Rights and Punishment

Jean Chang

M. Phill
Department of Philosophy
University of Glasgow
October/1998

ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 – 1346

Contents

Introduction

During the last two centuries, the theory of moral rights has been significantly developed by many thinkers. Though this development began in the field of political philosophy, it finally brought a great change in the structure of society in the real world. There is no doubt that nowadays people are much more aware of the importance of these moral rights and care much more about the rights' issues than they use to. Yet there are several problems which haven' t been solved. One of these problems is the problem of punishment, or, more precisely, the criminal' s legal liability to punishment, which has remained a debatable issue in the area of moral rights theory. As A. H. Goldman says, " the paradox of punishment is that a penal institution somewhat similar to that in use in our society seems from a moral point of view to be both required and unjustified."[1] In another words, from a moral point of view, punishment needs to be justified in a fashion consistent with human rights (which are, of course, moral rights) argument, but philosophers and theorists of human rights have not come to any general agreement yet. Even so, there are some methods to find out a possible way for people to face this paradox, and one of them, I think, can be relayed on the examination of the coherence of rights arguments for punishment. It is not to say that we should let ' coherence' become a crucial justification of truth, and use it to decide which rights argument is more believable than others. The purpose of using the conception of coherence is to find out which argument is ' less false' , and a ' less false' argument might be able to lead us to a possible way to solve the problem. Therefore, in this thesis I want to examine the justification of punishment in some well-known theories of moral/human rights, and I want to find out if any of these justifications is more coherent than the others, that is to say, to ask whether, if punishment is necessary for our rights, it can be incorporated into moral rights theory without contradiction.

Now let us turn to the core of the problem of punishment from the moral point of view. Generally speaking, we may say the core of this problem is this: " Will punishment cause a self-contradictory conclusion in moral rights theory?' Why might one think that punishment would cause a self-contradictory conclusion in our rights

[1] A. H. Goldman, ' The Paradox of Punishment' , in A. J. Simmons, M. Cohen, J. Cohen, and C. R.

theory? The problem might arise from salient features of punishment itself. It is considered that punishment is a form of legal sanction, and its main function is to protect people's legal rights by deterring rights-offenders. One feature of punishment is that it involves the deprivation of certain normally recognized rights, a means which is considered unpleasant to the offender. The problem is not that people doubt as to whether or not punishment is justifiable. For the most part, punishment has been accepted in our society as the proper response to offence. The question is about the "right to punish". Why is it just for a particular person or any legal authorities to punish the offender? And, furthermore, why is it just to punish the offender by depriving his moral/legal right? How can a rights theory defend punishment in the face of these problems? If the rights theory cannot give answers to these questions, punishment would be something like "repay evil for evil", and the "right to punish" is just another form of right-violation. Our moral rights can be violated if it is necessary to protect them. This is not only against our view of morality, but also the conclusion the rights theorist will not want.

Therefore, a sound argument in justification of punishment within the rights theory should be able to solve these problems, without creating the contradiction between punishment and rights. To find out whether there is such an argument in some well-known rights theories and why it is plausible will be the major work in this thesis. In the process of discovery, we will also examine those arguments which are used to justify the moral legitimacy of authorities, and doctrines of moral/human rights. This is another way, I think, to discover how far our structure of rights may prevent our beliefs concerning rights from incoherence and collapse. Moreover, discussion of the justification of punishment is important "not simply because of our deep and natural desire to better understand the foundations of our own societies. It is also important because of the contribution such efforts can make to ongoing public debates about punishment."[2]

Moreover, since the debate over the problem of justification of punishment is such an important but also controversial issue, it contains many plausible arguments and

---

Beitz(ed.) *Punishment* (New Jersey: Princeton University Press, 1995), p30.

[2] A. J. Simmons (ed.) *Punishment*, (New Jersey: Princeton University Press, 1995), p. viii.

answers in history. To lighten my burden, I will limit my discussion of punishment to arguments that are widely used in the rights theory, and, fortunately, there are two arguments that are commonly used to divide the discussion of punishment into two groups. The two arguments which can fulfill my purpose are utilitarianism and consent theory. Few doubt, as I mentioned before, that the existence of punishment does promote welfare in our society. From this aspect, utilitarianism seems to be capable of giving a normative theory about punishment on the grounds of utility, as well as a normative argument about rights. On the other hand, if we can show that punishment is justified because it gives offenders what they morally 'deserve', or we can say that even the offender agrees to ways of thinking about his or her liability to be punished as a necessary consequence of his or her offence, then the problem is solved. Furthermore, there are two traditional views of punishment which have been mentioned by moral rights theorists, and they have reflected two aspects of punishment in our society, that is, the retributivist and deterrence account. From this point of view, it won't be a surprise for us to know that it has been proposed by some theorists that while the justification of the practice of punishment is utilitarian (deterrence), the justification for the distribution of specific punishments within that practice is retributive[3]. However, since their views are not very correlative to my purpose, I would like to keep my attention to the two famous human rights arguments of the justification of punishment in this thesis, and try to find out if their arguments are able to provide a plausible answer for our problem.

[3] See A. J. Simmons, M. Cohen, J. Cohen, and C. R. Beitz (ed.), ibid., pp. viii-ix. But the general difficulty of aligning practices of punishment with respect for human rights cannot be solved in this way. This is H. L. A. Hart's attempt to show how both retributivism and deterrence can find a place (consistently) in our thinking about punishment.

SECTION 1
ANALYSIS OF THE CONCEPT OF RIGHTS

According to the normal procedure of arguing or inferring a framework for a theory in political philosophy, the first thing we should do is to clarify the idea which will be discussed or employed in the issue. This step is not only necessary for us to define our purpose, but also will be helpful for us to limit our focus. For this reason, before we turn to discuss the utilitarian justification of punishment, the first thing that we should do is to clarify several ideas such as what the general account of rights is, and, for this reason, I think, it seems that we should clarify the meaning of" rights" from the very beginning in this section. Therefore, let me begin with the concept of rights.

1.1 The concept of rights

Though, as I mentioned before, people nowadays are much more conscious about the importance of their rights than any other time in human history, and they understand that moral rights can keep them away from treating each other like means, it is not enough for us to draw a clear picture from people's awareness of what their rights are supposed to be, how this concept works, and why it is important. Usually, there is no doubts that when we assert that an agent X has a right of doing A, it means that this agent can do or not do A as he wants to, and no one else can forbid X from doing A or, on the contrary, force X to do A without sufficient reasons. Therefore, we may analyse the meaning by saying, minimally, that" X has a right of doing A" is, in other words, this agent has no duty not to do A. There are, of course, many other meanings of this assertion such as what kind of duty X is supposed to have, and how far his liberty of doing A can be protected from other's interference. But before these questions force us to think deeper of the conception of" rights", we may try to draw a draft of this concept in this section.

Briefly speaking, people usually distinguish two broad categories of rights, that is, moral rights and legal rights. The former are thought to exist independently of social

recognition and enforcement[4], and the foundation of these rights are established from the moral point of view; the latter are rights and liberties which are bestowed by systems of juridical law[5], that is to say, rights which are admitted and defined, and respected by political authorities and juridical institutions. But this does not give us a full understanding of what ' rights' means. Therefore, it seems to be better for us to classify what the different features of' rights' may be, rather than to argue for the two rough categories of human rights. Generally speaking, the concept of' rights' can be divided into the following groups[6]:

A. Liberty/ Liberty Rights

Rights in this sense have also been described as " mere liberties" (this concept, I think must be familiar for Hobbesians, but I do not intend to explain what Hobbes' view of it is). These rights may be conferred by the systems of rules or law, or where the law or rules are *silent*, that is to say, people are *at liberty* to do what law, or rules do not restrain. In regard to this definition of rights, such rights are described as " mere liberties" . People who have rights in this narrow sense are rights-holders who have no duty to refrain from acting, that is, they have no duty not to do what they are *at liberty* to do such as to appropriate by their labor some particular unowned good. Such rights are based on the silence of the law or rules. A liberty right is the mere absence of duty, or the absence of an obligation to refrain, they are rights which are not protected by correlative duties on the part of others. Rights in this sense are liberties which are not forbidden by law, but it does not follow that the law therefore imposes any duty on others to respect or allow performance of these liberties. Suppose that you and I happen to see an unowned wild field, and I think that I am at liberty to wander on it without going against any rules, that is my liberty right. However, my right to wander on this field does not impose a new duty to refrain from doing the same act on you; you are also at liberty to wander in it or do other things which you want to unless this field is owned by some one else. As long as this field is unowned, both of us are also at liberty to appropriate it by our labor. The rights we have, in this sense, are liberties, and that is a kind of rights with no correlative duties on the part of others.

---

[4] See D. Lyons, ' Utility and Rights' , in J. Waldron (ed.) *Theory of Rights* (Oxford: Oxford University Press, 1984), p111.

[5] See J. Feinberg, *Social Philosophy* (New Jersey: Englewood Cliff, 1973), p55.

[6] See A. J. Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992),

B. Moral Power

This implies a proper moral power governing the ascription of rights and duties, that is, " a moral ability to change or impose other people' s (claim) rights or duties"[7]. Briefly speaking, it is not a general kind of rights, but it is a very important sort of rights from the moral point of view. It is the moral power that rights have, and if the rights-holder exercises this power, everyone is liable to have their moral status changed by it. With this kind of power, or, more precisely, this kind of rights, right-holders will be at the position to change their moral status, and once an agent has claimed such a power/right in the moral sense, will immediately change the moral status between him and other agents, and imposes immediately on others new rights or duties in regard to his power. According to Simmons' view, the moral power is very much like the legal power, it is a " higher order" right, and it " can be either perfect (requiring no one else' s participation) or imperfect (requiring the willing cooperation of others)."[8] For example, suppose that you and I wander around an unowned wild field, suddenly I dig a hole for water and make it a well, then with this action I have exercised my moral power to impose on you a new duty to respect this well as my property; therefore, my power to make property has changed the moral status between us. Furthermore, if after I have created the well, I decide to let you have it, and you agree to accept, then again with my moral power, I have created a new right that you own this well as your property. Hence, in both of cases you are " subject" to my " power", and, from the moral point of view, I alter your moral situation.

C. The Claim Rights

The claim rights are, in Simmons words, " protected liberties", that is, rights which have correlative duties of others to the right-holder. These are rights which are thought to be the central category of rights in Locke' s theory. The correlative duties of others to the right-holder may be based on law or rules, but they may also be based on the moral force of rights. Therefore, " in appropriate circumstances the right-holder can " urgently, peremptorily, or insistently" call for his rights, or assert them

---

pp71-73. Simmons also mentions that he follows Hohfeld' s analysis of legal powers.

[7] A. J. Simmons. *op. cit.* p72.

[8] See J. Simmons, *op. cit.* p72.

authoritatively, confidently, unabashedly"[9], and impose on others the duty not to interfere. Furthermore, these rights can be divided into two kinds, that is, positive claim rights and negative claim rights. A positive right is a right to other persons' positive actions, that is, someone else has a duty to do something. By contrast, a negative right is a right to other persons' omissions or forbearances, which means that others have duties to refrain from doing something.[10] For instance, if you get a loan from that bank, then that bank will have a positive right with respect to you, that is to say, my bank may impose a duty on you to repay your debt; that is a right to positive action from you. In the case of negative right, however, the money in my bank will impose a duty on you not to take it, and that is a negative claim right to your omissions.[11] No matter which kind of claim rights is considered in different situations, such rights will always correlate with and protected by the duty of others, and that is why they are described as" protected liberties".

Now we have a rough view of the meaning of rights. When an agent X asserts his right, it is not only to claim that he has no duty not to do certain acts, but also may give rise to correlative duties of others to do or not to do certain acts toward him. The duty of others may come from the definitions of a system of law or rules, and they may also come from the moral point of view. No matter which sense of rights is considered in the rights theory, the most basic feature of rights is the absence of an obligation to refrain on the part of the right-holder. It seems that we may find out why rights are important for our lives; after all, a world with rights is one " in which all persons, as actual or potential claimants, are dignified objects of respect, both in their own eyes and in the view of others."[12] Such a description might be true. But it cannot prevent us raising other questions: what makes X' s rights morally ' right' ? That is to say, what is the moral basis of X' s rights? Can we justify the moral foundation of rights? How can we decide what moral rights we can claim? Trying to solve these problems, or to reply by providing a convincing argument is the response to every rights theory, and a theory cannot be regarded as a theory of human rights unless it

---

[9] See J. Feinberg, *op. cit.* p.58.

