P U N I S H M E N T

A THESIS SUBMITTED FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

IN THE DEPARTMENT OF MORAL PHILOSOPHY

AT THE UNIVERSITY OF GLASGOW

BY

STEPHEN OFEI

JANUARY 1979

A C K N O W L E D G M E N T S

I have to thank Mr. R.F. Stalley - Department of Moral Philosophy - for supervising this work.

I am conscious of the debt owing to Professor R.S. Downie and Lecturers of the Moral Philosophy Department for the part they played in extending my knowledge of Moral Philosophy and related disciplines. This thesis bears some testimony of their contribution.

I would like to record my thanks to Miss Elspeth Attwooll of the Department of Jurisprudence and Professor W.A. Harland of the Department of Forensic Sciences and Medical Jurisprudence for giving me the opportunities to participate in their programmes. I gained much from their stimulating discussion of issues.

The interest of other persons in this topic (notably Mr. Michael Van de Zande of the Extra-Mural Department, University of Edinburgh and Mr. Ian Gregory of the University of York) has undoubtedly had some margin of impact upon the presentation and content of the present study.

In the presentation of this thesis I have consulted many authors - many more than those from whose work I have quoted. It is only in virtue of their contributions, to be found in books and articles that much of my own discussion can claim to have significance. Others have played the major role in providing ideas and facts, which I have then examined and evaluated whithin the terms of reference that describe the present undertaking. Acknowledgment here of gains derived from 'these others' is recorded with gratitude.

TABLE OF CONTENTS

PART THREE: SOCIETY, LAW AND EDUCATION

S U M M A R Y

S U M M A R Y

The concern of this work is with 'punishment' and its logical application in discourse to Law and Education. The thesis is divided into three main parts and sub-divided into ten chapters preceded by an introductory section aimed at pointing out the complexity of the concept. In chapter one, I attempt to reconstruct the traditional retributivist position: the position held by Kant, Hegel and Bradley - the fundamental point being that punishment appeals to our capacity to follow rules. I consider the criticism that 'retributive punishment' is "vengeance in disguise" and reject that criticism after examining the concept of revenge and the theory of James Tyler. Chapter two attempts to reconstruct the traditional utilitarian position, as expounded by Paley and Bentham. The problems of the utilitarian theory are then explicated; in particular the retributive demand that the innocent should not be punished show it to have more content than has usually been thought to be the case. The question of the moral justification of punishment is considered in chapter three where the traditional "theories of punishment" are examined for their intrinsic importance. First, it is argued that the retribution theory is essential for it is the only theory which connects punishment with desert. Second, that even deterrence requires a rule awareness on the part of those on whom punishments are imposed and that it serves to strengthen the general awareness of rules. Third, that reform is in general workable in the long run when it is

treated not as external or extrinsic end to which punishment is regarded as a useful means, but as in some sense internal or intrinsic parts of the consequences of the punishment itself. We should not set out to reform by punishing; rather in punishing we should also hope to reform.

Part two deals exclusively with education, discipline and punishment. Chapters four and five present a view of education culminating in the explication of the notions of 'need' and 'interest' deemed as a necessary prelude to a philosophical discussion of 'punishment' in an educational context. It is argued that the child should go to school to receive discipline. Genuine 'discipline' must be distinguished from 'behavioural control', the latter implying a more or less arbitrary set of rules compliance with which is maintained by manipulating rewards and punishments. In chapter seven, I examine punishment in schools and argue that educational psychologists in the main have misinterpreted the logical status of 'reward and punishment': and this misinterpretation is linked with their tendency to see learning in terms of conditioning, discipline in terms of control and education in terms of schooling. In a parallel way, then, they see reward and punishment in terms of 'reinforcement'. But whether one only 'rewards' children, or whether one 'punishes' them too, in either case one's action is manipulative and its pain or pleasure to the child is a 'reinforcement', rather than moral desert, if the rules in question define behaviour which has no intrinsic point.

I N T R O D U C T I O N

INTRODUCTION

Philosophers have given a good deal of attention to the meaning of punishment and, as we shall see, some arguments about its justification have been supposed to rest on how it is defined. And to begin we shall briefly consider the historically important definition of punishment. Hobbes defines punishment as follows:[1] "A punishment is an evil inflicted by public authority on him that has done, or omitted that which is judged by the same authority to be a transgression of the law; to the end that the will of men may thereby the better be disposed to obedience..... All evil which is inflicted without intention or possibility of disposing the delinquent or, by his example, other men to obey an act of hostility, because without such an end no hurt done is contained under that name." A feature of this definition is that Hobbes includes a purpose for punishment within the definition itself, and for this reason however satisfactory the definition would otherwise be, we cannot accept it, at least in toto. We want to be able clearly to distinguish questions about what purpose(s) the practice may be used to forward. Should we accept Hobbes' definition we should find ourselves in the position that while discussing the justification of punishment on retributive, deterrent or reformative grounds we should have to admit that whatever retributivism justified it could not justify punishment. Accepting the definition would therefore

amount to a logical bar on the discussion of the justification of punishment. This would be an unfortunate consequence, but there is no good reason for us to accept this part of Hobbes' definition. Even a cursory examination of the ordinary uses of "punishment" show that no such reference to ends is entailled by it. Hobbes has offered a persuasive not a descriptive definition of punishment.

The difficulty, of course, with precise definitions of words, which like punishment, we use to characterise human activities, is that they are unlikely to give sufficient clarity to the term without being reduced to unwarranted stipulation or vagueness. To overcome this problem Anthony Flew[2] has suggested five criteria for the use of the word 'punishment' in its primary sense. In other words, Flew has defined what he calls the standard or central case of 'punishment' in terms of five elements.

(i) It must be an evil, an unpleasantness, to the victim.

(ii) It must (at least be supposed to) be for an offence.

(iii) It must (at least be supposed to) be of the offender.

(iv) It must be the work of personal agencies.

(v) It must be imposed by authority (real or supposed), conferred by the system of rules against which the offence has been committed.

As Professor Flew pointed out, the first three elements can be supported by straightforward appeal to the Concise Oxford Dictionary, which defines "punish" as "cause" (offender) to suffer for an offence. The fourth and fifth criteria can be supported by appeal to the Oxford English Dictionary, which prefaces the same definition as that given in the Concise Oxford Dictionary with "As an act of superior or public authority."

Flew and most other writers on the subject agree that while there are various different criteria for the use of the word "punishment" not all of these need to be satisfied for the use to be natural and legitimate. It would therefore not be a misuse of the word to talk, for example, of a batsman "punishing the bowling" in cricket, an expert driver "punishing the gears" of his car, a master "punishing his dog", and a fighter "punishing his opponent" in a boxing match. However, because these usages disregard one or more of the above criteria they must be treated as secondary or metaphorical and therefore peripheral to the central uses of the term. In considering "punishment" in education, for instance, the word will be confined to its primary sense, unless otherwise stated.

A difficulty which arises in considering the place of punishment in education is that in most literature consideration of the definition of punishment is almost always related to punishment in a legal setting and the distinctive meaning of punishment in school situation is

seldom pressed very far. P.H. Nowell-Smith[3] associates the word punishment with the law. He writes: ...'punishment' is a legal term... 'Punishment' is a complex idea consisting of the ideas of inflicting pain, on someone who has broken a law.' In his definition H.L.A. Hart[4] also regards the educational case as sub-standard. He writes: "I shall relegate to the position of sub-standard or secondary cases the following among many other possibilities: (a) Punishment for breaches of legal rules imposed or administered otherwise by officials (decentralised sanctions) (b) Punishments for breaches of non-legal rules or orders (punishments in a family or school).

How far then are Flew's criteria a contribution to the clarification of the meaning of 'punishment' in general, and in particular, in the context of the school situation? An atempt will be made to answer this question by examining each criteria in turn.

In his first creteria Flew uses "evil" or "unpleasantness" instead of "pain" as essential to the meaning of punishment, probably on the grounds that these terms are wide enough to cover both physical pain and mental suffering. He may also have in mind that "pain" usually has physical implications but that few punishments today deliberately intend physical pain. Hastings Rashdall[5] argues that punishment is in need of moral justification not because it is a deliberate and avoidable infliction of suffering but because it is the deprivation of a good.

Imprisonment and fines are deprivations of liberty and property; the death penalty or sentence is a deprivation of life and every attempt is made to exclude suffering.

Even so, the use of the word "evil" is misleading. Despite Bentham's[6] argument that deliberate infliction of pain (as in punishment) is evil very few people or teachers who punish offenders or children for wrongdoing think themselves as doing something evil. Doesn't the judgement as to whether it was 'evil' or not occur as part of a moral judgement taking account, not just of the existence of the pain, but of the wider context of actions and relationships in which the pain occurred? It is more likely that teachers interpret punishment as the deliberate causing of pain, inflicted to bring about something "good" and it would be difficult to understand how one could ever do something "good" by doing 'evil'.

To put the objection another way; 'evil' is inappropriate because it carries too much moral flavour. The world is conceptually, a worse place the more evil there is in it, whereas the infliction of "pain" or "unpleasantness" may be viewed as "good" if its purpose is to motivate people into doing what is theoretically in the interest of us all.

Punishment is obviously not something done to anyone chosen at random and without regard to his previous conduct. Punishment, or so we habitually think, is imposed on an offender, someone who is found to have broken a rule,

to have done something prohibited. This is the substance of Flew's second and third criteria, punishment must be for an offence and of an offender.

But how are we meant to interprete "an offence"? If "an offence" is assumed to be an action that goes against a rule previously stipulated, then it may be denied that punishment is always preceded by an offence. Must a teacher always have announced, before punishing a child who has done something outrageous, that no one was to do "that"? If there are such cases, where there have not been offences, are there also cases where the person punished is not an offender; that is, someone found to have broken a rule? If this interpretation of "an offence" is adopted then there necessarily are such cases.

Professor R.S. Peters[7] in his account of punishment speaks of "a breach of rules", but this seems no more profitable as to clarifying the concept in the context of the school situation than Flew's use of "an offence". Even if the notion of "a rule" or "an offence" were clear, it would not be possible to relate punishment simply to "offences" or "breaches of rules", for such a characterisation fails to distinguish between "punishment" and "penalisation". As John Kleinig[8] subjects: "It is the latter that Peters has defined. The occasion of penalization, and the fact that distinguishes it from punishment is that the person punished has simply broken a rule. To constitute punishment, such rule-breaking must also be recognised as involving moral guilt. Thus whereas one can penalise a hockey player or being off-side without any suggestion of punishment, the same is not true of the mur-

derer whose penalty is seen as punishment. There is a stigma attached to being punished which we are usually reluctant to associate with breaches in games and minor traffic and administrative offences, and this stigma arises because of the immoral character of punishable offences.

What is being suggested is that "punishing" and "penalizing" have different logical characteristics. For example, a motorist fined for illegal parking may calculate that the advantages of committing the offence outweigh the disadvantages of paying the fine and regard it as perfectly reasonable to repeat the offence. In other words, his breaking of rules is advantageous to him in terms of gains or penalties.

Such an example could hardly feature as punishment. For this reason it seems misguided to look at the process of the law only for the paradigm cases of punishment. Very often, although the law may claim to be punishing a person, what actually happens is that he is merely penalised for breaking a rule which he personally does not regard as a moral rule at all. According to Geldart[9] the law is fundamentally an agency for the preservation of a particular social order. Punishment, by contrast, is primarily a moral matter. Only if the motorist feels that his offence is something which is "wrong" in moral terms may his penalty be interpreted as punishment. To render punishment effective it is sometimes necessary for the offender as well as the penal agent to realize that the

deed is wrong. One is thus "penalized for breaking authorised rules, but only when the rules are moral ones or when one endorses the rules as morally justifiable does the breaking of them constitute doing "wrong". To put it in another way, an action can only be construed as punishment if it is as a consequence of the breaking of a moral rule, and the distinction between a moral rule and a non-moral rule is a matter which can only be decided by the judgement of the persons concerned. A fuller account of what constitute penalties and punishments will be taken up later in this work.

It follows from our discussion that the grounds on which we distinguish punishment from other forms of unpleasantness is its infliction for some moral offence. Anthoy Flew's second criterion, that cases of punishment must be "for an offence" is misleading and "for a moral offence" would be more exact. The point about 'moral offence' may need clarifying further. We would want to include not just mala in se but also all cases where we have a moral obligation to obey the law even though what the law enjoins may not be morally required. For example, it could be argued that it is morally wrong to deliberately drive on the wrong side of the road because we have a moral obligation to obey the law in these cases.

It may also be suggested on the basis of a quite different argument that punishment is not always of an offender. We do speak of collective punishment of groups,

such as classes in schools, some only of whose members have offended. For instance, a schoolmaster might declare that he was keeping his whole class in after school because three paint brushes were missing, and believed stolen after an art lesson. Similarly, with "vicarious liability"; an employer could be held responsible for certain acts of his employees. Surely, it may be said, neither the "whole class" nor the "employer" could be regarded as offenders in a literal sense.

These examples must be put forward as instances of what we would ordinarily regard as punishment, and also as instances where some element specified in Flew's criteria for standard cases of punishment is missing. Do they then show that he has not captured the ordinary notion of punishment?

The crux of the problem surely is that punishment has necessarily to be for an offence (and as previously argued, for a moral offence). The innocent are "conceptually immune". Anthony Quinton[10] defends this view when the points out: "the absurdity of 'I am punishing you for something you have not done' is analogues to that of 'I promise to do something which is not in my power'. Unless you are guilty I am no more in a position to punish you than I am in a position to promise what is not in my power. So it is improper to say 'I am going to punish you' unless you are guilty, just as it is improper to say 'I promise to do this' unless it is in my power to do it..... guilt

is a logically necessary condition of punishment.....

This argument however is not without its critics. K.E. Baier[11] objects against Quinton: "My point is that, it is simply not true that 'I am punishing you for something you have not done' is as absurd as 'I promise you to do something which is not in my power.' It need not be absurd at all. The executioner may whisper it to the man who has been sentenced to death: 'I am punishing you for something you have not done' would be analogous to 'I promise you to do this which is not in my power' only if to say 'I am punishing you..... were to punish you, just as 'I promise you'..... is to promise you.

Baier is clearly right in pointing out that Quinton is mistaken in taking the two senses of 'promising' and 'punishing' to be analogous. The verb 'to promise' is a performatory word, 'to punish' is not. Flew's criterion that punishment may only be inflicted on an offender i.e. the guilty, nevertheless remains secure. Some other description must be given to the practice of inflicting pain or unpleasantness on the innocent, unless of course cases of vicarious or collective punishment are conveniently relegated to the position of sub-standard or peripheral usages of the concept. This is indeed a move H.L.A. Hart[12] makes to prevent what he calls the 'definitional stop' in discussions of punishment.

Flew's fourth criterion, that punishment should be the work of personal agencies seems correct. Clearly,

punishment is not a matter of fortuitous misfortune, or in the school situation, the natural consequences of misbehaviour. Thus a pupil who disobeys an instruction to remove his chewing gum before diving into the swimming pool, and consequently almost drowns, may be said to have suffered a penalty, not punishment, for his disobedience. The Headmaster who speaks of a boy's broken leg as 'punishment for running in the corridor' is using the word metaphorically. Pain and unpleasantness occuring to people as the natural consequences of an action may be refferred to as a "penalty" but not as "punishment." Nothing will be added concerning "divinely instituted punishments" as these seem unlikely to occur in legal or educational contexts.

The fifth criterion is that punishment must be by an authority whose rule has been broken. Flew thinks that direct action by an aggrieved person with no pretensions to special authority is not properly called punishment, but revenge. Peters[13] also argues that unpleasantness inflicted without authority is "revenge", and if inflicted at whim, is "spite". He states: "The pain also must be inflicted by someone who is in authority, who has a right to act in this way. Otherwise, it would be impossible to distinguish 'punishment' from 'revenge'. People in authority can, of course, inflict pain on people at whim. But this would be called 'spite' unless it were inflicted as a consequence of a breach of rules on the part of the sufferer.

Firstly, it may be against the fifth condition that punishments are not always nor are they necessarily the work of authorities, i.e., persons, or groups of persons empowered to act by rules that have something like general acceptance. Direct action by an unauthorised parent who takes it upon herself to 'punish' a neighbour's misbehaving child, may in ordinary parlance, be called punishment. "War criminals" are said to be punished despite doubts as to whether the tribunals of the winning side count as authorities. Even in legal punishment, there is no particular person who punishes the offender. The question 'who punished the criminal?' is usually superfluous since in most situations there is only one agency with the power to punish. It is true that different individuals within the state might impose and administer the punishment but we are interested in them as occupiers of roles rather than as individuals. Also, how are we to describe the action of a school caretaker who chastises naughty boys, perhaps apprehended kicking his coke around the playground. Would we not say that the caretaker was inflicting punishment for the purposes of correction rather than to speak of "revenge" or "spite" for the simple reason that the caretaker did not have any authority over the boys.

Secondly, punishment obviously is not revenge although certain of its supposed justifications would go some way to justifying revenge, and some of those who punish may sometimes be accused of sharing motivations with those who

take revenge. However, Peters' and Flew's view that non-authoritative infliction of unpleasantness constitute revenge, though widespread, might be challenged. It could be objected that the distinction between punishment and revenge is to be located elsewhere. Revenge is the getting of one's own back, the notion of moral wrong being irrelevant to it. Thus a games master, playing football with his pupils, may take revenge on an opponent because of a personal injury inflicted in the course of the game, not because of a wrong committed by the pupil. The distinction between punishment and revenge is in motives, not status. Because the revenge argument can more often than not confuse the concept of punishment a complete section has been devoted to its analysis elsewhere in this work.

The first objection is often answered by once again pointing to the distinction between the central cases of punishment and the more peripheral ones. The boy who says to the caretaker, "You cannot punish me", is conceptually corfect, for it is a logically necessary condition of standard uses of the word, that the unpleasantness must be inflicted by somebody who has the right to act in this way. What is done to "war criminals" may be taken to be punishment only by those who accept that tribunals count as authorities. Those who do not accept this might give some other description to instances of this kind. Such as answer will only do however if it can be established that it

is a logically necessary condition that punishment be inflicted by someone in authority.

The second objection appears difficult to meet. Clearly, unpleasantness inflicted without authority is not necessarily revenge; it might, for instance be pure vindictiveness. Furthermore, Professor Peters is wrong to suggest that it is impossible to distinguish punishment from revenge except on the grounds of "having a right" to inflict unpleasantness. The difference can be explained in terms of motives. Punishment is a consequence of a moral wrong; revenge is getting one's own back. The mistake that is made by both Peters and Flew is to argue as if punishment is necessarily institutionalized. This is just not so. One can be punished by anyone with whom one shares an interest, and if one fails to behave in a way appropriate to that interest. To insist that punishment can only be given by some agent formally authorized or empowered to do so is to confuse "being punished" with "paying a penalty." One is penalized for infringing the authorised rules of an institution, but one is punished for breaking specifically moral rules. In other words, any moral agent is capable of inflicting punishment. Flew's fifth criterion is therefore inappropriate to the meaning of punishment.

Before reformulating Flew's criteria we might consider whether any factors have been overlooked which could affect an examination of the relevance and justification of punishment in law and education. The charge might

reasonably be made that the analysis is casual with regard to punishment in its legal setting. The answer to this is that we can never hope to understand the place of punishment in education simply by looking at its meaning as exemplified in a court of law. And as already argued the distinctions which are made in law between penalizing and punishing (if indeed any are made) would be quite inadequate to cover instances of punishment in education. There is still the problem, however, of how to meet cases which appear to conform to all logically necessary conditions so far specified but which we would not ordinarily think of as cases of punishment. Suppose, for example, a teacher accidentally bangs the head of a pupil who happens to be deserving of punishment, while carrying out some other task. Pain has been inflicted on an offender by an appropriate moral agent, but we can hardly describe the blow as punishment - at least not seriously. This might be answered by pointing out that as the pain is incidental to some other aim, the second condition, that is punishment must be for an offence, is not met. Another, and perhaps more reliable one, would be to add the word "intentional" to the first condition.

Professor Flew's criteria for the use of the word "punishment" in its primary sense, may now be amended to meet the requirements of the use of the word in the context of an educational situation:

(i) It must involve an intentional imposition of

pain or some other form of unpleasantness.

(ii) It must be for a moral offence; actual or supposed.

(iii) It must be imposed on an offender.

(iv) It must be the work of personal agencies.

(v) It must be imposed by an appropriate moral agent.

A final problem before leaving the complexities of the meaning of the word "punishment" concerns what Professor Peters[14] describes as cases of "external discipline". For instance, he says that a pupil made to repeat badly completed school work, is an example of "external discipline", not punishment. This crucial point, Peters thinks, is that in a school situation there is a frequent tendency to confuse punishment with discipline. This is unfortunate because punishment is conceptually distinct from discipline. The notion of "discipline" (which will be fully analysed later) is tied to the learning situation, and refers to the very general activity of submission to rules or a system of order, whether externally brought about or self imposed. "Punishment" on the other hand is "a much more specified notion", and refers to the authoritative imposition of unpleasantness in consequence of a breach of rules.

Peters thus links discipline and punishment by virtue of their connection with rules, but this is unhelpful and unnecessarily blurs the distinction. As already argued, it is wrong to suggest that for someone to be punished a rule must have been broken. Children are frequently, and

rightly, punished without having broken an authorized rule. Furthermore, to say that a child is being "externally disciplined" is not only something different from punishment it is also a contradiction in terms. The whole point of the term "discipline", in an educative context is that the orderliness characteristic of it is "internal" to the activity or relationship in question. There is really no such thing as "external discipline". A child can only submit to the proposed form of order if he can at least see something of its intrinsic value.

Etymologically, discipline is rooted in the idea of "discipuli", pupils. Although it would be a fallacy to suppose that a word always means what it originally meant, nevertheless, in the school situation "discipline" is generally regarded as a means to the end of helping the learning of the "discipuli". Our educative concern is therefore with matters of discipline. Because the form of order associated with extrinsic control is logically distinct from the form of order associated with discipline the contention will be that punishment is the infliction of various forms of unpleasantness, not for breaking authorized rules but for moral wrongdoing, or in other words for faults of discipline. This is the proper link between discipline and punishment. When so interpreted punishment becomes something educative. The child is required to learn something from his punishment not because of it, as in the case when punishment is interpreted in a legalistic way and thought of merely as a form of social control. This point will be expanded in the final chapter.

In many ways this analysis depart from most of the definitions and descriptions provided by Philosophers who have considered the question of punishment. But this is not surprising because this thesis deals with a broader topic, and it is my ultimate intention to justify punishment in law as well as in education. The difficulty with many of the recently proposed analyses of punishment is that they are advanced to justify legal punishment only. But as McCloskey[15] rightly points out "..... there is not a single core, basic use of punishment". It is obvious that I have tried to capture a notion of punishment appropriate to educational situations, but in so doing there has been no deliberate move to depart from the most common or perhaps ordinary notion.

A final point about legal punishment: To attempt a "complete" definition of such a complex institution, and one subject to so many variations, as legal punishment, would be to overdo our ground survey by hacking through a jungle we would do better to view from a distance. If we are to consider the purpose of punishment, we need a definition which is sufficiently general to include a large number of variants. Otherwise, as Hart has pointed out,[16] debates about punishment can be closed off too easily and soon by disclaiming the institution under attack. It should also be pointed out that we do not want to define punishment in such a way as to tip the scale in favour of retributivism or utilitarianism.

NOTES AND REFERENCES

INTRODUCTION

1. Hobbes, Leviathan Part II. Ch. 28, pp. 243-245.
2. Flew, A., "The Justification of Punishment", Philosophy, 1954, pp. 293-294.
3. Nowell-Smith, P.H., Ethics, Basil Blackwell, Oxford, 1957, p. 237.
4. Hart, H.L.A., Punishment and Responsibility, Oxford University Press, 1968, p. 5.
5. Rashdall, H., The Theory of Good and Evil, Clarendon Press, Vol. 1, 1924, Ch. 9.
6. Bentham, J., An Introduction to the Principles of Moral and Legislation, Wilfrid Harrison, ed., Oxford, 1948.
7. Peters, R.S., Ethics and Education, London: Allen and Unwin, 1966, p. 268.
8. Kleinig, J., "Peters on Punishment" in British Journal of Educational Studies, Vol.20, No.3, Oct61972. p. 260.
9. Geldart, W., Elements of English Law, 1966 ed. (ed. Yardley, D.C.M.), Oxford University Press, 1911.
10. Quinton, A., "On punishment", Analysis, June 1954, Sec. 4, p. 138ff.
11. Baier, K.E., "Is Punishment Retributive?" Analysis Dec. 1955, p. 30.
12. Hart, H.L.A., Punishment and Responsibility, OUP, 1968, p. 5.
13. Peters, R.S., Ethics and Education London: Allen and Unwin, 1966, p. 268.

14. Peters, R.S., Ethics and Education, London: Allen and Unwin, 1966, p. 268.

15. Mc Closkey, H.J., "The Compexity of the Concepts of Punishment", in Philosophy, 1962, p. 307.

16. Hart, H.L.A., "The Prolegomenon to the Principles of Punishment", The Presidential Address of the Aristotelian Society, Proceedings of the Aristotelian Society, 1959-60.

See also Phylosophy, Politics and Society, ed. P. Laslett and W.G., Runciman, Oxford, Basil Blackwell, 1962.

PART ONE

THEORIES OF PUNISHMENT

CHAPTER ONE

A. RETRIBUTIVISM - CLASSICAL THEORISTS

1. KANT

2. HEGEL

3. BRADLEY

4. CONCLUSION.

B. RETRIBUTION AND REVENGE

1. THE REVENGE ARGUMENT

2. TYLER'S ARGUMENT.

A: RETRIBUTIVISM - CLASSICAL THEORISTS

1. KANT

Kant has been classified as a retributivist and the classification is usually accompanied by a reference to some part of the following passage from the Rechtslehre, which is worth qusting at length.

> "Judicial punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subjects of real right. Against such treatment his inborn personality has a right to protect him, even although he may be condemned to lose his civil personality. He must first be found guilty and punishable before there can be any thought of drawing from his punishment any benefit for himself or his fellow citizens. The penal law is a categorical imperative; and woe to him who creeps through the serpent windings of utilitatianism to discover some advantage that may discharge him from the justice of punishment, or even from the due measure of it, according to the Pharisaic maxim: "It is better that one man should die than the whole people should perish." For if justice and righteousness perish, human life would no longer have any value in the world.....
>
> But what is the mode and measure of punishment which public justice takes as its principle and standard? It is just the principle of equality, by which the pointer of the scale of justice is made to incline no more to the one side than the other. It may be rendered by saying that the undeserved evil which anyone commits on another, is to be regarded as perpetrated on himself. Hence it may be said: "If you slander another, you slander yourself; if you steal from another, you strike yourself; if you kill another you kill yourself." This is the Right of RETALIATION (justalionis); and properly understood, it is the only principle which in regulating a public court, as distinguished from mere private judgement, can definitely assign both the quality and the quantity of a just penalty. All other

> standards are wavering and uncertain; and on account of other considerations involved in them, they contain no principle conformable to the sentence of pure and strict justice."[1]

There are two main points in this passage to which we should give particular attention:

(i) The only acceptable reason for punishing a man is that he has committed a crime.

(ii) The only acceptable reason for punishing a man in a given manner and degree is that the punishment is "equal" to the crime for which he is punished.

It seems to me that these propositions express rightly the main points of the first and second paragraphs respectively. We shall go on to the third before stopping over these points. Writers on retributivism also point to the following passage from the Rechtslehre.

> "Even if a civil society resolved to dissolve itself with the consent of all its members - as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world - the last murderer lying in prison ought to be executed before the resolution was carried out. This ought to be done in order that everyone may realize the desert of his deeds, and the bloodguiltiness may not remain upon the people; for otherwise they will all be regarded as participators in the murder as a public violation of justice."[2]

This passage draws our attention to the third point namely Kant holds that:

(iii) Whoever commits a crime must be punished in accordance with his desert.

Taking the three propositions we have isolated as expressing the essence of the Kantian retributivistic position, we must now ask a direct and obvious question. What makes Kant hold this position? Why does he think it apparent that consequences should have nothing to do with the decision whether, and how, and how much to punish? An answer to this question might follow two directions. One would lead us into an extensive excursus on the philosophical position of Kant, the relation of this to his ethical theory, and the relation of his general theory of ethics to his philosophy of law. In short, it would take our question as one about the consistency of Kant's position concerning the justification of punishment with the whole of the Kantian philosophy. This would involve discussion of Kant's reasons for believing that moral laws must be universal and categorical in virtue of their form alone, and divorced from any empirical content; of his attempt to make out a moral decision - procedure based upon an "empty" categorical imperative; and, above all, of the concept of freedom as a postulate of practical reason, and as the central concept of the philosophy of law. This kind of answer, however, we must forego here for while it would have considerable interest in its own right, it would lead us astray from our purpose, which is to understand as well as we can the retributivist position, not as part of this or that philosophical system but for its own sake. It is a position taken by philosophers with

diverse philosophical systems; we want to take another direction, then, in our answer. Is there any general (nonspecial, nonsystematic) reason why Kant rejects consequences in the justification of punishment?

It seems to be the case that Kant believes that consequences have nothing to do with the justification of punishment partly because of his assumptions about the direction of justification; and these assumptions are believed also to be found underlying the thought of Hegel and Bradley. Justification is not only of something, it is also to someone: it has an addressee. Now there are important confusions in Kant's and other traditional justifications of punishment turning on the question what the "punishment" is which is being justified. But if we are to feel the force of the retributivist position, we can no longer put off the question of the addressee of justification.

The question as to who the Kantian justification of punishment is directed may seem a difficult one to answer, since Kant does not consider it himself as a separate issue. Indeed, it is not the kind of question likely to occur to a philosopher of Kant's formalistic leanings. A Kantian justification or rationale stands, so to speak, on its own. It is a structure which can be examined, tested, probed by any national being. Even to speak of the addressee of justification has an uncomfortably relativistic sound, as if only persuation of X or Y or Z is possible, and proof impossible. Yet, in practice, Kant does not address his

proferred justification of punishment so much to any rational being (which, to put it otherwise, is to address it not at all), as to the being most affected: the criminal himself.

The criminal is the one who is cautioned not to creep through the serpent-windings of utilitarianism. It is the criminal's rights which are in question in the debate. It is the criminal we are warned not to mix up with property or things: the "subjects of Real Right." In the Kritic der Praktischen Vernunft, the intended direction of justification becomes especially clear.

> "Now the notion of punishment, as such, cannot be unlimited with that of becoming a partaker of hapiness; for although he who inflicts the punishment may at the same time have the benevolent purpose of directing this punishment to this end, yet it must be justified in itself as punishment, i.e. as mere harm, so that if it stopped there, and the person punished could get no glimpse of kindness hidden behind this harshness, he must yet admit that justice was done him, and that his reward was perfectly suitable to his conduct. In every punishment, as such, there must first be justice, and this constitutes the essence of the notion. Benevolence may, indeed, be united with it, but the man who has deserved punishment has not the least reason to reckon upon this.

As this matter of the direction of justification is central in our understanding of traditional retributivism, and not generally appreciated, it will be worth our while to pause over this paragraph. Kant holds here, as he later holds in the Rechtslehre, that once it has been accepted that a given "mode and measure" of punishment is justified,

than "he who inflicts punishment" may do so in such a way as to increase the long-term happiness of the criminal. This could be accompalished, e.g., by using a prison term as an opportunity for reforming the criminal. But Kant's point is that reforming the criminal has nothing to do with justifying the infliction of punishment. It is not inflicted because it will give an opprotunity for reform, but because it is merited. The passage does not require an explanation; it is transparently clear. Kant wants the justification of punishment to be such that the criminal "who could get no glimpse of kindness behind this harshness" would have to admit that punishment is warranted.

Let us suppose we tell the criminal, "We are punishing you for your own good." This is wrong, because it is then open to him to raise the question whether he deserves punishment, and what you consider good to be . If he does not deserve punishment, we have no right to inflict it, especially in the name of some good of which the criminal may not approve. So long as we are to treat him as rational - a being with dignity - we cannot force our judgement of good upon him. This is what makes the appeal to supposedly good consequences "wavering and uncertain." They waver because the criminal has as much right as anyone to question them. They concern ends which he may reject, and means which he might rightly regard as unsuited to the ends.

Kant distinguishes, in the "supplementary Explanations of Principles of Right" of the Rechtslehre, between 'puni-

tive justice (justia punitiva), in which the ground of the penalty is moral (quia peccatum est)," and "punitive expediency, the foundation of which is merely pragmatic (ne peccetur) as being grounded upon the experience of what operates most effectively to prevent crime." Punitive justice, says Kant, has an "entirely distinct place (locus justi) in the topical arrangement of the juridical conceptions." It does not seem reasonable to suppose that Kant makes this distinction merely to discard punitive expediency entirely, that he has no concern at all for the ne peccetur. But he does hold that there is no place for it in the justification of punishment proper: for this can only be to show the criminal that the punishment is just.

The question may be put: How is this to be done? The difficulty is that on the one hand the criminal must be treated as a rational being, and end in himself; but on the other hand the justification we offer him cannot be allowed to appear as the opening move in a rational discussion. It cannot turn on the criminal's acceptance of some premise which, as a rational being, he has a perfect right to question. If the end in question is the well-being of society, we are assuming that the criminal will not have a different view of what that well-being consists in, and we are telling him that he should sacrifice himself to that end. As a rational being, he can question whether any end we propose is a good end. And we have no right to demand that he should sacrifice himself to the public well-being, even supposing he agrees with us on

what that consists in. No man has a duty, on Kant's view to be benevolent.[4]

In order to come out of this perplexity we have to show the criminal that we are not inflicting the punishment on him for some questionable purpose of our own choice, but that he, as a free agent, has exercised his choice in such a way as to make the punishment a necessary consequence. "His own evil deed draws the punishment upon himself".[5] "The undeserved evil which anyone commits on another, is to be regarded as perpetuated on himself."[6] But may not the criminal rationally question this asserted connection between crime and punishment? Suppose he wishes to regard the punishment <u>not</u> as "drawn upom himself" by his own "evil deed?" Suppose he argues that no good purpose will be served by punishing him? But this line of thought leads into the "serpent-windings of utilitarianism," for if it is good consequences that govern, then justice goes by the board. What may not be done to him in the name of good consequences? What proportion would remain between what he has done and what he suffers?[7]

But punishment is <u>inflicted</u>. To tell the criminal that "he draws it upon himself" is all very well, only how do we justify to ourselves the infliction of it? Kant's answer is found early in the Rechtslehre.[8] There he relates punishment to crime via freedom. Crime consists in compulsion or constraint of some kind: a hindrance of freedom.[9] If it is wrong that freedom should be hindered, it is right to block this hindrance. But to block the constraint of

freedom it is necessary to apply constraint. Punishment is a "hindering of a hindrance of freedom." Compulsion of the criminal is, then, justified only to the extent that it hinders his compulsion of another.

Could we rightly understand Kant here? Punishment comes after the crime. How then can it hinder the crime? The reference cannot be to the hindrance of future crime, or Kant's doctrine reduces to a variety of utilitarianism. The picture of compulsion versus compulsion is clear enough but how are we to apply it? Our answer must be somewhat speculative, since there is no direct answer to be found in the Rechtslehre. The answer must begin from yet another extension of the concept of crime. For the crime cannot consist merely in the act. What is criminal is acting in accordance with a wrong maxim: a maxim which would, if made universal, destroy freedom. The adoption of the maxim is criminal. Should we regard punishment, then, as the hindrance of a wrong maxim? But how do we hinder a maxim? We show, exhibit, its wrongness by taking it at face value. If the criminal has adopted it, he is claiming that it can be universalized. But if it is universalized it warrants the same treatment of the criminal as he has accorded to his victim. So if he murders he must be executed; if he steals we must "steal from" him.[10] What we do to him he willed, in willing to adopt this maxim as universalizable. To justify the punishment to the criminal is to show him that the compulsion we use on him proceeds according to

the same rule by which he acts. This is how he "draws the punishment upon himself." In punishing, we are not adopting his maxim but demonstrating its logical consequences if universalized: we show the criminal what he has willed. This is the positive side of the Kantian rational of punishment.

2. HEGEL

Hegel's[11] account of punishment has attracted more attention and disagreement, in recent literature. It is the Hegelian metaphysical terminology which is in part responsible for the disagreement, and which has stood in the way of an understanding of the retributivist position. The difficulty turns around the notions of "annulment of crime", and punishment as the "right" of the criminal.

Hegel tells us that:

> "Abstract right is a right to coerce, because the wrong which transgresses it is an exercise of force against the existence of my freedom in an eternal thing. The maintenance of this existent against the exercise of force therefore itself takes the form of an external act and an exercise of force annulling the force originally brought against it."[12]

In the Common Law, Holmes complains that by the use of his logical apparatus, involving the negation of negations (or annulment), Hegel professes to establish what is only a mystic (though generally felt) bond between wrong and punishment.[13] Hastings Rashdall asks how any rational connection can be shown between the evil of the pain of punishment,

and the twin evils of the suffering of the victim and the moral evil which "pollutes the offender's sould," unless appeal is made to the probable good consequences of punishment. The notion that the "guilt" of the offence must be, in some mysterious way, wiped out by the suffering of the offender does not seem to prôvide it.[14] Crime, which is an evil, is apparently to be "annulled" by the addition to it of punishment, which is another evil. How can two evils yeld a good?[15]

But it seems that Hegel is following the Rechtslehre quite closely here, and his doctrine is very near to Kant's. In the notes taken at Hegel's lectures,[16] we find Hegel quoted as follows:

> "If crime and its annulment..... are treated as if they were unqualified evils, it must, of course, seem quite unreasonable to will an evil merely because "another evil is there already"..... But it is not merely a question of an evil or of this that, or the other good; the precise point at issue is wrong, and the righting of it..... The various considerations which are relevant to punishment as a phenomenon and to the bearing it has on the particular consciousness, and which concern its effects (deterrent, reformative, etc.) on the imagination, are an essential topic for examination in their place, expecially in connection with model of punishment, but all these considerations presuppose as their foundation the fact that punishment is inherently and actually just. In discussing this matter the only important things are, first, the crime is to be annulled not because it is the producing of an evil, but because it is the infringing of the right as right, and secondly, the question of what the positive existence is which crime possesses and which must be annulled; it is this existence which is the real evil to be removed, and the essential point is the question of where it lies. So long as the concepts here at issue are not clearly apprehended, confusion must continue to reign in the theory of punishment."[17]

One would argue that this passage is not in any way likely to dethrone confusion, but it does bring us closer to the basically Kantian heart of Hegel's theory. To "annul crime" should be redd "right wrong", Crime is a wrong which consists in an "infringement of the right as right."[18] It would be unjust, says Hegel, to allow crime, which is the invasion of a right, to go unrequited. For to allow this is to admit that the crime is "valid": that is, that it is not in conflict with justice. But this is what we do not want to admit, and the only way of showing this is to pay back the deed to the agent: coerce the coercer. For by intentionally violating his victim's rights, the criminal in effect claims that the rights of others are not binding on him; and this is to attack das Recht itself: the system of justice in which there are rights which must be respected. Punishment not only keeps the system in balance, it vindicates the system itself.

Apart from talking about punishment's "annulment" of crime, Hegel has argued that it is the "right of the criminal". The obvious reaction to this is that it is a strange justification of punishment which makes it someone's right for it is at best a strange kind of right which no one would ever want to claim! McTaggart's explanation of this facet of Hegel's theory is epitomised in the following quotation:

> "What, then, is Hegel's theory? It is, I think, briefly this: In sin, man rejects and defies the moral law. Punishment is pain inflicted on him because he has done this, and in order that

> he may, by the fact of his punishment, be forced into recognizing as valid the law which he rejected in sinning, and so repent of his sin - really repent, and not merely be frightened out of doing it again."[19]

If McTaggart is right, then we are obviously, not going to find in Hegel anything relevant to the justification of legal punishment, where the notions of sin and repentance are out of place. And this exactly is the conclusion McTaggart of course reaches. "Hegel's view of punishment," he insists, "cannot properly be applied in jurisprudence, and... his chief mistake regarding it lay in supposing that it could."[20]

But though McTaggart may be right in emphasizing the theological aspect of Hegel's doctrine of punishment, he is wrong in denying it a jurisprudential aspect. In fact, Hegel is only saying what Kant emphasized: that to justify punishment to the criminal is to show him that he has chosen to be treated as he is being treated.

> "The injury (the penalty) which falls on the criminal is not merely implicitly just - as just it is eo ipso his, implicit will, an embodiment of his freedom, his right; on the contrary, it is also a right established within the criminal himself, i.e. in his objectively embodied will, in his action. The reason for this is that his action is the action of a rational being and this implies that it is something universal and that by doing it the criminal has laid down a law which he has explicitly recognized in his action and under which in consequence he should be brought as under his right.[21]

To accept the retributivist position, then, is to accept a thesis about the burden of proof in the justification of punishment. Provided we make the punishment "equal"

to the crime it is not up to us to justify it to the criminal, beyond pointing out to him that it is what he willed. It is not that he initiated a chain of events likely to result in his punishment, but that in willing the crime he willed that he himself should suffer in the same degree as his victim. But what if the criminal simply wanted to commit his crime and get away with it (break the window and run, take the funds and retire to Australia, kill but live?) Suppose we explain to the criminal that <u>really</u> in willing to kill he willed to lose his life; and unimpressed, he replies that <u>really</u> he wished to kill and save his skin. The retributivist answer is that to the extent that the criminal understands freedom and justice he will understand that his punishment was made inevitable by his own choice. No moral theory can hope to provide a justification of punishment which will seem such to the criminal merely as a nexus of passions and desires. The retributivist addresses him as a rational being, aware of the significance of his action. The burden of proof, the retributivist would argue, is on the theorist who would not start from this assumption. For to assume from the beginning that the criminal is not rational is to treat him, from the beginning, as merely a "harmful animal".

> "What is involved in the action of the criminal is not only the concept of crime, the rational aspect present in crime as such whether the individual wills it or not, the aspect which the state has to vindicate, but also the abstract rationality of the individual's volition. Since that is so, punishment is regarded as containing

> the criminal's right and hence by being punished he is honoured as a rational being. He does not receive this due of honour unless the concept and measure of his punishment are derived from his own act. Still less does he received it if he is treated as a harmful animal who has to be made harmless, or with a view to deterring and reforming him."[22]

To address the criminal as a rational being aware of the significance of his action is to address him as a person who knows that he has not committed a "bare" act; to commit an act is to commit oneself to the universalization of the rule by which one acted. For a man to complain about life imprisonment for manslaughter is as absurd as for a man to complain that when he pushes down one tray of the scales, the other tray goes up; whereas the action, rightly considered, is of pushing down and up. "The criminal gives his consent already by his very act."[23] "The Eumenides sleep, but crime awakens them, and hence it is the very act of crime which vindicates itself."[24]

3. F. H. BRADLEY

Bradley makes a contribution to the retributive theory but this contribution is regarded as adding heat but not much light. The central, and best known passage is the following:

> "If there is any opinion to which the man of uncultivated morals is attached, it is the belief in the necessary connection of punishment and guilt. Punishment is punishment, only where it is deserved. We may pay the penalty because we owe it, and for no other reason; and if punishment is inflicted for

any other reason whatever than because it is merited by wrong, it is gross immorality, a crying injustice, an abominable crime, and not what it pretends to be. We may have regard for whatever considerations we please.- our own convenience, the good of society, the benefit of the offender; we are fools, and worse if we fail to do so. Having once the right to punish, we may modify the punishment according to the useful and the pleasant; but these are external to the matter, they cannot give us a right to punish, and nothing can do that but criminal desert. This is not a subject to waste words over; if the fact of the vulgar view is not palpable to the reader, we have no hope, and no wish to make it so."[25]

Bradley's sympathy with the "vulgar view" should be apparent.[26] And there is at least a seeming variation between the position he expresses here and that we have attributed to Kant and Hegel. For Bradley can be read here as leaving an open field for utilitarian reasoning when the question is how and how much to punish. Ewing interprets Bradley this way, and argues at some length that Bradley is involved in an inconsistency.[27] However, it is quite possible that Bradley did not mean to allow kind and quantity of punishment to be determined by utilitarian considerations. He could mean as Kant meant, that once punishment is awarded, then "it" (what the criminal must; time in jail, for example) may be made use of for utilitarian purposes. But, it should go by this time go without saying, the retributivist would then wish to insist that we not argue backward from the likelihood of attaining these good purposes to the rightness of inflicting the punishment.

Bradley's language is beyond question loose when he speaks, in the passage quoted, of our "modifying" the punishment, "having once the right to punish." But when he says that "we pay the penalty because we owe it, and for no other reason," Bradley must surely be credited with the insight that we may owe more or less according to the gravity of the crime. The popular view, he says, is "that punishment is justice; that justice implies the giving what is due."[28] And, "punishment is the complement of criminal desert; is justifiable only so far as deserved."[29] If Bradley accpets this popular view, then Ewing must be wrong in attributing to him the position that kind and degree of punishment may be determined by utilitarian considerations.[30]

4. CONCLUSION

Three propositions can be drawn from the viewpoints of Kant, Hegel and Bradley - these are the points central in Kant's retributivism.

(i) The only acceptable reason for punishing a man is that he has committed a crime.

(ii) The only acceptable reason for punishing a man in a given manner and degree is that the punishment is "equal" to the crime.

(iii) Whoever commits a crime must be punished in accordance with his desert. To these propositions should be added two underlying assumptions, namely:

1. An assumption about the direction of justification: to the criminal.
2. An assumption about the nature of justification: to show the criminal that it is he who has willed what he now suffers.

Traditional retributivism cannot be dismised as unintelligible, or absurd, or implausible.[31] There is no obvious contradiction in it: and there are no important disagreement between the philosophers we have studied over what it contends. Yet in spite of the importance of the theory, no one has yet done much more than sketch it in broad strokes. If, it is accepted that the theory turns mainly on an assumption concerning the direction of justification, then this assumption must be explained and defended.

The key concept of "desert", however, is intolerably vague. What does it mean to say that punishment must be proportionate to what a man deserves? This seems to imply, in theory of the traditional retributivists, that there is some way of measuring desert, or at least balancing punishment against it. How this measuring or balancing is supposed to be done, we will discuss latter.

A further problem is, when we say of a man that he "deserves severe punishment" how, if at all, may we support our position by arguments? What kinds of considerations tend to show what a man does or does not deserve? There are at least two general sorts: those which tend to show that what he has done is a member of a class of actions

which is especially heinous; and those which tend to show that his doing of this action was, in (or because of) circumstances, particularly wicked. The argument that a man desserves punishment may rest on the first kind of appeal alone, or on both kinds. Retributivists who rely on the first sort of consideration alone would say that anyone who would do a certain sort of thing, no matter what the circumstances may have been, deserves punishment. Kant, for reasons of his insistence on intention as a necessary condition of committing a crime, clearly wishes to bring in considerations of the second sort as well. It is not, on his view, merely what was done, but the intention of the agent which must be taken into account. No mater what the intention, a man cannot commit a crime deserving punishment if his deed is not a transgression. But if he does commit a transgression, he must do so intentionally to commit a crime; and all crime is deserving of punishment. The desert of the crime is a product both of the seriousness of the transgression, considered by itself, and the degree to which the intention to transgress was present. If, for Kant, the essence of morality consists in knowingly acting from duty, the essence of immorality consists in knowingly acting against duty.

Perhaps the retributivist can avoid the question of how we decide that one crime is morally more heinous than another by hewing to his position that no such decision is necessary so long as we make the punishment "equal" to the

crime. To accomplish this, he might argue, it is not necessary to argue to the relative wickedness of crimes. But at best this leaves us with the problem how we do make punishments equal to crimes - a problem which will not stop plaguing retributivist. Then also there is the problem which transgressions, intentionally committed, the retributivist is to regard as crimes. Surely, not every morally wrong action.[32]

Finally it may be asked: Has the retributivist cleared himself of the charge that the theory is but a cover for a much less commendable motive than respect for justice: elegant draping for naked revenge?[33]

B. RETRIBUTION AND REVENGE

1. THE REVENGE ARGUMENT.

2. TYLER'S ARGUMENT.

1. THE REVENGE ARGUMENT

Retributivists are often, and in a variety of ways, accused of wishing to have revenge upon the criminal, and deceiving themselves and others by distinguishing this wish as a demand of justice. This accusation is seldom elaborated into an argument; although there does seem to be an argument implicit in it. It is that since the retributivist explicitly ignores the consideration of the question whether any good consequences may be expected from punishment, and yet insist on the right to punish where a crime has been committed, his position is morally indistinguishable from that of a man who simply insists on revenge.

Because this charge is inimical to the retributivist position it may be worthwhile to explore the notion of revenge and the relationship which it bears, if any, to 'retributive punishment'. We shall do this in two ways: first, by a comparison of punishment with revenge and secondly, by examining a retributive account of punishment which does attempt to find a role for revenge in punishment.

The objections which may be raised against the retributive theory along these lines would seem to resolve themselves into claims such as: (i) 'Retributive punishment' is identical with the taking of revenge. K.G. Armstrong formulates this particular criticism as the contention that "retributive punishment is only a polite name for revenge."[34]

(ii) The retributive theory of punishment is merely a rationalization of the desire for revenge. (iii) 'Retributive punishment' has its genesis in the taking of revenge. (iv) The retributive theory of punishment justifies the taking of revenge.

To begin with, it could be argued that in describing an act as revenge we are describing not only the act but also the motives from which it was done. Similarly in talking of 'retributive punishment' we might be referring to punishment inflicted for the purpose of exacting retribution. But punishment may sometimes be inflicted for other reasons. So even if 'retributive punishment' is revenge it does not follow that punishment as such is.

The act of revenge is a natural act. Men do not have to learn to revenge themselves. No institution or social setting needs to be presupposed before an act of revenge can take place, in contrast with, for example raising one's hat to a lady which presupposes a social setting with rules of ettiquette. But revenge may presuppose a concept of personal identity while some manifestations of revenge may presuppose social institutions e.g., if I revenge myself for the act of Soldier A by shooting soldier B who belongs to the same force. More importantly however revenge may also be taken swiftly while enraged or cooly after settled deliberation. Thus it would be more plausible to identify the instinctive response of men and animals with revenge after settled deliberation.

Revenging oneself for an injury is something which is open to all men. When we seek revenge we do not need to be cloaked in any authority to succeed. When somebody has formed an intention to bring about harm to another person this harm is meant as a response to a harm believed to have been done to him by that other person. Revenge therefore has a feeling of personal malevolence involved in it. But this should not always be necessarily the case because a person could also take revenge for something done to someone close to him. Now, there are two important points here (i) revenge presupposes rather the moral wrongdoing and harm done to ourselves or our associates (ii) punishment presupposes moral wrong and is not necessarily for something done to us (cf forgiveness and pardon). In taking revenge we make no appeal to an idea of proportion. Further, whether 'retributive punishment' is justified or not it is still punishment; and definitionally it is true of punishment that it can only be exacted by a representative of authority. But when we seek revenge we are not clothed by an authority - we seek it simply as persons who have been harmed. Conversely, the punishments we are handed out are seldom (if ever) owing to a harm done to the person or persons handing out or implementing the punishment. Indeed it would usually be public policy that they should <u>not</u> be the same persons.

The paradigm of revenge is that of a man seeking to harm someone for harm done to himself or someone close to

him, urged on by feelings of hatred and resentment. Thus the idea of a man seeking revenge yet not at the same time feeling resentful towards the object of revenge strikes us as peculiar, hence in need of explanation. If a man did not feel resentment we would ask what was the reason for seeking revenge. A man does not seek revenge to relieve his feelings, rather the resentment felt is usually the cause of his action. However, the term revenge covers another slightly differing notion from that just mentioned. But a man might seek revenge and yet not hold any feelings of resentment towards the person who had done the harm. Thus Anscombe[35] writes, "If we wanted to explain e.g. revenge, we should say it was harming someone because he had done one some harm; we should not need to add to this a description of the <u>feelings</u> prompting the action or the thought that had gone with it." Perhaps so: but one of the things we want to know is the force of the <u>because</u> here, and this Anscombe does not explain. However, the action of a man who acts without any feelings of resentment begins to look a little more like 'retributive punishment', but a little less like revenge as ordinarily conceived.

