation. It is a well-established fact in criminology that “being at the bottom of the class structure”, as Braithwaite says, “increases rates of offending”.⁴⁹² *The Oxford Handbook of Criminological Theory* similarly states that “the idea that structural inequality contributes to community-level variations in crime is uncontroversial”.⁴⁹³ Before looking closer at more specific criminogenic mechanisms of social deprivation, it is worth to pause and note the implications of this supposedly uncontroversial claim. Crime, it says, happens partly because of social structures and social policy beyond the control of individuals.⁴⁹⁴ That means that if a community had had in place policies to combat social inequities, be it access to better schooling, a more progressive tax system, a higher minimum wage, we would have removed one of the causes of crime, increasing the possibility that some of the crime committed today would not have been committed. Maybe John’s house would not have been broken into; Charlie, a local teenager, would not have committed burglary. Maybe the 7-Eleven on the corner would not have been spray-painted; Jenny and Paul would not have committed vandalism. The claim can thus be formulated in more controversial terms: Society is partly to blame for the fact that Charlie, Jenny and Paul have become criminals. Framed in this way, it is increasingly plausible that there are normative implications for the justice of punishing them.

The criminogenic conditions of SSD have interconnected material, cultural and psychological aspects. There are different views within the field of criminology on the

⁴⁹² Braithwaite, *Crime, Shame and Reintegration*, 48.

⁴⁹³ Graham C. Ousey and Matthew R. Lee, "Community, Inequality, and Crime", in *The Oxford Handbook of Criminological Theory*, ed. Francis T. Cullen and Pamela Wilcox (New York: Oxford UP, 2013), 363.

⁴⁹⁴ This applies not merely to economic crimes. Elliott Currie, for instance, notes that “the level of violence a society suffers is indeed strongly influenced by social policy and can be substantially mitigated, or exacerbated, by it.” “Violence and Social Policy”, in *Routledge Handbook of Critical Criminology*, ed. Walter S. DeKeseredy and Molly Dragiewicz (New York: Routledge, 2012), 465.

relative importance of these aspects.⁴⁹⁵ For our purposes, however, it matters less which of these factors are generally better predictors of crime, and more that they are of significance for at least some cases of SSD. The factors are anyhow intertwined and can therefore only crudely be isolated in the following.

After having reviewed some commonly acknowledged criminogenic conditions pertaining to SSD in section 13.1, I will turn to the topic of crime and recognition in section 13.2. The theory of recognition, I will claim, can help explain aspects of criminal behavior and motivation that a materialist (economic) psychological theory (Section 13.1.3) cannot. These aspects are associated with SSD, and the recognition theory can thus serve to substantiate the claim that law-abidance is disproportionately difficult for those with SSD. The recognition perspective on criminal behavior overlaps with insights from other psychological theories (e.g. object-relations theory), but the recognition theory itself has received little attention within the literature on criminal behavior and social deprivation. An advantage of the recognition perspective is that it can be brought to bear on the discussion of how to remedy the wrong in crime within a Kantian-Hegelian framework for criminal justice. We shall see examples of this in the following chapters on mitigation and on restorative justice. For these reasons I will devote a relatively large amount of space to expounding such a perspective in this chapter.

13.1 Criminogenic conditions of social deprivation

13.1.1 Criminogenic material aspects of SSD

Adverse childhood experiences, such as maltreatment or deprivation of affection, disrupts brain development, and, according to a recent review of evidence “has wide-ranging effects on neural, endocrine, immune, and metabolic physiology”.⁴⁹⁶ Another recent review shows “a growing body of evidence suggesting that exposure to adverse circumstances affects the developing brain in ways that increase risk for a myriad of problems”. Among these are cognitive problems, the authors summarize, such as “memory problems, learning difficulties, and cognitive delays, which are likely contributors to

⁴⁹⁵ See for instance *ibid.*, 465.

⁴⁹⁶ Anne E. Berens, Sarah K. G. Jensen, and Charles A. Nelson, "Biological Embedding of Childhood Adversity: From Physiological Mechanisms to Clinical Implications", *BMC Medicine* 15, no. 1 (2017).

disproportionately higher rates of academic difficulties and school adjustment issues”. In addition, “[a]ttention and behavior regulatory difficulties are also highly prevalent in children exposed to early adversity, likely underpinning risk for ADHD and associated behavioral problems”. Further, “atypical emotional development is also often observed in children reared in adverse contexts. Problems involve difficulties with stress, sensitivity to reward, and emotion and behavioral regulation, which lead to increased rates of psychiatric disorders, interpersonal problems, and engagement in high-risk antisocial activities”.⁴⁹⁷

Research has also shown stunted physiological development associated with socioeconomic disadvantage (and not just as above, with adverse experiences). For instance, a comprehensive study in the United States found that “[p]arental socioeconomic disadvantage was [...] associated with abnormal child neural development during the first 7 years of life”, as well as “deficits in cognitive and emotional development”.⁴⁹⁸ In their book *Scarcity: Why Having Too Little Means So Much*, Sendhil Mullainathan and Eldar Shafir set out to explain (among other things) why economic disadvantage may inhibit normal cognitive and emotional functioning. Scarcity of a resource, in this case money, has the mental effect of “taxing cognitive bandwidth”, i.e. reducing a person’s mental capacity, making it harder to concentrate on a given task. Experiments measured this effect to an average drop of 14 IQ points. A “tunneling effect” makes long-term goal attainment suffer at the expense of a narrow focus on the scarce object. In addition, scarcity weakens executive control, making sudden outbursts of anger etc. more likely when people are stressed due to scarcity. The scarcity thesis thus challenges the widespread, but simplistic view that poverty is primarily a result of failure (failure to graduate from high school, failure to hold a steady job, and so on). Rather, the reverse also holds: failure is a result of poverty. Without reduced cognitive and emotional functioning due to scarcity, failure might not occur, and the dialectic of poverty and failure may not get started. George Fletcher, when discussing the relevance of poverty to criminal justice, similarly notes that “[p]overty is a condition that disables people from functioning in the expected manner. It is a handicap relative to the society in which it occurs”. The disability can be fairly

⁴⁹⁷ Johanna Bick and Charles A. Nelson, "Early Adverse Experiences and the Developing Brain", *Neuropsychopharmacology* 41, no. 1 (2016), 177.

⁴⁹⁸ Galen Chin-Lun Hung et al., "Socioeconomic Disadvantage and Neural Development from Infancy through Early Childhood", *International Journal of Epidemiology* 44, no. 6 (2015), 1890.

obvious: “if you do not have enough to eat, you are sick all the time. If you cannot rest properly, then obviously you cannot work, either physically or mentally. Further, if you do not receive a proper education, you cannot function well.”⁴⁹⁹

These are some examples of the debilitating material effects of both adverse childhood experiences and socioeconomic disadvantage. By impeding learning, concentration, deferred gratification, regulation of behavior, stress management, impulse control etc., SSD becomes a handicap, limiting a person’s capabilities. We can understand ‘capabilities’ in accordance with ‘The Capability Approach’ advocated by Amartya Sen and others, as *the real opportunities a person has to do and be what he or she has reason to value*. As Sen puts it, “[t]he focus here is on the freedom that a person actually has to do this or be that – things that he or she may value doing or being”.⁵⁰⁰ A person’s ability to do this or be that – for instance, to graduate from high school or to be a steady employee – will be affected negatively by reduced cognitive, emotional, and in turn social functioning. In this material way, then, SSD inhibits a person’s freedom and, in ways to be explained, predisposes a person to commit crime.

13.1.2 Criminogenic cultural aspects of SSD

How might a reduced capability to do and be what one has reason to value bear on one’s capacity to conform to law? In his 1938 article “Social Structure and Anomie”, Robert Merton provided what became a highly influential explanation for this link between opportunity and criminal conduct, often known as ‘opportunity theory’ or ‘strain theory’ of crime. The idea is simple: To the extent that persons lack legal opportunities to achieve what they value, they will have a motive to try to achieve this illegally. In a society where a good is highly valued, but where parts of the population are deprived of the legal means to achieve it, the social structure will be criminogenic by strengthening the motive to achieve it illegally. “[A]ntisocial behavior is in a sense ‘called forth’ by certain conventional values of the culture and by the class structure involving differential access to the approved opportunities for legitimate, prestige-bearing pursuit of the culture

⁴⁹⁹ George P. Fletcher, “Material Poverty – Moral Poverty”, in *From Social Justice to Criminal Justice*, ed. William C. Heffernan and John Kleinig (New York: Oxford UP, 2000), 266.

⁵⁰⁰ Amartya Sen, *The Idea of Justice* (London: Penguin, 2009), 231. See also Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, Mass: Belknap Press, 2011).

goals.”⁵⁰¹ A society’s crime level will thus vary according to two parameters: How strong the shared cultural evaluation of a goal is, and how effective the blockage of this goal is for parts of the population.

It is only when a system of cultural values extols, virtually above all else, certain common symbols of success for the population at large while its social structure rigorously restricts or completely eliminates access to approved modes of acquiring these symbols for a considerable part of the same population, that antisocial behavior ensues on a considerable scale.⁵⁰²

As Merton notes, it is not poverty *per se* that is criminogenic. A feudal society or a caste society will often have more poverty and fewer possibilities of social mobility than a capitalist society, yet less crime. The important factor, Merton claims, is that in a capitalist society the lower classes will to a larger extent measure individual success by the same yardstick as the higher classes. Wealth becomes a good that is universally valued, and “monetary accumulation [...] a symbol of success”.⁵⁰³ And because success by that yardstick is restricted, more people will see their legal opportunities of success frustrated. Put differently: If, as in pre-capitalist societies, one’s expectations and hopes are largely defined by one’s caste or class, attainment of these goals will likely be less restricted. For example, if your goal in life is to take over the farm or become a shoemaker like your father and his father and father’s father before you, your goal is likely within reach. You may still have few alternative opportunities. Poor people have, objectively speaking, fewer opportunities than wealthier people. But if what you want (or at least, expect) is among the opportunities that you have, you may nonetheless be content.

The problem occurs when your goals are dissociated from your opportunities, i.e. when you want something you cannot have by legal means. Merton’s point is that the latter situation arises more often in capitalist societies. The lower classes are no longer taught to want what they have, so to speak. Tradition no longer offers a recipe for how to “find one’s

⁵⁰¹ Robert K. Merton, "Social Structure and Anomie", *American Sociological Review* 3, no. 5 (1938), 679. In 1960, Cloward and Ohlin amended the theory slightly, noting that it is insufficient that legal opportunity be blocked. Criminal opportunity must also be open. This helps to explain why lower-class people do not commit white collar crime, even though their legal opportunities for wealth are blocked. See John Braithwaite, "Poverty, Power, White-Collar Crime and the Paradoxes of Criminological Theory", *Australian & New Zealand Journal of Criminology* 24, no. 1 (1991).

⁵⁰² Merton, "Social Structure and Anomie", 680.

⁵⁰³ *Ibid.*, 681.

place” within realistic reach. Instead, under capitalism, the hegemonic culture exerts a pressure to desire what most people cannot have: The wealth and prestige of the higher classes.⁵⁰⁴ Merton’s opportunity theory thus emphasizes the side of opportunity unaccounted for by the material factors mentioned above: The “want”-side of opportunity. Our freedom, or capability, depends not only on our abilities to do this or be that, period. It depends on what we value doing or being, and whether this is within reach. What we value depends in part, as Merton and countless others have claimed, on the cultural values of one’s society.

We can of course try to gain relief from the cultural pressures influencing our desires, thus exerting our freedom to determine what we value in our lives. As the Stoics and Buddhists have long understood, freedom can be attained by changing one’s desires. Put plainly: If you want nothing, then your opportunity to have it will definitely not be frustrated. But succeeding in exerting our freedom from cultural pressure requires the capability to reflect critically upon the cultural values that influence our desires. This capability must be nurtured through education, political participation, spiritual guidance etc., something the capability approach indeed emphasizes.⁵⁰⁵ Without assistance in cultivating this capability, as will likely disproportionately be the case for the severely socially deprived, it will be all the harder to free oneself from those culturally determined goals that one might attempt to pursue through crime. SSD is criminogenic, then, not just simply because it blocks one from legally attaining that which one desires, but also because it undermines one’s independence from culturally instilled desires.

The normative significance of this kind of cultural pressure for punishment remains to be determined, of course. I might add here, however, that the notion of such legal significance of cultural pressure is less radical than perhaps one might assume, and was recognized even by Kant, who otherwise, of course, stressed the importance of addressing the criminal as a *homo noumenon*, retaining pure practical reason. “There are”, Kant writes, “two crimes deserving of death, with regard to which it still remains doubtful whether legislation is also authorized to impose the death penalty”. One is infanticide by the mother of a child

⁵⁰⁴ There is a clear affinity between Merton’s theory and Antonio Gramsci’s notion that the ideology of the bourgeoisie exerts *hegemony* over the ideology of the working classes, as also Braithwaite notes, “Poverty, Power, White-Collar Crime and the Paradoxes of Criminological Theory”, 50.

⁵⁰⁵ Nussbaum, *Creating Capabilities*.

born outside wedlock. The other is murder by one soldier of another in a duel. “The feeling of honor leads to both”. The soldier who is insulted “sees himself constrained by the public opinion”, and likewise “no decree can remove the mother’s shame when it becomes known that she gave birth without being married”.⁵⁰⁶ Quaint as these examples may seem to us, it is clear that Kant recognizes that a strong cultural pressure may influence one’s capacity to conform to law. Since the citizen is torn between two incompatible social forces, the culture of honor and the criminal law, “public justice arising from the state becomes an *injustice* from the perspective of the justice arising from the people”.⁵⁰⁷ Whether or not this truly qualifies as a tragic situation parallel to that of Antigone, is another matter.⁵⁰⁸ In any case, the negative implication of the claim that public justice arising from the state is unjust, is that reduced punishment would go some way toward remedying this injustice, as we shall discuss later.

13.1.3 Criminogenic psychological aspects of SSD

We have so far seen that there are material and cultural conditions that disproportionately restrict the freedom of severely socially deprived persons. This group exceedingly lacks resources to do and be what they value doing and being. First, because they are affected by a strong cultural pressure to value what for most is realistically out of reach. Secondly, because they have, all things equal, less education, less ability to regulate behavior, less resourceful networks and so on – in short, less of the cognitive, emotional and social resources that provide options for success in a competitive society. We know also that having such deficits is correlated with a disproportionate tendency to commit crime. But we have yet to provide a satisfactory explanation for *why* a person with such deficits might be drawn toward crime. A proper explanation of criminal behavior requires not only that we identify general traits of those who are disproportionately disposed toward crime. It requires that we explain what a person might try to attain by her crime. In other words, we

⁵⁰⁶ Kant, *The Metaphysics of Morals*, 6:336.

⁵⁰⁷ *Ibid.*, 6:337.

⁵⁰⁸ Unlike a truly tragic situation, it seems far-fetched to say that we have here two opposing claims of justice, as if the right to duel or to kill children born out of wedlock were just claims, even though they were likely perceived as such by many in Kant’s days. Kant himself went far in justifying them, for instance making the bizarre claim that a child that is “born outside the law” has been “stolen into the commonwealth (like contraband merchandise), so that the commonwealth can ignore its existence [...] and also ignore its annihilation”, *ibid.*, 6:336. To the extent that public justice (punishment for murder) is unjust in such cases, then, it seems better to simply say that its necessary criteria (such as the capacity to freely choose to conform to law) are not met or compromised to some degree.

must supplement a negative explanation, which says what criminals tend to *lack* compared to the rest of the population, with a positive explanation of what makes crime an attractive strategy for a person so disposed. Saying, for instance, that criminals tend to have less impulse control or less empathy, only explains why this group tends to have fewer inhibitions toward crime. It does not explain what it is that crime might provide for them. It is as such only ‘half’ of the explanation and must be supplemented by a plausible theory of what a person committing crime tries to achieve, consciously or subconsciously.

Needless to say, any such theory will be somewhat speculative since we do not have direct access to the “inner workings” of criminals. Furthermore, there are probably great variations between criminals and between types of crime, such that one psychological theory may be suitable in one instance but not in another. This should not deter us from attempting to offer psychological explanations, however. The fact is that all theories of crime and punishment rely on some theory of what motivates criminal behavior. Declining to provide alternative theories merely leaves the field open to common-sense perceptions of criminal psychology. Such common-sense perceptions provide the premise for both deterrence theories and some retributive theories like the profit theory and the freeloader theory, and are, as we shall see, incomplete at best. Further, even though the topic invites answers that are tentative and short of being full-blown theories of “*The psychology of crime*”, we can still assess the plausibility of these answers by considering how well they explain well-established facts pertaining to criminal behavior. A good explanation requires that the two “halves” of the theory, the negative and the positive, be connected. The theory must explain the link between whatever a person lacks and what she might gain from crime, in other words, how crime (supposedly) remedies the deficit. A plausible psychological theory of crime must therefore fit the characteristics of the criminal population. If this group disproportionately lacks X, a good theory will explain how crime may be perceived as providing a remedy for the lack of X.⁵⁰⁹ Such a theory will then help

⁵⁰⁹ Otherwise, we really have no explanation for the relevance of X. If we found out, for example, that criminals disproportionately lack their front teeth, we would require, if we were to conclude that said trait is criminogenic, a theory explaining how lacking front teeth might motivate criminal behavior. In the absence of such a theory, we might just as well explain the trait as a consequence, rather than as a contributing cause of behavior related to crime, for instance as a consequence of disproportionate exposure to violence, poverty etc.

us determine whether this applies especially to those with SSD, thus intensifying their motive to commit crime.

An economic view of criminal motivation

Let us start, then, by looking at the psychological premise of the opportunity theory explained above. In its simplest form, the psychological premise is that people will try to gratify their desire for material wealth by the easiest and least costly method. Like water runs where resistance is least, so a person will be drawn toward crime if it provides the easiest way to get what she wants. The prospect of punishment might provide a counter-motive, however, leading the person to change her course, just like a rock or a log can steer a stream from where it otherwise would go.

Framed in this way, the premise of the opportunity theory corresponds with the common-sense view of crime as motivated by personal gain (i.e. material wealth, or more generally, pleasure). I will call this view ‘the economic view’ for short. As we shall see, this represents but one interpretation of the psychological premise of the opportunity theory. The common-sense economic view is revealed, as I mentioned in the chapter on the profit theory, in the ways we talk about crime and punishment in everyday language. We often frame the issue using economic metaphors, saying for instance that a criminal tries to “get away with murder” or that he must “pay his debt to society”. More generally, this theory of criminal motivation accords with a view of humans as primarily utility-maximizing beings; the so-called *homo economicus*-model of human rationality. This model has come under sustained attack from behavioral economists and others in recent years, but continues nevertheless to serve as a psychological premise for much public policy.⁵¹⁰ Like other public policy issues, crime is here framed as a function of an imbalance between incentives and disincentives in favor of the former. As Jeremy Bentham put it:

When a man is prompted to engage in any mischievous act, [...] the strength of the temptation depends upon the ratio between the force of the seducing

⁵¹⁰ See Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011). Richard E. Nisbett, *Mindware: Tools for Smart Thinking* (New York: Farrar, Straus and Giroux, 2015). Sandel, *What Money Can't Buy: The Moral Limits of Markets*, provides an overview and a critique of the many areas in which the *homo economicus*-model forms the basis of public policy. As Alfie Kohn puts it, behaviorism has largely been discredited as a psychological theory, but lives on in the form of “pop-behaviorism”, a folk psychology influencing the ways we organize the education system, the workplace, the tax system and so on. Alfie Kohn, *Punished by Rewards* (New York: Houghton Mifflin Company, 1993).

motives on the one hand, and such of the occasional tutelary ones, as the circumstances of the case call forth into action, on the other. The temptation, then, may be said to be strong, when the pleasure or advantage to be got from the crime is such as in the eyes of the offender must appear great in comparison of the trouble and danger that appear to him to accompany the enterprise.⁵¹¹

If the price is right, so to speak, the criminal will take the risk of punishment, because the increased (or more immediate) pleasure from the crime outweighs the pain that might ensue from punishment. We see this notion expressed in Bentham's principle that "the value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence".⁵¹² And we see it explicitly argued in political debates to justify increased punishment levels and policies promoted as being "tough on crime". On the other hand, this economic (or materialist) framing of crime and punishment is also adopted by some on the Left who promote policies that are supposed to be "tough on the causes of crime". While the Left tends to focus on the incentive side, claiming that material conditions induce the socioeconomically deprived to commit crime, the Right tends to focus on the disincentives, claiming that punishment levels are too low to dissuade potential criminals. The Left and the Right thus propose different policies based on the same psychological factor. This suggests that if we were to adopt an alternative psychological theory of crime, we could expect yet other policies to appear suitable. We shall see an example of this in chapter 15, where I will discuss the potential in restorative processes of addressing causes of criminal behavior found in conflict-ridden relationships and lack of recognition.

How should we assess the economic view just outlined? One problem with this view is that it often seems inappropriate to talk of crime as if it were merely one of many ways of gratifying one's desires. Most people have inhibitions against committing many types of crimes and would not under normal circumstances even consider these courses of action. This holds even when a clear benefit could be gained and there are no external disincentives. I could easily get away with stealing and selling my neighbor's bike, but I would never do it. As we saw in the chapter on the freeloader theory, the notion that most

⁵¹¹ Bentham, *The Principles of Morals and Legislation*, 147.

⁵¹² *Ibid.*, 179.

people would torture or rob someone unless they were dissuaded from doing so by external threats or internal efforts of willpower is “too creepy to be right”.⁵¹³

However, there are other types of crimes that do not to the same extent elicit empathy with the potential victim (e.g. theft from a corporation), as well as situations where our inhibitions are weakened (e.g. “he had it coming”-situations, or “better him than me”-situations). These are, as Bentham put it, situations where our “standing tutelary motives”, in short, our social dispositions, have diminished strength.⁵¹⁴ It seems reasonable to assume that in such situations, at least, the prospect of pleasure might motivate the commission of a crime if legal ways were blocked. At first sight, then, it seems reasonable to assume that the economic view can be more or less suitable depending on the type of crime at issue. But as we shall see, even purely economic crimes may be seen as filling other psychological needs than the need for material wealth. How much importance we ought to accord the economic-materialist view remains to be determined, then, and depends in part on how well it can explain the most central variables associated with criminal behavior.

Criminological research has established that crime is disproportionately associated with the following variables: being male, aged 15-25, unmarried, living in large cities, with high residential mobility and relatively weak ties to school, work and family, and being at the bottom of the class structure.⁵¹⁵ It is implausible that people with these traits are generally more utility-maximizing than other people, and that this could account for their increased tendency to seek pleasure through crime. On the other hand, it might be that the relative weight accorded to the incentives and disincentives to crime is somewhat abnormal for this group. As mentioned above, the increased marginal utility of the dollar may make some crimes more attractive to the poor. This may hold not only for purely economic crimes, but perhaps also for crimes that yield other types of pleasure for which the mentioned group may have fewer opportunities. E.g. stealing a car to go for a joy ride is more tempting for a person who cannot afford his own car. Further, it might be that the disincentive of punishment weighs somewhat less for people who are already downtrodden. The prospect of going to jail and being fed three meals a day may not be all

⁵¹³ Murphy, quoted in Hampton, "The Retributive Idea", 116.

⁵¹⁴ Bentham, *The Principles of Morals and Legislation*, 148.

⁵¹⁵ Braithwaite, *Crime, Shame and Reintegration*, 44-48.

that frightening to a person living on the streets in mid-winter. *When you ain't got nothing, you ain't got nothing to lose*, as the song goes.

On the other hand, the economic view cannot explain why men would be more tempted by the prospect of pleasure from crime than women. All things equal, women have fewer legal opportunities for material success than men, and ought therefore to have greater incentives to crime than men. Further, the theory offers no explanation for why being unmarried, having high residential mobility or having weak family ties would increase the likelihood of crime. Of the mentioned factors, the economic view seems able to properly account only for poverty and weak ties to school and work, and to some extent being young and living in cities. Looking beyond the mentioned characteristics of the criminal group, it is likely also that adverse childhood experience is strongly correlated with criminal behavior.⁵¹⁶ The economic view cannot account for this variable either.

We find a similar lack of support from the data if we compare the economic view to research on punishment's deterrent effect. If we really were as sensitive to utilitarian incentives and disincentives as the economic view suggests we would expect that higher punishment levels would have a significant effect on the level of crime. But research on deterrence has not been able to establish such an effect from increased punishment. Put simply: The evidence does not support the idea that an increased disincentive – say, five years as opposed to three years in prison – will affect a person's tendency to commit rape or robbery. The evidence does show a deterrent effect from the risk of exposure, though. The more likely you think it is that you will get caught, the more likely it is that you will abstain from crime.⁵¹⁷ Johs. Andenæs suggested that the fear of exposure varies with the severity of the overall consequences of exposure for the offender, and not merely the consequences in terms of formal punishment.

An accountant who embezzles, a priest who cheats on his taxes, a teacher who makes sexual advances toward minors, a public servant who takes

⁵¹⁶ We saw above that 81 % of the Norwegian prison population reported to have had one or more ACE's, Revold, "Innsattes levekår 2014: Før, under og etter soning," 18. We also saw evidence of a strong correlation between experiencing domestic violence as a child and committing domestic violence as an adult, Whitfield et al., "Violent Childhood Experiences and the Risk of Intimate Partner Violence in Adults: Assessment in a Large Health Maintenance Organization".

⁵¹⁷ See Jacobsen, "Diskusjonen om allmennprevensjonen sin faktiske verknad" for a review of the empirical research on general deterrence.

bribes – in these and many other instances the fear of exposure will be more the fear of shame and scandal, loss of employment, problems in the family, than fear of formal punishment [...] For a previously punished habitual criminal, or for an unemployed youth from a drug-user environment, this may be different.⁵¹⁸

Fear of exposure is thus not merely fear of being caught and punished. It is fear of the *social repercussions* of being exposed as someone who has done the act in question. Andenæs' point, then, is similar to the “nothing to lose”-point from above: If you are already known as a no-good criminal or junkie, the social repercussions of being caught yet another time may be exceedingly small. Not so for a well-esteemed citizen.

How does this fit with the general characteristics of the most criminal group of society? The trait that unites this group, Braithwaite suggests, is *weaker than normal social ties*. Men are less bound to the family than women, all things equal. Youths are often ‘between families’, having loosened the bonds to their parents and having not yet married and established their own families. Those who have high residential mobility have looser bonds to their communities, all things equal, and the same goes for those who do not attend or do not fit in at school or in the workplace. It seems plausible that the social repercussions of being caught are less severe for this group, since this group is less intensely invested in social relationships, all things equal. The deterrent effect of the threat of exposure may thus be smaller for this group. The so-called *primary control* exercised by friends and family will be weaker, leaving more to the less effective *secondary control* of the criminal justice system. Where primary control is weak, crime will be up, as Christie, among others, has shown. Social distance, i.e. loose social interaction, is thus criminogenic.⁵¹⁹

We have, then, an explanation for why this group may have *fewer inhibitions* toward crime than normal. But what is the “positive” half of the explanation, i.e. the explanation for why this group is especially drawn to crime? The economic view can only supply such an explanation to the extent that crime is thought to remedy the specified deficits of this group – and as we saw, it can therefore explain properly only why low-class people and others with few legal opportunities for material wealth (e.g. high school dropouts) tend to disproportionately commit some types of crime. The economic view must be

⁵¹⁸ Johs. Andenæs, *Straffen som problem* (Oslo: Exil, 1996), 53-54. Translated by me.

⁵¹⁹ Christie, *Hvor tett et samfunn?*

supplemented by another theory, then, both because there are unexplained traits of the criminal group and because the economic framing is poorly suited for non-economic crimes such as rape and domestic abuse. I will turn now to a theory that I believe can supply such a supplement to the materialist-economic theory just outlined.

13.2 Crime and recognition

Hegel's theory of recognition provides, I believe, a promising framework for understanding criminal behavior.⁵²⁰ The psychological premise of the theory is the following: Everybody needs recognition from others. Human beings have a drive to achieve recognition of one's personality, an ineluctable hunger for acknowledgment that leads us to seek ever-evolving relationships and institutions to try to satisfy it. Why do we have this drive? Which necessary function does it serve?