[10] See J. Feinberg, *op. cit.* p59.

[11] In some cases, according to Feinberg' s analysis, there may be a negative element in positive rights and a positive element in negative rights. The right of an accident victim to be assisted by anyone who happens to be in a position to help is positive and negative. See J. Feinberg, *op. cit.* p60.

[12] See J. Feinberg, *op. cit.* p59.

can pass this test. Once we have a theory available, we can use it to examine the problem of the consistency of the practice of punishment with our human rights claims.

SECTION 2
UTILITARIANISM, RIGHTS AND PUNISHMENT

2.1 Rights and Utility

Now we may begin our analysis of the utilitarian accounts of rights. Criticism of the capability of utilitarianism of accommodating rights is complex. One line of criticism argues that utilitarians are hostile to moral rights but have no difficulty accommodating legal rights and providing a normative theory about them[13]. This impression of utilitarianism, according to D. Lyons' sanalysis in his article, may come from the spirit of Bentham. This is a spirit of hostility and skepticism to moral rights or, more precisely, natural rights. In Bentham' s approach, he holds that " meaningful statements about rights must be understood as statements about beneficial obligations, and he holds that statements about obligations concern the requirements of coercive legal rules." [14] Therefore, he rejects the very idea of natural rights, for he rejects the central doctrines associated with them, that is, there are moral rights which are conferred naturally or discovered by the light of our natural reason. And he is skeptical whether there really exist such natural rights which appeal to natural law. Therefore, one has a right if and only if one is supposed to benefit from another person' s compliance with a coercive legal rule. He could not, in this sense, recognize rights that are independent of social recognition or enforcement, that is, the natural moral rights[15]. Hence, for Lyons, though " it seems that his (Bentham' s) analysis of rights neither follows from a principle of utility nor entails it" , " it is arguable that, given his utilitarianism, Bentham could not have accepted the idea that we have any moral rights," and" his utilitarianism committed him to The Exclusion Thesis." [16]

For this reason, though there seems to be no difficulty in giving a utilitarian account of legal rights, it seems to be incapable of accounting for moral rights, and, therefore,

---

[13] D. Lyons, *op. cit.* p.112. In his writing, he distinguishes two normative theses of utilitarianism: the Moral Rights Exclusion Thesis and the Legal Rights Inclusion Thesis. They are distinguished, he argues, because they show two different things: the limitation and capability of utilitarianism of accommodating of rights.

[14] D. Lyons, *op. cit.*, p114.

[15] See D. Lyons, *op. cit.* pp113-114.

its feature of being hostile to moral rights, in Lyons view, has made the whole theory unsuitable to provide an account of the moral force of rights. Before we go further from Lyons' point of view, there is one thing should be clarified, that is, the argument from Bentham of denying the existence of natural moral rights does not mean that only legal rights can exist in the utilitarian account of rights. Bentham only tries to clear away the natural rights argument from the ground of rights theory. He cannot, and will not, deny the existence of moral rights in our society, and everyone knows that some time these rights are not conferred by any law. For instance, the right to ask someone to keep his promise could be a mere moral right. Suppose that yesterday you promised to help me with my housework today, it would be your moral right to do so and my moral right to ask you to keep your promise, and you have a moral duty to keep to your words. Neither my right nor your duty is conferred by law. If you do what you said to me, then it would be a morally right thing; however, if you say " I know what I promised to you yesterday, but now, I have changed my mind", then, of course, your behavior will be considered as to be morally wrong, you have offended my moral right. In most cases, if you do not keep your words to me, from the moral point of view, I can ask you to keep it to fulfill your duty to me; however, it does not mean that my rights in this sense can be regarded as a legal right, and your breach of promise is not considered to be against the law. Therefore, we may say that, according to Lyons' view, the utilitarian might not be able to explain the moral force of moral rights, and they might be clever enough to account for the legal rights on the ground of utility, but we cannot say the utilitarian will not admit the existence of moral rights.

However, even we can agree that the utilitarian will not deny the existence of moral right, from Lyons' point of view, the whole theory will still be unsuitable to provide an account of the moral force of rights, that is, the moral threshold of rights. Rights are not necessarily absolute, but when we say someone has a right to do something, this means we provide a shell against others' interference, that is, an argumentative threshold, which, in Lyons' s words, explains the normative force of rights. The right-holder need not show that his right to something is useful or valuable for the sake of welfare, and it is not wrong for this rights-holder to use his right even at some cost to overall welfare. Furthermore, " others may not interfere just because it would promote

---

[16] D. Lyons, *op. cit.*, p114.

overall welfare to some degree if they did' .[17] Suppose that I have a right to speak, and this means that I have no duty not to speak, and, moreover, the right provides a moral threshold against others' interference. As a holder of such a right, I do not need to prove that my speaking is valuable, useful, or able to promote overall welfare. Even if I say something unpleasant to other members in my society, I can still properly use my right to speak, but it would be wrong for others to interfere just because that would promote welfare. The moral force of my rights will defeat the objections. According to Lyons' analysis, however, the argument of utilitarianism seems to be unable to provide such an argumentative threshold of rights, for the argument ignores the moral force of rights. Hence, if one accepts moral rights, one cannot accept absolute guidance by welfare argument.

Another example of this kind of criticism is in R. Dworkin' s argument of rights and utility. In his argument, rights should be considered as trumps over utility. Rights are best understood, in this sense, as in the following description: " if someone has a right to publish pornography, this means that it is for some reason wrong for officials to act in violation of that right, even if they (correctly) believe that the community as a whole would be better off if they did."[18] In this description, utility must not be the only important ideal, and it must yield to a right of moral independence, for the purpose of protecting persons.

Suppose there is a utilitarian community, the goal of political decisions is to fulfil as many of people' s preferences for their own lives as possible (the principle of utility). It might be supposed that there will always be the possibility of justifying an infringement of rights by calculating utility, or giving less weight to some persons than to others, or discounting some preferences because these are ' ignoble' , and rejecting their claims. Utilitarian theorists may reply that this is the corrupt version of utilitarianism. A sound utilitarianism, as utilitarian theorists insist, should " claim that people are treated as equals when the preferences of each, weighted only for intensity, are balanced in the same scales, with no distinctions for persons or merit."[19] But if this

---

[17] D. Lyons, *op. cit.*, p115.
[18] R. Dworkin, ' Rights as Trumps' , in J. Waldron (ed.) *Theories of Rights* (Oxford: Oxford University Press, 1984), p153.
[19] R. Dworkin, *op. cit.*, p154.

community accepts a false political preference theory, like the Nazi, whose set of preferences includes that some people have more of their preferences satisfied or some people have less or none, the utilitarian cannot defeat rather than fulfil the false theory without facing contradiction. The utilitarian cannot " accept at once a duty to defeat the false theory_ and a duty to strive to fulfil the political preferences of those who passionately accept that false theory, as energetically as it strives for any other preferences." [20] Therefore, Dworkin argues, " one very practical way to achieve this restriction is provided by the idea of rights as trumps over unrestricted utilitarianism" [21], and the right of moral independence is part of the same collection of rights, and as a trump over a utilitarian justification of giving some people less or some people more in a society with a false political preference theory.

According to these two critics, we find that the utilitarian theorist has to face two major difficulties accommodating moral rights in terms of utility, that is, the difficulty of building an effective threshold for rights and the difficulty of preventing a political preference theory accommodating the violation of our rights. However, utilitarian theorists still try to establish a normative theory about rights. The directly utilitarian account of rights, such as Bentham' s argument, would hold that rights are to be evaluated solely in terms of social interests or welfare. The utilitarian calculation of consequences is capable of conferring rights upon persons in order to maximize utility. But the question arises: can this account of rights surmount the argumentative threshold of person' s rights?[22] As Lyons mentioned in his article, if a person has a right to do something, he is entitled to do it rightfully, and his right provides a threshold against objections, as well as limits to others' interference. If there were a directly utilitarian account of rights, however, persons may not defend their rights if this were at some cost to overall welfare, and others may interfere just because it would promote overall welfare to some degree if they did. If we accept the directly utilitarian account of rights, we have to accept the conclusion that follows from it: we

---

[20] R. Dworkin, *op. cit.* p157. In his article, he also argues that what ensures the utilitarian cannot avoid the contradiction is that utilitarianism does not give weight to the truth of the theory, but just to that fact that many people hold that theory. The distinction between the truth and the fact of the false political preference theory, collapses, because if utilitarianism counts the fact of these preference it has denied what it cannot deny, which is that justice requires it to oppose them.

[21] R. Dworkin, *op. cit.*, p158.

[22] See D. Lyons. *op. cit.*,p 115.

cannot actually have any moral shell for our rights, because the utilitarian argument cannot provide an argumentative threshold of rights. An alternative way forward for utilitarian theorists is to derive the argument from " indirect utilitarianism" . The term " indirect" is used to describe the central feature of this kind of utilitarian argument: such argument appeals to the principle of utility for accommodating rights indirectly. There are two arguments I shall mention in the following paragraphs.

2.2 Indirect Utilitarian Argument of Rights

The argument derived from Mill' s *Utilitarianism* [23] is based upon Mill' s analysis of moral rights and obligations in it. In Mill' s thesis, " when we call anything a person' s right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion." [24] In case of directly accommodating rights and their moral bases in utility, he distinguishes three levels of normative concepts and judgement.[25] The most concrete level concerns the rightness or wrongness, justice or injustice, morality or immorality of particular acts. The second level consists of moral principles, which concern general moral rights and obligations. Judgements of right and wrong conduct at the most concrete level are functions of moral rights and obligations and of nothing else. Since moral rights are assumed to be correlative to obligations, as Mill argues, " duties of perfect obligation are those duties in virtue of which a correlative right resides in some person or persons" [26], and " a right in some person, correlative to the moral obligation" [27], this can be put solely in terms of obligations. The third, topmost level is of normative judgements and concepts concerning the values (the value at work here is human happiness or welfare) that may be invoked to establish moral principles. Therefore, moral principles about general rights and obligations are supposed to have a direct relationship to the principle of utility, but judgements concerning the rightness or wrongness of particular actions have no such relation.

---

[23] J. S. Mill, *Utilitarianism* (1859), in M. Warnock (ed.) (Glasgow: William Collins Sons and Co. Ltd., 1977).

[24] J. S. Mill, ibid., p309.

[25] This account is completely utilitarian. Mill continues: " If the objector goes on to ask, why it out (to have rights)? I can give him no other reason that general utility." (*Utilitarianism*, ch5, p309).

[26] J. S. Mill, *op. cit.*, p305.

[27] J. S. Mill, *op. cit.*, p.305.

The statement can be found in Mill' s analysis of justice, when a law is thought to be unjust," it seems always to be regarded as being so in the same way in which a breach of law is unjust, namely, by infringing somebody' s right; which, as it cannot in this case be a legal right, receives a different appellation, and is called a moral right."[28] And justice" implies something which is not only right to do, or wrong not to do, but which some individual person can claim from us as his moral right. No one has a moral right to our generosity or beneficence, because we are not morally bound to practice those virtues towards any given individual."[29] The rightness or wrongness of an action depends on whether it respects moral rights and obligations, not directly on the basis of direct utilitarian reasoning[30]. Therefore, we may have avoided the possibility that a violation of rights may be justified as morally right on the ground of utilitarianism.

The second indirect utilitarian argument defending rights goes like this: there are two levels in our moral thinking which need to be distinguished. We use principles or criteria at the first level in order to select those guides or establish rules at another level by which to conduct people' s life[31]. The guides selected or rules established will be those whose general acceptance will maximize utility. One of the best examples of this sort of argument is to be found in R. M. Hare' s theory. According to his argument, if the guides selected, at the first level, take the form of principles, then most of our moral thinking at the second level will take the form of trying to decide what it would be right to do, on the basis of these principles. Furthermore, given the principles selected by utilitarianism, what is right is what is in accordance with the principles; and if our principles at the second level confer some rights upon us, then, unless we have a conflict of principles or are confronted with a situation which our principles cannot readily deal with, an act is wrong if it infringes one of these rights. In this way,

---

[28] J. S. Mill, *op. cit.*, p299.

[29] J. S. Mill, *op. cit.*, p305.

[30] See D. Lyons, *op. cit.*, pp134-135.