Revenge then is reflective, but the abstract noun 'vengeance' covers another idea expressed by the verb 'to avenge' which does not express this limitation. With this verb we get closest to the idea of 'retributive punishment'. One may avenge oneself, but one may also avenge someone else. There is no restriction on who may avenge a particular deed. Anyone may take it upon himself to do so, and again there is no restriction on who may be avenged. Any-

one may be avenged but in both these directions the idea of punishment is highly restricted. Only particular persons in authority may exact punishment, and then only for particular persons, namely those making up the community. But one essential element which is constant in revenge and avenging is that they both involve interpersonal transactions. No authority is claimed by those either revenging themselves or avenging other people. They may claim to be justified in what they do and may offer justification, but they do not claim that which they do by virtue of a particular authority. Thus the exacting of revenge cannot be the same as the exacting of punishment, not even 'retributive punishment'.

Revenging oneself or avenging someone else is often deplored because of the feelings which are thought to be attendant on the act. But if they need not be present in the case of revenge, even less do they need to be present in the case of avenging.

This discussion may be summarized as follows: Revenge and 'Retributive punishment' are not identical. Some varieties of revenge do seem to have more in common with 'retributive punishment' than others. However, it is doubtful whether critics have had the variety of revenge which most closely approximates to 'retributive punishment' in mind when levelling the claim that 'retributive punishment' is revenge. One good reason for denying that 'retributive punishment' is revenge is that 'retributive punishment' is punishment, and punishment has logical features not shared with revenge. Even should these conclusions be accepted

however, the critic is not obliged to withdraw from the field; for it may be that he never intended to claim that a strict identity existed between revenge and 'retributive punishment' but rather that in some sense they amount to the same thing. What he may have in mind is that 'retributive punishment' is revenge by proxy. We shall encounter the difficulties of this view in our examination of Tyler's theory of punishment which attempts to make the retributive theory of punishment do just that.

The second objection to the retributive theory of punishment in these terms is to the effect that the theory is not a genuine theory at all and that retributive reasons are specious. We wish to revenge ourselves and to avenge each other, something we enjoy doing, but at the same time we are aware that the practice is not morally acceptable, and so we fabricate a theory in an attempt to justify ourselves. Charles Berg[36] expresses the criticism in the following words: "The attempt to justify as reasonable is manifestly absurd. That the retributive element exists in the psychology of punishment there is no denying. It is an emotional force. I would criticize merely the attempt to rationalize it, to justify it, and to disguise it as a function of the reason."

But it is not patently obvious that retributivist are rationalising when offering reasons for their views. There may be well recognised marks of the rationalizing temper, and these marks have not to my knowledge been observed to characterize retributivists in discussion. Are they, we

may ask, aware or half aware of what they are doing? In such a case they stand guilty of hypocrisy. But since this charge is absurd, we may take it that they are not so aware, that this all goes on may be subconsciously. This suggestion combined with the apparent absence of noticeable marks of rationalisation suggests that the criticism rests upon some psychological theory. However, then the criticism is only as cogent as the theory is verified. Is there any psychological theory which has the required degree of support? We may say finally that even if it were true that the retributivist unbeknown to himself was engaged in rationalisation, even so his rationalisations, whatever their source, may be productive of valid reasons in support of the theory he desires to foster.

The third point which a critic may have in mind when denying the validity of the retributive theory by claiming that it is merely revenge, albeit masquerading as something else, is that 'retributive punishment' has grown out of the practice of vengeance; and so to the extent that that practice is to be condemned, so is 'retributive punishment.' There are two rejoinders to this criticism - one factual and the other logical. It may be true that in looking for the original signs of 'retributive punishment' we come across the practice of revenge. But it may still not be true that 'retributive punishment' grew out of revenge. 'Retributive punishment' can be seen as having imposed constraints upon the practice of revenge, which constraints are imposed in two ways; checking the pursuit of unlimited

revenge and restricting the seeking of revenge to just those persons who have been responsible for the initial harm. Suppose, however, that we concede this particular claim to the critic, agreeing the historical origins of 'retributive punishment' are to be found in revenge, even so it would not follow that because the seeking of revenge is to be condemned 'retributive punishment' is therefore to be condemned. To think so is to fall foul of the fallacy which J.S. Mill describes as inferring "the nature of the effects from the assumption that they must in this or that property, or in all their properties, resemble their cause."[37] A parallel error is committed by Tyler when defending the retributive theory of punishment. There is no likelihood of the notion of revenge that can be used in this way to repudiate successfully the retributive theory.

The fourth possible objection which may be made is that the retributive theory of punishment justifies the taking of revenge. Evidently it does not do so. It only justifies the infliction of punishment and nothing else. It may be thought to do so only because it is confused with views which are in fact quite distinct. Thus Stephen writes:

> "In cases which outrage the moral feelings of the community to a great extent the feeling of indignation and desire for revenge which is excited in the minds of decent people is, I think, deserving of legitimate satisfaction;"[38] and again: "I think it is highly desirable that criminals should be hated, that the punishment inflicted on them should be so constructed as to give expression to that hatred and to justify it so far as the public provision of means

> for expressing and gratifying a healthy, natural sentiment can justify and encourage it."[39]

This view of punishment, applauding and encouraging the expression of revengeful feelings through the medium of the penal system may justly be called institutionalised revenge, but it is a mistake to identify such a view with those of retributivism. Every society is obliged to take account of feelings of revenge and hatred towards criminals which may reside in the breasts of the populace for as Holmes says:

> "People would gratify the passion of revenge outside the law if the law did not help them; the law has no choice but to satisfy the craving itself and thus avoid the evils of private retribution (of lynching)"[40], but "at the same time the passion is not one which we wish to encourage either in private individuals or in lawmakers."[41]

There is no reason why a retributivist should not agree with this sentiment. It is rather the utilitarian who may be called upon to institutionalise revenge; and make part of punishment at least 'vengeance in disguise'.

If it were true that 'retributive punishment' were nothing but institutionalised revenge or 'vengeance in disguise', then should we cease to be moved by the feelings of revenge there could be no reason given for continuing to punish retributively.

Few retributivists would be prepared to accept this conclusion. However, though a retributivist may support a theory of punishment which neither explicitly nor implictly refers to revenge, that revenge does have a connection with retributivism is a belief which is not altogether without

foundation. Some writers have allowed the notion of revenge to play a central role in their theory of punishment and described themselves as retributivists. It therefore behoves us to examine the theory of one of such retributivists.

When we search our minds for an example of a retributivist who stressed the primacy of revenge in judicial punishment we naturally think of James Stephen and may be especially of his pronouncement that, "The criminal law stands to the passion of vengeance in much the same relation as marriage to the sexual appetite."[42] Stephen thought the desire for revenge which he supposed arose in the community in consequence of serious crimes to be "deserving of legitimate satisfaction." But he was also prepared to appeal to prudence when justifying criminal punishment, for "Let us not forget that there is always a natural resentment in any society against those who have attacked it. Will people be satisfied to see one who is guilty of horrible crimes simply reformed, and not give vent to social horror and resentment against the miscreant?" Further, he saw the justification of punishment consisting in part in its utility as an instrument for enforcing morality. This being so, Stephen's retributivism is a much qualified thing and rather than consider Stephen's theory then I shall examine a retributive theory of punishment advocated by Alexander Tyler.

2. TYLER'S ARGUMENT

Tyler's[43] theory of punishment constitutes a classic formulation of the retributive account of punishment and would be worth considering for that reason alone. But the point of particular interest is that Tyler has sought to make the role of revenge central to his theory by trying to relate retribution to revenge. Our conclusion will be that he fails to do this, that the theory of punishment to which Tyler in fact subscribes is logically independent of considerations of revenge and that we shall be provided with additional reason for thinking that criticisms directed at the retributive theory on the ground that in some way it implies revenge are misplaced.

I shall not follow strictly the order in which Tyler presents his arguments. Instead I shall follow what I believe to be a more logical order. Tyler holds that the individual has the prima facie duty to seek revenge for an injury sustained. He says:

> "Among the original lines of our moral constitution, two of the most remarkable, and which bind eminently to support the bonds of society, are gratitude for benefits received..... and resentment of injuries which incites to revenge, or to the punishment of the aggressor. As on experiencing an important service from our neighbour, an emotion of gratitude increases in the mind, and we feel there is a debt created which we are uneasy till we discharge; by a reciprocal act or testimony of beneficience, so upon the receiving of an injury a feeling of resentment is raised which is not appeased till an adequate revenge is taken of the offender."[44]

Tyler is suggesting that just as we are bound to discharge debts measured by the beneficence of others, so

"pari passu" we are bound to discharge injury upon those who injure us. These duties, it seems to be implied, are on the same footing, on two sides of the same cŏin. The marks of the duty in the two cases are feelings of gratitude and resentment. If these putative duties are parallel then Tyler has provided an argument to support his claim that seeking revenge is a duty if as would be widely acknowledged, discharge of such debts is a duty. But in fact no such parallelism exists. It is perfectly consistent both to maintain that we are obliged to discharge debts arising from the beneficent actions of others and to deny that we are obliged to injure those who injure us. They are logically independent propositions.

Elsewhere, Tyler writes of "This retribution or revenge, which by the law of nature, belongs to the person himself who is injured", and at this point he clearly has in mind some idea of natural right which men possess, but he nowhere explains on what it is grounded or how such rights are to be distinguished from non-rights. We can easily enough construct a valid argument which has as its conclusion that there does exist a right of revenge, thus:

> "It is natural to seek revenge for injury endured; whatever it is natural to do we have a right to do."

Therefore, we have a right to seek revenge. However, inspite of Tyler's reflections on feelings which are "congenial..... to the nature of man", it is unlikely that he would have been prepared to accept the major premises of

this argument. In fact to do so would be self-defeating for any criminal would thereby be provided with an argument of which he could avail himself in defence of his own criminal activities.

Assuming, however, that it is virtuous to seek revenge, still "This retribution or revenge, which by the law of nature, belongs to the person himself who is injured, it has become necessary in every civilised society to surrender to the public."[45] One of the reasons offered for so doing is that of 'utility'; the prevention of confusion and disorder arising from acts of private vengeance. A second consideration is that of justice - "it is necessary for the accomplishment of justice that the retribution should be precisely commensurate to the injury. But there is a natural propensity in every man to overate the injuries he has sustained, and to exceed in the measure of his revenge".[46] Thus Tyler concedes that the taking of revenge cannot constitute the whole of a theory of punishment. What he thinks it can do is provide the justification and right to punish. The state's right to punish being derivative from the individual's original right to seek revenge.[47] But to be justly exacted the revenge taken via the institutions of the state must itself be regulated as without such regulation there would be no justice. This suggestion introduces a novel principle into the theory.

So far Tyler's theory appears to have been the following: the individual exercise of revenge is virtuous or falls

under a natural right, But if everyone exercised this virtue or a right on the appropriate occasions civil chaos would ensue. It is therefore derivable that an institution be created the function of which is to exact revenge on behalf of the injured parties. The amount and quality of suffering to be meted out should be in accord with their wishes. But in fact Tyler rejects this theory. Punishment is to be regulated and determined by reference to considerations of justice. If a partidular injured party does not desire revenge it does not follow that the criminal is not to be punished. Siminarly, a party may desire an "excessive" punishment but such punishment will not be administered. In short, the particular desires of such persons are not to be considered at all. Tyler's comments as to how this regulation and determination is to be carried out are general and vague. We are told that revenge or punishment is no further just than when it is approved of by the conscience of every reasonable and impartial man;[48] but we are not told how to identify such men or what "impartial" is to mean here. If it means "moved by no particular emotions towards the incident," there may be no impartial men for we have already been informed that the relevant emotions need not be confined to those persons who are the victims of the offence. Tyler rules out the unreflecting assumption that the criminal should suffer to the same extent as the victim of the offence. This is a natural view but he claims that careful reflection would

show us that justice requires the punishment to exceed the harm occasioned. To what extent then is the criminal to be punished?

On occasions he seems to be thinking that the criminal is to be punished in proportion to the actual amount of harm done. For example, in one place he writes of the criminal being "made to suffer himself the same degree of loss and pain which he has occasioned to another."[49] In another place he sounds undecided. "The atrocity of a crime, or the moral guilt which it involves ought to be in every case....."[50] Elsewhere he notes that "The amount of the punishment of crimes ought in every case to depend on the moral turpitude of the criminal."[51] How then are we to measure the subjective guilt? Once more Tyler refers to the impartial mind and writes: "Nature has furnished an infallible criterion in that indignation which arises in the impartial mind upon the commission of an offence and which always keeps its just proportion to the magnitude of the offence."[52] But he is not content to leave the matter there. Then he continues: "As justice requires that every injury should be followed by an adequate portion of vengeance against the offender, so the resentment or indignation which the injury exacts ought in every case to be the measure of this vengeance."[53] The vengeance taken is not to be total but "adequate" and the resentment or indignation is not the resentment or indignation of the offended mind but of the impartial mind. Once again we ask: What is "adequate" vengeance and where is the impartial mind to

be found? It could not be a sufficient test of impartiality that one was not injured by the offence, for even then one might still be partial in being too indignant or resentful or not sufficiently so.

Tyler's account gives rise to the question what precisely is the purported relationship between the phenomenon of revenge and 'retributive punishment'? It is a question to which there is no clear answer, for Tyler equivocates continually in his use of the terms "vengeance". His equivocation on these terms is a certain sign that he has not satisfactorily defined the relationship. However, the difficulties which Tyler's theory does face are typically those which face a retributive theory of punishment, difficulties which are irrelevant to a view of punishment as institutionalised revenge.

Our brief examination of Tyler's theory demonstrates one fact clearly, a satisfactory theory of punishment cannot be erected solely on considerations of revenge. When Tyler asks how much punishment is to be inflicted he is obliged to enquire beyond the notion of revenge for an answer. A judicial system which simply canalized revenge would be an unjust system. The "impartial" mind decides what punishment is deserved and may well give a reasonable account of punishment. Tyler has himself confused a retributive theory of punishment with a revenge theory of punishment. However, it is clear that he does in fact support a retributive theory and not a revenge theory for at crucial

points in his account he prefers retributive answers (whatever difficulties they may entail) to the questions raised and not the answer which would be given by a supporter of a revenge theory.

We shal conclude this discussion by asking why Tyler wrote the appendix. The answer constitutes a partial rebuff to those critics of retributivism who cavalierly level it "barbaric". At the beginning of his essay he expresses himself as much concerned about the then cruelty of English penal practices, and protests against what he calls "the barbarism and absurdity of the penal laws of the most enlightened nation."[54] His protest is one against the severity of punishments then current; "With what indignation do we need those statutes which enact the punishment of death for setting fire to a haycock, breaking down the head of a fish-pond or cutting an apple tree in an orchard." He is similarly indignant over the extension of punishment to innocent people recommended by some of his contemporaries.[55] Such barbaric practices and suggestions Tyler attributes to a mistaken jurisprudence, to a belief that the primary function of a criminal punishment is to prevent crime. "Whence has that disproportionate severity arisen? Solely from our departing from the just principle of commensurating the vengeance of the law to the moral guilt of the offender."[56] Were this mistake rectified criminal punishment would be both just and humane.

Thus Tyler's reason for examining the foundations of punishment is to provide reasons for eradicating cruelty and injustice from the practice of the law. The retributive theory which Tyler recommended was a weapon utilised for human purpose as well as a criterion of justice.

NOTES AND REFERENCES

CHAPTER ONE

1. Rechtslehre, Part Second, 49, E. Hastie translation, Edinburgh, 1887, pp. 195-7.

2. Ibid. p. 198 cf. also the passage on p. 196 beginning "What, then, is to be said of such a proposal as to keep a criminal alive who has been condemned to death..."

3. Book I Ch.I, Sect.VIII, Theorem IV, Remark II (T.K. Abbott translation, 5th ed., revised, London, 1898, p.127).

4. Rechtslehre. op.cit.

5. "Supplementary Explanation of the Principles of Right," V.

6. cf. long quote from the Rechtslehre, above.

7. How can the retributivist allow utilitarian considerations even in the administration of the sentence? Are we not then opportunistically imposing our conception of good on the convicted man? How did we come by this right which we did not have when he stood before the bar awaiting sentence? Kant would refer to the loss of his "Civil Personality", but what rights remain with the "Inborn Personality", which is not lost? How is Human dignity modified by conviction of crime?

8. Introduction to the Science of Right. General Definitions and Divisions, D. Right is joined with the Title to Compel. (Hastie, p.47).

9. This extends the definition of Crime Kant has given earlier by specifying the nature of an imputable transgression of duty.

10. There are serious difficulties in the application of the "Principle of Equality" to the "mode and measure" of Punishment. This will be considered in the discussions to follow later.

11. I shall use this short title for the work with the formidable double title of Naturrecht and Staatswissenchaft in Grundrisse; Grundlinien der Philosophic des Rechts (Natural Law and Political Science in Outline; Elements of the Philosophy of Right). References will be to T.M. Knox translation (Hegel's Philosophy of Right, Oxford, 1942).

12. Philosophie des Rechts, Sect.93 (Knox, p.67).

13. Holmes, Jr. O.W., The Common Law, Boston, 1881, p.42.

14. Rashdall, H., The theory of Good and Evil, 2nd Ed. Oxford, 1924, Vol.1, pp.285-6.

15. G.E. Moore holds that, consistently with his doctrine of organic wholes, they might; or at least they might yield that which is less evil than the sum of the constituent evils. This indicates for him a possible vindication of the Retributive theory of punishment. (Principia Ethica, Cambridge, 1903, pp.213-4).

16. Included in the Knox translation.

17. Knox translation, pp.69-70.

18. There is an unfortunate ambiguity in the German word

Recht, here translated as "right". The word can mean either that which is a right or that which is in accordance with the law. So when Hegel speaks of "infringing the right as right" it is not certain whether he means a right as such or the law as such, or whether, in fact, he is aware of the ambiguity. But to say that the crime infringes the law is analytic, so we will take it that Hegel uses Recht here to that which is right. But what the criminal does is not merely to infringe a right, but "the right" (des Recht) as right2, that is, to challenge by his action the whole system of rights. (On Recht", cf. J. Austin, the Province of Jurisprudence Determined, London, Library of Ideas end, 1954), Note 26, pp.285-288 esp. pp.287-8).

19. McTaggart, J.M.E., Studies in the Hegelian Cosmology, Cambridge, 1901, Ch.V, p.133.
20. Ibid., p.145
21. Hastie, E., Sect.100, p.70.
22. Ibid., Lecture notes on Sect.100, Hastie, p.71.
23. Ibid., Addition to Sect.100, Hastie, p.246.
24. Ibid., Addition to Sect.101, Hastie, p.247. There is something ineradicably curious about retributivism. We keep coming back to the metaphor of the balance scale. Why is the metaphor powerful and the same time strange? Why do we agree so readily that "the assassination" cannot "trammel up the consequence" that "even handed justice comments th' ingredients of our poisoned chalice to our own lips?"

25, Bradley, F.H., Ethical Studies, Oxford, 1952, pp.26-27.

26. Yet it may not be amiss to note the part played by the "vulgar view" in Bradley's essay. In "The Vulgar Notion of Responsibility in connection with the Theories of Free Will and Necessity", from which this passage is quoted, Bradley is concerned to show that neither the "Libertarian" nor the "Necessitarian" position can be accepted. Both of these "two great schools" which "divide our philosophy" "stand out of relation to vulgar morality". Bradley suggests that perhaps the truth is to be found not in either of these "two undying and opposite one-sidednesses but in a philosophy which "thinks what the vulgar believe". Cf. also the contrasting of the "ordinary consciousness" with the "philosophical" or "debauched" morality (p.4). On p.3 he says that by going to "vulgar morality" we "gain in integrity" what we "lose in refinement". Nevertheless, he does say (p.4) "seeing the vulgar are after all the vulgar, we should not be at pains to agree with their superstitions."

27. Ewing, A.C., The Morality of Punishment, London, 1929, pp.41-42.

28. Op.cit., p.29.

29. Ibid., p.30.

30. Op.cit., p.41.

31. Or, more ingeniously, "merely logical", the "elucidation of the use of a word; "answering the question", "When (logically) can we punish?" as opposed to the

question answered by the utilitarians, "When (morally) may or ought we to punish?" (Cf. A.M. Quinton, "On punishment", Analysis, June, 1954, pp. 133-142).

32. Distinctions will be made in later discussions.

33. The Revenge argument is examined in more detail in sub-section B of chapter one.

34. Armstrong, K.G., "The Retributivist Hits Back" in Mind, 1961, p.471.

35. See Campbell, T.D., Adam Smith's Science of Morals, George Allen and Unwin Limited, London, 1971, pp.84-5.

36. Berg, C., Fear, Punishment, Anxiety and the Wolfenden Report, London, 1959, p.76.

37. Mill, J.S., System of Logic, 1868, Vol.II, Bk.V., Ch.III, p.339.

38. Stephen, Sir James., A History of Criminal Law of England, London, 1883, Vol.I., p.478.

39. Stephen, Ibid.

40. Holmes, O.W., "The Common Law" Cambridge.

41. Stephen, Sir James., General View of the Criminal Law of England, London, 1885, p.99.

42. Stephen, Sir James., A History of the Criminal Law of England, London, 1883, Vol.I. p.478.

43. Tyler, A., Memoirs of Henry Home of Kanes, Vol.I Appendix (1807) pp, 73-103.

44. Tyler, Ibid., p.80.

45. Tyler, Ibid., p.81.

46. Ibid. p.81.

47. Ibid., p.91.

48. Ibid., p.81.

49. Ibid., p.85.

50. Ibid., p.79.

51. Ibid., p.102-3.

52. Ibid., pp. 102-3.

53. Ibid., p.100.

54. Ibid., p.74.

55. See, for example, Hon. Philip Yorke, Considerations in the Law of Forfeiture.

56. Tyler, A., Memoirs of Henry Home of Kanes, Vol.I., Appendix (1807) p.86.

CHAPTER TWO

A. UTILITARIANISM - CLASSICAL THEORISTS

1. PALEY
2. BENTHAM
3. CONCLUSION.

B. PROBLEMS OF THE UTILITARIAN THEORY

1. INTRODUCTORY STATEMENT
2. REVISED UTILITARIANISM: RAWLS
3. SOME DETAILED ANALYSES
4. RETROSPECTIVE ENACTMENT/STRICT LIABILITY
5. CONCLUSION.

A: UTILITARIANISM - CLASSICAL THEORISTS

1. WILLIAM PALEY

The utilitarian theory of punishment can be regarded as but a subheading of a highly developed general theory of ethics which has had numerous advocates in the history of philosophy, and remains popular today. It is therefore tempting to begin our analysis with some general formulation of utilitarianism (e.g. "An act, policy, course of action, or practice is right if and only if the set of consequences it initiates would be better on the whole than the consequences initiated by any alternative act, policy, course of action or practice") and to show how, if this general position be accepted, the special utilitarian theory of punishment follows. But this approach would be mistaken. It would lead us to settle by fiat a vigorous debate among utilitarians over the way in which the general position should be formulated and defended. (Should acts be justified by references to rules, rules by reference to practices, and practices by reference to their tendency to maximize good consequences; or should we reserve the right to short-cut the rules and practices, and calculate the consequences of the act? And what are the consequences which should be maximized?). It would also lead us to ignore the real possibility that a philosopher might without inconsistency adopt a utilitarian position with respect to punishment, but reject it as a general theory of ethics.

My concern must be, rather, to delineate the general

outline of the traditional utilitarian theory of punishment: to set it out, as far as possible, in propositions which can be contrasted with those taken as expressing the retributive position. To accomplish this it will be necessary to turn again to the history of philosophy, to philosophers generally accepted as promulgating a utilitarian view of punishment. Here, as in the previous section, we will make no attempt to survey the whole field, but will discuss positions which would be universally accepted as paradigmatic: those of William Paley and Jeremy Bentham.

There are advantages in beginning with Paley beyond that of mere chronological appropriateness. Paley's formulation of the utilitarian theory of punishment was enormously influential, since it was expressed in a book which was a text at Cambridge, and a standard reference on philosophy, running through fifteen editions in Paley's own lifetime.[1] This book was so highly regarded and so conservative in tendency, that Sir Samuel Romily, the great reformer of the English criminal law, was obliged to devote a large proportion of his major address of 1810 to a critical analysis of it.[2] More importantly for our purposes, it provides us with a bold and uncomplicated first statement of the position we wish to understand.

"The proper end of human punishment is not," Paley tells us, "the satisfaction of justice, but the prevention of crimes". And since the prevention of crimes is the "sole consideration which authorizes the infliction of

punishment by human laws", punishment must be proportioned to prevention, not to guilt. "The crime must be prevented by some means or other; and consequently, whatever means appear necessary to this end, whether they be proportionate to the guilt of the criminal or not, are adopted rightly, because they are adopted upon the principle which alone justifies the infliction of punishment at all". Since punishment is itself an evil, it should be resorted to only when a greater evil can be prevented. "The sanguinary laws which have been made against counterfeiting or diminishing the gold coin of the kingdom might be just, until the method of detecting the fraud by weighing the money, was introduced into general usage". The facility with which a crime can be committed constitutes a ground for more severe punishment. The stealing of cloth from bleaching grounds must be punished more severely than most other simple felonies not because this crime is in its "own nature more heinous" but because the property is more exposed.[3]

"From the justice of God", says Paley, "we are taught to look for a graduation of punishment, exactly proportioned to the guilt of the offender". But, not finding this proportion in human law, we question its wisdom. However, we must recognize that:

> "When the care of the public safety is entrusted to men, whose authority over their fellow creatures is limited by defects of power and knowledge; from whose utmost vigilance and sagacity the greatest offenders often lie hid; whose wisest precautions and speediest pursuit may be eluded by artifice or concealment; a different necessity, a new rule of proceeding results from

> the very imperfection of their faculties. In their hands the uncertainty of punishment must be compensated by the severity. The ease with which crimes are committed or concealed, must be counteracted by additional penalties and increased terrors. The very end for which human government is established, requires that its regulations be adapted to the supression of crimes. This end, whatever it may do in the plans of infinite wisdom, does not in the designation of temporal penalties, always coincide with the proportionate punishment of guilt."[4]

This is a flat opposition to retributivism. To Kant's thesis that the only reason for which we may punish is that a crime has been committed, Paley replies that the only reason for punishment is the prevention of crime. To Kant's thesis that the only ground for choosing a given "mode and measure" of punishment is that it equals to crime, Paley counters that mode and measure must be determined by the utility of the proposed punishment in preventing crime. Paley could not agree that the last prisoner, in Kant's example of the dispersing community, should be executed; since he holds if crime can be prevented by means short of punishment it should be, but it is a truism that if the community is dispersed the opportunity for crime will not arise again in the community. To each of the propositions to which we reduced Kantian retributivism, Paley would oppose a contrary proposition.

(i) The only acceptable reason for punishing a man is that punishing him will serve the end of the prevention of crimes.

(ii) The only acceptable reason for punishing a man in a given manner and degree is that this is the manner and degree of punishment most likely to prevent the crime.

(iii) Whether or not a man should be punished depends upon the possibility of preventing the crime in question by non-punitive means.

But it seems to me that Paley's theory of punishment is but a sketch, so cryptic that one could not envisage what direction he might have taken in developing it.

2. BENTHAM

Bentham's utilitarian theory of punishment is regarded as the most comprehensive theory in the history of philosophy.[5]

Bentham extends the work of William Paley by:

(1) Providing a general theoretical foundation for the justification of punishment;

(2) Distinguishing carefully between punishment and other "remedies" for crime;

(3) Drawing the limits beyond which punishment should not be applied; and

(4) Offering rules for the determination of manner and degree of punishing.

In the wealth of important material to be found in Bentham's published work on the subject of punishment, any selection is bound to seem arbitrary; yet select we must. Our object will be merely to give some indication of what traditional utilitarianism with respect to punishment is like in its most highly developed form.

Bentham is not content to begin with the purpose of punishment, but thinking of punishment as but one tool in the hands of the legislator, asks what the end is which this and other legislative tools should be made to serve. This end is "to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, everything that tends to subtract from happiness: in other words to exclude mischief"[6].

This broader foundation will allow Bentham to include more under punishment than prevention of crimes as they arise and to take a wider view of prevention than Paley did. Bentham agrees with Paley that punishment is itself an evil and should, if used, be used as sparingly as possible: "Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil." But here again he takes a wider view, by setting for himself the task of discriminating between those situations in which punishment should be used and those in which it should not.

The mischief of crime obstructs happiness but the mischief of punishment does too; so we must be chary in our use of punishment and look about for other means of dealing with the mischief of crime. All such means, including punishment, Bentham terms "remedies", and there are four sorts: (a) Preventive (b) Suppressive (c) Satisfactory, and (d) Penal remedies or Punishment.

(a) The first of these remedies has an unfortunate title,

since on Bentham's view, punishment is preventive also. What he has in mind are, first, direct moves which can be made by the police or private citizens, like admonitions, threats, or seizure of arms, to prevent the occurrences of a particular crime which is thought likely to occur; as when we see a man apparently preparing to commit armed robbery and warn him away.[7] Secondly, there is the whole vast class of indirect moves which can be made to prevent crime: indirect in that they refer not to this or that particular crime, but to a class of crimes which might be committed - preventive medicine as opposed to treating the cholera of crime when it breaks out. Under this important heading, Bentham discusses[8] at length such topics as removal of temptations to crime, like easily concealed arms and tools for the counterfeiting of money; substituting innocuous for dangerous desires and inclinations; and putting people on guard against certain types of offences.

(b) Supressive remedies "tend to put a stop to an offence in progress, but not completed, and so prevent the evil, or at least a part of it."[9] Bentham gives no examples but mentions that suppressive means are the same as preventive ones. The difference apparently lies in the stage of the game at which they are applied: the crime of murder is suppressed if we warn his victim to leave town or pass and enforce a law prohibiting the sale of weapons which can easily be concealed.

(c) Satisfactory remedies "consist of reparations or in-

demnities, secured to those who have suffered from offences."[10] They assume the crime done and try to remove all or part of the mischief it caused. Thus the money taken from the bank must be returned, the damage to a house repaired, the public calumny publicly admitted to be false. The object is to make it as if the crime had never occurred. The object is not, as with Kant's Principle of Equality, that the criminal must suffer in the way and to the degree that his victim suffered; but that the suffering of the victim must somehow be compensated to him.[11]

(d) Punishment is distinguished from the other remedies for the chief of crime in that, like satisfactory remedies, it occurs only after the crime, but, unlike satisfactory remedies, its purpose is preventive: "to prevent like offences, whether on the part of the offender or of others."[12]

> "What is past is but one act; the future is infinite. The offence already committed concerns only a single individual; similar offences may affect all. In many cases it is impossible to redress the evil that is done; but it is always possible to take away the will to repeat it; for however great may be the advantage of the offence, the evil of the punishment may be always made out to outweigh."[13]

The punishment which serves to deter the criminal from repeating his crime is called by Benthan "particular prevention." This may be achieved in three ways: by taking away from the criminal the physical power of repeating his offence (incapacitation), by taking away the desire of offending (reformation), or by making him afraid of offending (intimidation). It is general prevention, however,

the prevention of crime by example of the punishment suffered by the offender, which "ought to be the chief end of punishment, as it is its real justification".[14]

> "That punishment which, considered in itself, appeared base and repugnant to all generous sentiments, is elevated to the first rank of benefits, when it is regarded not as an act of wrath or of vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations, but as an indispensable sacrifice to the common safety."[15]

The limits of punishment: When we understand that punishment is but one of the remedies which may be used against crime, and the conditions under which and the purpose for which it should be used, we are ready to approach the topic of the limits of punishment: "cases unmeet for punishment". Given the general preventive end of punishment, it ought not to be inflicted where it is (a) groundless (b) inefficacious (c) unprofitable or (d) needless. Since punishment is in itself an evil, the burden of proof is on him who would inflict it, and this is so even though a crime has been committed. This contrasts with the traditional retributivism, where the burden is on the criminal to show why he should not be punished equally with his crime, but does not rest (provided the proper proportion is observed) on the person inflicting punishment.

(a) Punishment is groundless when there is no mischief for it to prevent. For example, even though it seemed mischievous (breaking into a man's house, burning his fields), yet the "victim" gave his (free and fairly obtained) con-

sent; or though it is mischievous it was necessary as a means to an over-all good (tearing down a man's house to get material for plugging the dike).

(b) Punishment is inefficacious when it cannot act preventively. Examples are ex-post facto laws; laws not sufficiently promulgated; punishment of infants or insane persons, or persons under physical compulsion.

(c) Punishment is unprofitable when the punishment would produce more evil than the offence it is meant to prevent (capital punishment for picking pockets).

(d) Punishment is needless when the mischief can be prevented at a "cheaper rate". This limitation comes about when there is some means short of punishment which accomplish the same thing. (Instructing misguided people concerning the moral principles by which they should be guided).[16]

Rules for the determination of the manner and degree of punishment: It is here that the subtlety and caution of Bentham are especially apparent. He could not be satisfied by the claim that the crime must be prevented by some means or other and the proportion between guilt and punishment must therefore be ignored. Among the factors which Bentham considers, are the need to set penalties in such a way that where a person is tempted to commit one of two crimes he will commit the lesser, that the evil consequences (mischief) of the crime will be minimized even if the crime is committed, that the least amount possible of punishment be used for the prevention of a given crime.

3. CONCLUSION

A close look at both Paley and Bentham's arguments lead one to draw the conclusion that Bentham moves well beyond Paley in intelligibility and careful analysis. Does the Benthamite analysis conflict with the Paleian position: force us to alter the formulation of the utilitarian theory of punishment which we understood Paley to express? It does not so much require alteration as careful qualification of the bare and bold Paleian pronouncements:

(i) The only acceptable reason for punishing a man is that punishing him will serve the end of the prevention of crimes.

To this Bentham would say, but we must not forget that there are some deeds it will not be worthwhile to denominate crimes and try to prevent; nor that prevention is itself a very complex notion, the analysis of which bears importantly on the means we use.

(ii) The only acceptable reason for punishing a man in a given manner and degree is that this manner and degree of punishment is most likely to prevent the crime.

Bentham would add: Consistently with the reduction of mischief in general! We cannot look at the prevention of each crime as a separate problem. We want to reduce the mischief of all crime at the least possible expense. Otherwise, we will fall into feckless severity as did Paley himself.

(iii) Whether or not a man should be punished depends upon the possibility of preventing the crime in question by nonpunitive means.

To this Bentham would agree, since punishment is but one of four possible remedies for crime, and should be reserved until remedies involving less mischief have been tried.

Paley looks only to the prevention of the crime in question, or (at best) of crimes in general. For Bentham, prevention of crime is but a subheading under prevention of mischief, and that a subheading under the promotion of happiness. But since there is no question but what mischief must be prevented if happiness is to be promoted, and that crime is mischief, the justification of punishment turns inevitably only on the prevention of crime at the least cost, in mischief, of the means used.

It is, of course, the word "only" which gives trouble, for the retributivist creed has an "only" in it too: it is only by reference to desert that punishment may be justified. Both of these positions can be questionable.

If we were to follow out the lead developed in the previous section, we would look for the addressee, if there is one, of the Benthamite justification of punishment. And we would find that Bentham does not appear to have so much in mind justification to the criminal (or to any of us who might have to play that role) as justification to the non-involved citizen whose interest is simply in the best order-

ing of society. But to make this out in detail would be tedious. It might also be misleading, for it might suggest the whole controversy could be resolved by showing that the retributivist is talking to one addressee and is concerned with one set of problems, and the utilitarian to another and another set of problems.

Perhaps in the process of examining the various theories of punishment we should be in a position to distinguish a number of disparate undertakings which have traditionally been lumped together as "the justification of punishment".

B. PROBLEMS OF THE UTILITARIAN THEORY

1. INTRODUCTORY STATEMENT
2. REVISED UTILITARIANISM: RAWLS
3. SOME DETAILED ANALYSES
4. RETROSPECTIVE ENACTMENT/STRICT LIABILITY

1. INTRODUCTORY STATEMENT

The utilitarian is committed to doing whatever, in any given situation, is likely to promote public happiness; or if it is impossible to promote happiness, in the circumstances, at least to minimize unhappiness, and thus he is committed to the minimization of mischief, which is merely any state of affairs that brings about unhappiness. This means, so far as punishment is concerned, that he will punish when, and only when, and in such a way, and to the extent that, there is likely to be less mischief than if he did not punish, or punished in some other way.

But sometimes the best way to minimize mischief would be to punish an innocent man. This argument is usually directed against that wider form of utilitarianism which takes as its principle the promotion of consequences "good on the whole", but, for simplicity, I confine this statement of it to a form uniform with the Benthamite utilitarianism described in chapter one.

If the thesis that punishment of offenders deters other potential offenders is correct, then the greatest need for punishment is when offences are on the increase. It is not however always easy to find someone to punish just when the crime wave is getting under way. And sometimes, by the nature of the circumstances, criminals are very hard to catch. Few law enforcement officials may be available, or those present may be inadequately equipped, or criminals may develop effective warning systems. The

very nature of the offence may make apprehension difficult, as in theft by servants, vandalism, and the writing of threatening letters.

The time may be suitable for a deterrent example. A stiff term of imprisonment, an execution, could frighten would-be criminals, bring home to them the legal consequences of the crime they comtemplate. And is the deterrent example less useful if the "criminal" is innocent, unknown to all but the judge? Would not a consistent utilitarian judge sometimes be constrained by the principle of the minimization of mischief to make use of "misplaced" punishment for the reduction of crime? How, as a utilitarian, could he fail to punish a man guilty in the eyes of everyone but himself, if an example were needed? This argument, if stated in its most general form, would emphasise "misplaced" punishment. That is to say, punishment inflicted in such a way as to fall on wrong shoulders, or too hard on the right ones. Thus there would be included, besides simple punishment of an innocent man, group punishment for an individual's crime, punishment for crimes not yet commited but expected, and punishment of the guilty for more heinous crime than they actually committed.[17]

This alleged consequence of the utilitarian position is so unwelcome that it constitutes one of the strongest arguments against the utilitarian theory of ethics in general, and opponents are held to be most conspicuously wrong when this implication of their doctrine of punishment is clearly made out.

The classic example of expression of the moral repulsion felt by the philosopher when he contemplates the punishment of the innocent is the passage, already quoted at length, from F.H. Bradley, and apparently directed against the philosophy of J.S. Mill. Here Bradley cries out that:

> "if punishment is inflicted for any other reason whatever than because it is merited by wrong, it is a gross immorality, a crying injustice, an abominable crime, and not what it pretends to be."[18]

Obviously the way to answer the charge that utilitarians would have to sanction punishment of the innocent, is to deny that the consequences of punishing an innocent man would ever be better than the consequences of not punishing him. This is argued by appealing to the extremely bad consequences of punishing an innocent man. These consequences, it is held, are so far-reaching and so superlatively bad in their total effect that it is impossible that it could ever be productive of the best consequences to punish an innocent man. The most that can be done by punishing an innocent man is to produce good consequences for a limited number of people over a limited span of time. But since punishing an innocent person subverts the very foundations of the system of law, and since without law human existence would be misery, the effects of punishing the innocent person extend farther and are more fraught with misery than the effects of not punishing him could ever be. No matter how pressing the reasons seem to be for

punishing him, the good consequences of punishing him could not possibly extend as far as the bad ones. For in not punishing him, one is not subverting the system of law. In fact, to refuse to punish an innocent person, under circumstances in which excellent consequences would result from punishing him, is to give strong support to the system of law. The utilitarian may even go so far as to say that the greater the temptation to punish an innocent man, because of the excellent consequences which would result, the greater good is done in refusing to punish him and, instead, upholding the system of law.

The reply to this utilitarian defence is that it is simply not true that the consequences of punishing an innocent are always worse than those of not doing so. Certainly there is no necessary connection between the punishment of the innocent and the subversion of law. How is the law supposed to be subverted? The answer turns on what happens if it is discovered that a person has been punished for a crime of which he is not guilty. If it should come to the notice of the public that, as a matter of policy, a judge has senteced an innocent person, for the purposes the judge deems good, what would be the effect of this news? It would lessen the respect people have for the judiciary. Indeed the foundations of the law would be weakened.

The critic however argues that, all of this weakening of the foundations cannot take place unless the fact that an innocent man has been punished (knowingly) by the govern-

ment is generally known. If it is kept quiet then the foundations are not weakened. So there is nothing wrong, on consistently utilitarian grounds, with punishing an innocent person, so long as the practice can be kept quiet.[19]

The utilitarian can argue that there will certainly be difficulty of keeping the punishment of the innocent person quiet. For not only must the news be kept from the populace but also from the officials of government, if subversion of the law is to be avoided. If officials hear that an official has punished an innocent for a seemingly good reason, then they are going to begin to feel free to do likewise, even when men are not guilty. Obviously such a practice would lead to injustice and chaos.

An answer such as this still leaves open the possibility that there might be circumstances in which the judge could be very sure that only he knows that he is using an innocent man for exemplary purposes; and here the consistent utilitarian judge has no choice. The defence from the extremely bad consequences of punishing the innocent shows at most that the utilitarian would most of the time not punish the innocent. But if he could keep it quiet he would punish the innocent whenever good seemed likely to result from it. If the utilitarian could be said to be occasionally committed to the approval of the punishment of the innocent, then he would also - on occasion - have to approve the reward of the guilty.

Let us suppose it is discovered by a group of distinguished psychiatrists that our approach to criminal conduct

has been all wrong. To punish the man who has committed a crime has bad effects in several ways. Many crave punishment, and it is because they crave it that they commit the crime. Other criminals will be only further embittered and deranged by the punishment. With some criminals the crime is so compulsive that the threat of punishment has little or no deterrent effect.[20] But suppose that it is found that what will reduce the crime rate is to treat the criminal not harshly but sympathetically. Specifically it is found that what ought to be done is to give the criminal a chance to start life afresh under favourable auspices. Suppose also that a successful experiment has proved that if criminals are removed from their former surroundings, given fifty acres of land, a tractor, seedling, and government support and advice for a period of three years, there is a good chance that they will become productive and peaceful citizens.

Again we shall assume that a dangerous criminal commits a violent and premeditated assault upon an innocent man. The criminal is duly examined and presented with his fifty acres and tractor, and is carefully coached and nurtured by the government for three years. At the end of these three years, the programme having succeeded, he has become a prosperous and active member of the Farming Community, has built a neat home, and has bought two adjoining farms. At the end of fifteen years he is the proprietor of a large estate

on which cattle roam and has enrolled his daughter in a public school.

In the meantime, the victim of the assault has drifted from bad to worse. The injuries he has received from the criminal result in his losing his job, going on relief, in his loss of respect, in his living a life of loose wandering, and in his final reduction to selling pencils on a street corner. The criminal now makes it a habit to buy his pencils from his victim, and that to soothe his conscience he pays his victim an additional ten pence for each pencil he buys.

The foregoing example has the anti-utilitarian advantage that the more successful the programme is in reducing the crime rate by rehabilitating the criminal, the greater will be the injustice in the relative status of criminal and victim. The conclusion is that to show that a policy is justified on utilitarian grounds is not to show that it is morally justifiable; and that considerations of justice can conflict with considerations of utility.

On this analysis therefore the utilitarian judge will not only occasionally punish the innocent, but also he will from time to time reward the guilty. To punish an innocent or reward a guilty person seems the very paradigm of injustice; and, to the extent that we value justice, we seem unable to accept the utilitarian position in so far as it bears on punishment. Even if it can be shown that the utilitarian judge would very seldom punish an innocent

or reward a guilty person, he would (we are sure) refrain on principle from such acts, for he is guided by only one principle: The maximization of public happiness. Guided by this one principle he cannot but regard the prisoner before the bar as a possible lever for the public weal. But to make use of prisoners in this way is to ignore or offend against the demands of justice. Indeed this is the centre of gravity of the argument.

2. REVISED UTILITARIANISM: RAWLS

It should be clear now that so far as the traditional utilitarian position is concerned, there is little more that can be said in reply to the punishment of the innocent argument. A valid answer would seem to lie in a better understanding of utilitarianism than the traditional utilitarian had. It rests on the distinction of levels of discussion in the utilitarian argument. This distinction was first made clear by contemporary philosophers not so much interested in taking sides in the traditional dispute, as in the distinction itself.

The formulation of utilitarianism which has been thought to avoid the criticism that utilitarianism permits the punishment of the innocent is that of Rawls. Rawls[21] investigates the importance for utilitarianism of distinguishing between two kinds of moral justification, justify-

ing a rule or practice and justifying a particular action falling under it. The first kind of justification, says Rawls, is the legislator's concern and it turns mainly on utilitarian considerations. The legislator is concerned with the question whether it would be best on the whole to prohibit a certain kind of action, and how much it ought to be penalized. The second kind of justification is the concern of the judge, and it is settled by retributive-like arguments. The judge is not qua judge entitled to consider whether it would be best on the whole to punish a kind of action, and he is severely limited in his decision how and how much to punish. The judge's concern is with the questions what the defendant has in fact done, and whether that which he has done is against the law. Utilitarian considerations are appropriate, then, to legislative discussions; whereas retributive ones are appropriate to judicial discussions. The apparent conflict between the two views is resolved by showing that:

> "these views apply to persons holding different offices and different duties, and suited differently with respect to the system of rules that make up the criminal law."[22]

A clear objection to this resolution of the difficulty is that utilitarianism if taken as the only principle of justification, in legislative discussions, is likely to justify that which would be "cruel and arbitrary". Even with the best of intentions, utilitarians might find themselves favouring the infliction of suffering on innocent persons.

Retributivists might insist that:

> "there is no way to stop the utilitarian principle from justifying too much except by adding to it a principle which distributes certain rights to certain individuals."[23]

This would be an abandonment of the strong position that it is solely by reference to utility that punishment is justified in legislative discussions. Rawls argues that the position is not to be abandoned so quickly. For by concentrating on the distinction between justifying rules and justifying actions falling under the rules, one can see that the utilitarian legislator would be extremely unlikely to favour the infliction of suffering on innocent individuals. Qua legislator, he does not make decisions about which particular individuals are to be made to suffer. What is he accused of, then? It must be of adopting the position that the institution of punishment, in which suffering is inflicted only on the guilty should be superceded by an institution in which it may be inflicted on the innocent as well. He is accused of advocating a change in the whole system. But the ground on which he would favour abandoning punishment for a system in which the innocent may sometimes for good reason be made to suffer ($R_a$wls calls this "Telisment"),[24] would have to be that he thinks that the consequences of adopting "Telishment" would be better than the consequences of retaining punishment. "Telishment" is the institution in which some group of officials has the right to decide under certain specified circumstances that

it would be well to inflict suffering on ("telish") one or more persons who are innocent of the crime "for" which they are telished.

What is important is to consider the probable consequences of such an institution to see that the utilitarian is extremely unlikely to favour it over punishment. These probable consequences are that (1) since there is no real check on the officials who may telish, the right to telish will be abused for those officials' personal ends; and (2) the detterrent effect of the penal system as a whole will be undermined, since a man may be telished even though he has not broken the law, and therefore when he is contemplating a crime, fear of the penalty does not provide the motive for refraining that it does in punishment.

This is, briefly, an answer which could be used by the utilitarian to defend himself against the "punishment of the innocent" argument. It is perhaps a stronger defence than any offered by the traditional utilitarians.

3. SOME DETAILED ANALYSES

The moral justification for the practice of punishment is today sought almost invariably in deterrent and reformatory terms. For those who subscribe to simple hedonistic utilitarian theories of morals, retributivism is ruled out, a priori, by their moral beliefs. One could not therefore hope to shift their position on punishment without first refuting their general moral theory. It is

also the case, however, that most of that great majority of people who do not subscribe to hedonistic utilitarianism reject or, more commonly, ignore the retributive theory of the moral justification of punishment. The reason is probably that many people, particularly philosophers, can see no rational justification for inflicting suffering for its own sake. Even though they admit, as for instance Anthony Flew[25] does, that criminal desert gives us the right to subject the criminal to various unpleasant processes such reformatory measures, and this can be described as a modified form of the retributive theory, they cannot see any point in just making the criminal suffer. The purpose of punishment is therefore only seen in its immediate use to the community, and this use is thought to be best served by deterring and reforming.

The deterrence theory, among several other utilitarian theories, is characterized as an account of the justification of punishment which looks to the future. It is contrasted in this form with the retribution theory which is often spoken of as looking to the past for its justification of punishment. The deterrence theory (like reform and prevention) finds no justification for action in a past offence and its arguments depend entirely upon the consequences of punishment. This view that punishment is justified by the value of its consequences is compatible with any ethical theory which allows meaning to be attached to moral judgements. It holds merely that the infliction of

suffering is of no value or of negative value and that it must therefore be justified by further considerations.

In our review of the traditional utilitarian position we saw that a philosopher who typifies this point of view is the founder of utilitarianism, Jeremy Bentham.[26] He says:

> "General prevention ought to be the chief end of punishment as it is its real justification. If we could consider an offence which has been committed as an isolated fact, the like of which would never recur, punishment would be useless. It would be only adding one evil to another. But when we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent but also to all those who may have the same motives and opportunities for entering upon it we perceive that punishment inflicted on the individual becomes a source of security to all".

Elsewhere he suggests:[27]

> "All punishment is mischief: all punishment in itself an evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil."

Bentham's case is that punishment is a technique of social control which operates to reform the criminal, to prevent him from repeating the offence, and to deter others from similar offences. What Bentham meant exactly by prevention and reform has already been explained in the traditional account. But according to the interpretation offered here if the damage to the offender outweighs the expected advantage to society, it loses its justification, for then it produces more mischief than it prevents. The calculus would also have to take into account the strength of the deterring effect upon others.

But it seems the strongest utilitarian case for punishment is that it serves to deter potential offenders by inflicting suffering on actual ones. How can we be sure whether many people are really deterred? Is it an established truth that punishment does in fact deter or a mere supposition? Naturally philosophers have been reluctant to consider this question for it could be settled only by other than philosophical methods. As it is an essential part of the utilitarian argument we shall discuss it more fully in the next section. In the meantime we assume that the claim could be no other than an assumption because researchers have so far devised no satisfactory methods of setting up appropriate control groups so as to make available the relevant statistics.[28]

There are several important and quite subtle objections to the utilitarian justification of punishment. A pertinent criticism of the deterrence view is one advanced by Kant and supported by both Hegel and Bradley as we saw in the traditional debate. It is the retributivist claim, that to treat a man as an end in himself also involves treating punishment as an end in itself. To punish a man simply because this will deter him and other from committing offences in the future is to treat him only as a means and not as an end. Kant, Hegel and Bradley all agreed that to treat a man in this way is an affront to human dignity. It is a view which receives some confirmation from the remark of an ex-convict, which is quoted by Mabbott:[29]

"To punish a man is to treat him as equal.
To be punished for an offence against rules
a sane man's right".

It may be replied to this objection that there is nothing in the utilitarian approach, as Bentham understood it, that denies the principle encapsulated in Kant's injunction. The criminal must, like anyone else, "count for one"; but he must not count for "more than one". Providing that in weighing advantages and disadvantages to everyone we do not lose sight of the offender's welfare altogether; we are not bound to treat it as our sole legitimate concern.[30]

This would clearly be too weak to satisfy those who employ Kant's rule to support reformative theories of punishment. They would argue that punishment is not justified simply by the prevention of offences and although punishment may protect the interests of others, it must also serve the interests of the offender.

A reply such as this to the objection is altogether too weak, for it entirely misses the point Kant was making. If we punish the offender according to what he has done, we at least treat him like a man, like a responsible moral agent. If we punish on a deterrent principle (i.e. what punishment given to this offender will effectively deter others from imitating his offence?) we are using him as a mere means to somebody else's end, and surely Kant was right when he objected to that. Kant claims that "rational nature exists as an end in itself".[31] By this, he seems to mean that all rational beings, including people, are

ends in themselves. In other words, every person is intrincically good. From this, Kant infers that it can never be morally right to treat a person as if he were simply a useful object for your own purposes. This view, which is the second version of the categorical imperative, is stated by Kant in a variety of ways:

> "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end."[32]
> "A rational being, by his very nature an end and consequently an end in himself, must serve for every maxim as a condition limiting all merely relative and arbitrary ends."[33]
> "So act in relation to every rational being (both to yourself and to others) that he may at the same time count in your maxim as an end in himself."[34]

We shall understand Kant to be saying in these passages that one ought never to act in such a way to treat anyone merely as a means. In other words, an act is morally right if and only if the agent, in performing it, refrains from treating any person merely as a means. According to this statement there is a moral prohibition against treating anyone merely as a means. We should however recognize that this claim does not rule out treating a person as a means. Kant's statement embodies an important moral insight, one that many would find plausible. It is the idea that it is wrong to "use" people as proponents of the deterrence theory try to do. People are not mere objects, to be manipulated to serve our purpose. We cannot treat people as we treat wrecked cars, or wilted flowers. Such things can be

thrown out or destroyed when we no longer have any use for them. People, on the other hand, have dignity and worth, and must be treated accordingly. Thus what Kant says seems fairly plausible.