We saw in Chapter 9 that Hegel uses the Master-Slave parable in the *Phenomenology of Spirit* to illustrate how self-consciousness requires the presence of another and equal self-consciousness, i.e. another person to enable consciousness of oneself as a person. The function of recognition is here the *formation of self-consciousness*, but many commentators on Hegel have attributed a broader function to recognition. Recognition serves the purpose of emancipating the individual; in short, it's function is to enable *freedom*.⁵²¹ In Axel Honneth's reconstruction of Hegel's theory, recognition is understood as a necessary condition for the *formation of personal identity*. Or in Honneth's various formulations, the function of recognition is to enable the development of "the practical

⁵²⁰ In addition to Hegel, I will draw on Axel Honneth's theory of recognition, which is largely, but not solely based on Hegel, as well as more specific psychological theories of crime. What I present is thus 'Hegelian' in the broad sense of being largely compatible with Hegel's claims, but goes beyond what Hegel himself said about the issue.

⁵²¹ Several authors have attributed a function beyond the formation of self-consciousness to the recognition described in the Master-Slave parable, but have drawn criticism for over-working these passages. "The Master-Slave parable is not, as Marx and Sartre later reinterpret it, about 'freedom'", claims Solomon, *In the Spirit of Hegel*, 427. Honneth agrees with Solomon that the concept of recognition of the *Phenomenology* must be understood within a framework of a theory of consciousness, but he finds in the older Jena manuscripts (1802-06) an understanding of recognition that goes beyond this framework. For Honneth's comments on the difference between the function of recognition in the older texts and in the *Phenomenology*, see *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge, MA: Polity Press, 1995), especially 27 and 62. See also the discussion of recognition in Robert B. Pippin, "What is the Question for which Hegel's Theory of Recognition is the Answer?", *European Journal of Philosophy* 8, no. 2 (2000), 155, where he defends the view that "[t]hat question is the question of the nature and the very possibility of freedom".

self”⁵²², “successful ego-development”⁵²³, “identity-formation”⁵²⁴, “psychological integrity”⁵²⁵, “positive attitudes toward themselves”⁵²⁶, and “individual self-realization”⁵²⁷. Though the concept of recognition can thus be given different meanings, the importance of these differences should not be exaggerated. It seems rather that these meanings ought to be understood as highlighting different aspects of recognition that are essentially compatible with each other. Clearly there is an intimate connection between self-consciousness, personal identity and freedom.⁵²⁸ Without self-consciousness, how could an individual be considered a free agent? To the extent that he could even be said to act upon the world, he would be merely like the Master who consumes in order to try to stem his desire, over which he has no conscious control.⁵²⁹ Likewise, the self-realization that Honneth talks about requires consciousness of and a degree of control over one’s own needs. Or as he puts it, a kind of positive freedom which is manifested in “a form of trust directed inward, which gives individuals basic confidence in both the articulation of their needs and the exercise of their abilities”.⁵³⁰ The connection between recognition, self-realization and freedom is made clear in the following negative formulation:

[U]nless one presupposes a certain degree of self-confidence, legally guaranteed autonomy, and sureness as to the value of one’s own abilities, it is impossible to imagine successful self-realization, if that is to be understood as a process of realizing, without coercion, one’s self-chosen life goals. With regard to such a process, ‘lack of coercion’ and ‘freedom’ cannot be understood simply as the absence of external force or influence, but must rather signify the lack of inner barriers as well as psychological inhibitions and fears.⁵³¹

Freedom, understood as self-realization, thus presupposes three things which, as I will explain shortly, arise only as a result of recognition: self-confidence, self-respect and self-esteem.⁵³² These three aspects of one’s self-image – or self-consciousness if you wish –

⁵²² Honneth, *The Struggle for Recognition*, 68.

⁵²³ *Ibid.*, 69.

⁵²⁴ *Ibid.*, 69.

⁵²⁵ *Ibid.*, 165.

⁵²⁶ *Ibid.*, 169.

⁵²⁷ *Ibid.*, 173.

⁵²⁸ Hegel is explicit about this in the Master-Slave section too, see Hegel, *Phenomenology of Spirit Phenomenology of Spirit*, 114.

⁵²⁹ *Ibid.*, 118.

⁵³⁰ Honneth, *The Struggle for Recognition*, 174.

⁵³¹ *Ibid.*, 174. Honneth refers to Charles Taylor at the end of this paragraph, a further indication that Honneth insists upon the necessity of a positive form of freedom.

⁵³² *Ibid.*, especially 129.

are developed through different forms of relations with other people, from familial relations of love and friendship, to legal relations, to ‘ethical’ relations in one’s community.

Hegel’s three forms of recognition thus correspond to three different social spheres or practices: family, law, and ethical life (‘Sittlichkeit’). All three are necessary for the successful formation of the self, meaning that each by itself is insufficient or ‘one-sided’. Hegel thus explains the evolution of human practices and institutions: The drive to achieve recognition leads us to try to overcome the insufficiencies at each stage. The hunger for freedom, i.e. for self-realization and self-consciousness, is the motor of this dialectic process– the *causa finalis* “pulling” human development toward new forms of practices and institutions involving new types of relations and new forms of recognition.

This explanation of development is supposed to apply both ontogenetically and phylogenetically, that is, both pertaining to each individual’s psychological development, and pertaining to the development of the human species and its practices and institutions. For Hegel, it is only natural that these two types of development should mirror each other, since individual freedom is possible only within the ethical life of a society, i.e. in the “lively unity” of “universal and individual freedom”.⁵³³ For the purposes of my discussion here, however, it is useful try to distinguish the ontogenetic and the phylogenetic aspect of Hegel’s theory, focusing on the former.⁵³⁴ Hegel’s framework allows us to theorize on the importance of intersubjectivity in the development of the individual personality and individual action, and it is this that bears most directly on the psychology of criminal behavior.

⁵³³ Quoted in *ibid.*, 13.

⁵³⁴ The phylogenetic aspect, with its metaphysical premises, is inherently controversial, and therefore preferably held outside any normative theory of crime and punishment. As Honneth says, “a speculative foundation is not sufficient” by today’s academic standards as the basis for a social theory. We must attempt, instead, “a reconstruction [of Hegel’s model] in the light of empirical social psychology”, *The Struggle for Recognition*, 68. The ontogenetic aspect of the theory is clearly more suitable for this, as Honneth shows by drawing on psychological and sociological research. Focusing on the psychological aspects of Hegel’s theory does not imply a denial of the historical aspect and its influence on psychology. We can bracket, so to speak, Hegel’s teleology for the moment without denying his historical perspective on psychology.

13.2.1 The three forms of recognition

Before turning to the explanation of criminal behavior, we must first consider the three types of recognition that human beings seek and which motivates much of our behavior in general. The first is the recognition that we gain through relationships of love, in the family and among friends. It is with the experience of love, as Honneth explains Hegel, that we become more fully aware of our own needs and able to develop the necessary self-confidence to trust the significance of these needs. The most fundamental such experience is the relationship of the newborn baby and the mother, which develops from a state of symbiosis toward a gradual self-assertion and self-awareness made possible by trust in the mother's love. "During the first months of life, the child is incapable of differentiating between self and environment" Honneth remarks, drawing heavily in this section on psychoanalytic object relations theory.

At six months, on average, the child begins to interpret acoustic and optical signals as clues to the future satisfaction of needs, so that the child is slowly able to endure the temporary absence of the 'mother'. In thereby experiencing, for the first, the 'mother' as something in the world that is outside of his or her omnipotent control, the child simultaneously begins to become aware of his or her dependence.⁵³⁵

Awareness of one's dependence on each the other – the experience that 'I need you, and you need me' – is what characterizes love. "In the reciprocal experience of loving care, both subjects know themselves to be united in their neediness, in their dependence on each other."⁵³⁶

The family is the primary location of this unity of interdependence.⁵³⁷ But as the child matures, it gradually gains independence from this unity. There is thus a dialectic progression in the child's development, from being completely immersed in the unity of the family toward more and more autonomy, that is, toward recognition of oneself and others as separate persons. In relationships of love each is recognized in his or her uniqueness, as a particular and irreplaceable individual: You are your daughter's father, your brother's brother, your friend's friend and so on. And just like you cannot substitute anyone for your daughter, your brother, your friend, so *you* are unique to them. This form

⁵³⁵ Ibid., 100. Honneth is especially influenced by Donald W. Winnicott in this section.

⁵³⁶ Ibid., 95.

⁵³⁷ Hegel, *Philosophy of Right*, § 158: "The unity of the family is one of feeling, the feeling of love."

of recognition is one-sided, however. The child gradually learns to see itself not merely as a unique other to a unique other (as son or daughter, brother or sister and so on), but as a ‘generalized other’, that is, as equal to others, sharing general characteristics with others.⁵³⁸ In this latter form of recognition, each is recognized as *same* rather than unique. But in order to be alike, one must abstract from the concrete idiosyncrasies of each individual. One must “put on the mask of the person”, as explained in Chapter 9.

This recognition as a legal person is also one-sided, however. When we relate to other people, it is not merely as abstract, empty categories. We relate to each other as individuals with concrete qualities and skills: he is a baker, she is a lawyer, this guy is very funny, she has a great voice. To put it succinctly: We are *someone* to each other; we are not just anyone, like we are before the law. Yet this more concrete form of recognition does not amount to the recognition of love and friendship. Being someone in one’s community is not the same as being a uniquely loved someone. The baker may also be a beloved father, and as the latter, he is irreplaceable. As the former, however, he is someone in light of the role he fills. If he is sick one day, somebody else might fill in for him, but nobody can fill in for a loved one. The individual is thus socially recognized for the social function he fills through his role. Through his function, he contributes to the community. He is thus recognized for his contribution to the common good.

The upshot of this, more fundamentally, is that one’s identity – who you are, how you understand yourself – is determined by the ethical values of your community, i.e. the ‘Sittlichkeit’ in which you live. Hence, you are unique only via commonly shared (i.e. non-unique) values – a kind of mediated uniqueness, we could say. In the Hegelian dialectic, this third form of recognition is thus a sublation of the two other forms of recognition – a transcendence of the dichotomies of uniqueness vs. sameness (love vs. equal respect), and of unity vs. separation (family vs. law). In ethical recognition you are individual-as-part-of-a-whole, in Hegelian terms, *identity-in-difference*. Yet, even though the two previous and one-sided forms of recognition are transcended in the recognition of the ethical community, they are still necessary forms of recognition for human self-realization. Hegel’s fundamental insight is that we need all three forms of recognition. We need to feel

⁵³⁸ Honneth, *The Struggle for Recognition*, refers to Georg Herbert Mead’s distinction between concrete other and generalized other, illustrated in the progression of children’s play from role-playing (e.g. with dolls) to games where one fills replaceable roles (e.g. playing keeper or mid-fielder in a football game).

loved, to feel respected, and to feel appreciated – if we are lacking in either, we will be motivated to try to remedy this deficit.

13.2.2 Lack of recognition

As mentioned, this premise can be used to explain both historical development and individual psychological development. It functions as the premise of Hegel's explanation of the development of Spirit throughout history. And less abstractly, it is the premise of Honneth's explanation of social development as a "Struggle for Recognition". My interest here, however, is whether this premise can also be used to explain individual criminal behavior. Although a narrower question, this too finds textual support in Hegel, and fits well with Honneth's theory of social conflict. According to Honneth, "[...] Hegel traces the emergence of crime to conditions of incomplete recognition. The criminal's inner motive then consists in the experience of not being recognized, at the established stage of mutual recognition, in a satisfactory way".⁵³⁹

To assess this claim, we require first a theory of how privation of recognition can become a motive for any action at all, and second and more specifically, how it can motivate crime. Honneth derives the first from John Dewey's pragmatist psychology whereby emotions are understood as affective responses to actions. Positive emotions such as joy and pride arise with successful solutions to action problems. Negative emotions such as shame, guilt, anger, sorrow and indignation arise when one's expectations for action are frustrated. The affective response to frustrated expectations, Dewey claims, shifts one's attention toward these expectations, which may be either instrumental expectations or 'moral expectations', i.e. normative expectations of how one ought to behave or how one ought to be treated. The feeling of *guilt* is thus an emotional response of an actor to a violation of a norm she accepts as prohibiting her action. The same action may trigger *indignation* in another person. *Shame* is an emotional response of a person to an action, by herself or another, which she perceives as showing that she has a lower social value than she had previously assumed. Recall Hampton's point that many crimes threaten the feeling of self-worth of victims, that is, cause them to feel shame. This may happen, she noted, either because they believe the crime has *caused* their degradation, or because they perceive it as *evidence of*

⁵³⁹ Ibid., 20.

their true status (e.g. "I deserve to be raped"). Conversely, the criminal may feel shame by perceiving the crime as confirming to herself and others that she is a bad person, that she does not live up to the normal standard for how one ought to be (as opposed to guilt, which relates to the action, not to one's personality). Emotions thus serve a cognitive function by making us aware of the discrepancy between our expectations and how we actually act or are acted upon. Emotions thereby help clarify to ourselves our normative beliefs.⁵⁴⁰

Becoming emotionally (and cognitively) aware of the discrepancy between one's current situation and one's normative expectations, may trigger, as I see it, one of two responses to dispel the emotional tension. One can either lower one's expectations or one can struggle to achieve one's expectations – two different strategies for cancelling out the perceived discrepancy. The first strategy can be seen when feelings of shame lead to apathy and acceptance of one's degradation, as Hampton described. Perhaps it is partly a matter of sour grapes: When you cannot get what you want, you can simply change your desires, in this case your expectations for how you ought to be treated.⁵⁴¹ Or perhaps it is a more fundamental problem, best described as a vicious cycle of self-deprecation. Self-confidence, self-respect and self-esteem are required, as we saw, for one's self-consciousness as a free agent, in other words, for one's self-perception as one who should not accept degradation. However, one's degradation is itself an impediment to the self-confidence, self-respect and self-esteem needed to assert the injustice of one's degradation.

The other strategy to overcome the discrepancy is to act so as to bring one's treatment in accordance with one's normative expectations, i.e. to pursue recognition. As Honneth puts it,

the experience of being disrespected can become the motivational impetus for a struggle for recognition. For it is only by regaining the possibility of active conduct that individuals can dispel the state of emotional tension into which they are forced as a result of humiliation.⁵⁴²

The struggle for recognition can take the form of collective action when minority groups react to their exclusion from social recognition accorded to comparable groups. The

⁵⁴⁰ Cf. discussion in the Introduction (Chapter 1).

⁵⁴¹ Jon Elster, "Sour Grapes: Utilitarianism and the Genesis of Wants", in *Utilitarianism and Beyond*, ed. Amartya Sen and Bernard Williams (Cambridge: Cambridge University Press, 1982).

⁵⁴² Honneth, *The Struggle for Recognition*, 138.

movements for women's rights, racial equality and LGBT-rights are but a few examples. Participating in such political struggles can in and of itself help to remedy one's lack of recognition. Being included in a group where one's feelings of disrespect are articulated and shared provides recognition from one's fellows in this group and can thus function as an "anticipation that a future communication-community will recognize them".⁵⁴³ But lack of recognition does not always spur collective action:

Empirically, whether the cognitive potential inherent in feeling hurt or ashamed becomes a moral-political conviction depends above all on how the affected subject's cultural-political environment is constructed: only if the means of articulation of a social movement are available can the experience of disrespect become a source of motivation for acts of political resistance.⁵⁴⁴

For many people, feelings of disrespect have no political outlet. They are alone, or at least feel alone, with their lack of recognition. A high-school dropout, a sexually humiliated husband, or a neglected teenager – for them and countless others who perceive that they are not respected, not esteemed, not loved, it is difficult to find a social movement that might articulate their lack of recognition as a collective problem. And when the problem is individualized, shame and apathy are all the more likely outcomes. But there are also individual remedies to lack of recognition. Some work hard to get rich. Some are happy to show off their pretty girlfriends. Some study like mad to prove to themselves and others their great intellectual capacity. And, as Hegel explains, some seek individual remedies to lack of recognition through crime.

13.2.3 Recognition through crime

We saw in the previous part that Hegel (like Kant) defines crime as the negation of universal right. By its very definition, then, crime is non-universal, that is, an expression of a particular will. In doing wrong, one "exhibits particularity", Hegel states.⁵⁴⁵ One creates an "opposition of abstract right to the particular will".⁵⁴⁶ Hegel goes further,

⁵⁴³ Ibid., 164. I will return to this issue shortly, when I discuss its explanative potential for political terrorism and related crimes.

⁵⁴⁴ Ibid., 138.

⁵⁴⁵ Hegel, *Philosophy of Right*, § 15 Note.

⁵⁴⁶ Ibid., § 82. See also especially § 81 and § 95, and also my discussion of Hegel's concept of tragedy above.

however, saying at one point that crime is motivated by the wish to be recognized as a particular individual:

The inner (subjective) source of crime is the coercive force of the law [...] his inner justification is this coercion, the reinstatement of his individual will to power, (his wish) to count for something, to be recognized. He wants to be something (like Herostratus), not necessarily to be famous but only to have his will prevail, in opposition to the universal will.⁵⁴⁷

Herostratus was a young man who lit fire to the Temple of Artemis in order to achieve, well, *herostratic fame*. Crime, Hegel suggests, is like fame in that it might be motivated by the need to *be someone* in the eyes of others. The anonymous, abstract ‘sameness’ of legal recognition is insufficient. We all need to be someone, to be individual. In other words, we all need Hegel’s third form of recognition, where we are recognized for our particular qualities, for instance as a successful businessman, as a caring nurse, as the clown of the class, or as the high school beauty queen. Hegel’s insight is that if we lack such recognition, crime may be perceived as a way of achieving it. If we feel that our esteem is threatened in a particular situation, a particular crime may be perceived as a way of regaining esteem. In short, if we feel humiliated, a particular crime may be a way of demanding respect, i.e. demanding to be treated as someone to be reckoned with. “The consummated crime is the will that knows itself as individual”, Hegel says.⁵⁴⁸ Let us now apply this so-far rather theoretical and abstract claim to different types of crimes to see how the theory of recognition might explain the motivation of those who commit them. Needless to say, I cannot here discuss all types of crime, as space is limited. I will be content, therefore, to show the potential of the theory of recognition in explaining the motivations for two broad categories of crime, economic crime and violent crime.

Economic crime

I will start with the types of crime most easily explained by the economic view of criminal behavior: crimes where the offender stands to gain an (economic) advantage, i.e. theft, fraud, blackmail, drug trafficking etc. Can the theory of recognition contribute to an understanding of the motivation for such crimes? It seems clear that if these crimes are

⁵⁴⁷ G. W. F. Hegel, "The Philosophy of Spirit (Jena Lectures 1805-6)", in *Hegel and the Human Spirit. A translation of the Jena Lectures on the Philosophy of Spirit (1805-6) with commentary* (Detroit: Wayne State University Press, 1983), 130.

⁵⁴⁸ *Ibid.*, 131.

committed in order to satisfy a basic material need, like Jean Valjean stealing a loaf of bread, the economic view is sufficient to explain their motivation. In many cases, “he needed the money”, should be considered a perfectly good explanation. However, much economic crime is not committed out of basic material need, but is rather committed out of greed, like when a business owner bribes a government official for a lucrative contract. The economic view would explain this motivation as simply wanting more of what one desires, e.g. more money on top of what one needs to get by. But although this explanation is clearly correct, it is insufficient. Greed is not just a desire for material goods *per se*. Material goods are means of communication, instruments for expressing to other people one’s identity, one’s individuality. In other words, wealth is more than a means for self-sustenance; it is also a means for self-aggrandizement, for instance through conspicuous consumption aimed at showing off one’s status, and through the power over others that wealth yields.

For the same reason, a purely materialist interpretation of the opportunity theory is insufficient. It is not merely lack of opportunity for material wealth *per se* that creates criminogenic conditions in a society. As we recall, Merton explicitly denied such a purely materialist interpretation, noting instead that in a capitalist society, an additional criminogenic factor stems from the social fact that material wealth is almost universally acknowledged as a yardstick of success. Hence, if you lack legal opportunity for wealth, you do not merely lack legal opportunity for material goods – you lack legal opportunity to achieve success by this yardstick. You lack, in other words, access to a source of recognition from others.

On a macro-level, then, the social structure of a society may provide or block access to sources of recognition to varying degrees and for larger or smaller portions of the population. As Braithwaite put it, “[s]ome societies and institutions are structurally more humiliating than others”.⁵⁴⁹ The experience of humiliation, Braithwaite argues, may arise from many types of social structures, including economic structures:

[I]negalitarian societies are structurally humiliating. When parents cannot supply the most basic needs of their children, while at the same time they are assailed by the ostentatious consumption of the affluent, this is structurally humiliating for the poor. Where inequality is great, the

⁵⁴⁹ Braithwaite, "Poverty, Power, White-Collar Crime and the Paradoxes of Criminological Theory", 49.

rich humiliate the poor through conspicuous consumption and the poor are humiliated as failures for being poor.⁵⁵⁰

Braithwaite mentions among other humiliating social structures, racism. “For a black, living in South Africa is structurally more humiliating than living in Tanzania.” A black person in Apartheid-South Africa was humiliated by the social structure that denied her recognition of the same political rights and esteem as white people. Similar forms of humiliation may result from other social structures, Braithwaite notes, such as a school system that rewards ‘dunces’ and delegates the academically challenged to an inferior position. Or such as an excessively retributive penal system, where inmates face degrading conditions and threats of violence, and where humiliation continues after they are released, through disenfranchisement and demeaning parole controls. In these and many other ways, material and cultural conditions of a society contribute to the first-person experience of humiliation by individuals in that society. If economic gains can counteract humiliation by raising one’s status in the eyes of others and oneself, this may provide a motive for economic crimes.

Since wealth has both a material function and a status function, we cannot expect to separate one from the other and determine its specific motivational force. For the same reason, we cannot expect full awareness by the agent of how these aspects influence her actions. This applies more generally to all actions that might be seen as strategies for gaining recognition. Since recognition is achieved through actions that carry meaning independently of the recognition they provide, we might assume that the agent is not always aware of the multiple aims that her actions may serve. Indeed, the action may be overdetermined by the different functions it achieves.⁵⁵¹

As we shall shortly see, the picture is further complicated by the fact that an action may be perceived by the agent (more or less consciously) as a way of achieving recognition, yet it may fail to provide just that because it represents a self-defeating strategy for recognition. The fact that the action is doomed to failure is not necessarily known to the

⁵⁵⁰ *Ibid.*, 49.

⁵⁵¹ Here’s an example: The point of playing a guitar solo may be to play beautifully or to play really fast. This in turn provides recognition as a guitar virtuoso. The guitarist is not necessarily aware of the recognition aspect, but it is nevertheless likely that part of her motivation, at least sometimes, is to play in a way that gives recognition.

agent, and the action may therefore make sense from a first-person perspective, even though it does not make sense from an informed third-person perspective.

Violent crime

Violent crime, like economic crime, is a broad category consisting of many distinct types of crime, which occur in a great variety of situations. When trying to answer the general question of why people commit violent crimes, we might start by distinguishing between these violent situations, to see whether some of the same motivations apply across situations and across types of crime.

Based on interviews with violent criminals, Lonnie Athens has distinguished between four types of interpretations of violent situations.⁵⁵² The first is “physically defensive”: an interpretation of the situation that is formed when an actor believes a physical attack is forthcoming or actually taking place. The second is “malefic”: an interpretation of the situation that is formed when an actor sees the other as having a malicious or extremely negative character. The third is “frustrative”, which is when the actor interprets resistance from another person to the actor’s line of action, or coercion from the other to pursue a line of action that the actor does not want to pursue. The fourth is “frustrative-malefic”, a combination of the two preceding types. Such an interpretation of a situation occurs when the actor sees the other as resisting her plans or coercing her, and then constructs an extremely negative object of the other and his behavior.

In the first and the third type of situation, the motive for violence can be rather easily explained by the economic view of criminal behavior. In both situations, there is a clear benefit to be gained from committing the violent act: security for one’s physical health in the first, freedom to pursue one’s ends in the third. Poisoning a colleague in order to take her job could easily fit the third category, the colleague being “frustrative” of one’s career opportunities. This would suggest, in turn, that the act can at least partly be explained as motivated by a desire for material benefit.

But much, if not most, violence does not lend itself to such an explanation. The paradigmatic example of violence is not the kind of premeditated, “rational” violence that

⁵⁵² Lonnie Athens, "The Self and the Violent Criminal Act", *Urban Life and Culture* 3, no. 1 (1974).

the example represents. Violence is often unplanned, occurring under exceptional circumstances, and often yields no external benefit. Homicide situations, Jack Katz found in his review of police records and ethnographic studies, are usually characterized by the “materially petty, ‘inconsequential’ nature of the conflicts”. Katz’ book *Seductions of Crime* attempts to reconstruct a first-person narrative of criminal motivation, “approaching crime from the inside” as he says, and concludes broadly that “the attraction that proves to be most fundamentally compelling is that of overcoming a personal challenge to moral – not to material – existence”.⁵⁵³ Similarly, David F. Luckenbill found in his review of 71 homicides that, “[i]n all cases ending in murder the offender interpreted the victim’s previous move as personally offensive”.⁵⁵⁴ Roy F. Baumeister et al. likewise found a main source of violence to be “threatened egotism”.⁵⁵⁵ In short, violence is here understood as a reaction to humiliation. In Katz’ phrase, violent rage is “livid with humiliation”, and he describes how there is often cursing, threatening and pushing in the build-up to the violent act, which he interprets as attempts to silence the other’s disrespect and thereby save face. When this does not succeed, violence becomes “a last stand in defense of respectability”.⁵⁵⁶ Luckenbill too found that “[t]ransactions resulting in murder involved the joint contribution of the offender and victim to the escalation of a ‘character contest,’ a confrontation in which at least one, but usually both, attempt to establish or save face at the other’s expense by standing steady in the face of adversity”.⁵⁵⁷ Such cases fit Athens’ category of “malefic” interpretations of the violent situation, wherein the other person is seen as an extremely negative object which threatens one’s standing.

The view that violence is a response to humiliation is supported by the fact that in many cases the material side of the conflict is all but insignificant. When a fight breaks out over whose beer it is, it is not really the beer, but the offensive insinuation that the other person has the right to push him around that triggers the offender’s response. In many cases (41 % of homicides in Luckenbill’s data set, to be precise), the victim makes a verbal expression

⁵⁵³ Jack Katz, *Seductions of Crime: Moral and Sensual Attractions in Doing Evil* (New York: Basic Books, 1988), 9.

⁵⁵⁴ David F. Luckenbill, "Criminal Homicide as a Situated Transaction", *Social Problems* 25, no. 2 (1977), 180.

⁵⁵⁵ Roy F. Baumeister, Laura Smart, and Joseph M. Boden, "Relation of Threatened Egotism to Violence and Aggression: The Dark Side of High Self-esteem", *Psychological Review* 103, no. 1 (1996): 5.

⁵⁵⁶ Katz, *Seductions of Crime*, 19.

⁵⁵⁷ Luckenbill, "Criminal Homicide as a Situated Transaction", 177.

which the offender interprets as offensive. Katz too recounts many cases where “the victim either teased or dared the killer to resolve the conflict”.⁵⁵⁸ Some of the examples he relates are instances of domestic violence following an experience by the husband of being sexually humiliated by the wife, either verbally or through flirtations or sexual relations with other men. Baumeister et al. refer to several studies where rapists describe among their motives for rape the wish to disabuse a woman of her sense of superiority: “The woman gave the man the impression she thought she was better than he was, and so he raped her as a way of proving her wrong.”⁵⁵⁹

In many cases, the offender interprets the victim’s refusal to cooperate as offensive. Cases in which parents murder their children are usually of this sort. Luckenbill found that “[w]hen the parent’s request that the child eat dinner, stop screaming, or take a bath went unheeded, the parent subsequently interpreted the child’s activity as a challenge to rightful authority”.⁵⁶⁰ Again, it is not the eating or screaming or bathing in itself that is the issue. It is when these material facts are interpreted as moral challenges that rage builds. Such cases fit Athens’ category “frustrative-malefic”: the victim frustrates the offender’s plans, which in turn creates in the mind of the offender an image of the victim as a malicious threat to the offender’s respectability.

The next question, then, is why a person who is humiliated would commit violence in response to the humiliation? What does the humiliated person try to achieve through violence? And why do so many people who are humiliated abstain from violence – in what way do they differ from violent criminals? In Katz’ interpretation of the homicide cases he reviews, he emphasizes the offender’s perceived lack of other ways to save face. As the conflict escalates and attempts to silence the other person’s disrespect by cursing and threatening fail, the offender perceives violence as the last alternative to an unbearable defeat. “After humiliation makes one painfully aware that what has just now happened cannot be reconciled with a respectable vision of oneself in any imaginable, concrete future, rage rises to block out concern for what will be”.⁵⁶¹ But violence is not inevitable up to that point. There are exits all along the route from humiliation to violence. If the

⁵⁵⁸ Katz, *Seductions of Crime*, 20.

⁵⁵⁹ Baumeister, Smart, and Boden, "Relation of Threatened Egotism to Violence and Aggression", 17.