[31] The two-level argument in utilitarian theories may be found in R. M. Hare' s *Moral Thinking* (Oxford: Oxford University Press, 1982) and J. Rawls' s' Two Conceptions of Rules' , in P. Foot (ed.) *Theories of Ethics* (Oxford: Oxford University Press, 1967). In Hare' s theory, he distinguishes two levels: critical level and intuitive level. In Rawls' thinking, he shows the importance of the distinction between justifying a practice and justifying a particular action falling under it.

indirect utilitarianism founds moral rights in utility[32].

Now we can see that these two arguments are concerned with the evaluation of law and social institutions. We may apply the principle of utility to the rules and institutions at first, not to the justification of consequences of actions or decisions in particular cases. The justification of rules and institutions are supposed to have a direct relationship to the principle of utility. Rules and institutions are morally justifiable only if they are designed to serve the general welfare, and are capable of satisfying this purpose.[33] If the rules and institutions are justified in terms of utility, then most of our actions and decisions in particular cases will try to conform to what it would be' right' to do, on the basis of the rules requirements. Moreover, given the rules justified by utilitarianism, what is right is that action in accordance with the rules; and if our rules and institutions confer some rights upon us, then, unless we have a conflict of rules or are confronted with a situation which our principles cannot readily deal with, an act is wrong if it infringes our rights.[34]

One example can be found in Rawls' thesis, especially in his" *Two concepts of Rules*" . In Rawls' approach, a utilitarian would accept institutions that are justified on utilitarian grounds. Institutions are justified if they promote human welfare. Social rules and institutions that are supported by the utilitarian principles will require decisions in particular cases, that is, the practice conception of rules. Therefore, institutions ought to be designed so that people or officials as well as private decisions will by and large promote such a value to the extent that this can be contrived. Yet the whole system would not allow any person or any official in such a system to have power to violate any person' s interests whenever it is thought to promote social welfare. " The reason is that, on the practice conception of rules, rules are not generalizations from the decisions of individuals applying the utilitarian principle directly and independently to recurrent particular cases." Rules define a practice and are themselves the subject of the utilitarian principle, and individuals' actions and

---

[32] See R. G. Frey, *op. cit.* pp.70-71.

[33] See D. Lyons, ibid., pp. 121-123.

[34] See R. G. Frey,' Act-utilitarianism, Consequentialism, and Moral Rights' , in R. G. Frey (ed.), *Utility and Rights* (Oxford: Basil Blackwell, 1985), pp. 70-71.

decisions in particular cases are justified under it.[35]

The same argument now is able to be used to account for rights in utilitarianism. The improved criterion is not the greatest benefit of society simply, but the greatest benefit of society subject to the constraint that no one's rights may be violated. An indirect utilitarian theorist can say that certain rights would be conferred by legal institutions that are justified by his basic normative principles. Institutions designed to serve the general welfare are capable of conferring the proper range of freedom and impose the appropriate restrictions upon others' behavior that correspond to the range of freedom, and human welfare is to be promoted by accommodating rights and obligations under justified rules, therefore, institutions conforming to utilitarian requirements would incorporate certain rights. When such a system is justified, it is to be followed. Because of these reasons, once person's rights are conferred by institutions, and institutions are thought to be logically prior to particular cases, then any one or any official in the system could not justifiably have power to violate person's rights whenever it is thought for the benefit of social welfare. Such power could not be justified under the rules on utilitarian ground.

Since any theory of rights should be capable of accommodating rights in its argument, and provides an argumentative threshold of rights, the best way of evaluating Rawls' utilitarian theory of rights is to use its argument in accounting for some rights that are taken seriously in our mind. One of the best candidates is the right to private property. It may not be the most important right we have, but we can hardly imagine a society in which no one will need and be entitled to have some goods for their own interests in their lives. If there are conflicts among these individuals in pursuit of their interests, then people naturally need some rules that are concerned " to lay down the proper duties and power of owners", and find " the causes and consequences of the distribution of titles of ownership."[36] Therefore, we may use Rawls' version of institutional practical utilitarian to account for the right to private property, and see where it leads us.

---

[35] J. Rawls, *op. cit.*, pp. 162-163.

[36] A. Ryan, ' Utility and Ownership' , in R. G. Frey (ed.), *Utility and Rights* (Oxford: Basil Blackwell, 1985), p175.

A possible approach may be like this: utilitarian grounds of rights to private property, claim that such rights may be justified or not for instrumental reasons, that is to say, if we defend rights to something, we may find that the best way is to embody these rights in law by defining such rights and the correlative duties (but these instrumental reasons do not themselves necessarily involve reference to rights). The justification of our rights to property, however, is to show how institutions which define and enforce such rights and the correlative duties can best promote the general welfare. If so, then the conclusion follows: institutions designed to serve the general welfare would and should incorporate the right to property.

Suppose that people live in a pre-political situation, and they have the greatest possible liberty to gain and improve their own interests in their lives. But there will also be the greatest possibility of conflicts among these individuals, who violated one another's interests for their own private convenience. Therefore, rules and institutions designed "to lay down the proper duties and power of owners" will be accepted happily by any rational, self-interested person in that state. For this reason, we need to set up rules and institutions which grant that all people have equal *right*, under rules and institutions, to own property as they may, and remove the liberty to interfere with one another in various areas, in order to allow us to live more securely and more contentedly. In this course, there is no need to apply to any *natural* or *essential* right to property. The whole point of establishing and conferring such a right under rules and institutions is for the sake of maximizing the general welfare and minimizing the possibility of chaos in society. A society which is concerned with the proper range of people's rights of ownership and imposes the appropriate restrictions upon others' behavior that correspond to the range of freedom will be better off than not. Therefore, if the institutions are justified on utilitarian grounds, the right to property and the correlative duty will be conferred under it on the same grounds.

There is one more thing, I think, that needs to be said about this account of the right to property on utilitarian grounds. In Rawls' approach, one does not have to argue that the institutions establish the right to property because when people exercise their property rights, it will be most likely to maximize human welfare, nor to think that a person is fully justified in exercising his right to property only if his exercise can promote the maximizing of human welfare. People are not required to worry generally

about the utility of their actions. Rawls seeks to accommodate rights and duties under institutions that establish rules and institutions can be defended on utilitarian grounds, that is, as useful, well-ordered social institutions which benefit human beings. Rawls' approach is " to apply the utilitarian principle to the institution which is to authorize particular actions", and, therefore, to set up rules and institutions that people will be happy to accept, because their lives will be better off if they live under it.

2.3 Punishment, Right and Utilitarianism

As I mentioned before, it seems to be necessary to know whether the utilitarian has the capability of accommodating human rights or not, then we may discuss whether this theory can be used to argue for a way out of the paradox of punishment in regard to human rights. According to our analysis of Rawls' indirect-utilitarian approach, it seems that human rights can be accounted in the terms of utilitarianism, and punishment as well. Now the criticism of his argument is that the punishment of innocent persons will be allowed in a utilitarian society. The measure of criminality might be " the damage done to the nation", or " the seriousness of crimes more by the rank of the injured party than by their significance for the public good"[37]. According to the principle of utility, the measurement of criminality must be based upon the welfare that is damaged by the criminal. However, M. M. Mackenzie has given us a good example of the criticism of the measuring. According to their suspicion, the principle of utility does not legislate against the following possibilities[38]:

1. A has committed no crime at all. Nevertheless, it is thought that his punishment may have a deterrent effect, perhaps because others think that he has committed the crime. On strict utilitarian lines, therefore, the general good is to be served by his being punished; so he is punished.
2. B is a recidivist who has committed crimes, but not this one. Nevertheless, perhaps for preventive reasons, it is thought useful to punish B for this crime; so he is punished.
3. C actually committed this crime. He is only partly responsible for it because he

[37] Beccaria, *On Crimes and Punishments and Other Writings*, R. Bellamy (ed.) (Cambridge: Cambridge University Press, 1995), p22.

was coerced. Yet punishment may still deter him from repeating the offence (next time, for example, he may offer greater resistance to coercion); therefore he is responsible in the instrumental sense. Again, utility demand that he be punished; so he is punished.

In these tree cases, A, B and C are all punished improperly and unjustly. But, from Rawls' point of view, these cases might be avoided. In Rawls' reply to the objection that utilitarianism allows the punishment of innocent persons, for example, it is mentioned that what people doubt is that " whether the utilitarian, in justifying punishment, hasn' t used arguments which commit him to accepting the infliction of suffering on innocent persons if it is for the good of society." [39] Moreover, it is the question of whether " the utilitarian is committed in principle to accepting many practices which he, as a morally sensitive person, wouldn' t want to accept." [40] (This is the very doubt of the utilitarian account of rights, too.) To stop such a doubt, Rawls states utilitarianism in a way which accounts for the distinction between the justification of an institution and the justification of a particular action falling under it. The institutions are constituted by the general system of rules, and rules are justified in terms of the principle of utility. If the justified rules to establish the rule of law, which provides the definition of violation and punishment, then institutions of punishment are established according to the due process of law. Once one sees that the hazard in setting up institutions of punishment are very great, he will ask himself whether or not it is likely that having this institution would be for the benefit of society in the long run. " One must not content oneself with the vague thought that, when it' s a question of this case, it would be a good thing if somebody did something even if an innocent person were to suffer." [41] Therefore, " if one is careful to apply the utilitarian principle to the institution which is to authorize particular actions, then there is *less* danger of its justifying too much" [42] and the official in this system who understands the utilitarian justification of the rules that he is charged with administering would persevere in the rules.

---

[38] M. M. Mackenzie, *Plato on punishment* (California: University of California Press, 1981), p. 43.
[39] J. Rawls, *op. cit.*, pp. 149-150.
[40] J. Rawls, *op. cit.*, p 150.
[41] J. Rawls, *op. cit.*, p 151.
[42] J. Rawls, *op. cit.*, pp. 152-153.

As I mentioned before, in Rawls' approach, a utilitarian would accept institutions that are justified on utilitarian grounds. Institutions are justified if they promote human welfare. Social rules and institutions that are supported by the utilitarian principles will require decisions in particular cases, that is, the practice conception of rules. Therefore, institutions of punishment also ought to be designed so that people or officials as well as private decisions will by and large promote such a value to the extent that this can be contrived. Therefore, the whole legal system would not allow any person or any official in such a system to have a power to violate an innocent person' s rights whenever it is thought to promote the benefit of social welfare. the basic principle of rules is still the same: " the practice conception of rules, rules are not generalizations from the decisions of individuals applying the utilitarian principle directly and independently to recurrent particular cases."[43] Rules define a practice of punishment, and they are liable to the utilitarian principle, and actions and decisions of punitive institutions in particular cases of punishment are justified under it.[44] Therefore, punitive institutions and laws which are established on utilitarian grounds, in theory, will avoid the problem of punishing innocents.

2.4 Criticism of the Utilitarian Argument

According to the institutional utilitarianism argument, as we mentioned, there is no doubt that rights could and should be incorporated in utilitarian institutions. The society which is concerned with the proper range of people' s rights and willing to impose the appropriate restrictions upon others' behavior will have the greatest possibility of maximizing the general welfare. Therefore, rules and institutions justified on utilitarian grounds are capable of conferring certain rights. Critics of utilitarianism do not claim that utilitarian rules and institutions cannot accommodate any rights in their system. But they may claim that such institutions may occasionally violate or ignore such rights in order to pursue utility. One of the traditional views of these critics may be found in the issue of the justification of punishment, especially of the punishment of innocents. The critics may ask: might it be true that utilitarian

---

[43] J. Rawls, *op. cit*, p163.

[44] J. Rawls, *op. cit.*, pp. 162-163.

institutions recommend the punishment of innocent people (who have not done anything against the rules or the law) on the grounds of utility? Is it possible that the utilitarian argument may justify too much, that is, it may justify the conditional violation of innocent persons' rights for the sake of general welfare?