Perhaps the most serious criticisms of the deterrent theory centre around the claim that if punishment is justified by deterrence alone one is committed to immoral practices. The first of these is that it would be possible to justify punishments divorced from the relative seriousness of offences. In other words, we should not bother about whether or not punishments were unfairly severe, so long as they effectively put a stop to the repetition of offences. Thus, if the only way to deter people from trivial offences were to impose major penalties it would appear justifiable to flog a man for a parking offence, since flogging would certainly have the effect of deterring him and others from parking their cars in wrong places. As K.G. Armstrong[35] remarks:

> "Let him be whipped to death, publicly of course for a parking offence; that would certainly deter me from parking on the spot reserved for the Vice-Chancellor!"

There is also the point that by making a penalty stiff enough in theory to deter anyone, in practice we are bound to make it unfairly severe for someone, which would make nonsense of the retributive significance of the 'punishment' as being "something which is morally deserved."

The stock reply to this criticism is that such objections derive from taking into consideration what amounts to a parady of the deterrence theory. It is quite true that

repugnant consequences would follow from the simple principle that any punishment is justified if it deters, and for that reason such a principle is morally indefensible. The proper deterrence theory, as expressed by Bentham, is that a penalty may be justified only when the distress it causes to the offender is not greater than the distress that would result if he and others, undeterred, offended in the future. Again this mode of reply misses the point of the objection. Even allowing the deterrence theory, Bentham's more reasonable form, what is at issue is that the detterence principle is insufficient by itself to justify punishment, for if we exclude from our considerations the questions of whether an offender <u>deserves</u> to be treated in a particular way injustices could occur. Moreover, it is obvious that Bentham was more concerned with deterrence and prevention than with justice, for he held that where detection is difficult, and the risk of punishment accordingly diminished, greater severity ought to compensate for the uncertainty. On this view, a seriously but easily detected offence would warrant lesser penalties than a minor but less easily detected one; an intolerable situation for anyone committed to the principle of justice and a belief that the degree of punishment should be related to the degree of wickedness involved in the offence.

Another "immoral practice" permitted by a deterrence theory of justification is what might be labelled "victimization" or "punishing the innocent". If it were <u>only</u> a

question of deterring and preventing people from committing offences, then perhaps we might find that we needed on occasion not only to 'punish' the guilty but also the innocent, since this would maybe deter the innocent but tempted. Perhaps also, we should "punish" not only the offender but also his family and friends, since probably this would add greatly to the deterrent effect of the "punishment". The point is succinctly made by Benn and Peters[36] in the following words:

> "Critics of the utilitarian approach content that it would justify punishing not only the guilty but the innocent too. For if punishment is justified solely by its effects, would it not be permissible to manufacture evidence against an innocent man, in order to provide an example to others? If there were an outbreak of crimes particularly difficult to detect, and if people generally could be persuaded than an innocent man had in fact committed such a crime, would not the utilitarian conditions for punishment be adequately justified? Alternatively, if the advantage of deterrence could be achieved by merely seeming to punish a criminal, would it not be wrong to do more than pretend to punish him, since the advantages could then be had without disadvantages."

Unfortunately, they then proceed to make the usual riposte to the sort of charges against detterent theories of punishment. Such charges, they insist involve a logical impossibility, for it follows from the definition of 'punishment' that suffering inflicted on the innocent cannot be "punishment". Moreover, this will not do, for this is a sense in which definitions do not settle substantive moral questions. The reply might be made, "This is a serious

moral and practical point which you want to dismiss with a terminological quibble. I will therefore re-phrase the objection. Why shouldn't we, in certain circumstances, do to the innocent that which, when it is done to the guilty, is known as punishment?" H.L.A. Hart[37] does in fact make a similar objection:

> ".....Not only will this definitional stop fail to satisfy the advocate of "Retribution" it would prevent us from investigating the very thing which modern scepticism most calls in question: namely the rational and moral status of our preference for a system of punishment under which measures painful to individuals are to be taken against them only when they have committed an offence..... ...No account of punishment can afford to dismiss this question with a definition."

It looks as though at this point, those who offer a moral justification for the practice of punishing in terms of deterrence, are in a difficult position; for on their view what morally licenses us to inflict unpleasantness on a man is not that he is guilty, (for that merely gives us a logical licence to use the word "punishment" to refer to the infliction of pain or unpleasantness) but that there will be a socially useful consequence in terms of deterrence.

In "Ethics and Education" Professor R.S. Peters,[38] recognises the problem but does not really face up to it. With his example of a schoolmaster who, because he cannot find the culprit, keeps the whole class in, he argues that, unless a person is involved in some kind of offence and so places himself in a category which makes him different from others, he cannot fairly be given discriminatory treatment.

Noting the traditional view that in general it is more useful to be fair, he observes that in the event of a clash of principles, for most utilitarians, utility would take priority over fairness. But this option is not open to Professor Peters, for his position is that "both fairness and the consideration of interests are fundamental principles of a rational morality and that they are ...logically independent of each other." Thus in the case of the schoolmaster, where two fundamental principles conflict, Peters could provide no rational solution.

There is a further line of criticism of the deterrence theory which might involve asking how the utilitarian axiom that pain is evil can be established. It is assumed, virtually without question, that pain is always evil and that therefore, since punishment is painful, it is an evil which could only be justified by showing it to be necessary to the avoidance of some greater evil than itself. This really involves a fundamental objection to utilitarianism in general and far wider issues than punishment are implied here. It is possible, at least to suggest however, the need for far more analyses to be make of the relationship between pain and evil, for there is some room for doubt about the necessary evil of all pain. If I have toothache, for example, is my pain 'evil'? If I get kicked on the shins during a football match, is the pain of this an 'evil'? If, in making prodigious efforts to arrive at some crucial judgement or solve some intractable problem, I experience at times the 'pains' of frustration, anxiety, disappoint-

ment and so on, are these 'evil'? The answer would certainly depend, not just on the existence of the pain, but also on the extent in which the pain occurred. It would arise as part of a moral judgement taking all the circumstances into consideration.

Hitherto, it has been assumed that the detterence theory is that punishment is justified by the fact that it deters and for no other reason. The one and only, and a sufficient, justification of punishment is that it deters people from wrongdoing. Punishment on this view is therefore valuable only as a means to a desired end. As we have seen such a theory does or would in certain circumstances, justify victimisation. Now because it could not be agreed that victimisation could ever be morally justified, even on grounds of utility, an attempt might be made to deal with the problem by reformulating the theory. As victimizing a man amounts to treating him in a way that he does not deserve, this possibility is easily avoided by re-stating the theory as: the imposing of a penalty on a man who is an offender is justified if it deters him.

Now apart from the fact that we no longer have a detterent theory per se, in that the retributive consideration of desert has been brought in, it is open to at least one formidable objection. What of the man, guilty of wrongdoing, who is not deterred by punishment? According to this theory the man should go unpunished, for punishment is only justified if it in fact deters.

4. RETROSPECTIVE ENACTMENT/STRICT LIABILITY

One of the major claims of the retributive theory is that the innocent ought not to be punished. It is sometimes said, as we have seen, that this claim presents no difficulty for a utilitarian theory of punishment because in the primary meaning of 'punishment' the punishment of the innocent is a logical impossibility. We can then as a preliminary discount the primary meaning of 'punishment' as the relevant meaning. Rather than considering all other possible meanings of the word 'punish' of which there may be an indefinite number, it will be more enlightening, bearing in mind that we are dealing with a moral injunction, to consider whom we might conceivably direct our injunction.

There may be other classes of person to whom the injunction may be directed besides legislators, judges and juries and the police, but these seem to be the most important and we shall restrict our attention to these. When might "the innocent ought not to be punished" be said to legislators? It might be said that when there is a question of restrospective penal legislation being enacted it would be unjust to so legislate because it would mean punishing people for doing something which at the time was not a crime and that this is an instance of punishing the innocent. The rule more precisely formulated would read: a person who does something which at some time is prohibited by penal law should not be punished for so acting unless the enactment

of the penal law antedates the time of the action. If asked for justification of this rule the reply which would most likely be given is that for any law a person ought to be given a chance to conform his behaviour to the dictates of the law. But why, in view of the patent justice of this requirement should anyone need to assert it? Only because there is occasionally a demand for such laws. This demand occurs mostly, we may suppose, where a statute which was intended to cover the particular action, through some failure of draughtmanship or other technical oversight, does not do so; where the offence is a very serious offence; and where the act in question is widely believed to be immoral. Perhaps also cases where a past action may cause serious future harm. Under such circumstances there generated a strong desire not to let people get away with something 'due to a mere technicality'. A utilitarian might hold that the claim interpreted in this way presents no difficulty for utilitarianism since punishment is justified only so far as it serves the future good of society and retrospective punishment could not perform this function - not at least on a long term view of social good. It is however possible that the public outcry against some particular deed is so great that unless some action is taken over it there would be serious risk of civil disorder. Might it not then be possible to find utilitarian justification for the retrospective enactment of such a law, and in this way come into conflict with the claim that the

innocent ought not to be punished?

Another set of circumstances to which the claim would be relevant would be that in which legislators were presented with a Bill and asked to consider it should form part of the criminal law. There may be no doubt about the worth of the Bill, but there may arise controversy over the criterion of guilt to be applied - is the law to be one of strict liability or are the traditional criteria to be followed? Though, technically, only the guilty should be punished, yet in a morally important sense punishment would occasionally be imposed upon the innocent. There is not, it must be admitted, a settled utilitarian position on the question of the rightness of laws of strict liability, though as Glanville Williams has pointed out the demand for such laws is one that has been fostered by utilitarians.[39] However the matter is resolved finally to the satisfaction of utilitarians it will come about solely by a consideration of the advantages and disadvantages of instituting such conditions for laws.

The retributive theory of punishment in maintaining that the innocent should not be punished protest not only against the practice of imposing penalties on those who have not transgressed in law but also against the practice of imposing penalties on those who would not have conformed their behaviour to the laws requirements. The cases of strict liability are known at present more in the civil law than in the criminal law, but it would be splitting hairs

to deny that the penalties levied are punishments. With this example in mind let us turn to a query by Rawls:

> "Will not a difference of opinion as to the proper criterion of just law make the proposed reconciliation unacceptable to retributivists? Will they not question whether if the utilitarian criterion is used as the criterion it follows that those who have broken the law are guilty in a way which satisfies the demands that those punished deserved to be punished."[40]

Rawls, then, produces an argument which a consideration of the examples of strict liability will show to be fallacious. He says:

> "Suppose that the rules of the criminal law are justified on utilitarian grounds. Then it follows that the actions which the criminal law specifies or offers are such that if they were tolerated, terror and alarm would spread in society. Consequently, retributivists can only deny that those who are punished deserve to be punished if they deny that such actions are wrong. This they will not want to do."[41]

We may begin by observing that utilitarians will recommend laws which will have a greater scope than that of preventing terror and alarm. Many traffic laws have utilitarian justification but the offences they prohibit seldom give rise to terror and alarm. Now there are demands which a law may make, where it is unreasonable to expect that the demands can always be met. A man may exercise all due care and yet, still fail to meet the requirements of the law. The retributivist will describe such law as unjust, and unjust not because it produced an undesirable state of affairs, but because it could lay a man open to punishment when he is neither morally culpable nor indeed

responsible for the state of affairs, for which he is being punished. Liability without responsibility is unjust. Even so, we may be able to find utilitarian justification for the enforcement of such laws. A law of strict liability may be justified on the grounds that it is so important to attain the end that punishment of the morally innocent or non-responsible may be used "pour encourager les autres". As stated above we already have laws of strict liability in both civil and criminal law. One could speculate that such laws do have utilitarian justification though unacceptable to a retributivist. Once again it seems that we are able to drive a wedge between the two theories to prevent a reconciliation.

Our example shows us one point at which Rawls' reasoning is faulty. He says:

> "Consequently retributivists can only deny that those who are punished deserve to be punished if they deny that such actions are wrong."[42]

We may say that it is wrong for a dairy to permit milk to become infected and at the same time hold that the person who was responsible for seeing that it did not become so infected did not deserve punishment. It does not follow from the fact that some action which the law prescribes to be done was not done that there is somebody who deserves punishment for not performing that action. If it does appear to so follow that is only because 'desert' has been defined in some forward-looking utilitarian way which avoids any reference to responsibility as the retributivist would understand that term. Laws of strict liability are unjust laws

but the justifications offered for them have been entirely utilitarian.

The demand that the innocent ought not to be punished is one which could be directed towards judges and juries. In fact a large part of the rationale of court procedure could be given in terms of this demand for it is one which has a large part to play in the practice of the courts. If we enquire of many procedures employed by the courts what is their utility? No satisfactory answers can be given, for their justification is not that they aid justice but that they combine to preventing injustice in the form of finding guilty and fit for punishment those who are not in fact guilty. It is sometimes said of the courts that they are so concerned with preventing the punishment of the innocent that their main function, that of punishing the guilty, is one which they attend to only imperfectly. The innocent ought not to be punished means partly to judge that rules of evidence ought to be such that only hard data in the form of documents and other articles, testimony of the senses and expert professional opinions are to be accepted as evidence; it will also mean that relation of evidence to verdict must be such that there can be no reasonable doubt of the man's guilt. Doubtless, it means other things as well. When all are taken together the courts are seen to take a very strict view of the matter. They need not have done so; they could have demanded less strict tests, tests which would have better served the public welfare. Here, at least, the principle appears to have had absolute sway.

The directive might be given to the police; a reminder that convictions are nothing if they are not convictions of the guilty. Clearly, the directive may impinge upon police practice in various ways which it would serve no purpose to enquire into, for by now the point would have been established the principle that only the guilty ought to be punished is relevant to a variety of practices. For the utilitarian to point out that in its primary sense "punishment" implies "guilt" is not relevant to the question whether utilitarianism does justify any of the above practices. Whether utilitarianism does justify any of these practices may be debated, but if any of them can be so justified then in the relevant sense utilitarianism does justify the punishment of the innocent. Against all these practices (and many others as well) the retributivist objects whatever the advantages to society from the adoption of them.

5. CONCLUSION

The demand that the innocent should not be punished shows it to have more content than has usually been thought to be the case. It can be seen from our discussion that the charge against the utilitarian for punishing the innocent may take different forms. But punishing the innocent offends against the principle of treating others as rule following members of a kingdom of ends.

Recent attempts (such as that of Rawls) to reconcile the traditional utilitarian and retributivist positions on

the rational of punishment by distinguishing different levels of punishment - justification fail. It may be perfectly justifiable to refrain from punishing to a lesser (greater?) degree than what is deserved. We may also be justified in not enacting laws which require or permit punishment of the morally innocent (i.e. those who do not deserve to be punished), even where considerations of utility alone would require enactment of such laws. Hence laws permitting punishment of those who have acted neither intentionally nor carelessly (e.g. strict liability statutes) might be unacceptable even if it could be shown that such laws would, if operative, have great deterrent force.

Indeed, the principle of retributive justice require inter alia, that:

(i) Only those guilty of an offence at the time of the commission of an act ought to be punished for that act;

(ii) Only those guilty of an act which could have been conformed to the laws requirements ought to be punished;

(iii) Only those guilty of an offence ought to be subject to detention the purpose of which is to combat crime;

But these requirements are barren until the details are provided.

NOTES AND REFERENCES

CHAPTER TWO

1. Paley, W., The Principles of Moral and Political Philosophy. References are to the 6th Edition, corrected, London, 1788.

2. Radzinowicz, L., A History of English Criminal Law and its Administration from 1750, London, 1948, pp.257-259.

3. Op.cit., Vol.II, Book VI, Ch. IX, pp.268-70.

4. Ibid, pp.273-4.

5. The sources used here are Introduction to the Principles of Morals and Legislation, Wilfrid Harrison, ed., Oxford, 1948; The Theory of Legislation originally edited and published in French by Etienne Dumont re-translated, and re-edited by C.K. Ogden, London, 1931; and the Rational of Punishment, also re-translated from Dumont's edition, London 1830. But reference will mainly be made to the Principles or the Theory, since the Rationale is out of print and not generally available.

6. Principles, p.281.

7. Examples are mainly mine, since Bentham gives few.

8. Theory, "principles of the Penal Code", (pp.358-472).

9. Ibid., p.271.

10. Ibid., p.271.

11. A connecting link could be the vindictive satisfaction felt by victim on seeing the criminal punished, considered as compensation to the victim. But the victim may not want this kind of "compensation" (Cf. Theory,

Principles of the Penal Code, II, XVI).

12. Ibid., p.272.

13. Ibid., p.272.

14. Rationale I, III, p.20

15. Ibid., p.21.

16. Principles, pp.281-288.

17. An analogous argument concerns reward of the guilty. Bentham saw the problem in its general form, and discussed it under the heading "Of Mis-Seated Punishment" in Principles of Penal Law, Part II Book IV.

18. Bradley, F.H., Ethical Studies, Oxford, 1952, pp.26-7.

19. See Mabbott, J.D., "Excursus on Indirect Utilitarianism" in his paper "punishment", Mind, XLVIII, 1939, pp.155-7. where the argument that a utilitarian would have to approve punishment of the innocent - on occasion - so long as it can be kept quiet is well presented.

20. The psychiatrist's argument against punishment will be examined in more detail in chapter 9.

21. Rawls, J., "Two Concepts of Rules", Philosophical Review, Vol.64, No.1, Jan., 1965, pp.3-32.

22. Rawls, Ibid., p.6.

23. Ibid., p.9.

24. Ibid., p.11. Strictly speaking, the words "innocent" and "guilty" should not be used in speaking of the institution of telishment, for to say that a man is innocent is to imply that he is not liable to punishment, but not to imply that he is not liable to telish-

ment. For the new institution we might use "innocel" and "guiltel". To say that a man is "innocel" is to say that (a) he did not break the law, and (b) it would not be best on the whole to telish him. To say that he is "guiltel" is to say that (since there must be some connection with the "crime") (a) he had the motive and the opportunity to commit the "crime" and (b) the proper authorities have, under the prescribed circumstances, decided that it would be best on the whole to have him "telished" "for" that "crime".

25. Flew, A., "The Justification of Punishment", Philosophy, 1954.

26. Bentham, J., "Principles of Penal Law" in the works of Jeremy Bentham, Vol.1, ed. Bowring, J., p.383.

27. Bentham,J., Introduction to the Principles of Morals and Legislation, ed. Harrison, W., Oxford, 1948, p.281.

28. See Wootton, B., Social Science and Social Pathology, London, 1959.

29. Mabbott, J.D., "Punishment" in Mind, 1939, p.158.

30. See Benn, S.I., and Peters, R.S., Social Principles and the Democratic State, London: Allen & Unwin, 1959, p.179.

31. Kant, I., Groundqork of the Metaphysic of Morals, translated and analysed by H.J. Paton (New York: Harper & Row, 1964), p. 96.

32. Ibid.,

33. Ibid., p.104.

34. Ibid., p.105.

35. Armstrong, K.G., "The Retributivist Hits Back" in Mind, 1961.

36. Benn, S.I., and Peters, R.S., Op,cit. p.181-182.

37. Hart, H.L.A., "Prolegomenon to the Prinsiples of Punishment", in Proceedings of the Aristotelian Society, 1959, p.5.

38, Peters, R.S., Ethics and Education, Allen and Unwin London, 1966, p.271.

39. Williams, Glanville, The Criminal Law: The General Part (2nd Ed.) London (1961) ch.6. But for criticisms of such laws see e.g. N. Morris and Colin Howard, Studies in Criminal Law, London (1964) p.199 et.seq.

40. Rawls, J., "Two Concepts of Rules": Philosophical Review, Vol.LXIV, 1965, pp.8-9.

41. Ibid., p.9.

42. Ibid.

CHAPTER THREE

TRADITIONAL THEORIES RE-EXAMINED

1. 'RETRIBUTIVE PUNISHMENT': MORAL/SOCIAL SATISFACTION
2. THE 'THREAT' OF PUNISHMENT
3. THE REFORMATORY THEORY.

1. 'RETRIBUTIVE PUNISHMENT': MORAL/SOCIAL SATISFACTION

As we have noted the traditional retribution theory maintains that we are morally obliged, or at least permitted to punish those who are deserving of it and prohibited from punishing anyone else. The essential condition of retributivism is therefore that punishment is only justified by guilt. Other principles of the doctrine (which have been made clear in the traditional arguments) claim that the function of punishment is the annulment of wrongdoing, that punishment must fit the crime and that offenders have a right to punishment - as moral agents they ought to be treated as ends, not merely as means.

Kant's[1] famous statement with which we opened the traditional debate is not merely asserting that we are morally justified in punishing an offender, but rather that we have a categorical obligation to do so. This is so, we are told, "only because the individual on whom it is inflicted has committed a crime".[2] If we are to take Kant's words seriously then they must be interpreted in such a way that we have a moral obligation to punish a man, not simply because his act was against the criminal law as it stood, but because he acted wrongly or immorally. In other words, we are obliged to support a man's punishment 'because it is his desert for his deeds'.

It would be useful to consider more fully the meaning and implications of "desert" claims but before doing so it would be as well to clear away the problem of what is some-

times called "logical retribution". This is the theory that retributivism, properly understood, is not moral but a logical doctrine, and that it does not provide a moral justification of the infliction of punishment but an elucidation of the use of the word. 'Desert', we are told, is not moral but rather a logical condition of punishment. To say that a man was punished although he did not deserve it (because he was not guilty) is to say something self-contradicting in virtue of the meaning of the term "punishment". The point is best put by Anthony Quinton "...the necessity of not punishing the innocent is not moral but logical. It is not, as some retributivists think, that we may not punish the innocent and must only punish the guilty. Of course, the suffering or harm in which punishment consists can be and is inflicted on innocent people but that is not punishment, it is judicial error or terrorism, or in Bradley's characteristically repellent phrase "social (sometimes "moral") surgery". This infliction of suffering on a person is only properly described as punishment if that person is guilty. The retributivist thesis, therefore, is not a moral doctrine, but an account of the meaning of the word 'punishment'... 'Punishment' resembles the word 'murder', it is infliction of suffering on the guilty and not simply infliction of suffering, just as murder is wrongful killing and not simply killing."[3]

Writers who have agreed with Quintin include Anthony Flew and S.I. Benn. Benn, for example, preserves the idea

that to inflict pain on someone who had not committed an offence would not be punishment at all. For a pain or deprivation to constitute an act of punishment it must be inflicted on someone who has committed an offence. There is therefore no punishment without guilt.[4] This is a verbal or logical point which meets the retributivist's demand that punishment requires pain to be inflicted for guilt but denies retributivism the status of moral justification.

It is certain that no one, not even the utilitarian could expect to deny with any hope of success, the conceptual connection between 'retribution' and what is ordinarily meant by 'punishment'. 'Punishment' logically involves 'retribution', for 'retribution' implies doing something to someone in return for what he has done. Indeed, it is part of the meaning of the term 'punishment' that it must involve pain or unpleasantness and that it must be as a consequence of an offence. It is surprising though that there should have been such ready acceptance by Quinton, Flew and Benn of this 'logical' account of retribution for it has long been accepted as one of the three 'theories' of punishment, and hence as doing more than giving the 'meaning' of the word.

It would, perhaps, be philosophically ludicrous to argue against Quinton, Flew and Benn on historical grounds. Nor would it be sufficient to point to the authority of Bradley,[5] who maintained, ".....our people believe to this day that punishment is inflicted for the sake of punishment"; even though this is presently supported by many ordinary people as can be seen by recent favourable comments on the

increase in severity of punishments. Nevertheless, I shall take the claim, that retributivists have been merely concerned to assert that punishment can be of the guilty only when this is an assertion not about what is morally allowable but rather about the meaning of the term 'punishment', to be false. It is obviously necessary to point out that punishment must be of an offender for an offence, but as A.R. Manser[6] says, "....this is not a stage in the elucidation of punishment; it is rather a datum from which any elucidation must start." The traditional retribution theory maintains that we are morally obliged to punish wrongdoers and is not the view that we are not to describe unpleasantness as punishment if those upon whom it is inflicted are not guilty.

The claim that the retributive theory can be shown to be wrong by such simple facts of language usage as, for instance, that it makes sense to say, 'He was punished for something he did not do,' because among other things, the theory demands that to say a man was punished for a crime logically necessitates that he committed it, is therefore mistaken. K.G. Armstrong[7] has shown that while a fact about how the word 'punishment' is used might well show that a theory of punishment in the definitional sense was wrong, such a fact could not show that a theory dealing with the moral-justification had done so incorrectly, except in the sense that it had dealt with something other than punishment.

To make these points much more explicit it will be useful to adopt Armstrong's[8] analyses. He argues that the way ethical terms are used certainly can show that a general moral theory is incorrect, but this is not true of the way that non-ethical terms are used. Now 'punishment' is not in itself an ethical term: 'punishment', like all activity words, can occur in ethical propositions, but such propositions are not made ethical by virtue of its presence. Nor if the general moral theory was correct, and, by hypothesis, the term 'punishment' had been correctly defined, could the theory of punishment be shown to be a misapplication of the general moral theory by some fact about word usage. But to establish the truth of this last assertion we will have to make a short excursion - as Armstrong[9] does - into the field of ethics.

When it has been settled what it is for an activity to be moral or good (general moral theory), we still have to decide whether each particular activity, in this case the activity of punishing, is a case of a moral or good activity. The method employed to decide this varies with the general moral theory, but it will turn out to be one of the following kinds of procedure:

(i) An appeal to intuition in the broadest sense. To decide whether a particular type of activity is good, a duty, what one ought to do etc., one has simply to reflect on it and one can just 'see' the answer (Moore, Ross, in fact the majority of recent theories).

(ii) A factual calculation of the total amounts of pleasure and pain that the action causes (Hedonistic Utilitarianism).

(iii)(a) A check on whether God has told us, by Revelation, to do it. (The theory that Good is that which God enjoins.)

(b) A check on whether the majority of the community approves of it. (The theory that Morality is Social Convention, i.e. Social Externalism)

(c) A simple statement of whether the speaker himself likes or approves of it (subjectivism) and wants others to do so too (Stevenson, Emotivists generally).

(iv) Settling whether it is in accordance with Human Nature and Man's Final End, both by examining our internal, intuitive attitude to it and by reasoning from what we already know of Man's nature and destiny. (Thomist theory.)

(v) Checking it against a set of specific criteria of various sorts provided by the general theory for determining what is in accordance with the Moral Law (Kant) or what are genuine moral rules (Baier).

Now if we consider all these methods it can be seen that in no case could the theory of punishment (moral justification) produced by their use be upset by facts about the use of the word 'punishment'. It should be remembered

that the data about what it is for an activity to be good, moral, etc., and what punishment is are, in each case, correct by hypothesis. In method (i) no further data at all are introduced, so there is no possibility of error through false information. In method (ii) the additional information is scientific, mainly psychological; it is about how men feel, not about how they use words. In method (iii) there is room for error over (a) what God has commanded, or (b) what the majority of the community does approve of - it is very doubtful whether one could make an error over (c) what oneself approves of or likes - but neither of these could be shown to be erroneous by the way the word 'punishment' is used in sentences not about Revelation or approval. In method (iv) an error could only come in through a false notion of Human Nature or mistakes about Man's Final End; but our ideas about Man's Nature and End are in no way dependent on the question of which sentences using the word 'punishment' make sense and which do not. In method (v) the possible sources of error will vary with the criteria put up by the general moral theory for determining whether an activity constitutes a breach of a genuine moral rule. However, the only criterion which could be shown to have been misapplied by our noting that it made sense to use the word 'punishment' in some given non-ethical sentence would be one which specified that this must not be the case, e.g. 'An activity, to be moral must be such that the word signifying it cannot sensibly be used in such-and-such sort of non-ethical sentences'. Now, of course, no general theory

of morals which would lead to the use of method (v) has such a criterion, and it is hard to see what reason there could ever be for introducing such a one.

The point therefore is that even if a theory of the moral justification of punishment can be wrong in the sense of being a misapplication of the correct general theory, whichever that may be, its wrongness can never be proved by an appeal to language habits. Indeed we are concerned with what is right and wrong, not with questions about language.

We shall return once again to examine 'retributivism' as a moral theory of justification but before doing so R.S. Peters[10] statement that punishment .....is retributive by definition; ...But definitions .....settle no substantial questions" merits some attention. It seems that what Professor Peters is maintaining is that grounds for punishing people could not be found by inspecting the concept. But is it true that we do not frame concepts such that the justification of the activity they refer to is an integral part of the concept? If we examine notions like 'murder' or 'stealing' we find that they are terms used in the English Language to reflect a system of values. For instance, given our present conceptual schema it is analytically true that 'murder' and 'stealing' are wrong. We distinguish 'murder' from 'manslaughter' by reference to the reasons for the behaviour and not by reference to the overt empirical features of situations. So to define 'murder' not only enables us to

distinguish one concept of murder from other concepts about killing, but also gives the grounds for its wrongness. If the same is true of punishment it would seem to be entirely appropriate to find grounds for punishing people by inspecting the concept. This would show that the retributive aspect of the definition of 'punishment' is not simply a logically necessary condition, but also the ground for the justification which 'punishment' inherently possesses.[11]

Having shown that the retributive theory cannot be disposed of by writing guilt into the concept of punishment, upon what does its attractiveness as a moral theory of justification lie, and can the notion of 'retribution', which is a necessary element in the concept, in itself, provide adequate ground for justification? In the first place, the retributive theory is often rejected because the popular notion of what is meant by 'retribution' confuses it with revenge and spite, or perhaps more literally, with retaliation. The idea of 'getting one's own back' and 'the punishment fitting the crime' is then literally interpreted in terms of the lex talionis; 'an eye for an eye' 'a tooth for a tooth'. But unlike, revenge, spite and retaliation, retribution is the just Desert of action. As has been argued so often, there is nothing necessarily just about taking 'an eye for an eye'. Some people, for example, might have only one 'eye'. Moreover, such an injunction would encounter great practical difficulties. What, for instance, would be

the lex talionis prescribed for a blind man who blinded someone else? How does one punish a blackmailer, a sodomite or a dope pedlar or as J. Laird[12] so aptly puts it, "what genuine equivalence" is there between an old eye and a young eye, or between a short-sighted eye and an emmetropic one? But in any case such objections entirely miss the point. The retributivist's concern is not with the form of punishment but with its severity. All that the retributivist is concerned with or requires is that there should be some equivance between the gravity of offences and severity of punishments. But the further question that comes into focus is: how would one balance gravity of offence and severity of punishment? The simple answer is that this is not supposed to be done on the basis of mathematical calculation. In The Ethical Theory of Hegel, Reyburn writes:[13]

> "The equivalence of the wrong and its undoing is one of value, not of detailed quality, and the law recognises this principle when it grants compensation for injury and punishes by fine and imprisonment."

The more serious the offence, the more serious the punishment. Moreover, it is hard to believe that the ancient injunction of the lex talionis was intended to be interpreted in such a literal fashion. It probably had two functions. On the one hand, in an environment in which bloody revenge was not common, it required to seek to impose no more than a just penalty on the offender. On the other hand, it probably functioned to afford compensation to the victim for it is immediately followed by, "And if a man smite

the eye of his servant, or the eye of his maid, and destroy it, he shall let him go free for his eye's sake. And if he smite out his man servant's tooth, or his maidservant's tooth; he shall let him go free for his tooth's sake".[14]

It is emphasised with force that in the area of the moral justification of the practice of punishment a Retributive theory is essential, because it is the only theory which connects punishment with desert, and so with justice, for only as a punishment is deserved or undeserved can it be just or unjust. It is therefore necessary to be clear as to what is meant by the claim that a man 'deserves a penalty'. This is not uncomplicated because the claim may be taken to mean a number of things, some of which are open to serious objections.

To begin with we can discard the notion of desert which implies the imposition of penalty involving an action very like the man's action in his offence. Apart from the reasons already suggested, this notion would rule out defences such that the accused was grossly provoked or that his action was unintentional. All that would count would be that he actually did, which might, fairly obviously, be unjust. For instance would any society seek to punish a motorist who runs over a small child, discovered to have been hiding beneath the car, unknown to the driver? Neither, could we allow claims that a man deserves something where all that is intended is that it is right that he gets it. When the supposed reason is identical with the supposed conclusion the argument is fallacious.

An interpretation of desert which has certainly given force to the retribution theory is that exemplified in the remark, "His punishment is the repayment of his debt to society". What appears to lie behind such claims is that a man is rightly punished because his punishment brings satisfaction to others. It is important to see that to defend a man's punishment as deserved in this sense, is not simply to rest one's case on an equivalence between penalties and grievances, but to defend punishment as providing satisfaction for the victim of the offence and others. Such a doctrine may have relevance in the justifidation of punishment in a legal setting, but would be entirely out of place in justifying punishment in education (i.e. schools). Nor has it any part to play in pure retributive theory, where justification for punishing a man is found wholly in his past action and a relationship between that and the penalty in so far as it affects him.

Another understanding of desert claims, which sees them as referring to a penalty system, is that connected with the notion of responsibility for action. If a man was aware of two options, and being free to choose between them, opted for one, knowing the intention of society to penalize that course of action, then he could be spoken of as "deserving of punishment". He was responsible for his action and performed it with a knowledge of possible consequences according to a penalty system. He knew what he was getting into so it "served him right". It might be thought that these last two interpretations of "desert" in themselves or taken together provide a sufficient argument for punishing

a man. It will be accepted that this may be so if the sole concern is with the justification of punishment in the legal sphere. Here, of course, much could depend upon the notions of 'freedom' and 'responsibility' (which will be discussed fully elsewhere in this work), The Law, however, makes no logical distinction between penalizing and punishing and the retributive significance of punishment in seeing something as morally deserved.

Attention is also drawn to a further important argument namely: that to say a man deserves to suffer is not to give anything that could count as a reason for punishment. The point is emphasised by Benn and Peters in the following statement:[15]

> To say, with Kant, that punishment is a good in itself, is to deny the necessity for justification; for to justify is to provide reasons in terms of something else accepted as valuable. But it is by no means evident that punishment needs no justification, the proof being that many people have felt the need to justify it.

What is being asserted is that punishment is only to be justified by giving reasons in terms of something else accepted as valuable, in terms of something other than itself. Now Anthony Flew[16] makes several logical points about the notion of justification but this is not one of them. Why should it be supposed that a description of punishment alone, cannot count as a reason for its justification? Why should it be thought that a feature of a thing itself, or in the case of punishment, more than one feature, cannot be the basis of its acceptability? Certain-

ly what is distinctive about 'retributivism' is that it treats punishment as an end in itself, otherwise it would be open to the charge of disguised utilitarianism. And do we not justify other such ends as, for example, "education", "happiness" and "friendship", by picking certain features intrinsic to them? There seems no reason for supposing that the same cannot be true of institutions like 'punishment'.

The reader is reminded that the purpose of this section is to examine the traditional retributive theory for its intrinsic importance. A great deal more could be written about the retributive theory but for the purpose of this work enough has been said to show that many of the current objections rest on confussion and mis-statements of the problem. There are several factors which will crop up in other sections. For example, there is the mistaken belief that a retributive moral justification of punishment would make the infliction of pain on the guilty a positive, inescapable obligation, instead of merely creating a right to inflict pain which, like other rights, it may in some circumstances be foolish or mean to exercise. On the other hand, in the area of penalty-fixing (which is admittedly a problem for a purely retributive theory) it has been pointed out that, the charge that retributive theories of penalty-fixing are barbarous is based on the mistaken assumption that the only such theory is the lex talionis. By being retributive punishment should be an imposition of fair penalties.

What emerges from the foregoing which is particularly relevant to the present discussion, is the unique ability of the theory to connect punishment with the notions of desert and justice. Yet it is because it has failed to give an adequate account of the retributive or "morally fitting" character of punishment that 'Retributivism' has so often been rejected. From Hegel to Bradley onwards the distinctively retributive element of the theory as a morally intelligible response to wrongdoing has been largely unexplained. Also, why is it the case that wrongdoing merits punishment and not something else such as rewards, or good-humoured quips or indeed anything? Granted that wrongdoing deserves a retribution, why does it have to be in the form of punishment? This, of course, is a fundamental problem for the retributivist and it is one which is not shared by the detterence theorists. The short answer is that the idea of giving back, not just anything, but rather what one <u>should</u> give back in response to someone's action, is something which is built into the generally accepted notion of retribution. Retribution, it will be maintained, is the just desert of action. If someone does right and is rewarded, or wrong and is punished this is probably what he justly deserves. No other response would be morally intelligible.

2. THE 'THREAT' OF PUNISHMENT

2. THE 'THREAT' OF PUNISHMENT

In citing the purpose of punishment as a deterrence Ted Honderich writes:[17]

> "It is suggested that because of the posibility of punishment some significant number of potential offenders, individuals contemplating possible offences in a serious way, do not in fact go ahead. Other men who find themselves in situations which they did not anticipate or intend, perhaps situations where they are provoked, are said to be restrained by the prospect of a penalty. Others who do commit certain offences are restrained from more serious ones because of the greater possible penalties... The individuals in each of these three classess may not have been punished in the past. The explanation of their behaviour may be 'threat' of punishment, some other aversion to it, or a prudential calculation. What is typically not mentioned is the further proposition that the practice of punishment may have a role in the creation, transmission, and reinforcement of the unreflective attitudes of many people for whom the question of breaking the law never or rarely arises in a serious way."

It is important to distinguish the possible types of motivation that underlie successful deterrence. We must ask both how the punishers themselves see 'deterrence', and also about the presuppositions of the various ways of seeing it, and again how those deterred see things and how and why they are 'deterred' from criminal activities. We may start with the criminal or potential criminal who is frightened into abjuring crime. We can certainly conceive of cases where men are simply so frightned or scared that they dont commit the crimes they are contemplating, or they commit less serious ones. A paradigm case of this would be that of a man who sets out to rob a rich man's house and passes a gibbet on which are hanging the dead bodies of men who

committed the same crimes themselves. The sight so terrifies him that he turns round and goes straight home. Or we can imagine a similar would-be criminal watching a television programme that realistically portrayed life in an ordinary prison. The experience so frightens him that he immediately resolves to 'go straight'. In these cases the mere fear or 'threat' of punishment is, we are to imagine, enough to bring about the decision to be law-abiding.

We may distinguish from this the cases of the prudential calculation. A man is tempted to rob a nearby garage. He then reads in the paper of a man being jailed for six months for a very similar offence. He begins to think about his project again and asks whether the risk is worth taking. The thought of prison does not exactly frighten him, but he finds it unattractive. True, the proceeds of the robbery would be useful but he might find it harder to get rid of the stolen goods than he thought, and, anyway, he would be cut off from all his friends while in prison. After much deliberation he eventually decides not to go ahead with his plan. It simply wouldn't be worth the risk, he concludes.

But there is also another kind of case. A milk roundman who has been perfectly honest for most of his life suddenly wants money badly. He plans to burgle the house of a deaf old pensioner who, he knows, always keeps some money in a particular drawer of her bureau in the front room. Next day he reads in the paper an account of the trial of someone who had done very much the same thing. He is struck by words

of the judge to the accused when sentencing him: "You have committed a mean and despicable act to a harmless and defenceless person just for the sake of your own selfish gain. I am therefore going to send you to prison for six months." The judge's desription of the act particularly catches his attention and it gradually dawns on him that his own project is also mean and despicable; he decides not to steal to get out of his difficulties after all.

It seems to me that in the above examples 'deterrence' is effective in three different sort of ways. In the first case the motivation is totally non-rational, in the second it is prudential, in the third it is moral. In reality, of course, none of these is very likely to occur in its pure form. A man who is terrified into being honest may be temporarily deterred by sheer terror, but if this 'fear' or 'threat' is to have any more or less permanent effect it must have some clearly grasped cognitive content and be linked closely to prudential calculation. It may also, of course, lead to moral considerations. Sheer terror at the prospect of something highly unpleasant may lead a man, for instance, to imagine himself in need of his parents' protection; this thought may lead to the remembrance of their moral teaching and the genuine realisation that the contemplated action is wrong. Then, possibly, the 'disowning' of such 'sentimentality' may drive him back to the position of hard-headed prudential calculator. Again the man who

starts with prudential calculation may either find the results of his computation reinforced by fear or be led on insensibly to the sphere of the moral. He may, for instance think of the disgrace and shame of being tried for the action he is thinking of doing, and these things may lead him to realize their instrinsic evil.

Honderich points to the role of the practice of punishment in "the creation, transmission, and reinforcement of the unreflective attitudes of many people for who the question of breaking the law never or rarely arises in a serious way".[18] This should be expanded thus: The fact that certain actions are punished, especially if they are normally punished by imprisonment, and tried by jury, is inseparably bound up in many people's minds with their intrinsic immorality or injustice. Punishability is thus a sign or indicator of moral evil, at least, where severe punishments are concerned (clearly nobody thinks that the existence of a fine of £5. for a parking offence implies that parking in certain places is morally evil). One of the major arguments against ceasing to punish, say, certain kinds of sexual act (behaviour which has great moral significance and importance in any case) is that such an action will inevitably be interpreted as a moral sanctioning of such acts, if not as straight forward moral approval. This people are 'deterred' from many crimes because the existence of punishments for such acts constantly puts them in mind of the fact (and in some cases even 'teaches' them), that such deeds are morally wrong.

But it should be seen, too, that fear, prudence and morality are not, as it were, equal partners in the motivational struggle underlying 'deterrence'. Being quite simply frightened out of something is, in all but pathological cases, a very temporary state. Human equilibrium can only be found in prudence or morality. But here, too, there is a significant difference. Though prudence, is for the purposes of this discussion, a mere weighing of personal advantages, and disadvantages, it is one of the four 'cardinal virtues'. Imprudence is, in many cases, itself blameable, even if not punishable. It therefore has a very close connection with morality and tends to pass over into it. A man who is open to prudential reasons is open to at least <u>parts</u> of morality.[19] Thus a man who refrains from crime for reasons of prudence is, so to speak, on a sort of slippery slope. The sorts of reasoning he uses to persuade himself that his attempt at crime is 'not worth it' because of the unpleasantness its commission would bring upon him is by its very nature capable of extension to other people in other situations.[20] Unless he deliberately and, to certain extent, artificially 'blocks' certain lines of argument, he is always 'in danger' of seeing that the contemplated crime itself involves unpleasantness towards others like himself. That is, the truly prudent man 'naturally' tends to become the just man - though, of course, human ingenuity can provide all sorts of barriers to this development. The passage from prudence to virtue (of at least a fairly basic level - a virtue, that

is, centring on justice, honesty, veracity, etc.) is also 'naturally' encouraged by the fact that some of the prudent man's reasoning inevitably raises the moral issue itself. Part of the material of his deliberations will be the facts that ex-prisoners find it harder to find work, that the general public disapproves of crime, indeed that prison is an unpleasant place. This inevitability raises the question 'why?' , and though the impervious 'sociologically' oriented type of would-be criminal can always answer in terms of 'society's norms' or of 'middle-class morality' and further postpone the personal confrontation with the demands of morality, it is hard for a man to competely avoid raising the question of whether or not the contemplated acts are intrinsically immoral.

The upshot of this discussion is that much talk of 'deterrence' as the cause of a reduction in crime or of 'being deterred' as a reason for not committing crimes, or of committing fewer, or less serious, crimes, disguises some response to the moral prohibitions that undoubtedly apply to most criminal acts. Such a response may be pretty minimal, not much more than conformity to respectable 'moves', but in many cases 'being deterred' may well amount to the morally-inspired repudiation of criminal activity.

We must now consider a further important range of points that arise from the consideration that 'deterrence' is, notoriously, not always successful. We are not concerned

here with certain obvious grounds for lack of success. Desperate need, lack of imagination, foolhardiness etc. - these are obvious reasons why deterrence doesn't always work, and raise practical questions about how to overcome such need or such obtuseness or insensitivity. What I want to consider now are the more or less deliberate refusals to be deterred. Normally when people talk of a 'deterrent punishment' they have in mind an exceptionally severe punishment, a punishment whose severity greatly exceeds what is normally thought to be appropriate. Hanging a man for stealing a loaf of bread is obviously unjust even if it does deter. What it does not, we may well see behind this failure a kind of despair or necessity on the part of the thieves or a reckless bravado displayed in what is seen as a war of the poor against the rich, or a complete contempt for the officials and rulers of the society in accordance with whose laws such a grotesquely excessive punishment could be laid down. For the fact is that men cannot be compelled to be law-abiding. They can always refuse to co-operate, even, such is the human spirit if this means almost certainly death. And what, for those who are not already in the position of outlaws, leads to such co-operation is <u>fairness</u> of the law. For the mass of men the success of 'deterrence' depends on the acceptance of the punishments as independently just and fair. Why should a man deal justly by his neighbour (especially a rich and powerful neighbour) in a state whose systems of

punishments so blatantly flouts all feeling for the justice of an 'equivalent' sentence? Certainly prudence and morality (if not primitive feeling) counsel him against injustice. But where reason and justice are so systematically mocked by the authorities, the feeling for morality and even prudence in its citizens may well also wither.[21]

It is not being suggested that 'deterrent' and 'exemplary' sentences never 'work'. They may well, for instance, achieve their end in some kind of emergency. If, for example, a nation experiences an acute, but probably temporary shortage of oil, and in an effort to conserve petrol supplies, bans Sunday driving and threatens to fine offenders some astronomical sum, we may well at first gasp with amazement at the disproportion between sentence and offence. When, however, we reflect that one purpose of the fantastic fines is to drive home a complacent and unimaginable populace the seriousness of the situation and the selfishness of arrogating to oneself privileges other people are being denied, we may feel less resistance to the prima facie injustice. An injustice it still remains, however, and it is clear that too much of this sort of thing would at the very least rightly topple a government. The end also may be achieved in a society in a sort of permanent 'state of emergency', like the situation immediately following a revolution, or in a society so brow-beaten by a secret police, or a tyrannical oligarchy that the sense of justice has become numbed,

along with an appreciation of the value of individual freedom, but in an advanced democracy it is fairly clear that the ability to make 'deterrent' sentencing 'work' (that is, serve as a 'threat' to reduce the incidence of seriousness of specific type of crime) is greatly restricted, and that this is largely due to the existence of a population who are sensitive to spectacular deviations from what they have learnt are the appropriate sentences for particular offences. It may also be added that of course there is room for manoeuvre within the area of discretion usually left to the judge in sentencing. Since the general public are, by and large, only sensitive to a large deviations from standard practice, they will not notice the small deviations introducible for 'deterrent' reasons. But there will always be a prima facie injustice about such departure from precedent.

We may now look at 'deterrence' from the point of view of the deterrers, and explore some of the underlying attitudes and presuppositions here. As far as the attempt to use 'blind' fear or terror goes we may surely agree with Hegel when he writes:[22]

> "To base a justification of punishment on threat is to liken it to the act of a man who lifts his stick to a dog."

The implication is that, barring exceptional circumstances, order is paramount, justice does not very much matter, and that the general public are a bunch of savages who cannot be expected to co-operate. It is, in fact, a sort of declaration of war and therefore an encouragement

to non-compliance. Such 'deterrence' shows complete contempt for the citizen and for all sense of values. An overall policy of 'deterrent' sentencing could only be justified when the sense of justice really did seem about to disappear from the mind of the average citizen. But in itself such a policy would do little or nothing to salvage the feeling for justice. It would rather create the impression that it really had disappeared.

A government whose deterrent purpose primarily took the form of an appeal to prudence could not depart so far from the justice of 'equivalence'. At the same time its emphasis[23] - "if you commit this crime you will be punished with this amount of severity, so I should advise you to think again" - conspicuously lacks the element of appeal to the basic moral values which underlie most systems of justice. We may well not wish to go all the way with Plato when he says that the function of the state is to educate and improve its citizens, but in its system of justice, it surely must have some concern with improving more than the merely outward side of social behaviour. A purely prudential emphasis would tend, in that it ignored the essential connection between moral guilt and punishment and the symbolic disgrace of, at any rate, imprisonment, to create a nation of cynics and would encourage people to find ways of out-witting or by-passing the law. And, of course, in so far as the 'prudential' approach is different from the 'moral' approach in that muchh more use is made of 'deterrent' sentencing, it would—barring, again genuinely exceptional

circumstances - tend to erode the general sense of justice which would still be palely reflected in the general system of punishment, though increasingly in an 'empty' and meaningless form.

'But', it may be objected, 'the point of such an approach - a much more widespread appeal to deterrence as the main rationale of punishment - is moral, in that the appeal is made in the name of benevolence, to create a society where, in the end, all are better off since there is much less crime'. But the question basically is this: can you bypass justice on your way to a benevolently - inspired 'good' society? In so far as this is interpreted as a question of fact the answer, on the evidence available so far, is plainly 'no'. Considered as a question about the 'logic' of morality or political science the answer is surely still negative. Justice, it will be maintained, is more 'basic', more 'fundamental', than benevolence in that its demands are more urgent and more pressing. Only a government whose citizens were reduced to the condition of brain - washed imbeciles could justifiably put benevolence before justice.

Only the 'moral' appeal to 'detterence' implies a completely acceptable attitude. Here the existence of punishment 'deters' in that it draws men's attention to what they are assumed to have forgotten. Men are here solemnly warned to give their minds properly to what they are doing or planning or tempted to do. They are invited to contemplate the suffering which, they are to suppose, inevitably awaits them, in order that they may be brought to their

senses. The punishment that 'deters' is here not a meaningless quantum of pain, but the symbol of the injustice of the crime to which it is the response. The appeal is made to the erring fellow-citizen, the lapsed equal, and is essentially one addressed to his higher faculties, not the low cunning or man-of-the-world smartness of the morally indifferent, but the intelligence of the citizen of a democracy who has some genuine concern for the values that underlie it.

The problem however is that such an attitude is sometimes inappropriate. Organised crime may almost become a war against society, and this applies quite obviously to much politically inspired bombing or assassination. But the man who kills, robs, and cheats for 'economic' reasons has still an interest in the continuance of the freedom of civilized society. To confirm him in his 'outlawry' by threatening him with 'the big stick' may be to say farewell to any chance of reclaiming him. On the other hand - and this is a point we may be thought to have neglected so far - the mormal law-abiding citizen may well think <u>he</u> has been unjustly treated if the activities of the professional criminal - let alone the anarchist killer - are not, stamped upon by all the resources of 'law and order'. Does he not pay his taxes so that he may be able, among other things, to sleep soundly in his bed at night? This, of course, is an excellent argument for having a highly trained and efficient system of crime detection. However, it still does not alter the strength of the points made above. 'Deterrence'

in the form of spectacularly severe punishments, is only likely to 'work' in the end if it can be seen to be independently just and fair - though occasional departures from justice may be tolerated - since only under these conditions does it have much hope of making men just. And again, to quote, from William's remarks about the utilitarian approach in general:[24]

> "One disturbing effect of people being active and conscious utilitarians (and hence putting a strong emphasis on deterrence as the purpose and justification of punishment) is that it tends to debase the moral currency: a Greasham's law operates, by which the bad acts of bad men elicit from better men acts which, in better circumstances, would also be bad".

Thus we must say to the average law-abiding citizen that in the end, the ideas of justice and injustice would themselves lose their meaning if the idea of a just (i,e. equivalent) punishment were totally abandoned. 'Deterrent' sentencing may be justifiable <u>sometimes</u>, but there is always a <u>prima facie</u> injustice about it. Once it can be lightly resorted to without the sense of strain and shock which it still produces in many countries, then society will have got its moral priorities badly wrong.

The concept of 'economic deterrence' has not been mentioned so far. It is clear that this notion was introduced to answer some of the objections to a stress on simple deterrence as the purpose of punishment. It is noted, for example, that exceptionally severe sentences for deterrent reasons are apt to cause the 'victims' extra stress, shock,

or suffering over and above that brought about by the extra pain of the punishment itself. The utilitarian still will have to note these 'extra' pains as simple quanta of suffering to be thrown into the balance with the suffering the same punishment without the extra 'shock' element would cause. But it is clear that this extra pain is a justified sense of moral outrage at being treated much more severely than one deserves. The concept of 'economic deterrence', in other words, conceals the fact the general public has a rough idea of what punishment is usually just for a particular offence and can without great difficulty spot the injustice of deterrent sentencing. It is in fact the existence of a widely diffused sense of justice that makes sole stress on deterrence the plausible approach to punishment it sometimes appears to be. 'Deterrence theory', as a branch of utilitarianism in general, tends to come up with calculations of the severity of punishment appropriate in a given case which do not differ as strikingly as we might expect from traditional retributive calculations, simply because it has to take account of a deeply engrained sense of justice among the general public.