⁵⁶⁰ Luckenbill, "Criminal Homicide as a Situated Transaction", 180.

⁵⁶¹ Katz, *Seductions of Crime*, 43.

other person backs off, the situation no longer calls for a last stand. A few words or a gesture might make one see a possible future where honor is restored. Or one might perceive that violence will not succeed, and therefore realize that it is better to stand down than to risk further humiliation. There are thus situational contingencies that separate those who are humiliated and who commit violence from those who are humiliated but remain non-violent.

In addition, there are likely differences in character traits between those who end up committing violence and others who are humiliated but remain non-violent.⁵⁶² A widespread view is that violence is disproportionately committed by people with low self-esteem, and at first sight this view seems to harmonize with the Hegelian theory of recognition: Low self-esteem is a sign of (and a consequence of) lack of recognition, which in turn might trigger a motive for violence as a way of gaining recognition. However, according to Baumeister et al., this common view is wrong. On the contrary, they claim, “the major cause of violence is high self-esteem combined with an ego threat”.⁵⁶³ Reviewing available studies on different types of violence, Baumeister et al. conclude that persons who have positive feelings about themselves are more likely than others to react with violent rage when humiliated.

In this view, then, aggression emerges from a particular discrepancy between two views of self: a favorable self-appraisal and an external appraisal that is much less favorable. [...] More to the point, it is mainly the people who refuse to lower their self-appraisals who become violent.⁵⁶⁴

The tendency to commit violence, they claim, is correlated with feelings of self-worth, and not, as one might think, with feelings of worthlessness. It is the sense of superiority, and not the sense of inferiority, that triggers violence. If you feel superior to others, you will likely have weaker inhibitions against maltreating those over which you feel superior – their feelings mean less to you. And with a sense of superiority comes a sense of entitlement, which means there will be more acts that are potentially offensive to you. Especially, Baumeister et al. note, if your self-image is unrealistically positive.⁵⁶⁵

⁵⁶² Athens, "The Self and the Violent Criminal Act".

⁵⁶³ Baumeister, Smart, and Boden, "Relation of Threatened Egotism to Violence and Aggression", 8.

⁵⁶⁴ *Ibid.*, 8.

⁵⁶⁵ *Ibid.*, 9. An example: If you believe your status in a certain field is in the 90th percentile, you will be

Many types of violence do indeed seem to display a perception by the offender of his superiority, implying an inherent asymmetry between the parties. Characteristic of misogynistic violence, for instance, is the belief it conveys in the woman's status as lower than that of the man, entitling men to dominate women.⁵⁶⁶ Political violence and war displays confidence in the superiority of one group or nation over that of the (evil and inferior) enemy. And within the larger 'in-group' of the nation, we often find elite groups committing political violence on behalf of the state, for instance torturers and special forces. For these groups, we see a double tendency to portray themselves as superior, both vis-à-vis their compatriots and, of course, vis-à-vis the enemy.⁵⁶⁷ The same double sense of superiority is also characteristic of some political terrorists – Breivik is a prime example – seeing themselves as inherently better than their enemies (e.g. Muslims and “cultural Marxists”) and as saviors, capable of an exceptional sacrifice for their group (e.g. saving Europe from the Muslims).⁵⁶⁸

While feelings of superiority and entitlement increase one's sensitivity to disrespect, the converse holds for those with low self-esteem. Put differently: Only those who demand respect can be insulted. If you do not think yourself worthy of respect, you may easily come to interpret demeaning treatment as evidence of your true status. You may come to internalize disrespect as self-loathing and shame, as many crime victims do, thinking that they deserve to be raped or deserve to be put in place. Hence, lack of recognition does not necessarily make the individual attempt to gain recognition, for instance through violence. Nor does it necessarily lead to a political “struggle for recognition”, as discussed in connection with Honneth's theory above. It might instead simply lead to nothing; to

offended if you are treated as if you are in, say, the 60th percentile. Not so if you believe you are in the 40th percentile.

⁵⁶⁶ Rape is thus a way of expressing a man's “right” to acquire sex while simultaneously denying the sexual autonomy of women. According to Baumeister et al., studies have found “a common masculine belief in entitlement as a cause of marital rape”, *ibid.*, 17. As for domestic abuse, they conclude their research review: “All of these findings suggest that men beat their wives to maintain the superiority of the husband role that has been threatened or jeopardized”, *ibid.*, 19.

⁵⁶⁷ *Ibid.*, 22-24. A prime example is the SS forces of Nazi-Germany, viewing themselves as capable, due to their exceptional loyalty, courage and self-sacrifice, of committing “necessary violence” which other branches of the Nazi forces were incapable of committing. See for instance Arne Johan Vetlesen, *Studier i ondskap* (Oslo: Universitetsforlaget, 2014), 97-99.

⁵⁶⁸ On this aspect of the Breivik case, see Arne Johan Vetlesen, “Narratives of Entitlement,” in *Moral Evil in Practical Ethics Conference* (Oxford Uehiro Centre for Practical Ethics 2012). Manuscript, unpublished per October 2017, but read at Oxford 2012. See also Atle Møen, “Fall og raseri: Om Behring Breiviks ubestemmelege livsløp, nedgåande sosial mobilitet og tap av mening”, *Tidsskrift for ungdomsforskning* 16, no. 2 (2016).

apathy; to withdrawal. Humiliation will trigger a counter-reaction only when there is a discrepancy between one's treatment and one's normative expectations. The views of Baumeister et al. can thus help us refine our Hegelian theory of violent behavior: It is not lack of recognition per se, but denial of expected recognition that provides, all things equal, motives for violence.

But there is something strange about this notion that perpetrators of violence supposedly have high self-esteem. Certainly at least some violent offenders convey an image that suggests the opposite – think for instance of a troubled youth, unsuccessful at school, unpopular among his peers etc. Recall also the study referred above, where 41 % of inmates in Norwegian prisons (as opposed to 4 % of the reference group) rated their own social status at levels 3 and below on a scale from 0 to 10.⁵⁶⁹

More fundamentally, however, the notion that violent offenders have high self-esteem seems oxymoronic. If the offender truly had high self-esteem, he would not let himself be provoked. He would know that his status was undeniable, and could simply shrug off an insult as if it were a fly that had landed on his nose. There is an irony in defending yourself against offenses to your status: By accepting the other's words and actions as offensive, you accept that you are not above and beyond the other. You are vulnerable to him. Responding with violence can thus be seen as a *de facto* recognition of the power that the other holds over you.

This seeming contradiction – that self-esteem is necessary in order to take offense, and that taking offense implies lack of self-esteem – can be overcome if we add to the analysis the concept of self-certainty. Self-esteem means holding a favorable opinion of oneself. One believes, simply put, that one is “good enough” to deserve to be treated in accordance with a norm that applies to esteemed people. This belief comes in degrees of certainty, however, and can also be more or less stable over time. Those who are self-certain, i.e. certain of their self-esteem, can easily ignore what others may take offense from. They are “beyond resentment”, in Hampton's phrase, meaning that “their belief in their standing is so strong that demeaning actions cannot call it into question”.⁵⁷⁰ On the other side of the

⁵⁶⁹ Revold, "Innsattes levekår 2014: Før, under og etter soning.", 30. The study surveyed all types of offenders, not just violent offenders, but there is no reason to expect off hand that members of the latter subgroup have a higher perception of their own status.

⁵⁷⁰ Hampton, "Forgiveness, Resentment and Hatred", 57.

spectrum are those who are certain in their lack of self-esteem, “those who cannot resent”, i.e. who do not react with resentment to an offense because they believe they deserve such treatment. Between these extremes are those who have some, but not complete certainty in their own right to respect and esteem. Presumably, in reality we all fall into this third category. That is, even for those who are close to the extremes there are some actions that are so offensive that it will trigger their resentment.

Upon Hampton’s phenomenological analysis, the experience of a degree of self-certainty is coupled with a fear that one might be wrong. One’s thoughts about one’s own rank and value might be inflated. The offender, by treating me as low, might have put me in my right place. Such fear, Hampton says, is a necessary component of resentment, which she analyzes into the following parts:

1. A fear that the insulter has acted permissibly in according you treatment that would be appropriate only for one who is low in rank and value. Your fear can be analyzed as involving:
 - a) *some degree of belief* that the insulter is right to treat you as low in rank and value (i.e., you neither fully believe it nor fully disbelieve it)
 - b) a *wish* that the belief described in item 1a is not true, so that you are not low in rank and value (i.e., you wish to have no degree of belief that you are as low in rank and value as his action assumes you to be).
2. An *Act of Defiance*: you “would have it” that the belief in item 1a is false (i.e. you would have it that you are high in rank and value).⁵⁷¹

When we fear that we are as low as we are treated, resentment becomes a way of denying the truth of that which we fear. Hence, if we do not fear it, either because we know it to be true or because we know it to be false, we will not feel resentment. While the latter alternative is difficult to attain, the former is difficult to accept. To accept that it is true that you deserve the disrespect you have faced is to accept shame. And shame, as we all will have experienced, is psychologically painful; a threat to the ego.

To resent, is to deny shame. Through an act of defiance, we state a claim that we deserve better – whether this act be a verbal rebuttal, a curse, a push; or violence. To act in violence in response to an offense is a way of denying the shame one would experience if one accepted the truth of the offense.⁵⁷² As Baumeister et al. put it: “By focusing on his or her

⁵⁷¹ Ibid., 57.

⁵⁷² Note that this applies when violence is a response to a personal offence. Resentment on behalf of others

hostility toward the evaluators, the person avoids the dismal cycle of accepting the feedback, revising his or her self-concept, and experiencing the dejected feelings about the self.”⁵⁷³

This way of understanding violence as a response to shame can also be formulated in psychoanalytic terms, as for instance Arne Johan Vetlesen does in his philosophical studies of genocide and war crimes: Violence is a way of displacing repressed feelings of shame onto the victim.

[S]trong, negative feelings – like anger and rage – arise with particular intensity in a subject who in another human being meets feelings that he has long denied himself to experience, or to express openly. The soldier who kicks his victim again and again [...] reacts to something inside himself which he has refused to accept as a part of himself. To kill this part of another – the part that shows a deep vulnerability and dependence – becomes a way of confirming, again and again, that one also exterminates this part within oneself.⁵⁷⁴

To emotionally access the vulnerable part of oneself and experience feelings of weakness, of dependence, of humiliation, bitterness, mortality, etc., is psychologically painful, especially for those who have been taught to repress such feelings. Having contained and controlled these feelings, the threat of having to face them can feel like losing control. When a person is humiliated by another it threatens to rob the person of his sense of control of his self-concept, i.e. of his ability to define himself, forcing him to admit to himself that others do not see him as the strong and well-esteemed person that he wants to be. Katz’ analysis brings out the same point: “In both humiliation and rage, the individual experiences himself as an object compelled by forces beyond his control. That is, his control of his identity is lost when he is humiliated. We say, for example, that a person has become an object of ridicule.”⁵⁷⁵

The same sense of a challenge from one’s ‘evaluators’ may arise even in situations without direct humiliation. Genocide and war crimes often provide examples of situations where there is no offense to react against with resentment. In such cases the perpetrators are

or on behalf of an impersonal value can be labeled ‘indignation’, and presumably such indignation may also enrage a person to the level of becoming violent. *Ibid.*, 59.

⁵⁷³ Baumeister, Smart, and Boden, "Relation of Threatened Egotism to Violence and Aggression", 11.

⁵⁷⁴ Vetlesen, *Studier i ondskap*, 90. Translation by me.

⁵⁷⁵ Katz, *Seductions of Crime*, 24.

hardly objects of ridicule. On the contrary, they are often clearly superior to their victims who are already degraded, weak and passive. Vetlesen refers to numerous historical examples where the perceived inferiority and weakness of the victims did not, as one might think, restrain violence against them, but rather functioned as triggers of heightened contempt for the victims, as further ‘proof’ of their unworthiness to live.⁵⁷⁶ The weakness of the victims, Vetlesen claims, is a reminder to the perpetrators of their own weakness, which they, unlike their victims, have hidden and handled “like men”. Being hard on oneself is a way of controlling one’s vulnerability, thereby displaying strength. Lack of such control, displaying weakness, is worthy of contempt, especially in cultures where stereotypical ideals of the ‘hard man’ prevail. Thus, Theodor Adorno writes about the ideals that applied to Nazi commanders and which reinforced their brutality: “Whoever is hard with himself earns the right to be hard with others as well and avenges himself for the pain whose manifestations he was not allowed to show and had to repress.”⁵⁷⁷

The same ‘contempt of weakness’⁵⁷⁸ is also evident in many instances of violence outside extreme situations of genocide and war crimes. In everyday life, violence often occurs in asymmetrical situations, where the inferior suffer at the hands of the powerful. We see it in police brutality against downtrodden alcoholics and junkies. We see it in hate crimes against sexual minorities. We see it in the schoolyard, when five boys stand around a classmate lying on the ground, kicking him. In all these cases, the victims will often have done nothing to provoke and humiliate their aggressors, except, of course, by displaying their vulnerability, reminding the offenders of something in themselves which they do not want to access.

We might say, perhaps surprisingly, that there is a kind of empathy behind such violence. Bullies (of all kinds) are experts at detecting insecurity and weakness – they know who and what to comment on and attack. They have, in other words, the ability to ‘place themselves in the other’s place’ and perceive when and how they feel vulnerable. But

⁵⁷⁶ Vetlesen, *Studier i ondskap*, 82.

⁵⁷⁷ Theodor Adorno, “Education After Auschwitz”, quoted in Vetlesen, *Studier i ondskap*, 89.

⁵⁷⁸ Harald Ofstad argued that “contempt of weakness [...] is precisely the core of Nazism.” But the same contempt of weakness can be seen in many contexts, which implies that “those dispositions and considerations that were given extreme expression among Nazis are hardly as distant from us as we like to think”. Harald Ofstad, *Vår forakt for svakhet: En analyse av nazismens normer og vurderinger* (Oslo: Pax, 1991), 13. Translated by me.

though they empathize with their victims, they do not sympathize with them, for the weakness that the victims reveal is an object of contempt both in themselves and in others. And just like one seeks to control and repress one's own weakness, so one may try to obliterate the weakness represented in the other which threatens to reveal one's own weakness to oneself and to the world.

Even the most destitute and miserable other is thus one's 'evaluator', in the sense that he or she reveals to you aspects of yourself, thereby providing a basis for self-reflection. With Hegel: the other is a source of self-consciousness. The problem arises when you do not like what the other reveals about you. Violence, both after direct humiliation and against the weak, can then be an attempt to regain control of your own self-concept. A last stand in defense of your ability to define yourself; a denial of other people's power to define you as low and weak; a denial of your own experience of weakness. The sense of control and power this gives can be gratifying. Sadism, as Vetlesen defines it, is precisely such a "pleasure in taking control over the human experience of being a victim, of being vulnerable to pain, by displacing it onto another".⁵⁷⁹

But, as I have mentioned several times, such a strategy for regaining self-esteem is bound to fail in the long-run. Violence is a self-defeating strategy for recognition. As we have seen, the person who reacts with violence has in reality admitted to himself, if ever so briefly, that he is not above and beyond the other. He is vulnerable to humiliation from the other; he is vulnerable to the 'evaluation' of the other, even when the other is merely a mirror in which he sees his own vulnerability. The other has thus already exposed his insecurity and weakness that he wishes to repress. Exterminating the source of the humiliation is like shooting the messenger after the message has been received. The damage to his self-concept has already been done. And through his violent act he merely confirms his own vulnerability.

Likewise, the notion of feeling big by dominating the other is equally self-defeating. I mentioned in my review of Hampton's theory in Chapter 9 that both malicious and spiteful haters are bound to fail in their goals of elevating themselves. In the first case elevating one's own worth by showing the other's worthlessness only makes him "the lord or

⁵⁷⁹ Vetlesen, *Studier i ondskap*, 133. Translated by me.

nothing”, as Hampton puts it, which is the same problem that faces Hegel’s Lord.⁵⁸⁰ In the second case, where out of spite one seeks “company at the bottom”, the act is equally futile as means for elevating one’s self-worth. As Hampton puts it, “[o]ne who has a scarred face cannot become more beautiful by throwing acid in the face of everyone she meets”.⁵⁸¹

That violence does not provide long-term solutions to humiliation and shame is corroborated by accounts of offenders who soon after having committed violence realize the futility and irrationality of their acts. The material Katz reviewed found offenders frequently saying “I got carried away”; “I didn’t know what I was doing”; “I wasn’t myself”, expressing that what they had done was “an aberrant moment that disrupted their characteristic state of moral competence”.⁵⁸² A similar sense of astonishment at what they had done, even shortly after the act, was expressed by killers who were interviewed by Paul Leer-Salvesen, a prison minister and researcher in Norway. Years after the homicide many of the killers expressed that it had not provided a sense of satisfaction, but on the contrary caused an “existential pain” which never completely eased.⁵⁸³

Recognition of one’s identity

Let us now look at a possible objection that can be raised against the recognition perspective on violence I have proposed here. If it is true that violence can be understood as a response to a challenge to one’s self-concept (an ‘ego threat’), and if it is true that such a response is self-defeating, why do some offenders continue to commit violence? Should we not expect that they would learn the first time that violence does not give them what they are after?

One answer to this objection might simply be to accept that the recognition perspective provides only a partial explanation for violent behavior. The reason why some become habitual violent criminals might be that they get something else from violence (e.g. material benefit, power over others) that makes violence a recurrent temptation. Another answer might emphasize the affective character of violent behavior and the situational conditions that trigger violent reactions. This answer suggests that some offenders simply

⁵⁸⁰ Hampton, "Forgiveness, Resentment and Hatred", 74.

⁵⁸¹ *Ibid.*, 79.

⁵⁸² Katz, *Seductions of Crime*, 25.

⁵⁸³ Paul Leer-Salvesen, *Menneske og straff* (Oslo: Universitetsforlaget, 1991), 81.

do not act in their rational best interest (they do indeed pursue self-defeating strategies repeatedly), but tend to get carried away and lash out when pressed.

Both are plausible answers that should likely form part of a comprehensive theory of violent behavior. There is a third answer, however, which suggests a further explanative role for the recognition perspective: Dominating another may indeed be useless for gaining recognition from that person, but it may provide recognition from a third-party. That is, it is not simply through violently suppressing the source of humiliation represented by the victim that one seeks to elevate oneself. Self-esteem is gained through recognition of the identity one conveys to others by having committed the violence. For a gang-member, for instance, beating up the clerk at a corner store will be futile for gaining recognition from the clerk, but the act may gain him recognition from his mates in the gang. In other words, the act may convey and secure his identity as an ‘insider’, a worthy member of his group. The victim, who is someone on the outside of the group, is simply used as an instrument for recognition from the people on the inside whose recognition really matters.

A long tradition of research on violence has emphasized group affiliation as a motivation for violence. Following orders from a respected authority and otherwise acting in accordance with the norms of the group are ways of expressing one’s allegiance to the group and thereby gaining recognition as a group insider. Under certain conditions, researchers have claimed, normal, law-abiding citizens may come to perform terrible acts of violence, such as genocide, out of respect for authority and conformity to the norms of one’s group.⁵⁸⁴

In addition to conveying group affiliation, acts of violence (and crimes in general) may convey a certain image of the perpetrator to third-parties more broadly. Establishing one’s identity vis-à-vis others is likely one of the motives for many different types of violence, from terrorism to debt collecting. For instance, political scientist Olivier Roy, who has compiled a database of roughly 100 persons involved in Islamic terrorism in France and Belgium since 1997, found that the common interpretation of their crimes as motivated by the wish to spread Islam and the Islamic state is at best an incomplete explanation. Though

⁵⁸⁴ See for instance Philip Zimbardo, *The Lucifer Effect: How Good People Turn Evil* (London: Random House, 2011).

that is their stated aim, it serves to some extent merely as a “theological rationalization” for their violence.⁵⁸⁵ The terrorists are not, contrary to common perception, characterized by their deep and long-term commitment to Islam. Almost all are second- or third generation immigrants whom Roy characterizes as “born-again” Muslims, meaning that they have suddenly renewed their religious observance after a period of leading a highly secular life (with drinking, frequenting clubs, etc.), or have converted to Islam (25 %). Most start to prepare for terrorist attacks just months after having converted or “reconverted”. A majority (70 %) have only a basic knowledge of Islam, they usually have little and ambivalent contact with mosques, and many do not read or speak Arabic. None had taken part in proselytizing activities, none had worked for a Muslim charity, none had campaigned for a pro-Palestinian movement or similar anti-colonial movements, and almost none go back to their parents’ homeland to wage jihad.

Roy emphasizes instead the “identity vacuum” of second- and third generation immigrants who have little connection with their parents’ country of origin and who have problems integrating into European society (for instance, 50 % have committed petty crimes, mostly drug dealing, and many have served time in prison and have become radicalized there). Joining the Jihad cause may serve as a way of asserting their identity in opposition both to the traditional Islam of their parents and to Western society, while at the same time portraying themselves as heroes of a greater cause. For example, as in the posthumous statement of London-bomber Mohammed Siddique Khan: “I am directly responsible for protecting and avenging my Muslim brothers and sisters.”⁵⁸⁶ Note here the similarity to Breivik’s grandiose self-image as the savior of Europe.

Another example of how identity is conveyed through the violent criminal act can be found in Katz’ review of research on armed robberies. Katz concluded that such acts are superficially motivated by economic gain, but that this motive cannot explain the modus and the persistence of career robbers. An economically rational way of conducting armed robbery would be to abort the mission upon the slightest resistance from the victim, and then simply move on the next and likely more cooperative victim. Instead, career robbers tend to go all the way once the robbery has started, thereby facing risks that far outweigh

⁵⁸⁵ Olivier Roy, “Who Are the New Jihadis?,” *The Guardian*, April 13, 2017.

⁵⁸⁶ Quoted in *ibid.*

the potential gains of the robbery. It takes a certain type of person to be willing to pursue such a career path. And it is precisely the promotion of an image as such a person, Katz explains, that forms part of the appeal of robbery. Career robbers express through robberies an identity as a “hard man”: a man who is so tough that he simply does not care about the excessive risks he is taking. His criminal identity expresses that he is a man whose will shall prevail, regardless of circumstances. He is the type of man who is brave enough to endure the insecurity and chaos of the robbery situation, indeed, who is powerful enough to define the entire situation (e.g. “This is a robbery”) and to force the world to succumb to his will.

In her philosophical dialogues with inmates in a Norwegian prison, Marianne Walderhaug similarly encountered a ‘criminal identity’ which formed a common self-conception among the inmates. The identity is defined in opposition to ‘straight’, ‘normal’ people, whose lives are boring, filled with routines and obligations. In contrast, many of the inmates talked of the freedom of the criminal lifestyle, the excitement it brings, and of their ability to ‘play the game’ and function in a world that is chaotic and uncertain, where “rationality has gone on vacation”, as one inmate formulated it.⁵⁸⁷ Several inmates conveyed the same notion as Katz described, that being a tough and ruthless “hard man” is necessary to survive in the criminal world. As one inmate said, “hearing his name was enough to make people pay up”.⁵⁸⁸ Several conveyed that the norms of the criminal world require that you “don’t let yourself get stepped on” if you are to gain respect among your “likeminded”.⁵⁸⁹ Such respect within the criminal group is preferable to “being at the bottom of the social ladder in the normal society”.⁵⁹⁰

However, several inmates conveyed to Walderhaug that after a while the criminal lifestyle also feels restrictive and they wish to settle into normal life. But doing so turns out to be difficult both due to lack of opportunity (e.g. to get a job and to make friends in ‘normal’ society), and because the routines and dullness of a job does not fit the desires and the self-concept of someone who has spent years living outside the law. In several cases that Walderhaug mentions, the inmate did get job offers, but he did not want it or quit after a

⁵⁸⁷ Marianne Walderhaug, "Filosofiske samtaler med innsatte i fengsel" (University of Bergen, 2018), 291 (electronic manuscript)

⁵⁸⁸ *Ibid.*, 292.

⁵⁸⁹ *Ibid.*, 294 and 301.

⁵⁹⁰ *Ibid.*, 303.

short while. The freedom of the criminal lifestyle turns out to be counterproductive to a broader conception of freedom, both because it limits one's opportunities as a law-abiding citizen, and because one's range of desirable choices compatible with one's self-concept is also limited.

Vetlesen notes a similar counterproductivity in seeking recognition through group affiliation. One will not succeed in extinguishing one's anxiety about one's own worthlessness by identifying with a powerful group, because, as Vetlesen explains

“[...] the real threat against the individual is its *own* group, due to its demand that the individual renounce everything distinct, everything genuinely peculiar, in order to be accepted and kept as a member. [...] The price of belonging is the imperative to hide, repress and deny everything that can reveal one's dissimilarity from the group.”⁵⁹¹

The irony, then, is that such group recognition does not provide the ‘recognition as individual’ that one seeks, but is simply another type, beside abstract right, of recognition as ‘same’.

13.2.4 The relevance of recognition as a theory of criminal behavior.

Having thus explained how the recognition theory provides a coherent theory of criminal motivation, I turn now to the question of its relevance in explaining the disproportionate difficulty of law-abidance correlated with SSD. As I stressed above, any theory of criminal behavior must explain what attracts a person to commit a crime. Doing so means explaining what one gains from crime and what it is that the person lacks which makes her want such a gain. I labeled these the positive and the negative side of a theory of criminal behavior. Using this distinction, we can now address the problem of relevance in the following way: If it is true that recognition is an important motive for crime – i.e. that many, if not most crimes can be understood as motivated by the possibility of achieving recognition (positive) – then we can assume that this motive will be strongest where lack of recognition is most predominant, i.e. among those who experience unsatisfactory recognition (negative). By implication, we can expect the group that commits most crime to be characterized by their relative lack of recognition compared to other groups in

⁵⁹¹ Vetlesen, *Studier i ondskap*, 128.

society. We have already seen one study showing the subjective self-perception of inmates to fit this claim.⁵⁹² But we can also look at the objective variables that are disproportionately associated with criminal behavior: being male, aged 15-25, unmarried, living in large cities, with high residential mobility and relatively weak ties to school, work and family, and being at the bottom of the class structure.⁵⁹³

The last variable has been discussed already in connection with Merton's opportunity theory. As he emphasized, lack of opportunity for wealth is criminogenic not just because of the material benefits of wealth, but because wealth is regarded as an (almost) universal yardstick of success in a capitalist society. Hence, being poor means being deprived of a means for recognition, which would explain why, if recognition is a motive for economic crimes, the poor are overrepresented among those who seek recognition through crime.

Similarly, 'weak ties to school and work' suggests that a person so characterized has fewer than normal opportunities for recognition in these arenas. If you do not work, you cannot identify with your occupation and achieve esteem through the useful function it serves for the common good. You will lack a particularly important venue for achieving Hegel's third form of recognition. Likewise, if you have with weak ties to school, you likely do not find it an arena for gaining esteem. If you are academically challenged, your problem will be exacerbated by the kind of 'structural humiliation' that Braithwaite mentioned: school systems where 'dunces' are rewarded and poor students demeaned.

Young people are particularly vulnerable to these kinds of problems. They are in the midst of finding their identity, searching for arenas where they can 'be somebody'. Living in large cities and moving often means that you have relatively weaker bonds to neighbors and the local community. In other words, yet another arena where the criminal group has relatively fewer opportunities for 'being somebody'. The same applies for those who have weaker than normal ties to family, such as the unmarried (compared to the married), and men (compared to women). With weaker and/or problematic familial relationships, they

⁵⁹² Revold, "Innsattes levekår 2014: Før, under og etter soning.", 30.

⁵⁹³ Braithwaite, *Crime, Shame and Reintegration*, 44-48.

will to a lesser extent define themselves in their relational role, and, hence, relatively more of their self-image will depend on achievements in other arenas.⁵⁹⁴

We saw in the section on violence how situational contingencies might determine the outcome of a volatile situation. If the potential offender does not perceive an alternative way to re-establish his dignity, violence may be his last stand. Hence, there are foreground factors that trigger violence in the particular situation, such as an offensive gesture by the other, a refusal to back down etc. But, as we also saw, some people are more sensitive to these foreground factors than others. To the extent that a person is beyond resentment he will be quite insensitive to many of these triggers. Such a person will be less inclined to take offense when, say, somebody bumps into him. He will not take it as a challenge to his self-respect, and be more inclined to think, “That guy has a problem, not me”.