The institutional utilitarian theorist has worked hard to deny this doubt, as we mentioned before, and a good example is Rawls' reply. In his reply to the objection that utilitarianism allows the punishment of innocent persons, Rawls states utilitarianism in a way which accounts for the distinction between the justification of an institution and the justification of a particular action falling under it. These distinctions in levels of justification, as A. H. Goldman argues in his ' The Paradox of Punishment' , are " matters of degree, since when justifying an institution, one must consider acts within it; and when justifying legislative decisions, one must consider their applications in the judicial system." [45] According to Rawls' reply, we may save the innocent people from being punished by applying the utilitarian principle to the institution directly. The institutions of punishment, as we can imagine, would and should confer that people have certain legal rights in the trial process, such as the right to silence, rights of cross-examination, so that the innocent people may defend themselves from being punished. If we also establish the safeguards against conviction under trial procedures as well, such as the requirement of evidence needed for conviction, provision for legal representation, then the possibility of innocent people being convicted may be reduced in particular cases under the legal system. Utilitarian institutions, therefore, will not recommend the punishment of innocent people under it on the grounds of utility, and, on the contrary, they will defend innocent people from being punished for the sake of general welfare.

But critics of the institutional utilitarian still may say that even under Rawls' system which conferred certain rights under the process of law on the innocent people, it still may be possible for the institutions to consider the utilitarian suggestion that, " perhaps even primarily in order to save the innocent lives of victims of crime, we should simply reduce the safeguards for conviction under normal trial procedures (so

---

[45] A. H. Goldman, ' The Paradox of Punishment' , in A. J. Simmons, M. Cohen, J. Cohen, and C. R. Beitz(ed.) *Punishment* (New Jersey: Princeton University Press, 1995), p30.

that fewer guilty criminals will get away)."[46] In fact, as S. Smilansky mentioned, the current Western procedures of law face such a strong requirement. The argument may work like this[47]:

1. Assuming the utility of punishment, the general welfare of the whole society will be maximized if fewer criminals could escape from conviction and punishment in the legal system.
2. If we can insure that fewer criminals could escape from punishment, this is not to say that any official or authority in the system may have power to violate persons' rights whenever it is thought for the benefit of social welfare in particular cases.
3. It is obvious that fewer criminals will go unpunished if we relax the rules of punishment by simply reducing the safeguards against conviction under normal trial procedures.
4. There is no need to diminish the general respect for the rules and institutions of punishment, and it is possible for most innocent people that they would still not be at risk of being punished.
5. Therefore, though more innocent people are likely to be punished under such a legal system, the damage is negligible if compared to people' s chance of being harmed (including the punished innocents) by the unpunished criminals, and compared with the damage to the whole society if more guilty persons may go unpunished.

Now we can see that this kind of critic of institutional utilitarian, as S. Smilansky mentioned, may say that even under the utilitarian institutions which conferred certain rights under the process of law on the innocent people, it still may be possible for the institutions to consider the utilitarian suggestion that," perhaps even primarily in order to save the innocent lives of victims of crime, we should simply reduce the safeguards for conviction under normal trial procedures (so that fewer guilty criminals will get away)."[48] Assuming the utility of punishment, the general welfare of the whole society will be maximized if fewer criminals could escape from conviction and punishment in

---

[46] S. Smilansky, ' Utilitarianism and The ' Punishment' of The Innocent: The General Problem' , the *Analysis* (vol. 50, 1990), p258.
[47] S. Smilansky, ibid., p259.
[48] S. Smilansky, ibid., p258.

the legal system and that is not to say that any official or authority in the system may have power to violate persons' rights whenever it is thought for the benefit of social welfare in particular cases. All we have to do is to relax the rules of punishment by simply reducing the safeguards for conviction under normal trial procedures, then fewer criminals will go unpunished. Most innocent people would not be at the risk of being punished. It means, however, more innocent people are likely to be punished under such a legal system. But this damage is negligible if in comparison with the overall utility gains.

This is a dangerous argument for the institutional utilitarian, for utilitarianism of this kind in general depends on applying the utilitarian principle to the institution, and this argument shows that a legal institution, which conditionally allows the punishment of innocent persons, may not be against the principle of utility. Furthermore, in terms of a utilitarian argument, there is nothing inherently *wrong* in the punishment of any innocent people. According to his analysis, a legal institution which allows the innocent person to be punished could still confer certain rights on them under legal procedures. It is not to say that such a system cannot give any argumentative threshold of people' s rights, nor to claim that innocent people who walk on the street may be framed for no reason but utility. What it emphasizes is that, even when one is careful to apply the utilitarian principle to the institution which is to authorize particular actions, there is a *danger* of its justifying too much. This will happen when we seek to reduce, not to withdraw, the threshold of conviction and the safeguards of innocent persons' rights in the judicial system, so that more criminals will be punished. If it will be beneficial in utilitarian terms, then it may turn out to be justifiable in utilitarian terms. If so, that is what ought to be done. This is the conclusion that the institutional utilitarian must draw, thought they may not want to do so.

The point, as J. Wolff argues, " is not that it is better to punish the innocent; surely it would be better still on the utilitarian calculus to fine and punish the guilty. But when everything is taken into account it seems quite likely that some miscarriages of justice are defensible in utilitarian terms."[49] How can the institutional utilitarian avoid such a

[49] J. Wolff, *An Introduction to political philosophy* (Oxford: Oxford University Press, 1996), p58.

problem? There is a real case, however, that shows the damage of punishing innocents to the whole institutions and rules is not *negligible* in utilitarian terms, as S. Smilansky claims above. That is the case of the " Birmingham Six' in the U. K, who " had been found guilty of murder, but claimed that their confessions had been beaten out of them by police_ that the confessions were involuntary and were improperly admitted in evidence and that the convictions were erroneous." [50] Even so, they should still remain in jail for utilitarian reasons, according to Lord Denning' s comments. Unfortunately, this error of judgement has diminished the general respect for the rules and institutions of punishment, and, worse, more people, guilty or not, may claim that their confessions are" involuntary and are improperly admitted in evidence' . Since the general respect and trust for the legal institutions of punishment have been diminished, more guilty persons who make the same claim may be believed to be innocent by juries and the public, so they are more likely to go unpunished during the trail procedures. Therefore, general insecurity will be the consequence of the punishment of innocents if the public realize what is going on. The consequences of Smilansky' s judicial system will go against the principle of utility, the institutional utilitarian may reply, and, therefore, " one must describe more carefully what the *institution* is which his example suggests, and then ask oneself whether or not it is likely that having this institution would be for the benefit of society in the long run." [51]

To sum up, the reason why a utilitarian argument concerning punishment will cause us to doubt the legitimacy of victimization, that is, let innocents be punished in the legal system on the ground of utility, is this: if the existence of punishment in our society is simply in order to maximize welfare, then " there is nothing to prevent serious cases of victimization of the innocent or exploitation of the guilty." [52] Though the imposition of suffering on a guilty person (or who is believed to be guilty) will satisfy our feelings of justice, and, by witnessing the suffering, some potential criminals might be deterred, the punishment of innocents or exploitation of the guilty (if we knew) would still go against our other feelings of justice, and definitely cause the violation of rights. No doubt such kind of punishment is morally wrong, and a punitive institution which allowed victimization and exploitation for reasons of

[50] J. Wolff, ibid., p. 58.
[51] J. Rawls, *op. cit.*, p151.

welfare will damage the whole society in the long run. The utilitarian agrees that there might be no punitive institution that can exclude all possibility of punishment of innocents, and once it happens, it must be harmful overall (that will be disutility). But if there are some limitations of the use of punishment, the possibility may be reduced, even will not take place any more. The utilitarian insists such limitations must be based upon the priority of utility, the right usage of the principle of utility, and the right calculation of utility in the long run. Therefore, utility forbids the punishment of innocents or, at least, utilitarian punitive institutions will not necessarily produce this result.

However, though the punishment of innocents, after we calculate its disutility, might be forbidden by the principle of utility, the criticism still suggest that there seems to be no good reason why utilitarian institutions will *necessarily* produce such a result. The institutions which will protect innocents from punishment and guilty persons from exploitation, , such protection might not maximize the general welfare. There is another problem that needs to be solved in particular cases in discussing the paradox of punishment, that is, the problem of justifying the punishment of a guilty person without facing the criticism that rights are violated. Now that we knew this argument is capable of justifying moral and legal rights, and is also able to justify practices of punishment with a threshold against the possibility of punishing the innocent, we can still ask whether utilitarian argument can justify the punishment of wrongdoers without violating their rights? I think the answer could be " yes" . In a utilitarian society, we may imagine, that the institutions which protect people' s rights will do so effectively by establishing rules which define people' s correlative duties to respect each other' s rights, and justify the punishment to rights-offenders. According to the principle of utility, the institutions will improve the welfare in the long run if it does so. It is also reasonable to think that the justification of punishment must be based upon the offender' s legal liability to be punished, and the way to justify such liabilities can be prescribed in the definition of rights and duties in rules. Briefly speaking, definitions of rights in terms of rules are always complex. They should not only describe the rights-holder' s liberty of doing certain actions, but also prescribe the correlative duties of others to respect such rights, and all right-holders' legal liability

---

[52] See M. M. Mackenzie, *op. cit.*, p43.

to punishment if they fails to respect the same rights of other right-holders. Rights may not be absolute in law, but punishment must be justified by rules of rights. Therefore, take my right to private property for example: the right to private property includes another' s duty to respect it, and the specific provision that those guilty of right-offending be punished for it. Suppose you stole my car, then, and were caught by the police, you are then fined by punitive institutions. The punishment to you does not violate your right to private property, because the rule of private property does not say that your property may *not* be appropriated should you be found guilty of thief. Furthermore, my right to private property does not say that the punitive institutions should not fine me if I commit the same crime as yours to others. On the contrary, the rules of our right to private property prescribe that we are qualified to our rights by our liability to be punished if we break the rules. Hence, we may say that punishment is justified within the system of rules that constitute rights. The paradox of punishment will be dissolved in the detail of the rules.

Now, according to this argument, we may justify punishment with respect to rights, and the argument is guided by the principle of utility. But there is an alternative way to establish the wrongdoer' s liability to punishment, that is, the consent to punishment of the wrongdoer. If we may find out that the liability to be punished is consented to by the offender himself, then that there is an alternative the principle of utility, as a means of dissolving paradox of punishment. So let us turn to look at another famous theory of rights, that is, the consent theory, and see how it argues for the justification of punishment. Maybe there will be another approach to establishing people' s liability to punishment, which does not lead back to some utilitarian formula as its normative outcome.

SECTION 3

CONSENT THEORY

As many theorists will agree, traditionally speaking, consent theory is not something new in history, and yet it has provided us with a more intuitively appealing account of human rights and political obligation than any other historical theories in modern political theory. Since the ancient Greek philosophers such as Plato, consent argument has become an artificial but somehow intuitively convincing explanation for the structure of human society and its rules. And" there is no denying the attractiveness of the doctrine of the doctrine of personal consent. _ It has greatly influenced the political institutions of many modern states and has been a prime factor in the direction political theory has taken since 1600."[53] One form of this sort of argument is the famous contract theory. Briefly speaking, as Hume referred to the ' origin contract',[54] the contract argument tries to establish " the origin of government on a consensual act."[55] The historical origins of this theory are established by these classic contractarians, Hobbes, Locke, and Rousseau. However, I do not intend to analyze or trace the origins of the consent theory and contract argument here. But rather I intend to examine the arguments' account of human rights and the justification of punishment within that theory. Since it is Locke' s thinking that, for the defense of the natural rights of men, human beings established nonnatural states and social orders, and, therefore, punishment, exists to serve the same function in our society, we can also ask whether it may be justified on the same ground as well. I suggest that we begin our discussion of punishment in consent theory with Locke' s argument, that is, the forfeiture argument.

---

[53] A. J. Simmons, *Moral Principle and Political obligation,* (Princeton: Princeton University Press, 1979), p57.

[54] D. Hume,' Original contract' in S. Copley and A. Edgar (ed.) *David Hume Selected Essays*, (Oxford: Oxford University Press, 1993). For the function of the contract argument in political theory, Hume writes:" as no party, in the present age, can well support itself without a philosophical or speculative system of principles annexed to its political or practical one, we accordingly find, that each of the factions into which this nation is divided has reared up a fabric of the former kind, in order to protect and cover that scheme of actions which it pursues." p.274.

[55] See D. Castiglione,' History, Reason and Experience: Hume' s Arguments against Contract Theories' in D. Boucher and P. Kelly (ed.) *The Social Contract from Hobbes to Rawls*, (London: Routledge Press, 1994), p. 97. But he also mentioned that there are two different pacts of contract argument:" the main conceptual distinction between the establishment of social order and that of government." p. 96.