Our conclusions about deterrence may be summarized as follows: In the first place, deterrence has been widely championed as <u>the</u> purpose of punishment because it is clearly good that crime should be reduced or kept to a minimum, and because punishment, except when it is wildly unjust, does by its very nature deter. A just punishment is like

an argument addressed to any reasonable man; a system of just punishments is like a standing reminder of the demands of justice. Successful deterrence thus, by and large, presupposes the just of punishment; it does not create it. However the practical question about deterrence is whether it is right, and, if so, to what extent, to depart from the just sentence for 'deterrent' reasons. It has been argued that though this is sometimes justified it is normally only under very exceptional circumstances (at least in some societies). In the vast majority of cases deterrent sentences would not make men just in the end - though there might be short-term gains in the form of a reduction in certain sorts of crime. Not only would the system of justice itself fall into disrepute, and criminals and would-be criminals fail to be made, or kept just, but the 'moral currency', in Williams' phrase, would itself be debased. All this might conceivably be justified in an extremely unstable society; but in any civilized society with an appreciation of the value of justice and freedom it could only mark a general moral and social deterioration.

This discussion is unique in so far as it concentrates on certain aspects of deterrence which are not commonly discussed as they should be. It is clear, too, that deterrence would 'work' better with some types of crime than with others (for instance, its effect on 'crime or passion' is likely to be minimal, at the very least). It is also clear that once we grant the legitimacy of the purpose in

itself the way is open to its extension to the 'punishment' of the criminal's family, or to the widespread detention of those who, it may be thought, are likely to commit crimes in the future. But if deterrence is to be the sole consideration we may well challenge the validity and feasibility of the empirical work which must underlie it. Can one predict the behaviour of people well enough without moulding them in some way to fit one's predictions? There is no reason to believe that one can.

3. THE REFORMATORY THEORY

3. THE REFORMATORY THEORY

Reform is considered to be one of the main ingredients of the Utilitarian approach to punishment. Unfortunately however this theory is subject to various interpretations and its advocates too often mistake it. It is important therefore to make clear from the outset precisely what the relation of reform to punishment is. Whereas it is not logically possible to claim to have punished someone without thereby performing a retributive act, it is empirically possible to inflict punishment upon someone without thereby reforming the offender in anyway or deterring people from further offences. There is no conceptual connection between punishment and reform; instead, reform (like detterence) is thought to provide the reason or purpose or justification for engaging in punishment in terms of social control.
It is to be noted too that some theories dealing with the reform of criminals are not at all theories of punishment. Where criminality is conceived of as disorder or disability certain practices of treatment, as opposed to punishment, are recommended. Instances of such practices would be "house of correction", psycho-surgical and psychological treatment or social care and social welfare - all of which aim to eliminate some of the need to commit certain offences. It seems to me however that it is a mistake to refer to any of these forms of 'treatment' as 'reform'. 'Treatment has nothing to do with punishment whatever, it is, in fact, a highly suspect substitute for it.

It is also important to distinguish reforming a man by punishment and reforming him while he is being punished. Rashdall[25] made the point clearly:

> "Now, of course, it is the duty of the state to endeavour to reform criminals as well as to punish them. But when a man is induced to abstain from crime by the possibility of a better life being brought home to him through the ministrations of a prison Chaplain, or (according to a system which is, I believe, adopted in some American prisons) by the lectures of the Moral Philosopher attached to the prison, through education, through a book from the prison library or the efforts of a Discharged Prisoners' Aid Society, he is not reformed by punishment at all".

Thomas McPherson[26] comments upon Rashdall's statement in the following words:

> "In practice, it may be extremely difficult to decide between these possibilities. Again, how does one establish clearly whether a criminal has been reformed or merely effectively deterred from repeating his crime? Although some Utilitarians would not consider it imporatnt to make the distinction - good consequences are good consequences - it is important to bear the difference in mind if one is concerned with improvements in the penal system".

Moreover we need to distinguish theories dealing with reformative measures to accompany the punishment from those which hold that the suffering intrinsic to the notion of punishment is itself reformative. In the first case it might be said that punishment is justified because it provides opportunities for steps to be taken to reform offenders and to reduce offences. Detention in prison or reform centre may not be in itself an essential part of the process of inculcating moral principles or "socialising" offenders, though it may (at best) provide a convenient opportunity

for psycho-theraputic treatment. However, taken by itself this reformative doctrine is open to ready dismissal for, as a justification of punishment it portrays a premiss that is undoubtedly false. What is suggested is that certain steps may be taken which will improve men morally and make them law-abiding, and that punishment is justified because it enables these steps to be taken. But what one also needs to be established is that only punishment would provide the opportunity or the best opportunity. While it may be admitted that some form of restraint would be necessary for an attempt to be made in the suggested ways, this is not to say that punishment need be. There is no necessary connection between the intentional imposition of unpleasantness, which is an essential element of punishment, and reformative measures of this sort.

But this difficulty is escaped by the second doctrine namely, that the suffering involved in punishment can itself have a reformative effect. The most important way in which this occurs is that it is said to contribute to a change in the beliefs of offenders and others as to the wrongfulness of certain actions, thereby affecting a change for the better in behaviour. Punishment then, as A.C. Ewing[27] describes, has the effect of emphasizing to a man his immorality:

> "It is not only pain that is characteristic of punishment, it is pain inflicted because of wrong done and after a judicial dicision involving a moral condemnation by an organ representing society. It is not only that

the man suffers pain, but that he suffers as a consequence the condemnation of his act by society as immoral and pernicious. Now this surely is a striking way of bringing home to him, so far as external symbols can, the wickedness of his conduct. It is generally admitted that recognition of one's sins in some form or other is a necessary condition of real moral generation, and the formal and impressive condemnation by society involved in judgement is an important means towards bringing about this recognition on the part of the offender."

There is yet another variation of the reform theory which is the doctrine that punishment is justified because it has a moral effect on individuals other than those who actually experience it. Ewing[28] thinks that as well as helping the offender to realize the "badness of his action" it may also help others to realize the badness of the action in question before committing it. This obviously differs from a purely deterrent theory, because a person who abstains from crime simply because he is deterred does so through fear of suffering and not because he thinks it wicked; whereas a person who abstains because the condemnation of the crime by society has brought its wickedness home to him abstains from moral motives and not merely from the fear of unpleasant consequences to himself.

This view rests on an assumption that individuals may not realise the extent of the wrongfulness of an action unless it is one that is punished by society. Such an assumption virtually amounts to saying that members of a society could not, or would not, regard offences as wrongful without the demonstration of punishment. But such a crude conception

of the relationship between accepted morality and the practice of punishment would be unacceptable. There is no reason, however, why it cannot be accepted that the making of an action into a punishable offence may serve to fortify beliefs as to its immorality, but this hardly amounts to a strong justification for punishment. Once again it would be an attempt to justify punishment solely by its effects - a view considered to be mistaken. To accept a principle to the effect that punishment would be justified solely in virtue of its influece or moral beliefs and further consequences in behaviour - more especially justifying punishment by its effects on others - would be to commit oneself to victimization.

Furthermore, there is a special objection to this kind of reformative doctrine and to others of similar kind. To attempt to reform by punishment is to endeavour to change beliefs and attitudes of members of society with respect to certain actions. Thus to suppose that this is necessarily desirable is to assume that punishment will always create or re-inforce attitudes that certainly are right. This would be an error, for at any time, the law includes elements which are open to question; and what is required is not that members of society should be influenced in some direction by the practice of punishment, but that there be unrestrained discussion of the issues in dispute. Undoubtedly, moral progress and rational decision-making would be impeded if the practice of punishment coerced judgement in one direction. One does not become a good man simply by being

impressed by condemnations issued by others. One is more admired as a moral agent if one obeys the law out of sympathetic and impartial awareness of the reasons which provide backing of laws, and of effect on others if they are broken. We are also to be reminded of a further difficulty concerned with the changing of beliefs and attitude by means other than argument and giving of reasons. The general case against such means is that these are values of the first importance in maintaining the place in society of rational discussion. The practice of punishment is then primarily seen as attempting to change behaviour.

The reform theory may therefore be objected to on the grounds that: (1) it places insufficient limitation on what may be done to individuals in order to secure certain behaviour. (2) it fails to take into account limitations having to do with justice and equality of treatment. The ideals of reform and individualization of punishment which have been increasingly accepted into modern penal practice, under certain circumstances, plainly run counter to principles of justice. K.G. Armstrong[29] comments as follows:

> "If the aim in punishing is the reform, or "cure", of the offender, then the logical pattern of penalties would be for each offender to be given reformatory treatment until sufficiently changed for the experts to certify him as reformed."

There would no longer be any basis for the principle of a definite limit to punishment. And since the aim of the reform theory is to eliminate the tendency to commit offences, why wait until "the damage is done" before punish

ing him? Let him be punished for what he is, not for what he has done!

This is not to suggest that punishment is never justifiable as reformative; but it is questionable, even on utilitarian grounds alone, whether the reformative benefits of punishment would justify it. Also, it just does not take into account features of the practice of punishment which are essential to which any justification of it might have. However, given that punishment is necessarily for other reasons, the desirability of arranging the conditions of punishment in such a way that there is some possibility of the offender being "morally improved" <u>while</u> he is being punished, cannot be denied.

In this way, then, punishment can reform. Punishment is essentially symbolic. The walls of a man's prison <u>do</u> 'speak' to him if he has ears to hear (though certainly the conditions in many prisons today make it very difficult to 'hear' this 'message'). A prisoner may well see in his degradation and shame the outward symbol of his own inner state and be filled with genuine feelings of remorse and repentance. And this, if people will let it, can lead to a real re-integration of the ex-criminal into society and a reconciliation between him and his victim. Such things are certainly possible and occasionally do happen.

But we must see that such a result presupposes the imposition of a just punishment. It is sometimes thought that any stress on reform entails the conclusion that if it

were possible to 'reform' by methods the prisoner found pleasant we would be logically bound to take <u>this</u> path to the desired end. But this entirely misses the point of what reform <u>is</u>. There is, first of all, the prisoner himself. He cannot be reformed unless he fuly realises the evils he has committed. But such full realisation necessarily results in remorse and repentance, which are in themselves very painful. Ideally the pain of the punishment itself, symbolises, encourages and somehow induces the inner pain of repentance (though, of course, repentance may also precede the serving of the sentence). And the punishment is necessarily then accepted by the criminal - so far as it is independently just. He himself perceives his need to expiate his crime, to pay his debt. He too responds to the mysterious demand for expiation. Not that the repentance and the acceptance of the justice of expiation necessarily go together. The one can exist without the other. But each has a necessary tendency to produce its fellow, because each makes the wrongdoer more sensitive in general to the demands of justice and morality. A man who has fully repented and fully submitted to these demands is then, 'reformed'. He has got clear of his guilt, he is a new man again, he can look the world in the eye. But the world, too, cannot accept the criminal unless he has suffered - except of course in the case where forgiveness or mercy are possible. A full and genuine acceptance of the wrongdoer is simply not humanly possible unless the demand for expiation

is somehow met, or acknowledged or superceded. This 'reform' cannot possibly be achieved through purely benevolent means unless it takes the form of forgiveness and mercy. Some kind of 'purification' through suffering is indispensable.

It should also be clear now that 'reform' cannot possibly be anyone's <u>policy</u> in punishing, as conceivably, but illegitimately, deterrence can. It may be possible to try and deter, by imposing savage sentences to try and frighten people away from crime, but there is no analogous way in which a judiciary may try and <u>reform</u>. You can't <u>make</u> anyone better, nor is there any plausible way of trying. The most that can be done is to arrange the details of punishment that reform is possible. For reform is ultimately the free response of the wrongdoer to moral value. Indeed, we may say similar things about 'moral deterrence'. Like reform, such 'deterrence' is intrinsically bound up with just punishment. But their relationship to punishment is rather like that of happiness to morality. There is no guarantee that the moral man will be happy. But somehow there is an intrinsic connection between the two. This connection is more than the insight that the moral man <u>deserves</u> happiness. It is rather that the moral man will tend to be happy. But he will not achieve this 'natural' consequence or end of morality if he <u>aims</u> at it too strenuously. Happiness is no more than the utterly appropriate by-product of the moral life. It is, I suggest, the same with deterrence

and reform. If they are deliberately aimed at, or, in the former case, aimed at too frequently (for it is clear that not <u>every</u> deterrent sentence is wrong), they will not be achieved. Somehow the attempt is self-stultifying. But if the aim is to do justice, they will tend to follow as natural accompaniments. Clearly there are many exceptions to this tendency and it might even be thought ridiculous to say that reform and deterrence 'naturally' follow punishment in societies where crime is on the increase. The point might then be better expressed as follows: if you want to achieve deterrence and reform in fully acceptable ways you had better concentrate first and foremost on retributive justice. There is, under normal circumstances, no better way of proceeding.

These arguments try to show that the two most widely canvassed 'purposes' or 'ends' of punishment are, rightly construed, desirable 'by-products' of just punishment. Though we can <u>sometimes</u> use punishment in order to 'deter', such occasions must be strictly limited and only reluctantly sanctioned; to become too interested in deliberate deterrence would be both extremely unjust to the individuals punished and would be self-defeating in the end. Reform, on the other hand, cannot be deliberately aimed at. All that can be done is to encourage it by various means or to ensure by the control of the punishment itself that it is possible. But as in the case of deterrence, the success of the 'policy' will be, in general, unlikely unless the punishments are

accepted as just. We can say, then, that deterrence and reform are in general justifiable or 'workable' in the long run when they are treated not as external or extrinsic ends to which punishment is regarded as a useful means, but in some sense internal or intrinsic parts or consequences of the punishment itself. We should not set out to 'reform' or 'deter' by punishing; rather in punishing we should also hope to reform and deter.

The crucial point about utilitarian views, however, is that it is parasitic on a view of men as capable of following and understanding rules.

NOTES AND REFERENCES

CHAPTER THREE

1. Rechtslehre, Part Second 49, E. Hastie translation, Edinburgh, 1887, pp.195-197.
2. Ibid.
3. Acton, H.B., (ed.) The Philosophy of Punishment, London: Macmillan, 1969, pp.58-59.
4. Benn, S.I., "An Approach to the Problems of Punishment" in Philosophy, 1958, p.325ff.
5. Bradley, F.H., Ethical Studies, (1876), New York:DVP, p.28.
6. Manser, A.R., "It serves You Right", In Philosophy, 1962, p.295.
7. Armstrong, K.G., "The Retributivist Hits Back" in Mind, 1961, p.478.
8. Ibid., p.476.
9. Ibid., p.476ff.
10. Peters, R.S., Ethics and Education, London: Allen & Unwin, 1966.
11. Kleinig, J., Makes a similar objection in Peters on Punishment - British Journal of Educational Studies, Vol.20, No.3, October, 1972.
12. Laird, J., "The Justification of Punishment" in Monist, 1931, p.399.
13. Reyburn, H.A., The Ethical Theory of Hegel, Clarendon Press, Oxford, 1967, p.153.
14. Exodus 21, 26-27.

15. Benn, S.I., and Peters, R.S., Social Principles and the Democratic State, London: Allen & Unwin, 1959, pp.175-176.

16. Flew, A., "The Justification of Punishment" in Philosophy, 1954.

17. Honderich, Ted., Punishment: The Supposed Justifications, Hutchinson and Co. Ltd., London, 1969, p.42.

18. Honderich, Ted., p.42.

19. Cf. "Moral Beliefs", Phillipa Foot, Proceedings of the Aristotelian Society, 1958-9.

20. Cf. The Whole Central Theme of Values and Intentions, J.N. Findlay, London: Allen & Unwin, 1961, p.442ff.

21. There is also the whole question of 'Social Justice". Great inequalities in Worth, and the opportunity to acquire it, are bound to qualify all this. But it should be clear from the whole argument of the thesis (at least up to this point) that I think that the basic insight that retributive justice somehow precedes, or is more important and basic than, the part of benevolence we now term 'social justice' means that we cannot look on our system of criminal justice as a way of redressing social justice, which are injuries of quite a different order. It is this refusal to make a complete separation between the justice of desert and the justice of 'equal shares' that, I think, is a major defect in Honderich's thesis.

22. Addn. No.62 to paragraph 99 of Hegel's philosophy of Right (p.246 of Knox's edn.)

23. Which would be apparent, inter alia, in the lack of moral condemnation shown by the judge when sentencing.

24. Williams, B.A.O., Morality and Emotions, London, 1966, p.110.

25. Rashdall, H., The Theory of Good and Evil, Vol.1, Clarendon Press, Oxford, 1907, p.292; the quotation incorporates a footnote).

26. McPherson, T., Social Philosophy, Van Nostrand Reinhold Company Limited, London, 1970, p.81.

27. Ewing, A.C., The Morality of Punishment, 1929, p,97.

28. Ibid., p.96.

29. Armstrong, K.G., "The Retributivist Hits Back" in Mind, 1961, p.484.

PART TWO

EDUCATION, DISCIPLINE AND PUNISHMENT

CHAPTER FOUR

EDUCATIONAL VALUES AND NEEDS

1. NEEDS AND VALUES IN EDUCATION
2. THE PROCESS OF LEARNING AND INDIVIDUAL NEEDS
3. EDUCATION AND SOCIETAL NEEDS
4. SOME CONCLUDING REMARKS.

1. NEEDS AND VALUES IN EDUCATION

The view of education as the development of rationality through the acquisition of certain kinds of objectively true knowledge goes back at least as far as Plato and it was this Platonic/Christian tradition in educational practice that Rousseau inveighed against his Emile. Rousseau urged us to start from the child in making our educational provision rather than from the subject matter.

> "We know nothing of childhood and with our mistaken notions the further we advance the further we go astray. The wisest writers devote themselves to what a man ought to know, without asking what a child is capable of knowing. They are always looking for the man in the child, without considering what he is before he becomes a man."[1]

Thus did Rousseau begin a movement that was taken up by educators like Dewey and Montessori and that has culminated in many of the changes that we can see in schools today.

This view of education is sometimes characterized as 'progressive education'; sometimes it is called 'child-centred' or 'learner-centred'. At root it is an attempt to provide a form of educational guidance on the basis of the 'needs' or 'interests' of the child. Rousseau's own proposals for the practice of education do not help us much here since basically they amount to the advice that, in the early years of childhood at least, we should try to leave the child alone to develop naturally, to grow, and thus protect him from the corrupting influences of society - a primitive version of one aspect of the view currently being put forward by certain sociologists.[2]

However, it is now widely believed that all decisions as to curriculum content shoult be made by reference to the needs of the children. Some psychologists have tried to discover for us the needs of children in order to provide us with the basic knowledge we must have to begin to plan a curriculum along these lines. Maslow, for example has proposed a theory of motivation in terms of need reduction.[3] He has identified three sorts of need - primary needs, those for food, air, sleep and so on, emotional needs, those for such things as love and security, and social needs, those for acceptance by a group and the confidence that comes from an awareness that one has something to offer to a group. The theory is that if these needs are reduced, the patterns of behaviour associated with this need reduction will be reinforced and that this is how learning takes place.

Such a theory may help us in our search for effective methods of teaching; it does not help us with questions about the content of our teaching. For all such theories of need or attempts to define need must involve some kind of evaluation on the part of the person propounding the view and more so on the part of anyone attempting to implement it. Once one gets beyond the needs for food, drink, sleep and other physical requirements of this kind, it becomes increasingly difficult to separate what a child needs from what he wants or from what someone thinks he ought to have. In other words 'need' is a term which has a prescriptive as well as a descriptive connotation.[4]

John S. Brubacher comments as follows:

> "There seem to be two meanings of the word 'need', one prescriptive and the other motivational. Thus it makes some difference whether needs stem from a social requirement or whether they are "felt" needs of the student himself. Prescriptive needs will further vary depending on whether "needs" means necessity or mere deficiency, and they will vary much further if one raises the question "need for what?"[5]

Despite these ambiguities however needs-philosophies of education still form the received doctrine upon which majority of teachers would claim to base their practice. Colleges of Education courses, for example, are still for the most part heavily weighed with studies in educational psychology and its application to 'methods of teaching' and there is a continuing bias within educational psychology itself towards needs-interpretations of human action and motivation.

The general assumption tends to be that the more we know about the psychological development of children, the better - automatically, or without further serious reflection - we will understand what they need for their education. But this would only be true, if children were like, say, machines or plants or something whose efficient functioning or 'healthy' development were matters determinable by reference to fairly rigid, settled standards and criteria of value. In that case, plainly, the more 'facts' we know about how the machine worked or the plant grew, the 'better' we would be able to look after and control it. But whereas

machines and plants do not themselves have a sense of values, children do. Children are not merely things of more or less value, as machines and plants are. They themselves place more or less value on things.

A child's education is not merely something which looks after him while he produces more or less valuable product such as could be got from a machine. The important point about a child's education is that it contributes to his sense of value. This is not something which is brought about merely by 'meeting his needs', whether they were 'healthy' ones, or promoted his 'healthy' development, or not. On the contrary, without some sort of educated sense of values it would not be possible in the first place to make judgements as to what the 'needs' were. 'Needs' have no existence in abstraction from the valuation of goals. To state that something 'meets a need', individual or societal, raises, rather than settles questions as to its value. Moreover, even if its value for individual or societal survival were agreed, its educational value would be another question altogether.

Educational psychologists and social psychologists are now conscious of these criticisms and are now therefore careful to try to detach their investigations of matters of 'fact' about children and their 'needs' from the questions about the value of different forms of needs - satisfaction and about the relative value of different needs. This point has now been made many times, that:

> '...We cannot infer a duty to teach in some particular way from the descriptive sentences of psychology'[6]

This distinction, however, between the states of affairs which we judge 'in fact' to exist and those which we judge that it would be of value to achieve, is by no means a simple one.[7] And, when drawn by psychologists in an oversimplified way, the rest very often is merely to cut psychology adrift from education altogether, the one entirely surrounded by 'facts', the other by values. Thus Margaret Clark writes:[8]

> 'The Role of the teacher and the function of education are basically important issues which should be considered by any teacher in training. Such issues are, however, not within the remit of psychologist. The psychologist is concerned with 'what is' and not 'what ought to be'?

What then, can an 'educational' psychologist be concerned with? In spite of disclaimers, whenever psychology is 'applied' to education, value - assumptions are made. Even to argue that it is not the business of psychologists to <u>prescribe</u> what teachers ought to do, but just to <u>describe</u> what is liable to happen when they do it, is still to assume that psychologists somehow know what 'it' is, which it is their proper business to describe. The 'role' of the 'psychologist' is <u>itself</u>, in common with other 'roles', not just a matter of 'what it is' but also of 'what ought to be'. 'Facts' and 'values' cannot be simply wrenched apart in this way. Without value-assumptions one would not even know that it was one's business to look at the facts.

Another example of this situation is provided by K.M. Evans, the social psychologist. In her book 'Attitudes and

Interests in Education[9] she explains that it is not for psychologists which attitudes and interests 'educators' should know how to develop in children. When the question later arises as to how in that case she managed to decide which attitudes, interests and modes of development she ought to study in her book, the answer which she gives is that this is just a matter of one's 'philosophical' preferences:

> "To legislate for the education of children is a great responsibility and a task which should not be approached lightly. In what ways it is good, for them and for society, that they should develop...? The question is really philosophical, and we are all philosophers enough to be able to attempt to answer it."[10]

Elsewhere she continues:

> "...the author has made philosophical decisions about what attitudes and experiments are educationally important. Even psychologists are people and have their predilections."[11]

These passages seem to suggest that when psychologists tell us what our 'developmental needs' are, their advice to us will be strongly coloured by their personal philosophy or 'predilections'. Yet, on the other hand, if they are utterly 'scientific' and keep their 'predilections' right out of their picture of 'the facts' it would be impossible for them to explain what the point of our looking at 'the facts' could possibly be.

'Developmental norms' at most, indicate some of the typical 'needs' of typical children as judged by typical or consensual standards of value. In practice therefore they provide no more than the roughest guidance for teachers

trying to work in highly individualized, personal relationships with particular children. Indeed, they may as often prove misleading, I would think, as helpful, since the values built into them could well be quite extraneous to the values arising from the teacher's relationships with this or that individual child. Such norms, in other words, can as easily disort, as guide, a teacher's decisions as to what he should in a particular case, making him liable to act in such a way as to make the norms, as it were, come true. The norms are no <u>substitute</u> for personal decision and judgement - indeed, they are themselves a generalized outcome of it. The most that they can do is to suggest a range of possible alternatives from which a teacher might be wise to choose. To be able to understand only what is 'normal', however, must at times be as much a handicap as a help to a teacher.

A newly qualified teacher fully equipped with a good knowledge of developmental norms normally is confronted by particular children each with his own particular sense of values and each, therefore, with particular individual needs and ways of behaving. It is quite impossible for that teacher either to understand those children's values or to predict what they will be likely to do to preserve and promote them, if the main part of what he is relying on in the way of 'theory' is his generalized knowledge of some of the sorts of things which 'children in general' value and do. One can say that 'children generally' need security, self-esteem, affection and so on, or that at various ages and stages they will need to appear rebellious or to make strong

positive indications, to become more independent or to form close peer-group relationships, to have plenty of conversation with adults or to have plenty of non-verbal 'concrete experiences' ...and so on. But exactly which of these things they will need, and when and why and of what quality, and whether they should be given them without further ado or should have to work for them, and in what sort of context they will recognize, or appreciate, or accept, or value them, when they get them - these are problems of vital importance, and which in practice a teacher will be making decisions every moment of the day, and over the surface of which his mere knowledge of general norms will slip with almost total superficiality.

The situation seems to be that developmental norms can tell us only what things a child of a certain sort may need, if it is assumed also that it would be valuable for him to develop in a certain direction. They cannot tell us which sort of child this or that one is, nor distinguish for us the directions in which he should move. A particular child's actions can only be understood in the context of what he personally <u>intends</u> or <u>means</u> to be. What he intends or means is in turn something which we can only fathom to the extent that will gain knowledge, not just of children in general and their needs, but of the values of this particular child.

Not even someone's actions (let alone his needs for action) can be identified without reference to his intentions, purposes and values. This contention raises wider philoso-

phical issues concerning human action and much discussion of the issues involved for which we have no space is described in 'Free Action' by A.I. Melden.[12] In the meantime, it is hoped that it is clear at least that while we may say that if someone means or wants to play patience then he will need a pack of cards, nevertheless, from the observable fact of his getting out a pack of cards we cannot infer anything in particular about the game that he means or wants to play. He might not even be intending to play a card game, but just to check that the pact is complete, or to compare the designs of the kings of the four suits, or to build himself a house out of the cards or simply to begin tidying-up the drawer in which the cards are stored. Similarly, from the fact that statistically significant samples of children act in certain ways at certain ages and stages, nothing in particular can be inferred about the significance of this or that action. Behavioural norms do not explain actions: they themselves need explaining.

It seems therefore misleading to write, as Clark does that:

> "With our present level of knowledge it is sometimes only possible to predict the likely outcome of a series of actions, rather than to state with absolute certainty the inevitable consequences of certain environmental variables."[13]

This statement has the implication that it is only a matter of time before all the variables will have been discovered and psychologists will thus be able to 'state with absolute certainty the inevitable consequences'[14] of them

in terms of predictions about children's behaviour. But there will never be more than 'likely' outcomes to situations in which human beings are involved. Action is not the inevitable consequence ' of anything, since in part at least it is always undertaken with particular values, purposes and intentions in mind. The sort of deterministic psychology which assumes that actions involving people are no different in kind (but only in complexity) from happenings involving material bodies, will never provide educational and practical guidance in classroom decisions involving particular children.

The point I have been trying to bring out so far is that there is nothing unambiguously 'good' about 'meeting children's needs', even when they are said to be developmentally 'normal' ones, and even when contiditions of life at school and elsewhere are arranged in such a way that needs can only be met when individuals perform 'educationally desirable' tasks. In its extreme form the latter strategy involves the reduction of 'learning' and 'teaching' to conditioning; thus raising additional difficulties - some account of which we must now turn.

2. THE PROCESS OF LEARNING AND INDIVIDUAL NEEDS

In this section I shall argue that there are important differences between 'teaching' and 'learning' on one hand and 'conditioning' on the other, and also that if 'education' were no more than socially approved conditioning there would be no point in encouraging children to attend school.

Usually the needs of the individual are thought of as a sort of driving force or motivating condition which can be activated by presenting an appropriate stimulus or incentive to the individual. Hunger, for example, is one of such drive or motivating force. The presentation of food acts as a stimulus or incentive to the hungry individual to spring into action appropriate to the satisfaction of his need for food. What is here referred to as 'need for food' is not just an empirically observable 'fact' but something which can only be identified in the context of an evaluation of the whole state of affairs of which it is a part. What 'drives' the individual, whether it is food or independence that he is seeking, is not his 'needs' but his sense of what is important and valuable. It is from his evaluations that his 'needs' derive, not vice versa.

But to a psychologist who starts from the assumption that people only act when they are driven to and that what drives them to act is their needs, it follows that 'learning' is merely the set of behavioural changes which an organism makes in order to adjust to emerging environmental conditions of needs - supply. In other words learning is '...a relatively permanent change in a behavioural tendency and is the result of reinforced practice. The reinforced practice ...is the cause of learning'.[15] The 'reinforcement' so to speak, is the gratification of a need. In effect what De Cecco is implying, then, is that by manipulating the conditions under

which children can secure need - gratifications one can bring about behaviour changes, in the same sort of way that by manipulating the supply of carrots one can modify the behaviour of donkeys. If the manipulated conditions are relatively regular, then the modifications in behaviour will become relatively permanent. The manipulations, on this view, constitute 'teaching'; the modifications constitute 'learning'. Any modifications could be demanded, and, so long as living conditions at school were consistently arranged so that needs could only be gratified upon production of those modifications in behaviour, some children at least would manage the task. In theory, then, the modifications which could count as 'education' are entirely open to anyone to decide, upon any grounds he chose. Presumably, in practice some educators would take the view that there is no need at all to take a decision.

In addition to the confusion involved in taking 'needs' rather than valuations as the 'driving force' behind behavioural change there are further several points at which the foregoing model of teaching, learning and education is inadequate.

In the first place an essential feature of successful conditioning is the regularity which the behaviour to be 'learned' is reinforced, and with which other behaviour receives negative reinforcement. Now a relatively permanent response to regularity is not one which could itself be acquired by conditioning, since successful conditioning

depends upon it. Unless, then, the animal (or child or whatever is being conditioned) has <u>already</u> learned to distinguish 'regular' from 'irregular' conditions, the whole process could not even get started. Or, if it could, then how it started would be inexplicable. Theories of conditioning, therefore, far from 'explaining' learning seem to require an account of 'learning' in order to explain them. Learning (or at least some learning) involves getting to see a meaning or significance or import in some area of one's experience.

Similarly, if 'teaching' involves something to do with trying to show someone the significance or import of some feature of their experience, although this could account for someone's learning something and, therefore, could account for his becoming conditioned to expect certain reinforcements to be regularly associated with certain kinds of behaviour, the conditioning itself could never be the same thing as the teaching, any more than it could be the same thing as the learning. Any behavriour, theoretically, could be associated by conditioning with the receipt of positive reinforcements. For instance, one could set out to condition children to wiggle their ears whenever the headmaster entered the classroom, by regularly rewarding those who managed to do so and penalizing those who did not. Only some children would ever master the task, just as only some children would ever manage to master other tasks set in school. The point however, is that not even those who did become successfully

conditioned would have been taught to do so by the reinforced practice. They would first have had to learn to see the whole process as 'practising' the mastery of certain task. The practice itself would not enable them to do this, since it would merely be practice of the task - not practice in seeing repeated attempts at the task as 'practice'.

Again, merely being rewarded whenever they wiggled their ears at the right time, although it would be nice for them, would not itself teach them what 'the right time' was. However often they did the right thing at the right time by chance, and were rewarded, and however desirable it therefore became to them to do it again, doing the right thing at the right time would still be a matter of chance, unless they managed to grasp what 'the right time' meant. The desirability of something does not increase the likelihood of its happening by chance, nor does it show why it happens. One could be conditioned, then, to expect a reward if one wiggled at the right time. But one could not be conditioned to recognize 'the right time'. This is something which one would have to learn, and which one could possibly be taught.

Moreover, both teaching and learning are activities which are only identifiable by reason of their intrinsic point or, to put it another way, because there is some intelligible reason for undertaking them. Like 'needing', they are not identifiable or recognizable because of their empirical features alone. Just as one cannot recognize that someone is engaging in an activity 'because he needs to',

merely by observing him, nor identify an action as a 'needful' one merely by checking its empirical features against some fixed or standard pattern for 'needful' actions in general, so, also, there is no standard list of actions which must be performed when one is 'teaching' or when one is 'learning' and which make these activities recognizable. Only when observable actions intelligibly exemplify the logical point of 'teaching' and 'learning', can they be identified as actions within the overall 'activities' of teaching and learning.[16] By contrast, conditioning and being conditioned by definition as processes identifiable solely by their observable features - since the only features of anything which theorists of conditioning will admit to exist are the empirical observable ones. Therefore there is a fixed or standard list of empirical features by means of which (in theory at least) 'conditioning' processes may be recognized. Further, it follows that there is no intrinsic point to conditioning. What is being associated with what, in a conditioning situation, is of no logical consequence whatever. It simply does not matter. One could (in theory) be conditioned to do anything, without this making any difference to the fact that what was happening to one was that one was 'being conditioned'.

Teaching aims at trying to bring about learning. This is not the same thing as trying to bring about a change of behaviour or belief, although it may have those consequences as well. Again, the point of 'learning' is to try to understand how to act or how to interpret one's experience in a meaning-

ful way; but this too, is not at all the same sort of thing as merely undergoing a fairly permanent change in one's behaviour or in the state of one's mind. By contrast, the only point of 'conditioning', from the conditioner's point of view, is whatever good or bad ends the process is being employed as a means to, and, from the conditionee's point of view, whatever 'positive reinforcements' he can manage to get out of it. Both of these 'points' are extrinsic, in other words, to the process itself. In itself, any particular example of the process could be both a genuine example of 'conditioning' and yet also intrinsically pointless. 'Intrinsically pointless teaching' and 'intrinsically pointless learning', however, are self-contradictory notions. If there were nothing intelligible to understand, one could not conceivably 'learn' it. And if one were trying to get someone to do something entirely unintelligible to you both, one could not possibly be 'teaching' him.

In sum, then, one can change someone's behaviour by changing the environmental conditions surrounding him, and if, for example, one regularly gives him a team point or a gold star when he writes a complete sentence or adds up numbers correctly, then the change in his behavriour may possibly become quite permanent. In the very general sense, too, that such behavioural changes were not due solely to maturation, I suppose that one could call the changes 'learning' and the process of inducing them 'teaching'. Philosophers of education such as Scheffler[17] and Langford[18] would argue

that both 'teaching' and 'learning' involve, centrally, some reference to the meaningfulness, or rationality, or perhaps intelligibility, of the content of what is being 'taught' and 'learned'. 'Teaching' and 'learning' in this sense cannot be accounted for in terms of conditioning, since their content is as important as the observable methods which they employ. Indeed, it seems unlikely that 'conditioning' itself can be accounted for, without reference to 'teaching' and 'learning' in a more restricted sense. Pupils could be conditioned to expect reward for certain kinds of behaviour, but it is hard to see how the acquisition of the ability to behave in those ways could itself, by reference to the process of conditioning alone, be intelligible.

These account for some of the serious theoretical difficulties involved in the reduction of 'teaching' and 'learning' to 'conditioning' which is required by the value - gap in needs - based theories of education. But even if teaching and learning were no more than socially approved conditioning there would still be the practical difficulty of deciding which goals should be approved. The pupil's 'needs' could provide no scientific or other pointer to guide such a decision, since, the existence of 'needs' itself presupposes the existence of acceptable standards of value. One would be arguing in a circle if one said that the 'agreed goals' were good simply because children 'needed' them if one had already formed the opinion that they were good.

A clear way out of this impasse is to argue that what the children 'really' need is what meets the needs of society. This claim has it that the 'true' guide in the diagnosis of individual need is societal need. 'The needs of society' on this view are the same as the 'real' needs of its individuals. We shall now turn to examine 'societal needs' to see if they can provide solutions to the problem so far identified.

3. EDUCATION AND SOCIETAL NEEDS

The claim has often been made that a child's education is meaningful only when it meets 'societal needs'. A partnership between individual and societal needs (and thus between individual and societal values) is however not an easy one. In practice, the two sets of needs are liable to conflict. According to some sociologists the conflict is explicit and unavoidable. Waller makes the following point:[19]

> "Typically the school is organized on some variant of the autocratic principle .....the social necessity of subordination is a condition of human achievement, and the general tradition governing the attitudes of students and teachers toward each other, set the limits of variation."

In this model, societal needs, are explicit and always override individual needs.

One of the most convincing recent sociological account of schooling is to be found in Robert Dreeben's 'On What Is Learned In School.'[20] In this work the question scarcely arises as to whether or not schooling is valuable. The book is an account of what just happens to children, as a result of their going to school. Briefly, they "acquire" societal

norms. Dreeben[21] explains how children learn specifically:

1. To act independently rather than co-operatively.
2. To try to come up to certain standards of excellence which are identical for all.
3. To regard themselves primarily as members of classes or types of person, rather than as persons, and
4. To value the type-casting features of themselves and to devalue the rest.

The purposes behind the setting up of the conditions for the acquisition of these norms (i.e. the setting up of schools) are of course societal, not personal. The first norm is 'needed' societally because adult workers and citizens must be able to make many sorts of decision by themselves regardless of others. That is, the need to make a decision (e.g. as an employer, as a soldier, as a motorist) overrides the value of considering the interests of others. Similarly the other three norms are prerequisites for the rating of individuals for the purpose of giving calculated economic rewards for work done.

The job of the school, then, is to produce belief in the value of these norms - these are the 'educational goals'. The 'method' employed is of course to make use of the child's current individual needs (for security, esteem etc.), withholding gratification of these until the child appears to be 'learning' to view the world (and himself) in the required 'adult' fashion. According to Dreeben, it is the child's self-esteem (his image of an adequate, successful self)

which is made to depend upon his adopting the new role. Through a variety of 'socializing' situations, such as public questioning and testing in front of his peers, various forms of competitive self-assessment, and ritualized examination procedures which reward 'independent' effort and punish co-operation as 'cheating', the child is slowly but unavoidably shamed into adulthood. Elsewhere Dreeben continues:[22]

> "...the same activities and sanctions from which some pupils derive gratification and enhancement of self-respect.....may create experiences that threaten the self-respect of others. Potentialities for success and failure are inherent in the tasks performed according to achievement criteria (norm 2). Independence (norm 1) manifests itself as competence and autonomy in some, but as a heavy burden of responsibility and inadequacy in others. Universalistic treatment (norm 3) represents fairness for some, cold impersonality to others. Specificity (norm 4) may be seen as situational relevance or personal neglect."

In such a situation, failure is not just a risk, it is a certainty.[23] The educational methods could not work at all (for some) unless there were actual failures as well as successes. The point of the methods in its effectiveness is to promise success, and therefore to threaten failure.

A similar warning is given by Dreeben[24] by reminding us of the logical circumstance that if psychological 'health' is dependent of the satisfaction of needs then in a needs - based system of schooling there cannot be anyone who is not at all times more or less psychologically 'ill'. Nevertheless, whether it is right that children (or anyone) in this way should be stripped of what they value in order to be clothed in what we value - and whether, indeed, even

we value it, when we see its true colours - is not what is at issue in the book. Dreeben does not claim to be describing anything valuable. He does not, for example, name the process 'moral education' - but merely 'the acquisition of norms'. Looking at his account of the way in which the norms are acquired, however, it is plain that the whole process involves the destruction, not the development, of values. The children change (if they're lucky enough to be able to) because they have, to keep their self-respect. They acquire not a mere educated sense of values, but just a temporarily useful set of norms. The manipulative psycho-social mechanisms employed are fundamentally the same as those which, for example De Cecco described as 'learning' and 'teaching' or which K.M. Evans calles 'attitude change'. But whereas Dreeben refers to the process, when it occurs in schools, simply as 'schooling', De Cecco and Evans call it 'education', thus making assumptions about the value of the process which Dreeben is careful to avoid.

We could rightly comment on Dreeben's accuracy as exceptional. Most Sociologists who stress societal needs refer to the process of meeting them as 'education'. The individual is said only to be able to develop 'healthily' if he satisfies his individual need to fit security into the pattern set by the rules and practices of his society. Alternatively he is said to be 'deprived' and 'disadvantaged', if he lacks the sort of 'education' which societally is claimed to be desirable. D.F. Swift,[25] for example, des-

cribes these 'educational' (i.e. societal) goals as being:

1. To inculcate the values and standards of society.
2. To maintain societal solidarity.
3. To transmit the knowledge which makes up the social heritage, and
4. To develop more of such knowledge.

Thus, just as on the one hand we find 'education' described as something of utility to the individual in terms of ambiguously 'good' goals such as healthy growth, self-realization, personal freedom, socialization, etc., so, on the other hand we find it declared to be equally 'good' for society, in terms equally ambiguous, such as social stability, social continuity, social innovation and so on.

In Education for Teaching, Garforth[26] stated this position with great explicitness. He wrote:

> "We must be clear ...that education is essentially instrumental; it is not an end in itself, as is sometimes loosely said, but a means both to fulfilment in the individual and to stability and progress in society. It is a tool ... to achieve the aims which society sets before itself."

It is argued that in terms of the possible achievement of something valuable, such an 'education' as this is entirely empty, since there is nothing in it which is valued for its intrinsic worth. Not only is each set of goals (the individual and the societal) liable to cancel out the other - as, for example, societal 'solidarity' is liable to obliterate particular or individual sub-cultures. Within itself, too, each set of goals is in fact self-cancelling, as for example, innovation cancels 'continuity' or 'knowledge' cancels 'incul-

cation', and as what is 'personal' is cancelled by what is merely 'selfish' or what is 'healthy' by what is merely 'socializing'. There is no principal guidance here for the resolution of the conflict situations which the theory makes in practice inevitable. And what is good about the 'need' to go to school, remains obscure.

Barry points out that just as one does not always value what one needs, so one does not always deserve it either.[27] In practical situations where one 'need' seems to conflict with another, it is impossible to decide on the basis of need alone what should be done, since one has not yet clarified the valuable features of the respective goals of the conflicting needs, and thus one cannot judge in a reasonable manner which one should be described for the sake of the greater value which might come of the other.

4. SOME CONCLUDING REMARKS

It appears from our discussion that all needs-based 'education' is 'compensatory', rather than of intrinsic value. It starts by diagnosing what the children have not got, and then sets out to make up their deficiences , rather than to try to help them to realize the potentialities of value inherent in what they have already. When the term 'compensatory education' is selectively applied to groups of children regarded as being particularly lacking or deficient, then as Bernstein has written, this implies.[28]

> "...that something is lacking in the family, and so in the child... and the children are looked at as deficit systems. If only they were like middle-class parents, then we could do our job...

If children are labelled 'culturally deprived', then it follows that the parents are inadequate, the spontaneous realizations of their culture, its images and symbolic representations are of reduced value and significance. Teachers will have lower expectations of the children, which the children will undoubtedly fulfil. All that informs the child, that gives meaning and purpose to him outside of the school, ceases to be valid and accorded significance and opportunity for enhancement within the school."

Bernstein continues, 'this may mean that the contents of the learning in the school should be drawn much more from the child's experience in his family and community.'[29] And he concludes:[30]

> "We should start knowing that the social experience the child already possesses is valid and significant, and that this social experience should be reflected back to him as being valid and significant. It can only be reflected back to him if it is part of the texture of learning experience we create."

However, this is true not just for some children and for some learning but for all, if schooling is to be in any way educative.

Children of today are increasingly disciplined to be manipulated by hope and fear into doing blindly what adults tell them that they need. But unless children are asleep, under hypnosis or in a state of shock, it is one of the most obvious facts about them that they are always both 'started' and 'going' already. The educative task of teachers is not to give them a series of shocks followed by motivational pushes and pulls in directions alien to their own, but to try to help them to see significance of goals which already they find interesting and take to be of some possible

value. Making use of a child's interest as a means of some extrinsic end never reveals what that interest itself is worth in terms of human feeling, but devalues it by treating it as no more a prerequisite for something else. Of course, it is true that society, if it is to continue in its present direction of growth, 'needs' skilled manpower, law-abiding citizens and so on. It is true, too, that schooling may be as efficient as a way as any of 'meeting these needs', in the short run at least. Certainly it is such 'schooling' which governments and local authorities want, and which they are prepared to sponsor. My concern, however, has been to show that such 'schooling' is not 'education', or that its value, far from being shown by describing it as being 'needed', is thereby presupposed. When, therefore, such documents as the Spens Report, for example, advise us that '....before everything the school should provide for the pre-adolescent and adolescent years a life which answers to their special needs',[31] not only is no guidance about 'schooling' contained in such a tautology. As an authoritative statement about the kind of values to be sought in education, its termilogy is extremely misleading.

Of course, not all 'individual needs' should be gratified. How are we to decide which should and which should not? By reference to 'societal needs'? But, similarly, not all 'societal needs' should be satisfied. How are we to decide which of them should be 'answered' and which should not? There is no way out of this impasse. Once we have equated 'schooling' with 'education' and thus reduced 'teaching' and

'learning' to conditioning, we have generated insoluble moral and practical problems for teachers and children in schools.

In order to bypass this difficulty with the idea of 'needs' to provide us with educational guidance without at the same time losing the advantages that are thought to be associated with an approach that takes full cognisance of the psychology of the child, some educationists have stressed the desirability of using children's interests as the criterion. It is argued that children learn best through interest, that they are manifestly not interested in much of what is presented to them by a 'traditional' curriculum and thus do not learn in the full sense of the word and that we might achieve more success if we were to find out what interests them and work from that.[32] It is this notion of 'interest' to which I must now turn.

NOTES AND REFERENCES

CHAPTER FOUR

1. Rousseau, J.J., Emile, Preface 1.
2. Downey, M.E., and Kelly, A.V., Theory and Practice of Education: An Introduction, Harper and Row, Publishers, London, 1975, p. 146.
3. Maslow, A.H., Motivation and Personality, Harper and Row, 1954, discussed at length in C.N. Cofer and M.H. Appley, Motivation Theory and Research, Wiley, 1968.
4. Cf. Dearden, R.F., The Philosophy of Primary Education, RKP, 1968, Ch.2.
5. Brubacher, J.S., Modern Philosophies of Education, McGraw-Hill Inc. New York, 1969, p.169. Cf. R.F. Dear-dean "Needs in Education" British Journal of Educational Studies 14, 5-17, November, 1966. See also Reginald D. Archambault. "The Concept of Needs and Its Reation to Certain Aspects of Educational Theory," Harvard Educational Review 27, 38-62, Winter, 1957.
6. Best, E., 'The Supposed Premiss in Educational Psychology', 1962, p.7 in Komisar and Macmillan (ed.) 1970
7. Hudson, W.D., (ed.) The Is-Ought Question, London: MacMillan, 1969.
8. Clark, M., 'Discipline: a developmental Approach' in Stenhouse (ed.) Oxford: pergamon Press, 1967.pp.154-5.
9. Evans,K.M., Attitudes and Interests in Education, London, Routledge and Regan Paul, 1965, p.141.

10. Evans, K.M., Attitudes and Interests in Education, London, Routledge and Kegan Paul, 1965, p.142.

11. Evans, K.M., Ibid., p.143.

12. See Melden, A.I., Free Action, London: Routledge and Kegan Paul, 1961, ch.3.

13. Clark, M., 'Discipline: a developmental Approach' in Stenhouse(ed.) Oxford: Pergamon Press, 1967, pp.140.

14. Clerk, M., Ibid.

15. De Cecco, J.P., The Psychology of Learning and Instruction: Educational Psychology, Englewood Cliffs, N.J.: Prentice-Hill, 1968, p.243.

16. Langford, G., Philosophy and Education, London: MacMillan, 1968, p.117.

17. Scheffler, I., Conditions of Knowledge, Illinois: Scott, Freeman, 1965, Chs. 1 and 5.

18. Langford, G., Philosophy of Education, London: MacMillan, 1968, Chs. 6-8.

19. Waller, W., The Sociology of Teaching 1965 ed., New York: Wiley 1932, pp.8-9.

20. Dreeben, R., On What is Learned in Schools, Reading, Moss: Addison-Wesley Publishing Co. Inc., 1968.

21. Dreeben, R., Ibid. Ch. 5.

22. Dreeben, R., Ibid., p.84.

23. Holt, J., How Children Fail, 1969 ed., Harmonds Worth: Pengium Books, 1964.

24. Dreeben, R., p.86.

25. Swift, D.F., Sociology of Education, London: Routledge and Kegan Paul, 1969, ch. 5, p.91.

26. Garforth, F.W., 'Values in Society and Education' in Education for Teaching, No.64, May, 1964, p.25.

27. Barry, B., Political Argument, London: Routledge and Kegan Paul, 1965, p.48n.

28. Bernstein, B., 'A Critique of the Concept of 'Compensatory Education' in Rubinstein and Stoneman (ed.) 1970, pp.112-113.

29. Bernstein, Ibid., p,113.

30. Bernstein, Ibid., p.121.

31. Quoted by Gribble, J., Introduction to Philosophy of Education, Boston: Allyn and Bacon, 1969, p.80.

32. Downey, M.E., and Kelly, A.V., Theory and Practice of Education: An Introduction, London: Harper and Row, 1975, p.149.

CHAPTER FIVE

1. LEARNING THROUGH INTEREST
2. IDENTIFICATION OF CHILDREN'S INTEREST
3. DEVELOPING AND SUSTAINING INTEREST
4. ARE ALL INTERESTS DESIRABLE?

1. 'LEARNING THROUGH INTEREST'

Children are said to learn through interest and for that reason teachers are advised to take into account 'children's interest' in the execution of their duties. But when it comes to identifying specifically the kind of interests being referred to one begins to encounter all sorts of problems.

Nevertheless 'children learn through interest' becomes plain when the phrase is interpreted to mean that children must be 'made' interested in what is in their and others' interests, so that they will learn it. Teaching, then, on this view will be just a matter of teaching students some psychologically effective methods of 'making children interested' in what is (by general agreement) in everybody's interest. Thus K.M. Evans writes:[1]

> "Just as we can arrange for our children to acquire particular information and to learn particular skills, so we can arrange for them to acquire particular attitudes and interests. The techniques needed are fairly well understood."

It is, then, a matter of mastering these techniques. By arranging for dhildren to become interested in acquiring the information and skills which are in their and others' interests, teachers can enable them to learn these things 'through interest'.

The question to ask, however, is: Why go to the extent of getting children interested? What is the special virtue, in their learning all these good things 'through interest'? If we can 'arrange' for children to acquire desirable infor-

mation, skills, attitudes and interests, why should teachers go to the trouble of arranging for them to become interested in acquiring them? Is there something about 'learning through interest' which not only explains one of the ways in which we can get children to learn, but which is itself 'in their interest' somehow? Are 'interests' not just motivational aid to learning something otherwise dull, but also themselves the sorts of things which children ought to be occupied with and learning about in school? But what do we do about those trivial things such as talking and playing and so on in which children take interest?

At this point, we should remind ourselves of the monograph on the subject which Dewey[2] wrote which was directed against those who could see no relevance in interest for education except in terms of its making school a more pleasant and confortable place for everyone concerned, by increasing pupil's motivation and thereby facilitating teachers' control. In other words he was concerned to argue that children's interests should not be treated just as a motivational aid. His point was that children will not only learn quickly what they are interested in, and that they will learn it in an untroublesome and co-operative sort of way, but also that what they are interested in is what they will learn best. The presence of interest, Dewey pointed out, maximises the likelihood that the pupil, when what he is interested in proves difficult or problematic, will put forth and sustain not just his greatest but also his best

possible effort to master its difficulties. Whether the interesting activity is obviously in his and others' interest, as in learning to read, or not so obviously so, as in learning to reach the tip of his nose with his tongue, the significance of his interest is the same in either case, namely, that it will invoke his 'best' efforts.

But, what is the significance of the word 'best' in Dewey's argument? What is the particular 'virtue' of interest in education? Dewey's opponents did not stop for a moment to reply that although interested pupils perhaps learn 'best' in the sense of most rapidly and vigorously, what they learn is nevertheless not always 'best' in the sense of being most 'in everybody's interest'. What about such childishly interesting activities, for example, as biting one's nails? Many children exhibit great interest in activities such as this, and no doubt they learn 'best' about such activities when they are interested in them, taking great pains over them and making every possible effort to get them right. When apparently there is no virtue in an activity, such as in biting one's nails, how can it make sense to say that children do it 'best' when they are interested? If there is no 'good' in it, how could it be done 'better' or 'best'.