Presumably, in order to reach the level of self-confidence required to be beyond resentment in a particular situation, one must experience recognition in other areas of life. If you know that you are loved, respected and esteemed, it will be easier to brush off an insult and define the problem as residing with the other person. If your self-conception is stable and certain, you will to a lesser extent perceive the acts of others as ego threats. Presumably, then, a person who lacks recognition will, all things equal, have a more insecure self-conception and will be more sensitive to challenges to it from others. Hence, the variables mentioned above are background factors which, all things equal, strengthen the foreground triggers of violence. There might thus occur a situation of compounding humiliation: The more you are humiliated in your daily life – i.e. the less you experience recognition through family, school, work etc. – the more easily you will perceive offensive treatment from others as humiliating, all things equal.⁵⁹⁵

⁵⁹⁴ For a study on the difference between how women and men define themselves, see Carol Gilligan, *In a Different Voice* (Cambridge, MA: Harvard UP, 1982), 163: “Instead of attachment, individual achievement rivets the male imagination, and great ideas or distinctive activity defines the standard of self-assessment and success.” This might help explain the gender difference in the tendency to commit crime: Since men to a lesser extent define themselves in their relational roles, they will to a larger extent be tempted to seek recognition by “being someone important” through crime.

⁵⁹⁵ Of course, there is no strict rule to this. As I have already discussed, some people are ‘below resentment’, having experienced so much humiliation as to internalize it, thus failing to perceive new instances of humiliation as just that.

Katz similarly noted cases of violence that occurred due to “convergent disrespect in a person’s occupational and intimate life”.⁵⁹⁶ After being humiliated at work, a person finds the additional humiliation at home unbearable. Indeed, a typical homicide, Katz found, takes place not at work, “in those infuriating moments when people are humiliated by their bosses or realize that their careers may have been irreparably damaged by the backstabbing of co-workers”⁵⁹⁷, but rather in casual settings at home or at the neighborhood bar, and most often on weekends. As Katz indicates,

[I]f experience at work becomes intolerably degrading, the worker can fantasize about respect and sensual pleasure at home. If tensions at home become intolerable, he can escape to the neighborhood bar. But at some point on this route, there may be no further escape.⁵⁹⁸

What about those instances where violence is not preceded by insults or other forms of direct humiliation? In cases where violence functions as a way of displacing repressed feelings of insecurity and weakness onto the victim, a lack of recognition in other areas of life will surely contribute to those feelings of insecurity which trigger the violence. Further, boys, more so than girls, are influenced by a cultural ideal whereby a display of vulnerable feelings like grief, fear and shame is seen as a sign of weakness. Such an ideal of manliness disproportionately leads boys and men into what Thomas Scheff calls “the silence/violence pattern”: “At first merely to protect themselves, boys begin suppressing feelings that may be interpreted as signs of weakness [...] In situations where these options seem unavailable, males may cover their vulnerable feelings behind a display of hostility.”⁵⁹⁹ We see, then, that the recognition perspective on violence can accommodate what is likely the most important background factor of violence: being male, as is shown in the fact that the vast majority of violence is committed by men. Finally, the same mechanism of repression of vulnerable feelings can also explain why victims of childhood abuse and neglect (and more generally those who have high ACE scores, i.e. have had multiple and severe Adverse Childhood Experiences) are overrepresented among violent offenders. A common way of coping with childhood trauma is to repress the extremely painful feelings

⁵⁹⁶ Katz, *Seductions of Crime*, 45.

⁵⁹⁷ *Ibid.*, 21.

⁵⁹⁸ *Ibid.*, 46.

⁵⁹⁹ Thomas Scheff, "Aggression, Hypermasculine Emotions and Relations: The Silence/Violence Pattern", *Irish Journal of Sociology* 15, no. 1 (2006), 24. For a discussion on repression of vulnerable feelings and its connection with the cultural ideal of manliness, see Vetlesen, *Studier i ondskap*, especially 89-93.

it produces, which in turn can explain the disproportionate attraction a person with such repressed wounds might find in controlling and ‘exterminating’ the re-appearance of these feelings in another, even ‘re-enacting’ the trauma (e.g. sexual abuse) with himself in the dominating position.

Though these background variables can thus be seen to correlate both with an increased tendency to commit crime and with a relative lack of recognition, they cannot, of course, be used to predict the life-situation of any individual. Within each group, most do not commit crime and most do probably experience (some or sufficient) recognition – e.g. people who are poor, but who feel respected; who have no job, but who know their worth to other people; who have been abused, but who have survived with their sense of self-confidence intact. Conversely, there are many who are rich but feel they are not as good as the next guy; who succeed at school, but feel unpopular; who are esteemed by others, but cannot trust that it is deserved and fear that they will one day be exposed as frauds.⁶⁰⁰ In any case, the data we have reviewed is enough to conclude on a general basis that the recognition theory of criminal motivation provides both a coherent and a relevant theory of what attracts a person to commit crimes. And since the theory predicts that the more of the background variables of crime that pertain to a person, the more statistically likely it is that he is wanting in recognition, and the more applicable, all things equal, will be a theory describing the pursuit of recognition as his motive for crime and other actions. That means that for the question I am mainly concerned with here, the disproportionate difficulty of law-abidance of those with SSD, the recognition perspective is highly relevant in explaining the reasons for the difficulty.

13.3 Conclusion

This chapter has shown that there are material, cultural and psychological factors pertaining to social deprivation which make law-abidance disproportionately difficult. We can identify the sources of this difficulty both statistically and through theories that fit and explain the empirical data. As mentioned at the outset of the chapter, the fact that we can

⁶⁰⁰ Of course, there may be a statistical correlation here too, i.e. those who do share the characteristics of the typical criminal, but who do not commit crime, may tend to experience recognition in their lives. And conversely, those who do not share the characteristics of the typical criminal, but who do commit crime – for example a middle-aged female business owner who commits fraud – may in fact lack recognition, for whatever reason. The presented data cannot answer whether or not this tendency exists.

substantiate the link between SSD and criminal behavior is a necessary condition for taking SSD as an excusing condition. I have not, however, sought to determine when the difficulty of law-abidance due to SSD is sufficiently serious that it ought to excuse an offender. Clearly, most people who fit the characteristics of SSD retain their capacity for moral and legal responsibility. We cannot exclude, however, that in extreme cases, the deprived circumstances facing an offender are so severe that her capacity for choice is effectively negated. If, for instance, a person has been so damaged by abuse at an early stage that she has not developed a normal capacity for agency, then the person is not criminally responsible.

An objection which has been raised against considering SSD a potential excusing condition is that it is over-inclusive. If SSD can be an excusing condition, the argument goes, we would be committed to excusing anybody whose criminal behavior can be traced to social conditions. William C. Heffernan thus asks: "But if RSB [rotten social background] is critical, why is it not possible for the child of abusive, white, racist skinheads or the child of rich, neglectful heroin addicts to invoke the defense?"⁶⁰¹ Michael S. Moore goes further, accusing those who advocate SSD as excusing conditions of having a *liberal bias*, since "often excluded from being considered to be excusing are causes such as excessive wealth [...], too much free time, boredom, lack of parental supervision, reading too much Nietzsche at an early age, etc".⁶⁰² Moore mentions as an example the famous case of Loeb and Leopold, two university students in Chicago in 1924 who after having read too much Nietzsche kidnapped and murdered a 14-year old boy in order to prove their own status as *Übermenschen*.

This objection does not provide difficult to answer for a proponent of SSD as a potential excusing condition. One might simply concede that if the mentioned social conditions did influence the offender to a degree that effectively negates the offender's capacity for choice, these conditions too are grounds for excuse. If, let's say, Loeb and Leopold had not merely read too much Nietzsche (and obviously misunderstood Nietzsche), but had rather been hypnotized by an evil philosophy professor into thinking that they were

⁶⁰¹ Heffernan, "Social Justice/Criminal Justice", 68.

⁶⁰² Michael S. Moore, "The Quest for a Responsible Responsibility Test: Norwegian Insanity Law After Breivik", *Criminal Law and Philosophy* 9, no. 4 (2015), 668.

Übermenschen whose mission it was to commit the crime in question, then they too ought to be excused.

The point is that not only the deprived can raise an excuse defense based on social conditions. All social conditions can hypothetically exert an influence over the will of an agent to the degree of negating her capacity for responsibility.⁶⁰³ The question is whether the claims of such an influence are plausible or not. It is hard to see how boredom or being rich could take such a toll on somebody so as to render them without moral agency. It is more plausible, to put it carefully, that social deprivation could have this effect, especially in extreme cases. The mechanisms described in this chapter go some way toward substantiating this claim.

⁶⁰³ Notice that my claim does not entail taking a stand on controversial issues about free will and responsibility. Somebody like Moore, who is a free-will compatibilist, will just as easily as a free-will libertarian accept the notion that external influences can become so strong as to negate the freedom of the agent (whatever conception of freedom one holds). What Moore would deny is that it is sufficient for excuse that SSD *causes* one to commit crime, for he would hold that there are always sufficient causes behind any crime.

14. Diminished need for punishment

I will in this chapter consider whether it is just to mitigate the punishment of severely socially deprived persons, punishing them less than non-socially deprived persons for comparable offenses.⁶⁰⁴ H. L. A. Hart explained in the following way the circumstances under which mitigation of punishment is appropriate:

The special features of mitigation are that a good reason for administering a less severe penalty is made out if the situation or mental state of the convicted criminal is such that he was exposed to an unusual or specially great temptation, or his ability to control his actions is thought to have been impaired or weakened otherwise than by his own action, so that conformity to the law which he has broken was a matter of special difficulty for him as compared with normal persons normally placed.⁶⁰⁵

Mitigation is here a matter of comparative difficulty, and not, as with excuse, a matter of falling below a certain standard for responsibility. The previous chapter did, indeed, give us reason to believe that SSD involves a *special difficulty* in conforming to law, *compared with normal persons normally placed*. The pertinent question, then, is *why* a comparative difficulty of law-abidance should mitigate one's punishment. It seems intuitively obvious that provocation, for instance, should count as a mitigating factor.⁶⁰⁶ But merely establishing that there is a difference between an offender who has been provoked and a normal person normally placed does not by itself provide a reason why it might be just to lower the sentence of the former. To provide such a reason, we have to consider the purpose of punishment. As I have remarked more generally above, a just distribution (of anything) must be determined in relation to the purpose of the practice to which the distribution applies. Mitigation is a matter of the distribution of punishment. The just purpose of punishment, we have seen, is remedying the injustice of the crime. Combining this general claim with Hart's statement about the features of mitigation gives us the following formula for the justice of mitigation:

⁶⁰⁴ I will not discuss the practical implementation of the normative claims that are made in this chapter. We might envision that mitigation should be left to the discretion of the sentencing judge, or we might also incorporate in statutes or sentencing guidelines measures that ensure lower punishment for people with SSD. The point here is to consider the grounds for implementing such measures or allowing the judge such discretion.

⁶⁰⁵ Hart, "Prolegomenon to the Principles of Punishment", 15.

⁶⁰⁶ Cf. commonly used phrases such as "He was asking for it" and "He pushed my buttons", which express a moral difference between such cases and others.

Mitigation is just when, in a particular case, less punishment than normal is needed in order to remedy the injustice of the crime.

Specifically, with regard to SSD as a mitigating factor, the claim is that when the offender is severely socially deprived, less punishment than normal is needed in order to remedy the injustice of the situation. Since the question of mitigation must be determined in relation to the just function one ascribes to punishment, there will be different mitigating factors (or different reasons for the mitigating factors) depending on the theory one applies. I will limit the following discussion to the Kantian-Hegelian purpose of re-establishing mutual freedom.

14.1 Equal treatment versus treatment as equals

Before looking closer at the grounds for considering SSD a mitigating factor upon a Kantian-Hegelian theory of punishment, I will discuss an objection that is potentially relevant regardless of which theory of retributive justice one applies: If a person, for whatever reason, is deemed worthy of less punishment than normal, does that not imply a denial of her status as equal before the law? Being a legal subject means being treated as equal to other legal subjects. If I get one year in prison for stealing a car, while my friend who was my accomplice gets only six months, we would not say that *like cases are treated alike*. Mitigating his sentence would thus be *unfair* to me.

This rests on a dubious premise, however, namely, that equality before the law requires equal treatment. As Ronald Dworkin showed in *Taking Rights Seriously*, we must distinguish between two forms of equality: *equal treatment* and *treatment as equals*.⁶⁰⁷ The former is not always necessary for the latter. And only the latter is necessary for fairness (in fact, it *is* fairness). For Dworkin, as for Rawls, fairness means impartiality, in other words, that equal concern is afforded everyone. Put negatively: Nobody counts for more than anybody else when a fair practice is determined.⁶⁰⁸ The function of the ‘veil of ignorance’ in Rawls is precisely to ensure impartiality, because nobody could conceivably

⁶⁰⁷ Ronald Dworkin, *Taking Rights Seriously* (London: Bloomsbury, 1997), 273.

⁶⁰⁸ Dworkin refers to the phrase that Mill attributed to Bentham, “everybody to count for one, nobody to count for more than one”, which shows that the principle of equal consideration of interests is fundamental to utilitarianism. However, Dworkin goes on to show that preference-utilitarianism does not entail respect for this principle, and is as such not compatible with fairness. *Ibid.*, 281-286.

prioritize themselves or others if they knew not where they were placed. The principles determined in a fair deliberation, i.e. when each person is treated as equal, do not, however, entail equal treatment.

An example: A student admission policy based on academic skills will not treat all applicants equally. Only some will be offered admission. Some will be disadvantaged by the policy compared to others (as will be the case with all policies). But this is not sufficient to say that the interests of those who lose out will not have been given equal concern. As Dworkin explains, a policy is fair when the loss to those who are disadvantaged by the policy has been *outweighed* by the gain of the community as a whole, *and*, in addition, everybody's interests are accorded an equal weight when determining the interests of the community.⁶⁰⁹ The notion of 'gain for the community as a whole' can be given both a utilitarian and an ideal (justice) interpretation, though Dworkin shows that a common version of the former will not in principle be fair.⁶¹⁰ In any case, with this understanding of fairness, many policies cannot plausibly be said to be fair. For instance, a policy which excludes the admission of black students cannot be said to show concern for the interests of those who are disadvantaged by the policy, since upon any plausible conception of how such a policy might benefit the community as a whole, blacks will not have been shown equal concern in the determination of the interests of the community.⁶¹¹ The policy based on academic skills does pass the test, however, because it is highly plausible that this policy will benefit the community as a whole when equal concern is afforded everyone in determining the gain for the community.⁶¹²

Hence, treatment as equals, and not equal treatment, is necessary for a practice to be fair. Fairness, in turn, is a necessary feature of any legitimate exercise of political power. "No government is legitimate that does not show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance", Dworkin states.⁶¹³ In

⁶⁰⁹ Ibid., 274.

⁶¹⁰ See note 608.

⁶¹¹ See Dworkin's discussion of the admission policy of the University of Texas Law School prior to 1945, when the Supreme Court ruled that allowing only whites to attend violated the Fourteenth Amendment of the U.S. Constitution, *ibid.*, 269-88.

⁶¹² We would reach the same conclusion by Rawls' test: The policy could have been chosen behind a veil of ignorance, since admission would in principle be open to all and the scheme would benefit the least well-off.

⁶¹³ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard UP,

Rawls' formulation, "political power is legitimate only when it is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in light of common human reason. This is the liberal principle of legitimacy".⁶¹⁴ The very same principle could have been formulated by Kant, who, we recall, poses as a test for legitimate law that a people, while respecting the innate right to freedom, "could impose such a law upon itself"⁶¹⁵. Using Kantian-Hegelian terminology, we can say that recognition as legal subjects always requires *formal*, "abstract" equality, i.e. mutual respect for freedom. However, as we saw in Chapter 9, a certain level of *material* equality is required in order to attain (formally) equal access to freedom. We saw, for instance, that without assistance to the poor, material conditions would render the poor at the mercy of those with property in order to survive, and hence unfree and unequal. And even when the bare minimum for survival is achieved, there can still be so much material inequality in a society that the formal equality of everybody cannot be assured, as, for instance, when economic wealth can be transformed into political power. On a Kantian (republican) theory of mutual freedom, then, it will sometimes be necessary to treat members *materially unequally* (for instance by taxing some and redistributing to others) in order to assure their formal equality.⁶¹⁶

However, the reverse necessarily holds as well: If material conditions are *not unequal* with respect to some issue, there will not be a need to counteract material inequality in order to assure formal equality. Treatment as equals may *sometimes* require equal treatment. The question is *when*. Dworkin mentions as examples of practices and laws that require equal treatment those which protect interests that are "so vital" that everyone has them equally, such as elementary education.⁶¹⁷ Presumably, we could elaborate on the concept of 'vital needs' and thereby develop an understanding of which interests are so basic that all should

2000) 1.

⁶¹⁴ John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Belknap Press, 2001), 41.

⁶¹⁵ Kant, *An Answer to the Question: What is Enlightenment?*, 8:39.

⁶¹⁶ We see here once again that fairness and equality are fundamental to Kant's legal philosophy in general, and thereby more specifically to his theory of just punishment. Michael Tonry has recently argued for the importance of some of the issues of inequality between offenders that I raise in this chapter, but argues that standard retributive theories "cannot adequately address" these issues, "but that a normative framework incorporating fundamental principles of fairness, equality, proportionality, and parsimony could". Tonry argues that these values must be added to "monist" theories, such as Kantian retributivism to solve some of the problems he identifies. As I argue here, however, these values are already part of Kantian retributivism when Kant's penal theory is viewed in relation to his broader legal and political theory, as it ought. Tonry, "Fairness, Equality, Proportionality, and Parsimony", 17.

⁶¹⁷ Dworkin, *Taking Rights Seriously*, 274.

have the right to equal treatment with regard to them. We all share a basic need for clean water, for instance. Since we are materially equal in this regard, the state ought to distribute water purification systems equally. However, it is difficult to see that this method of identifying vital interests could provide us with sufficient conceptual tools to determine hard cases such as the proper distribution of punishment. Is punishment an ‘interest’ sufficiently vital to require equal treatment in order to be treated as equals?

I suggest that a better way to settle the question of when equal treatment is required for treatment as equals, is to apply the negative method I have proposed throughout the thesis. We can then simply ask whether there are any circumstances which could plausibly entail the *injustice* of equal treatment, and if there are no such circumstances, equal treatment is implied by treatment as equals. In other words: Equal treatment is the default distribution. This follows from the concept of justice as remedying injustice. For with this concept, there must be present an injustice which is remedied in order for justice to happen. In other words, an *unequal distribution* of anything can be said to be just only if it remedies an injustice. Hence, only if there would be more injustice if the distribution were equal, can an unequal distribution be said to be just. By implication, an unequal distribution which does not remedy an injustice would *unjustly* prioritize some people over others, thereby treating them not as equals but as ‘unequals’.

Let us take government-paid parental leave as an example. There may be several purposes to this practice, but one plausible purpose is to compensate those who are prevented from working because they have taken on the burden of providing fulltime care for a baby. The long-term survival of any society requires the steady influx of new members. Those who provide babies are thus providing a social benefit. We might therefore think that this obligates the society receiving the benefit to compensate those who bear the immediate personal costs of producing the social benefit. With this framing, an unequal distribution of parental leave between the mother and father of the baby may be considered just, because the mother bears a larger burden in producing the baby, which effectively prevents her from working in the weeks prior to and after giving birth. If an entirely different distribution were introduced, whereby the government were to pay for additional weeks of parental leave for fathers who are, say, over 30 years old but not for those under 30, this unequal treatment could not plausibly be said to be just. There is no reason to think that

fathers over 30 take on a larger burden which they ought to be compensated for with extra weeks of parental leave.

Again, this is only one plausible framing of the issue of parental leave, but the point is that given this framing, some forms of unequal treatment will be just, while others will be unjust. If we took the just purpose of parental leave to be something else, we would find that other distributions were just or unjust accordingly. Suppose, for instance, that we see parental leave as equivalent to the pensions of senior citizens, in other words, basically one's own money that has been saved up and returned when one is not able to work. With this framing, there would not be reason to distribute parental leave unequally between mothers and fathers; the just distribution would simply depend on what each person has saved respectively.

Let us now turn to the issue at hand here, the distribution of punishment, and ask: *Can an unequal distribution of punishment be more just than an equal distribution because an offender is severely socially deprived?* The answer will depend, as we just saw, on what we take to be the purpose of punishment. I will, as mentioned, limit the discussion to the purpose of re-establishing mutual respect for freedom.

14.2 Diminished need for punishment with severely socially deprived offenders

Within a Kantian-Hegelian framework for criminal law, the purpose of punishment is to negate the infringement upon freedom constituted by crime, and thereby to assert the supremacy of law in accordance with mutual freedom. We have seen that there are several aspects of this function. For Kant, punishment primarily addresses the formal wrong against law. With Hegel, we saw a clearer intersubjective conception of the formal wrong of crime: Crime is a negation of the victim's status as a legal subject. A negation of this negation requires a re-establishment of recognition of both victim and offender. In addition to the *formal wrong* of crime, many victims suffer *material wrongs*. On a Kantian-Hegelian theory, it is primarily the function of compensation to remedy material wrong. However, as has been made clear, material conditions do affect one's capacity for formal right. To the extent that a material wrong precludes a person's access to freedom, remedying that material aspect must be considered part of what it takes to negate the

negation of freedom. Examples of such material aspects of infringements of freedom are physical injury and psychological damage that, for instance, prevent a victim from holding a job or going out in public.

These functions of punishment can be said to remedy different aspects of what is wrong in crime, when understood as infringement of freedom. They address, in other words, different needs which arise with regard to securing freedom. These needs correspond largely to the three needs that Phillip Pettit and John Braithwaite identify as arising from crime upon their republican theory, which, like the Kantian-Hegelian framework, sees crime as an infringement of freedom as non-domination. These are the “Three R’s”, as they say: the need for *Reassurance*, the need for *Recognition*, and the need for *Recompense*.⁶¹⁸ Reassurance corresponds loosely to the Kantian demand for re-establishing the supremacy of law. Crimes do not simply affect the parties directly involved. They tend also to cause feelings of uncertainty, fear, indignation, distrust etc. in the population at large. In short, they undermine people’s faith in the reality of mutual freedom, thereby effectively limiting people’s freedom. An example: If I read in the newspaper about multiple muggings in my neighborhood park, I will likely prefer to take a detour around it when I am out walking after dark. My freedom to roam about will thus be restricted *in reality*, though of course I am free to go where I want in principle. Apprehending and prosecuting those who commit the muggings will address my need for reassurance of my freedom to walk in the park.

Recognition corresponds to the need emphasized by Hegel for a clear and public acknowledgment of the wrongdoing that has been done against the victim(s). The message entailed by the crime – the denial of the victim’s capacity for possessing rights – must be denounced as untrue by the polity. The rights of the victim(s) are thereby vindicated, as, of course, are the equivalent rights of everybody else, including the offender(s).

Recompense corresponds to the need to address the material wrong of crime. When possible, recompense can take the form of restitution. When full restitution is impossible,

⁶¹⁸ Philip Pettit and John Braithwaite, "Not Just Deserts, Even in Sentencing", *Current Issues in Criminal Justice* 4 (1992). Philip Pettit and John Braithwaite, "Three Rs of Republican Sentencing", *Current Issues in Criminal Justice* 5 (1993). For a critique of their sentencing policy, see Andrew Ashworth and Andrew von Hirsch, "Desert and the Three Rs", *ibid*.

it may still be possible to compensate the victim in some measure. Finally, Pettit notes, when compensation is impossible or clearly inadequate, as in homicide, a form of reparation to those who have suffered from the crime is appropriate, thereby “sharing in the loss”.⁶¹⁹

Having thus distinguished between three aspects of what it takes to remedy a negation of mutual freedom, we can turn to the question of mitigation. Applying the definition of just mitigation from above, we can ask: *Is less punishment than normal needed in order to remedy these three aspects of the wrong in crime when the offender is severely socially deprived?*

To answer this question, we must start by recalling that the material aspect of *punishment* (i.e. the pain or disutility of punishment) stands in a contingent relationship to the symbolic or *formal* function it serves as a manifestation of mutual freedom. The material aspect of punishment is the medium through which the formal function is achieved. As mentioned in Chapter 9, Kant and Hegel believed it a necessary medium – they were in other words retributivists, a position I do not adopt – but they too would agree that the *amount* of the material disutility of punishment is not directly given by the formal function it is meant to serve. Recall Hegel’s claim that “a penal code belongs to its time and to the condition in which the civic community at that times is”.⁶²⁰ He explicitly declares that in some historical situations there will be less need to punish severely than in others, for reasons I will elaborate below. This suggests, indeed, that he would agree that the material and the formal function are not coextensive.

If we look at other types of action where a material medium serves a symbolic function, the intuitive appeal of the separation I advocate will show itself. I mentioned earlier the example of giving gifts. When we send flowers to the family of someone who has passed away, the flowers are the medium through which we communicate our compassion. When I give my neighbor a box of chocolates after he has done me a favor, I provide him with a material benefit (the pleasure of eating chocolate), but the chocolate also serves a symbolic function: It expresses my gratitude. Clearly, the material aspect and the formal or symbolic

⁶¹⁹ Philip Pettit, “Indigence and Sentencing in Republican Theory”, in *From Social Justice to Criminal Justice*, ed. William C. Heffernan and John Kleinig (New York: Oxford UP, 2000), 238.

⁶²⁰ Hegel, *Philosophy of Right*, § 218 Note.

aspect of actions are somewhat connected. Sending flowers is a conventional way of expressing compassion, hence, there is normally a link between *this* medium and *this* message. However, the material and the symbolic are also somewhat independent of each other. It is not the case, for instance, that a dozen flowers convey twice as much compassion as a half a dozen flowers, or that an expensive gift necessarily conveys stronger love than, say, a homemade scarf. In other words, the same message can potentially be conveyed by a *smaller amount* of the same medium, or even by a *different medium* entirely.⁶²¹

A further reason for the contingency of the material and the formal function, is the fact that the same *objective* amount and type of punishment will be experienced *subjectively* differently by different people. Punishments have, in other words, a *differential impact* on people. As Michael Tonry puts it:

Imprisonment may mean very different things to a young gang leader, an employed middle-aged parent, and someone who is seriously ill. To ignore such things in relation to comparably culpable people, however culpability is measured, is to accept huge differences in the pains imposed upon them.⁶²²

For instance, research has shown that being incarcerated has greater impact on a person with a disability.⁶²³ Penalties are also considered to be more onerous for young offenders, a fact that is reflected in the rules for juvenile justice adopted by the United Nations.⁶²⁴ The same applies, for instance, to mentally ill offenders. Offenders with children may also experience punishment as tougher compared to those who do not have any dependents. And if we take into account the experiences of the children and other third-parties as well, punishment may indeed have considerably differential impact in otherwise similar cases.

⁶²¹ I shall in the next chapter on restorative justice discuss whether the formal of function of punishment – instantiating respect for and realizing mutual freedom – can be achieved by an entirely different medium: conferencing with involved parties and following up on their agreements. I will here concentrate on the question of whether the *amount* of punishment can differ while still achieving the formal function of punishment.

⁶²² Tonry, "Fairness, Equality, Proportionality, and Parsimony", 8.

⁶²³ Andrew von Hirsch, Andrew Ashworth, and Julian Roberts, "Doing Justice to Difference: Diversity and Sentencing", in *Principled Sentencing: Readings on Theory and Policy*, ed. Andrew von Hirsch, Andrew Ashworth, and Julian Roberts (Oxford: Hart Publishing, 2009), 343. The authors refer to *Price v United Kingdom* (2001) 34 EHRR 1285, which found that imprisoning a severely disabled person constituted a violation of his human rights.

⁶²⁴ United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"). Adopted by General Assembly resolution 40/33 of 29 November 1985. Principle 17.1 b) states that restrictions on the personal liberty of the juvenile shall be "limited to the possible minimum", and 17.1 d) states that "the well-being of the juvenile shall be the guiding factor in the consideration of her or his case."

If the purpose of punishment is to balance or outweigh the material gain of crime, the issue of differential impact will have to be taken into account in sentencing. The matter is not as clear, however, when we consider punishment to serve a communicative purpose. Compare again with giving gifts. If two of your neighbors have helped you paint your garage and you want to give them each, say, a bottle of wine to thank them, should you give one neighbor a bigger bottle because he has a wife to share it with? Doing so would equalize the otherwise differential impact of the gift, but if their contributions have been equal, it might 'send the wrong message' if they are not thanked with equal gifts. Similarly, if two professors receive an honorary award for their achievements, should the one who has children to feed get a bigger check? And should the other get a bigger bouquet of flowers because he has such a gloomy outlook on life that it will take more to cheer him up?

The examples are absurd, of course, but precisely for that reason do they reveal that differential impact is not necessarily relevant when the aim of the action is to make a statement. The material aspect (and so the material impact) is relevant only to the extent that it serves as a medium for the message one is trying to convey. In a setting where one is trying to thank somebody or confer an honor upon her, one is not trying to help her feed her children or trying to cheer her up. The impact with regard to the latter is irrelevant to one's purpose in this setting.