3.1 Forfeiture Argument

According to Locke's natural rights theory, human beings claim certain *natural* rights, that is, they have them *qua* human beings, and these rights are not *established* or *conferred* by man-made institutions or rules. People as rights-holders are bound by certain moral laws, that is, the law of nature, which define the natural rights of human beings and protect these rights as well. The claim rights and moral powers are included in the conception of natural rights, especially those relative to the right to private property. Locke is clear about the duty correlative to our moral powers and claim rights, and, from his point of view, natural law has also defined our duties to respect each other's rights as well. Therefore, if we failed to fulfill our duties to respect others' rights, these acts will be considered as "violations". According to the natural law, if any agent violate some another's right, "the law of nature be observed, which willeth the peace and preservation of all mankind, the execution of the law of nature is in that state, put into every mans hands, whereby every one has a right to punish the transgressor of the law"[56]. Another reason for punishment is to deter others from doing the like crime, and "secure men from the attempt of a criminal". In his theory, therefore, people can rightfully punish any wrongdoer, and every other agent can legitimately punish him without facing the problem of rights-violations. Beside, the consequence of such actions will "preserve all mankind". However, punishment can only be justified upon this ground, and the right to punish must be exercised, that is, in regard to "the necessity of defending the repository of the public well-being from the usurpations of individuals", as Beccaria says; otherwise "every act of authority between one man and another which is not derived from absolute necessity is tyrannous", and "everything more than that is no longer justice, but an abuse"[57].

However, the main problem of the forfeiture argument that Locke leaves to us is that: we cannot resolve the question of how the criminal forfeits his rights by wrongdoing, and, therefore, it will be impossible for us to decide how far the criminal gives up his rights. If we cannot solve this main difficulty in the theory, we can hardly imagine, as a result, that in a Lockean society people have right to punish any wrongdoer, or that

---

[56] J. Locke, in P. Laslett (ed.) *The Second Treatise of Government* (Cambridge: Cambridge University Press, 1992), II, 7.

the punitive system has a measure for the proportion between crimes and punishment. For this reason, A. H. Goldman attempts to solve this problem in his' The Paradox of Punishment' . The paradox of punishment he points out is that " a penal institution somewhat similar to that in use in our society seems from a moral point of view to be both required and unjustified"[58], and this dilemma arises from two ' intuitively plausible' theses: " one associated with a retributivist point of view and another associated with a utilitarian justification of the institution of punishment."[59] These two theses relate to two different aspects of punishment in our society: punishment must be deserved and beneficial. The criminal must deserve his punishment, and the whole society will be benefited by the existence of the penal institution, as a deterrent for further crime. According to his analysis, the retributivist point of view is concerned with the amount of punishment in particular cases, that is, the justice done to the wrongdoer by the imposition of punishment, and, on the contrary, the utilitarian justification of the penal institution is interested in that " the community benefits from a prisoner' s role as an example for others"[60]. For Goldman, if we try to convince a wrongdoer that he or she is not being treated unjustly in being punished, then the retributivist point of view seems to be more plausible than the institutional utilitarian thesis, and this is because " persons normally have rights not to be severely imposed upon in order to benefit others. If we are justifiably to ignore these rights, it could only be when they have been forfeited or alienated."[61] Therefore, " since having rights generally entails having duties to honor the same rights of others, it is plausible that when these duties are not fulfilled, the rights cease to exist."[62]

Locke uses a similar theory to justify the rightness of punishment. However, is not a consequentialist argument. This argument is derived from the changing of moral statuses. In this sense, everyone can rightfully punish any invader, because once an agent breaks the law of nature, this person' s moral standing is changed, and the moral boundaries, which shield his natural rights, become lower or fall away immediately.

---

[57] Beccaria, *op. cit.*, pp. 10-11.
[58] A. H. Goldman, *op. cit.*, p30.
[59] A. H. Goldman, ibid., p30.
[60] A. H. Goldman, ibid., p31.
[61] A. H. Goldman, ibid., p31.
[62] A. H. Goldman, ibid., p31.

Every other agent can legitimately treat this person as " a wild noxious beast", as a consequence of the wrongdoing has been to put the wrongdoer into a position of liability to punishment. Because of the changing of the wrongdoer's moral status, that is, the *forfeiture* of his rights, the violator is liable to punishment, and every other agent can legitimately punish him without facing the problem of rights-violations. This forfeiture theory seems to give us an idea that the justification of punishment can partly rely on the forfeiture of any transgressor's human rights. At first sight, this seems quite acceptable to our intuitions' judgement. It seems to explain the reason why the punishment of any law-breaker cannot be taken as rights-violations. However, the argument of forfeiture in Locke's and Goldman's theses does not tell us how the criminal forfeits his human rights, which rights he gives up, and why the violation of others' rights causes the violator to lose his own. The connection between wrongdoing and forfeiture is still a mystery.

Suppose that one day I broke into my neighbor's house and stole his money. There is no doubt that my neighbor's right of private property was violated by me, and no one would object to my liability to punishment after I have committed my crime. Now, the punitive institutions decided to send me to prison for five years and fine me $5000. If I dare to complain of injustice done to me by the imposition of punishment, according to the forfeiture argument, the answer to my objection might be that, by violating the rights of others in my offence, I have lost my moral rights that I formerly held, that is to say, the moral boundaries, which shield my natural rights, become lower or fall away immediately. Therefore, according to the change in my moral status, every other agent can legitimately punish me without facing the problem of rights-violations.

But from here the question arises. Suppose that I still insist that the imposition of punishment is unjust because I raise doubts about how my moral status has changed, that is, how my rights are *forfeited*, and, furthermore, which right I am supposed give up. The first question will be connected to the problem of the 'first person' and 'the third party' in the forfeiture theory. In Locke's argument, unfortunately, it is not clear how the offender forfeits his rights; it seems *naturally* to have happened after the offender violated another's rights. But it is hard to believe that I, as an offender, will be convinced by this reason. Generally speaking, to say that someone's rights are forfeit means that either this person agrees that, under some conditions, if he didn't

fulfill certain duties, then some of his rights cease to exist, or, simply, a third party asserts that this person's rights are deprived. In some cases, forfeiture these two respects may happen at the same time. Suppose that I am playing a game with my friends, and any one who wants to join this game must adopt certain rules. These rules prescribe that under some conditions, if the player fails to fulfill the rules, he or she will forfeit some of his or her rights in this game. Every player knows these rules in advance, and any one who decides to join the game will be considered to have accepted the rules of "forfeiture". Therefore, if any one fails in this game, we may say his rights in this game are forfeited on both the first person account (because the player agrees with these rules of forfeiture in this game) and on the third party account (the other players apply the rules).

In the case of punishment, however, the problem is different. In the view of "the first person", if I try to avoid my liability to punishment, all I have to do is disavow, and that is enough to protest against the claim that I am liable to be punished because I *agree* to give up my rights if I fail to respect others' rights. It is not like a game in that I knew the rules in advance, and my situation can be taken as an agreement to the forfeiture of my rights or my liability to punishment. It is hard to prove that I have agreed to any law or rule of forfeiture *before* I become a member of my society. If I say I did not forfeit my rights, then no one can say that I did. In the statement of a "third party", the problem is more obvious: it is lack of grounds. My rights, in this sense, are forfeited because "they (the punitive institution, the law, or, to sum up, the third party) say so". After I have violated my neighbor's rights, I know that, according to the law, I am liable to punishment, and if I question people how they can punish me without facing the problem of rights-violations, they might say that because I have lost my moral rights that I formerly held by violating the rights of others in my offence, that is, the forfeiture. And if I question how my rights are forfeited, the answer will be like this: the law, the punitive institution, that is, the third party has decided that every offender will lose his or her rights by violating other's rights. This answer is no different than saying that I am liable to be punished by the third party because the third party asserts that I am liable to be punished. The fault of this argument is "begging the question". Therefore, neither of these two arguments seems to be able to convince me that my liability to punishment is justified on the ground of forfeiture.

To resolve this problem of the forfeiture argument, there is another solution which tries to establish an argument for the offender' s agreement to his or her liability to punishment. The resolution focuses our attention on the problem of' the first person' in forfeiture argument. If we can prove that the offender does voluntarily consent to his liability to punishment after he violated another' s rights, then the problem is solved, and this kind of resolution will lead us to another argument concerning human rights: the consent theory.

3.2 Consent Theory

Now we are going to examine another argument for the justification of punishment in rights theories. It is the argument of consent theory. As a theory of rights, basically, consent theory is concerned with the legitimization of political obligation. Consent theorists try hard to establish a foundation for political obligation which is based upon the voluntary agreement of citizens. Punishment, which is also considered as a burden to people, though it cannot be taken as a branch of political obligation, can perhaps be explained on the same ground. The reason is like this: punishment is a manmade burden on the citizen for the protection of the whole society. If we can establish its foundation upon the voluntary agreement of citizens, then the problem of its justification is solved. Citizens consent to their liability to punishment voluntarily for their own benefits. Therefore, the argument for the justification of punishment can be similar to the argument for the legitimization of political authority; therefore, it is plausible to examine the consent theory' s argument and see if its form can be used for the justification of punishment.

The consent theory is based on the belief that the legitimization of any political authority and obligations correlative to it must be justified by its citizens' voluntary agreement, that is, the political authority and obligation of its people are founded upon their individual performance of a voluntary act. In this theory, every citizen is considered as a rational agent, who can make decisions for themselves, understand their actions and take responsibility for the consequences. Therefore, they can freely decide, according to their wills and benefits, to establish political institutions and

rules among them by promises, contracts, or express or tacit consent. According to the theory, rules and institutions arise from people' s consent. Man is not bound to a particular political institution until he voluntarily chooses to be. I shall be considering whether an argument of similar structure could be used to defend punishment. In respect of" consent" , it is said that there are varieties of consent theory, and there are four features of them:[63]

1. Human beings have certain rights qua their humanity, and these rights are not the product of other voluntary acts of the right-holder, nor do they arise from any consent, contract or promises. They are our rights to act and choose within the limits of moral law without interference from others. According to this feature, the consent theory contends that" our political bonds must be freely assumed."[64]

2. "Man gives up his natural freedom (and is bound by obligations) only by voluntarily giving a" clear sign" that he desires to do so."[65] That is to say, though there are many kinds of consent, express or tacit, that can be used to legitimate the political authority and obligations, all of them " must be deliberate undertakings, sufficient to indicate clearly that the actor has freely given up his natural freedom with respect to the specified actions and parties."[66] Therefore, man does not really lose any freedom of action to begin with, because he" makes the government' s acts his own."[67]

3. In consent theory, no one may decide what is in the interest of another agent, and it claims that no citizen is" to be automatically bound at birth to any state." [68]It is via people' s voluntarily acts of consent that the political authority and obligation are legitimated. Therefore," the method of consent protects the citizen from injury by the state."[69]

---

[63] A. J. Simmons, *Moral Principle and Political obligation*, p62-70.
[64] A. J. Simmons, ibid. p64.
[65] A. J. Simmons, ibid. p64.
[66] A. J. Simmons, ibid. p65.
[67] A. J. Simmons, ibid. p65.
[68] A. J. Simmons, ibid. p68.
[69] A. J. Simmons, ibid. p.65.

4. Since the authority of any political institutions arises from the consent of its citizens, and they consent to it willingly for their own benefits, and none of them can be free to decide what is good for any other agents, the method of consent "protects the individual from becoming bound to any government which he finds unpalatable" [70]. That is also to say, "The state is an instrument for serving the interests of its citizens." [71]

According to these four features, on the one hand, any political authority and correlative obligations are legitimated only if it is established via people' s consent, and, on the other, the theory also tell us that people' s obedience to rules and institutions is justified if it arises as the consequence of their consent. No one can reasonably blame others for things which are done to us with our agreement; therefore, we cannot complain of our liability to political obligation, because that is confirmed by our consent. As Simmons mentions, "Consent theory respects our belief that the course a man' s life takes should be determined, as much as possible, by his own decisions and actions." [72]

Before we turn to use the same argument for the justification of punishment, there is one interpretation of" voluntarily consent" . According to the consent theory account of political obligation, J. Rawls suggest that" acquiescence in, or even consent to, clearly unjust institutions does not give rise to obligations," [73] and that " obligatory ties presuppose just institutions." [74] This is because any extorted promises are invalid, and "unjust social arrangement are themselves a kind of extortion" ; therefore," consent to them does not bind." This argument sounds plausible to our intuitive judgement, however, as A. J. Simmons argues, an unjust social institution might harm innocents, but it does not follow that one cannot voluntarily consent to it." Supposing only that the unjust institution does not happen to be doing violence to me, I can freely consent

[70] A. J. Simmons, ibid. p69.
[71] A. J. Simmons, ibid. p.68.
[72] A. J. Simmons, ibid. p69.
[73] J. Rawls, *A Theory of Justice*, p343.
[74] J. Rawls, ibid., p112.

to its authority." [75] Hence, an unjust institution or unfair law does not presuppose that it cannot be voluntarily consented to by the citizen, though consenting to it, it might be a wrong decision.