In these senses, then, who would say that children should go to school in order to engage in interesting activities (however, effortfully, undertaken and however well executed eventually) such as hair-pulling, bullying, chair-banging,

teacher-baiting ...and so on? What about all the trivial sorts of things which children show occasional interest in, such as wiggling their ears, standing on one leg, making themselves go cross-eyed, poking blotting paper into ink bottles or sticks into cracks in floors.....? And what about those stereotyped and boringly derivative occupations which seem to make up the whole impoverished gamut of battle pictures criss-crossed with never fading tracer bullets and explosions labelled 'Boom!' and Pow!'; the continual chatter about football, television, pop records; the comic-reading and gum-chewing; the pushing and showing and all the pointless, tedious, repetitive and often blindly stupid or unkind things which children do, apparently, with great interest? Is this what they should go to school for, just to go on doing these 'with interest'? Could this be 'education' on Dewey's view?

It is indisputable that if teachers, believing themselves to be 'progressive', following Dewey, and so on, ever acted consistently on such an interpretation of Dewey as this, most of the children in their classes, and probably the teachers themselves too, would be very badly damaged before the end of their first half term. In practice, students in colleges of education who start with this view (and there are many) sensibly abandon it as soon as they are in a position to do so. An indiscriminately interest-gratifying view of schooling is plainly just as silly as an indiscriminately needs-gratifying one. It is no more educative to pander to

every inclination which children have, than it is to satisfy everyone of their demands on sight. But what, then, did Dewey mean? How could it be in the child's educational interest for him to 'learn through interest'? How could interest be more than a sometimes dangerous - and in any case, rather 'soft' - motivational apparatus?

In the discussions which followed we shall consider in turn three of the several philosophical problems raised by Dewey's apparently straightforward slogan. First, 'learning through interest' requires at the very least that we be able to identify, recognize or diagnose what interest a child actually has. How can this be done? What does it mean to attempt such a task? Second, having analysed what would be involved in locating a child's interests, how could these be fostered or developed? Also, in what sense, if any, would it be possible to start him off on a totally 'new' interest? In other words, how could children's interests be aroused or possibly 'made', and sustained? Third, what are we to think about the interests which children undoubtedly have in trivial, harmful or antisocial activities? In what sense, if any, are children learning 'best' when they are learning 'through' these? For that matter, in following any interest, what is it of specifically educational value which children are supposed to be learning thereby and which they could not learn as well in any other way? Dewey's writings on interest raise a lot of problems and without some attempt to think clearly and carefully about them, one's educational theory

- where it has any connection at all with what in practice one actually does - will remain caught in that ideological feather bedding of permissiveness which, as Cremin[3] and Hofstadter[4] have argued, has been the bane of education for more than fifty years.

2. IDENTIFICATION OF CHILDREN'S INTEREST

To begin with, wel shall raise a few questions: How do we recognise a 'feeling of interest' when we 'feel' it? How are we to recognize the existence of such feelings in others, and in children particularly? These are logical questions, not psychological ones. Very often one finds that the bulk of psychological work makes no reference to 'interests' at all or reduces the notion of 'interest' to the logical status of 'felt' need. Reliance upon psychologists therefore does not help us to clarify the nature of 'feeling of interest'. Indeed such an approach to 'interests' can give rise to emptiness in terms of scientific practical guidance. Thus Woodworth[5] writes: "The drive to actualize one's capacities would accordingly be an important source of a great variety of human interests." But how would it help us in school to know that any child showing an interest in anything was doing so because he was being 'driven' to 'actualize his capacities'? Would this help either to explain why he was doing it, or to justify us in helping him to do it?

It seems to me that the logical features of interests is something which must be clarified before, not after, conducting psychological research into them. To assume as

Woodworth[6] and others do, that 'interests' stem from 'drives' and 'needs' is to prejudge issues of a scientific sort, which could show that one is only interested in something because one 'needs' to be. And on the face of it, in ordinary discourse we do not use the words 'need' and 'interest' in this way at all. In this section, then, we shall be concerned first, with questions about the logical categorization of feelings of interest, both in respect to the sort of 'feelings' which they are and to the sort of notion which 'interest' itself is, and, second, with the questions about any special problems which may arise in connection with identifying and recognizing such feelings.

(i)

We may speak of interest in the sense of someone owning or acquiring an 'interest' say, in a business enterprise. By the 'interest' which children 'learn through' we mean the things which they actually find interesting or 'feel interested' in. One could own 'an interest' in a factory manufacturing yet not find the faintest nor feel the slightest bit interested in its activities. As A.R. White[7] writes, 'An interested party may be a bored one'. The kind of 'interests' we are concerned with are not a sort of or liability which one can get hold of or lose like a piece of property. They are a kind of inclination or disposition. According to White[8]

> 'interest' is an inclination to engage in some one or more perceptual, intellectual or practical activities that are appropriate to the particular object of interest.'

In his earlier book White puts it in this form:[9]

"To feel interested in anything is to feel attracted to it; to feel inclined to give attention to it; naturally, it also involves feeling disinclined to attend to other things, and feeling vexed, unhappy or uncomfortable, when prevented from giving attention to it."

Feeling inclined in this way is to have an 'occurent' interest. Thus to be interested, if this is occurring now, entails giving one's attention. This occurrence sense of 'being interested' refers to 'showing' or 'taking' an interest at this moment; and implies that at this moment I am thinking about or giving my mind to whatever it is . 'Being interested' can be used in the 'dispositional' sense, which is used to characterise someone. To say that I am interested in model railways, in this sense, is to imply that there are frequent occasions when I am interested in the occurrence sense. Being interested in the dispositional sense is a reason why one is interested in the occurrence sense. 'Why are you taking so much interest in that old chair?' 'Well, I have an interest in antique furniture.' To feel interested is to experience interest, to find oneself being inclined or drawn towards the object of one's interest. To have an interest in the dispositional sense does not require that one constantly feels interested.

The 'interest of children', then, are the fairly settled dispositions which they have to notice, to pay attention to and to engage in some appropriate activity with certain sorts of things rather than others. An 'interested' child, therefore, is one who is characteristically active, attentive and

absorbed in ways appropriate to his interest. The word 'appropriate' here refers to the child's interest, and not necessarily to anybody's view of what might be 'appropriate' to him. Most boys, for example, will say that they are interested in 'football', but they may be able to play it just as well with any object which will roll about fairly freely when kicked, as with a 'real' football.

Indeed what we mean by 'football', for example, must be an inclination towards attentive activity in a flexible orange of matters, some of which might be perhaps only very loosely connected with what we might understand as the game. To insist that the boys play to the strict rules of our version of the game may be the very thing which they are not interested in. Thus an interest may sometimes seem 'inappropriate' to both the person who shows it and any conventional views as to its nature, and yet we still regard it as a perfectly genuine interest.

What is of interest to the child will depend upon what it is that he notices or goes on attending to and what he regards as 'appropriate activity'. Any label, such as 'football' which he gives to his interest will designate no more than a fraction of what the interest actually is, and any particular label may sometimes prove more misleading than helpful as a way of identifying the interest. One mistake, then, which we may commit about the identification of children's interests is to assume that they are necessarily going to be some sort of approximation to adult interests. A

further mistake in identification may arise over the kind of 'feeling' which we may assume that children's interests contain. While compares 'feelings of interest', first, with what he calls 'sensory and perceptual feelings':

> 'Feeling' interested is obviously not a perceptual feeling like feeling a hole in my pocket nor is it an exploration like feeling for a light switch. Neither is someone who is interested in what he is doing necessarily having any sensations, faint or acute, study or intermittent, localisable or general. Such sensations would distract him from the object of his interest'.[10]

To plunge children merely into a range of sensory and perceptual 'feelings' then, as teachers might do when they are trying to stimulate creative writing, for example, is as likely to destort children from their interests as to promote them. When 'feeling' his way along the branch of a tree, for example, or 'feeling' the sorts of sensations which are part of interesting activities such as swimming, a child might get to 'feel interested' in the sensory and perceptual 'feelings', in abstraction from any interesting pursuit of which they formed a part, is something which we would expect to find in a person of rather exceptional and specialized training, such as a neurologist or a phenomenological psychologist. And in any case, the 'sensory and perceptual feelings' would diferr from the 'feeling of interest'.

A.R. White[11] says 'feelings' of interest may be confused with moods and emotions: "An interest is not a mood, like cheerfulness or gloominess; it has a definite object." A characteristic thing about moods such as depression, for example, is their pervasiveness, their lack of an identifiable

focus. If one 'feels' depressed, everything is depressing. If one 'feels' interested, one 'feels' it about something in particular. The sort of mood-setting, then, such as playing gramophone records or covering a corner of the classroom with different shades of green which may go on when teachers nowadays are trying to 'spark off interest' is often misconceived.

Emotions, on the other hand, at least are a little more akin to 'feelings of interest,' than are mood-states. However, being in a emotional state is, as White points out, quite different from being interested. In particular, 'feelings of interest' lack the excited or 'stirred-up' quality which one finds in emotions such as fear, anger, joy and so on. One can be afraid, for example, too, without necessarily being interested in whatever it is that one is afraid of, just as one can be interested (e.g. in electrical storms) without necessarily feeling emotional about the interesting object in any way at all. According to White,[12] "feeling interested is not an emotional or stirred-up state, such as feeling, excited or thrilled, agitated or surprised. You cannot be 'beside yourself' or 'speechless' with interest, nor does increasing interest disturb your concentration, as mounting excitement or anxiety may." This quotation can be interpreted to mean that emotions, like moods, are only circumstantially not logically connected with 'feeling of interest'.

As a result of this confusion teachers tend to interest children by using methods which in fact constitute the very

thing most likely to prevent an interest from developing. Merely excited children, whose emotions have been agitated or 'stirred-up' by some purportedly 'interesting' prospect which their teacher has conjured up, are typically very demanding, very dependent and in a highly unstable state which increasingly approaches the limit of their self-control. Teachers promising a class outing, a film, a game, or doing anything which is not itself interesting but merely an 'exciting' or 'stimulating' prelude to activities or events which the children are led to believe will be interesting, are putting their children into a sort of Christmas Eve situation whose outcome is as likely to be deflating as inspiring. They are not arousing 'feeling of interest', but merely stirring up emotions. What is 'sparked off', and what so soon fizzles out, is excitement, not interest. The mistake lies in confusing an emmotional state, or what White calles 'agitation' with a 'feeling of interest'.

Interests, as we have seen, are inclinations and for the most part, of course, people are 'inclined' to seek pleasure and avoid pain. However, there are many things which we are inclined to do, but which we are not necessarily interested in doing. Habits and impulses, for example, may show the kind of behaviour which one is regularly or irregularly 'inclined' or 'prone' to engage in under circumstances. I may now and again experience an impulse, or irregularly 'feel-inclined', towards a pipe-smoking 'habit'.

But I do not necessarily 'feel an interest' in what I am either habitually or impulsively inclined to do. Siminarly, the objects of my likings and preferences, although they show some forms currently taken by my inclinations to seek pleasure and avoid pain, are not necessarily the same as things which I currently find interesting.

Children, surely, have innumerable likings and preferences and are also especially prone to behaving impulsively and to forming rather rigid and stereotyped habits of action. None of these four forms of 'inclination', however, is logically in the same category as the inclination to notice, to pay attention to, and to engage in action appropriate to one's interests. The connection of children's likes and preferences, impulses and habits, therefore, with their interests, where it exists at all is probably entirely fortuitous. Letting children just do as they like or prefer, or as impulse or habit inclines them, is therefore not the same thing at all as letting them 'pursue their interests'.

(ii)

We now turn to the second problem of identifying children's interests. First we must know what sort of thing we are looking for. A 'feeling of interest' as we tried to indicate above is not a set of sensations, nor a mood or emotion, nor an inclination to get pleasure, nor an impulse or habit. It is rather an inclination to notice something, to pay continuing attention to and to try to enter into some active relationship with it which seems appropriate to its

interesting features. Second, however, we must now ask whether there are any special difficulties involved in recognising the sort of thing which we now know that we are looking for.

This is not as simple a task as it might seem since children can never just say what interests them. Merely because they, not we, feel their 'feelings of interest', it does not in the least follow that they will know best what those feelings are. There is no specific quality of feeling which comes into experience ready-labelled, as it were, with 'This is a feeling of interest.' It is true, of course, that all feelings, thoughts and indeed, 'experiences' in general, are in a sense 'private' to the person who has them.[13] But it does not follow that because I am the only person who can (logically speaking) 'feel' my feelings or 'think' my thoughts, therefore no one else can know as well as I do (or better) what their significance may be. It is certainly a fundamental error of theory, then, to suppose that children can simply <u>tell</u> their teachers what their interests are.

Can teachers then just look and see whether or not a child is interested in what he is doing or proposes doing? In a sense, yes; but only in a vastly oversimplified sense. Children can 'show' an interest; even if they cannot communicate it verbally or by the sort of gestures or expressions which 'show' pleasure or pain. But even the interpretation of expressions of pleasures and pain can raise difficulties.

A doctor, for instance, would require some verbal confirmation of what our behaviour 'shows'. Where such verbal endorsement can be extremely tricky indeed. But even where the aid of words is available judgements have still to be made as to their truth and accuracy. An interest, like a pain or a pleasure, can be a readily 'concealed' or 'feigned' as it can be 'shown'.

It should be plain from our analysis that recognizing whether or not a child is 'showing an interest' will never be a simple matter. Not only is he usually unable (and often unwilling) to give us reliable verbal guidance, the experience of 'being interested' is itself so much more complex than the experience, say, of pain and pleasure, that difficulties are bound to arise.

Kinds of behaviour may include such things as noticing, paying attention, persisting in one's efforts in an absorbed or undistracted way. But none of these kinds of behaviour are sufficient to 'show' interest for sure. The problem, from our point of view is that there is no further sort of behaviour or event which conceivably could 'show' it in any other kind of way. As White writes:[14]

> "...concealing your interest does not mean keeping any activities hidden in the way that concealing the fact that you are attending does. Nor does it mean that you keep any results to yourself, as must the man who tries to pretend that he has not noticed anything."

In the same breadth, 'showing' your interest does not mean revealing or displaying any particular and unmistakable sort of sign by which your interest must certainly be detected.

Children do not 'show' their interests as a sufferer shows his pain, or even as an attentive listerner shows his attention. Exactly the same observable circumstances may be interesting to one child, tedious to another. And exactly the same observable behaviour may be engaged in by a child who is bored. Nor is there any 'internal' or 'private' and 'unobservable' kind of 'behaviour' going on in one child but not in the other, which if disclosed or discovered, would provide an infallable mode of distinguishing between the two.

We shall return to the connection between interest and values. For the moment we are concerned to stress that certain theoretical assumptions which are widespread - that children's interests are plain to see, that all children have much the same interests anyway (at appropriate ages and stages), and that if there is any doubt about a particular child's interests we need merely to instruct him to consult his 'feelings' and report back upon what he finds - must be entirely false.

To say that the child knows best what interests him, or that the teacher, the parent, the developmental psychologist or anyone else knows best, is just not true. It is only extremely misleading. Therefore to lead student teachers to believe that a good teacher is one who 'considers children's interests' puts both students and children in an impossible situation. Implicit in a child's interests is all

that is most personal and unique about him. To claim to have discovered this after a few weeks in a crowded classroom is absurd. In practice, of course, most students quickly and sensibly abandon the attempt - and, with it, most of their 'theory'. But could it be claimed that experienced teachers have found what most often interests children and that educational practice should be based on this? On our analysis this is also not certain.

A child's behaviour may mask his interests as readily as it reveals them. He may feign interest to please us, conceal interest in order to deceive us, and of course he is as likely to try to please and to deceive himself, at times, as to do so to others. If children have no confidence either in others or in themselves, then to show an unfeigned interest will seem to them like courting disaster. Even in circumstances of mutual respect and trust, however, interests, like anything else which we can 'see' or be 'shown', require interpretation. By themselves the logical difficulties implicit, as Wittgenstein[15] has shown in the very notions of 'identification' and 'recognition' should caution us against diagnosing people's interests in a facile way, even if the psychological difficulties of the task apparently do not.

3. DEVELOPING AND SUSTAINING INTEREST

Interest, for many teachers, is nothing more than motivational aid. It is regarded as a means of inducing children to undertake tasks which to the children themselves are tedious but from the teacher's point of view such tasks re-

present some desirable good or norm of schooling. Perhaps the best that can be said is that there is nothing <u>educative</u> in this at all, although it may be an efficient way of getting children 'schooled'. What is worrying or disturbing, however, from the point of view of an interest - based rather than a needs-based educational philosophy, is to hear it alleged that by hooking children's interests to tedious tasks so that they will have to get the tasks accomplished before they can return to the pursuits of their interests, the teacher is 'making' the tasks interesting or 'making' the children interested in the tasks.

Such an attempt can only amount to trivializing children's interests by treating them merely as a means to ends. More so, it aims at devaluing the tasks themselves, by implicitly admitting to the children that they are the sorts of tasks which in fact any sensible person would only undertake for a fee. This sort of strategy is what Dewey had in mind. Thus he wrote:[16]

> "When things have to be made interesting, it is because interest itself is wanting. Moreover, the phrase is a misnomer. The thing, the object is no more interesting than it was before. The appeal is simply made to the child's love of something else."

A teacher can make use of a child's interest in, for example, pleasing his parents in order to get the child to an instrumental task but this is not 'making him interested' in pleasing his parents. It is not originating in him an inclination to try to undertake behaviour appropriate to

undertake work for its own sake.

Sears and Hilgard[17] in an essay on motivational aids to learning, express clearly, the reduction of learning to performance which is implied in the strategy of treating interest as a motivational aid and of which we have already given account. When children are put in a situation in which they need to learn in order to promote their interest in pleasing parents, then; 'learning' becomes increasingly a matter merely of carrying on a performance of the required nature. Sears and Hilgard[18] therefore wrote: "For purposes such as those of instruction, the distinction between learning and performance becomes somewhat less important, since what keeps the pupil performing is also likely to keep him learning. Since the teacher has the situation firmly in control, though his strategy of controlling the child's access to what he finds interestings (such as pleasing his parents), the pupil has to keep performing work assigned in class - and performing work assigned in class will mean keeping busy on any set of tasks which to the teacher equate with 'desirable learning'.

It seems to me that arbitrary connection of pre-selected subject-matter with children's existing interests is more likely to kill the existing interests than to create new ones. Sometimes, no doubt, a new interest does appear during the course of this treatment, in the same sort of way that occasionally a child may acquire a taste for his medicine after being many times induced to swallow it by the offer of

a sweet. But, even if a pupil does eventually grow interested in a subject originally studied for the sake of an entirely different interest, no credit for this can lie with a teacher whose only reason for 'stimulating interests' was in order to make use of them as motivational aids. Such a teacher has not even been trying to get the child interested in the subject, but merely to engage repeatedly in the performance of 'taking' it. To try deliberately to bring a new interest into being, therefore, has nothing in common with using psychological pleasures to induce children to undertake performances. According to White[19] interest is not explicable by attention. Nor can it be explained in terms of motives or reasons. Being or becoming interested, or showing an interest, is not something we intentionally do; it is something we cannot here and now help. To explain a continuing interest is to discover the sources of proneness. It can be deduced from this that nothing which merely sets out to obligate, or tempt, or make children want or wish to become interested, can 'make' them do so. In the same vien, we can make children pay attention to their sums and try to do all the things which they believe will enable them to do get them right. But we cannot in the same way make them interested in getting them right. White puts the point as follows:[20]

> "Attention may be demanded; interest has to be aroused. It is unfair to blame someone for not serving an interest. ...Trying to get interested in something is somewhat like trying to feel

sorry for someone; neither is a matter of trying to do it."

So we cannot get children interested in something by getting them do anything. We have to teach them the interest of it. Its interest is something to be learned, in a sense quite different from that in which 'learning' is 'performing', and more like that in which it means 'seeing the point' or 'getting to understand'. Getting to understand what logically speaking makes a sum 'right' is quite different from just trying to get the sum right. 'Getting to understand', like 'becoming inclined', is not a matter in 'trying to do', nor a matter of being 'made' psychologically to do, anything at all. You cannot make a person acquire an interest in cricket or poets, but you can try to teach a person the distinctive point of these things.

So far as it can be seen, the only way of engendering interest in anything is through helping the child to see something of its significance. 'Stimulating' behaviour by teachers in classrooms (e.g. blowing soap across the room, setting fire to newspapers, starting a 'green corner' or an 'interest table', playing electronic sound - effects records) may 'make' children excited, astonished, apprehensive, bewildered, indifferent and so on, but unless there is something of intelligible interest in what the teacher is doing nothing of interest is likely to develop. The most that a teacher can do, I think, is to try to communicate his view of what is interesting and arouses interest, but it only does so if one can somehow show to others what it is that seems interesting.

We must notice, finally in this section that neither arousing dispositional interest nor engendering an accurrent one is the samething as 'sustaining' an interest once it exists. It is entirely catastrophic to the whole enterprise of 'learning through interest' to suggest that once children are interested there is nothing much for the teacher to do but stand back and let them get on with it. On this unfortunate theory, teachers should 'keep in the background' and just allow interests to be followed. We do not expect a child of two to be able to pursue his interests entirely without some form of assistance. The question therefore is, why, then, should we assume that a child of five, ten or fifteen, or for that matter an adult of fifty, whose interests by this time are correspondingly more complex, will be capable to pursue them without help?

We shall look at the ideological reasons for this assumption later, but for the present it is the sheer impracticability of the idea which we have to stress. An interest is an inclination to pay attention to something and to enter into appropriate active relationships with it. A child, and often an adult, cannot simply see what to do in the furtherance of his interest, as though its cognitive and practical implications were somehow written on it like the instructions on a puncture outfit. He has to learn what these implications may be, and the functions of teachers is to help him to do so, if they want him to 'learn through

interest'. The point (on this view) of his going to school is that he should there be able to receive some expert help. It is entirely pointless, therefore, to send him off to school and then leave him there, while teachers and others, drop off a few stores now and then to sustain his intellectual and other 'basic needs'. Every child wishes that he knew how to do 'properly' what he is interested in doing - since the inclination to try to do just this is what 'being interested' means. For his interest to be sustained, then, he must make progress in learning how to pursue his interest and, in doing so, learn ultimately more of what is involved in that interest itself.

The child needs, along with expert help in learning, some sort of enabling environment which contains resources to pursue his interest with. With variety of content and flexibility of access in this respect, he might be better off at home or in the streets. Moreover the environment must of course be socially, as well as materially, helpful. How forty to fifty children could ever really be expected to 'learn through interest' while kept in one room, for example, is beyond my imagination. Such a setting, for five hours a day, would impoverish the interests of one child, let alone of forty. To this situation add the doctrine which stipulates in effect that the teacher has no responsibility for sustaining interest anyway, or that he is to do little more than stop fights and give out supplies, and one begins to understand why in practice so-called 'learning through inte-

rest' may become an aimless free-for-all in which children's interests grow increasingly trivial, destructive or concealed strategically.

4. ARE ALL INTERESTS DESIRABLE?

Hitherto, it has become clear that leaving children to their own devices is unlikely to help them to sustain and develop their interests. It is also plain that of the interests which children would like to follow, many are wildly imprudent, many trivial and many ill-chosen on moral grounds; and that in any case they cannot all be followed instantly. Some selection, then, must be made. It is the problem of finding educationally good grounds for such selection with which we are concerned in this section.

(i)

A child's interest will always constitute 'a good reason' for his engaging in the activities which he sees as relevant to it. However, on other grounds, unconnected with that interest, there may be better reasons for his not engaging in such activities at all, or at least not doing so for the time being or in the present circumstances. Hence to say that it is good for children to be able to 'follow their interest', is true if by this we mean that engaging in interesting activity is always something for which the presence of the interest constitutes' a good reason '. But it is not true if by it is meant that the presence of interest is always the best reason for action (other things

considered), or that the things which children are interested in are always the best possible things for them to do.

We shall try to put the point about 'interests' and 'reasons' in another way. The word 'need' whenever used in referring to a reason for action, it is implied also that reasons can be given for the need. Not only does the 'need' point to a reason for the action; beyond the action there exist also reasons for the need. For example, if I say that I am reading a certain book because I 'need' to check my recollection of a particular point in its argument, It is implied (by my use of the word 'need') that reasons exist, in turn, for my need to check my recollection. Indeed, if you question me further, I might explain, for example, that I have a poor memory and therefore always 'need' to check back to the original source in order to be sure of a point. In this way, with you questioning and me answering, a dependent chain of 'needs' may be revealed, or in other words a chain of 'reasons for' my action in reading the book. Beyond my reason would lie a range of further reasons <u>extrinsic</u> to that activity. Beyond the activity of reading the book would be a logically interminable sequence of activities, the performance of each one a possible pre-requisite to the performance of the next. 'Needs' are 'reasons for action' then, only because someone (and not necessarily the person in need) can point to extrinsic reasons for the needs. By contrast, although 'interests' are 'reasons for action' too, this is not because of any <u>extrinsic</u> reasons which they may happen

to be for those interests. By pointing out extrinsic reasons for an interest such as for example the circumstances in which it first arose, one would not be doing anything to justify its pursuit. To give good 'reasons for action' in pursuing it, the most that one could do would be to try to explain to the questioner the intrinsic reasons for its interest or to bring home to him exactly what it was which one was finding interesting in it.

It follows then, that 'interest', by contrast with 'need' is always 'good reason' for action; and if all that we are concerned with is the possible value or good intrinsic to an action, then the child should 'follow his interest' and we should help him. But if we are concerned also (as we almost always are) with values extrinsic to that action, then we must weigh up whether there are not also other and better reasons for putting a stop to it, at least for the time being. For example, if the child's interest is morally obnoxious then, on moral grounds there are better reasons for stopping it.

Thus, 'needs' presuppose values; 'interests' do not. There is always value 'in' my interest, even though what I value may turn out to be utterly worthless in terms of anything else than its interest, and even though the pursuit of it may be positively detrimental to the achievement of other goals. In the second part of this section I shall argue that the educative task of teachers is to help children to understand more fully and to practise more effectively some of

the things which they find interesting, and thus to get a measure of the value intrinsic to them.

(ii)

The view of education we have been describing here has often been labelled 'child-centred education'. But this does not mean that a teacher should stand back and just allow children to pursue whatever interests come into their heads. The point of calling education 'child-centred' lies in emphasising that even when the person who is being educated is a child and even, therefore, when his interests often seem 'childish' or silly or undesirable from the view of his adult teachers, nevertheless his education can only proceed through the pursuit of his interests, since it is these and only these which for him are of intrinsic value. However, ridiculous a child's interests may seem, there is nothing else in terms of which he can become more 'educated'. He can be 'schooled' to adopt adult values, but only at the expense of learning his own values.

A person's interests, dispositional and occurrent, represent his capacity to find intrinsic value in the circumstance of living, and his inclination to pursue or seek such value in terms of feeling and understanding and of activity which seems appropriate to its practical point. Such a person's 'education' consists in whatever helps him to develop this capacity for valuing and this inclination to pursue what is valued. Thus whatever enables him to appreciate and understand his interest more fully, and to pursue it more actively

and effectively is '<u>educative</u>'. But this does not imply that it is incumbent upon teachers to offer assitance in the pursuit of anything and everything which catches the interest of a particular child. Still less does it mean that they should stand aside, or merely 'follow' the child down 'divergent paths'. There is a difference between helping a child to follow an interest for himself, and abandoning him to get on with it by himself.

In pursuing an interest no one can ever say in advance exactly how it is going to turn out. In it, one is not trying to approximate a <u>norm</u> of action, or in other words to do what the majority of people might agree that one 'needs' to do. It is not a matter of trying to conform to proven a consensual standards or norms of value. It is more like trying to find out more about what it is which gives value to norms. In principles, this is a risky business. In gaining what is of value in an interest, we might lose other values which previously we had achieved in other directions, or jeopardize the future achievement of further values in store. Just as each new understanding which we gain restructures our entire conceptual grasp of world in which we live, so each new value which we find or seek, in pursuing an interest, brings about a shift - and sometimes a radical shift - in our entire current scale of values. Such changes, although pursued for their interest, are by no means always in our interest, let alone in the interest of anyone else. Children, therefore, and perhaps especially children educationally speaking, need

constantly the kind of confidence to proceed which comes from receiving effective help. This effective help is the educative function of teachers.

By contrast, then, with the kind of manipulative changing of behaviour which we have already described, 'teaching' of an <u>educative</u> kind consists in helping children to structure their experience and activity in ways which enable them to see more of its intrinsic point and value. I am trying to suggest that children benefit 'educationally' by learning how to pursue their interests both more effectively and in an increasingly selective and discriminating way, and that 'educational' teaching' therefore is whatever intentionally serves to bring about this end. It does not mean that anything and everything which a particular person values is bound to prove valuable or to be most worth pursuing here and now. A child's interests are already selective. Through them he begins to discriminate intelligible and possibly valuable features of the world. Trying to pursue an interest means always, then, trying to see those features more amd more clearly and in doing so, trying out (as it were) their possible value. The child's educational need is to be sustained and helped through these trials, so that his interests neither become fixed in some stereotyped form through his inability to see how to develop them further. But neither on educational grounds nor on any other grounds does the child 'need' to pursue all his interests. Indeed, it is only on educational grounds that

he 'needs' to pursue any of them. There is room, then, for prudence, practicality, morality, etc. to be considered, when the selection is being made as to which of the interests should be accommodated in school.

If these 'other grounds' however are being considered both by children and by teachers to the exclusion of interests then school becomes a place where no education can possibly be going on at all. If one were always to be prudent, it would be unwise ever to pursue an interest for its own sake, because of the unavoidable risks involved.

NOTES AND REFERENCES

CHAPTER FIVE

1. Evans, K.M., Attitudes and Interests in Education, London: Routledge and Kegan Paul, 1965, p.141.
2. Dewey, J., Democracy and Education, 1966 ed., Toronto: Free Press, 1916, ch.10.
3. Cremin, L.A., The Transformation of the School, New York: Random House, 1964.
4. Hofstadter, R., Anti-Intellectualism in American Life, New York: Cape, 1962.
5. Woodworth, R.S., 'A behaviour Primary Theory of Motivation', 1958 in Teevan and Birney (eds.) 1964, p.140.
6. Woodworth, Ibid.
7. White, A.R., Attention, Oxford: Blackwell, 1964, p.104.
8. White, A.R., The Philosophy of Mind, New York: Random House, 1967, p.85.
9. White, op,cit., p.104.
10. White, p.104.
11. White, 1967, p.83.
12. White, Ibid.
13. Cowan, J.L., Pleasure and Pain, London: MacMillan 1968, pp.48-49.
14. White, op.cit., p.106.
15. Wittgenstein, L., Philosophical Investigations, Oxford: Blackwell, 1953. The Blue and the Brown Books, Oxford: Blackwell, 1958.

16. Dewey, J., Interest and Effort in Education, Boston: Houghton Mifflin, 1913, pp.11-12.

17. Sears, P.S., and Hilgard, E.R., 'The Teacher's Role In the Motivation of The Learner', 1964 in Hilyard.

18. Sears and Hilgard, Ibid., p.182.

19. White, p.109.

20. White, 1967, p.84.

CHAPTER SIX

DISCIPLINE AND SCHOOLS

1. DISCIPLINE AND CLASS CONTROL
2. REGARD FOR WORTHWHILE COMMITTMENTS
3. THE PROBLEM OF DISCIPLINE APPROPRIATE TO EDUCATION.

1. DISCIPLINE AND CLASS CONTROL

The notions of discipline and control are often confused. All philosophers would probably agree that the term discipline always denotes a state of order, and most would say that in an educational context discipline is order which facilitates approved and often planned learning. Some writers would argue however that not all such order is properly called discipline. Key issues are the source of the order (Is it imposed by the learner himself or by someone else?) and the reasons for which it is imposed. Thus Hughes and Hughes[1] maintain that the source or origin of control is the important factor in distinguishing discipline from other states of order.

> "It is regrettable that the word "discipline" is often used as if it were a synonym for "order", and it will help to clarify our thinking if we use it in a more limited sense. Discipline, we suggest is a term that should be reserved to describe a state of mind; order, on the other hand, is a state of affairs. At the extremes, order is of two kinds, somewhat similar in outward appearance but radically different in origin. It may be a state of affairs imposed on unwilling pupils by external authority, or it may be a state of affairs - the result of pupils willingly submitting themselves to certain good influences. This willing submission to outside influence is the very essence of discipline....."

> "...It is clear then that discipline is a state of mind, the acquirement of which needs the active co-operation of the pupil himself. True discipline is always in the last resort self-discipline...."

Most other writers, and probably most teachers, would take a less restricted view and define discipline in schools as all order which facilitates either planned learning, or

unplanned learning which in retrospect is judged to be desirable. Most would wish to distinguish however between order which is externally imposed by teachers on pupils, and that which derives from the pupils themselves for whatever reasons - whether because they perceive it as necessary in order to get something they value such as 'o' grade or the teacher's approval, or because they want to avoid punishment, or have internalised certain norms of behaviour, or are spontaneously interested in the task in hand. All these reasons could according to this less restricted view of the term be operative in situations properly described as disciplined.[2]

But this interpretation of discipline confuses discipline with control in that Stenhouse includes discussion of techniques of pupil management in his teatment of discipline in schools.

On the topic of discipline John S. Brubacher states:

> "A special instance of the social and moral infrastructure of the school that deserves separate mention is discipline. Whether one's educational philosophy calls for much or little freedom, certain optimum social conditions must obtain in the school if effective learning is to take place.[3]"

Then he goes on to equate discipline with law and order and maintains that Law and order are as necessary for the carrying on of instruction as they are for the ordinary pursuits of everyday life outside school.[4] But why equate discipline with law and order? Surely such a view sounds odd and misguided in educational contexts.

George Partridge and Felix Pe'caut make discipline a condition precedent to instruction in schools. They write:

> "There must be a certain amount of order and quiet before instruction can begin. Indeed maintaining order and giving instruction are almost two different functions of the teacher. Under such conditions codes of discipline usually state the rules. In these, prompt obedience to the will of the teacher is the first and great commandment.[5]

On this view the teacher may give reasons for his request, but he need not. Children should obey simply because the teacher in loco parentis wills it. And it is claimed that in doing so, the children are really obedient to the moral law itself.

Another approach makes discipline coincident to interesting instruction. Here the teacher, whose enthusiasm for his field of specialisation should be so contagious that it spreads to his pupils, need not bother about discipline as a separate concern. Children will be so engrossed in the curriculum that their interest will afford a self-discipline (as opposed to externally imposed control). According to this theory, there is such a moral and spiritual unity between pupil and teacher that the docility of the former as a condition precedent to instruction never arises.[6]

Still yet, another method goes even beyond utilising interest to transfer the locus of authority for maintaining discipline from the teacher alone to the class as a whole. Here rule by the one gives way to rule by the many. Social order in the school becomes a function of a group purpose.

If children are comparatively engaged with the teacher, in a joint project, pursuit of the common end will enforce its own order.[7]

We can see at a glance that discussions about discipline and order can lead to different interpretations. To escape misinterpretation we need to make clear the view of discipline to which we subscribe.

It is agreed that both discipline and control are forms of order, but the order in each case is of a logically different kind. In the former case, the order in a 'disciplined activity is achieved by virtue of reasons implicit in, or for the sake of values intrinsic to, the activity itself. In the latter case, the order of a 'controlled' activity or sequence of events is achieved for reasons unconnected with, or of values extrinsic to, the activity. Thus a 'control' is a way of ordering things which is considered necessary for getting something done. By contrast, 'a discipline' is the form of logical and evaluative order which must be learned if one is to understand what is involved in doing something. Both control and discipline involve compulsion, but in the former the compulsion is not in the first instance a logical or a moral one. It is not achieved through the force of a logical or of a moral imperative. The force is physical, as when we arrange for things to be physically manipulated in certain ways (the 'controls' of an aircraft), or psychological, as when we employ phychological sanctions to ensure that people or animals behave in certain ways (e.g. police 'control' of

traffic, military 'control', the 'control' of the lion-tamer over his troop). In discipline on the other hand, the compulsion involved has nothing to do with the physical and psychological force which backs orders or instructions in the sense of commands. When instruction entres into the achievement of discipline, it is 'instruction' in the sense of teaching, not in the sense of giving orders. When we 'order' or 'instruct' someone to do something, as in giving commands, we are not teaching him what to do. We are just telling him.

When we exercise 'control' over people, therefore, we are not 'disciplining' them. The question 'who is in command here?' or 'who is in control here?' means 'who is responsible for getting things done in this situation?" It does not mean 'who is getting the people here into a disciplined frame of mind?' 'Control' over people is a way of deliberately putting them in an order designed or intended to accomplish some purpose to the achievement of which (in that order) they are merely a means. Thus it seems to me that the devices which Oskar Spiel[8] mentions in his book 'Discipline without Punishment' have nothing to do with discipline at all. Then there is also the question of instructing a waiter to fetch us dinner; following instructions printed on a route-guide. This form of order (in serving dinner or following route-guide to get to another part of the country) is not achieved merely by submission or obedience to orders in the sense of commands, but by trying to see what the point of the order is. It is a matter of discipline. In other words ,

a matter of trying to learn what is involved in doing what is being ordered.

Similarly, when we talk of a teacher 'controlling' his class, or his class 'controlling' him, although a form of order is present in both cases, in neither case are we talking about 'discipline'. In so far as relationship between teacher and class is simply one of means to ends, in which each tries merely to get the other to do something , then each purpose is accomplished at the moment when, willingly or unwillingly, the other does it. It is quite irrelevant whether or not the children (or the teacher) can see the intrinsic point of what they are being ordered to do, so long as they do it. When the teacher commands the class, for example, to sit down, stop talking, be quiet, pay attention, listen carefully and so on, there is no clue in his commands as to what the point of obeying them could conceivably be. If all that the teacher is trying to do (at the start of a lesson, for example) is to 'gain control', then he is almost bound to fail to bring the class to order. As I pointed out earlier George Partridge and Felix Pécaut[9] think such an approach is discipline. But this is misleading because if the teacher is to obtain more than momentary and unco-ordinated obedience, his children must be able to see something of the point in the order for which he is asking. As students on teaching practice find out to their cost when they are advised to get the class absolutely quiet before they start teaching, if one merely <u>orders</u> quiet, one may wait for ever. It is impossible to get thirty or forty child-

ren simultaneously quiet for more than a moment or so unless they can see some point or value in the constraint. 'Getting the class quiet' is a matter of discipline, not merely of 'gaining control'. It is not something to be done before, but rather it is part of, 'starting to teach'.

It is a mistake, it seems to me to contrast discipline not with control, as we are trying to do, but with order (as in, for example, Harold Entwistle's[10] Child - Centred Education) since discipline is itself, a form of order. Similarly, it merely confuses the issue, it seems to me, to speak of control metaphorically as 'external' discipline, since the whole point of the term 'discipline' as we are using it, is that the orderliness characteristic of it is 'internal' to the activity or relationship in question. A discipline relationship between teacher and class is one in which both parties to the relationship (the teacher as well as the class) submit to the educative order of the task in hand. The 'discipline' is not something which one party to the relationship possesses over or manages to impose upon the other. Unless the person being disciplined, as well as the one doing the disciplining, can see at least something of the valuable point of the proposed order, then he will not submit to it for its sake (for its intrinsic value) but only, if at all, for the sake of values 'external' to it. In this case, to say that he is being 'externally' disciplined sounds like a contradiction in terms. It would be clearer to say that his behaviour was being controlled by considerations external to

the logic of the task in hand. Thus, if a child tried to get his sums right only because he valued the gold star which his teacher would then give him, I would not call the rala-tionship between teacher and child a 'disciplined' one. Ins-tead I would say that the teacher was 'controlling' the child, and that the child was 'controlling' himself, through the desire for gold stars. By contrast, if the child had under-stood something of what 'right' means, and had seen, there-fore, that there is no point or value in (or intrinsic to) the activity of 'doing sums' unless one is trying to get them 'right', then I would call his effort to get his sums right a 'disciplined' one.

Discipline, then, is educative order. The word 'disci-pline' refers always to the kind of order involved in trying to reach appropriate standards or follow appropriate rules for engaging in a valued activity. The valued activity may be a very personal one; it might involve the learning, even, of an entire way of life (as in 'discipleship'). It may be a highly intellectual activity (as in the 'discipline' of different forms of thought such as history and mathematics), or a practical or an aesthetic or a moral one. The point in each case, however, is that any valued activity, so long as it is distinguishably one activity and not another (and so long, therefore, as there are discoverable rules and standards proper to it), must be engaged in a more or less disciplined way if it is to retain its interest. The sense of the word 'must here is not the commanding or manipulating sense which

has its proper place within a system of control. It is the logical or moral sense which belongs in the setting of educative teaching and learning.

Unlike control (whether 'self-control' or 'external control') discipline does not involve the setting up of some previously non-existent order, or the gaining of regulative powers over something previously regulated differently or not at all. It involves getting to understand more of the sort of order which is already more or less explicit in what one is trying to do. One does not 'set up' the disciplines involved in something like mathematics, as one 'sets up' a system of control. The features of mathematics in virtue of which we call it a 'disciplined' study are already, as it were, 'there'. They are not 'there' or in existence in the sense, however, in which the hinder in a game of hide-and-seek is 'there' - 'ready' to be 'discovered'. They are 'there' more in the sense in which America was 'there' for Christopher Columbus - little more than a direction in which to travel, towards a form or shape of things only partly understood.
If one is interested in the study of mathematics, having some inkling of what it is about, one is then concerned to become further instructed in it and hence to discover more of those special features in virtue of which it is the sort of study which it is. Receiving such 'instruction' does not consist in obeying commands which contain no clue as to the point of the order being asked for. It consists in trying to understand the informative directives with which the teacher helps

his pupils to see more explicitly the 'form' or order of the mathematical task or situation which they find interesting.

One does not set out to 'get' discipline over other people or over oneself, though one may try to gain control in this way. A disciplined social group does not behave in a disciplined way because someone in particular is in control over it or has responsibility for it, but because its members are themselves concerned to discover increasingly the features in virtue of which it is the particular and distinctive group in which its members are interested. If they share no interest, they cannot become more disciplined group. Their 'discipline' is the educative order in virtue of which there continues to be some distinctive and intelligible point in their existence as a group.

What I have argued so far is that discipline must be self-imposed order, but the reasons for which the order is imposed are also crucial. Order is properly called disciplined only if pupils impose it on their own behaviour because they are interested in a particular activity and value it for its own sake. Order imposed for reasons external to the task in hand is more appropriately called control - self control if imposed by the agent, external control if imposed by others.

Elsewhere in this thesis I have tried to explain that one criterion of a child's interestedness in something will depend upon his willingness to seek various forms of order in its pursuit. The child can achieve this by trying to engage in his interest in a disciplined way rather than just

doing things impulsively. Ultimately, then, what makes the reasons for his activity intelligible is his interest. To understand his reasons for acting in a particular way we must be able to share in his interest. But there are trying moments when the child is no longer able to offer reasons for his actions. At this point the teacher is most likely to abandon his responsibility to share and help the child in his interest. In other words, it is when the teacher, too, seems to be missing the point of the child's interest that the educative order of the situation is liable to break down and therefore some form of control is substituted.

But if we are sure either that there is <u>harm</u> in what the child is doing or that no prOgress is possible in it in the present circumstances, then obviously we are right to put a stop to it. But on what grounds should we be sure? If our only reason for calling it 'harmful' is that it seems imprudent by current general norms of health or harm, rather than by our particular judgement as to its possible health or harm, and if our only reason for seeing no 'future' in it is that it does not happen to belong to what is currently on the list of things generally considered <u>worthwhile</u> for children to be initiated into, then to stop the activity would be mistaken.

More often than not, a confusion can arise between those occasions on which children have to be controlled, with those in which both children and teachers are learning to think about something in a more disciplined way. As we have already pointed out, the control of children could never be

something which helps <u>initiate</u> them into thinking in a disciplined way. What interests children is not something which we can control "externally" (or which they can control "internally"). On the contrary, it is because they find some things interesting that we can control them at all (by controlling the conditions under which we permit them to pursue those interests). Our <u>educative</u> task, then, as distinct from but not necessarily opposed to our <u>prudential</u> task in controlling and schooling them, is to help them to elaborate and differentiate the disciplined character of the thinking which they are already engaged in, in pursuit of what they find interesting.

One might be concerned with pupils' activities on other grounds, such as whether they were dangerous, for example, or involved harm to others - and on these grounds one would have to exercise some control over the activities and the pupils. It would be absurd, for example, to let a child dash across a busy street in front of traffic merely on the educative ground that he was extremely interested in something happening on the other side of the road. Nevertheless, in advance of knowing what activities were interesting to pupils, one could never rule out any activity at all on the grounds that it was inherently uneducative, nor could one have any educational ground for declaring that there are some things rather than others which all pupils, regardless of their interest must study. The view of education being presented here is not in complete accord with the notion of education

as the passing on of what is worthwhile. It is this notion of worthwhileness with which the next section is concerned.

2. REGARD FOR WORTHWHILE COMMITMENTS

School (academic) subjects, among other things (art, beauty, love etc.) are often said to be pursued <u>for their own sake</u>. There are a range of studies, it is claimed, which are valuable in themselves, and must be pursued as <u>ends in themselves</u>, rather than as a means to ends, outside themselves. They are, furthermore, somehow corrupted, and lose their integrity, if they are conceived as a means to some other end, however valuable <u>it</u> may be. The notion that there are intrinsically worthwhile activities, the value of which cannot be guaged by, nor thought to originate in considerations external to the activity, itself, is not one that squares with any of those main theories which actually provide justifications for answers to questions of the form "What ought I to do?" The intuitionist could answer such questions about academic pursuits as glibly as he has answered all previous questions as to the value of certain courses of action over others, with claims to intuitive knowledge of much activities were intrinsically worthwhile. The emotivist and the prescriptivist theories attribute meanings to moral terms such that a justification of such answers is not called for in general terms. If an activity is to be justified on a utilitarian or on a religious basis, then it will be judged as being <u>instrumental</u> to the attainment of some value more central to the scheme of justification in question,

i.e., maximizing happiness for the greatest number, attaining salvation or knowledge of God. A more sophisticated naturalistic justification would still have to relate the pursuit of these activities to some factual considerations (about human nature) external to the activities themselves and would have to contend with the great difficulty that these activities are characteristically carried on in their 'highest' form by a very small and extraordinary section of mankind, so it would be hard to see how the justification of their pursuit could lie in a general account of human nature.

Not only is the subject matter of these activities held to have intrinsic value, but it is also held to govern very closely how these activities should be carried on: a certain reference or respect is demanded, i.e. in the plea 'Art for arts sake', in the defence of scholastic methods and procedure, and in the view that the natural science when properly carried on, represent the untrammelled pursuit of truth, (often with a conspicuous neglect of the evils which it may be instrumental in promoting. If such views are to be sanctioned, then the justification of claims that some activities, rather than others, have intrinsic value should be forthcoming.

R.S. Peters[11] and A.P. Griffiths[12] are prominent supporters of this view in present day educational philosophy, and the argument Professor R.S. Peters, in particular, has produced to support the notion that there are intrinsically worthwhile activities, is on his own admission, central to the

overall philosophical view of education that he has presented.

'TRANSCEDENTAL ARGUMENTS': The sort of argument by peters to show that 'curriculum activities' are intrinsically worthwhile bears a close resemblamce to the argument he employes to establish the principle of justice.[13] The general strategy of this form of argument is to show that certain presuppositions, which must underlie any serious enquiry of the type in question, will, on close examination reveal that the questioner is already committed to a certain answer to the question. Peters' argument for the principle of justice is better understood than his argument for the intrinsic value of certain activities but while we could sketch the former argument to illustrate what it seems to me to constitute its success, I will rather devote attention for the argument in respect of the intrinsic value of particular curriculum activities.

It is, Peters[14] says, because some activities rather than others best exemplify or most explicitly embody disciplined, inquiry, that we should place these activities compulsorily at the centre of the school curriculum for all. The very fact that we are concerned to give good reasons for a curriculum is itself the best possible reason for getting pupils going on those theoretical pursuits such as science and history in which the different forms of disciplined thought can be seen (by us, at least) in their most highly developed state.

Whenever a teacher or a pupil starts to think seriously about what he is doing (as he must start to think, if he is

going to engage in it in a disciplined, educationally worthwhile way), then, argues, Peters, he is bound to find himself involved in the sorts of intellectural pursuit of which ultimately (as we, at least, can see) the curriculum of a university is largely constructed. Thus, he says:

> "It would be irrational for a person who seriously asks himself the question 'why do this rather than that?' to close his mind arbitrarily to any form of inquiry which might throw on the question which he is asking."[15]

Therefore, he argues, if the curriculum of any child's schooling is to be educationally justifiable, it must include intellectual pursuits which we can see as best exemplifying the giving of good reasons for anything, even if at first the children themselves, understandably cannot see them in this way.

If the kind of compulsion which is being envisaged here is logical, or in other words if all that is being said is that any serious thought is logically bound to take more or less orderly or intelligible forms, then it cannot be said that the conflict between what is being said and the principle of 'learning through interest' is a fundamental one. Unfortunately, however, the argument can also be interpreted[16] as meaning that all pupils must compulsorily be made to undertake studies such as science and mathematics seriously - and the compulsion intended here is psychological and perhaps, if necessary physical. This compulsion, it is argued, has a prudential function, as a prerequisite for the pupils' eventual attainment of a worthwhile way of life. In no other way, the argument runs, could we be sure that all pupils

would have the opportunity to develop the capacity (eventually) for making rational choices about what they should do when (eventually) the compulsion is lifted. Not before this point (i.e. eventually) would it be rational to free them from external compulsion.

These points are clearly made out by J.P. White as follows:[17]

> "...Clearly there are many justifiable constraints; no one would deny, for instance, the young children must be taught to read and write, to keep themselves clean, to be king to other people and not to hurt them.
>
> Consideration both of the child's and others' interests warrants interference in these areas. What of the secondary school child? He is constrained to attend classes in anything from English to woodwork, plus compulsory games as well. Very often he has choices between activities, but they are choices within a compulsory framework; he can rarely choose to do anything. How much of this constraint is justified?
>
> Much of it plainly is. Every child must acquire sufficient understanding of the concepts and theories of science and mathematics to enable him rationally to choose whether or not he wishes to pursue them further, either for their own sake or for vocational reasons. He must acquire a historically and philosophically based understanding of domestic and world politics. He must acquire such understanding as he is emotionally capable of in literature, music and plastic arts. Most important, perhaps, his moral awareness must be developed, both theoretically, through the moral issues raised in the disciplines.....and practically, through classroom situations and in other ways..."

He continues:[18]

> "If he is deprived of these forms of understanding he will be cut off not only from all sorts of vocational and hedonistic possibilities, not only from all kinds of social service, but also from that ancient and too often neglected end of education - self-knowledge. If he is not compelled to acquire these at school, the chances are that he will not pick them up otherwise; so constraint is fully justified."

Obviously one aspect of the problem here is to find a rational way of deciding what is meant by "eventually", or in other words of deciding when it would be rational for the external compulsion to be withdrawn. Plato, for example, seem to think that it would not be before the age of about fifty, or so that people (and then only a very few people) would be able to make rational choices and therefore, would be fit to graduate from the ranks of the compelled to join the rank of the compellers. This, of course, was just Plato's opinion. There is no rational way of knowing whether or not a person has become capable of rational choice. One could never be sure on rational grounds alone that one's criteria for judging rationality were themselves rational and were being compelled.

Further than this, however, from what we have already said it **should** be plain that there is something very odd about the whole idea of proposing to use physical and psychological sanctions to 'make' pupils undertake certain studies seriously, just as there would be about trying to 'make' them interested in something by such methods. One can compel someone's obedience to a system of social control, but no one can be psychologically or physically 'made' to submit to the logical and moral imepratives of disciplined thinking. It would be like standing over someone with a stick or a threat of imprisonment and saying 'Will you or will you not admit that 3 and 3 make 6!' or 'Will you or will you not admit that

one should pursue truth!', and continuing in this way until (eventually) he was 'forced' to admit it. It may be an empirical question whether or not, and in what precise circumstances, anyone subjected to such treatment ever does subsequently become interested in or start to think seriously about the matters which has first been, as it were, forced-fed. But at least it should be clear that force-feeding, in itself, does nothing to help the pupils even to start to understand or see the intrinsic point of the subject matter. I cannot see anything rational about trying to force someone to study seriously the things which I take seriously and see as best exemplifying rationality but which he as yet does not. On the face of it, indeed, I would think that such treatment would be at least as likely to close his mind to those things as to open it. To offer the learner some extrinsic reward for studying or to threaten him with a penalty for not studying might, indeed, be the very thing most likely to convince him that there was no intrinsically good reason for such studies, and that the real reason for undertaking them must therefore lie in their contingent utility for getting pleasures and avoiding pains.