The same potential irrelevance of one (material) aspect of the action can be seen in the reverse case, when unequal treatment serves to avoid differential impact. Assume that you want to give a \$ 1,000 piece of art to each of your two children. One lives close by, and you can hand it over yourself. The other lives overseas and the shipping expenses amount to \$ 300. In this case, you will spend 30 % more on one of your children, yet this unequal treatment will hardly matter, since the shipping expenses are not directly relevant to the purpose of giving these gifts to your children. On the contrary, it would likely seem strange to give a less valuable piece of art to the one who lives overseas in order to ensure that an equal amount of money was spent on the two. The reason is that the amount of money spent is inessential to the purpose of the action.

Turning again to the setting wherein punishment is administered in order to realize mutual freedom, the differential impact of punishment will then be relevant only to the extent that

it bears on this function. As with the examples of gifts and other transactions, it is not the differential impact *per se* that matters, but the impact of the amount of punishment – that is, the material aspect of punishment – on the achievement of *reassurance*, *recognition* and *recompense*.

14.2.1 Recompense

I will start with the function of recompense since there is least to say about it in the context of mitigation. As noted above, material wrong is relevant in this context when it impacts upon the wronged person's access to mutual freedom. The victim's need for recompense is independent of the personal circumstances of the offender (e.g. her SSD), though the latter will determine the offender's ability to deliver recompense if sentenced to do so. From the perspective of mutual freedom, this suggests that when the offender is poor, recompense ought to be paid for by the state, and then recuperated from the offender to the extent possible.⁶²⁵ This follows, at least in severe cases, from the fact that the victim would otherwise be denied access to mutual freedom, since poor offenders do not have the ability to pay. In addition, saddling poor offenders with millions in debt would in effect deny them the chance to ever regain their status as free and equal, and is therefore unacceptable.

Further, the victim's need for recompense will presumably also be independent of circumstances pertaining to the criminal's motivation for the offense. The material wrong is independent of whether, for instance, it was done out of a sadistic motivation or out of need. Neither the personal circumstances of the offender nor the subjective aspect of the offense influences the material wrong and so the need for recompense.⁶²⁶ I conclude, therefore, that *this* aspect of restoring mutual freedom (recompense) does not offer an

⁶²⁵ Such a system exists in Norway, the so-called "Voldsoffererstatning", or "crime victim compensation"-institution where victims can apply for recompense from the state, which may then claim regress from the offender.

⁶²⁶ The only possible counterexample I can think of is when the crime has caused damage in the form of a crippling fear or other psychological injury related to how the victim understands the offense. If the fear is related to the offender, it will potentially matter to the victim why the act was committed and whether there were special circumstances, such as severe need, which might influence the victim's impression of the offender. If the victim's impression of the offender is that he is an evil man who is out to hurt her, the psychological damage caused by the crime will be greater than if the impression is that the offender committed the act out of need and that she was simply a random victim. However, the remedy for the material wrong in this example may just as well be framed in terms of reassurance as recompense, so it is not necessary to view this as a counterexample to my conclusion.

argument for mitigation due to the offender's SSD (except if damages are reduced due to diminished capacity to pay).⁶²⁷

14.2.2 Reassurance

Reassurance is necessary in order to convince people that their rights are actual in time and place – in other words, that they are not merely in principle, but in reality, free. The need for reassurance is usually felt most acutely by the victim of the crime, who might worry, for instance, that the offender will harm her again. However, the need for reassurance arises also for the community. Hegel describes in the following way this link between individual damage and damage to the community at large:

The fact that, when one member of a community suffers, all others suffer with him, alters the nature of crime, not indeed in its conception but in its *external existence* [emphasis added]. The injury now concerns the general thought and consciousness of the civic community, and not merely the existence of the person directly injured.⁶²⁸

I understand this in the following way: Crime does real damage (i.e. has external existence) by undermining, in the collective consciousness, faith in the reality of (i.e. the external existence of) mutual freedom. Remedying this lack of assurance constitutes the prospective function of punishment, which I discussed in Chapter 9. However, the need for reassurance may vary, both historically and situationally, which means that the amount necessary for achieving the prospective function of punishment may also vary. Hegel noted in this regard an interesting tendency, which might seem counterintuitive at first, namely that the need for punishment decreases as the state's control and power increases (i.e. as it achieves a monopoly of violence). The tendency makes sense, however, when connected to the damage that crime does via the collective consciousness as described above. For if the state is powerful enough to assure the supremacy of law whenever it is broken, the impact of each crime viewed in isolation will diminish. Isolated breaches will not be

⁶²⁷ My conclusion seems to conflict with that of Phillip Pettit, who argues that the need for “a credible form of reparation” may be diminished when the victim is indigent. However, our disagreement is merely a semantic one. The reasons he supplies for a diminished need for reparation pertain to the recognition aspect of reparation, and should therefore, in my opinion be properly dealt with under the heading of recognition. Pettit does not supply an independent argument for the diminished need for recompense, hence he does not say anything that would dispute my conclusion. Pettit, “Indigence and Sentencing in Republican Theory”, 243.

⁶²⁸ Hegel, *Philosophy of Right*, § 218 Note.

enough to undermine people's faith in the power of law enforcement. Hence, Hegel concludes, "the security, felt by society, lessens the external importance of the injury. As a result crime is now often punished more lightly".⁶²⁹

Turning now to specific criminal situations, the very same mechanism that Hegel describes may potentially apply: *The external importance of the injury* – i.e. the affect it has on the security of the society – may vary from one case to another. It follows from this that the community at large may have less need to punish to achieve reassurance in some cases as opposed to others. One important factor in determining whether there is greater or lesser need to punish an offender for this purpose (*in order to achieve reassurance*), is *power*. The greater power to exert one's unilateral will through crime, the greater need society has for assurance against that person's power. Again, we are reminded of Bertolt Brecht's famous question, "What is a picklock to a bank share?" For there is a systematic discrepancy between the power of those who commit crimes *in the streets* and the power of those who commit crimes *in the suites*, to use Braithwaite's phrase.⁶³⁰ The latter have, all things equal, the power to undermine law and cause damage to mutual freedom in ways that far exceed that of a burglar with a picklock. And there are other power structures in society as well, beside the economic structure, which increase the dominion of some groups over others, including to the point where members of one group can do criminal acts with relative impunity compared to others. We saw an example in the Jim Crow laws of the American South, which manifested white power and privilege to the extent that the likes of Hattie Carrol had little assurance against the violence and dominance of the likes of William Zantzinger. Today's "Black Lives Matter" movement points to a similar relative impunity for police officers who shoot and kill black people. And similar kinds of abuse of power is committed to varying degrees by police officers and government officials all over the world. Indeed, those at the very top have the greatest reason to put credence in their own impunity. To give just two examples, no top bankers were prosecuted after the financial crisis of 2008, and no heads of state were criminally

⁶²⁹ Ibid., § 218.

⁶³⁰ Braithwaite, "Poverty, Power, White-Collar Crime and the Paradoxes of Criminological Theory", 42.

investigated for their role in the attack on Iraq in 2003 – probably the two single events that have caused most damage around the world in later years.⁶³¹

Criminal prosecution and conviction in these cases would serve the expressive functions that Feinberg mentioned, “authoritative disavowal”, “vindication of law” and “symbolic non-acquiescence”. The polity would thereby communicate to the offender, and to other people in powerful positions who might be tempted to commit similar offences, that “you are alone in your abuse of power, the rest of us do not acquiesce”. This symbolic function of criminal prosecution is an important but not a sufficient means to assuring compliance with law in general. Put differently, reassurance is *partly* achieved through *recognition*. For with recognition of wrongdoing follows shame, guilt, loss of status and other social repercussions and informal sanctions that tend to have a deterrent effect on potential offenders. Conversely, without recognition of wrongdoing, what ought to be termed abuse of power is considered (justified) privilege, and therefore perpetuated.

In addition to the symbolic function of punishment, the material function of inflicting hardship on offenders is clearly also important for assuring compliance with law. As mentioned in the previous chapter, research on deterrence has shown a so-called ‘absolute deterrent effect’ of the existence of penal sanctions, though the research has not established an increased deterrent effect relative to the amount of punishment. This does not mean, of course, that the amount is unimportant.⁶³² While the deterrent effect of exposure is considerable, especially for types of crime that are *mala in se* (i.e. independently condemned), it is likely that this effect is less significant for *mala prohibita*-offenses and crimes that do not to the same extent elicit shame in those who are exposed. Being caught

⁶³¹ It might of course be that the top bankers and heads of state have not committed any crimes, even though their acts have been disastrous. But that is precisely what a criminal investigation and prosecution would seek to determine.

⁶³² The mentioned symbolic function stems in part from the amount of punishment: severity of punishment *communicates* severity of offense. This, in turn, would suggest an increase in the intensity of the mentioned informal blaming-mechanisms for types of offense where punishment is severe. In other words, the effect of exposure is intensified for crimes that are strongly condemned, and part of the reason why they are strongly condemned is the fact that they carry heavy penalties. Hence, severity of penalties has an indirect deterrent effect after all. Of course, this explanation risks putting the cart before the horse. It is generally much more plausible that people see penalties as appropriately severe because the offenses are considered severe, than that offenses are seen as severe because penalties are severe. That does not mean that there is not a certain dialectic between the two types of severity. Presumably, this is especially plausible for *mala prohibita*-offenses and other types of acts that are not independently condemned to a great extent. An example might be the moral panic that spread from the 1960s onward with regard to drug use.

making moonshine in the basement is presumably much less humiliating than being caught stealing liquor from the neighbor. The worry of what people are going to think if they find out is presumably much less pressing in the first case than in the second. Similarly, in some business circles, those who “cut corners” in meeting government regulation will likely feel less fear of exposure thinking that “everybody else is doing it, so why can’t I?”

In such cases, it seems reasonable to expect that the material disutility of punishment plays a relatively greater role in achieving deterrence, since the symbolic function of recognizing wrongdoing will be less important when the wrongness of the act is disputed or downplayed. This is not simply due to less condemnation by others, however. One’s own moral constraints will likely be weaker too. In short, where there are fewer moral inhibitions against crime (Bentham’s “standing tutelary motives”), the relative importance of other disincentives increases. This suggests that it may be necessary in order to achieve the purpose of reassurance to adjust the size of the material disutility of punishment according to the situation of the offender, so that in each case a credible reason to expect compliance is achieved. As Pettit put it, we require “the sort of penalty that we would expect to be effective in persuading the offender not to commit the same sort of crime again”.⁶³³ This means, in other words, that in cases like this, the differential impact of punishment is relevant in itself, precisely because it is primarily the material impact (and not the symbolic function) of punishment which is meant to achieve its function. A rich person will thus require a larger fine (or other punishment) than a poor person if the fine is to make enough of an impression to dissuade her from reoffending (in cases where other reasons for not reoffending have little force). Traffic violations are good examples. If fines are not adjusted to the wealth of the offender, society will not have credible assurance that rich people will respect the rules. A recent example from Norway showed how the courts take this fact into consideration: A drunk driver was sentenced to 24 days in prison and handed a fine of 108,000 Norwegian kroner (approximately USD \$ 13,000). The high sum followed from the court’s practice of setting the fine to 1.5 times the offender’s monthly salary.⁶³⁴

⁶³³ Pettit, “Indigence and Sentencing in Republican Theory”, 243.

⁶³⁴ “Fikk 108.000 i bot etter fyllekjøring”, article in Bergens Tidende, July 27, 2017.

To sum up, there are two main factors to consider when determining a just distribution of punishment for the specific purpose of reassurance: 1) the relative importance of reassurance in the specific case. 2) the amount of punishment needed in order to provide a credible assurance against (re)offending. Both these factors lead to the conclusion that reassurance may require, all things equal, more punishment than normal for the rich and powerful. The reasons for this are, to sum up, that the crimes of this group are more often such that they affect the lives of many, for instance by causing pollution, by defying safety and health regulations, by putting people's entire savings at risk etc., thereby making it correspondingly more important to prevent their crimes. Many of these crimes also trigger our moral inhibitions to a lesser extent than crimes where the impact is more immediate and visible. This speaks to the need for the material disutility of punishment to provide a realistic disincentive. We can add to this the fact that it takes more to create such a disincentive for those who already have much wealth and power.

The question, then, is whether the reverse also holds, i.e. that the purpose of reassurance requires less than normal punishment of the poor and powerless. The answer is both yes and no. By logical necessity, if we accept the argument that more punishment is needed for the rich and powerful, relatively less punishment is needed for the poor and powerless. I have already established that wealth and power are relevant factors to take into account for the purpose of reassurance, which means, presumably, that less of the two speaks to the need for less punishment. But there is one complicating factor in this otherwise acceptable claim. Power can mean different things in this context. A person who is among the socioeconomically least powerful may nevertheless wield power in his encounters with other people. For instance, a destitute person with little ability to influence society on a large scale may be a serial rapist. He has shown, then, that he is able and willing to use power to commit rape. He is in this sense more powerful than, say, a rich politician who could never bring himself to wield this kind of power of others. The need for reassurance that the rapist will not reoffend is no less simply because he is powerless in a different arena.

Further, if we look more broadly at different types of crime, it may be the case that the objective harm from crimes typically committed by the rich and powerful is greater than the objective harm from crimes typically committed by the poor and powerless.

Nevertheless, the effect that Hegel described on the “consciousness of the civic community” is not correlated with the objective harm of crime. Some types of crime make an impression on third-parties that is widely overblown compared to their relative harmfulness, and *vice versa*. To take an example I mentioned in Chapter 11: Almost four times as many people in the U.S. are killed as a direct result of employer negligence compared to homicides. Yet, the fear and attention devoted to homicides far outreach that of occupational deaths. This fear is relevant to the need for reassurance, however, because such subjective inhibitions limit people’s exercise of their freedom. Death by, say, food poisoning may be much more likely than death by gunshot, yet fear of the latter causes people to take all kinds of precautions, thereby limiting their freedom. To conclude, “the external importance of the injury”, i.e. it’s detrimental effect on mutual freedom, may conceivably be equally great (or greater) for typical street crimes as for typical suite crimes, even though the latter tend to cause greater objective harm. Together with the point that even the socioeconomically powerless can be dangerous to others and therefore have some power in this sense, this suggests that the purpose of reassurance does not generally justify lower punishment for those with SSD, but that sometimes and for some types of crime, this group’s lack of power and money is a mitigating factor.

14.2.3 Recognition

Finally, I will consider the purpose of recognition. It is this retrospective dimension of sanctioning crime that has been most closely associated with Kant and Hegel (and retributivism in general), though, as we have seen, their theories also proscribe a prospective function to re-establishing mutual freedom. Recognition means acknowledging that wrongdoing has been done. By publicly denying the offender’s right to dominate the victim, the polity thereby recognizes the *equal* rights of victim, offender and all citizens. Treatment as equals is thus essential to the very concept of recognition. But does it entail equal treatment?

For conviction, yes. All infringements upon mutual freedom (at least of a certain seriousness) require negation, irrespective of who does them and who suffers them. Holding an offender responsible is a recognition of her inclusion in the moral community of free and equal persons. If an offender with SSD is not held responsible for her crimes,

she is not considered free and equal. Hence, when it comes to the function of conviction, equal treatment is required for treatment as equals.

The question is whether this also holds for the punishment to which one is convicted. Does recognition of the offender's criminal responsibility always require a materially equal sanction? To answer this question, we must consider in more detail how the material function of punishment serves to achieve recognition. On Kant's theory, we saw, punishment of an offender serves the function of "bring[ing] his misdeed back upon himself"⁶³⁵. The rationality of the offender is respected if his deed is turned against himself, thereby interpreting his maxim as a statement that the specific law does not protect *his* equivalent rights, i.e. that 'the same' as he has done can be done to him. This speaks to the need for a roughly proportional punishment, though, as I have argued in Chapter 9, a formal or symbolic proportionality, meaning that the amount of punishment expresses how serious the offense was.

To establish such symbolic proportionality, it is first of all necessary to interpret the offence in order to determine its severity. How did the offence express disrespect for mutual freedom? How serious was the disrespect that the offender showed? Compare two interpretations of the same act: 1) Jim steals from a grocery store because he is greedy. 2) Jim steals from a grocery store because he needs food for his starving children. Upon the first interpretation, the disrespect that Jim shows for the grocery store owner is deeper than upon the second interpretation. In the first version, Jim might be said to place himself above the owner, clearly expressing disdain for the owner's needs and rights by prioritizing his own desires. However, in the second version, although Jim does disregard the owner's needs and rights, he does not express the same contempt for the owner. He does not imply that he is superior to the owner. He simply prioritizes his children's more serious needs over the owner's needs. He might even recognize that he has done wrong by the owner, and regret that the owner became an innocent victim to his unfortunate circumstances.⁶³⁶ On both interpretations, the criminal offense is the same: theft. Yet, the wrongness of the

⁶³⁵ Kant, *The Metaphysics of Morals*, 6:363. See also Hegel, *Philosophy of Right*, § 100.

⁶³⁶ Jim would then be feeling so-called "tragic remorse" where one regrets having had to choose an action that is wrong, but nevertheless *least wrong* under the circumstances, and therefore an action that one does not regret as such. See Stephen De Wijze, "Tragic-Remorse: The Anguish of Dirty Hands", *Ethical Theory and Moral Practice* 7 (2004).

offense, when wrongness is understood as denial of recognition of another's equal freedom, is worse in the first case than in the second.

The same kinds of deliberations apply more generally to the subjective and objective aspects of the wrongness of crime. On the Kantian-Hegelian conception of crime, the severity of the *objective* wrongness of the crime is determined by how seriously it infringes upon mutual freedom – i.e. killing somebody is worst because it completely annihilates the victim's freedom, then the scale continues downward: torture, violence, sexual assault does very serious injury to a person's freedom, theft a little less, buying illegal drugs even less, and so on.⁶³⁷ The severity of the *subjective* wrongness, in turn, is determined by the extent to which the agent shows disrespect for mutual freedom. Infringing upon someone's freedom purposefully entails a deeper disrespect for law than doing so knowingly, which in turn shows more disrespect than when the act is due to recklessness, and even more so than when it is due to negligence. Purposefully denying someone's freedom entails a form of contempt for the other which is absent in a negligent act. In the latter case, the offender may show no ill-will or disrespect against the victim at all; she was perhaps merely distracted for a moment. She did not by her act suggest that she is superior to the other and that she can treat the other as if he were a mere object and not a free and equal person with the capacity for having rights. Her crime is therefore less wrong than an objectively equal crime done purposefully.

Similarly, with recognition as punishment's purpose, we are also provided with a rationale for the standard mitigating factors such as provocation, necessity, minor role in the offense, mental or physical illness, genuine remorse and more. Provocation, for instance, serves to explain why the offender did as he did in the particular circumstances, and why we cannot infer from this particular instance a deeper (and longer term) disrespect for mutual right. The offender cannot as easily be said to have shown an authentic perception of his own

⁶³⁷ Notice that the objective wrongness is not simply harm, but harm related to the exercise of freedom. A similar criterion for gauging the seriousness of a crime is suggested by Andrew von Hirsh: "I suggest, victimizing harms might be ranked in gravity according to how much they typically would reduce a person's standard of living". The concept of 'standard of living' is explicitly used in the sense following Amartya Sen: "the living standard, in Sen's sense, does not focus on actual life quality or goal achievement, but on the means or capabilities for achieving a certain quality of live." In other words, not merely actual harm, but harm to capabilities. Sen's (and von Hirsh') capabilities approach is here, as we also saw in Chapter 13, compatible with a Kantian-Hegelian 'freedom perspective' on criminal law. Andrew von Hirsch, "Seriousness, Severity and the Living Standard", in *Principled Sentencing: Readings on Theory and Policy*, ed. Andrew von Hirsch, Andrew Ashworth, and Julian Roberts (Oxford: Hart Publishing, 2009), 144.

superiority as when the same act is not “brought on” by the heat of the moment. The intuitive appeal of a provocation defense may stem from a common perception that “I too would have reacted like he did if I had been egged on like that, even though I generally respect mutual freedom”. Likewise, if we judge that mental illness is part of the explanation for why the offender committed the act (though not sufficiently to excuse her), we have less reason than under normal circumstances to infer that the offender sincerely and lastingly meant to show contempt of other people’s rights. Similarly, genuine remorse serves to separate the person standing trial from the message of disrespect conveyed by her previous act. It shows that she no longer intends the denial of recognition implied by her act as a truth to be accepted

This notion of separation between actor and act is central to Jeffrie Murphy’s account of when forgiveness is appropriate. Though proposed as part of a theory regarding moral relations between wrongdoer and victim, the notion has relevance to state punishment when recognition is considered one of its purposes. Murphy proposes the following list “represent[ing] ways in which an agent can be divorced from his evil act”:

1. he repented or had a change of heart *or*
2. he meant well (his motives were good) *or*
3. he has suffered enough *or*
4. he has undergone humiliation (perhaps some ritual humiliation, e.g., the apology ritual of “I beg forgiveness”) *or*
5. of old times’ sake (e.g., “He has been a good and loyal friend to me in the past”)⁶³⁸

In all these cases, it is possible to consider the agent as more detached from the disrespect and harm that her act has caused than when these conditions do not apply.⁶³⁹ This makes it easier and also more justified to forswear resentment *of the offender* without thereby condoning her actions, Murphy argues. Applied to criminal sentencing: The more detached from the offense the offender is, the less inclined are we to attribute the message of disrespect entailed by the act to an authentic, deep-rooted conviction on the part of the offender. The more detached, the less we take the denial of recognition to be a proposed

⁶³⁸ Jeffrie G. Murphy, “Forgiveness and Resentment”, in *Forgiveness and Mercy*, ed. Jean Hampton and Jeffrie G. Murphy (Cambridge: Cambridge UP, 1990), 24-25.

⁶³⁹ The only one that is not intuitively understandable, I believe, is number 3, which I discuss in the main text.

truth – a normative statement intended to be left standing – and the less threatening to mutual freedom is the message.

From the perspective of mutual freedom, then, the worst crimes, all things equal, are those where the offender purposefully commits crime and is in a position to continue to make the crime empirically valid, i.e. to effectuate the denial of equal freedom in time and place. The power of the offender is important in this regard, as discussed above. But so is the offender's attachment to the denial of freedom. The more the offender "owns" the crime – i.e. the more it can be ascribed to an autonomous choice to deny freedom – the more we are inclined to take it as a denial of recognition purported to be left standing. By implication, the more the crime can be ascribed to background factors and special circumstances of the situation (e.g. provocation, necessity), the less inclined are we to see the act as implying a sincere statement by the offender about the status of mutual freedom. Put differently, the more readily we accept the notion that "I too would have done the same under those circumstances, even though I generally respect mutual freedom", the more easily we separate the act from the message of disrespect for mutual freedom (this holds even to the point where there is no link at all, and therefore no crime. E.g. "I too would have shot him if he was threatening *my* family").⁶⁴⁰

Knowing why a person reacted the way she did, knowing what triggered her, and knowing why crime seemed an attractive option (as discussed in detail in the previous chapter on criminal motivation) thus enables an alternative message to be attributed to the crime. "To know all is to forgive all", as the saying goes. There is something to this when the alternative message which comes with knowledge undermines the initial message of superiority and disrespect conveyed by the crime. If you come to know, for instance, that a high school student who is terrorizing and dominating her fellow students has a family background of neglect and sexual abuse, you might be inclined to revise your initial understanding of her behavior as expressing her sense of superiority. In this new light, you might rather see her acts as stemming from fear and weakness, and from lack of resources to establish relationships of recognition that we all long for. Seeing her crimes as entailing this alternative message, it becomes clear that less than normal amount of punishment is

⁶⁴⁰ This line of thinking is closely linked to the grounds for lack of moral standing to blame termed "moral fragility" or "subjunctive hypocrisy" that I mentioned in Chapter 13, see Tognazzini and Coates, "Blame".

needed in order to deny her elevated position vis-à-vis others. There is, in short, less need to ‘put her in her place’ by punishing her. The opposite holds, of course, for powerful criminals who purposefully abuse their power: The message their crimes entail increases the need to ‘bring them low’, as Hampton contended.

The point is not simply that we may come to understand why the offender did what he did. SSD is not relevant for mitigation simply because it might provide a causal story of the crime. If so, then mitigation would be required whenever a causal explanation can be supplied.⁶⁴¹ Recall Moore’s examples in the previous chapter. Boredom or lack of parental supervision might provide causal explanations in a given case. But it is hard to see why that would mitigate punishment. Or how about the chairman of the local Ayn Rand Society who is indicted for tax fraud?⁶⁴² His lawyer could make the case that because of Ayn Rand and perhaps a convincing philosophy professor, he holds the belief that tax-paying under current conditions is equivalent to involuntary servitude and that he is therefore justified in his resistance. Clearly this causal explanation does nothing to justify mitigation of his punishment. In this case, as in many others, to know all is *not* to forgive all. As J. L. Austin is supposed to have said: “Understanding might just add contempt to hatred”. Knowing that an offender has committed his crime because his experiences have made him a bad person might just push our indignation one step back: We understand what caused his crime, but we resent him for letting himself become the kind of person who does such a thing. Recall Aristotle’s view that one is responsible for one’s bad character.⁶⁴³

Assuming that a person’s SSD is not sufficient in a given case to negate responsibility, that person, like everyone else, is responsible for how she deals with the circumstances she meets. We might understand why, for instance, circumstances would lead a homeless person to steal an unlocked bicycle. But that does not take away the homeless person’s responsibility for having let the circumstances lead her to do so. Nevertheless, in such circumstances, we might find a relevant difference between her theft of a bicycle and that of, say, a group of bored youths who steal a bicycle to go for a joy ride, or an anarchist who has read too much Proudhon (e.g. “Property is theft!”). The relevant difference is the

⁶⁴¹ Stephen J. Morse dubs this mistaken belief about the normative relevance of causation the “fundamental psycholegal error”, see “Deprivation and Desert”, in *From Social Justice to Criminal Justice*, ed. William C. Heffernan and John Kleinig (New York: Oxford UP, 2000), 130.

⁶⁴² The example is an adaptation of one found in Heffernan, “Social Justice/Criminal Justice”, 56.

⁶⁴³ Aristotle, *Nicomachean Ethics*, 1114a4.

message entailed by these instances of theft. While they all show disrespect for the owner of the bicycle, the relative unimportance of the needs of the bored youths and the conscious denial of the right to property by the anarchist make their messages of disrespect more serious. The youths prioritize themselves above the owner *for no good reason*. The homeless person, too, prioritizes himself above the owner and thereby does him wrong. But we cannot say that his reason is without merit entirely. Having as little as he has, it is understandable (though not justifiable) that he seeks to acquire things that can help him in his bleak situation. Again, we might intuitively recognize that we too might be moved by this motive if, “but for the grace of God”, we were in the same situation. Indeed, we might acknowledge that society is indirectly complicit in the act by allowing this person to live under such unjust circumstances (cf. Chapter 12) – hence, the message of the crime is less that he is *above* the law, and more that he is *below* the law, e.g. that his situation does not qualify as realizing his right to mutual freedom.

SSD is a potential mitigating factor, then, not because it has a particularly strong influence on criminal motivation, but because SSD may have a particular influence on the statement that is entailed by crime. Hampton similarly claims, when discussing the relevance of psychological explanations of crime:

[T]hat explanation is irrelevant to the way in which the action is wrongful; it is the expressive content of the action [...] and not the causal story we tell to explain why it was performed, that accounts for its being wrongful. Although there may be times when that causal story is relevant to our determination of the action’s expressive content.⁶⁴⁴

The last sentence accords with the view I am defending here: The causal story that SSD provides may influence the expressive content of the crime. As the previous chapter showed, this story is one where crime tends to express less a grand self-image and the feeling of entitlement, and more a sense of weakness and humiliation; less a sense of independence and privilege, more the experience of failure and the need for help.

In Hampton’s words, punishment is justified because “we are morally required to respond by trying to remake the world in a way that denies what the wrongdoer’s events have attempted to establish”.⁶⁴⁵ The point I would make, then, is that part of what the severely

⁶⁴⁴ Hampton, "Correcting Harms Versus Righting Wrongs", 1684.

⁶⁴⁵ *Ibid.*, 1686.

socially deprived person tries to establish is not something we are morally required to deny. Part of the message is not the offender's superiority, but rather his inferiority, his social exclusion, his feeling of being 'nobody'. The message is thus not just a denial of mutual respect for freedom (though it is, of course, by definition a denial of mutual freedom), but in part a demand for mutual respect, a demand for access to those goods and those relationships which are necessary for mutual recognition.