Now we may turn to the justification of punishment. If we clarify the form of the consent theory, then we can see how the same argument can be used for the justification of punishment:

1. Human beings have certain rights qua their humanity, and these rights are not the product of other voluntary acts of the right-holder, nor do they arise from any consent, contract or promises. They are our rights to act and choose within the limits of moral law without interference from others. Since the means which punishment may use against offenders might violate their human rights; the consent theory contends, therefore, that our liability to punishment must be freely assumed.

2. According to the second feature of consent theory, " Man gives up his natural freedom (and is bound by obligations) only by voluntarily giving a " clear sign" that he desires to do so." [76] Hence, no matter what kinds of consent, express or tacit, that can be used to legitimate our liability to punishment and the punitive institutions, all of them must be " deliberate undertakings" by its citizen, including those offenders. It is " sufficient to indicate clearly that the actor has freely given up his natural freedom with respect to the specified actions and parties." [77] Therefore, as we mentioned before, every citizen does not really lose any right or freedom, because he makes his liability to punishment by himself.

3. In consent theory, though no one may decide what is in the interest of another agent, and it claims that no citizen is " to be automatically bound at birth to any state" [78], it is via people's voluntarily acts of consent that obligation and punishment are legitimated. Therefore, the method of consent does not only protect the citizen from injury by the state, but also protects them from the misuse

[75] J. Rawls, ibid., p78.
[76] J. Rawls, ibid. p64.
[77] J. Rawls, ibid. p65.

and abuse of punishment.

4. If the authority of any political obligation, which is considered as a manmade burden on human beings, arises from the consent of its citizens, and they consent to it willingly for their own benefits, and none of them can be free to decide what is good for any other agents, then punishment can arise from the same ground. Now the method of consent, in the case of punishment, can be used to protect the individual from becoming bound to any punitive system which he finds unacceptable. Further more, in this sense, punishment can also be considered as an instrument for serving the interests of every member in our society.

The form of the whole argument of this theory seems to be sound so far, and the conclusion is acceptable to our intuitions. But the question arises: the argument would be true only if the premise is true. If the premise is false, then the theory would collapse. Worse, if there is no evidence to show that we do consent, expressly or tacitly, to our political obligation or liability to punishment, then, on the one hand, we don't have any obligation or liability at all, and on the other, none of our political authorities, institutions, legal system are legitimated (according to the consent argument). That is to say, if we are not forced to live under a non-legitimated government, then we should live in the state of anarchy. Since we can never tell that someone consents or not unless he admits that he did, the political obligation or liability to punishment of any citizen will be invalid if he or she sincerely disavows these. This is the problem that C. S. Nino wants to solve in his consent argument; therefore, let us turn to Nino's argument and see how it works.

3.3 Nino and Consent Theory

In Nino's thinking, the practical meaning of consent is quite controversial, especially "among the jurists"[79]. The concept of "consent" is not a term that only has moral and political meanings, but also finds application in the area of law. Instead of discussing all the details of these debates, he simply gives us some guidelines for what

---

[78] J. Rawls, ibid. p68.

[79] C. S. Nino, "A Consensual Theory of Punishment", in *Philosophy and Public affairs*, 12,1983.

constitutes consent.

In his view, if we claim that someone has consented to the assumption of some duties or obligations, it does not follow that this agent has actually signed or made a statement such as ' I consent to X' . That is just a special kind of consent, express consent, to use Locke' s term, and it is familiar from the detail of specific contracts. The consent can also be shown by someone' s' voluntary act' , that is, " the consent of the individual to some duty or responsibility is shown by the performance of *any* voluntary act with the knowledge that the act has as a necessary consequence the assumption of the duty or responsibility in question" [80]. The word ' knowledge' does not imply that the agent must know the whole consequence of his act, nor does it mean that the agent has to have the precise knowledge of legal rules which might be correlative to his act and its consequences. It is knowledge that " must include, in particular, awareness of the obligations or liabilities he is assuming with his act." [81] Therefore, " a person consents to all the consequences that he knows are necessary effects of his voluntary act" [82], and " the person who voluntarily performs an act knowing that it has the undertaking of certain obligations as a necessary consequence consents to undertake those obligations." [83] Consent, for this reason, is a voluntary act that has legal normative consequences, and" when that particular legal consequence of the voluntary act is known by the agent, we may say that he has consented to it." [84] This is the very beginning of his further discussion on ' the consent theory of punishment' .

The justification of punishment, as Nino mentioned, might be very similar to the justification of political obligations. For, since' punishment is one species of the large family of measures involving intentional deprivation of a person' s normally recognized rights by official institutions, using coercive means if necessary' , the justification of punishment will involve the justification of political obligation and political authority in any rights theory. Hence, if we look at the case of punishment,' it

---

[80] C. S. Nino, ibid. p294.
[81] C. S. Nino, ibid. p295.
[82] C. S. Nino, ibid. p295.
[83] C. S. Nino, ibid. p295.
[84] C. S. Nino, ibid. p296.

is easy to find analogies with the cases mentioned above.' It is the case of offenders' consent to assume a liability to punishment.

According to Nino' s analysis, " a necessary legal consequence of committing an offense is the loss of immunity from punishment that person previously enjoyed', and the loss of immunity is obviously correlative to the legal power on the part of certain public officials to punish the offender.' This is a description of the normative legal situation, in terms of consequences to the offender of committing an offence. This description sounds very similar to the Lockean theory of punishment. According to that theory, after committing an offense, the offender ' forfeits' his rights, forgoes his immunity, lowers his moral boundaries, and, therefore, is liable to punishment. For these reasons, the punishment to the offender cannot be considered as a violation of the offender' s human rights, because the offender has lesser rights or no rights at all. But it would be a mistake to interpret Nino' s description in this way. It is the concept of ' consent' , not ' forfeit' that gives a moral justification for punishment in his argument.

In Nino' s view, " the fact that the offender loses his legal immunity from punishment does not imply that he also loses the moral immunity deriving from the principle that it is prima facie wrong to sacrifice an individual for the benefit of others." Therefore, we need an argument that is " grounded on something more that the mere fact that the law gives officials the power of punishment." One of the possible ways is to ground the offender' s liability to punishment on his consent, that is, " a person consents to all the consequences that he knows are necessary effects of his voluntary act'[85], and " the person who voluntarily performs an act knowing that it has the undertaking of certain obligations as a necessary consequence consents to undertake those obligations." If an offender commits any offence voluntarily, and knowing that it has necessary effects as the consequence, then once he commits the offence, he consents to all the consequences " that he knows are necessary effects of his voluntary act', and punishment, too. This argument can be simplified as follows:

1. X is an offence.

[85] C. S. Nino, ibid. p295.

2. Any one who commits X will be liable to punishment as the necessary consequence
3. I know that any one who commits X will be liable to punishment as the necessary consequence.
4. I commit X voluntarily, knowing it to be an offence.
5. Therefore, I have consented to my liability to punishment, because I do it voluntarily, in full knowledge of its necessary consequences.

According to his argument, we may say that the criminal has consented to assume a liability to punishment after committing the crime. In this approach, Nino may avoid the problem of the acknowledgement of consent in consent theory. If a person performs a voluntary act such as offence, and knows the necessary consequence of that act, then he or she *does* consent to the duty or obligation as the necessary consequences of his or her act. The consequences which possibly follow from the act, in this sense, may be used to justify the assertion that the agent has consented to them. Therefore, though the offender may claim that he disavows his consent to his liability to punishment, his voluntary act has justified that he *does* consent to it. As Nino mentioned, " this consent to assume a legal liability to suffer punishment is, as in the case of contracts and in the voluntary assumption of a risk, an irrevocable one, and it is independent of the attitude of the agent toward the event which is the object of the normative characterization."

3.4 Criticism of Consent Argument

Nino' s argument seems to be plausible so far. As we mentioned before, generally speaking, no one can reasonably blame others for things which are done to us with our agreement; therefore, if we can say that the offender performs a voluntary act which is an offence, and knows the necessary consequence of that act in law, then he or she *does* consent to their liability to punishment as the *necessary* consequences of his or her act. But there is one question that arises here: how can we be sure that any agent who performs a voluntary act, with the full knowledge of its necessary consequences, has consented to all the things that are done to him as the necessary consequences? How can we be sure that the consent is an irrevocable one, " independent of the

attitude of the agent toward the event which is the object of the normative characterization", especially if this agent thinks his legal liability to suffer punishment, as the necessary consequence from his "voluntary assumption of a risk", is totally wrong?

Suppose that, according to the law, every one who wants to emigrate to another country should give up his right to private property, and be questioned everyday by policemen before he leaves his country; if anyone disobeys this law, they will be liable to punishment. If I want to emigrate from this country, and I know precisely what the law says, though I think the law is wrong, I still might obey it voluntarily. But in this case, it is hard to say that my voluntary act can account for my consent to the law. The reason for my voluntary obedience is based upon the consideration of my benefits, not on my agreement to the law. I may voluntarily obey the law that I do not agree with, and if I do not agree with it, then I do not consent to it. In this sense, my legal liability to punishment is the necessary consequence for my disobedience, according to the law, and if I am brave enough to disobey the law voluntarily, I know the necessary consequence of my offence, but my voluntary act is not sufficient enough to claim that I do consent to my legal liability to punishment. Therefore, it is difficult for Nino to convince us that our consent is justified by our voluntary acts, and independent of the attitude of the agent toward his legal liability to punishment.

Some people might argue that, according to Nino' s argument, no matter whether the law is just or not, since it prescribes our legal liability to punishment, we have consented to it. Their argument goes like this: the law is made by the political authority, that is, the government, and no government is legitimate until it is legitimated via our consent, express or tacit; hence, when we consent to the legitimization of the government, we know that this government would have several kinds of power over us, and one of them is the power to make law and make it work through the prescriptions of penal system. Once we voluntarily consent to the legitimization of government, we have consented to our obligations and obedience under its governing at the same time. Therefore, we have consented to our legal liability to punishment as the necessary consequence in law of disobedience, because of our consent to the legitimization of the government, that is, the sovereign lawmaker.

The objection to this argument is very simple: the consequence arising from this argument will be contrary to the basic belief of consent theory. We consent to our political obligation and authority for our own benefit, and this method will protect us from injury by the state. In this sense, government is considered as an instrument for serving the interests of its citizens, and so, too, must be the law; therefore, our consent must be a deliberate undertaking. We do not really consent to giving up our freedom of action and judgement, that is to say, our consent to the government and its power is conditional; if this consent is unconditional and irrevocable, this contract will turn out to be contrary to our benefit. For this reason, no one can reasonably assume that since we have voluntarily consented to the authority of the government, then we do consent to everything the government may do to us as the necessary consequence of our consent, even if the government is wrong or acts unjustly to us. We consent to our government with limitation and conditions. The consent argument is used to constrain the government from the possibility of misuse and abuse of its power, not to justify such misuse and abuse.

Hence, if consent, as A. J. Simmons suggests, " must be given intentionally and knowingly", and also " must be given voluntarily"[86], then the crucial question for Nino's theory is this: how can he convince a criminal that he does consent to his liability to punishment through his voluntary act (the offence he commits), and forgoes his previously enjoyed immunity in the legal system as a necessary consequence of committing an offence? Further more, if the criminal sincerely disavows that he consents to any " necessary consequence" of his offence, because, personally, he disagrees with the law, then how can Nino persuade him that his consent is " independent of the attitude of the agent toward the event which is the object of the normative characterization" ? To answer this question, Nino seems to suggest that the offender cannot reasonably reject his liability to punishment on the grounds of his disagreement with the law, if the law is justified, and the punitive institution is legitimate. That is to say, if the whole penal system is legitimate and just, that means the criminal's disavowal to his consent will not be reasonable, because no one can reasonably deny or disagree with something that is accepted and agreed by

[86] A. J. Simmons, *Moral Principles and Political Obligations*, p77.

him when his reason is sound. Therefore, any punishment of his offence which is prescribed by the just law and executed by the legitimate institution is consented to by the criminal himself, for that is what he *ought to* consent to.