Moreover, there is no educational need to treat pupils in this way, however necessary it may seem at times on grounds of prudence. What has been shown by Professor Peters[19] is that a more or less disciplined understanding of whatever a pupil is engaged in is an essential part of what we mean by

the educativeness of the situation. His argument is not that children need to be forced to 'study science', for example, because then they will get to think rationally. Rather, it seems to me, he is saying that 'studying science' is one of the things which we mean by 'thinking rationally'. It would follow, then, that to the extent that a child was engaged in any activity in a way which involved trying to think about it rationally, he would thereby unavoidably be engaged in thinking about it 'scientifically'. If this were so, then the issue turns on how narrowly or widely one limits or defines the activities which one is prepared to count as being bona fide examples of 'thinking scientifically', 'historically' 'mathematically', 'aesthetically', 'morally', and so on. Differences of definition in this case, however, would be stipulative, not a matter of differences of fundamental principle. An infant school and a university teacher might have differences, for example, about what they were prepared to call ' art '. Both, however, could still agree as to the seriousness, and therefore the more or less disciplined, rational and educative character of their pupils' thinking.

What has so far been established is that a child does not have to be made to wait until he has studied certain school subjects as defined, say, by university teachers, before he can be adjudged to be (more or less) rational. If he is seriously studying the doing of anything, then he is engaged already in trying to be more rational about it. If

his teacher, in separating out the logically distinct forms of thought which the child is actually developing in this way, finds it helpful to use, or to avoid, labels such as 'science', 'history', and so on, this does not affect the basic issue of principle which is involved, nor should it be allowed in any further way to put limits on what the child must do if he is to succeed in his activity. If a child is interested to find out more about how his family, for example or his neighbourhood or school or anything else, got to be the way it is, whether or not one calls this 'studying history' is not the vital issue; and to try to compel him to undertake such inquiries because one considers it vital for him to 'do history', would be pointless. What is of fundamental importance educationally is whether or not his inquiries (whatever they are) are being engaged in for their intrinsic interest. What makes his curriculum educationally worthwhile is not the presence on it of any particular school subject, but the presence in it of serious thought about whatever he is doing.

'Serious thought' means thought for which one is prepared to give one's reasons, up to the point at which there are no more reasons which one can give. At this point one can and should be willing to be instructed, but, educationally speaking, no one can or should try to psychologically or physically make one receive that instruction. To see the point of an instrudtion one has to be trying to do so; One cannot be

'made' to see its point by being instructed to do so. The only way in which one could interpret such unilluminating instruction ('Do it or else!') would be a series of commands to be obeyed.

An educational situation, therefore, is only to be regarded as an 'educational' situation when what is held to be 'educational' value in it is what is currently held to be of value by the person avowedly being 'educated'. The specifically 'educational' feature of the situation, then, would arise from its subject-matter being at all times that which the person being educated took or found to be of value, its methods being those which allowed and assisted the person to continue in this way, and its aim being to maximise the possibilities of his so continuing. Any other subject-matter, methods and aims might be accounted more desirable (even for the person being educated), in the sense of being judged more likely to turn out well by persons other than the person being educated, but they would not be of 'educational' value in the sense described. They might make available for the person being educated all manner of 'goods' such as health, character, taste in the arts, citizenship, vocational success and so on - they might in a word 'do him good' (or at least it would be his own fault' if they did not) - but he would not necessarily be better educated for having them. At the most, these non-educational 'goods' might be desirable as a matter of prudence - they might be 'in his interest', or 'to

his advantage' - but they would not necessarily lead him to develop a more 'educated' sense of values which life for him might have in store.

> ".....Initiation is a continuum not an achievement; being a person is a complex web of more and less, not a single dimension; children are more or less skilled in or competent at a variety of things and in a variety of ways; there is no sharp distinction between understanding and participating; there is no clear dividing line between those areas where a human being must understand and those where it does not matter in the slightest whether he does or does not; there can be no way of packaging subjects into those which must perforce be taught and those which can be picked up".[20]

3. THE PROBLEM OF DISCIPLINE APPROPRIATE TO EDUCATION

I have been trying to argue that whereas 'instructing' in the sense of commanding or 'giving orders' which are backed by psychological and physical sanctions can hardly be claimed to have any place in <u>educative teaching</u>, instructing in the sense of 'informing' is an integral part of such teaching. To restrict instruction, as many teachers do, to certain 'compulsory' subjects or the so-called 'basic skills' while depriving children of educative instruction in other areas is not only misguided but mistaken. A case in point is the statement which J.P. White makes in his article entitled 'Learn As You Will'. He writes:[21]

> "Our education system needs to be rationalised. The compulsory element in it needs strengthening - to ensure that <u>all</u> children and not only the more able of them gain a thorough understanding of the 'basic disciplines'."

This deprivation is usually called 'leaving children free to

discover', and, apart from 'discovery learning' in mathematics and science, the areas in which children are commonly left to flounder about by themselves in this way are those of the so-called 'practical' and 'creative' activities or 'topics'. Where instruction is unilluminating, naturally enough it must seem to the child to be no more than a stream of arbitrary constraints. On the other hand, when children do find instruction informative, their being given it does not somehow make them less 'free' or in some sense imply that they have been prevented from 'discovering' its significance (as opposed to by) themselves. Logically speaking, one could never 'discover' something which was totally 'unstructured' inchoate, formless - for in a formless experiential flux there would be nothing 'there', so to speak, to 'discover'. Apart from that, however, when pupils do grasp the illuminating point of instruction it makes perfectly good sense to say they have thereby been helped to 'discover' or 'find' its relevance or connection with whatever it is which they are trying to do. One of the main values in having a good teacher, I would have thought, is from the child's point of view that with his instructive help and guide interesting activities and experiences do not remain in a relatively formless, incoherent, unstructured state.

The relative merits of 'instruction' and 'discovery learning' discussed by some writers[22] as alternative methods are immaterial since the point I am making here is rightly interpreted by Downey and Kelly:[23]

> "...There is no doubt that discovery is logically possible for everyone, if we realize that we mean by this only that an individual finds out something that is new to him: it does not have to be taken as implying that one has discovered something new to human knowledge..."

Elsewhere they continue:[24]

> "The arguments that it is impracticable and inefficient are also based on an extreme view of what learning by discovery is to be taken to mean.
>
> ...If learning by discovery is to have any value, there is need for a good deal of careful preparation by the teacher and of judicious interference in the process."

Despite the above passages what is of main importance is the dependence of both 'instruction' and 'discovery learning' if they are to be educative or in other words to help children to make any progress in the pursuit of their interests, on the **selection** of appropriate subject-matter for study in school. If the teacher is preoccupied, above all else, with getting the children to study certain 'subjects' whether they find them interesting or not, then, where there is no interest there will be no 'illuminating point' in his instructions, since there will be nothing in the pupils, experience for those instructions to connect with. Similarly, if he abandons explicit instructions in favour of discovery materials intended to get the children going on those subjects by themselves, the children in this case will still not have the faintest idea what it is that they are supposed to be 'discovering'. To quote Downey and Kelly once more;

> "There is no doubt that if we were to leave children completely alone to find out everything for themselves this would be a long and wasteful process and one from which they would be to get little of value."[25]

In neither case then can the situation become an educational one. The children's 'practical activities' remain on the undeveloped level of more or less fleeting and pointless amusements or diversions. Little serious thought goes into them, because no effective help is being given about how to think about them, in a more disciplined and effective way. Where there is no intrinsic connection between the teacher's preoccupations and the children's interests, probably the most that the latter will 'discover' is that school is a place where it pays you to look as though you're seriously busy, regardless of whether you yourself can see the point of what you're doing or not. Meanwhile the teacher expends his efforts in securing obedience to his instructions, or attention to his 'discovery materials', generating theoretical pursuits whose practical point may be clear enough to him, but could never be clear to the children except in some more or less remote or eventual future.

In 'The Logical and Psychological Aspects of Teaching A Subject' as well as in 'The Logic of the Curriculum' Professor Paul H. Hirst[26] refers to the content of the particular 'fields of knowledge' as embodied in 'school subjects' laying emphasis on the practical grounds of its interest to the people engaged in teaching it. In Hirst's view these practical grounds are seldom the pupils' ones. More often they

relate, for example, to particular academic traditions and to the examination requirements by means of which teachers test knowledge of those traditions. What is being suggested is that in many cases the teacher's overprotective attitude towards or preoccupation with his own 'discipline' and his concern with getting pupils to pursue it in the way, eventually, in which he would like (or would have liked) to pursue it himself, is educationally speaking misplaced. To the extent that a child is 'thinking seriously' at all, rather than acting merely on impulse or from liking or for immediate gratification or to please or placate (or annoy) his teacher, then it seems to me that it is logically unavoidable that his thinking will come increasingly to take conceptually distinct "forms" increasingly explicit in disciplined ways of thinking or 'forms of thought', are somehow paradigmatically embodied in 'school subjects' or in 'fieldds of knowledge' as these are found in school curriculum. We cannot forecast or preselect what particular children will think seriously about with any reliability until we ourselves are taking an interest in and 'thinking seriously' about the practical pursuits of those children. This is something which teachers scarcely ever do, since the main part of their effort goes into devising 'methods' and 'materials' for getting the children, theoretically at least, to engage in their favoured pursuits.

It is questionable, then, whether we have good grounds

for saying that there are some activities such as, science or history about which one can 'think seriously' and other activities such as cooking or needlework about which one cannot realy 'think' in an educationally worthwhile way at all. The 'seriousness' of any activity - whether (for economic or other reasons) we call it 'work or play'[27] is shown by one's willingness to try to give reasons for the way in which one is engaging in it, or in other words by the extent to which one can show that one is thinking about it in a more or less disciplined way. Wilson[28] in reviewing Dearden's Philosophy of Primary Education in Education for Primary Teaching cites the moral seriousness of a game (any game) as something to be played 'properly' rather than just 'played about' (or fooled around) with to be a far better guarantee that children will be likely to exert themselves in 'serious' thought about it, than that provided by the vocational or economic or other 'good' reasons with which teachers so often try to persuade children to 'work'.

Practical considerations can still be given priority in curricula planning, without thus endangering in any way the disciplined character of pupils' thinking. But the chief practical consideration for the teacher, in my view, should not be respect for his own characteristic style of thinking - nor that of the academic tradition in which he finds himself as working - but for the pupils. The pupil's thinking, too, has a tradition, and unless the teacher begins his instructive communication with the pupil in a language and in rela-

tion to experiences and activities which already the pupil understands something of the point of, then no conceptual development and no development of interest will result directly from the encounter. Bernstein writes:[29]

> "If the culture of the teacher is to become part of the consciousness of the child, then the culture of the child must first be in the consciousness of the teacher. This may mean that the teacher must be able to understand the child's dialect, rather than deliberately attempting to change it."

Thus, the culture of the teacher too must change, at least until it reaches a state in which he is prepared to admit the child has a 'culture', or in other words is something more than a mere barbarian at culture's gates.

As we have already indicated to 'think seriously' is to ask oneself and others just what it is which one is trying to do and whether, therefore, it is being done appropriately. One's capacity for 'thinking seriously' in this sense, depends not on any purportedly 'serious' quality peculiar to some activities and pursuits rather than to others, but on the quality of one's interest in it for its own sake. Different people can be involved in entirely different ways in what is seemingly the same pursuit (e.g. 'studying' mathematics). Whether children are thinking seriously about what they are doing will depend far less upon its theoretical or intellectual character, than on whether or not they are finding any point in thinking seriously about anything at all. If their occurrent interests are never 'seriously' considered by adults, if all questions of value except trivial

ones are settled for them by others, and if they are never encouraged and helped to think things out for themselves as though their teachers' as well as their own values were sometimes at stake, then being promoted or stimulated to engage in theoretical or 'thoughtful' pursuits will not in any sense be equivalent to engaging in 'serious thought'.

To compel children 'externally' is needed to the same extent that children do need controlling and looking after, or do need adjusting to the most inflexible aspects of our social and physical world, Where such adjustment and control cannot be clearly shown to be necessary on grounds of prudence in an individual case, there is no room for someone to help children to learn to do things in an increasingly flexible and thoughful way. The only kind of compulsion appropriate to education, then, as opposed to schooling, is not that of control and command but that of discipline and instruction. Separating thought from activity - doing up 'thoughtfulness' in separate parcels of 'theoretical activity' labelled 'science', 'mathematics', 'history' and the rest - does not help children to become more thoughtful; and it more or less dooms the material in the other parcels (labelled 'practical activity' 'creative expression' and so on) to being engaged in a thoroughly thoughtless way.

Peters[30] arguments concerning 'Activities and Their Justification' and 'The Case for Curriculum Activities' set out in chapter 5 of 'Ethics and Education' do not seem to

entail on educational grounds alone, that we should rule out some activities from the curriculum and rule others in. To order someone to study something seriously does not help him to settle the question as to what he should do. What it does is to merely settle it for him, making it at the same time increasingly pointless for him to think about any activities seriously at all. The teacher has already done the thinking and the child is merely required to obey or otherwise.

Thus it is becoming evident that much of what has been written about discipline in schools[31] is not really about 'discipline' but about 'control'. The values of school activities are seen almost entirely in terms of values lying beyond and outside the school. In school, therefore, since there is little or no intrinsic point in what they are expected to do and thus little discipline in the tasks themselves, children stand increasingly in need of external pressures and controls. In this way, teaching becomes increasingly a matter of pupil management while discipline and education become 'internalized' control and schooling in that order.

NOTES AND REFERENCES

CHAPTER SIX

1. Hughes, A.G., and Hughes, E.H., Learning and Teaching; Longmans, 1959, p.209

2. Stenhouse, L. (ed.) Discipline in Schools : A Symposium, Oxford, Pergamon Press, 1967.

3. Brubacher, J.S., Modern Philosophies of Education, McGraw-Hill Book Company, New York, 1969, p.208.

4. Ibib., p.208.

5. Partridge, G., Generic Philosophy of Education, Sturgis and Walton, New York, 1912.
Pécault, F., "The Philosophy of Understanding the National System of Education in France", International Institute, Educational Yearbook, 1929 (Teachers College, Columbia University) New York, 1930, pp.169-171.

6. Brubacher, J.S., op.cit., p.209.

7. Dewey, J., School and Society, The University of Chicago Press, Chicago, 1899, pp.30-31.

8. Spiel, Oskar,, Discipline Without Punishment, Faber and Faber, 1947, chapter 2.

9. Partridge, G., and Pécault, F., op.cit.

10. Entwistle, H., Child-Centred Education, London: Methuen, 1970, p.67.

11. Peters, R.S., Ethics and Education, London: Allen & Unwin, 1966.

12. Griffiths, A.P., 'A Deduction of Universities' in Philosophical Analysis and Education, Ed., R.D. Archambault, RKP, 1965.

13. Peters, R.S., Ethics and Education, Allen & Unwin, 1966, ch.4, section 2.

14. Peters, R.S., Ibid.

15. Peters, R.S., Ibid., pp.162-163.

16. White, J.P., 'Learn as you Will' In New Society, 4 December 1969, pp.893-894.

17. White, J.P., Ibid., p.893.

18. White, J.P., Ibid., p.893.

19. Peters, R.S., op.cit.

20. Thompson, K., 'Not So Simple' in New Society, 30 April 1970, P.728.

21. White, J.P, 'Learn As You Will' in New Society, 4 December 1969, p.894.

22. Dearden, R.F., 'Instruction and Learning by Discovery' in The Concept of Education, Peters, R.S., (ed.), London: Routledge and Kegan Paul, 1967, pp.135-155.

23. Downey, M.E., and Kelly, A.W., Theory and Practice of Education: An Introduction, Harper & Row, London, 1975, p.162.

24. Downey and Kelly, Ibid.

25. Downey and Kelly, Ibid.

26. Hirst, P.H., 'The Logical and Psychological Arts of Teaching A Subject', Peters, R.S., (e.d.), London: Routledge and Kegan Paul, 1967, pp.44-60; see also 'The Logic of the Curriculum' in Journal of Curriculum Studies, Vol.1, May 1969.

27. Dearden, R.F., 'Instruction and Learning by Discovery' in The Concept of Education, Peters, R.S.,(ed.), London RKP, 1967, pp.135-155. See also Manser, A.R., 'Games and Family Resemblances', in Philospphy, Vol.42, July 1967, pp.210-225.

28. Wilson, P.S., 'Review of Dearden, R.F., The Philosophy of Primary Education' in Education for Primary Teaching No.77, Autumn, 1968.

29. Bernstein, B., 'A Critique of the Concept of "Compensatory Education"' in Rubinstein and Stoneman (ed.) 1970, p.120.

30. Peters, R.S., Ethics and Education: Allen & Unwin, 1966, Ch.5, pp.144-166.

31. Stenhouse, L. (ed.), Discipline in Schools: A Symposium Oxford, Pergamon Press, 1967.

CHAPTER SEVEN

PUNISHMENT IN SCHOOLS

1. UTILITARIAN THEORY ASSESSED WITHIN AN EDUCATIONAL CONTEXT
2. LOCATING THE RELEVANCE OF PUNISHMENT
3. PENALTIES AND PUNISHMENTS DISTINGUISHED
4. PUNISHMENT: A ROLE TO PLAY IN EDUCATION?

1. UTILITARIAN THEORY ASSESSED WITHIN AN EDUCATIONAL CONTEXT

The utilitarian view of punishment, as we have seen, is well summed up in the words of Jeremy Bentham:[1]

> "All punishment is mischief, all punishment in itself is evil; upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in so far as it promises to exclude some greater evil."

In other words, punishment involves pain and pain for the utilitarian is always bad and can only be justified if it can be shown to lead to pleasure, happiness or the avoidance of greater pain in the future. Only consequences, therefore can justify punishment. Thus Fred Feldman[2] writes:

> "As with all forms of utilitarian justification, this justification of punishment is totally forward-looking. That is, the justification of punishment in any given case depends entirely upon what will happen as a result of the act of punishment, as compared with what would happen as a result of not punishing. The utilitarian justification of punishment pays attention only to the consequences of punishment and the consequences of nonpunishment."

The difficulties of this viewpoint have already been pointed out but we need once more to expose them before examining whether or not the theory has any significance for punishment in education. The main difficulties stem from the fact that while utilitarianism may offer us useful suggestions as to the most efficient methods of social control, it is not strictly a theory of punishment as we have defined it. For if the only criterion we are to take account of in dealing with offenders is a consideration of the likely consequences of our actions, then there will be occasions

we will be led to take action that will involve no unpleasantness for the offender at all, or even action which is taken not against the offender himself but against some other person. Action taken against the mother of a juvenile offender, for example, may be more effective in curbing his behaviour than action taken against the offender himself. If a calculation of likely consequences is all that need concern us then punishment as such will not always necessarily be the best solution.

Educationists have felt that deliberate acts of nastiness should be no part of education and that it is better to have the freedom in which to decide what it best for the individual child in each situation. However, it is sometimes helpful to make certain distinctions within the kinds of situation in which questions of the rights and wrongs of punishment arise. A distinction might be made, for example, between those offences which are committed against moral rules where we must be aware of the morally educative dimensions of any action we take, and those where the rule broken has no real moral import, if there are such rules, and where it might as a result be possible to take appropriate action without the same kind of moral compulsion. Also, for an act of punishment to have the kind of morally educative effect that is wanted the child must be capable of understanding the reasons for it and appreciating its point; otherwise, it will be in his eyes an act of naked aggression.

DETERRENCE AND EDUCATION

How far can a deterrence theory be used to justify punishment in an educational context? Unfortunately, there is a tendency in education to link punishment with discipline and discipline with control. Punishment is therefore usually identified with the apparatus of control. It will be argued elsewhere in this thesis that this is to take a very limited view of punishment for punishment is part of our education. Meanwhile, we should point out that efficient teaching cannot proceed without general conditions of order and children being what they are, sometimes seem determined to disrupt proceedings. If penalties are attached to the breach of authorised rules, to deter possible offenders as well as to deal with actual ones, such measures may only be regarded as "punishments" in so far as they have intrinsic importance. That is to say the offender must see the 'punishment' as having a point or value. Extrinsic controls are more clearly described as "penalties". There is also the question of whether or not children are in fact deterred from breaking rules by having unpleasantness inflicted upon them. Most children appear to conform to rules for reasons other than the threat of sanctions. The point here is that under no circumstances could victimization in schools be justified, so that although sanctions may serve to deter children from breaking rules and generally misbehaving, unpleasantness may only be inflicted upon those who deserve it. Deterrence is

not, and would not ever, be morally acceptable as the sole justification for imposing penalties or punishment in schools.

REFORM AND EDUCATION

We now turn to the notion of 'reform' and that of education. As Professor R.S. Peters[3] points out:

> "It is often argued that when one is dealing with children a much stronger case can be made for reform as a reason for punishment than at the adult level. Many adolescents live in a world of fantasy and, it is argued, that the 'sharp shock' involved in punishment may bring them to their sense and help to establish them in socially more desirable forms of conduct. There is also the point that in a school situation, the fact that education is the main business of the school lends weight to considerations connected with reform. For 'education' is like 'reform' in that 'reform' implies some change for the better."

Peters disagrees with the view that in schools a strong case can be made for reform as a justification for punishment. He argues that, although education is like reform in that it implies some change for the better, it differs from reform in that it does not convey the same suggestion of bringing a person upto a standard from which he has lapsed. In Peters' opinion "...punishment in a school is at best a necessary nuisance. It is necessary as a deterrent, but its positive educative value is dubious."[4] Elsewhere[5] he suggests that the only good reason for employing punishment is to function as a deterrent and maintain conditions of order.

It therefore looks as if Peters is committed to the view that there is little or no case for the justification of

punishment in education in the sphere of moral improvement. But this seems odd considering that most people see punishing children for wrongdoing as being vaguely connected with moral education. Perhaps what he really has in mind is the distinction he draws between "education" and "reform". To put it another way; while moral improvement is part of what we mean when we talk about moral edudation, reform, because it is to do with bringing a person back up to a standard from which he has lapsed, is not what we normally have in mind in talk about moral education. Here the idea of moral development would be upermost in our thoughts.

Furthermore, although the interpretation of reform as the notion of changing beliefs and attitudes by non-rational means, i.e., by punishment can be rejected as being tantamount to indoctrination, it might reasonably be pointed out that we certainly do influence children by other than rational means. Such means being defended on the ground that they can help stamp in desirable habits, which will later make a solid foundation for a rational moral code. Indeed Peters[6] devotes two whole papers to developing precisely this point. What he maintains is that rules have often to be learnt before they can be properly understood; which, of course, is the familiar paradox of moral education Aristotle first expounded in Book II of his "Nicomachean Ethics".

Whether or not punishment is the most effective way of "stamping in" these desirable moral habits is not a philosophical question. The work done by Psychologists[7] in this area has so far produced little evidence that punishment, in

a manipulative situation, leads to moral learning. It will be argued later that this is only to be expected where the role of punishment in moral development is entirely misunderstood. Such an account misses the whole point of the difference between a manipulative situation and an educative one.

Surely, education requires us to respect every individual as a person, as a moral being, to regard him as responsbile for his actions and as entitled to punishment if he committs an offence; that we cannot without doing violence to the notion of education justify reforming him, moulding him, shaping him or in any other way treating him like a thing rather than a person; that the only way to lead him to understanding and ultimately to autonomy is to enable him to learn the moral lessons that are implicit in the acts of punishment.

2. LOCATING THE RELEVANCE OF PUNISHMENT

In the preceding sections we have tried to argue that it could never be justifiable to compel children to go to school, if all that we mean by this is that children stand in some sort of personal or social need of submitting to the control of adults. It seems then that, only to the extent that school is educative, or to the extent that it helps children to engage in intrinsically valued pursuits, can we reasonably say that it is right that they should be encouraged to go there.

We have also argued that discipline is a kind of compulsion to which it is right that one should have to submit. We must now make out a parallel case for saying that punishment is the infliction of a kind of pain which it is right that one should have to suffer. Our reason for making this assertion is not for breaking the rules of a particular system of control, but for moral wrongdoing,or in other words for faults of discipline. Unfortunately, in many schools, where headteachers control staff without giving them any genuine share in the process of decision-making, and where teachers control children in the same way, 'punishment' (and 'reward') is usually identified with the apparatus of control. Unfortunately, too, in most theoretical discourse as well as in practice, the matter of punishment and reward, like that of discipline, has commonly been treated as though it were part and parcel of the business of control. This is true both in philosophical writings, in which punishment has usually been viewed as an adjunct of legal control, and in psychology, in which it has often been treated as part of the mechanism of conditioning and related kinds of psychological control. However, in schools and other institutions in which by contrast there is some mutual agreement on the intrinsic value of attempting to live and work together in an orderly way, the form of order therein envisaged is a moral, not merely a social one. Accordingly its development is a matter of discipline, rather than control. In this section therefore it will be my argument that in such situations punishment

and reward are educative, rather than mere inducements to toe a particular line of action.

Almost any current text in educational psychology will illustrate to the reader the conflation of discipline with control, and the complementary treatment of punishment and reward as though they were agencies of psychological manipulation rather than features logically implicit in the notion of 'discipline' itself. Thus, Ausubel, for example, writes:[8]

> "By discipline is meant the imposition of external standards and controls on individual conduct... When external controls are internalized we can speak of self-discipline; it is clear, nonetheless, that the original source of the controls, as well as much of their later reinforcement, are extrinsic to the individual."

Ausubel describes 'punishment' as 'aversive motivation' which helps the child to realize what these external controls are and which thereafter induces him to 'internalize' them, or in other words which teaches him to control himself rather than to go on encouraging others to do this for him.[9] But we are not told why the 'internalization' of external controls should be called 'self-discipline' instead of 'self-control'. Neither are we given reasons why discipline should be located in sources lying exclusively outside the individual or the child. In Ausubel's account the morally distinctive feature of discipline (namely, that it is a form of order which is sought for its <u>intrinsic</u> point) and of punishment and reward (namely, that they are the pains and pleasures which one <u>deserves</u>, rather than which it is namely expedient

for one to avoid or to seek) play no part.

Other psychologists notably, Sears and Hilgard[10] writing on the Role of Motivation of Learning describe reward and punishment as 'techniques of control'.[11] Sears and Hilgard claim furthermore that the employment of these techniques is part of 'the teacher's responsibility for maintaining discipline in the classroom'. Pleasure and pain 'reinforce' learned behaviour, and reward and punishment are simply the deliberately administered positive or negative 'reinforcements' with which the teacher secures whatever kinds of behaviour he thinks desirable in the classroo.[12] Unfortunately, in Sears and Hilgard account, too, no reason is provided for equating discipline with control or rewards and punishments with 'reinforcement'.

Just as 'learning through interest' rather than through extrinsic controls has often been misinterpreted as meaning that such learning needs no discipline, so punishments and rewards have often been construed as though they were matters which had to be explained as extrinsic 'reinforcements' and which therefore could <u>never</u> be intrinsic to the task of learning. Teachers have been prepared to "reward" children,though not to 'punish' them. And a great many teachers have felt guilty about punishing their children for wrongdoing, and even at times about rewarding them for doing right, because they have been led to believe that such treatment is merely a kind of external manipulation or control which 'in theory' should not be necessary when children are 'learning through interest' or in other words are 'intrisically motivated.

But all learning takes place in a social context. The pleasure of successful learning is as much social as intellectual in origin, as in the pain of failure. When children are 'learning through interest', then, as much as at any other time, it is absurd to try to keep them in some sort of social vacuum empty of both punishment and reward, or to place them in the kind of socially sterilizing situation in which, while behaviour which deserves to succeed is applauded, whatever is deserving of failure is merely ignored.

Some psychologists have had second thoughts and are now of the opinion that it may actually make some children happier to get 'punished' now and again, since maybe this satisfies their 'basic needs' for security. In 'Educational Psychology' Ausubel[13] writes:

> "Without the guidance provided by unambiguous external controls they tend to feel bewildered and apprehensive. Too great a burden is placed on their own limited capacity for self-control."

Ausubel claims, then, that it is the helpful function of 'punishment' to make the external controls 'unambiguous' to the child, to help:

> "Structure a problem meaningfully, furnishing direction to activity - and information about progress toward goal - in terms of what is to be avoided....."[14]

But this argument misses the whole point of the difference between a manipulative situation and an educative one. Both situations - the critic might argue - are to some degree orderly and rule-governed, and in both situations, naturally

enogh, individuals become 'bewildered and apprehensive' if the rules remain ambiguous and vague. But the point however is that in the former situation the only guidance about the rules derives from the pains and pleasures arbitrarily associated with their infringement, or non-infringement. In the latter situation, by contrast, both the pains and the pleasures stem in part from seeing the point or rightness of the rules. In a manipulative situation the rules are only 'right' in the sense that you get hurt if you break them. In an educative situation, however, it is because the rules are right that it hurts to break them. The former situation, again, is 'manipulative' in the sense that there is nothing worth learning in it except that you will get hurt if you break its rules. 'Direction to Activity' as Ausubel[15] calls it stems entirely from considerations extrinsic to the situation itself. In the 'educative' situation, however, there exists the possibility of learning something of intrinsic point or rightness of the rules (both rational and moral) which thus far appear to define it. Manipulative rules have no intrinsic point in the situation which they govern. This is why it is correct to call them 'external' controls. The 'internalization' of these controls, so that the individual now begins to manipulate or control himself without needing too often the active intervention of others, makes no difference to the logical status of the manipulative rules. If they had no intrinsic point at the time when they were being

imposed on the individual by others, they cannot somehow acquire intrinsic point merely because the individual has now been induced to impose them on himself. They are the same rules and can have no more intrinsic point than they had previously.

I have so far argued that educational psychologists in the main have misinterpreted the logical status of 'reward and punishment', and that this misinterpretation is linked with their tendency to see learning in terms of conditioning, discipline in terms of control, and education in terms of schooling. In a parallel, way, then, they view reward and punishment in terms of 'reinforcement'. The newer trend in psychology as we saw in the quotation from Ausubel still makes no difference to the principle which is involved. Because whether one only 'rewards' children, or 'punishes' them one's actions is still manipulative and its pain or pleasure to the child is also a 'reinforcement' rather than moral desert unless the rules in question are seen to have an intrinsic point.

3. PENALTIES AND PUNISHMENTS DISTINGUISHED

It has already been suggested that both discipline and control are forms of order, the difference between them lying in the kinds of value inherent in the structuring of situations which they seem to make possible. Educative order or Discipline is seen as being of intrinsic value by those engaged together on any task in which they share an interest.

Manipulative or control or command, on the other hand, is not seen as being of any value in itself, but just as a more or less efficient means to a goal valued by the controller alone. A controlled situation, on this interpretation, therefore, is regulated by concern for values other than those implicit in the situation itself. To argue, then, that social control is the first step, as it were, towards an educative order or discipline seems as misguided as to say that extrinsic motivation is the first step towards intrinsic motivation or that schooling is the first step towards education. In each of these examples two <u>logically</u> different kinds of commitment are involved. One of them cannot somehow 'turn into' or be 'a necessary first step' towards the other.

The point I have been trying to emphasize is logical, not empirical. It is a matter of interpretation, not merely of 'fact'. On this interpretation of 'education', educational situations must themselves be seen as orderly situations. 'The first step' in one's education, having seen value to lie in a certain direction, is to try to take that direction <u>because</u> of its value - not for reasons of some <u>additional</u> penalties or advantages which one either wishes to prevent or to gain.

At this juncture we must digress to draw a distinction between penalties and punishments. There is no one agreed conception of penalties. One view is that there are some penalties the imposition of which is an intrinsic part of a rule-governed activity such as: a free kick given against one in a game of football or 'penalty points' in a car rally.

People who incur these penalties are not thought to have done anything morally wrong. It may even be correct tactics to risk incurring such penalties. The penalties are undesirable to people participating in the game in the normal way and in normal circumstances. For example, a footballer whose aim is to win will not normally want to have a 'free-kick' given against him (but he may sometimes). People who are not taking part in the activity or who are doing so with non-standard aims (e.g. those who want to lose a football match) will not find penalties undesirable.

The other kind of penalties are not intrinsic to any kind of a rule governed activity and are not thought to carry any moral censure either; e.g. fees for overdue library books. These penalties differ from the other type because they are not an intrinsic part of a rule-governed activity. One could, for example, know exactly what it was to borrow a library book without knowing about fees or fines, whereas one couldn't know exactly what it is to play football without knowing about 'free-kicks'. Penalties of this kind would be undesirable to most people and not just to those taking part in an activity with standard aims.

I make these distinctions not because penalties may or may not be an intrinsic part of a rule-governed activity but because whereas penalties do not generally carry any moral censure punishments do. Penalizing, therefore, although appropriate to social control, is not part of becoming more

disciplined and should not, indeed, be interpreted as 'punishment' at all.

Punishing and penalizing, then, should not be confused with each other. Their logical characteristics are quite different. There is no reason for saying that a person should refrain from repeating an offence, if all that is going to happen to him is that he will be penalized. Provided that that person is willing, and capable of paying the penalty, nothing can stop him from breaking the rule over and over again. A motorist, for instance, may calculate that the gain of parking on yellow lines outweighs the advantage of paying the fine when he is caught. It may thus make sense for him to continue to commit the offence, so long as he is not caught so often. His excuse will normally be that there is no reason why he should not repeat the offence, so long as he is perfectly willing and able to pay up when caught. He is not being 'punished', therefore, by having to pay the penalty, nor is making him pay the penalty a way of 'disciplining' him. Penalization is a mode not of discipline but of social control.

It is not the pain of punishment which makes it 'punishment', any more than it is the pleasure of a reward which is sufficient to make it a 'reward'. When we inflict pain on someone in a way which he regards as unjust or undeserved, he will see this not as 'punishment' but as spite, retaliation or revenge. But even if he sees the pain as a just one, unless it is given for something which he regards as wrong

(rather than just illegal or against authorized rules) he will construe it as a penalty, not as punishment. Similarly to give pleasure to someone, if he had no notion that he deserved such a thing, will seem to him like flattery, currying, favour or offering a bribe, not like a 'reward'. Thus both reward and punishment need justification. But again, even when he feels that there is an acceptable reason or justification for the pleasure in terms of custom or precedent (as on his birthday, for example) he will construe it not as a 'reward' but as a gift. Only when deliberate pleasure - giving is for moral desert, is it properly speaking a 'reward'. Other sorts of deliberate pleasure-giving fall under categories such as: 'prize' or 'gift', or on occasion 'bribe' or 'inducement' and 'flattery'.

In the same vein, although to 'reward' someone gives pleasure both to him and to you, the question of there being an advantage in it for either of you need not arise. Similarly, to 'punish' someone is painful both for him and for you, but not in terms of some advantage which either of you have thereby lost.

On the other hand, to 'award' either a penalty or a goal is to give something of a disadvantage or advantage to the participants in the game; and any pleasure or gain which the players feel because of it, derives from the advantage or gain which has thus been given or taken away. Reward and punishment, however, unlike gains and penalties, are given and received only when people feel to some extent con-

cerned morally in their own case. Just as discipline involves a willingness and concern to correct one's mistakes and seek the truth for oneself, so punishment involves one's own willingness and concern to see faults and suffer their correction.

4. PUNISHMENT: A ROLE TO PLAY IN EDUCATION?

Philosophical literature on punishment is, undoubtedly, enormous. A learned journal hardly goes by without additions to the already great spread of words upon topics such as: blame, remorse, forgiveness, attonement, guilt, expiation, mercy, retribution, detterrence, reform, treatment, reparation and many other notions relating to the general theme. Thus Jeffrie G. Murphy writes:[16]

> "The topic of punishment fascinates men, learned and unlearned alike, to a degree that is rare for any topic that may even in part be called "philosophical". The fiction of crime and punishment..... is perennially popular; and public debate on punitive topics..., the abolition of the death penalty, preventive detention etc., is closely followed by the media.....
>
> The intense interest, then, is perhaps perplexing and many fanciful explanations for it have been given....."

James F. Doyle[17] also comments as follows:

> "The question of punishment and its justification has been a major preoccupation in recent philosophy of law....."

Similar comments can be found in a great number of books and journals. However apart from its sheer bulk, the most striking feature of the literature is that all of it is concerned with the legal notion of punishment. Professor H.L.A. Hart, for example, explicitly lists among the five elements

in terms of which he defines 'the standard or central use of punishment', that:

> (ii) It must be for an offence against legal rules...
>
> (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.[18]

Elsewhere he continues:

> "In calling this the standard or central case of punishment I shall relegate to the position of sub-standard or secondary cases the following among many other possibilities:
>
> (a) Punishments for breaches of legal rules imposed or administered otherwise than by officials (decentralized sanctions).
>
> (b) Punishments for breaches of non-legal rules or orders (punishments in a family or school)."[19]

This implies that, for example, offences against moral as opposed to legal rules, or against parental injunctions cannot be punished or can be punished only in a secondary sense of 'punishment'. Hart himself does indeed describe the latter of these cases as 'sub-standard or secondary'. But how can we hope to understand the place of punishment in education if in the very definition of it the educational case is regarded as sub-standard? Even in the few papers in which punishment is considered in other contexts than the legal one, the distinctive meaning of punishment in family and school situations is seldom carried very far.[20]

McPherson, Perhaps, has taken it further. He writes:[21]

> We do talk of parents punishing their children, and we do talk of self-punishment. To say or imply at the outset that these uses are at best secondary, or sub-standard is, even when a disclaimer is made, to depreciate any contribution that they may be able to make to the clarification of the concept of punishment.

McPherson points out later that:

> "Punishment can turn up in any human relationship. Lovers punish each other; parents punish their children; the state punishes criminals."[22]

In the above quotation it is in the state's treatment of criminals, that 'punishment' comes closest, to being nothing but an adjunct of social control, in the sense of being little more than the imposition of a set of graduated penalties for breaking rules devised not for persons in particular but for people or society in general (or 'in the general interest').

Attempting to offer an explanation of the meaning of 'punishment' by looking at it as exemplified in a court of law and its associated penal institutions, is like trying to paint a picture of something which one has seen only through the wrong end of a telescope; the vital details are blurred or missing although. All those features of punishment which are clearest and which count for most in a personal or human relationship are at their most obscure and their least valued in law. This is so, because the law is designed for 'the general public' not for individuals or particular persons. Indeed, it would be unthinkable to enact laws with any particular person in mind. The consequence of this is that all the things which one would regard as most important in human relationships, and hence in punishment and reward are scarcely taken into account in law. Thus fairness which is important in education is obscure in law. In law what some see as 'extenuating circumstances'

is sometimes interpreted as 'letting the blighter off' or 'going soft'. Forgiveness plays no part in law since the guilty must pay their penalty, regardless of whether or not being found guilty has been adequate suffering. Remorse is also obscure: the offender is free only when the has paid his penalty. It is irrelevant whether or not the offender is yet conscious of having done wrong.

It is inconceivable then to look at the processes of the law solely for the paradigm cases of punishment as the law is not concerned (logically) to make a distinction between penalizing and punishment. More so, legal distinctions are even not adequate. According to exponents such as Geldart[23] civil law is not even concerned with punishment, but only with the restitution of social order. In other words, civil law on Geldart's interpretation is concerned with the maintenance of the status quo through social control. Criminal law, on the other hand, which it is said to be concerned with 'punishment' turns out instead to be particularly concerned merely with the control of a special class of social rule-breaking namely, the one which is 'a matter of public concern'. In both Civil and Criminal law on this interpretation the law functions as an agency for the preservation of a particular social order. But it seems to me that such an interpretation of punishment is misguided because primarily (at least) punishment is a moral matter.

Thus punishment in a legal setting is quite different from punishment in an educational situation. It is emphasized,

once again, that punishment, is part of our education. According to R.S. Peters,[24] it helps to initiate us into the moral dimension of life. Extrinsic controls, by contrast (but not necessarily in opposition to this) which are usually in psychological and legal contexts misinterpreted as punishments must be described more clearly as 'penalties', not as 'punishment'. The different senses in which penalties differ from punishments have already been discussed. What should concern us in this section is to establish that in educational situations we are concerned with punishments, not penalties. Only a moral agent is capable of punishing and of being punished. One is penalised for infringing the authorized rules of any social practice in which one engages, but one is punished by breaking specially moral rules. A rule breaker is liable for a penalty whether or not he can see good reason for the rules, but a wrongdoer is liable for punishment because he can see good reason for the rules (and has nevertheless broken them). Penalties are awarded 'disinterestedly' - hence, the law is no respecter of persons; but punishments are as variable as the strength of interest of the persons concerned. One is punished by someone with whom one claims to share an interest but towards whom one has failed to behave in a way appropriate to the interest which you share. One important characteristic of punishment is that it always implies moral blame whereas penalty does not. A penalty is a disadvantage in respect of the pursuit of personal goals. A punishment is more likely a timely reminder of what one's personal goals are.

In educational situations any reference to penalties must be regarded as 'last resort'. It is only when children are not 'learning through interest' that teachers might be inclined to fall back on extrinsic controls, namely psychological and physical manipulation. When children are learning, they are learning about the moral value, as well as other values of their interest. From the outset of such situations, reward and punishment, then, must be an essential ingredient of what goes on. Educational situations are intrinsically rewarding, and therefore intrinsically punishing too. They could not be one if they were not also on occasion the other. Teachers who claim to be deliberate agents in the education of others, must face up with the fact that on occasions what they do deliberately will hurt, just as on other occasions it will please. Exactly what it will take to 'show' a child for sure that he is failing educationally, is an empirical matter which will vary from child to child. It will depend partly, for example, on what sort of language he is thus far capable of understanding - words, gestures or deeds. But whatever language is employed, it will have force, as well as meaning. It will perform a function, as well as 'say something'. With highly articulate children reward and punishment may often be accomplished by 'doing things with words'; with others - for example with very young children - it will be a matter, at least to begin with, of saying things with deeds. In either case, however, the force of what we say or do in punishing hurts, while the <u>meaning</u> educates. To a university student, for example,

the force of a criticism can be painful, it's meaning educative. To very young children, the meaning of a smack can be educative, while its force hurts. But this is not to suggest that any general rules can replace the judgement which achieves value in each particular case. The art of education, whether undertaken by parent, teacher or anyone else, lies in understanding the language and appreciating the sensitivity of the person whose interest one shares and therefore in whose interest one is concerned.

However, when the hurts we inflict upon children and others are calculated by standards imposed for purposes extrinsic to those of the situation in which they occur, we are dealing with penalties, not punishments, and not with discipline or educative order but of control. But while some (the minimum) control is plainly unavoidable on prudential grounds, our educative concern lies with matters of Discipline and not with matters of control.

It is emphasized finally therefore that discipline (as distinct from control) involves taking part in rule-governed activities.

NOTES AND REFERENCES

CHAPTER SEVEN

1. Bentham, J., Introduction to the Principles of Morals and Legislation, ed. Harrison, W., Oxford, 1948, p.281.

2. Feldman, F., Introductory Ethics, Prentice-Hall, Inc., englewood Cliffs, N.J., 1978, p.56.

3. Peters, R.S., Ethics and Education, Allen & Unwin, 1966, p.272.

4. Ibid., p.273.

5. Hirst, P.H., and Peters, R.S., The Logic of Education, R.K.P., 1970, p.129.

6. Peters, R.S., "Reason and Habit; The Paradox of Moral Education," Moral Education in a Changing Society, ed. Niblett, W.R., 1963. Also, Peters, R.S., "Moral Education: Tradition or Reason?" in The Nation, USA, 1969.

7. Kohlberg, L., "Moral Development" in Child Psychology, 1963,p.303.

8. Ausubel, D.P., Educational Psychology: A Cognitive View, New York: Holt, Rinehart & Winston, 1968, p.459.

9. Ausubel, D.P., pp.379-84.

10. Sears, P.S., and Hilgard, E.R., 'The teachers role in the motivation of the learner', 1964, in Hilgard (ed.) 1964,p.192.

11. Ibid., p.192.

12. Ibid.

13. Ausubel, D.P., Educational Psychology: A Cognitive View, New York: Holt, Rinehart & Winston, 1968, p.459.

14. Ibid., p.380.

15. Ibid.

16. Murphy, J.G.,(ed.) Punishment and Rehabilitation, Wadsworth Publishing Co., Inc., Belmont, California 1973,p.1.

17. Doyle, James,F., "Justice and Legal Punishment" in Philosophy Vol.42, July 1967, p.53.

18. Hart, H.L.A., Punishment and Responsibility, OUP, 1968, pp.4-5.

19. Ibid.

20. See McCloskey, H.J., 'The Complexity of the Concepts of Punishment' in Philosophy, Vol.37, 1962; McPherson, T., 'Punishment: Definition and Justification' in Analysis Vol.28, October, 1967.

21. McPherson, T., 'Punishment: Definition and Justification' in Analysis, Vol.28, October, 1967, p.23.

22. Ibid., p.26.

23. Geldart, W., Elements of English Law, 1966(ed.) (Yardley, D.C.M.)., Oxford University Press, 1911.

24. Peters, R.S., Ethics and Education: Allen & Unwin, 1966.

PART THREE

SOCIETY, LAW AND EDUCATION

CHAPTER EIGHT

THE SOCIAL CONTEXT

1. THE RIGHT TO PUNISH: GUIDING AND LIMITING PRINCIPLES
2. FACTUAL AND MORAL ASSUMPTIONS
3. EFFECTIVENESS, HUMANITY AND JUSTICE
4. ALTERNATIVES TO PUNISHMENT
5. EFFECTIVENESS AND ACCEPTABILITY OF PUNISHMENT.

1. THE RIGHT TO PUNISH: GUIDING AND LIMITING PRINCIPLES

Most of what we shall discuss in this section may not often find its way into philosophical discussions of punishment. These discussions deal with large and significant questions of whether or not we ever have the right to punish, and if we do, under what conditions, to what degree, and in what manner. Herbert Morris writes that:

> "There is a tradition .....the adherents of which have urged that justice requires a person be punished if he is guilty[1]."

He continues:

> .....these philosophers have expressed themselves in terms of the criminal's <u>right to be punished</u>. Reaction to the claim that there is such a right has been astonishment combined, perhaps, with a touch of contempt for the perversity of the suggestion. A strange right that no one would ever wish to claim....."[2]

Morris based his argument on four propositions concerning right that will certainly strike some as not only false but preposterous. First, he says, that we have a right to punish; second, that this right derives from a fundamental human right to be treated as a person; third, that this fundamental right is a natural, inalianable, and absolute right; and, fourth, that the denial of this right implies the denial of all moral rights and duties.[3] Indeed Morris admits that showing the truth of one, let alone all, of these questionable claims is not easy.

Morris' approach sounds promissing but in this section I shall adopt a completely different approach in settling the question that we have a right to punish. My main con-

cern shall be directed to the guiding and limiting principles. To begin with, the question is often put whether or not we ever have the right to punish, and if we do, under what conditions, to what degree and in what manner? What, in principle, would constitute an adequate defence of the institution of legal punishment. Before attempting an answer we must raise a prior question: What kind of undertaking is a "defense" or "justification" of an institution or practice? Legal punishment can be referred to both as a practice and as an institution. "Practice" is the wider term, and includes everything we would call an institution. To have a practice is to have a set or standard way of dealing with a recurrent situation.[4] Not, how do we go about it? But what is it we are going about?

We are offering reasons for the conclusion that punishment should be retained not abolished. In doing so, we are thinking of the practice of punishment not as a rib of the universe, but as a device which serve certain purposes well or ill. It is not a device in the sense that it is a "dodge" or "dadget" which can be used today and abandoned tomorrow. But it is something which has been devised - not all at once or consciously, perhaps; but it is an invention of man. It is an arrangement which we find already present in the culture of which we become bearers; but our culture could have been otherwise. There are cultures in which there is no legal punishment. To justify legal punishment is then, to show that there are better reasons for retaining than for abandoning it.

Strictly speaking, if we subscribe to the principle that the burden of proof is on anyone who would institute a change; all that we have to argue in favour of the practice of legal punishment is to show that no adequate grounds for changing it have been so far put oforward. It will not be convincing to say that punishment is something which is already in existence and that an attempt to change it always creates difficulties. Surely, a case can be made out for it which would warrant instituting legal punishment if it were not already the practice.

How, then, should we go about offering a justification of a legal punishment? What, in principle, would constitute an adequate general defence or justification of punishment or of any social practice. To justify a practice is to show two things: that under the circumstances, a practice is necessary, called for, or would be useful; and that of the alternatives available and acceptable the practice in question would likely be the most effective. We will refer to the reason why some practice must be instituted as the "guiding principle" of justification; and to the considerations by reference to which the practice is rejected as unacceptable even though it seems the best of the available alternatives, in the light of the guiding principle, as the "limiting principles" of justification. It is with respect to the guiding principle that a proposed practice can be more or less effective; but it may be rejected, even though effective, by a limiting principle.

These are general formal conditions of the justification of a practice. It is a necessary condition of an adequate justification of a practice that of the available alternatives it most efficiently serves the purpose for which a practice is needed; it is a necessary condition that the practice not be ruled out by a limiting principle; and it is a necessary and sufficient condition that the practice serve the purpose as well as possible within the bounds set by the limiting principles. The general view of justification of punishment presented here is perhaps closer to Ross' than any other traditional view. The distinctions made here, however, give us certain advantages over Ross' account. Ross speaks of the balance between the prima facie duty of "injuring wrong-doers only to the extent that they have injured others", and the prima facie duty of "promoting the general interest".[5] In the first place, our account avoids the implication that we simply balance these considerations one against the other like weights on a scale. It is not a question of choosing either justice or utility or a balance between them, but of finding the most useful social device consistent with the demand of justice. Secondly (though Ross might well not agree that this is an advantage) the emphasis is more on standing on, or holding a principle, than on knowing that something is true. Third, our account is not open, as Ross' is, to the kind of objection raised by J.S. Mill (in Hamilton)[6] to the effect that we cannot very well balance the maxims of justice, against those of utility, since what one maxim of justice demands may be incompatible with what another maxim of justice demands. On the present account, such conflicts,

which I believe are real, need not concern us; since if the practice in question conflicts with any maxim which we adhere to, then it is ruled out; and we must look around for one which is acceptable. But, like Ross, we are able to avoid the charge,that, by setting in motion an utilitarian engine of justification uncurbed, we are likely to justify too much. Thus this schema is at least useful in approaching the problem of the justification of a specific practice. It forces us to distinguish between the questions whether a practice is necessary; whether the practice in question best fills the need; and if; even so, it must be rejected.

But the question facing us, and with which we wish to come to grips in this section, concerns the right to punish. It requests a specifically moral justification. Like an economic or aesthetic justification of a practice, a moral justification will have guiding and limiting principles. But whatever principles we accept must be shown to be morally defensible. This may seem to present insuperable difficulties, for there are apparently irreconcilable differences over the ultimate principles of morality. Hence what is morally defensible to one school will not be so to another. For example, utilitarians, self-realizationalists might fail to agree on the moral defensibility of the guiding and limiting principles by which punishment must be morally assessed as a practice. But this may not necessarily be so. What is morally defensible from one point of view need not be indefensible from another. And it may be that the schema we use

will point up the complementarity rather than the incompatibility of the leading moral views. The retributivist can argue with real plausibility, that particular decisions concerning punishments should not be made on the ground that some supposedly good purpose would be served by punishing. and he can also argue (perhaps less plausibly) that all penal laws should be passed solely on the ground that justice demands them.

But is it really plausible to argue that justice demands a practice? Is it not more plausible to argue that when a practice can be shown to be necessary on utilitarian grounds, it should meet the demands of justice? Does justice demand the institution or practice of law, or marriage, or private property or representative government? To answer in the affirmative is to imply that there are burdens and privileges existing prior to an institution or practice, which the practice should be invented and adopted to protect. But then the question is how we can know what these burdens and privileges are, prior to any practice within which they operate. To say that the institution should be invented and adopted to protect these burdens and privileges is like saying that basketball should be invented so that fouls and points for goals can be recognized and penalized or rewarded. But, outside of basketball there are no fouls and points for goals. What would it mean to say that there are burdens and privileges which persons have, to protect which it is essential that we adopt, for example, the practice of marriage?