SSD thus influences the perceived seriousness of the crime, potentially making us interpret the crime as *a less forceful repudiation* of mutual freedom than the objective aspect of the crime would normally confer. But SSD may also be relevant apart from its influence on the expressive content of crime. The mere fact that a person is severely deprived may influence directly the perceived need to bring him low, even when we do not believe that his act was significantly influenced by his miserable situation (as it was in the example of theft by a homeless person). Consider, for instance, a person who suffers a great loss *after* committing the crime. An example could be a father who drives drunk home from a party and then accidentally runs over and kills his own child as he pulls up to his house. The crime is no less serious than a normal instance of homicide by drunk driving, yet the father has suffered immensely from his own act. This is an instance where we might talk of *the crime carrying the punishment with it*. The criminal has in a sense "paid in advance", in this case by the result of his action, but conceivably also in terms of prior unjust suffering (e.g. growing up in a socially deprived environment).⁶⁴⁶ Punishment of somebody who has already suffered greatly, we might feel, would be like kicking somebody who is already lying down.

The point is not, however, that a material balance between the suffering of the victim and the suffering (or profit) of the offender has already been achieved, as would be relevant on a material theory of punishment (see discussion in Chapter 5). The point is rather that the miserable material state of the offender has an *expressive effect* on the perceived need to re-establish mutual recognition: The offender is not (or not any longer) perceived as someone who elevates himself above the law and above others. "Isn't he already too low as it is?", Hampton asks about an inner-city teenager who is from one of society's lowest social rungs; "Could [he] ever be thought to elevate himself by his action, such that

⁶⁴⁶ Morse, "Deprivation and Desert", 150, attributes the "paid in advance"-theory to Martha Klein.

punishment could be justified to ‘lower’ him?”⁶⁴⁷ Hampton acknowledges that on her theory of retribution punishing this teenager is problematic – “but that is a strength of the theory, because punishing such a person *is* problematic”.⁶⁴⁸ It is problematic for the same reason that Murphy includes “having suffered enough” as the third item on the list of ways in which an offender can become detached from his offense: “suffering tends to bring people low, to reduce them, to humble them. If so, then enough equality may be restored in order to forgive them consistent with self-respect.” Applied to criminal sentencing: ‘Enough’ equality has already been restored in order to ensure recognition of mutual freedom. In other words, the fact that the offender is already ‘low’ due to his SSD means that the symbolic restoration of equality is partially achieved prior to punishment. A normal amount of punishment might degrade the offender, bringing him below the level of equality, creating a new imbalance that is detrimental to mutual recognition. In severe cases, we might talk of *compounding injustice* – social injustice carrying onto criminal injustice (in some of the ways identified in Chapters 11 and 13), in turn leading to more social injustice (e.g. ex-convicts that cannot get work etc.) and so on. There may come a point, then, at which punishment that is objectively proportional to the offense committed will entail suffering (on top of suffering, on top of suffering) that is incompatible with human dignity. In short, the unusual circumstances of the offender may make his punishment “cruel and unusual”, and therefore in conflict with mutual freedom.

This is not to say that punishment should always be lowered for the severely socially deprived, of course. The argument in this chapter has been that SSD ought to be considered a potentially relevant mitigating factor when applying a Kantian-Hegelian framework for criminal law. I have identified how one might argue for a reduction of punishment for people with SSD, but I have not sought to determine how much. Needless to say, a criminal case will often have aggravating factors against which mitigating factors must be balanced. I will have more to say on balancing competing claims of justice in the concluding chapter. What this chapter has made clear, I believe, is that *equal treatment* is not necessary for *treatment as equals* when it comes to sentencing, though it is for the need to hold offenders responsible (conviction). This opens for the possible legitimacy of alternative sanctions, to which I will now turn my attention.

⁶⁴⁷ Hampton, "Correcting Harms Versus Righting Wrongs", 1698.

⁶⁴⁸ *Ibid.*, 1699.

15. The justice of restorative justice

“The restorative justice movement originally began as an effort to rethink the needs which crimes create, as well as the roles implicit in crimes”, Howard Zehr, one of the pioneers of the movement writes.⁶⁴⁹ During the last four or five decades proponents of restorative justice have sought to rethink fundamental aspects of how society sanctions crime. What are the aims of sanctioning crime? What are the needs of the parties? How should we address the deeper causes of crime when sanctioning crime? Inspired by conflict resolution processes of traditional societies around the world, especially North American First Nations and Maori societies of New Zealand, scholars have developed a body of restorative justice theory, and many countries have implemented a range of restorative processes.⁶⁵⁰ Restorative justice has become a collective term for a variety of justice processes such as victim-offender mediation, family group conferencing, community circles, sentencing circles and more. These processes are applied in a variety of ways, sometimes as a replacement for a criminal trial and punishment in a given case, other times as a supplement, for instance as a part of a criminal sentence.⁶⁵¹ As Lord Justice Auld remarks, restorative justice has been described as “more of a philosophy than a specific model”⁶⁵². This philosophy, which I will attempt to reconstruct here, unites otherwise diverse practices by defining the aims of the restorative process and its essential features.⁶⁵³

⁶⁴⁹ Howard Zehr, *The Little Book of Restorative Justice* (New York: Good Books, 2002), 13.

⁶⁵⁰ Rupert Ross, *Returning to the Teachings* (Toronto: Penguin Canada, 1996), is one of many works showing the indigenous roots of restorative justice in North America. Seminal works in the restorative justice literature include Albert Eglash, "Creative Restitution: A Broader Meaning for an Old Term", *Journal of Criminal Law and Criminology* 48, no. 6 (1958). Nils Christie, "Conflicts as Property", *The British Journal of Criminology* 17, no. 1 (1977). Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press, 1990). Braithwaite, *Crime, Shame and Reintegration*.

⁶⁵¹ See Shari Tickell and Kate Akester, *Restorative Justice: The Way Ahead* (London: Justice, 2004) for an overview over restorative practices in different countries anno 2004.

⁶⁵² Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (London: Stationery Office Books, 2001), 387.

⁶⁵³ There is, of course, disagreement among proponents of restorative justice about how to understand its aims and essential features. However, there seems to be considerable agreement at a general level, and for that reason I do not believe my reconstruction will be perceived as controversial. The implementation of the general philosophy of restorative justice is more controversial, for instance, with regard to how far it is reasonable to go in adopting so-called “hybrid” models where restorative elements are incorporated into a retributive process. For an overview of the debates on restorative justice, see especially Howard Zehr and Barb Toews, eds., *Critical Issues in Restorative Justice* (New York: Criminal Justice Press, 2004) and Lode Walgrave, ed. *Restorative Justice and the Law* (Portland: Willian Publishing, 2012).

Are these aims compatible with the aims of sanctioning crime as it is understood within a Kantian-Hegelian framework for criminal law? In other words, can restorative justice processes potentially remedy the wrong of infringing upon another's freedom, so as to re-establish mutual respect for freedom? Or, to use Pettit and Braithwaite's terms, can a restorative process serve the just functions of *recompense*, *recognition* and *reassurance*?⁶⁵⁴

An affirmative answer would undermine Kant and Hegel's retributivism, i.e. their claims that punishment is necessary and sufficient for justice after wrongdoing. If there exists an alternative to punishment that may serve an equivalent just function, punishment cannot be considered necessary for justice. It is conceivable, *contra* Kant and Hegel, that under certain circumstances both retributive and restorative justice are sufficient (and, hence, neither necessary) to achieve the just function of negating the negation of mutual freedom entailed by crime. Identifying the features and aims of restorative justice will allow us to assess this claim and to consider which circumstances must be present for the processes to potentially fulfill the stated function. Note that I will not be discussing the radical claim that restorative justice may completely supplant retributive justice – the relevant question here is whether and to what extent processes seeking to achieve the two can coexist within the same criminal justice system.

To “rethink the needs which crimes create” means to consider how crimes impact both victim(s), offender(s) and third-parties (including the entire community), and to consider how these effects can best be remedied. This is in itself a radical proposal, proponents of restorative justice have claimed, for the criminal trial neglects the needs of the directly involved parties, aiming instead only to uphold the law. In one of the first articles of the restorative justice literature, “Conflicts as Property” from 1977, Nils Christie famously claimed that the legal system “steals” conflicts from the directly involved parties.

The key element in a criminal proceeding is that the proceeding is converted from something between the concrete parties into a conflict between one of the parties and the state. So, in a modern criminal trial, two important things have happened. First, the parties are being *represented*. Secondly, the one

⁶⁵⁴ Pettit, Braithwaite and other proponents of restorative justice such as Lode Welgrave explicitly see it as a means for promoting freedom as non-domination. In keeping with the point I made in Chapter 9 about the difference between Pettit and Braithwaite's republicanism and the ‘freedom perspective’ of Kant and Hegel, the important question with regard to the latter will be whether restorative processes can be seen to *instantiate* respect for mutual freedom, and not merely to promote freedom.

party that is represented by the state, namely the victim, is so thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena.⁶⁵⁵

A fundamental motive behind restorative justice has thus been to reclaim ownership of the conflict by its stakeholders, making them the principle participants of the process, excluding lawyers and experts, and letting the parties determine by consensus the appropriate result of the process. Note, however, that agreement is required to initiate the process. This means in practice that the offender must admit to at least a degree of responsibility for the offense, though not necessarily criminal responsibility.⁶⁵⁶ It is impossible to conduct a properly restorative process if one party denies having anything to do with the case.

Having ownership of one's own conflict is itself an important need (to be discussed further below), but the stakeholders also know best which needs are involved in the case. In other words, they know best where the shoe pinches. As Christie remarks, the issues that are deemed legally relevant in court are often not the issues of most concern to the parties.⁶⁵⁷ In many cases, the crime has caused great psychological distress for the involved, often making the conflict all-consuming in their everyday lives, preventing them from functioning normally. They have, therefore, often a deep need for closure. Perhaps also a need for reconciliation, depending to some extent on the prior relationship between the parties.⁶⁵⁸ But in any case, a need for something that can give them a sense of being able to move on. In the words of Charles Barton:

The fundamental aim and purpose in restorative justice is to bring about closure and healing of the effects of crime, especially the emotional harm,

⁶⁵⁵ Christie, "Conflicts as Property", 3.

⁶⁵⁶ In Norway, for instance, the prosecutor will consider whether a case is suitable for a restorative process, and in doing so she will consider whether the offender is willing to take at least some responsibility for the case. Some countries apply sentencing circles, which naturally take place after a conviction.

⁶⁵⁷ Christie, "Conflicts as Property", 4.

⁶⁵⁸ If, for instance, the victim and offender are complete strangers, the need for reconciliation (especially reconciliation that includes forswearing of resentment, i.e. forgiveness), will usually be less than if they are friends or family or in another kind of relationship which requires them to associate in a well-functioning manner. Two strangers might readily achieve closure by agreeing to never see each other again, without in any more substantial way being reconciled. Restorative justice may nevertheless have achieved, though perhaps to a less than ideal degree. Note here a difference between types of restorative justice though. Diane LeResche and other advocates of an indigenous "healing" approach say it focuses more on relationships than modern restorative justice does. "Peacemaking is more conciliation than mediation. It is relationship-centered, not agreement-centered", quoted in Ross, *Returning to the Teachings*, 68.

disconnectedness and social isolation experienced by those most seriously affected by the wrongdoing.⁶⁵⁹

We should note, however, that not all restorative justice scholars accept this framing of remedying harmful effects of crime; some insist, as I too will shortly, that the aim of the process is to remedy *wrongs*, not merely *harms*, particularly the wrong of denying recognition. Talking of the “needs” of the parties is problematic if among the needs we do not include the fundamental need to remedy wrongs. In any case, this focus on the needs of all the parties means that the process does not narrowly focus on what to do with the offender. “Hence, (restorative) justice is done, not when something negative is done to the offender, but when something positive is done to meet the needs of people harmed by crime”, Gerry Johnstone states.⁶⁶⁰ Restorative justice is therefore not punitive; the suffering of the offender is not a necessary feature of justice, as I will explain in more detail below.

From what I have said so far, then, restorative justice is clearly different from a traditional criminal trial and punishment both in terms of *how* justice is done – i.e. *who* determines the just outcome – and in terms of *what* a just outcome may be. Since the aim in restorative justice is to remedy the needs of the parties involved in each case, and since these needs will vary from case to case, it does not presuppose a universal answer to the question of what justice requires. And since it is the parties themselves that determine what justice requires, there is not an objective answer to what this is. The concept of justice of restorative justice is thus *singular*, as opposed to *universal*, and *intersubjective*, as opposed to *objective*. This concept is thus radically different from a traditional concept by which the justice of a case is deduced from a universal and objective principle.

Can such a concept of justice coexist with a traditional retributive concept of justice within the same criminal justice system? Or will these concepts of justice tend to undermine each other? Will, for instance, the ‘case specific’ nature of restorative processes undermine the rule-of-law principles that form the normative basis of the criminal process, such as the

⁶⁵⁹ Charles K. B. Barton, *Restorative Justice: The Empowerment Model* (Sydney: Hawkins Press, 2003), 35.

⁶⁶⁰ Gerry Johnstone, "How, and in What Terms, Should Restorative Justice Be Conceived?", in *Critical Issues in Restorative Justice*, ed. Howard Zehr and Barb Toews (Monsey, NY: Criminal Justice Press, 2004), 9.

principle of legality, the principle of proportionality and the principle of equality before the law?⁶⁶¹

As mentioned, many countries already have elements of restorative justice in their criminal justice systems, and positive results have inspired a trend to pursue these alternative sanctions further in the future. From a normative perspective, the question is whether we ought to view these examples as representing a pragmatic trend, where countries more or less explicitly make exceptions from criminal justice in order to achieve utilitarian aims, or whether the variety of processes and sanctions can properly be seen as serving the same overall purpose of criminal justice (here, especially the purpose of re-establishing mutual freedom, as specified above). An answer to this question will become more pertinent the more restorative justice is incorporated into the criminal justice system and the more serious the cases are to which it is applied, thus introducing a secondary question, which I will only briefly discuss, of *how far* the integration of the processes within the same criminal justice system ought to go.

Let us first consider how restorative and retributive justice differ in terms of *what* justice requires in response to crime, before returning to the question of *how* justice is done. Unlike retributive justice, restorative justice does not require that the offender suffer an intentionally painful or burdensome sanction.

Of course, restorative justice, too, is usually painful for the offender. Meeting the victim face to face and hearing him describe the harm he has suffered can be psychologically demanding and even considered worse (i.e. more burdensome) than simply doing time without having to face the victim's pain. As Christie notes, many offenders would likely be perfectly willing to give away their "property right to the conflict" in order to avoid the confrontation of the restorative meeting.⁶⁶² Duff, too, notes that an offender who properly understands what he has done, including the character, seriousness and implications of his wrong, will come to repent, "for sincerely to recognize what I did wrong is to recognize it

⁶⁶¹ I discuss this problem in more detail in David C. Vogt, "The Aims of Restorative Justice: Some Philosophical Remarks on the Challenges of Integrating Restorative Justice into the Criminal Justice System. Reconciling the Irreconcilable?", in *Restorative Justice and Criminal Justice*, ed. Linda Gröning and Jørn R.T. Jacobsen (Stockholm: Santérus Academic Press, 2012).

⁶⁶² Christie, "Conflicts as Property", 9.

as something that I should not have done". Repentance, Duff further notes, "is of its nature painful: the repentant wrongdoer cares, or has come to care, for those whom she wronged, for the values she violated; she must therefore be pained by that wrong and that violation".⁶⁶³

Duff and Barton and others have therefore claimed that the difference between restorative and retributive justice is exaggerated; indeed, it is a false dichotomy, they claim.⁶⁶⁴ Because restorative justice aims at making the offender recognize the wrong he has done and voluntarily undertake measures to restore that wrong, and because recognition entails pain for the offender, a successful restorative justice process will necessarily entail pain for the offender, just like retribution will.

There is nevertheless an important difference in the function that pain serves, which can be seen if we apply the distinction between a teleological and a non-teleological theory that Nozick made with regard to the function of "re-linking" the criminal with correct values.⁶⁶⁵ A teleological version of this theory seeks an effect *in* the wrongdoer, while a non-teleological theory like his own, Nozick claims, seeks an effect *on* the wrongdoer. The same distinction, we saw, applies to Duff's theory of penance. Repentance must be voluntary, Duff claims, and a trial cannot therefore force the offender to undertake penance but can attempt to persuade her to do so. We can thus separate between two functions of punishment: inducing repentance and communicating that the offender ought to repent, the latter having value in itself, i.e. non-teleologically.⁶⁶⁶

Applied to restorative processes, we see that pain is necessary only upon a teleological version of these theories, i.e. only to the extent that the communication with the offender is supposed to succeed in inducing her to repent (which is of its nature painful, as Duff explains). Punishment, however, is painful even when it fails to convince the wrongdoer to repent (and of course also when it succeeds). The difference, then, is that pain is the (necessary) medium by which retributive justice is achieved – retribution is per definition

⁶⁶³ R. A. Duff, "Restorative Punishment and Punitive Restoration", in *Restorative Justice and the Law*, ed. Lode Walgrave (Portland: Willan Publishing, 2002), 88.

⁶⁶⁴ *Ibid.*, 92. Barton, *Restorative Justice: The Empowerment Model*, 22.

⁶⁶⁵ Nozick, *Philosophical Explanations*, 375. See my discussion in Chapter 7.

⁶⁶⁶ Duff, "Response to von Hirsch", 424.

just infliction of pain – whereas pain is contingently related to restorative justice. A restorative process can, in other words, serve the just, non-teleological function of holding an offender accountable without being painful for the offender.⁶⁶⁷

In reality, it is often painful, as noted. In addition, restorative *outcomes* are also usually burdensome for the offender, and as Duff and others have stressed, taking on these burdens can serve a restorative function in themselves by expressing that the offender has recognized the seriousness of his wrong, and not merely by remedying harm. But the fact that restorative justice is often painful does not take away from the fact that pain serves a contingent function in restorative justice. Adopting restorative justice in response to crime therefore means denying the retributivist claim that criminals *must* suffer for their crimes.

In order to assess the justice of restorative justice within the context of criminal law I shall now consider whether it can achieve the functions of recompense, reassurance and recognition.

15.1 Recompense

If a crime has caused material conditions that hinder other people's access to mutual freedom, remedying the damage must be considered part of what it takes to negate the negation of freedom. This aspect of sanctioning crime is especially emphasized in restorative justice, and more so than in punitive processes. After all, punishment of the offender does not directly benefit the victim materially. On the other hand, repairing the harm done to the victims is one of the three main pillars of restorative justice, according Zehr.⁶⁶⁸

Many restorative processes result in an agreement that obligates the offender to compensate the victim for losses, either by paying restitution, or by committing to do something to benefit the victim, e.g. to work for the victim. In addition, the restorative

⁶⁶⁷ One might object that when restorative processes are applied in response to crime, they are not entirely voluntary, and there is thus an element of coercion to restorative justice. This does not undermine the distinction between restorative processes and punishment, however. Coercion is merely a contingent aspect of restorative justice, in much the same way that coercion is contingent upon the just function of paying taxes. Coercion is a necessary aspect of punishment, however. It is *in and through* coercion that retributive justice is done.

⁶⁶⁸ Zehr, *The Little Book of Restorative Justice*, 22. The other two pillars are “obligation” (of the offender, and to some extent the community) and “engagement” (of the affected parties).

meeting itself may serve to restore some of the emotional harm that the victim has suffered due to the crime. Victims often experience fear, anger and stress, and spend much energy pondering the causes of their victimization and the likelihood of it being repeated. This emotional harm is itself often an impediment to the victim's freedom, preventing him from functioning normally. Meeting the offender face to face, asking and answering questions, hearing each other's versions of what has happened, may facilitate the redress of such harm. Meta-studies have shown that victims who have participated in a restorative process tend to report greater satisfaction with the process and its results than victims in a control group whose cases have gone through regular court proceedings.⁶⁶⁹ Heather Strang found, for instance, that victims who had participated in restorative conferences reported that

Feelings of anger, fear and anxiety towards their offender fell markedly after their conference [...] The conference usually had a beneficial effect on victims' feelings of dignity, self-respect and self-confidence and led to reduced levels of embarrassment and shame about the offence. Overall, victims most often said their conference had been a helpful experience in allowing them to feel more settled about the offence, to feel forgiving towards their offender and to experience a sense of closure.⁶⁷⁰

Braithwaite sums up research on victim experiences in a recent article, saying that "restorative justice reduces victim fear, post-traumatic stress symptoms, victim anger, vengefulness," and increases "their belief that justice has been done" compared to victims after court proceedings.⁶⁷¹ There are differences in the results on participant satisfaction of different types of restorative processes. Interestingly, somewhat lower satisfaction rates have been found for participants in so-called shuttle mediation processes, where the parties do not meet face to face – a finding that may further underscore the independent importance of the restorative meeting itself.⁶⁷²

⁶⁶⁹ For an overview of research on victim satisfaction, see for instance Mark S. Umbreit et al., "Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls", *Marquette Law Review* 89 (2005). See also John Braithwaite, "Restorative Justice: Assessing Optimistic and Pessimistic Accounts", *Crime and Justice* 25 (1999). As Braithwaite remarks, victim satisfaction is not the same as restoration, but it can serve as a proxy, assuming that victims will be more satisfied, all things equal, when their harms have been recompensed and their wrongs recognized. See John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford UP, 2002), 46.

⁶⁷⁰ Heather Strang, "Victim Participation in a Restorative Justice Process : the Canberra Reintegrative Shaming Experiments" (Australian National University, 2000), iv.

⁶⁷¹ John Braithwaite, "Evidence for Restorative Justice", *The Vermont Bar Journal* (2014), 21.

⁶⁷² Umbreit et al., "Restorative Justice in the Twenty-First Century", 273.

15.2 Reassurance

Reassurance is necessary in order to re-establish trust in the supremacy of law. By apprehending and sanctioning those who challenge mutual freedom, the state enforces mutual freedom and gives people a reason to believe that their equal right to freedom is protected. Such faith is itself a prerequisite for one's freedom. At first glance, it seems that the use of restorative justice may tend to undermine this function of the criminal justice system. For starters, the 'singular' or 'case specific' nature of restorative sanctions weakens legal certainty with regard to which consequences one risks by committing an offense. Since restorative outcomes are not specified ahead of time according to a publicly known rule, like punishments are, they cannot readily function as disincentives to crime. And further, since restorative outcomes are often less severe than punishment for equivalent offenses (or are at least perceived as such from a by-stander perspective), this might also contribute to a weaker deterrent effect compared to punishment. The result might thus be more crime and, hence, less assurance of mutual freedom.

This conclusion is premature, however. First of all, we are not discussing the complete replacement of punishment with restorative justice. Punishments will still be specified in the criminal statute, ensuring legal certainty.⁶⁷³ From a deterrence perspective, the fact that punishments are specified and remain a realistic alternative to restorative processes, not least when the latter fail to achieve agreement, is likely sufficient to ensure that the disincentive toward crime is not weakened.⁶⁷⁴

Further, recall from the discussion of deterrence in Chapter 13 that a significant deterrent effect stems from fear of exposure. If you think it probable that you will be exposed, you will likely refrain from committing the offense, not least because of the social repercussions it will have. The important 'primary control' that friends, family, colleagues and neighbors exert will thus be achieved through fear of exposure, and, hence,

⁶⁷³ From a justice perspective, this ensures the *negative retributive function* of specifying the maximum severity of the sanction beyond which neither punishment nor restorative outcomes may go. I will return to this point in the next section on recognition.

⁶⁷⁴ From a deterrence perspective, the need for punishment increases with the seriousness of crimes, a point I will discuss below.

independently of the 'secondary' or 'formal control' exerted by the state's sanction. The potential downside to restorative justice is thus likely small for the purpose of reassurance.

There is also a potential upside to restorative justice. Empirical studies have shown that there is reason to be optimistic with regard to the *special deterrent effect* that restorative processes yield. Several meta-studies of re-offending have found a statistically significant decline in recidivism for offenders who have completed restorative processes compared to control groups.⁶⁷⁵ Sherman and Strang found in their meta-study that "rigorous tests of RJ in diverse samples have found substantial reductions in repeat offending for both violence and property crime".⁶⁷⁶ The meta-study by Nugent et al. found that "VOM [victim-offender mediation] youth recidivated at a statistically significant 32% lower rate than non-VOM youth".⁶⁷⁷ Single studies of group conferencing have shown recidivism rates declining even more.⁶⁷⁸ Although the size of the decline in recidivism varies in different studies and for different types of crimes and processes, the overall trend shows that restorative justice, when done right, significantly reduces re-offending and thus has a positive effect on the function of reassurance.⁶⁷⁹ There are two theoretical points that may explain why there is such an effect.

The first regards the relation of the offender and the victim. The restorative meeting lets offender(s) and victim(s) meet face to face without representation. The process thus allows for proximity between the parties, avoiding the alienating jargon of the courts and the (sometimes) conflict-escalating tactics of the lawyers. Using their own words, narrating their own experiences of the crime, the parties more easily gain insight into the perspective

⁶⁷⁵ Braithwaite, "Evidence for Restorative Justice", 18. Braithwaite, *Restorative Justice and Responsive Regulation*, Chapter 3.

⁶⁷⁶ Lawrence W. Sherman and Heather Strang, *Restorative Justice: the Evidence* (The Smith Institute, 2007), 8. Their conclusion states: "In general, RJ seems to reduce crime more effectively with more, rather than less, serious crimes. The results [...] suggest RJ works better with crimes involving personal victims than for crimes without them. They also suggest that it works with violent crimes more consistently than with property crimes."

⁶⁷⁷ Referred in Umbreit et al., "Restorative Justice in the Twenty-First Century", 286.

⁶⁷⁸ *Ibid.*, 288. On the opposite end are several studies showing no effect on recidivism, and one from a small study showing an increase in recidivism, Sherman and Strang, *Restorative Justice: the Evidence*, 8.

⁶⁷⁹ One should not be too optimistic with regard to effects on the crime rate, however. As Braithwaite reminds us, perhaps as much as 90 percent of crime is never brought to trial or restorative process. And for those cases that do get a restorative process, one should likely not expect that the process, which takes a few hours, will tend to override other criminogenic factors in the offender's life. Braithwaite, "Restorative Justice: Assessing Optimistic and Pessimistic Accounts", 80. The same might be said of any process, however. The argument applies to a purported crime preventive effect of any sanctioning system.

of the other, allowing for empathy with her point of view. In the words of Paul Robinson, “[s]uch processes provide something that nothing else in the traditional criminal justice can provide. Restorative processes can provide offenders with a better understanding of the real impact of their offenses and can put a human face on their victim”⁶⁸⁰ Barton explains this process as a “reversal of moral disengagement”⁶⁸¹. Offenders typically use a range of psychological mechanisms to disengage themselves from the wrong they have committed, such as rationalizations, lessening personal responsibility (e.g. “I just did what I was told”), denial of the seriousness of the harmful effects on others, and blaming, dehumanizing or otherwise derogating the victim (e.g. “He tried to be a hero”).⁶⁸² Upholding such moral disengagement becomes more difficult when interacting with the victim in a setting which focuses on the offender’s obligations to repair the harm done to the victim (cf. Zehr’s third pillar of restorative justice). A change in the moral engagement of the offender naturally effects the engagement of the victim too. Meetings thus often involve a transformation of attitudes on all sides, for instance by reducing anger, as we saw.⁶⁸³

The second theoretical explanation of the decline in re-offending regards the relationship between the offender and his network. In many cases, family and friends attend the restorative conference, and sometimes also representatives from the offender’s school, social workers and others. The offender is then called to answer for his crime not only to the victim but to people whom he cares about, who are also given the chance to express their concern and their disappointment. Here is a potential for what Braithwaite calls *reintegrative shaming*, a specific way in which primary control is exerted.

⁶⁸⁰ Paul H. Robinson, “Restorative Processes & Doing Justice”, *University of St. Thomas Law Journal* 3, no. 3 (2006), 421. Umbreit et al., “Restorative Justice in the Twenty-First Century”, 285, refer to research showing a sharper decline in recidivism for offenders participating in mediation with the victim compared to shuttle mediation: “As with satisfaction measures reported earlier, face-to-face mediation seems to generate better results both in the short run and in the longer run than the less personal indirect mediation.” This difference suggests that part of the reason for the decline in recidivism is indeed due to the mentioned effects of the personal meeting.

⁶⁸¹ Barton, *Restorative Justice: The Empowerment Model*, 50.

⁶⁸² See also Carol Tavris and Elliot Aronson, *Mistakes Were Made (But Not by Me): Why We Justify Foolish Beliefs, Bad Decisions, and Hurtful Acts* (Boston: Houghton Mifflin Harcourt, 2008).