This reply seems to be plausible at first glace, and leads us to the solution of the problem of the criminal's consent to his liability to punishment. No one can deny that if it is clear to us that something is just and legitimate, that is to say, something is *right*, then every reasonable agent would come to the same conclusion that such a thing ought to be done. And if the law and the punitive institution are just and legitimate, then, even if the offender might insist on his disavowal, it seems to be reasonable to think that his disavowal won't cancel the rightness of his liability to the punishment, which also *ought to* be consented by him if his reason is sound. In this view, if the law is just, then our consent to our legal liability to punishment which the law prescribes is truly justified, independent of our attitude, because it is the right thing that we *ought to* consent to; therefore, we consent to it.

But if we give a second thought to this reply, then we will find the main point of the argument is changed. For the consent argument for punishment, the most important question is to try to establish the foundation of our legal liability to punishment upon our voluntary agreement, that is, our consent. Therefore, if the argument can prove that we *actually* consent to our liability to punishment, then the problem of its justification is solved. But now, according to Nino's suggestion, the most important thing for us is to find out whether the law and the punitive institution are just. If the law and institutions are just and legitimate, then they should have been consented to by us, because we ought to agree with that. The conception of 'consent' doesn't play any major role in the argument any more, and the main point of the argument is the justification of the moral rightness of the law. If the law is just, then the problem of consent is solved but at a different level: the foundation is effected by the claim that punishment is right under the fair laws and just institutions. We don't need the argument for voluntary consent any more. If the whole argument is not based upon the conception of actual consent, then it seems to be hard to consider this argument as a branch of the consent argument. In fact, the problem and an alternative way that Nino leaves to us directs us to another theory which is also concerned with the conception of political obligation through the method of consent, not through the method of

actual consent but through a hypothetical version, that is, the hypothetical consent argument.

SECTION 4
THE HYPOTHETICAL CONTRACT ARGUMENT AND CONSENT THEORY

4.1 Hypothetical Contract Argument

As we mentioned before, though the forfeiture argument for punishment has several faults, it seems that the consent theory argument does not make much significant progress. Both of them face the some problem: the logic of these arguments is sound, and if the premises are true, then the conclusion is plausible; however, the premises seem to be implausible in respect of the criminal. For the forfeiture argument, the premises are very problematic: how can we assert the criminal has forfeited his or her rights after his or her violation of other' s rights, and, therefore, he or she is liable to be punished by others? The connection of wrongdoing and forfeiture still is a mystery. In Locke' s argument, the change of the offender' s moral status seems naturally to have happened after he committed the offence; for the recent theorist, such as A. H. Goldman, the rights of the offender are gone because he or she failed to fulfill the duty that is correlative with rights, that is, the duty to honor the same rights of others. But neither of them can give us a clear idea of how the forfeiture happens, who are entitled to assert that one' s rights are forfeited, and how far the wrongdoer gives up his or her rights.

For the consent theory, the problem is quite similar to the weakness of contract argument: we cannot prove that there is such a contract or a consent. For the argument, once we know what the terms of the contract or consent are, we know what the government is obligated to do, and what the people are obliged to obey; hence, if we use the same argument for the criminal' s liability of punishment, we may say that the criminal has consented to his punishment. But here rises the problem: if the premises are true, then punishment is justified. But if they are not, then the conclusion follows: that no one—neither citizens not government—is bound by the contract. According to the argument, contracts or consents can establish political obligations or legal liability to punishment only if they are actually agreed to. Unfortunately, it seems to be that we cannot convince all offenders that they do consent, expressly or tacitly, to their

liability to punishment through their voluntary offence, especially when they disavows that he or she consents to any" necessary consequence" of the offence.

To resolve these problems, the alternative way is that we can say that a certain agreement is the contract that people *ought to* sign, that is, *the hypothetical contract.* The hypothetical contract, unlike the contract or consent that people actually agree to, is a structure of reason. It is based on the belief that some agreements would be made by people for their benefits, if they were rational and look forward to cooperating with each other. In this argument, we are not considering any contract or consent which is actually agreed to by the citizen, but the appropriate perspective from which contracts or consents could be agreed to.

4.2 Dworkin and Hypothetical Contract Argument

When Dworkin discusses hypothetical contract arguments in his book *Taking Rights Seriously*, he notices that, for the hypothetical contract argument, the theorist does not suppose that any political institution and its citizens ever actually entered into a contract or consent, expressly or tacitly, nor does the argument need a state of nature or any sort of pre-political society. Therefore, it would be wrong to take such an argument as a simple form of the consent theory. The most famous example that Dworkin used to explain how this argument works is J. Rawls' s idea of the original position in his *A Theory of Justice*. The original position, in Rawls' s thinking, is a "hypothetical original position", and in this position, there are certain moral requirements that " would be chosen by his (Rawls' s) contractors from a choice situation under conditions of partial ignorance."[87] He does not suggest that any group ever actually enters into a contract as he described in his theory, but he suggests us to think in mind what " would/should be chosen" as if we were contractors in such an original position. As Dworkin suggests, this idea serves" not to work out the historical origins of society, or the historical obligations of governments and individuals, but to model the idea of the moral equality of individuals."[88] For this reason, the way of establishing the hypothetical argument may look like that one tries to build up a

[87] A. J. Simmons, *op.cit.*, p143-144.
[88] W. Kymlicka, *Contemporary Political Philosophy*, (Oxford: Clarendon Press, 1990), p60.

" dialogue" of " what *would/should* happen if..." along in his own though. Such kind of dialogue does not have to actually happen between more then one person. Furthermore, as we can find out in his writing, Rawls uses this idea as a means to explain why some agreements or contracts should be agreed to. He argues that *if* a group of rational men did find themselves in the predicament of the original position, then they *would* contract for some principles. Therefore, " his contract is hypothetical, and hypothetical contracts do not supply an independent argument for the fairness of enforcing their terms." [89] In this sense, Dworkin' s account of the hypothetical contract is that it is no contract at all, it is a " metaphor" rather then a real contract, for what it is suppose to do is to change the thinker to the decision maker (not actually, but only in mind) and reason the reasoning of other agents, and that is why it is a powerful device to convince people of the proper point of view from which some decisions should be taken.

Therefore, as R. Dworkin mentions in his *Taking Rights Seriously*, " a hypothetical agreement is not simply a pale form of an actual contract; it is not contract at all" [90], and the crucial question of this argument is " what is it about the independent arguments that make the contract or consent an appropriate representational device?" [91] For these reasons, the hypothetical contract argument that we use is to establish an argumentative device, as Dworkin says, and this argument is not used for justification of the ground of contract or consent. Dworkin tries to establish " the independent arguments that make the contract or consent an appropriate representational device" . It is an argument from a structure of reason, a method for hypothesizing, and people can use it as means when they establish a conclusion which different parties can accept and which is found upon the agreement or a contract between agents who are involved in. According to the failure of consent theory, the purpose of employing this argument is to explain why we can say, of some practice, that people should consent to them. This argument can give the way for us to hypothesize that a rational contractor would agree to certain rules. Dworkin has given out an example of how the argument works: suppose a person A is playing a game, then it is reasonable to

---

[89] R. Dworkin, *op. cit.*, p151.

[90] R. Dworkin, *Taking Rights Seriously*, (London: Duckworth Press, 1977), p151.

[91] R. Dworkin,' The Original Position' , in N. Daniels (ed.) *Reading Rawls*, (Oxford: Blackwell, 1975), p18.

think that he *would* have agreed to a numbers of rules if he had been asked in advance of play, and there must be reasons why A *would* have agreed if asked in advance as well. These may also be reasons why these rules may be enforced against A even if he has not agreed. This is a hypothetical agreement for A, of course, but it does not count as reason for enforcing the rules against A, as A' s actual agreement would have, rather the argument for hypothesizing the rules is given by whatever independent reasons there are to support it.[92]

Perhaps, according to our goal, we can use the hypothetical contract argument to find the same ground of our political obligation and justification of punishment. But before we use the hypothetical contract argument for our purpose, there is a misunderstanding of this argument that needs to be mentioned. Some people would take the hypothetical contract argument as" that because a man would have consented to certain principles if asked in advance, it is fair to apply those principles to him later, under different circumstances, when he does not consent. But that is a bad argument." And he gives us an example: suppose a painter who did not know the value of his painting on Monday; therefore, if a customer came and offered $100 for it on the same day, the painter would accept. But if the painter found his painting was more valuable than $100 on Tuesday, then it would be unfair for any court to make the painter sell it to the customer for $100 on Wednesday. In this sense, Dworkin conclude: " it may be my (the painter' s) good fortune that you did not ask me on Monday, but that does not justify coercion against me later."[93]

4.3 Rights, Punishment and Hypothetical Contract Argument

Now turning to the ground of our political obligation and justification of punishment. As Simmons mentions, " Consent theory respects our belief that the course a man' s life takes should be determined, as much as possible, by his own decisions and actions." According to this belief, any political authority and correlative obligations are legitimated only if it is established via people' s consent, and the theory also tell us that people' s obedience to rules and institutions are justified if these arise as the

[92] R. Dworkin, ibid., p151.
[93] R. Dworkin, ibid., p152.

consequence of their consent. The hypothetical contract argument's standpoint, however, is quite different from this. For the consent theory, our political obligations can be justified *only* on the ground of consent. That is why it is so important for this theory to prove that citizens *actually* consent to their political authority and correlative obligations. But for the hypothetical contract argument, the meaning of contract is like a *dialogue*, and it exists nowhere except in our own mind. In this sense, the whole argument is metaphorical, and its language is a way for us to put ourselves as contractors, that is, to look at things from others' point of view. We then try to infer and explain why people, in thought, *ought to* consent to their political obligations. According to this method, we may reason out why we should have rights, rules and punishment in though: if a group of rational men did find themselves in the pre-political society, according to the uncertainties and scarcities of their life, then they would contract for certain laws or the authority of political institutions. Though they may have different plans for their life or different ends, and have their own point of view, they are facing the same problem, the problem is relative to everyone of them. To solve this problem, they need to cooperate with each other. Therefore, we will not be too wrong to say that they will try to find a solution that is acceptable to all of them. For practical reasons, they will realize that no one's interests should be put on the top of the list, or be superior to others' benefit. If so, that will cause a lot of debates and difficulties in their reasoning. This is the reasoning we may hypothesize the citizen would adopt. Of course, we do not suppose that the 'contract' in this argument is an actual or historical contract, or, as an actual contract, can be used to enforce the law against people, rather it works as a metaphor, a way to help us to put ourselves in the position of contractors and see if there is a acceptable solution. Furthermore, it can be used to examine the argument that makes the contract, in Dworkin's terms, "an appropriate representational device".

The same strategy can also be used in the case of punishment. Suppose that people live in a society without punitive institutions or laws. As human beings, they have certain rights, and they know that their rights are very important for them to pursue their ends. Hence, it is reasonable to suppose these people, if they are rational and prudential, will agree that rights are equally important to any one of them, and if they think about the possibility of the violation of their rights, they will look for an effective way to protect their rights from that harm. For this reason, we may infer that

they will agree that the most effective way to protect their rights is to establish a form of legal sanction which may protect the rights-holder from the harm of the offender. Therefore, they might agree, in thought, that the necessary consequences of certain voluntary acts such as rights-violations must be prescribed as punishment, and the offender should be liable to be punished for his offence. Furthermore, they should agree that rights-offender should be liable to punishment, then they would also be liable to be punished if they offend others. Though they know that punishment involves the deprivation of certain normally recognized rights, or other measures considered unpleasant to the offender, they will agree to take these as the cost of protection. Thus each rational person, who claims rights and realizes that to be effective they need to be enforced, will accept a liability on their own point to accept punish, should they themselves violate the rights of others. In this sense, punishment needs not to be actually consented to by the violator, but it is a reasonable conclusion that is derived from our hypothetical contract argument. According to this argument, we may say that a offender' s liability to punishment is a product of a hypothetical contract that the offender *would have* consented to, had be thought through the impllications of his own rights claims

The way of inference in the whole argument, as we mentioned before, might look like the contract theory and consent argument, but they are different. For the contract theory and consent argument are seeking for an actual agreement, express or tacit, as a ground of the political obligation and punishment, and that is why they face the same problem: if we cannot prove that there is such a agreement, then the whole structure of beliefs collapses. But the hypothetical contract argument and all it stands for is not an argument for the grounds of contract or consent, rather it is an argumentative device. What it tries to explain is a structure of reasoning, and with it we could, in thought, come to the most acceptable conclusion concerning the consistency of rights-claims and the traditional practices of punishment by hypothesizing that each person seeks an agreement with all others. We use the social contract device to reach the conclusion that punishment is justifiable to rights-holders and claims as the product of an hypothetical agreement

Some people might criticize that the whole argument is based upon the congruence of reason, for it is conducted by isolated individual, and if the conclusion of his

reasoning should be supposed to be a appropriate decision for everyone, then we must presuppose that everyone *would* give the same solution to the same social problem they face to from their practical reasoning; however, it seems to be difficult to prove that this presupposition is true; hence, the hypothetical argument might be an acceptable structure of deliberation, but it is hard to say that everyone' s deliberation *would* reach to the same conclusion, or they *should* all accept a solution to their similar problems from one individual' s deliberation.