This might seem more plausible with respect to punishment. Is punishment as an institution justified because

justice demands that there should be an institution which accords punishment to ill desert? The ill desert must then be supposed to exist independently of any practice in terms of which it can be defined. The crucial point here is that it is impossible to account for the existence of desert in the absence of a practice in terms of which desert can be assigned. What may lead us to think that desert can exist independently of a given punishment - practice is that desert is a concept in not one but several practices: legal punishment being merely the most clearly articulated of them. But if we stop to think of it we would realize that we could not speak, for example, of what Johnson deserves for pouring ink on the oriental rug were it not for some prior understanding of a practice. According to this practice, those persons playing the role of parent are given the discretion or authority, if you like, to assign penalties not only for certain kinds of acts in advance, but also for acts adjudged "bad" or "naughty" after the fact: like pouring ink on rugs or putting glue in the seats. Punishment of such acts is justified, even though there is no rule promulgated in advance against them. But where do parents derive their moral authority to identify and punish such acts? Surely, not from some table beyond the table of rules. Then we would simply have to ask for the credentials of that table, and of any table from which it was derived etc. It is not that the ill desert exist prior to the role of parent, but that parents are persons who are given discretion, according to a practice, to make decisions concerning ill desert.

It might seem that, nevertheless, there is ill desert independent of the practices of punishment, becuase the decisions of parents or judges are not merely arbitrary: decisions concerning desert are not right simply by virtue of being made by the proper authorities, but by virtue of being made in accordance with standards which the authorities should observe. We can criticize the authority's decisions on rational grounds. But the analogous point holds for fouls in basketball, or balls and strikes in baseball. Here too we can criticise the decision of the umpire by reference to the criteria by which he should be governed. But it does not follow that there could be balls and strikes were there no game of baseball. The assertion that a person deserves severe punishment is significant if and only if there is some practice according to which some authority could, by discoverable criteria, rightly award severe punishment. To say that justice is a limiting principle of possible practices of punishment is not to say that practices should somehow meet the requirement that some abstract, extra-practice "desert" should be given its due. It is but to say that the practice must, in virtue of its arrangements, give everyone concerned a fair deal.

2. FACTUAL AND MORAL ASSUMPTIONS

We shall now turn to the question what the circumstances are which give rise to the need for some practice, be it

legal punishment, or an alternative. Here we will list certain very general assumptions of fact which, taken together, give rise to the problem. To the extent that these assumptions of fact are shaky, the justification of punishment totters; for the problem of punishment and its competing practices are designed to meet alters or disappears. The assumptions of fact in question fall naturally into three different categories: assumptions concerning human nature, human society, and nature or "supernature".

Concerning human nature, we assume that human beings are non-ant-like in that they do not order their affairs by instinct, or in other words, without rules. We assume also that whatever rules or regulations men set for themselves there will be tension between the rules and the private interests, desires, or passions of persons falling under these rules: that there will not be automatic submission.

Concerning human society we assume that it is necessary to set some rules if men wish to survive, simply because human beings, being without enough instinctual equipment, are incapable of carrying on common activities necessary for their survival unless they are shown, told, taught how to conduct themselves, what to do, and what to refrain from doing. And we assume that it is desirable to set other rules if the common life is to inhance the well-being (however that is defined) and reduce the misery and unhappiness (easier to agree upon) of all.

Concerning nature or "supernature", we assume that no natural or supernatural forces either compel action in accordance with the rules, or counter each violation with retribution. **Lightning** does not, as a matter of course, strike down either the man whose hand is raised with murderous intention or the murderer whose intention has been fulfilled. If **lightning**, pestilence, or tornado operated in either of these ways, social arrangements to ensure compliance with with rules would be redundant.

To these fadtual assumptions we must now add a moral one. We assume that survival in conditions not merely miserable, and with some hope of happiness, is a value worthy of protection. We shall assume, indeed, that to interfere with these modest prospects and possibilities is morally wrong; and that each community (call it society if you wish) has a collective moral right to prevent such interference.

Granting, then, that men wish to survive, and to decrease their misery and enhance their well-being there must be rules; and some social arrangement must be found which will counter the tendency to violate rules. Two points should be noted here. The arrangement in question is not required to be one which equqlly discourages the violation of all rules; some rules are more imprtant for survival and the well being of society than others; and the effectiveness needed in the prevention of some rule-violations is not demanded for the prevention of all rules violations. And, whatever practice may be instituted, its application in the prevention of rule-violations will be justified only to the

extent that the rule and/or rule-set is justified. The latter point must be expanded.

Legislators[7] may be in a position to enact any rules they choose. In enacting rules, they may or may not have sufficiently in mind the survival or well-being of the citizens. Their laws may be designed to enhance their own well-being. The state may be administered like the legislator's private plantation, the citizen regarded as Serfs - and it may be badly administered even on these terms. Can any practice designed to encourage compliance with the rules of such a legislature be justified? The alternative practices in question are not designed to encourage compliance with any particular set of rules, but are rather devices to encourage compliance,with rules. To show that there may be bad rules is not to show that the practices are bad practices. The practices are <u>needed</u> to counter the tendency to violate rules which for our survival and well-being we must have; but this, unfortunately, does not prevent their being used to enforce rules which may even go against the ends of survival and well-being. To reject them on this account is like rejecting hammers because they may be used by murderers, or representative government because we disapprove of the candidate from Glasgow central constituency.

There is a limit beyond which this argument should not be pressed. For various counter examples can be given. Should we not reject the practice of carrying hand-guns, e.g., even though it arose for a defensible set of purposes: to

provide a light gun, capable of being carried on long trips, which can be used for small game and, in wild country, for self-defense? Should we not have rejected duelling, even though it may originally have been a desirable substitute for simple unorganized mayhem? But the analogous argument in the present discussion would have to show that the conditions which gave rise to the demand for a practice designed to encourage compliance with rules are now so changed that practices originally meeting that need are now needed and are used for unjustifiable ends. While this does not now seem a plausible pair of contentions, it should be conceded that they could be, under circumstances now hard to foresee. If the great majority of human beings were in some way transformed so that the tension between rules and personal interests, passions, and desires disappeared; then the circumstances which gave rise to the need for a practice would have disappeared. And it could be that, under those circumstances, the practices originally designed to encourage compliance with rules, and now no longer necessary, were being used instead merely as instruments of oppression.

3. EFFECTIVENESS, HUMANITY AND JUSTICE

We begin this section with the following question: should punishment be preferred to other possible practices? Before attempting to assess the relative merits and demerits of punishment and its competitors, we must discuss the grounds of comparison. These, as we have noted, concern effectiveness and acceptability.

Punishment may not be the most effective possible method for discouraging crime. Probably the most effective way to discourage or abolish crime is to annihilate the human race. Or if this seems a little extreme, no doubt we could go a long way towards the elimination of crime by the use of drugs: the tranquilization of the human race. These possibilities are mentioned to point out the absurdity of arguing solely on grounds of effectiveness in the reduction of crime. Even though the procedures mentioned would work to eliminate crime, they would not be acceptable. What then are the boundaries of acceptability? To what limiting principles may we appeal in rejecting an effective practice? How many limiting principles are there? This is like asking how many ways there are for an effective practice to go awry. Limiting principles reject the proposed practice because it can be seen in advance that once this device is set in motion there are waysin which it would operate which we could never accept. But because the need for a practice is sometimes very great, the grounds on which a candidate may be ruled out, as unacceptable are naturally very much curtailed. Justice and humanity in that order, seem to be the limiting principles which bind with the greatest stringency; but for less important practice - choices, many more limiting principles can find their way in.

We have mentioned, above, not only justice but also humanity. By denominating humanity a limiting principle, we mean that one possible ground for refusal to accept an

effective practice is that it is inhumane. It is apparently usually assumed in theoretical writing that any practice which is inhumane is by the same token unjust, since humanity as a separate limiting principle is not discussed. Yet it is not absurd to suppose that a given practice could be just but inhumane: that it might violate none of the maxims of justice and still demand treatment of individuals which we would agree is cruel or degrading. The "solution" of the problem of crime by annihilation or drugging could be not only effective, but just - in that it did not violate any of the maxims of justice by discriminating between persons: drugging or annihilating everyone impartially. This possibility gives rise to the maxim that justice should be "tempered with mercy" - and to a certain confusion attending this maxim. For justice is not inherently opposed to mercy: What is just may be humane enough, but it need not be humane at all.

How is it to be decided whether a proposed practice is inhumane? It will not do to speak forcefully of setting up cardinal or ordinal scales on which there is a zero mark between minus-inhumane degrees and positive-humane ones. The question would then be how we know where to place any practice on the scale. Is it possible to find a purely formal criterion of inhumanity in a practice? It may be, but if so it would have to be developed in conjunction with a criterion of the justice of a practice, to which problem we now turn.

What is it for a practice to be just? Doyle[8] argues that any system of criminal law which meets generally acknowledged requirements of justice would adhere to the principle of the absolute equality of worth of all members of the legal community, as persons. This entails that legal demands on personal conduct be imposed and enforced impartially and without sacrifice of personal dignity. That just law may impose no arbitrary restraint would be generally conceded. Nor can there be any doubt that just law may uphold and enforce the discharge of obligations which have been duly and deliberately undertaken. He continues:[9]

.....one important requirement of law as a system of just demands is that these demands be, in some meaningful sense, self-imposed. Here self-imposition of legal obligations is considered to be a more deliberate and self-conscious process than mere acquiesencein, or consent to, these obligations. This principle implies that everyone who is bound by the law ought to have meaningful access, at the same time, to participation in those institutions by which the law is legislated, adjudicated, and enforced. Such interpretation however takes a minimal view of the concept of law.

The definition of and test for justice in a practice are topics which lead way beyond the scope of the present discussion. What we want to offer here is merely an approach which seems to me promising. One might agree that justice is a limiting principle even though one disagreed that it could be defined as it is defined here. Much of what shall be said here has been suggested by John Rawls.[10] Rawls

article and book offer a more complete discussion. However, it will be evident that I do not adopt Rawls' device of positing that the uncommitted individual we must picture is completely self-interested. He is but a construct, and we can do with him what we please, but to require that he be merely self-interested is to risk misleading comparison with Hobbes, and to make him more artificial than is necessary for my purpose. His recognition that a practice is needed may be based in part on altruism: a regard for the well-being (even remote) of others. But he would not likely join that society which would give him, or anyone a fair deal.

To answer the question as to what it is for a practice to be just, we shall take it that a practice is just if, knowing that it is necessary that there should be a practice and that this one would be effective, each of us would be willing to accept the practice not knowing in advance what role we would play. The assessment of the justice of a practice involves the conception of a particular view of the practice. It is the view taken of it by a person who realizes that a practice is necessary, and that this one will fulfil the need; who also realizes that in any practice there are going to be burdens and privileges; and who must decide whether these privileges and burdens are fairly apportioned in view of what the practice is designed to accomplish. The test of fairness of apportionment of burdens and privileges is whether the person contemplating the practice would

be willing to commit himself to it not knowing which role he might have to play; not from benevolence or self-sacrifice but because he, along with everyone else, needs the practice.

Our hypothetical uncommitted person might be unwilling to commit himself to a proposed practice for fear of discrimination, not only within, but in assignment to the roles of the practice; and these two types of discrimination are worth distinguishing here. I might be able to predict now that I would (because of my tribe, say) be more likely than other persons to be assigned a given burdened role in a proposed practice (criminal, defendant). Or the role itself (slave) might be such that whoever has to play it is the victim of discrimination, no matter how effective the practice may seem for no matter what good purposes. Slavery, then, may doubly discriminate: in its choice of persons to play a burdened role, and in its allocation of burdens and privileges between roles. It is discrimination in the second sense that the justice of practice is, strictly speaking, concerned. But by thinking whether a person situated as described could agree to the practice; we will not lose sight of the first form of discrimination either.

We may now return to the question of the criterion of humanity. More accurately, what is wanted is a criterion or criteria by reference to which it can be determined whether a practice is humane. Duelling may be a useful example. It is one of the several alternative practices by which quarrels can be settled. It must be noted that, this, of

course, is over-simplified. The quarrels in question arose out of supposed insults which, according to the code of honour, could only be expunged by duelling; so that it was the code of honour as **a whole** which had to give way, not duelling alone. A practice was needed. Whether it was a just practice may be questioned. That it was inhumane to cause a man to lose his life as the price of losing and argument, seems clear - to us, here, now. Why, on what ground, would we call it inhumane? It was not inhumane in that it resulted in the loss of life. Lives were lost in the transportation of freight from harbour to harbour; and the practice of exchanging goods was not on that account inhumane. Duelling was inhumane because it resulted in unnecessary mutilation, suffering, degradation, and loss of life: unnecessary because there were available equally efficient and just ways of settling quarrels.

There is another in which a practice can impose unnecessary, and thus inhumane, degradation, suffering or death: it can be, unlike duelling, a practice which serves no necessary purpose at all. It is hard to think of examples, partly because when a practice becomes a part of the way of life of a people it begins to play roles not originally envisaged for it, even if it ceases to be needed for the original purposes. But unless we are willing to subscribe to the thesis, so far as practices are concerned, that whatever is right, there will be ritual and other practices which because of the degradation and suffering they cause

individuals falling under them are inhumane and hence no longer acceptable.

If the criterion of inhumanity in a practice is to be that suffering, misery, death or degradation are imposed unnecessarily; then what is a test by which we can know that a given practice, we can ask whether a person, acknowledging that this practice would be efficient in fulfilling that need, acknowledging that the practice in question fairly distributes the burdens and privileges it creates, would nevertheless not want to commit himself to the practice on the ground that there are other equally efficient and fair practices which do not (as this one does) impose suffering, misery, degradation or death.[11]

4. ALTERNATIVES TO PUNISHMENT

We may now turn to the justification of legal punishment. We have tried to show that a practice is needed, and we have tried to specify criteria of comparison between punishment and alternative practices. What alternative practices are available, and how do they compare to punishment in the light of these criteria?

We will not here attempt to cover all the kinds of practice which would be used to encourage compliance with rules, but will limit ourselves to those which presuppose a system of law. We are thus taking it for granted that it is not only advantageous to have rules but to have legal rules. Our only excuse for such a leap is that to do more than sketch, as we have done, the general justification of

rules, is to embark on a question, the justification of law, which is not meant to be tackled withing the scope of this enquiry.

There is in principle no limit to the devices which human imagination could create for encouraging compliance with legal rules. We have already noted (and rejected) "treatment", for example. Another example which we should reject is an adoption of a practice which would make judges or legislators mere social engineers or mere balancers of scales of justice. In this instance the utilitarian would presumably hold that the judge's business within the defined limits of his discretion is, roughly, to sentence in such a way that the best results possible in the circumstances will be produced. The judge becomes on this view a sort of "social engineer", who, working with the tools given him by the legislators, accomplishes as much good as he can in the particular case with which he has to deal. He is limited so far as his equipment goes to terms in jail and fines; but he can clearly do a better or a worse job of rehabilitation or deterrence in the circumstances. He should make full use of the aid and advice of psychiatrists and social workers so that he can take full advantage within his limitations of the opportunity before him to maximize the social good. The retributivist, on the other hand, would think of the judge not as a queer sort of social worker but as the stern balancer of the scales of justice. On this view it is the business of the judge to see to it that the prisoner gets no more or no less than is due him because of

the seriousness of the crime. Here to think of the judge as a social engineer is impertinent and even dangerous. It is impertinent because the working of justice would be interferred with by a kind of amoral opportunism: a taking advantage of the immediate situation to promote good in any way possible within the rules. It is dangerous because justice in this society is imperiled if each convicted criminal is considered simply as a pawn to be used in the great enterprise of social improvement. There will have been substituted for the attempt to do what is absolutely right by the criminal, the attempt to do with the criminal whatever will serve the interest of the whole. Thus as we have already indicated we cannot find a clear picture of either the Social Engineer or the Stern Balancer, hence practices which would make judges or legislators mere social engineers or mere balancer of scales of justice must be rejected.

There are at least four remaining general sorts of practice which should be mentioned: First, practices which punish failure to comply with the law by informal means rather than formal procedure of legal punishment involving legislators, judges, and jailers. Varieties of social suasion other than punishment have been described for us by cultural anthropologists; and while there will be no substitutes in preliterate tribes, it is conceivable that social suasion could be relied upon to enforce statutes. For example, it might be the practice that if a man commits incest

he is disgraced in public by anyone knowing of the deed; or if he fails to suppost his in-laws his wife will leave him. Secondly, practices according to which compliance with the law is rewarded. Thirdly, practices according to which men are conditioned (e.g. drugs) to obey the law. Fourthly, practices according to which men are persuaded to abide by the law. Of these, all are really consistent with legal punishment. And "adequate" is to be understood in terms of the criteria already mentioned.

Social suasion is perhaps the strongest candidate of the four. What is envisaged is the possibility that criminal statutes should be enacted with no penalty attached; that courts of law should decide guilt not sentence; that, instead, suitable publicity should be given the crime and the criminal returned to the community. The assumption is that the public opinion of the home and immediate community would prove a stronger deterrent and reformative agent than the formal and more impersonal workings of a penal system.

This is a topic as large as the varieties of social suasion and the experience of the human race in their application. It is eminently worthy of research by social scientists, and, so far, little developed. The practice of leaving the punishment to the community has in its favour the point that for any individual the most meaningful punishment is that which is inflicted by those closest to him. It is the opinion of his peers that he values far more than the opinion of some vast and faceless "general public" represented by the sentencing judge. It is a point in its favour, also, that it makes for no discontinuity between the legal and moral community in the way that legal punishment does,

in setting off some offences as subject to the sway of jails and jailers while other offences, morally as henious, are not so subject.

There are, on the other hand, serious disadvantages in social suasion as compared to legal punishment. These turn largely around in the concept of "community". In the first place, there can be not only deviant persons, but deviant communities; and where this is so we cannot rely upon the opinion of peers to enforce laws which are for the public good. The deviant community may not regard laws necessary for the well-being of the larger community as incumbent upon it. Perhaps the term "deviant" should not be overstressed. It has inevitable connotations of criminality; and while we wish to include gangs and mobs in these remarks, we wish also to include any community in-so-far as it pursues its own (supposed) interests to the exclusion of the interests of the larger community, in survival, avoidance of suffering and enhancement of well-being. If we leave the sanctions of laws designed to further these ends of the larger community up to any smaller community, the system may not be viable, since with respect to the purposes of the laws in question, the smaller community may be deviant. And to rely on the social pressure of the larger community is to weaken the claim of social suasion to operate with the force of the judgement of peers - since the most effective peer-judgement comes from the most immediate communities.

Secondly, were the sanctions left up to the community, the same crime would be punished in many different ways

rather than in the one way set by legal penalty; but this would be unjst. It might be answered that the crime would still be punished in accordance with its seriousness, since in communities where it is a henious offence it would be punished severely, but where it is only a minor offence it would be punished lightly. But this answer only begs the question, raised in the previous paragraph, whether the smaller community may not be deviant in regarding as minor, e.g., what would be inimical to the well-being of the larger group.

Bearing in mind these reasons for rejecting social suasion as a substitute for punishment, we may without contradiction acknowledge its importance for legal punishment. The force of the threat contained in the penal clause of a criminal law is great not merely because the person contemplating crime fears the pain or suffering the penalty would impose if inflicted. Perhaps it is not even mainly this; for he also greatly fears the judgement of his peers symbolized by this official pronouncement of guilt and sentence. In fact, distinctions are made in everyday life and in legal debate between those penalties (e.g. fines) which do not necessarily carry this disapprobation with them, and those (imprisonment, execution) which do. Jerome Hall[12] quotes Justice Brandeis as saying, "It is ...imprisonment in a penitentiary which now renders a crime infamous." But it is a necessary condition of this disapprobation, or infamy, that the criminal has been sentenced to a penitentiary; so

the disapprobation is not here to be considered a substitute for punishment.[13]

Let us turn to the practice of rewarding rather than punishing crime. It is not clear how such a practice would operate. Would there be a reward for each person who goes through a year successfully without breaking a law? A reward for each person who, though severely tempered in a given circumstances, refrains from violating the law? Such practices are indeed conceivable, but would be subject to grave objections. Those laws which it is most important to enforce are often those there is the greatest temptation to violate. How could we prevent by means of rewards those crimes which in their nature are extremely profitable, such as embezzlement, or forgery? And would the prospect of reward deter a man about to commit a crime of violence? More importantly, would it be morally defensible to reward a person abiding by (presumably necessary and just) laws?

There is a sense of the word "reward" in which it is used synonymously with "positive reinforcement". In this sense, reward provides indespensable support for legal punishment. For here reward is indistinguishable from social suasion, the reinforcement in question consisting in the repeated approval of one's abiding by the law under temptation to violate it.

Concerning the possibility of substituting of persuasion for punishment, we would follow Aristotle in his assessment of human nature when he says:

> "...Most people obey necessity rather than argument, and punishments rather than the sense of what is noble."[14]

This should be immediately qualified (as Aristotle qualified it) by our assertion that we would much prefer to use persuasion rather than punishment, since punishment is a practice forced on us by the "human condition" rather than chosen as something possitively desirable on its own account. It sould also be said that persuasion may have a kind of pyramiding effect with respect to building respect for rules. That is, to the extent that we risk persuasion rather than punishment, we help develop people amenable to persuasion and not needing fear of punishment as a motive for abiding by the rules. Unlike some other alternatives, then, the side-effects of persuasion as a practice are good: better than the side-effects of punishment.

The cause of persuasion is one open to the advocate of punishment, Aristotle's assessment of human nature being granted as a generalization, but not taken to imply that any given person may not change in his amenability to persuasion. Persuasion as a means of encouraging compliance with the laws should be the subject of public discussion, that only demonstrably necessary or desirable legal rules be enacted, and that some attempt be made to render the body of law intelligible. If persuasion must be rejected, it is not as an adjunct but as a substitute for punishment. And it is not by virtue of its running afoul of limiting principles that we must reject it as a substitute for punishment, but as failing to measure up to the demands of the guiding principle.

The achievement of law-abiding community by the use of drugs or conditioning seems in principle perfectly possible but the side-effects of such procedures we would not, on grounds of humanity, be willing to accept. We would not accept them because they are unnecessarily degrading: unnecessarily, because law-abidingness can be attained at lower cost in human degradation. Thus, as opposed to persuasion we would accept conditioning so far as the guiding principle is concerned, but reject it for violating the limiting principles.

The case for punishment so far is that, granting certain very general assumptions of fact, the disvalue of misery, and the consequent need for rules, a practice is needed to encourage compliance with rules. And of the alternative practices some (i.e. rewarding, persuading) fail to measure up to the guiding principle as well as punishment, and others (i.e. conditioning, social suasion) are ruled out on the ground that they conflict with justice or humanity. The critic may say that this argument is deficient in two respects. First, it is not conclusive since there may be alternatives not taken into account which would compete more successfully with punishment. If this is the case, then it is open to the opponents of punishments to propose these alternatives and compare them to punishment by the criteria of efficiency and acceptability. Secondly, it says only, so far, that punishment is the least undesirable of the alternatives.

The answer to this second charge is that this was precisely what the section was meant to argue.

5. EFFECTIVENESS AND ACCEPTABILITY OF PUNISHMENT

There is much to be said for the thesis that punishment is just that: not anything we would want to have in the best of all possible worlds, but something we must accept for lack of something better in the world in which we live. Yet it may be well to note how it measures up to the criteria of efficiency in encouraging compliance with rules, of justice, and of humanity. But before turning to these, we should note that there are some very general assumptions of fact, beyond those which give rise to the need for a practice, upon which any justification of the practice of punishment must rest.

The first of these assumptions is that men are capable of calculating their own interest; and that in general they will. Obviously the efficacy of the threat contained in a criminal law rests on this assumption. If a man is unable or unwilling to look ahead to the probable consequences for him of a bank robbery then of course the possibility of a prison sentence is no deterrent.

Elsewhere in this thesis we are told that "The indifference of the criminal to the penalty that is ahead of him, even if this penalty is death, is more the rule than the exception."[15] Bentham, on the other hand, argues:

> "When matters of importance as pain and pleasure are at stake, and these in the highest degree (the only matters in short that can be of importance) who is there that does not calculate? Men calculate, some with less exactness, indeed, some with more; but all men calculate. I would not say, that even a mad man does not calculate."[16]

The case seems to me to be overstated on both sides. Bentham does not need to claim that everybody calculates. Even if the percentage of people who calculate is relatively small punishment would so far be worthwhile; for by the threat of punishment crime could be reduced. And as we have already noted more moderate psychiatrists do not accept such conclusions as Zilboorg's. Robert Waelder, for example, tells us that the claim of a "very small but articulate number of psychiatrists" that punishment does not deter is "a radical contention in view of everybody's daily experience in office and shop."[17]

The second assumption is that, in general, men are able to govern present impulses by the thought of future consequences. If they were not the threat of punishment would be useless. This, so far as it applies to criminals is also challenged by some of the more extreme psychiatrists.[18] Third, it is assumed that it is possible to find "evils" which are more or less universally dreaded. If there were no general desire to avoid fines or jail, then these "evils" would not be eligible as punishment. But unless the legislator can find some "evil" which qualifies, the institution of punishment fails; or is modified to allow judges complete discretion in the choice of punishment. Whether this would still be punishment and this "judge" a judge are open questions. Certainly a door would be left ajar for radical

abuse of power. There are advocates of the "individualization of punishment" who would be willing to take the risk for the supposed gain in reformatory effectiveness. But what is gained here may well be lost on the side of deterrence of would-be offenders, who could never know what the penalty is, for the crime they contemplate.

To turn to assumptions concerning human society, we assume, first, that there is a virtual monopoly of coercive power in the state. Suppose that each man has an H-bomb which he threatens to explode if molested. Then force could be used on a man only by his consent, and legal punishment would break down. Secondly, we assume that the culture is such that it is possible for people to grasp what it is to be an official in a legal system. If not, sentencing and the execution of sentences will be understood as moves made by particular persons against particular persons; and deterrence will give way to cycles of retaliation. This may help explain why for anyone, who refused on principle to allow the distinction between what is permissible for an official of a system and for an individual falling under the system, punishment was a moral nightmare.

To the extent that any of these assumptions, or the assumptions on which the need for a practice is predicated, are false, the case for a legal punishment breaks down. We shall not argue for them, but simply assume their truth. Assuming them true, it seems a priori likely that punishment would be effective in encouraging compliance with legal rules.

More than this: the experience of centuries of civilization constitutes evidence that it is effective. But not very conclusive evidence. We do not know to what extent social suasion, and intellectual conviction have been responsible for the tendency of the masses to abide by the law. We do not have controlled social experiments in which punishment is compared in point of efficacy to treatment, or social suasion, or persuasion. In those chaotic revolutionary situations in which the recent history of the human race abounds, we would hardly have dared rely on less than the strong medicine of legal punishment. Yet perhaps in more orderly times, less drastic practices can be encouraged.

Under the heading of the effectiveness of punishment as a practice we should note (what has sometimes been recognized) that punishment is at least more ingenious than its alternatives in that it works like a pricing system in reverse. Whereas the storekeeper tries to price his wares in such a way that there will be as many purchasers as possible; the legislator tries (or should try) to "price" crimes in such a way that there will be as few takers-of-the-risk of criminal behaviour as possible. And as we realize from our survey of Bentham - it is more, subtle than this. It is not merely that we want few, but that we want less takers of the worst crimes. So on these we put the highest price and our "pricing" can - on the practice of punishment - be carefully adjusted to the disvalue of the crimes: just as (inversely) the storekeeper can progressively encourage the taking of his wares by lowering the price.

What must be borne in mind is that if the evidence for the effectiveness of punishment in encouraging compliance with legal rules is less than satisfactory, the evidence for the comparatively untried alternatives is even less satisfactory. But the burden of proof is on him who would make a change, on the principle that we should change only where there is a likely advantage in doing so. And this principle seems worth defending, since changes, in deep-rooted practices especially inevitably involve difficult re-adjustments, and sometimes involve consequences not forseen.

What is also required in justification is that punishment should be shown as acceptable, i.e., as not violating the limiting principles of justice and humanity. Is the practice of punishment, as such, unjust or inhumane? To say that it is, is to say that a person so far uncommitted to a society, recognizing the need in any society for an effective practice to encourage compliance with rules, recognising that there must be burdens and privileges under whatever practice is chosen, would be willing to enter that society and fall under that practice, even though he does not know in advance and from this uncommitted standpoint what role he might have to play and what burdens or privileges would fall to his lot. To say that he would not commit himself to the society on the ground that he might through no fault of his own fall into a role which is at a disadvantage in the distribution of burdens and privileges, receiving,

compared to other roles, most of the burdens and none of the privileges, is to say that the practice is unjust. To say that he would not commit himself to the society on the ground that the burdens which must be carried by the players of some roles (even though they may be fairly distributed) are at the same time very heavy and not necessary for the attainment of the purposes of the practice, is to say that the practice is inhumane.

Is the practice of punishment unjust? There is a heavily burdened role, criminal, into which any of us might fall: but not, we may assume, without fault. The proper answer to the person who refuses to commit himself to the society containing this practice, on the ground that he might fall into the unfavoured role of criminal, is that once he commits himself to society and practice, whether he then plays or avoids the role of criminal is still open. He <u>can</u> have the advantages of the practice, and at the same time avoid the burdens of the unfavoured role. And should he fall into the role of criminal, there is nothing inherent in the practice which would make the burden borne by one category of criminal out of proportion to that borne by others, granted the need to distinguish between more and less dangerous crimes.

Is it inhumane? Since, as practice, it does not specify the burdens to be borne, but only that they shall be adequate to the purpose of discouraging crime, the practice

does not as such demand that there should be burdens not warranted by its purpose. It does not follow from the fact that there may be "cruel and unusual" punishments that the practice of punishment is therefore inhumane. Contrast the practice whereby the rulers administer drugs to the population at large which ensure that whatever laws enacted will not be violated. This could work only if the critical faculties were so deadened that the individual could no longer distinguish between good and bad laws, and between occasions on which even good laws should and should not be violated. But, since there are alternative ways of encouraging compliance with the laws, which do not involve these consequences, they are unnecessary, and the practice is inhumane.

Morally speaking, if our very general assumptions of fact be granted, and our judgement that widespread misery is a disvalue, then rules are necessary, and some way must be found to make them effective. But if the best and most acceptable way is the practice of legal punishment, then those persons who find themselves playing the roles of judge and jailer have the moral right to sentence and carry out sentences. They have this right as officials of a practice which is, by hypothesis, for the good of everyone alike.

NOTES AND REFERENCES

CHAPTER EIGHT

1. Murphy, J.G., 'Persons and Punishment' by Herbert Morris in Punishment and Rehabilitation, Wadsworth Publishing Co., Inc., Belmont, California, 1973, pp.40-41.
2. Ibid., p.41.
3. Ibid.
4. But sometimes an advantage of referring to the institution, rather than to the practice of punishment is that then we might not confuse two different sorts of thing we mean by practice. Here, however, we will settle on the wider term "practice" since we wish to compare punishment with possible alternatives which would qualify as practices but not as institutions.
5. Ross, W.D., "Punishment" in The Right and the Good, Oxford, 1930, Ch.11, Appendix II.
6. See Mill, J.S., An Examination of the Philosophy of Sir William Hamilton, London, 1865.
7. The term "legislators" is used here in a broad sense. Indeed the legislator is seen as in a quandary. He is responsible for the removal of crime, and is therefore tempted to use legal penalties strictly as a tool for this purpose, without allowing any consideration of justice to the individuals punished to enter into his calculations. But at the same time he recognises that he really ought to be guided by principles of justice as a legislative standard is opposed to taking expediency as the standard. The legislator's choice becomes one of doing what is moral and difficult or immoral and expedient.

8. Doyle, J.F., "Justice and Legal Punishment" in Philosophy Vol.42, July 1967, p.59.

9. Ibid.

10. Rawls, J., "Justice as Fairness" in Philosophical Review, 1958, pp.164-194. See also Rawls' A Theory of Justice, Oxford, 1972.

11. The discussion here is, admittedly, barely opened. How, by what test, do we decide that degradation, misery, or death are unnecessary? And, even more difficult what is to count as misery, suffering, and (most difficult) degradation? But even though the theoretical explanation of our test for humanity of a practice may be difficult, still the test can be used prior to explanation; for by and large (leaving the question of how) we do agree on what is unnecessary, and on whether suffering, misery, and degradation (to say nothing of death) are imposed. Or, if we do not agree, we know how to go about discussing the point. Explication could only start from the considerations we take as relevant in such discussion.

12. Hall, J., General Principles of Criminal Law, 2nd Edition, Indianapolis, New York, 1960, p.327.

13. The question, much discussed, whether or not a given piece of legislation is punitive in intent, is likely to turn on the question not merely what suffering it imposes but also on the way in which the suffering it imposed will generally be regarded. A suggested test

for legislation punitive in intent is to determine Whether the legislative concern underlying the statute was to regulate 'the activity or status from which the individual is barred'. or whether the statute is evidently 'aimed at the person or class or persons disqualified.'

14. Aristotle, Ethica Nicomachea, 1180a, 3-13.

15. Zilboorg, G., The Psychology of the Criminal Act and Punishment, New York, 1954,p.32.

16. Bentham, J., Principles of Morals and Legislation, XIV, 28.

17. Waelder, R., "psychiatry and the Problem of Criminal Responsibility," in University of Pennsylvania Law Review, 1952, p.383.

18. Cf., e.g. Karpman's definition of Criminal Behaviour, p.102.

CHAPTER NINE

TREATMENT vs. PUNISHMENT

1. RESPONSIBILITY/LADY WOOTTON'S ARGUMENT
2. DETERMINISM
3. REMEDIAL TREATMENT IN PLACE OF PUNISHMENT.

1. RESPONSIBILITY/LADY WOOTON'S ARGUMENT

In Social Science and Social Pathology and elsewhere[1] Lady Wootton puts forward arguments which she maintains undermine the case for 'retributive punishment'. I shall examine some of these arguments with a view to determining whether any of them are dicidable against the theory at any point and if so whether the retributive theory can be modified so as to take account of these criticisms.

One of the functions of the law according to retributivism is to see that wickedness is punished. The question immediately arises, where do we find wickedness? The retributivist answer (legally speaking) will be that it is to be found in the state of mind present in the offender at the time of the commission of the offence. To decide on the question of responsibility it is not sufficient to enquire into the question of what was done but necessary also to enquire into the way in which the offence came about. The end of such an enquiry will be a decision as to whether the offender is culpable or not, and since, there are admitted to be degrees of culpability, to what extent the offender is culpable. Only when these questions have been answered can the offence be regarded as punishable or non-punishable, and if the former is the case the appropriate punishment settled on.

A person can only be culpable when he is a responsible agent. Thus the retributivist is obliged to take seriously any arguments which seem to show that responsibility and its

degrees are not decidable matters. Lady Wootton attempts to show that questions of responsibility are fraught with such epistemological difficulties that we would be well advised to give up the search for answers to these questions and do away with the notion of responsibility as it affects the law and punishment.

If a person is insane at the time when he commits an offence we say that he should be relieved of responsibility for that offence. He is not culpable and not to be punished. "Pari passu" if there is nothing wrong with him he is left with full responsibility for his offence. There do seem however to be cases which we would be unwilling to assign to the former category yet where we think that the offender may not be responsible for his offence. What is required is some test or set of tests which will enable us to deal with these cases in a just fashion. Lady Wootton's central claim is simply that no such test is forthcoming.

Many such tests have been put forward by psychiatrists at various times but none of these are acceptable because they are not "objective". What does Lady Wootton mean by "objective" in the context? It is a difficult question to answer with any finality. We can say however what an objective 'science' or 'discipline' is not and may be this is all it needs to be said on the matter. Unfortunately the discipline which Lady Wootton advances as being one which does employ objective criteria has just those features which are supposed to disqualify in respect of objectivity.

An objective criterion is a criterion the existence of which is independent of matters of tastes, matters of value, and cultural norms. That is, if in describing or designating a condition reference must be made explicitly or implicitly to the tastes, values or norms of any group then neither the condition nor the criterion are objective. A paradigm of such objectivity might be found, it can be surmised, in classical particle mechanics - the State description for an example of a dynamic system designating an objective condition. The criteria employed in determining whether the example is matched by the description will then be those of physical science. However, the example Lady Wootton chooses to consider is drawn from medicine. She speaks of the criteria of physical health and ill-health as objective and the conditions which the criteria refer to as objective also.

A doctor investigates conditions of the body and there is no question but that these conditions are objective. One either has a gallstone or one does not; one has a condition known as leukemia or one does not. If asked what physical conditions a male aged twenty would have to manifest before he would say that he were healthy a doctor could make up a list of conditions to which the male organism would have to approximate to the healthy. Will the conditions be the same for all places on the globe's surface? Clearly they will not be. The body which will be healthy in London will be different in some respects from the body which will

be healthy in Kinshasha depending upon the differing strains imposed upon the body in the environment. Our doctor would, however, given the requisite geographical information, be able to produce sets of conditions of the body which would be healthy conditions in the various environments. The criterion of health would remain identical for each place, only the conditions of the body would vary. But how do we hit upon our criterion in the first place? If asked what good health was would it not be relevant though possibly uninformative to say a condition of the body which leads to satisfactory living? If asked to specify further we would begin to mention certain kinds of ends which are thought worthwhile, certain kind of demands - moral and social - which are made upon us and which for the most part are accepted. That is, in order fully to specify what we <u>meant</u> by physical good health we should need to mention matters which Lady Wootton would not regard as objective. Any definition of physical health or ill-health that is adequate will refer implicitly or explicitly to the above notions.

Had we the space we would pursue a parallel line of thought with respect to the concept of disease. A diseased condition of the body is not simply a condition of the body though many conditions of the body are universally regarded as diseased condition. Cancer is a disease but it is one because it is a condition of the body that is not wanted, one that is not consonant with comfort, happiness and long life. Because there exists a nearly universal desire for

these things it is a truism to say cancer is a disease but the important point is that it is not a tautology.

What is the view that Lady Wodton examines and rejects? It may be summarised in the four following propositions: statements about the mental health or ill-health of a person are not expressions of taste or value judgements but report on objective conditions; it is impossible to diagnose the presence of the conditions by the use of criteria which make no reference to anti-social behaviour; the presense of such conditions excuse anti-social behaviour.

Lady Wootton holds that there cannot be an objective criterion of mental health and ill-health because any such definition implies a reference to a culture. A particular condition which is regarded as one of ill-health in one society may not be so regarded in another. There are two preliminary comments to make on this matter. Firstly, though there may be some cases which may be classified differently in different cultures these may be surely border-line cases and do not require us to adopt a relativistic view of mental conditions. Schizophrenia will be classified as an abnormal condition in any culture, the reason being that there are many ends universally pursued.

Secondly, in connection with what has been said above if Lady Wootton wishes to maintain the relativity of mental health and ill-health then she must be prepared to admit the same for physical health and ill-health. But Lady Wootton does not want to allow this; indeed her case partly depends

upon this contrast being adknowledged. She wishes to draw a distinction between the two cases, claiming that with physical health and ill-health there is an objective criterion. But logically the two cases are on a par. There can be borderline instances of physical health and ill-health as there are with mental health and ill-health. Both make implicit reference to human purposes and since over a great area these are universal so criteria can be the objective.

Lady Wootton argues that the notion of mental disorder cannot be defined in objective terms, and so advocates the abolition of the concept of responsibility from the province of the law. Her advocacy of this course of action is supported in part by a critical examination of four criteria for distinguishing responsible from non-responsible behaviour. I would agree that three of the criteria offered are open to serious objection and shall not concern myself with them. The fourth criterion is "behaviour is non-responsible where there is present a psychiatric syndrome independent of anti-social behaviour". This criterion supplemented in a way which I shall later suggest, I think may prove to be acceptable. Lady Wootton has four reasons for rejecting this criterion. She claims that:

1. It leaves untouched the problem of the psychopath, for he shows no signs of abnormality other than his resistance to social norms. The criterion would therefore leave the psychopath with full responsibility for his conduct.

2. The presence of a psychiatric syndrome does not of itself necessarily explain disregard of the social norms.

3. The presence of a psychiatric syndrome does not necessarily excuse disregard of the social norms.

4. The definition of a psychiatric syndrome implies a reference to a special context and through this an acceptance of values of the society.

I shall deal with these criticisms in order.

The suggested criterion, so it is said, leaves the psychopath with full responsibility for his behaviour. One might deny that in so doing it creates a difficulty for the criterion, but rather agree that it does allow him to be just responsible and that it is correct in so doing. It could be said that he is wicked and that a reluctance to hold him responsible only reflects our own optimistic beliefs about the nature of man. It could be said that there is no contradiction in claiming that a man is wicked, even consistently wicked, and claiming at the same time that he is responsible for his behaviour.

It will always be reasonable to raise a query about a person's responsibility when his behaviour appears pointless or unreasonable, but such behaviour does not constitute proof of the presence of mental disorder. Indeed we should take particular care when using such behaviour as evidence towards that conclusion, for we may not merely be describing what somebody does, but in addition interpreting, or rather finding ourselves unable to interpret, what he does. Such interpretations will be made with the aid of those social values to which we subscribe. We often say that an

action is pointless where more accurate judgement would be that we cannot see the point of it, or that some behaviour is peculiar when we should restrict ourselves to saying that it is not the kind of thing we would even wish to do. Examples of such judgements readily spring to mind in contemporary discussions of so-called aberrant sexual behaviour. Speaking with reference to psychopaths among others, Dr. Robert Waedler has said:

> "Whether or not a psychiatrist is willing to classify any one of these conditions as diseases of the mind depends more on his philosophy than on any factual question that can be settled by observation or reasoning."[2]

Dr. Manfred Guttmacher has written:

> "There is certain to be professional disagreement as to whether some of these cases should be classified as psychotic .....or psychopatic.... The training and orientation of the psychiatrist is likely to be the decisive factor. If his orientation is psychoanalytic, he will be more likely to consider cases with severe character disorders as suffering from a mental disease."[3]

The upshot of this brief discussion is that it still has to be shown that psychopaths are the subject of mental disorders, the presence of character disorders does not establish that they are. If this is true psychopaths can hardly constitute a difficulty for our criterion.

Psychopaths as defined at present do not constitute an example of mental disorder. Suppose, however, we were to allow two kinds of evidence as admissible for diagnosing the presence of mental disorder. Then in the case of the psychopath we would have a conflict of evidence. We might

therefore decide to consider psychopathy a borderline case. Even then psychopathy would not invalidate our criterion, for all categories organising mental phenomena like those for physical phenomena will have borderline instances, which are impossible to assign with finality to any one category, but the classification is not invalidatedon that score.

A final point which may eventually resolve the worries which some psychiatrists have over psychopathy is that there is some reason to believe that even on our criterion, some personalities at present described as psychopathic will no longer be assigned to the class of responsible beings. There is evidence emerging that some so-called psychopaths are abnormal in a clear medical sense, e.g., one piece of work has indicated that certain brainwave patterns which are characteristic of children and epileptics are shared by psychopaths. This would not show that they were not responsible, but it is the kind of evidence which is relevant, and may eventually allow us to dispose of this pseudo-psychiatric category.

Lady Wootton's second criticism (i.e. that the presence of a psychiatric syndrome does not necessarily explain disregard of social norms) is to the effect that even if the criterion expresses a necessary condition for determining whether responsibility exists or not it does not express a sufficient condition. But it is not a matter of sufficient and necessary condition. The point is that although certain kinds of evidence (e.g., brain-waves) may show that there is a mental disturbance they do not prove that behaviour is

not responsible unless there are grounds for saying that the mental disturbance caused the offender to act otherwise than he would have done if he were not disturbed. It would also have to be established that there exists a causal relationship between the syndrome and the behaviour. Such requirements have been recommended as a legal test of responsibility since the time of Durham versus United States (1863) when it was agreed that "an accused is not criminally responsible if his unlawful act was the product of mental disease or defect", and a similar rule has been recommended in the Model Penal Code. The Royal Commission on Capital Punishment offered a rather different rule when it said that what was to be asked was whether the guilty person suffers from mental disorder "to such a degree that he ought not to be held responsible". The Royal Commission did not call for a causal connection, and in this it was mistaken, for there may well be cases in which the offender is suffering from mental disorder but where there is no reason to think that that disorder has anything to do with the crime. On this matter the commission reported that "there must always be some likelihood that the abnormality has played some part in the examination of the crime; and generally speaking the graver the abnormality and the more serious the crime, the more probable it must be that there is causal connection between them."[4] We may add that whether there are such causal connections is a matter which is open to scientific experimentation. Our knowledge of the existence of the purported causal connections in particular cases will depend upon the

prior ascertainment of important correlations. Thus, in answer to Lady Wootton we may say that though the presence of a psychiatric syndrome does not of itself explain a piece of anti-social behaviour, its presence in conjunction with laws connecting that type of syndrome with that type of behaviour will explain in a scientific way a piece of anti-social behaviour.

Lady Wootton's third criticism of the criterion is that even supposing the presence of syndromes does explain, they do not excuse such behaviour. She writes:

> "....explanation is not the same as exculpation... Undoubtedly people who suffer from disturbances of mental part-functions have to carry on the burden of these disturbances on top of whatever happens to be their share of the ordinary trouble and difficulties of human life. But so also do those who suffer from migraine and weak digestions. How can we be sure that it is legitimate in the one sense, but not in the other, to leap to the conclusion that, for those who suffered from these disabilities, that standard of social expectation ought to be lowered? Why is dishonesty excused as well as explained by depression but not by indigestion?"[6]

Lady Wootton's query is briefly why we are justified (if we are) in relieving a person partially or wholly of responsibility, when we can offer a scientific explanation of his behaviour which includes a reference to a mental element, but not when it includes a reference to a physical condition. I think Lady Wootton has not stated the supposed opposition clearly enough. When so stated the difficulty disappears. The first general point to make is that when a scientific explanation is available for an action then it is thereby implied that the action is not one for which that person

may be held responsible, whatever that action may be, and whatever the type of scientific explanation offered. Consider for example the following case: A pedestrian is crossing a road. Suddenly a car comes around the corner. The pedestrian jumps in the direction of the pavement. In so doing he knocks down somebody on the pavement. Should the pedestrian be held responsible? Without filling in the details we can say, probably not. The reason why we should answer in this way is that a scientific explanation, given in this case partly in terms of experimental psychology is available if required. But if we consider the examples Lady Wootton gives, migraine and weak digestion, there is no reason to suppose that they can form part of a scientific explanation of anti-social bheaviour, because there is no reason to think that they will figure as elements in appropriate scientific laws. It may not be true in general that "tout comprendre c'est tout pardonner." But where an explanation is scientific it does exculpate from blame. The problem is one of finding explanations which are scientifically satisfactory. The reason why this should be so is that scientific explanations are logically complete. Once again, if accepted, they need no supplementation. Some explanations of actions are incomplete in this sense; they need to be supplemented by statements about motives and intentions. Such explanations will not relieve one of responsibility.

A final objection which Lady Wootton makes to the criterion would be to the notion of a psychiatric syndrome. A psychiatric syndrome is defined in terms of the notion of mental disorder, mental disease or mental ill-health. Lady Wootton claims that these terms do not designate an "objective reality" but each contains implicit reference to value judgements. She is at some pains to examine definitions which have been offered by psychiatrists for these terms, and it must be admitted that the examples she chooses are deficient in this respect.[7] This fact does not however oblige us to reject the notions of mental ill-health, mental disorder etc. as referring to no objective reality. One course which we must follow would be to examine the proffered definitions to discover which mental conditions they all agree in accepting or discarding. Such definitions might then be tested against definitions which others including anthropologists might be able to elicit from alien societies. Such a procedure would, I think, result in a definition of mental ill-health which could be offered to all societies and would not involve implicit reference to a particular culture.

2. DETERMINISM

In this section I shall concern myself with the issue of the relevance or irrelevance of determinism to the Retributive Theory of Punishment. It is important to try to settle this issue because it will be generally condeded that

at least one of the alternative theories of punishment, namely the Deterrent Theory, would not be impeached should determinism be true; the truth or falsehood of determinism is logically independent of this theory of punishment. Whether the same can be said on behalf of the Reformative Theory is less certain, and I shall take up that question later in this section. Finally, I shall tentatively offer two lines of argument which are intended to lend some support to the contention that in a morally important sense we do have freedom.

Anyone who is prepared to advocate a Retributive Theory of Punishment will make use of, in formulating his theory, terms selected from among the following: "innocent", "guilty", "morally culpable", "responsible", "desért". These terms he may say are to be used and understood as they are normally used and understood in moral contexts. They will then carry with them the implications they normally have in such contexts. I shall take it that the retributivist does intend to take these terms to be taken in their ordinary signification. If this is so it would seem to follow that the logical relation which the Retributive Theory bears to the Determinist thesis is to be settled by an examination of their implications. It would be possible we may suppose for a retributivist to introduce novel definitions for these terms, but none to my knowledge has thought the theory required it and I shall therefore ignore that possibility.

It should be pointed out before continuing that not the whole of the retributive theory is relevant to the question under discussion. C.D. Broad has the following to say about 'Retributive punishment':[8]

> "The fundamental question in connection with retributive punishment is whether a combination of two evils, viz. wrongdoing and pain, can be a more desirable state of affairs than one of these evils, viz. wrongdoing without the other. The general answer is that there is no logical imposibility in this because the value of a whole depends largely on the relations between its constituents as well as on the nature of the constituents themselves. And the contention of the believer in retributive punishment is that there is a certain appropriateness of pain to wrongdoing, which... makes the whole state of affairs less bad than it would be if the wrongdoing were punished."

He argues that a determinist will hold certain states of affairs to be more valuable than others, and there is no reason to believe in principle why he should not hold the above state of affairs valuable. The only hesitation one might express would be over the term "wrongdoing". But there is no reason why a determinist should not admit the possibility of wrongdoing. Wrong actions are simply those actions which have bad consequences. Providing the cause of the consequences was an action we are not obliged to enquire whether it was determined or not to decide that it is an example of wrongdoing.

Nevertheless, one's initial temptation is to say that determinism if true would undermine retributivism. Sidgwick thought that the retributive theory did presuppose freedom of the will, though he believed it would have no practical effect since there were already sufficient reasons for

rejecting the retributive theory of punishment:

> "It must be admitted, I think, that the common retributive view of punishment, and the ordinary notions of 'merit', 'demerit' and 'responsibility' also involve the assumption of Free Will; if the wrong act and the bad qualities of character manifested in it are conceived as the necessary effects of causes antecedent or external to the existence of the agent- the moral responsibility - in the ordinary sense - for the mischief caused by them can no longer rest on him."[9]

The quotations from Sidgwick and Borad settle for me the point at which determinism may bear on the Retributive Theory,- where the terms "desert', "merit", and "responsibility" enter. Thus as stated before it would seem that the question could be answered by an examination of the logical implications of these terms. A Utilitarian may claim to be able to find definitions for these terms which successfully bypass the issue of determinism. However, it is doubtful whether any of these definitions so far offered do reflect the whole meaning of these terms as actually used. If they did our problem would be solved for us, but in fact they amount to partial redefinitions of a term, more restrictive in meaning than the original term, and this cannot provide a certain guide with which to solve our problem. Should we not instead of adopting some preferred definition attempt a theory of free investigation of these terms in actual use and try to discover whether they do as usually used imply some belief in free-will? I am highly doubtful whether by noticing how such terms are used we would get a clear indication as to whether or not they did presuppose freedom of the will. This would not be surprising since these terms form part of our daily discourse and are then used in practical determinations. We shall however return to this question shortly when discussing a solution

which has been offered to the problem of determinism.

It may be thought that should we find historical instances of dogmas which have accepted both determinism and the retributive theory, then we should have shown that they were compatible with each other. Sidney Hook writes:

> "It is argued by Professor Edwards that 'hard' determinism, which according to him entails the belief that no one is morally responsible because no one ultimately shapes his own character, leads to the abandonment of retributive punishment... But historically it is not so. From Augustine to Calvin to Booth the torment of eternal damnation is assigned and approved of independently - by a moral responsibility."[10]

And in the same volume another writer refers to "Calvinistic fatalism". If however we make even a brief excursion into Calvinist theology it is very doubtful whether the facts support the claim. Calvinism does allow a measure of freedom into this system, sufficient to avoid any possible conflict which might have arisen between predestination and the retributive theory. Predestination comes into Calvinism with the doctrine of the Divine Plan, but

> "It is a miscomception, first, if it is supposed that this inclusion by Calvinism of all acts and events in the sphere of the Divine Purpose is tantamount to the doing away with, or denial of, the reality of the operation of secondary causes - especially of human freedom. The contrary is the case. The operation of secondary causes is constantly presupposed."[11]

When we turn to the words of Calvin Himself we read:

> "God .. did .. freely and unchangeably ordain whatsoever comes to pass; yet so as thereby neither is God the author of sin, nor is violence offered to the will of the creatures, nor is the liberty or contingency of second causes taken away but rather established."[12]

and elsewhere,

> "God hath embued the will of man with that natural liberty, that it is neither forced nor by any absolute necessity of nature determined, to good or evil."[13]

It is not my wish to engage here in the exegesis of Calvinism, but merely to suggest that a short appeal to a supposed historical precedent will not solve our problem for us. It might for all I know turn out that Calvin did accept both doctrines, but even were we satisfied on that point, since we know that dogmas are able to embrace contradictory propositions at the same time, we could not then let the issue rest. There is no hope for it but to raise the questions - What is Determinism? What is Free Will? are they compatible or do they exclude each other? I shall deal with these questions and try to relate the discussion to the retributive theory by declining in turn with two separate theses, which we may call immitating Paul Edwards Soft Determinism and Hard Determinism.