⁶⁸³ Ingrid Kristine Hasund and Ida Hyde, *Ansikt til ansikt: Konfliktrådsmedling mellom gjerningsperson og offer i voldssaker* (Oslo: Cappelen 2007) provides an analysis of such “dialogical transformation” in restorative justice.

Crime is best controlled when members of the community are the primary controllers through active participation in shaming offenders, and, having shamed them, through concerted participation in ways of reintegrating the offender back into the community of law abiding citizens.⁶⁸⁴

Shaming without reintegration can be destructive, leading to stigmatization and further attraction to criminal subcultures.⁶⁸⁵ When coupled with reintegration, however, shaming by one's community amounts to a positive kind of primary control that is more effective than the secondary control exerted by the state. In Barton's words, "[w]hen important and respected people in the offender's life disapprove of the offender's *behavior* while at the same time show clear signs of respect and acceptance towards the offender as a person, positive impact on the offender is maximal".⁶⁸⁶ The idea is that those who surround the offender have knowledge both about factors in the offender's everyday life that may have contributed to his offence, and about what can be done to address those factors and to support the offender in changing his ways. The community is thus a resource both for communicating norms and for helping the offender to live by the norms. As Braithwaite says,

You need to bring out the perspectives of a plurality of stakeholders for it to work. With an incident of violence at a pub, there may be a girlfriend who can commit to sorting out a relationship problem that was engendering jealousy. There may be drinking mates who can commit to changing drinking practices. There may be a bar manager who can commit to the kind of self-regulatory program Homel found to reduce pub violence in Australia.⁶⁸⁷

We have seen, then, that both the empirical data and the theoretical explanations offered here suggest that restorative justice may be particularly well-suited to reduce re-offending, and in this way contribute to the purpose of creating reassurance of mutual freedom. However, of the many ways in which reassurance can be achieved, not all are consistent with the overall purpose of criminal law: ensuring and instantiating respect for mutual freedom. For instance, rehabilitation of criminals can easily be paternalistic. Might this also be a problem for restorative justice? Put differently: Braithwaite may be right that it is efficacious to involve the girlfriend to sort out jealousy issues, but does this not run the

⁶⁸⁴ Braithwaite, *Crime, Shame and Reintegration*, 8.

⁶⁸⁵ *Ibid.*, 14.

⁶⁸⁶ Barton, *Restorative Justice: The Empowerment Model*, 57.

⁶⁸⁷ John Braithwaite, "A Future Where Punishment is Marginalized: Realistic or Utopian?", *UCLA Law Review* 46 (1998), 1748.

risk of meddling in private matters? I will return to this question as we now turn to recognition.

15.3 Recognition

Right *is* recognition; mutual freedom *is* mutual recognition. This Hegelian insight is particularly well-suited to aid our understanding of the justice of restorative justice. How might it be that justice is achieved when the stakeholders to the injustice say so? How might it be that justice requires an elaborate scheme of recompense and penance in one case, while in a similar case it requires no outcome beyond an apology? With a Hegelian theory of right we may be able to answer these questions.

To some scholars, these questions conflict so fundamentally with the concept of justice that they simply deny the justice of restorative justice. In Paul Robinson's words, restorative justice serves an "anti-justice agenda"⁶⁸⁸. Other scholars criticize certain common approaches to restorative justice, such as Christie's approach, for inadequately framing criminal cases as "conflicts" with "parties" whose needs are unfulfilled, instead of framing them as "wrongs" committed by an "offender" against a "victim".⁶⁸⁹ The latter approach is necessary if we are to justify restorative justice in a criminal law setting. Only if restorative justice can be seen as remedying the relevant *wrong* in crime (as opposed to merely alleviating *harm*) can it be said to serve justice in this context.⁶⁹⁰

Punishment, we have seen, remedies the wrong of negating mutual freedom by instantiating respect for the autonomy of the offender, "bring[ing] his misdeed back upon himself"⁶⁹¹, and thus "express[ing] his own inherent will"⁶⁹². If restorative justice is to be seen as negating the offender's negation of freedom, it too must be seen as instantiating respect for his autonomy. It must be possible, putting it bluntly, to respect the offender's inherent will without incarcerating him against his will.

⁶⁸⁸ Paul H. Robinson, "The Virtues of Restorative Processes, the Vices of 'Restorative Justice'", *Utah Law Review* (2003), 378.

⁶⁸⁹ Duff, "Restorative Punishment and Punitive Restoration", 86.

⁶⁹⁰ Cf. Hampton, "Correcting Harms Versus Righting Wrongs".

⁶⁹¹ Kant, *The Metaphysics of Morals*, 6:636.

⁶⁹² Hegel, *Philosophy of Right*, § 100.

The last sentence exploits the double entendre of the term “will” in the Kantian-Hegelian theory of punishment. Disentangling these meanings may help us understand why both restorative and retributive justice may conceivably respect the inherent will of the offender. Recall from Chapter 9 that Kant distinguishes between the *homo noumenon* of the offender, which “draws up a penal law against myself”, and the *homo phenomenon*, which is subjected to the penal law “as another person”.⁶⁹³ The latter is the empirical self, the actual will of the person, while the former is the pure reason that is imputed to her, in other words, the will that the person would actually have *if she were purely rational*.

If legal force is to be legitimate, it must accord with this latter, purely rational will. A kind of hypothetical consent can thereby be imputed to the person who is coerced. In accordance with the principle of *volenti non fit injuria*, coercion does not then negate her autonomy.⁶⁹⁴ A criminal does not therefore have to actually consent to his punishment. Even though he does not actually will that his negation of mutual freedom be negated, using force against him in order to do so respects his autonomy, because that is what he would consent to *if he were purely rational*. But what if he actually does will that his negation of mutual freedom be negated? His actual will would then be consistent with the rational will, in which case coercion in order to treat him in accordance with his rational will, would be redundant. It is hard to see why incarcerating someone against his actual will in order to respect his rational will would be required if it were possible to respect *both* his actual will *and* his rational will.

Indeed, it would seem that the latter case of respecting both the actual and the rational will entails *greater respect* for autonomy. Put differently: While retributive justice affords actual autonomy to the offender only in the commission of the wrong, viewing him as a free and rational agent responsible for his act, restorative justice affords him actual autonomy in the remedying of his wrong as well. The offender is viewed as a free and rational agent capable of taking responsibility also for making his wrong right again. Victims and other stakeholders are likewise afforded autonomy in determining how to restore the wrong that has been done. Applying restorative justice thus means affording

⁶⁹³ Kant, *The Metaphysics of Morals*, 6:335.

⁶⁹⁴ *Ibid.*, 6:314.

more autonomy to the parties, a fact that speaks to the compatibility of these processes with the criminal law's overall purpose of protecting autonomy.

This is not to say that actual autonomy in the justice process is sufficient to create justice. The *fact* that the stakeholders *feel* that justice has been achieved does not imply the *normative* judgment that justice has been achieved. As Duff says, "we must ask not just what they in fact feel, but what they should feel".⁶⁹⁵ Sometimes parties may agree to arrangements that could not be said to remedy the wrong of negating freedom. Indeed, the agreement itself may sometimes represent yet another instance of abuse of power of the other. Imagine, for instance, that a rapist who is very rich was to compensate his victim so abundantly that she would be satisfied with no further sanction. We might still think that the wrong against her had not been adequately recognized – that the compensation amounts to paying her off – and that she *should not* therefore feel that justice has been done. Similarly, if the offender were to agree to reparations and acts of penance that were clearly disproportionate to the harm he has caused, as some offenders who feel especially bad about themselves are willing to, such an agreement should neither be seen as just.

This is one of the reasons why restorative processes are led by impartial mediators whose job it is to try to cancel any power imbalance that exists between the parties, and who must approve the agreement that is reached (in many jurisdictions court approval is also required). Clearly disproportionate agreements should not be approved as they are inconsistent with mutual respect of freedom. The actual will of the parties is not in such cases consistent with their rational wills. Another way of putting this is to say that respect for the autonomy of the stakeholders only applies to the extent that we trust that they are in fact autonomous. If their actual wills diverge substantially from what we take to be an objectively rational choice, we may doubt that they are actually sufficiently autonomous. The unjust agreement would be a sign that intimidation, extortion, lack of trust, lack of self-confidence, lack of self-respect or other factors have diminished the stakeholders' ability to freely reach a just agreement.

Hence, even though the outcome of a restorative process is inter-subjectively determined, it must conform to an objective standard in order to be just. This objective standard is

⁶⁹⁵ Duff, "Restorative Punishment and Punitive Restoration", 86.

negative, providing a limit on the inter-subjectively determined outcome. A principle of negative retribution thus regulates both restorative processes and criminal trials: The burden that the offender is to take on cannot be such that he could not rationally will it. Sanctions that are disproportionately harsh are inconsistent with his humanity and, hence, do not serve the just function of re-establishing mutual freedom. In this sense, the outcome of a restorative process is not principally different from the outcome of a criminal trial. We defer to the parties like we defer to a judge to determine what justice requires. But we retain in both cases the possibility of criticizing the outcome as unjust if it does not conform to an objective standard of justice.

There is an important difference between the cases, however. In a restorative process, but not in a criminal trial, the fact that those making the decision autonomously perceive it as just has independent bearing on its justice. Put negatively: It does not matter for the justice of a criminal sanction whether the authority administering it believes that it serves justice or whether she simply follows the rules in contradiction with her own normative beliefs. But it does matter for restorative justice that the stakeholders feel that justice has been done. The reason is that part of the purpose of sanctioning crime is precisely to re-establish recognition of mutual freedom *for those persons who have experienced that recognition has been negated*.

Recall that upon Hegel's theory, recognition, in its three forms, is a prerequisite for freedom. Specifically, this means that you must experience respect, love and esteem from others if you are to be free. There is thus an "experiential dimension" to recognition: If you do not feel recognized, you are lacking in recognition, and when you are lacking in recognition, you are lacking in freedom. Or put differently: Recognition is *intersubjectively experienced*, not simply objectively deduced from a principle such as the Universal Principle of Right. The latter does indeed express recognition of everybody as free and equal citizens; but Hegel's point is that people will not *in reality* be free and equal unless they experience self-respect, self-confidence and self-esteem, which can only be achieved intersubjectively.

Crime, we recall, is a formal wrong committed not just against abstract right in general but against a particular victim. It entails a "negative-infinite judgment" of the victim, denying him any capacity for possessing rights whatsoever. If this denial of his capacity for rights

is left standing, his rights are in effect void and he is unfree. When Zehr speaks of the “the needs which crimes create”, we ought thus to count among them the need of the victim to have this wrong against him recognized. Equivalently, the offender “needs” to be held responsible for denying mutual recognition. His own freedom is contingent upon recognition from other free and equal persons. Hence, if mutual recognition is denied, so is his own freedom.

The re-establishment of mutual freedom thus requires not only recompense (as in the example of the rich rapist). It requires that the parties experience that their lack of recognition is remedied. Specifically, the victim must feel that his experience of being wronged has been vindicated; he must experience that he has been believed when he tells about his victimization; he must feel that others, including the offender, understand properly the moral injury he has suffered and the proper respect he deserves. The offender, in turn, must experience that others hold him responsible, and that they respect him as a person, even when they disapprove of his behavior.

It seems safe to say that this experiential dimension of recognition is emphasized to a greater extent in restorative justice than in traditional criminal justice. The intersubjective and singular concept of justice makes sense only against this background. The parties are afforded autonomy precisely because it is important that they feel that justice has been done. As we saw, empirical studies of participant satisfaction do corroborate the view that restorative justice tends exceedingly to provide an experience of justice.

Indeed, it seems safe to say that Hegel’s notion that right is recognition is not only normatively justifiable, but *phenomenologically* accurate as a description of how stakeholders to an injustice tend to view justice. Time and time again experience has shown that what are superficially conflicts about material things, are really struggles for recognition, as we saw many examples of in Chapter 13. When two siblings quarrel over an inheritance, it is usually not just about the money they feel entitled to, but about the respect they feel that the other has denied them. When a Western tourist is cheated out of ten rupees by a rickshaw driver in Delhi it is hardly the financial loss that irritates the tourist; it is the lack of respect. Similarly, experiences from restorative processes show that what victims of injustice often want the most is simply to be recognized as having been wronged. A victim who ahead of the restorative process feels much anger and has high

demands for compensation will often renounce both at the moment when he receives a sincere apology from the offender. What he really needs, it turns out, is to be acknowledged and respected. Right *is* indeed recognition for this victim.

From an outsider perspective, such outcomes, which are not rare, may seem to let the offender off the hook too lightly. One might discuss whether or not that is true, considering how emotionally demanding the process can be. But we must anyhow not discount the importance of this *experience* of recognition, since it constitutes a remedy for the victim's experience of a denial of recognition. When it comes to this experience, the stakeholders know where the shoe pinches – they know best what it takes for them to feel that justice has been done. Who are we, then, to say that justice is better served in another way?

15.4 Public justice

Well, perhaps we are indeed the ones to say so. Mutual freedom is not only a matter between victim and offender. It is not simply about *their experiences* of recognition and freedom. Crime is a *public wrong* – not just because assurance of the (external) reality of law is undermined by crime (as discussed above), but because mutual freedom itself is negated. The negation of this negation is therefore in principle everybody's business.

Consider the example Robinson gives: A devoted Jew finds it in his heart to forgive Dr. Mengele for his ghastly concentration camp experiments on her and her family. "But few would think justice had been done if that meant Dr. Mengele was free to skip away to a happy life, even if he apologized to her."⁶⁹⁶ Of course, Dr. Mengele had thousands of victims, so no proponents of restorative justice would suggest that one victim should be given autonomy in the process against him. Nevertheless, the example triggers the intuition that affording autonomy to the parties is problematic in and of itself. Why should it matter if the victim finds it in her heart to forgive? Some victims are more forgiving than others; why should the sanctioning of crime depend on how "lucky" you are with your victim? Not only does this introduce an element of arbitrariness in the administration of justice; the focus on the feelings of the parties treats crime as if it is primarily a private matter

⁶⁹⁶ Robinson, "The Virtues of Restorative Processes, the Vices of 'Restorative Justice'", 381

between two (or more) parties, while crime is also a matter between the offender and the polity. In Duff's words:

For the criminal law is concerned not with our more local, intimate and optional relationships as friends, as lovers, as neighbors, as colleagues, but simply with our (somewhat abstract, detached and non-optional) relationships as fellow citizens.⁶⁹⁷

This accords with the Hegelian point that crime is a breach of the second form of recognition, *abstract right*. It is the relationships we have as right-bearing *persons* that is negated in crime. Whatever damage crime also does to our intimate relationships or to our esteem from fellow citizens is inconsequential to the public wrong that crime constitutes. It may be argued that when restorative justice is concerned with the "needs" of the parties for "closure" and for "healing of relationships", as is often emphasized, it deals with Hegel's first and third forms of recognition. Restorative justice represents, then, a form of "privatization of justice", which ultimately would be incompatible with mutual freedom.

However, the strength of restorative justice, as I see it, is that it shows this supposed incompatibility of addressing both public wrongs and private wrongs to represent a false dilemma. For starters, when restorative processes are applied in criminal cases, the processes are not private. They are referred to mediation or conferencing by a public authority (police, prosecutor, courts); they are structured according to legal rules governing the processes and led by a publicly appointed mediator; and a public authority, usually the courts, approves the agreement that is reached and thus has in principle the final say. Rather than seeing this as criminal cases being diverted to private arenas, we might see it as criminal cases being delegated to the most local level consistent with their resolution. This would be in accordance with the so-called principle of subsidiarity, a principle for delegating public authority which originated in the Roman Catholic church and which applies, for instance, in the European Union today.⁶⁹⁸

Further, because authority is delegated to the same people whose private relationships (i.e. the first and third forms of recognition) are at stake, and because they are the ones deciding which issues to address, the restorative process can avoid the paternalistic meddling that

⁶⁹⁷ Duff, "Restorative Punishment and Punitive Restoration", 93.

⁶⁹⁸ Subsidiarity is defined in the Oxford English Dictionary as "the principle that a central authority should have a subsidiary function, performing only those tasks which cannot be performed at a more local level."

would result if government officials were to address these issues. Take Braithwaite's example from above: It is not the state's business to address the jealousy issues a person has in his love life, which are aggravating him and making him violent. Neither is it the state's business to ask the person's drinking mates to change their drinking habits to help him avoid becoming violent. If, however, these persons address and resolve these issues themselves, it does not constitute illegitimate meddling. The process may thus instantiate respect for the freedom of the parties (the second form of recognition) while it at the same time addresses issues related to the first and third forms of recognition.

As we saw in Chapter 13 crime is often motivated by a search for recognition. In Hegel's phrase, the criminal wants "to count for something"⁶⁹⁹ – he wants recognition as *someone* in the eyes of others. We saw examples of humiliation that motivated violence as an attempt to save face. We saw examples of structural humiliation that cuts parts of the population off from the opportunity to achieve success by the culturally acknowledged yardstick of success. We saw examples of crimes that function as expressions of a criminal identity or a group identity. These issues, which pertain especially to the third form of recognition (although also to the first and second), are highly relevant to dealing with the causes of crime, and so with upholding mutual freedom. Ironically, (one could say), the criminal courts are largely cut off from the opportunity to address these issues, because they are constrained to deal only with the legally relevant issues, i.e. the issues pertaining to recognition of abstract right. They are cut off from addressing the most important social causes of crime, which are then considered political, not legal issues. When Hegel warned that "Jurists [...] look on [the law] as their monopoly", it was presumably a warning against letting matters of crime be delegated to specialists who cannot deal with them in all their complexity. As Hegel continues, "we do not need the services of a shoemaker to find out if the shoe fits".⁷⁰⁰ As I said, the stakeholders know best where the shoe pinches. They possess resources for addressing underlying causes of crime and conflict in each case that judges in a criminal court do not have and cannot legitimately have, for they concern first and foremost relationships between the parties and within the community. The effect

⁶⁹⁹ Hegel, "The Philosophy of Spirit (Jena Lectures 1805-6)", 130.

⁷⁰⁰ Hegel, *Philosophy of Right*, § 215 Addition.

of tapping into these resources can be seen in lower recidivism rates as well as enhanced participant satisfaction after the justice process.

To conclude, restorative justice can potentially remedy the wrong of negating mutual freedom by instantiating respect for mutual freedom and by fulfilling the three functions of recompense, reassurance and recognition. Because autonomy is conferred upon the parties in restorative processes, these processes give the opportunity to deal with a broader range of issues relevant to the crime and its causes than the criminal courts allow. Restorative processes have, in other words, some advantages compared to criminal trials, which suggest that when the purpose of sanctioning crime is to re-establish mutual freedom, restorative justice has a place in the sanctioning system.

I have not so-far dealt with the issue of what exactly this place is, and how to determine which cases are appropriate for restorative justice, and which are not. I propose here only schematically the following two parameters along which to consider this issue: First, the fewer stakeholders, the more adequate the assignment of autonomy to the directly involved parties. Conversely, the more stakeholders, the more adequate a third-party decision on the justice of the case. More serious cases will tend to have more stakeholders, in other words more people concerned with the justice of the response. Hence, there will be a division of labor between the procedures approximating the gradation of the seriousness of the crime.

The second parameter is: The more likely it is that the directly involved parties will be able to find a solution that is genuinely experienced by the parties as just, the more adequate it is that they be given autonomy. If a restorative process is to take place, it must, in other words, be voluntary, for without the wish of the parties to participate, the likelihood of a truly just experience is small. Likewise, the likelihood of genuine experiences of justice is diminished in situations where there is great imbalance of power between the parties. And, likewise, where one party is a corporation or the State, incapable of experience period.

The hard cases will then be where the solutions provided along the two parameters conflict, in other words, in serious cases where the parties are willing and wanting to go through a restorative process. How we ought to deal with these hard cases – whether, for instance, restorative justice may form part of a sentence in such cases – will have to be sorted out, either on an ad hoc basis, or as a result of future philosophical and legal clarification. Of

most importance for now, however, is that the preceding discussion has given us reason to finally dismiss the theory of retributivism. I concluded in Chapter 9 with the following claim about the justice of retributive justice:

If, in a given case, other ways of restoring mutual freedom is impossible, punishment, since it is sufficient for restoring mutual freedom, is necessary for achieving justice.

Restorative justice is one such “other way” that restoring mutual freedom can potentially be achieved. In such cases, then, we can deny the necessity of punishment, and hence the retributivist position. But there are also situations where punishment cannot achieve the function of restoring mutual freedom, as we have seen examples of in this second part of the thesis. It is conceivable that restorative justice could still be done in such cases – i.e. that the stakeholders themselves remedied the negation of mutual freedom that has occurred. The equivalent can therefore be said about the justice of restorative justice:

If, in a given case, other ways of restoring mutual freedom is impossible, restorative justice, since it is sufficient for restoring mutual freedom, is necessary for achieving justice.

This concludes my discussion of the justice of not punishing. It is time to consider the philosophical implications of conflicting claims to justice, of which we have now seen ample evidence.

16. Concluding remarks: On the justice of making exceptions

The discussions I have conducted in Part I and Part II have shown that in any given criminal case there are potentially several different wrongs in need of remedying. Some pertain to the criminal *act* – the theories expounded in Part I showed plausible ways in which punishment can be seen to remedy different aspects of the wrong in criminal acts. Others pertain to the situation of the criminal *agent*. Part II expounded reasons why less or no punishment (partially) remedies the injustice which is due to the severe social deprivation of some offenders. Part II also provided reasons why the wrong of the criminal act may potentially be remedied in a restorative justice process. I will not recapitulate the arguments here, but rather devote these concluding remarks to a philosophical problem which appears when the claims of the two parts are held together: What does justice require when there are several wrongs and their remedies are mutually exclusive?

There is a practical dimension to this problem: How should judges weigh competing concerns when sentencing offenders? To what extent should legislators constrain the deliberations of judges in these matters? To what extent should the parties be afforded autonomy in the case? My concern here, however, is with a more profound dimension to the problem, a meta-issue relating to the concept of justice itself: *Is it just to make exceptions from a just rule?* Put differently: Does justice allow for individual treatment, remedying whatever aspect of wrong is most salient in the case, or does justice require that we abstract from the complexity of the individual case in order to treat like cases alike according to a rule?

This problem has roots all the way back to Aristotle and the conflict he identified between the universality of justice and the idiosyncrasies of individual cases which preclude their neat subsumption under the rule. “[A]ll law is universal, and there are some things about which it is not possible to pronounce rightly in general terms”, Aristotle states.⁷⁰¹ The legislators cannot possibly account for all the real-life circumstances that affect the justice of particular cases. “[T]he error lies not in the law nor in the legislator, but in the nature of

⁷⁰¹ Aristotle, *The Nicomachean Ethics*, 1137b14.

the case.”⁷⁰² If we apply the law equally to all cases, it entails stretching and squeezing the individual cases until they fit this Procrustean bed of justice. On the other hand, if we make exceptions when “the nature of the case” requires it, it could mean creating an unfair discrepancy between those who are treated according to the rule and those who get special treatment. What, then, is the just solution?

It seems we are caught in a paradox similar to the one St. Anselm identified in his *Proslogion* from 1077 A.D. St. Anselm’s concern was with the nature of God, the most perfectly virtuous being imaginable.⁷⁰³ God must obviously be perfectly just, St. Anselm reasons. Yet, God, who forgives sinners, is also perfectly merciful. “For You save the just whom justice commends, but You free sinners whom justice condemns.” But freeing sinners condemned by justice is an injustice. How can God be both perfectly just and act against justice? “But how do You spare the wicked if You are all-just and supremely just? For how does the all-just and supremely just One do something that is unjust? Or what kind of justice is it to give everlasting life to him who merits eternal death.”⁷⁰⁴ Our concern here is not with mercy, considered as an independent virtue, nor with the nature of God.⁷⁰⁵ We see, however, that the paradox applies to the justice of making exceptions from a just rule. For if justice requires treating everybody alike according to a rule, then diverging from the rule by making an exception would entail diverging from justice. And similarly, if justice requires that the unique aspects of each case be addressed, then diverging from individual treatment in order to achieve equality with other similar cases would entail diverging from justice. Applied to our case: If justice requires that like cases be treated alike, then making an exception from retributive justice by applying a restorative process or by lowering or abstaining from punishment when the criminal agent is severely socially deprived, will entail diverging from justice. Conversely, if justice requires that we deal

⁷⁰² *Ibid.*, 1137b18.

⁷⁰³ As many will recall, St. Anselm’s claim to fame in the history of philosophy is this notion that God is the most perfect being imaginable. St. Anselm reasons that because existing is more perfect than not existing, the most perfect being – God – must therefore exist. An almost identical proof of God’s existence was later adopted by Descartes, hence, St. Anselm’s fame.

⁷⁰⁴ St. Anselm, *Proslogion*, (1077), <http://www.stanselm-institute.org/files/AnselmProslogion.pdf>, § 9.

⁷⁰⁵ For a secular discussion of St. Anselm’s paradox concerning justice and mercy, see Jeffrie G. Murphy, “Mercy and Legal Justice”, in *Forgiveness and Mercy*, ed. Jeffrie G. Murphy and Jean Hampton (Cambridge: Cambridge UP, 1988) and John Tasioulas, “Mercy”, *Proceedings of the Aristotelian Society* 103 (2003).

with each particular case in the way that best remedies its wrongs, then abstracting from complexity in order to punish like criminal acts alike will entail a divergence from justice.

There seems, then, to be no way forward that does not entail doing injustice. If we go one way, say, prioritizing the like treatment of like crimes, then injustice will be done toward the individual circumstances of the case, and vice versa. Jacques Derrida describes this as the *aporia* of justice, literally meaning the “non-passage” of justice (from Greek, *a*: non, *poros*: passage). We are, in other words, at an impasse. “Justice is an experience of the impossible”, Derrida says.⁷⁰⁶ The impossible, as I understand it, is the avoidance of injustice. What do we do, then, when we face this impossible situation?

16.1 Denying the paradox

One strategy would be to deny that there really is this fundamental conflict within the concept of justice. We could bite the bullet, so to speak, and say that justice *is* treating like cases alike and that diverging from the just rule is indeed simply unjust. When faced with hard cases where the moral problem of applying the rule is evident, we would then either have to deny that we ought to mitigate this situation (*equity*, Kant famously says, is “a mute divinity who cannot be heard”⁷⁰⁷, i.e. it is irrelevant from the perspective of right), or we would have to say that justice should be set aside for other reasons, such as prudential concerns, a concern for good-will, or a concern for mercy. The latter view would require a theory of when and why justice ought to be overridden, something which is difficult to square with the common view that justice is the first virtue of social institutions.⁷⁰⁸

We could also deny the paradox by arguing that retributive justice allows us to take into account the social situation of the individual agent and is otherwise consistent with ways of tailoring the just outcome to the specific case, including restorative justice. As we saw in Chapter 14, the situation of the agent may affect the ‘expressive content’ of the act, making it a less serious denial of mutual freedom than the objective features of the act would normally entail. Hence, lowering punishment for a severely socially deprived

⁷⁰⁶ Jacques Derrida, *Lovens makt (Force of Law)* (Oslo: Spartacus, 2002), 39.

⁷⁰⁷ Kant, *The Metaphysics of Morals*, 6:234. I will return to the subject of equity below.

⁷⁰⁸ Cf. Rawls, *A Theory of Justice*, 3. Aristotle similarly praised justice as the sovereign virtue, and “neither evening nor morning star is such a wonder” *The Nicomachean Ethics*, 1129b28. And of course, there is Kant’s famous statement that “if justice goes, there is no longer any value in human being’s living on the earth” *The Metaphysics of Morals*, 6:332.

offender may be consistent with retributive justice, and is not therefore an exception from it. Similarly, as we saw in Chapter 15, restorative justice is compatible with the aims of retributive justice in re-establishing mutual freedom. The case-specific nature of restorative justice does not, then, entail making exceptions from justice; the restorative process is merely a different method serving the same overall purpose as the criminal trial and punishment.

To frame the issue in this way does not, however, dissolve the paradox, but merely defines it away. For if we focus on the function of justice apart from the means by which the function is achieved (e.g. the amount of punishment required), then the different means of achieving justice will all, per definition, be just, and means that do not achieve justice will all, per definition, be unjust (e.g. if the “exception” were just, it would already be included within the just means and would not, then, be an exception from justice). Since the exceptions are, per definition, unjust, the paradox of the justice of making exceptions does not arise.