It is true that everyone stands up to their problem from their own point of view, including the thinker of hypothetical argument, but now the problem is the social problem, that is to say, the problem that all of them, including the thinker, are involved, and, therefore, any solution for it will have to be acceptable to all social members. For this reason, the thinker who tries to find the solution by hypothesizing should put himself in the position of other contractors to find out if his suggestion is plausible to others in thought. The calculation in the hypothetical contract argument might become harder in respect of many different ends, goods or values, but the thinker' s solitary deliberation, according to this procedure, would have to reach a compromise conclusion which will be reasonable and acceptable by all others.

Therefore, the hypothetical contract argumentative seems to be a possible way of dissolving the paradox of punishment, and successfully avoid two major problems the consent argument has to face, that is, the problem of criminal' s consent to his or her liability to punishment and the problem of the reality of the existence of such consent. For the second problem, it is clear that a " hypothetical' argument does not have difficulties about " reality' , because " the only relevant pressure for agreement comes from the desire to find and agree on principles which no one who had this desire could reasonably reject' [94]. Moreover, as for the first problem, the hypothetical contract theorist may say that even if the criminal insists that he does not consent to his punishment, he ought to have consented, for he, as a member of our society and wishing to preserve his life and rights, *would have*, for the sake of his rights, consented to the punishment of any rights-offender. J. J. Rousseau has put it well in these words: " he who wills the end wills the means also, and the means must involve

[94] T. M. Scanlon, ' Contractualism and Utilitarianism' in J. Rachels (ed.), *Ethical Theory 2*, (Oxford:

some risks, and even some losses." Hence, " it is in order that we may not fall victims to an assassin that we consent to die if we ourselves turn assassins" [95], and we can see that this argument can take both punishment and rights seriously, and show " how this can be so despite the fact that in punishing we subject people to treatment that in other contexts would violate or at least infringe their rights." [96] This problem is solved, as the hypothetical contractualist says, by referring to moral principles which concern both rights and the most effective way to protect them, that is, the liability to be punished if any one fails to respect other' s rights. Such principles are considered to be those which *should* be consented to, and no one, especially the offender, can reasonably reject. In the particular case we have been discussion, the principles ground the justifiability of punishment.

Oxford University Press), p110.

[95] J. J. Rousseau, *The social contract*, trans. by G. D. H. Cole, (London: J. M. Dent &Sons Ltd.), Book II, V. p3O.

[96] W. Quinn, ' The Right to Threaten and the Right to Punishment' in A. J. Simmons, M. Cohen, J. Cohen, and C. R. Beitz (ed.), *Punishment*, p.49.

SECTION 5
CONCLUSION

After the discussion of justification of punishment, we may find that, as W. Quinn says," most of us feel certain that punishment is, in many cases, fully justified. But as to the nature of the justification we are perplexed and uncertain."[97] In regard to the conception of human rights, the practice of punishment can be morally justified only if it will neither infringe nor violate a criminal' s rights. Now since we have briefly overviewed the two arguments in human rights theory and their justification of punishment, we may conclude by evaluating their solutions to the problem of the paradox of punishment. In regard to the utilitarian argument, we may see the failure of applying direct utilitarianism. If we simply concern the value of rights as to maximize welfare, and we punish wrongdoers with respect to utility in particular cases, then there is no doubt that we may lose both the moral force of rights against the interference from others, and the threshold against the possibility of punishment of the innocent or exploitation of the guilty. Hence, an alternative way for the utilitarian is turn to the indirect utilitarian argument, or, more precisely, institutional utilitarianism. Institutional utilitarian argument, such as Rawls' argument, can justify rights in institutions which are established under principles that are justified on the ground of utility, and such institutions which protect rights will do so by establishing rules which also justify punishment. Rights includes the specific provision that those who offend rights may be punished legitimately. The paradox of punishment is dissolved in the detail of the rules.

The other rights argument purporting to justify punishment is the consent theory. As we have sketched it, if we can built the violator' s liability to be punished upon his agreement, that is, his consent to his punishment, then the paradox of punishment will be solved just as it is solved in the utilitarian argument. No offender, if the consent argument is true, then, can say that the practice of punishment cannot be morally justified and that it will either infringe or violate his rights. Since the offender agreed to stay in his society as one of the members, exercised his rights, and with full knowledge of the necessary consequences of any right-violations, that is, punishment

---

[97] W. Quinn, *op. cit.*, p.47.

according to the rules, then he has consented to these rules, and once he voluntarily interfered with another' s rights, we may say that his punishment is consented to by him. According to the argument itself, the paradox of punishment, it seems, can be solved smoothly in this way, and the structure of inference of this argument seems to be quite sound. However, the truth of its conclusion is highly dependent upon the truth of its premises, unfortunately, it is hard to prove that the criminal *does* consent to his liability to be punished, especially when the criminal insists that he consents to nothing, nor can his voluntary action be regarded as an agreement to his punishment, because, though he has full knowledge of the necessary consequences which are prescribed in law, he simply disagrees it. In such cases, the consent theorist seems to be unable to convince the offender that his disavow is invalid.

Therefore, the consent' s approach requires another way which can exclude the problem of honest disavowed, but still found the offender' s liability to punishment upon his consent. The hypothetical contract seems to be suitable for these purposes. This argument refers to principles " which no one could reasonably reject"[98] rather than to principles which everyone *does* reasonably accept. For the paradox of punishment, this argument put us in a position as contractors, and considers the situation in which people face sever dangers to their rights, and it supposes that these dangers can be avoided if there are rules which prescribe peoples duties to respect others rights and enforce the liability to be punished if anyone fails to do so. If we know that there is such a way to protect our rights and that no one would have to face the dangers of living in chaos, then these rules which prescribe the offender' s liability to punishment should be consented by us, for even those offenders, " who are not now moved by the desire for agreement, could not reasonably reject should they come to be so moved."[99]

With regard to these arguments for punishment, it seems to me that both hypothetical contract argument and the institutional argument are plausible to solve the paradox of punishment for the reason that I have given. However, I think, if compare hypothetical contract argument with utilitarian argument, the hypothetical contract

---

[98] T. M. Scanlon. *op. cit.*, p. 111.
[99] T. M. Scanlon. *op. cit.*, p. 111.

argument for me is more like an abstract moral principle than an actual guideline in our imperfect world. It is not to say that the hypothetical contract argument is not concerned to seek for principles which apply to our real world. Rather the critique of these principles, that is, the ground upon which people can decide which are the principles that no one can reasonable deny, seems not to be prescribed in the hypothetical argument. On the contrary, the utilitarian approach seems can give us a strike answer to these fundmantle questions: what should social laws and rules do for us? Why shall we need them in our society? How can we decide which kind of social rules is better than others? The utilitarian answer to all of them is simple but convincing: the purpose is to improve our welfare. However, the hypothetical contract argument seems spend a lot of its effort to find out the agreement with which only morality and rationality are concerned, not our imperfect world; hence, for my opponent, it might not be a practical strategy for those who try to directly apply this argument as principles for building rules for their everyday life, especially when they face the problem of competition between people' s claim rights. Furthermore, in our imperfect world, it will be more convenient to have guidelines which ' might be reasonable accepted' by people than getting some abstract principles which ' no one can reasonable reject' . The argument for justifying rules in society could be a hypothetical argument, though, the critique, or, in another words, the principle of rules will be more practical if it is based upon the principle of utility. For this reason, I think, since the paradox of punishment can also be considered as the effect of competition between claim rights (the competition between the claim rights of the offender and the claim rights of his victim) in our real world, the argument which is based upon the ground of welfare seems to be more practical than the argument which based upon the hypothetical inference.

References

A. H. Goldman, ' The Paradox of Punishment' , in, A. J. Simmons, M. Cohen, J. Cohen, and C. R. Beitz (ed.) *Punishment* (New Jersey: Princeton University Press, 1995).
- ' The Original Position' , in N. Daniels (ed.) *Reading Rawls* (Oxford: Blackwell, 1975).

A. J. Simmons, M. Cohen, J. Cohen, and C. R. Beitz (ed.) *Punishment* (New Jersey: Princeton University Press, 1995).
- *Moral Principle and Political obligation* (Princeton: Princeton University Press, 1979).
- *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992).

A. Ryan, ' Utility and Ownership' , in R. G. Frey (ed.), *Utility and Rights* (Oxford: Basil Blackwell, 1985).

A. S. Nino, ' A Consensual Theory of Punishment' , in *Philosophy and Public affairs*, 12,1983.

Beccaria, in R. Bellamy (ed.) *On Crimes and Punishments and Other Writings* (Cambridge: Cambridge University Press, 1995).

D. Boucher and P. Kelly (ed.) *The Social Contract from Hobbes to Rawls* (London: Routledge Press, 1994).

D. Castiglione, ' History, Reason and Experience: Hume' s Arguments against Contract Theories' in D. Boucher and P. Kelly (ed.) *The Social Contract from Hobbes to Rawls* (London: Routledge Press, 1994).

D. Hume, ' Original contract' in S. Copley and A. Edgar (ed.) *David Hume Selected Essays* (Oxford: Oxford University Press, 1993)

D. Lyons, ' Utility and Rights' , in J. Waldron (ed.) *Theory of Rights* (Oxford: Oxford University Press, 1984).

J. Feinberg, *Social Philosophy* (New Jersey: Englewood Cliff, 1973).

J. J. Rousseau, *The social contract*, trans. by G. D. H. Cole, (London: J. M. Dent &Sons Ltd.).
J. Locke, in P. Laslett (ed.), *The Second Treatise of Government* (Cambridge: Cambridge University Press, 1992).

J. Rachels (ed.), *Ethical Theory 2* (Oxford: Oxford University Press, 1998).

J. S. Mill, in M. Warnock (ed.), *Utilitarianism* (Glasgow: William Collins Sons and Co. Ltd., 1977).

J. Waldron (ed.), *Theory of Rights* (Oxford: Oxford University Press, 1984).

J. Wolff, *An Introduction to political philosophy* (Oxford: Oxford University Press, 1996).

M. M. Mackenzie, *Plato on punishment* (California: University of California Press, 1981).

N. Daniels (ed.), *Reading Rawls* (Oxford: Blackwell, 1975).

R. Dworkin, ' Rights as Trumps' , in J. Waldron (ed.) *Theories of Rights* (Oxford: Oxford University Press, 1984).
- *Taking Rights Seriously* (London: Duckworth Press, 1977).

R. G. Frey (ed.), *Utility and Rights* (Oxford: Basil Blackwell, 1985).
- ' Act-utilitarianism, Consequentialism, and Moral Rights' , in R. G. Frey (ed.), *Utility and Rights* (Oxford: Basil Blackwell, 1985).

R. M. Hare, *Moral Thinking* (Oxford: Oxford University Press, 1982).

S. Smilansky, ' Utilitarianism and The ' Punishment' of The Innocent: The General Problem' ,*Analysis* (vol. 50, 1990).

T. M. Scanlon,' Contractualism and Utilitarianism' in J. Rachels (ed.), *Ethical Theory 2* (Oxford: Oxford University Press).

W. Kymlicka, *Contemporary Political Philosophy* (Oxford: Clarendon Press, 1990).

W. Quinn,' The Right to Threaten and the Right to Punishment' in A. J. Simmons, M. Cohen, J. Cohen, and C. R. Beitz (ed.), *Punishment* (New Jersey: Princeton University Press, 1995).