If we focus on the means, however, we see that the paradox reappears. Let’s say five people rob a bank together, and they are equally involved in the planning and execution of the crime. One of them is severely socially deprived. If, for one of the reasons outlined in Chapters 11-14, the latter offender’s sentence is lowered by, say, one year, from five to four years in prison, then it might be that his sentence is just when viewed in isolation. The individual circumstances are different in his case, and this makes the need for punishment slightly lower than in the cases of the other four. From the perspective of the overall purpose of sanctioning crime, the five crimes are treated equally in the sense that justice is achieved in each case.

From the perspective of the means of achieving justice, however, the cases are treated unequally and unfairly. The four other bank robbers might rightly say: “We all did the same deed and we ought to get the same punishment.” On the other hand, if their claims were heeded, an injustice would arise in the case of the severely socially deprived offender, who would be punished more than necessary (or if the sentences of the others were reduced, *they* would get less punishment than required by their crimes). Hence, either the vertical (i.e. isolated) justice of each case causes a horizontal injustice between the

offenders, or the horizontal justice between the offenders causes a vertical injustice in one or more cases.

To this someone might reply that the five cases are not actually alike, and that treating them unequally does not constitute a horizontal injustice. This response merely begs the question of what constitutes likeness, however. In the planning and execution of the crimes they were alike, and with respect to *this* aspect of the crimes, their unequal punishment was unfair. However, when we consider broader social issues and structures that influence one's likelihood of committing crime and being punished, the case of the severely socially deprived offender is different and may justly merit different treatment. But this simply means that the justice of the case depends on what we take as the basis of comparison between cases. In other words, when we "zoom in" and focus on the situation of the individual agent, the cases merit different treatment, but when we "zoom out" and look at only the crimes, the cases merit equal treatment. The paradox persists, then, for doing justice both to likeness and individuality is still impossible.

Finally, the paradox is even clearer with regard to the division of labor between retributive and restorative justice. Two cases may be alike in all relevant respects, yet because of circumstances that are arbitrary from the point of view of the offender (e.g. the willingness of the victim to meet with the offender), one offender is tried and punished while the other goes through a restorative process. If justice is achieved in both cases, then we have once again an example of vertical justice and horizontal injustice. To conclude, even when a range of means is included in what we take to achieve justice, we cannot avoid the paradox of the justice of making an exception from a just rule.

16.2 Transcending the paradox

There is, however, a way of transcending the paradox. The means for doing so lies in the concept of *justice as remedying injustice*. For with this concept, all justice is in a sense an exception, and there is therefore no inherent opposition between the just rule and the just exception. There are simply conflicting claims of justice, of which some are more important, i.e. *more just*, than others. Let me explain.

When we understand justice as remedying injustice, it means that there cannot be justice prior to or without injustice. Only when there is something which is unjust can we say that something else, an action that remedies the injustice, is just. Hence, without a real or potential injustice we cannot claim that it is just to treat a person or action or state of affairs in a certain way – for nothing is just if nothing is unjust. In such a situation, it cannot be just to treat anybody or anything differently from anybody or anything else. This means that the *default situation*, prior to justice and injustice, is one in which there is equality between everybody and everything. Equality, then, is not itself the aim of justice; it is the baseline or background from which claims of justice proceed. Put differently: *equality is neither just nor unjust per se*. This claim fits well with Monroe C. Beardsley's claim that the Principle of Equality is not itself a positive rule of ethics, but a rule for adopting rules, "a metamoral maxim" which takes the form of an Equality Injunction: "All persons are to be treated alike, except where circumstances require different treatment."⁷⁰⁹ Hence, both equality and inequality can potentially be just, but the former is the default situation.

Once there is (or is perceived) an injustice, however, the need to remedy it follows with necessity, for, as we saw in Chapter 1, the perception of wrong entails a perception that the wrong ought to be remedied. Hence, when there is injustice, there is also something which is (potentially) just. Since an injustice always pertains only to some things or somebody, the just remedy for the injustice will also affect only some things or somebody.⁷¹⁰ In other words, justice requires that we make an *exception from the default equality* which exists prior to justice and injustice, treating some things or persons differently than others, in order to remedy the injustice which relates to the group in question.

This will become clearer if we take a few examples. Let us start with the justice of locking somebody up in a prison cell. The default situation is equality, which means that at the outset it cannot be claimed that it is just to lock anybody up in a prison cell. We can make

⁷⁰⁹ Monroe C. Beardsley, "Equality and Obedience to Law", in *Law and Philosophy: A Symposium*, ed. Sydney Hook (New York: New York UP, 1964), 35.

⁷¹⁰ There are, of course, some claims of justice that pertain to all humans, such as human rights. But these claims still pertain only to some and not all things, i.e. not everything in the universe. The latter is impossible, of course, for such a situation would be like the night in which all cows are black, as Hegel says in the preface to the *Phenomenology of Spirit*, 9. Even an incredibly wide-ranging claim, say, one that includes all living organisms, would still have to set the limit somewhere (at dead matter) in order to make sense at all.

a just exception from this equality, however, for persons who have committed crimes that are above a certain threshold of severity. For this group, but not for others, incarceration will serve to remedy the wrongs they have caused, whether they are taken to be infringements of mutual freedom, freeloading, undermining the mutual benefits of law, or one of the other wrongs discussed in Part I. Once there is such a wrong, then, it may be just to single out this group for special treatment (punishment) aimed at remedying the wrong. Prior to or without the wrong of the crime, it would not be just to make an exception for this group, in the same way that it would not be just to single out any other group for which punishment would not remedy an injustice, say, people born on a Tuesday.

Take another example: air pollution. For most of human history, the air we breathe has not been a matter of justice and injustice. Regulating the use of air at this earlier time would be as foreign then as regulating the sharpness of the sunlight would now. The reason is the same as above: If there is no problem, there is no fix – if there is no injustice related to the cleanness of the air, there is no justice in regulating it. Today, however, carbon emissions cause global warming which takes and will take the lives of millions of people. Regulating emissions by taxing or prohibiting certain actions (e.g. building a coal plant or clearing a rainforest) goes some way to remedying the injustice of the harm that carbon emissions cause. Such regulation is therefore just to the extent that it achieves this, and all things being equal. Hence, it may be just today to prohibit a landowner from clearing the rainforest on her land, but the same justification could not apply, say, in the Middle Ages. There would at that time be no injustice (at least for reasons related to air pollution) in cutting down the forest. Singling out this act for prohibition would not therefore be just. We see, then, that the justice of the exception – in this case the exception to the free use of property by the owner of the rainforest – depends, like any claim to justice, on the presence of an injustice for which the exception is a remedy.

There is, accordingly, no difference, at the most fundamental level, between a claim to justice and a just exception. *Justice is always an exception from a default equality that is neither just nor unjust.*

16.3 The burden of proof

Let us look closer at the consequences that this way of conceiving justice has for how we consider different claims to justice. At first glance, it seems to make no difference whether we view the abstention from punishment of an offender who is deemed unpunishable as an exception from the rule that criminals ought to be punished, or whether we view the rule that criminals ought to be punished as an exception from the default equality of all persons. Similarly, we might presumably either view the prohibition of clearing the rainforest as an exception to the landowner's right to use her property, or we might view property rights as an exception to the equal right of use shared by all, and, hence, the prohibition as an exception to the exception. The choice of perspective does, however, make a difference for where we place the burden of proof. Since equality is the default position, the burden of proof must be placed with those who claim that inequality is just. In other words, absent a good reason, everybody ought to be treated equally. Beardsley gives an example to illustrate this: Two persons find a treasure, and A says to B, "give me half", whereupon B replies, "give me a reason why you should have half". This has it the wrong way, Beardsley says. It is B who must supply a reason why they should not share it equally. Such a reason could for instance be that B is poor and has five children to feed, while A is rich and single, or that B saw it first and A would not have noticed it if B had not pointed it out. But absent a reason, equality is the default. As Beardsley says, "there is a sense in which the person who asks for equal shares is not asking anything - not 'anything special', as we say".⁷¹¹ Since she is asking for nothing, equality is not something for which she must argue that the other has a moral obligation. "There is, strictly speaking, no (moral) obligation to treat people equally, but only a (logical) requirement to supply a good reason for treating people unequally."⁷¹²

Notice that this way of thinking has a clear affinity with the role of innate freedom in the Kantian framework, which I also elaborated in the discussion of Hart's "natural right to freedom" in Chapter 9. The innate right to freedom entails the right to be "beyond reproach", because, Kant explains, "before he performs any act affecting rights he has done no wrong to anyone" – in other words, he has not done anything for which the other can

⁷¹¹ Beardsley, "Equality and Obedience to Law", 37.

⁷¹² *Ibid.*, 37.

make a claim against him.⁷¹³ This entails, specifically, that a person is presumed innocent until others can prove that she has done wrong (i.e. affecting another's rights), for if she had to prove her own innocence, she would not be free. She could then easily be put off track by anyone who accused her, requiring her to spend time and effort on proving her innocence, a project enforced upon her by somebody else. Her freedom would then be limited by the will of another. Hence, freedom to be beyond reproach is the default position, unless proven otherwise.⁷¹⁴ Similarly, in Hart's account of the natural right to freedom, the negative, 'general right' not to be interfered with is the default position against which 'special rights' to interfere make sense. We could not understand the special right to have a contract fulfilled unless, but for the contract, the parties were free not to do the act in question. Hence, the burden of proof falls on the claim to a special right – only if such a right can be established can the general right to freedom be overridden. Similarly, in my framework for justice, the burden of proof falls on the claim that it is just to treat somebody or something differently from everybody or everything else – only if such a claim of justice can be established can the default equality of all be overridden.

This framework has practical implications for how we think about the justice of not punishing discussed in Part II. Chapter 12 and 13 discussed severe social deprivation as justification and as excuse respectively, and these two concepts illustrate the ways in which the burden of proof is implied by the notion of default equality prior to justice. To claim that an offense was *justified*, means denying that an act that would otherwise be wrong is wrong under the given circumstances. It is a claim, in other words, that the agent under these circumstances had the equivalent of a 'special right' to override the 'general right' of non-interference entailed by mutual freedom. The burden of proof therefore lies on

⁷¹³ Kant, *The Metaphysics of Morals*, 6:238.

⁷¹⁴ Kant also specifies that innate freedom entails "innate *equality*, that is, independence from being bound by others to more than one can in turn bind them." (6:238). The concept of equality is thicker here, in that it makes claims upon the substance of laws that are morally binding. Equality and freedom are nevertheless correlative also upon a thin (formal) version of equality, as is shown by Hart's point that special rights can only be understood against a general (i.e. equal for all) right to freedom. A somewhat related question could be raised regarding the status of innate freedom itself: Is it a general right upon Hart's terminology, or should we rather say that the general right is unbound freedom, and this general right is limited by the special rights of others that arise when their spheres of freedom collide? The correct answer, I believe, is that Kantian innate freedom is to be understood as a general right upon Hart's terminology, for by the very concept of 'general' right is implied that it applies to all. Unbound freedom cannot apply to all, for the unbound freedom of one is bound to collide with the equal freedom of another. The only way that freedom can be a general right then, is when it can coexist with the freedom of all, hence, as what Kant calls innate freedom.

justification. *Excuse*, however, pertains to the justice of punishing the offender for her wrong. The claim of excuse is a claim that the state does not have a ‘special right’ to override the defendant’s ‘general right’ not to be punished. The burden of proof falls on the state to show that it does retain this special right. In other words, the state must show that the defendant qualifies as a member of the subgroup of society for which an exception from equal treatment can be made because their punishment serves to remedy an injustice. Specifically, the state must show that the defendant has the capacity to be held accountable for her wrong, because, upon the freedom perspective, that capacity is a necessary requirement for re-establishing mutual freedom. As we have seen, we might believe that this capacity has been undermined sufficiently to excuse the offender if the economic, cultural and psychological mechanisms described in Chapter 13 are compounded to an extreme degree – hence, the state cannot then prove that the defendant is punishable. Or we may believe that an offender’s severe social deprivation is sufficient to mitigate his sentence – hence, the state *can* then prove that it has a special right to punish, but this right does not go as far in this case as it usually does for similar types of crime.

We see, then, that there is an asymmetry between the justice of punishing and the justice of not punishing – between aggravating factors and mitigating factors. The asymmetry lies in the fact that it takes less to establish the latter than the former – the former requires good reasons and the latter requires only absence of reasons. We might take this asymmetry as grounds for making the moral claim that when there is doubt, i.e. when there are conflicting claims pulling in different directions, it is better to err on the side of leniency. Hence, it is better to punish less than what retributive justice might require than to punish more than it might require. This claim is consistent with negative retributivism and the principle of *ultima ratio*, and it can also to some extent serve to justify the tendency in sentencing identified as the “Zug zur Milde”, the trend toward leniency.

16.4 A new point of departure

However, lowering or abstaining from punishment is also problematic, even when justice is achieved in the individual case. The reason is comparative: It is unfair to those who have committed similar crimes but who do not get to board the Zug zur Milde. We saw examples of such horizontal injustice above, for instance in the case of the five bank robbers, of

which one gets a lower sentence than the others. Clearly, *this* difference, the one between the sentence of the severely socially deprived bank robber and the sentences of his accomplices, also requires a justification (e.g. one of the reasons mentioned in Chapters 11-14). But this means that we have turned the burden of proof around: It is lower punishment, not higher punishment that now requires a good reason; it is four years, not five years that must be justified. Our baseline – the default equality – is now five years in prison, and the exception from *this* equality requires a reason.

We see, then, that claims of justice may not always relate to the fundamental, pre-justice equality of all – they can relate also to practices that are in place, established standards of equality, so to speak, that become new points of departure for claims about justice. Criminal law is one such practice that has established standards, such as punishment scales, that tend to be taken as basic, though, as we have seen, the justice of the practice itself must first be established from a more fundamental equality of all. Justice thus builds upon justice, we could say. Once the justice of a practice is established, the practice itself becomes the “just rule” from which new exceptions are made. Then these exceptions establish new standards of equality, for instance, regarding how much severe social deprivation should count toward a lower sentence. This, in turn, might breed new exceptions when it becomes evident that this rule, like all rules, cannot take into account all the real-life circumstances that pertain to the nature of the case, as Aristotle reminds us is inevitable.

Which standard of equality should we take as our point of departure when different standards conflict? Even if the exception to the exception is consistent with the even more basic rule, such as when abstaining from punishment is consistent with the pre-justice equality of all, there will certainly be other comparisons that can be made, and from which a horizontal injustice results. Some such injustices stem from the complexity of the frameworks that might be brought to bear on the case. Part I showed a handful of ways in which a crime can be wrongful, and, as we saw, all of these aspects are not equally present in all crimes, so that remedying one requires more punishment than remedying another. To take but one example, a drug dealer may have gained a great undeserved profit and may thus require a large punishment on the profit theory, but since he has sold mild drugs to autonomous adults, his crime may not require as much punishment on the freedom

perspective of crime and punishment. Hence, when justice is done by remedying one aspect of the wrong in crime, an injustice is done by punishing too hard according to another aspect of the wrong. And even if we settle on one framework, like I have advocated with the freedom perspective, there are still numerous ways in which the case can be interpreted, with varying amounts of punishment as the result: Is it the objective aspect of the crime – the five instances of bank robbery – which establishes the baseline from which exceptions are made? Or is it the damage that the crime does to the assurance people have of the reality of their freedom? Or is it the denial of recognition that can be imputed to the offender? How are we to determine which is more important in a given case?

We are thus back at the problem that Aristotle identified: If we give a general answer to the above questions, there will inevitably be cases that do not fit the answer. Even within the framework of mutual freedom, cases that are alike in one respect are unlike in another. A general rule for how to treat like cases alike will thus inevitably create injustice when cases are unlike according to other conceptions of wrong and these wrongs are not remedied. Let us first look at Aristotle's solution to the problem, before concluding with the solution implied by the concept of justice as remedying injustice.

16.5 Aristotle's concept of equity

For Aristotle, the central concept here is *equity* (Greek: *epieikeia*). Equity is the name of the virtue by which a link between the general law and the specific case is made. More specifically, its function is to remedy the rigidity of the law. "This is the essential nature of equity; it is a rectification of law in so far as law is defective on account of its generality".⁷¹⁵ Equity corrects the injustice that may follow from a strict application of law; "equity is just, but not what is legally just: it is a rectification of legal justice"⁷¹⁶. And it is therefore a higher form of justice. Equity is "superior to one kind of justice", namely justice which follows from the direct application of a rule.⁷¹⁷

This is the formal structure of equity. When it comes to the more precise content of equitable deliberations, there is disagreement about what Aristotle had in mind. According

⁷¹⁵ Aristotle, *The Nicomachean Ethics*, 1137b25-28.

⁷¹⁶ *Ibid.*, 1137b13.

⁷¹⁷ *Ibid.*, 1137b9.

to Eric G. Zahnd, most scholars have wrongly interpreted Aristotle as reserving equity for only the few cases where the law is unclear: “Most writers argue that Aristotle employs equity to fill gaps in the law; that is, equity enables a judge to adjudicate correctly a case presenting a novel issue on which the legislature has enacted no law or that law is incomplete”.⁷¹⁸ Indeed, this limited role of equity is substantiated by some of Aristotle’s passages.⁷¹⁹ However, other passages seem to contradict this view.⁷²⁰ In addition, Aristotle considered equity as superior to legal justice. Why, then, should its role be limited? If equity is superior to legal justice, does it not make more sense to abolish all the laws and let equity replace them?

Both these views on the role of equity – the limited and the all-encompassing – represent extremes that misunderstand Aristotle’s concept. A proper explanation of equity must account for its essential relation to law. As Zahnd explains:

The proper role of equity is not simply to fill gaps in the law. Instead, equity consists primarily in a judge's exercise of practical intelligence to conform universal laws to particular situations. Rather than filling a gap in the law, equity fills inevitable gaps in the legislatures’ foresight when the legislature makes a general legal rule without knowing the facts of any individual case in which it will be applied.⁷²¹

Equity is thus intimately connected with law; law is part of equity. But equity goes beyond law by subjecting it to practical reason, or *phronesis*, which Aristotle says “is not concerned with universals only; it must also take cognizance of particulars, because it is concerned with conduct, and conduct has its sphere in particular circumstances”.⁷²² When a particular circumstance so dictates, it is equitable to set aside the universal rule.

Aristotle gives an example of what such special circumstances might be. If, for instance, the law forbids striking another person with a metal weapon, striking with an iron ring on

⁷¹⁸ Eric G. Zahnd, "The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law", *Law & Contemporary Problems* 59 (1996), 268.

⁷¹⁹ “[W]ell-drawn laws should themselves define all the points they possibly can and leave as few as may be to the decision of the judges”, Aristotle, *Rhetoric*, trans. W. Rhys Roberts, *The Complete Works of Aristotle* (Princeton: Princeton UP, 1984), 1354a33-34. And further: “In general, then, the judge should, we say, be allowed to decide as few things as possible”, *ibid.*, 1354b12.

⁷²⁰ “It would seem then, that particular cases receive more accurate treatment when individual attention is given” Aristotle, *The Nicomachean Ethics*, 1180b12.

⁷²¹ Zahnd, "The Application of Universal Laws to Particular Cases", 280.

⁷²² Aristotle, *The Nicomachean Ethics*, 1141b15-16.

the finger would qualify legally, but not equitably.⁷²³ But to what extent does equity include considerations about other circumstances than the act and the law? Aristotle emphasizes that equity includes considerations of the personal circumstances of the offender. He insists on the importance of looking beyond the mere act, and seeing the full picture:

Equity bids us be merciful to the weakness of human nature; to think less about the laws than about the man who framed them, and less about what he said than about what he meant; not to consider the actions of the accused so much as his choice, or this or that detail so much as the whole story; to ask not what a man is now but what he has always or for the most part been.⁷²⁴

When we take into account “the weakness of human nature” and how the offender has “always or for the most part been”, we judge in a sympathetic way. Sympathy is the ability to ‘feel together’ with the offender, in other words, to show compassion with the offender’s personal situation. This is a distinctive feature of Aristotle’s equity: “An indication of this is the common view that the equitable man is especially sympathetic in his judgments, and that it is equitable to judge sympathetically in certain circumstances.”⁷²⁵

This conclusion is further substantiated by Aristotle’s treatment of the subject of friendship, which is not limited to what we today would count as friendship, but includes what we might call ‘civic friendship’ among members of the polity. According to Aristotle, friendship is characterized by a mutual feeling of goodwill toward each other. Friends truly wish each other well. “[I]n the case of a friend they say that one ought to wish him good for his own sake.”⁷²⁶ Thus, friends want the good for each other by virtue of their friendship, not because of the other person’s merits: “For friendship asks only for what is practicable, not what is in accordance with merit.”⁷²⁷ Friendship, like equity, is a matter of judging sympathetically, of looking beyond the other person’s actions, and seeing the person for his own sake. And just like equity, friendship is for Aristotle a superior form of justice: “friendliness is considered to be justice in the fullest sense.”⁷²⁸ And the stronger

⁷²³ Aristotle, *Rhetoric*, 1374a35.

⁷²⁴ *Ibid.*, 1374b9-16.

⁷²⁵ Aristotle, *The Nicomachean Ethics*, 1143a21-23.

⁷²⁶ *Ibid.*, 1155b32.

⁷²⁷ *Ibid.*, 1163b15.

⁷²⁸ *Ibid.*, 1155a28.

the friendship is, the stronger sense of justice accompanies it: “It is natural that the claims of justice should increase with the intensity of friendship.”⁷²⁹

16.6 More and less just

We see, then, that Aristotle’s solution to the conflict between the universality of law and the singularity of the nature of the case is to stake out a third way: an equitable and superior form of justice which includes but transcends the two sides of justice. In this lies an acknowledgment that both sides are indispensable. On the one hand, universality is an essential feature of justice. Justice *is* treating everybody equally according to a rule. On the other hand, the inevitable complexity of real-life cases means that there will always be more to justice than can be formulated ahead of time in a rule. Justice *is* remedying the injustices which pertain to the individual case. Singularity, is thus the other side of justice, the one that Aristotle emphasizes when he speaks of justice among friends. This side of justice entails taking in the full complexity of the case, acknowledging the unique features pertaining to the individual, judging him sympathetically, i.e. “for his own sake”. But even here is an element of universality: If there were an identical case, justice would require equal treatment. However, a third case might then come a long which was similar, but also different. Equity entails staking out a course between these two sides of justice, thereby achieving a more just solution than either of the two sides may achieve alone.

Incidentally, in St. Anselm’s response to his own paradox, he too acknowledged both that justice must be universal and that justice requires that the full complexity of the case be taken into account. However, the latter is impossible to achieve for humans because of our lack of knowledge. Only an omniscient God can therefore achieve justice. “For that alone is just which You will”, St. Anselm says, acknowledging that “it certainly cannot be understood by any reason”⁷³⁰. Many people have similarly concluded that justice is unachievable in human affairs; we must leave it to God to be the final arbiter on the judgment day. We saw a secular version of this sentiment above, in Derrida’s claim that justice is an experience of the impossible: It is impossible to take into account all relevant aspects of the case. It is therefore impossible to avoid doing injustice.

⁷²⁹ Ibid., 1160a8-9.

⁷³⁰ Anselm, *Proslogion*. § 11.

This does not mean that we cannot do justice, however. We can acknowledge that doing justice does involve (an experience of) the impossibility of avoiding injustice, as I interpret Derrida. But *justice is not impossible*. On the contrary. With the concept of justice as remedying injustice, justice is achieved every time an injustice is remedied. Justice is done when a killer is sent to prison. Justice is done when the rich are taxed at a higher rate than the poor. Justice is done when an academically challenged child is given extra tuition. This does not mean that justice is perfectly achieved in these and other instances, nor that these ways of doing justice cannot be trumped by other, conflicting ways. Neither does it mean that we could potentially consider *anything* as just – some things are clearly unjust (like punishing an innocent person or denying a child education) and some things are neither just nor unjust (like remedying a headache with a pain killer). Only when it is plausible that an action remedies an injustice can we say that it is just. But since there are often other ways of remedying the same injustice, and since doing one just action may exacerbate other injustices pertaining to the case, we cannot say that justice is ever completely achieved. The best we can say is that the action is the *most just* action in the given situation.

By considering justice in terms of *more and less*, we can transcend the paradox of making a just exception from a just rule. The paradox presupposes an *either/or* structure of justice: either justice is following the rule or justice is making exceptions from the rule in order to remedy the wrongs of the individual case. On the view I have advocated, however, justice is always an exception. There is no inherent difference between the just rule and the just exception. Justice is always a negation of a prior equality, a prior rule, if you will. And this new rule, in turn, is negated by new just exceptions establishing new rules. And other comparisons are always possible, as are new exceptions. Injustice thereby follows justice like a shadow. Still, there can be more and less (in)justice. Applying the negative method, we can say that an action is *most just* when it remedies the *worst injustice* pertaining to the case. Like Aristotle viewed equity as more just than either of the one-sided aspects of justice, so we can say that an action is more just when it remedies and avoids creating more injustice than another action would. Take the example of the bank robbers again: If one considers it just to lower the punishment of the severely socially deprived offender, it simply means that one considers the injustice of treating all the bank robbers equally worse than the horizontal injustice that results from mitigating the sentence of only one of them.

We cannot determine a priori which injustice is most important, because, as Aristotle reminds us, there will always be cases that are different in relevant ways. However, we can say that determining the importance of the injustice will at least entail considering the *salience* of the proposed injustice in the given case. Put negatively, if the injustice that the act is supposed to remedy is not salient or identifiable in the case, then the justice of the act will not be salient or identifiable. Recall “*The Negative Hume’s Law*” from above. Further, the importance of the injustice will also depend on *the practice* in which it is relevant. The practice of criminal law has established a range of principles and standards that constrain the scope of relevant factors to be considered. A theory of retributive justice ought to fit within a comprehensive theory of criminal law and the legal order more generally, in order to ensure consistency between these principles and standards. This was one of the reasons why I concluded that the freedom perspective is most suitable for criminal law within a democratic state under the rule of law. Specifically, this has bearing on the determination of the most important injustice of a criminal case, because a choice of an injustice which is irrelevant upon the freedom perspective means denying this perspective’s priority, and thereby, the consistency of the practice of criminal justice based on this perspective. It does not necessarily mean that this can and should never happen. Some cases are so special that one might consider the injustice of keeping with the established standards to be worse than the injustice of making an exception. It simply means that the standard is in fact established for good reasons, which in turn means that the burden of proof falls on the exception to these reasons.

This brings us the end of the thesis. There are, as we have seen, several ways in which justice can be done. Both punishing criminals and conducting restorative processes with the involved parties can, I have argued, remedy the wrong in crime. The social realities of our societies tend, however, to be reflected in our criminal justice systems. Social injustice undermines criminal justice, yet if we take full account of social injustice when doing criminal justice, we risk creating other forms of injustice, vis-à-vis victims and vis-à-vis other offenders. Because of this complexity, I have not been able to provide a definite answer to the question with which I began: What does justice require in response to crime? I have, however, been able to point out several theories and ways of sanctioning crime that do *not*, upon closer scrutiny, represent justice in a modern, democratic state. And as I have said: Pointing out the injustice is the first step to creating justice.

Abstract

The thesis discusses the justice of state punishment in response to criminal wrongs. The introductory chapter explores the logic of the concept of justice itself, proposing that we understand justice as the function of remedying injustice. This negative approach – studying justice through injustice – allows us to critically evaluate theories of retributive justice via the conceptions of the wrong in crime that they entail, and for which punishment is perceived as a remedy. Examples of the conceptions of the wrong in crime considered in the first part of the thesis are: ‘infringement of mutual freedom’, ‘freeloading’, ‘undermining the mutual benefits of law’, ‘undeserved profit’, ‘harm to the victim’ and ‘material imbalance’. Punishment, upon each of these conceptions, is just to the extent that it remedies the particular wrong of the crime, for instance by cancelling its undeserved profits or by alleviating the harm of the victim. The first part of the thesis culminates in a prolonged discussion of what is deemed the most suitable theory of punishment in a modern democratic state, the ‘Freedom Perspective’ based on a Kantian-Hegelian framework, whereupon crime is wrong because it infringes upon mutual freedom.

The second part discusses the possible injustice of punishing severely socially deprived offenders. Specifically, it considers four reasons for the justice of lowering or abstaining from punishment of this group of offenders. These reasons relate to the material, cultural and psychological factors which increase this group’s likelihood of committing crimes and of being punished. These factors are to some extent the result of unjust social structures in society. Hence, this part discusses the links between social (in)justice and criminal justice. Finally, the thesis examines the justice of an alternative way of remedying the wrong in crime: restorative justice processes between victim(s), offender(s) and other parties to the crime.

The concluding remarks are devoted to the meta-issue of how to conceive of justice when facing competing, yet plausible claims of justice.

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