State shortly, soft Determinism limiting its consideration to action says that determined actions are simply those which are constrained in some way; "constrained" may be understood widely so as to include both physical or psychological compulsion, and may be roughly categorised as that class of actions considered involuntary by Aristotle in the Nichomachaen Ethics Book Three. It is claimed, truly, that not all our action falls into this category, but that there is a class of human actions which are subject to no such constraints. The thesis is then put forward that we are entitled to say

of these actions that they are free, and that when we say of an action that it is free we mean just that. To quote Locke:

> "From the use of the word "freewill" no liberty can be inferred of the will, desire, inclination but the liberty of the man, which consisteth in his, that he finds no stop in doing what he has the will, desire or inclination, to do."[14]

If then possessing freedom of the will is tantamount to being able to perform free actions on some occasions, it follows that such freedom is not incompatible with determinism - some of our actions are determined but equally some are not. If this is what determinism is, then its truth could not be a bar to the acceptability of the Retributive Theory of Punishment, because there is no opposition between them. The retributivist may restrict the application of his theory to those persons whose acts were morally wrong and free in the above-mentioned sense.

However, when we turn to the Hard Determinist then the issues are far less clear. Let us first consider what it says with respect to every action, and thus also to the class of actions which by the criterion of Soft Determinism are free actions. It is said, firstly, that every human action can in principle be scientifically explained; that is that every human action can be regarded as the logical consequence of a set of initial conditions plus the application of a set of scientific laws. Secondly, though the initial conditions forming part of the explanation may in some cases consist in part of other actions of that person

whose action is being explained, there are always explanations available for these further actions. Sooner or later an explanation will be forthcoming which does not invoke amongst its initial conditions former actions of the agent. It may be that such an explanation will include among its initial conditions actions of other agents, but it is claimed that it need make no reference to the agent whose actions are to be explained, and "ipso facto", not to his freedom either. If this is the case the supposed additional factor of freedom of the will which is supposed to distinguish free actions from determined actions, is always rendered redundant, for to explain a man's action we had to ask questions about it.

The claim may be given to a stronger form to the effect that any man's actions can be explained (if we are prepared to enquire far enough back) in terms of scientific laws together with initial conditions which make no reference to human actions at all. However, this formulation involves the possibility of a reductionist programme, and for our purposes it is needless to enquire into this stronger formulation, for even the moderate thesis may if true undermine the belief that men act freely on some occasions. The belief is thought to be undermined because acting freely is supposed to require the possibility of acting to some extent independently of initial conditions and scientific laws, and not merely not being compelled, constrained or acting involuntarily. Here I think we see what is the major objection to the notion of the freedom of the will when opposed to the

hard determinist thesis - it is difficult to comprehend just what is being opposed to determinism, just what is being counter-claimed. The thesis of Hard Determinism may itself be vague in detail, it may be more of a programme than an established truth, it may indeed be difficult to see how we might establish its truth if true, but it is reasonably clear in outline. But what is supposed to constitute freedom on this level is never made at all clear. We are told, for example, by C.A. Campbell[15] that we have an apprehension or intuition that our will is free, but it is hard to see in what this awareness consists except the awareness that we are not constrained or performing involuntary actions. The apprehension of such freedom is quite compatible with Hard Determinism.

What may be in the minds of those who claim for us this undetailed freedom is the following: On many occasions before we do anything it is possible for us to rehearse inwardly alternative an mutually exclusive actions, each of which may be thought opposite to the situation presented to us. It may be agreed that the courses of action which we can reflect about are set for us. Still it will be claimed that there is a sense in which we can act freely, range over the class of actions which are possible and relevant to the circumstances, and that our choice from any of these may be a free one, not because it has no cause, or cannot be covered by a scientific law, but because a reason can be given for doing it, which would be a reason for doing it, whatever

kind of world we inhabited. Can an answer of this kind (however obscure) save the freedom of the will? It may be retorted that reasons are certainly efficacious, but some reasons are rational and some irrational, but that they all have a causal ancestry, and that the differences between rational and irrational choices can be accounted for simply by citing different causes. On this account to say that a certain choice is a rational choice is to say that it has a certain kind of cause.

I shall briefly follow up the line of thought above with a view to highlighting one of the consequences of accepting strict Determinism, a consequence which is self-defeating. I will suggest that there is one belief we hold which is not open to reappraisal, and that the account Strict Determinism gives of it is such as to give us good reason for rejecting Strict Determinism. In short it seems to me that while making use of rational arguments as traditionally understood and accepting them in this way the determinist leads us to a conclusion the upshot of which is to prove to us the impossibility of rational argument as normally understood.

To show this let us consider the example of non-moral rational discussion. Such discussion tautologically takes place via the medium of statements between which logical relations hold or do not hold. Restricting ourselves even further to deductive reasoning we may say that an argument used in a discussion is valid when the relation of implication holds between specific statements and invalid when it fails

to hold. In a rational discussion an argument may be rejected not only by challenging the validity of the inferences but also the truth of the premises. Now in order that the discussion be resolvable there must be agreement as to which rules of inferences are to be allowed and how the truth of disputed premises is to be determined. Let us suppose that in a rational discussion one party succeeded in gaining the assent of the other party. Then to the extent that the former is a rational agent we should say that he was convinced because the conclusion was logically entailed by the premises. If questioned as to why he accepted the conclusion, the party would likewise say that he had been provided with sufficient reasons for so doing, that given the premise and the agent he was logically compelled to accept the conclusion. But the determinist gives an alternative account of what has happened, and it is one which undermines the above account. Given the state of the agent and his environment at that time we shall be told that the stages of the argument can be regarded as causal conditions, sufficient to make the other party give his consent to this conclusion. We have two accounts, one given in terms of logical necessitation, the other in terms of causal necessitation. And now it may be asked how are we going to distinguish between the agreement reached via rational arguments from that reached in other ways. Hypnotism and propaganda may both function as mental causes which can lead to such agreement. Should our agent discover that the agreement had been reached via such

a course he would wish to reconsider the agent independently of that particular cause, and he is surely right to do so for we attach no value to agreement so reached. We should regard any triumph reached in this way as worthless for we would have succeeded only in using the correct psychological cues. A question for the determinist is why should we prefer one kind of cause to another in this case? The determinist or libertarian could say that there is a distinction to be drawn between reasons and causes, that the provision of cases for agreement would not make it a person's own decision, and indeed if we know that this was the way in which agreement had been reached we would not attribute this opinion to the agent however vigorously he maintained it.

The question of the freedom of the will is sometimes posed by asking can we ever do other than we in fact do. But here we see Determinism eroding at the possibility of freedom of thought. Canwe ever think other than we do think? If the human enterprise is rendered sterile by determinism in action, it is rendered meaningless by determinism of thought.

We actively distinguish between reason and causes, acting through reason and acting as the result of sufficient causal factors. We may be inclined to think that the latter are not strictly speaking actions at all, if we think reasons are always relevant to actions. The distinction is between categories, but it is one which determinism obliterates.

I have been at pains not to reject Hard Determinism

but to stress the repercussions which it has for ordinary views of men and thought. This does not mean that it is not true but we are entitled to wait until we are offered some cogent proof of its truth before accepting. Little so far has been forthcoming. It is highly doubtful whether it ever could be.

Turning back to our original question we asked what relation does the doctrine of Hard Determinism bear to the Retributive Theory of Punishment. I do not think we can go so far as to say that they are incompatible in a strictly logical sense; so that should someone maintain both doctrines we could not convict him of inconsistency. What I would stress however would be the pointlessness of holding these in conjunction. There may be some intrinsic value in a world where benefits and punishments are apportioned according to desert, and where freedom of the will is a fact (whatever that may mean). But in a world which is strictly determined, why should the benefits or punishments be attached to just those persons who form no more than the last link in a causal chain. Their actions are contradictory to the wrong-doing but so are many other causal events, and many other persons, so why let the merits and punishments lie just where the last link in the causal chain is to be found? Surely, such a state of affairs would be quite arbitrary, and by being so would offend against the principle which defenders of the retributive theory are so concerned to point to as one of the strengths of the theory - its justice.

3. REMEDIAL TREATMENT IN PLACE OF JUDICIAL PUNISHMENT

This section attempts to extend and re-inforce the arguments in the sections on responsibility and determinism. The concern throughout is with the vexed question of the substitution of treatment for 'retributive punishment'.

Contemporary psychiatrists and criminologists[16] contend that crime is not something imputable to the criminal, but, rather, to the criminal's abnormal condition: a condition brought on not by him, but by the circumstances of his life; To punish him is, therefore, unjust; what is needed is treatment. We are told that the insistence upon punishment is a symptom of a pathological condition on the part of those who insist upon it.

> "Our anxiety can be quieted down only in one of two ways: In our sudden unconscious denial of any similarity with the criminal we can hurl ourselves upon him with all the power of our aggressive, punitive, destructive hastility; or we can assume the criminal to be a mentally sick man and can then assume a more tolerant or charitable attitude towards the doer if not the deed."[17]

In 'Crime and The Mind', Walter Bromberg[18] insists, that: "A criminal act results when an impulse contrary to the expressed restrictions of civilised life cannot be withstood".[19] On this theory every crime results from the ... inability to abide by the law. Criminal behaviour, according to Benjamin Karpman[20], is an unconsciously traditional psychic reaction over which (the criminals) have no conscious control. Elsewhere, he states: "We have to treat them as psychically sick people which in every respect they are. It is no more reasonable to push these individuals ....than it is to push

an individual for breathing through his mouth because of enlarged adenoids, when a simple operation will do the trick,"[21] We are told in a standard work on Criminology,[22] "It seems not too much to expect society gradually to accept the thesis that the criminal also is socially ill and needs diagnosis and some sort of treatment other than punishment." The authors argue further that, "Most real criminals are so warped by their inherited defects or undesirable life habits, that their crimes are as natural an expression for them as law abiding conduct is for the rest of us."[23] Surely, if it is correct that all criminals are sick, then radical proposals about punishment follow. One of the most explicit of these proposals was put forward by Carl Menninger.[24] In his proposal Menninger declares that crime is only one type of "adaptation failure" with which the science of psychiatry is concerned, and that crime is, or can be, as an object of science, "studied, interpreted and controlled"; that science can change bad behaviour, foresee it, and enable society to provide for it, and "detect and endeavour to prevent the development of potential criminality." Therefore, legal procedure and legislation must provide for psychiatric examination of all offenders with latitude and <u>authority</u> in the recommendations made to the court as to the disposition and treatment of the prisoner. Menninger goes on:

> "This also entails certain radical changes in penal practice indlucing (a) substitution of the idea of treatment, painful or otherwise, for the idea of retributive punishment. (b) The release of prisoners upon discharge or parole only after complete and competent psychiatric examination

with findings favourable for successful rehabilitation, to which end the desirability of resident psychiatrists in all penal institutions is obvious, (c) the permanent legal detention of the incurably inadequate, incompetent and anti-social, irrespective of the particular offence committed, (d) the use of this "permanently custodial group" for the advantage of the State - to earn their keep."

Many lawyers (not unnaturally) were alarmed at such a proposal especially when part (c) of the proposal is given serious consideration. The question arises how the rights of the criminal are protected if, at the will of a psychiatrist or Board of psychiatrists, he can be held in prison after the expiration of his term because that individual or Board finds that he is not "rehabilitated". If a man is to be permanently detained because he is "anti-social", it would seem that we would need a very clear definition of the word "anti-social": but it seems to me that no such definition has to date been worked out.

Lawyers have hastened to remind the psychiatric opponents that there are more purposes to the criminal law than the rehabilitation of those who violate it.

> "The social aspects to punishment have, for the most part, been ignored by their critics; their medical orientation serves to pre-occupy them with the criminal qua patient. They forget that he is first a social unit and that although he may ultimately be handed over to the doctor, demands of society ought first to be met. He does not have cancer or flu or dyspepsia; he has committed a crime, has injured someone, has damaged society according to its own definition. Because of this and irrespective of any moral taint, the criminal is obliged and must answer to society."[25]

One of the best replies to the psychiatrists is to be found in Hall's Principles of Criminal Law.[26] Hall challenges the right of the psychiatrist opponents of punishment to

speak for science, or even for psychiatry; he underlines the lack of clear definition in psychiatric terminology and the resultant impossibility of substituting it for legal terms; he emphasizes the questionability of Freudian theories of human nature; and insists that a more adequate theory is embodied in the law.

The relevant discussion centres mainly on the psychiatrist - proposed Rule of "Irresistible Impulse" as a substitute for the generally accepted "M'Naghton Rules". Since the net result of the substitution would almost surely be a radical extension of the area of human action for which the agent cannot be held legally responsible, a brief survey of this dispute may be of interest before we turn to the underlying philosophical issues.[27]

The M'Naghton Rules were occasioned by the case of the Queen v. M'Naghton, 1843. In this case, M'Naghton having been acquitted of a sensational murder on the ground of insanity, a series of questions concerning the defence of insanity were put to the Lord Justices. After considerable debate, they produced the answers which are still the most important part of the law on insanity in relation to criminal responsibility. The central assertion of these rules is that:

> "To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

But many psychiatrists and other interested parties object to this rule mainly to the effect that many criminals are impulsive: that is, many, if not most of those who are really insane know that what they are doing is wrong, but cannot refrain from doing the act anyway. Further there are many insane persons who do criminal acts because they know that they are wrong and because they want to expiate a sense of guilt by drawing a resultant punishment upon themselves. Such persons, it is argued, should instead of punishment be treated for mental disorder.[28] The test, it is suggested should not be "...whether the individual be conscious of right or wrong - not whether he has a knowledge of the consequences of his act - but whether he can properly control his action."[29] The difficulty with such a criterion is that it is not clear how we are to distinguish inability to resist an impulse from simple failure to resist it. Was the impulse irresistible or simply not resisted? Clear answers to this difficulty have not been forthcoming. If the question of insanity turns on the commission of the very deed which the criminal has done, how are we to prevent the distinction from exonerating as insane whatever is done on "impulse?" It will not do either to say that the commission of the like acts in the past indicates "irrestible impulse", for this may just as well indicate habit and it seems odd to try to get a man off of a murder charge on the sole ground that he has committed a number of murders in the past.

Because the rule of "irresistible impulse" is on his view untenable, Hall finds himself inclined to accept the

M'Naghton Rules as interpreted by enlightened judges, as the best criterion of insanity offered to date. Desirable reforms in this rule are, he feels, delayed because the proposed reforms have so far been coupled with a theory (of "irresistible impulse") which attacks the very foundations of criminal responsibility.

In my view, two issues must be distinguished in the "treatment vs. Punishment" argument. The first is the prudential issue: whether crime would be more diminished by treatment than by punishment. Second, is the moral issue: whether if (as contended) the criminal is not responsible for his crime. Sweeping claims have been made for the superior efficacy of treatment in the reduction of crime. The evaluation of these claims would require careful analysis of experimental data. It may be doubted whether there is enough data upon which to found any firm conclusion. Certainly, theoretical difficulties will be apparent in distinguishing between treatment and punishment. This is not to suggest that the practical questions will be ignored. They will also be looked at in the latter part of this chapter.

What leads many people to favour treatment over punishment is not prudential but a moral belief: that punishment is no longer justified since whereas we had assumed criminals responsible for their crimes, we have now discovered that the assumption is at best shaky, and at worse false.

The first point that should be noted is how far the purported discovery about the responsibility of criminals spreads.

Criminals are distinguished from other human beings by their having committed a crime; and it is at least in principle possible to enact laws in such fashion, that descriptively speaking, any deed whatever is prohibited, and thus made criminal. So to say that no criminals are responsible for their crimes (or most are not) is to say, whether the implication is drawn out or not, that no one (or few people) are responsible for their actions. And this implication may be accepted or even welcomed. It may be well to pause over it.

While we may not be clear on the use which is being given to "responsible" in "No one is responsible for crime"; there is one point about this use on which we are clear; it does not correspond to any of the ordinary uses of the word. In the ordinary uses there is a tacit reference to such recognised heads of exception as mistake, accident, infancy, insanity, when it is claimed either that a person is not responsible for a given deed or is not responsible in general (dispositionally). But if the every same reason serves to exonerate everyone from responsibility, then this reason is no longer a head of exception. Therefore, though in the ordinary acceptance of the term it follows from "A is not responsible" that "A ought not to be punished"; the implication cannot be assumed to hold where "responsible" is given a totally different use. We cannot even assume that the first statement is a reason for the second, because we do

not know the rules which govern the "discussion game" which is apparently here being initiated: in fact we do not know whether there are any rules and therefore whether there is a "game" at all. We can only speculate about the circumstances in which the indicated "game" might arise, and how it might be conducted.

If we are to understand the contention that psychiatry and sociology have discovered that criminals are not responsible, or that few of them are responsible, we must know more about what it means to say of a person that he is or is not responsible. Ascriptions of responsibility are, in fact, like justifications of punishment, a varied and extensive lot. We have no more right to assume that there is one abstract general responsibility - ascription than we have to assume that there is one such punishment justification.

In the first place, we speak of persons as being, in general, responsible (that is, as being the sort of person to whom responsibilities can be entrusted without worry). Secondly, we speak of a person's being responsible for something - in a variety of ways. He can be responsible for the performance of certain tasks (watering the horses), all of the tasks in a given area of common endeavour (for the livestock), or - in a connected way - for the performance of his subordinates. These are prospective or a temporal ascriptions of responsibility. But there are also restrospective ascriptions.

We can say that A is responsible for something that has happened (B's death). To say this is to pack together some or all of a number of articles in a single suitcase. It may be to say that:

1. A caused the event to occur (was, in legal jargon, the "real", "leading", or "proximate" cause - not merely a causal condition, like the operation of the laws of gravity).

2. That A is at fault for what occured (he placed the hammer near the edge of the platform and it fell off; he flung it in the air as a joke; he aimed and threw it).

3. That A is answerable for what happened (he is subject to blame, and/or to execution, imprisonment, the payment of indemnity).

A can be held legally responsible for what

(a) he did not cause or

(b) he is not at fault for causing.

(a) He can be made answerable for the acts of his servants or employees, the misbehaviour of his dogs, the mistakes of his accountant.

(b) It may well be that A would not be held to be at fault for any of the above-mentioned acts which he did not cause, but in addition he may be held answerable for what he did indeed cause, but was not at fault for causing. Thus, e.g. A sold the drug which, misused by C in violation of A's instructions, killed B; or A puts up the road sign which caused B to take the highway

on which, because a bridge collapsed, B is killed; or A ordered B to come down from an icy structure, and on the way B slipped and was killed.

A may be held legally answerable for what he did or did not cause, and for which he is or is not at fault. Therefore to determine whether A is answerable for B's death, it is enough to determine that he caused it and/or is at fault for it. It is the retributivist position that fault is both necessary and sufficient ground for answerability. There does not seem to be any single utilitarian position. If there is utilitarian value in strict liability, and if strict liability can be interpreted so strictly that there is no fault left,[30] then fault is not - on utilitarian grounds - a necessary condition of answerability. In any case, it is not sufficient.

The argument against the institution of legal punishment based on the premise that no one is (or very few people are) responsible for crime, needs, then, a great deal more development than it has received. What is meant by saying that no one is (or few are) responsible for crime? It cannot be meant that people are not responsible in the causal sense of that word. Nor can it be meant that they are not answerable: it is surely not being denied that people are in fact held responsible (liable) for certain events. It must be in the sense of the imputation of fault. The contention is, then, that no one is (or few are) at fault for the violation of criminal laws. But if this is what is meant, is the discovery

in question properly regarded as a scientific discovery? It is hard, in the first place, to know how far the discovery extends. As noted above, in principle any kind of deed could be prohibited or required by law. So, in principle, it would follow that no one is (or few are) at fault for the commission of any deed whatever. Secondly, it is generally conceded that the question whether or not a person is at fault is a moral rather than a scientific question (whatever may be the grounds on which such a distinction is made).

Even supposing we should grant that it has been "discovered" that no one is (or few are) responsible (meaning at fault) for his crime, then it does not follow immediately that no one should be punished. For what must now be shown is that only those persons who are at fault should be punished. This is a premise which retributivists would accept; but utilitarians might not accept. It has been generally overlooked, I think, that the attack on the institution of legal punishment under discussion hereby assumes a basic premise of the retributivistic justification of that institution, even though it is the retributivist view of punishment (assumed incorrectly to provide its only support) which is at the same time attacked. But since no clear sense has been given to the "discovery" in question, it is not clear what we are conceding, even for the sake of argument.

We have tried to show, so far, that:

(a) the scientific status of the "discovery" that all (or most) men are not responsible for their crimes is

questionable and

(b) the assumption that there shall be answerability only where the act is caused by the agent and/or is his fault, is also questionable.

Perhaps these difficulties are surmountable. Suppose that the "treatment" advocate recognises and accepts his agreement with the retributivists that fault is a necessary (if not sufficient) condition of answerability. We have pointed out the debatability of this assumption, and the absence of its defence in the "treatment" position. But it could be recognised and defended. Suppose he also retreats from his position that the narrowing of the area of responsibility is a "scientific discovery". What would remain? Much which is worthy of careful attention.

The advocate of "treatment" would then frankly admit that his position is primarily a moral one, and not something which he knows on scientific grounds to be correct. What he does still claim to know scientifically is that all or most crime is committed by persons in some way deficient. His moral contention is that this deficiency constitutes an excuse for the commission of the crime; the crime is not therefore that fault of the person committing it; and punishment would therefore be unjust.

There must then be offered affirmative grounds for the substitution of treatment for punishment in most or all cases. What would have to be shown is that the deficiencies in question are such as are likely to respond to treatment, and that the appropriate treatment is known and could be made available.

Finally, it would have to be shown that, granting the treatment is available, the principle that all or most criminals should be treated can be defended against charges of injustice likely to arise.

It will be advisable at this stage to list some of the difficulties which this more candid and carefully stated "treatment" position would have to meet.

1. What are the deficiencies suffered by all or most criminals?[31]
2. Since, in principle, any description of deed can be prohibited or enjoined by law, and crime consists in violation of law; is it contended that the deficiency in question is shared by everyone? If so, in what sense is it a deficiency?
3. Would a "deficiency" shared by everyone, or almost everyone, constitute an excuse?

Mistake of fact, accident, coercion, duress, provocation, insanity; and infancy are excuses which are accepted in criminal law as excluding or reducing liability to punishment. If infancy, for example, is extended to include all but senile persons (as senility is presently understood), would it then be an excuse? To say, Yes is to abolish punishment. But is the decision to abolish punishment to be made on this ground alone? And what would it mean to treat all or most people as if they were infants - or insane, not only in the courts but in every day life? And if the distinction is not extended to every day life, what happens to the contention that

the deficiency in question excuses by showing that the person in question was not at fault. Is treatment necessarily more just in execution than punishment? Suppose that Menninger's proposals had been accepted. Would there be no ground for complaints of injustice on the part of criminals restrained against their wills for (sometimes unpleasant) treatment until the (sometimes difficult to define) deficiency in question is removed? Would it be possible in such cases to distinguish between treatment and punishment?

ii

The practical question whether we are to go over entirely to such a system, as has been suggested, or whether to extend such an approach to law-breakers much further than it is at present thought appropriate by the officers of the law itself, as many have urgently demanded, is a decision that must be based not so much on the availability or non-availability of certain scientific facts about individuals - though some facts will, of course, always be relevant to such a decision - but on the willingness to be swayed by certain <u>values</u> rather than others.

The essential fact about treatment is that a man is <u>passive</u> under it, and, in so far as the treatment we are considering is made mandatory, as it must be if it is to replace punishment, the patient has no choice about whether or not to submit to it. The one who is thus treated is in the power of his 'healer', who is supposed to know what is

best for his patient and has the authority to see that his prescriptions are carried out. The law-breaker under treatment is thus in much the same position as a young child in the hands of its parents. In so far as the reason for his treatment is that he is not responsible for the law-breaking he brought about he must also be regarded, in significant respects, as a helpless patient and therefore in many cases deprived even of the freedoms usually granted to quite young children. There is thus, as many have pointed out,[32] something essentially degrading about compulsory treatment (even if the person himself voluntarily submits to it); to be handed over or to surrender oneself so fundamentally to the will of another, however kindly one is treated, amounts to a kind of suspension of a man's essential humanity, his human dignity, and is therefore a prima facie moral evil.

On the other hand the driving force behind attempts to substitute treatment for punishment is basically humanitarian. There can be no doubt that many criminals, especially 'recidivists', exhibit a kind of helplessness in the face of temptation; born and brought up as many of them are in squalid and loveless homes, surrounded by poverty, unemployment and ill-health, poorly educated and subjected at an early age to criminal tendencies - is it any wonder, we may feel, that they take to crime?[33] Wouldn't we do the same? There seems something inevitable about the biographies of such helpless people. How could they possibly help doing what they did? Wouldn't it be kinder, we feel - as well as better for society - to 'help' them in some way, rather than punish them yet again?

If they are no longer amenable to ordinary education, isn't there something we can do <u>to</u> them to make them forsake crime and become happy and useful citizens?

If some criminals seem the feckless victims of their environment and upbringing, others seem to be at the mercy of powers and forces in themselves which they cannot control. Some people are assailed with overwhelming desires to steal from shops, articles they cannot possibly want or need; others feel they will burst unless they smash something or someone for no reason at all; others are overpowered by uncontrollable sexual urges to rape and murder. Such lawbreakers bemoan their fate, wish they were different, but can, it seems, do nothing about it. They feel quite unable to shake off their insatiable longings or insistent desires, which demand fulfilment in the most direct way possible. How can people cope with the strength of such feelings, we ask? If they seem unamenable to punishment are we not bound to try and treat them? We look back with horror at the swagery of the early ninteenth century penal code and fall over backwards to try to understand and sympathise with such helpless victims of themselves or their chemistry.

The driving force of such propposals is, as I said, undoubtedly humanitarian. Yet linked with it is a failure or a refusal to face the existence of moral evil. This seems to be one of the most serious problems of morals and for moral philosophy in a secular age. Christianity could 'explain' evil to some extent, particularly before the devil was demythologised. Securely encased in the armour of faith a man

might shudderingly contemplate the evil in himself (whose 'prisoner' he frequently felt himself to be) and in others and recognise it for what it was. But in our present naked-ness it seems to be too much for us. Only when we are forced to confront it can we really take it in. Pamela Hansford Johnson's admittedly highly journalistic book 'On Iniquity'[34] is an instructive lesson in this respect. Many people believed that Ian Brady and Myra Hindley, the perpetrators of the unbelievably horrifying 'MOORS' murders, simply must be mad. How could they otherwise have come to do such unspeakably appalling thing? Miss Hansford Johnson was asked to attend much of the trial of these two and write up her impression afterwards. She thus had the opportunity of observing them over many successive days. In spite of the fact that she, and many others, had expected to find them mad, she could not, when faced with the reality, see them as such. Nor could the other attendant journalists she spoke to, or the police who had to guard them during the trial, or even those who conducted their defence. The predominant experience of all those who came into contact with them was a sort of 'spiritual evil' emanating from them, especially the woman. But what is significant here is that only when actually confronted with the two could Miss Hansford Johnson and her colleagues accept this. She herself admits that she had once thought that all murderers 'must' be mad, and many people would include other types of serious crimes. Yet this is an age when she witnessed Belsen and all the other iniquities

connected with the Nazi and other totalitarian (and also democratic) regimes. It is obviously completely irresponsible to write off all exterminators and torturers and their 'superiors' as made or insane. Moral evil exists - and, what is perhaps even more important in the present argument - it exists in the squalid and sordid crime of the petty criminal, not only the spectacular abominations of the dictator.

We must next recognise that concepts of mental health, of sanity and insanity, are themselves inescapably normative. It would be absurd, of course, to maintain that 'madness' is merely a social fiction, a device for putting threatening deviants out of action, even though it can be, and in some countries is, exploited for such ends. That is, madness also 'exiists', however hard it may be to define - though it is clearly conceptually connected with some lack of responsibility for one's own actions. On the other hand there is no hard and fast line between the sane and the insane; many men judged to be in some way or other insane in contemporary Britain would neither have been so adjudged here in Victorian times nor would be today in many other countries of the world. There is an indeterminately large zone where judgements are bound to be disputed. However, it is often said that it is new 'discoveries' that account for the change in this country. Such talk suggests that, thanks to better diagnosis, we are now better at finding out who <u>is</u> insane (or psychotic, or neurotic or both). Certainly new behavioural

'syndromes' may be isolated and named, which are associated with an apparent lack of ability to cope in one way or another. But what is in fact happening is that we are simply adding more of the 'disputed' territory to the empire of insanity. And the practical effect of such action is the benevolently inspired refusal to hold people accountable for the plight whatever it is, that they have got into.

Now, as I have already made quite clear, it cannot be denied that some people are insane and, to a very great extent, not responsible for much of what they do. And yet it is also as certain as most things can be that some people are not insane, that some people are responsible for what they do. For example, I cannot possibly deny that I myself at least, am responsible to a very great extent for what I do and have done; and I would be absolutely astonished if the reader did not also say the same about himself. On the other hand, there are circumstances in which even the agent himself comes to deny his responsibility. Since this phenomenon is so important today we must examine it fairly closely by means of an example.

Suppose that a man becomes convinced that his marriage has irretrievably broken down. He leaves his wife and family and goes to live with another woman. When the first rapture of his new freedom becomes muted and he begins to take serious stock of himself and his position he will, if he has not already done so, feel the need to justify his action. He knows that he has committed at least a prima facie moral

evil, and perhaps feels occasional twinges of guilt about it. Therefore he needs to represent his action as either morally justified or, at least, as one he could not help doing under the circumstances, and hence one for which he cannot be <u>blamed</u>. In either case he has to try and deny his own responsibility for the situation between him and his wife having developed as it did. If he looks in the right place he will find many people in like or similar circumstances, or people who are sorry for him but do not know the whole situation, or even professional and semi-professional 'counsellors' who are ready to encourage or confirm him in such ways of seeing it. He will talk about the difficulties of his childhood, the perhaps still unresolved problems of his adolescence and the lack of understanding of his wife. His whole past will be spread out, stage by stage, every step seeming to lead inevitably and inexorably to the sudden and irreparable cracking-up of his marriage. If he has complete freedom to choose the members of his social circle he will be gradually confirmed in his view that he was not responsible for what happened, or, at any rate, that he took the only action he could have taken under the circumstances. Characteristically, he will shift between these positions according as he dwells on his past or sketches out his future, as he feels now master of his fate, now a powerless victim of circumstances. But perhaps as time goes on he becomes more and more disenchanted with his new position. He feels more and more guilt,

which, maybe, he projects outwards in the form of hostility towards those who surround him. Gradually, though, and often at a less fully conscious level the conviction grows on him that he has made a terrible mistake. Now when his new friends tell him that his guilt is irrational, that to return to his wife would destroy him once more, that he <u>had</u> to leave her, their words gradually take on a hollow ring; they seem false, and, though they still tempt him, he feels he has the power to see through them. Soon he is convinced of his own wrong. He goes back to his wife, who is still patiently waiting, and they gradually take up their life together again. He now sees things totally differently. How could he have shirked responsibility for what happened'? His past is still what is was, though now he will place the emphasis differently; but how could he have been so naive, so craven, as to imagine himself its prisoner? What if he suffered in childhood, if his wife 'did not understand him'? He has a duty to his family as well as his wife. How could he have so juggled with their lives? He will <u>take</u> responsibility henceforward for his actions. He sees that he cannot shuffle it off. Perhaps he now also realises for the first time the incredible seriousness and significance of moral choice, and with this realisation goes a new understanding of human dignity and worth. Not that he can wholly welcome this new dignity. There is a certain coldness and austerity about refusing to surrender responsibility for one's actions; in contrast to the warmth and snugness of the 'we are all fellow victimes of life' syndrome it may have a definite unattractiveness. Nevertheless, from his new perspective, he could not possibly see his actions as inevitable or not his fault. This,

at any rate, could never be more than the expression of a passing mood. He has now seen too much.

What must be stressed above all is the strange double - sidedness of the idea of responsibility. A house looked at from outside is still recognisably the same structure from within, even though the front and the interior are structured differently. We have to adjust, to think hard, to go back and have another look, but in the end we feel satisfied that we are dealing with one and the same object. Responsibility is not like this. From outside it seems to be a sort of capacity or power - a psychological phenomenon. We look for the presence or absence of certain features. Does this man know the difference between right and wrong? Did he know what he was doing when he did it, and that it was wrong? Were there features of his past life that would make it extremely likely that he would do such things? Are there features of his brain or bodily chemistry that would make it difficult for him to control himself? From inside, however - and, of course, the fact that we can never be both inside and outside the same 'house' is what causes all the trouble - things look quite different. From here responsibility looks more like a decision, a deliberate act of the will. We do not scan an object for features but ask; "am I going to accept responsibility for this"?, am I going to allow myself to be treated as a mere victim of circumstances or am I going to assert my "human freedom"? In so far as we then strain from inside to take the outside position we seem already to have lost our first essential insight, which can come to seem the

relic of a bygone age. Yet something may happen, it may seem, to bring us to ourselves. The original inner view may come to seem by far the most authentic, the attempt to take the outer, the frentic footling of 'other - directed' man.

On the other hand, if we look at the outer approach again we see that it does, after all, have a link with what might appear to be the more genuine inner one. For the 'inner' question: 'am I going to accept responsibility?, if it is a serious question, must surely be sometimes answered 'no'. If it is a question of whether I am going to take responsibility for catching a bout of 'flu' which lays me up for a day or two, there is clearly something pointless about answering 'Yes'. Such a man has ignored the facts about 'flu'. From the outside, too, a man's concern (for example a judge's) will be in whether he ought to ascribe responsibility to the man, whether he ought to hold him responsible - and, of course, he cannot do this without facts. The crucial question obviously is 'which facts?' Some facts are certainly relevant. A traditional list of excuses gives a fair example. We are under pressure today to make more and more facts relevant. Yet from the 'inside' this may appear increasingly absurd and, indeed, menacing, since it threatens the individual's autonomy and dignity as a person (though it also offers him a rather insecure asylum from his own guilt).

Let me try to put this difficult issue as starkly as I can. Fundamentally, I think it is an issue between what we

may call 'rationalists' and 'intuitionists'. Rationalists argue like this: 'We know that not everyone is responsible for what they do. Some facts are admitted by all as obliging us not to hole someone responsible for a particular action. More and more facts are being accepted as relevant to such an issue. How then, in view of the difficulty of saying precisely what responsibility is, can it be denied that ultimately we shall discover that fewer and fewer people ought to be held responsible, and ultimately that no one should?' The rationalist, of course, has the advantage of being able to appeal to scientific, that is, publicly 'available' and inspectable facts. The 'intuitionist' must counter thus: 'Irrational though this may seem, the process of discovering such relevant facts must stop somewhere. After all, millions and millions of years ago nobody (presumably) was responsible for his actions in the sense that he could legitimately be held to account for them, since there were no persons. Persons must have 'emerged' from non-personal beings and 'responsibility' must have emerged with them. This must have been a gradual process and one which is admittedly, very hard to understand. But responsibility does exist. I am responsible for what I do. And it is an eminently responsible assumption that most other people I meet are also. The intuitionist's trump card, his certain knowledge of responsibility in his own case (which is certainly compatible with his inability to give a complete analysis of it), is, unfortunately for him, private and, though

'empirical', 'unscientific'. He has to rely on the honesty and commonsense of other philosophers in acknowledging their own responsibility also.[35]

We must also add this to the intuitionist's case. It is good that people should accept responsibility for what they do. The readiness to do so is part of what we mean when we talk of human dignity. Also although we may not be able to say exactly what we mean when we talk of 'accepting responsibility', we all know in a rough and ready way what it is. Among other things, certainly we mean that we can be appropriately blamed or punished for what we do wrong, and praised or rewarded or thanked for what we do that is good, or at any rate especially good. But we can only accept responsibility for what we do and not relapse into the condition of passive victims of events if we live in a climate that is conducive to such a way of looking at things (see the example above). Indeed, unless children were educated in such an atmosphere, it is doubtful if they ever would be able to regard things like this. They have to be treated as responsible, or to be treated as a little more responsible than they actually are, in order that they should be able to advance as far as they can towards full responsibility. It is thus essential for a society which values human dignity (and what society can not, at least to some extent?) to encourage everyone to take responsibility, even when we may sometimes feel in the given case a great reluctance to blame

or condemn. Life itself seems sometimes unfair to people. But, as we have seen, certain expectations must be held and met if society is to hold together; one of the major things we must assume of each other is that, except in certain well-known sorts of cases, people <u>are</u> responsible for their behaviour.

On the other hand we have the humanitarian claim. In feeling sorry for certain accused or convicted persons we respond to a claim that is genuinely moral. Many people in such a position are entitled to our compassion and sympathy. And in a 'Welfare State', where people rightly come to expect that some of the burden of living will be lifted from their shoulders, it becomes, perhaps, increasingly hard to bear the burden of responsibility too. In its wholly admirable concern to lay the foundations generally necessary for human dignity (though human dignity can and does exist elsewhere without this help) by trying to ensure that everyone is fed, housed, tended in sickness and old age etc., a society such as this perhaps inevitably draws attention away from human dignity onto these desirable but still lowly foundations for it. It is thus made considerably harder for those who find it <u>extremely difficult</u> to avoid temptation, or to exercise self-control, to do so, and correspondingly easier to convince others - and, indeed, oneself - that one could not help doing what one did; the way is thus open for construing many cases of moral weakness, or even cunningly disguised viciousness, in cases, of 'diminished responsibility',

or insanity. But it is necessary to face what one is doing in thus exonerating people. One is making it much more difficult for them, and indirectly, everyone, ever to accept full responsibility for their actions, or certain of their actions, in future. And thus it is, perhaps, a short-term humanitarianism after all, or rather a humanitarianism that is inspired by certain (more material) values than by others (which are more directly moral and spiritual).

However, we should not forget, in addition, that the humanitarianism or benevolence which is tending to incline public opinion in the direction of enlarging the area where responsibility is thought to be diminished is also inspired by compassion or concern for society <u>in abstracto</u>. Now that the death penalty is abolished, society is faced with the problems of what to do with obviously dangerous criminals whom no longer prison sentence (short of a near-life or actual life term) is statistically likely to reform. There is a great temptation to treat such men, instead of punishing them, to protect society, that is, to deal with them in such a way that their putative status of autonomous, if immoral, human beings is disregarded. Certainly society needs to be protected. But from what? Surely not only from being raped, assaulted or killed, dreadful as these things are, in the persons of its members. Society also needs to be protected from its own dissolution and decay. For the <u>tendency</u> to treat rather than punish is necessarily bound up with tendency to diminish the sense of responsibility of all the members of society, without which society cannot long exist.[36] If we take 'the protection of society' as a legitimate reason

for treating rather than punishing, we do, just as in the matter of the 'welfare' of the individual, try to promote an end by means of a kind of action, which, if used beyond a certain limit, must be counter-productive.

The question of 'treatment' as an alternative to 'punishment' is thus intimately linked with the question of 'responsibility', which is in turn essentially bound up with a major moral - political question: 'what sort of people and what sort of society do we wish to be?' To throw out the institution of punishment altogether and substitute treatment wholesale would, I have tried to show, amount to a complete rejection of the values of human dignity, and this would bring about a relapse into barbarism and chaos. But, much more to the point, so would a progressive extension of the use of treatment. There is probably no point at which psychologists, qua psychologists, will be prepared to say "beyond this point, everyone is responsible for his actions". All they can do is to help draw various lines, which are alternative possible sticking points. It is then a politico - moral matter to decide how far we should attend to the claims of human dignity and retributive justice. The decision is extremely difficult, but it seems to me that 'treatment' detracts from the dignity of the human being. If we 'treat' a man we are regarding him as incapable of rule awareness.

NOTES AND REFERENCES

CHAPTER NINE

1. Wootton, Barbara., Social Science and Social Pathology, London, 1959, Chs. VII and VIII. Crime and the Criminal, London, 1963.
2. Waelder, R., "Psychiatry and the Problem of Criminal Responsibility" 101 University of Pennsylvania Law Review 378, 384 (1954).
3. Guttmacher, M., "The Psychiatrist as an expert Witness" 22 University of Chicago Law Review 325, 328 (1955).
4. Quoted from Wei'Hofen, Henry, The Urge to Punish, London, 1957, p.7.
5. Royal Commission on Capital Punishment Report. 1949-53 London, 1953.
6. Wootton, Barbara, op.cit., p.239-240.
7. See Wootton, B., Social Science and Social Pathology London, 1959, pp.211-214.
8. Broad, C.D., Five Types of Ethical Theory, London 1930, p.204.
9. Sidgwick, H., The Method of Ethics, London, 1962, p.71.
10. Hook, S., "Necessity, Indeterminism and Sentimentalism" in Determinism and Freedom (Editor Sidney Hook) New York, 1961, p.190.
11. Encyclopaedia of Religion and Ethics. Vol.3. New York 1910, p.149.
12. The Westminster Confession, Ch.3, 1.
13. Ibid., Ch.9, 1.

14. Locke, J., Essay Concerning Human Understanding Book II, Ch.XXI.

15. See Campbell, C.A., "Free-Will as Pseudo-Problem?" in Mind, N.S., Vol.IX (1951).

16. I do not wish to imply that all psychiatrists and criminologists, or even the majority, would defend the position described below. Nor do I wish to restrict the position to psychiatrists and criminologists. A few lawyers and jurists, psychologists etc. have taken up something very much like it. But the position described is philosophically interesting, for it represents one possible extreme on the question of criminal responsibility and answerability.

17. Gregory Zilborg, The Psychology of the Criminal Act and Punishment, New York, 1954, p.80.

18. Walter Bromberg., Crime and the Mind, Philadelphia, 1948.

19. Ibid., p.177.

20. Benjamin Karpman, "Criminality, Insanity and the Law", Journal of Criminal Law and Criminology, 1939, p.584.

21. Ibid.

22. H.E. Barnes and N.K. Teeters, New Horizons in Criminology, New York, 1943, p.952.

23. Ibid., pp.952-53.

24. Carl A. Menninger, "The Psychiatrist in Relation to Crime," American Bar Association Reports LI (1926) pp.751-57.

25. Edward De Grazia, "Crime Without Punishment: A psychiatric Conundrum", 52 Columbia Law Review 754 (1952).

26. Jerome Hall, General Principles of Criminal Law, 2nd Ed. Indianapolis, New York, 1960, ch.13.

27. Cf. Hall, Ibid.

28. Perhaps the historically most influential presentation of this argument is in a book published in 1896, and widely quoted: H. Maundsley, Responsibility in Mental Disease (New York and London). In his book Maundsley (a professor of Medical Jurisprudence, at University College, London) offers a variety of case histories especially of murderers and suicides to show that a man may, while having and acknowledging the wrongness of his deeds, nevertheless be unable to restrain the impulse which "forces" him to do it. In these cases the criminal will typically be quite sure in every respect that he feels a powerful urge to commit a certain sort of crime. Maundsley considers the person who possesses such an urge (too powerful to be kept always under control) as mentally diseased. He strengthens his argument by showing that very often such urges are "substitutes" in later life for epileptic seizure (admittedly a disease) in early life. He also urges that persons afflicted by such urges often are descended from mentally deseased parents. (cf. especially, chapters 4,5, 7 and 9).

29. Knaggs, Responsibility in Criminal Lunacy, 1854, p.69 (quoted in Hall op.cit., p.487).

30. Wesserstrom, R.A., "Strict Liability in the Criminal Law", Stanford Law Review, XII, 1960, pp.730-45. Re-printed in Herbert Morris, ed. Freedom and Responsibility, Stanford University Press, Stanford, California, 1961, pp.273-281.

31. It should be noted that the nominations for these deficiencies have changed with the times.

32. C.S. Lewis, The Humanitarian Theory of Punishment, repr. in Readings in Ethical Theory ed. W. Sellers and J. Hospers 2nd Ed. N.Y. Appleton - Century - Crofts, 1970. Also H. Morris, 'Persons and Punishment', The Monist, 1968. These two have made the point particularly clearly and forcefully.

33. Though it still sometimes needs to be stressed that a great many people subject to similar experiences do not take to crime.

34. MacMillan,, London, 1967.

35. It needs to be emphasised once more that this idea is quite compatible with feeling oneself to be, on occasion, the 'slave' of the evil habits of action and thought.

36. It could also be transformed into a society governed by an oligarchy or dictator who denied responsibility to any deviants who challenged their self-interested rule. This is in many ways a much more sinister and plausible possibility as the treatment of many political opponents of the ruling elites in certain parts of the world show.

CHAPTER TEN

THE CASE FOR PUNISHMENT: A FINAL VIEW

1. A RECONSIDERED VIEW OF PUNISHMENT IN LAW
2. RETRIBUTIVE JUSTICE IN EDUCATION.

1. A REFORMULATED VIEW OF PUNISHMENT IN LAW

We begin this final chapter with a quotation by Nietzsche:

> "Punishment, as rendering the criminal harmless and incapable of further injury - Punishment, as compensation for the injury sustained by the injured party. Punishment, as an isolation of that which disturbs the equilibrium, so as to prevent the further spreading of that disturbance. - Punishment as a means of inspiring fear of those who determine and execute the punishment. - Punishment as a kind of compensation for advantages which the wrong-doer has up to that time enjoyed (for example, when he is utilized as a slave in the mines). Punishment, as the elimination of an element of decay (sometimes of a whole branch, as according to the Chinese laws, consequently as a means to the purification of the race, or the preservation of a social type). - Punishment as a festival, as the violent oppression and humiliation of an enemy that has at least been subdued. - Punishment as a mnemonic, whether for him who suffers the punishment - the so-called, "correction", or for the witnesses of its administration. Punishment, as the payment of a fee stipulated by the power which protects the evil-doer from the excesses of revenge. Punishment as a compromise with the natural phenomenon of revenge, in so far as revenge is still maintained and claimed as a privilege by the stronger races. Punishment as a declaration and measure of war against an enemy of peace, of law, of order, of authority, who is fought by society with the weapons which war provides, as a spirit dangerous to the community,as a breaker of the contract on which the community is based, as a rebel, as a traitor, and a breaker of the peace."[1]

In the above passage Nietzsche attempts to provide an ironic summary of the multitudinous functions assigned to punishment at one time or another. Debates on the theories of punishment tend to be confused by the way associated images of dire penalties swim into the minds of some of the debators. Dark shadows of hangings, electrocutions, firing squads, assorted floggings of children, and sundry mutilations take over the field and help win the day for anti-punishment sentiment.

The power of state punishment to alter or reform is largely dependent on its being seen to be independently just, but this must mean more than that a particular sentence is seen to be consistent with established practice, or that the defendant had a fair trial and the degree of his moral guilt was wisely assessed and so on. Ultimately the justice of punishment must also rest on its being regarded as deserved, on its being the appropriate or proper or correct way to deal with a malefactor.

It has already been pointed out that deterrence and reform are in general 'workable' in the long run when they are treated not as external or extrinsic ends to which punishment is regarded as a useful means, but in some sense internal or intrinsic parts or consequences of the punishment itself. A just punishment must deter someone; the fact that so many convicted criminals never appear in the courts again shows clearly, too, that some kind of reform has been achieved. It would seem pointless to deny this. We may also clearly endourse Ewing's claim that punishment has an educational value in itself - apart from its provision of the opportunity for reform (though it is not easy to distinguish such an 'educational' from a 'morally deterrent' or 'reforming' function).[2] Punishment also tends, as de Jouvenel[3] points out, to strengthen the mutual trust, confidence and security of society; and indeed, we may be sure that unless human nature radically changes, the state could not continue to exist without it. The law, to be sure,

must assume a certain level of rationality in all those directly responsible to it. But the criminal, in willing an injustice ipso facto seems to replace the prohibition he has ignored with its contrary. In ignoring a man's right to his property or person the criminal seems in so far as we have to see him as a rational being, to be setting up the principle that a man's right need not be respected.

Thus Hegel writes:

> "We punish a criminal because his action is the action of a rational being and this implies that it is something universal and that by doing it the criminal has laid down a law which he has explicitly recognised in his action and under which in consequence he should be brought as under his right."[4]

Punishment can thus be seen as the criminal's act 'returning on himself', as the "absurd conclusion" of an argument whose "absurd premiss"[5] the criminal must be taken to have voluntarily accepted. Punishment thus appears as the logical consequence of crime.

We may also associate with this the Hegelian notion of punishment as annulling the crime. As the action of a rational being with an appreciation of justice and equality, a crime can be likened to an assertion of a new moral principle. In robbing someone's house it is as though he has proclaimed championing a new and rival ideal of right behaviour. As such it must be firmly rejected. But, in so far as I have failed hitherto to listen to the reason of speech, my assertion must be countered by the unignorable message of painful counter-action. Thus the punishment is the explicit counteraction of right. In Bradley's[6] words: it is the principle

of wrong. It is an assertion for all to hear that the principle embodied in my action is false and must not stand as a precedent since to let it stand uncontradicted amounts to acknowledging it as a new and valid principle of action.

There is also the idea of punishment as the "emphatic denunciation by the community of crime".[7] This conveys the idea that in punishment the community gives vent to its outraged and affronted feelings. The punishment, that is, is an expression of resentment, indignation or anger at the breaking of contract and the shattering of expectations. In this way the individual 'wronged' may get 'satisfaction' from the contemplation of such a response on the part of the community. And it will be felt, too, that the existing balance of welfare, violently tilted by the unjust action of the criminal, is now restored - or, in the absence of damages or recovery of stolen property and so on restored to some extent. At least the criminal has not been allowed to 'get away with it'.

Max Scheler[8] also stresses that punishment restores the possibility of relationships between the criminal and society. In this regard punishment can do away with the barrier of communication which wrong-doing sets up. The offender is expected to recognise his guilty -conscience and repent accordingly. This is perhaps the most basic function or 'justification'. It is not being implied that such a 'justification' will or can carry much weight in an open and 'impersonal' society. Most criminals are unknown to their victims; nor do the latter normally have the least

desire to establish (since they cannot usually establish) relations with their injurers.

But what is the status of these closely connected 'justifications'? It will be immediately apparent that they all, like the 'justificatory' appeals to deterrence and reform, in some way presuppose the justification of the practice. No punitive 'argument', in my view, can possibly be valid if it jars with a sense of justice. Justice must be observed as an important criterion of our practices. Again we may rightly ask why 'wrong' should be 'righted' in this form? Maybe the criminal is temporarily deaf to a responsible appeal; let us wait then until he has calmed down or come to his senses. Furthermore, why do we think the criminal or anyone else will see the punishment as a counter-assertion, and not as a vicious attack he is entitled to resist as far as he can unless he already grasps the justice of the stroke? It is clear, too, that no denunciations in such painful form, no expressions of outraged feelings, no enjoyment of satisfactions, has any moral legitimacy unless the feelings, denunciations etc., are somehow already seen to be justified and appropriate to the situation. And all this applies equally to the idea that we should see the justification or function of punishment in its power to re-establish communication within the group. But unless the punished individual's natural resentment were kept in check by the feeling that he deserved his treatment punishment could not do this.

More importantly, however, the central rationale of punishment is that it is the culminating refinement and modification of the demand, and the answering of the human need for expiation. A review of the arguments may be likened to the taking of various vantage points to look at a large and complex building. Seen from one side the building may not reveal itself to us as a whole. Its structure or form may defy our understanding. The 'argument' may still not be convincing. Seen from, elsewhere, the whole edifice may lay itself open to our grasp. We now view it as a whole, and the parts in their proper relation. Another person may still not quite comprehend it. He needs to move round still further to where a fresh perspective, which somehow answers his particular way of looking at things, affords him the understanding he still lacked. He now sees the force of our appraisals, appreciates the majesty of the structure. And any of these 'views' might have brought illumination with it. However none of us really understands the building completely unless we also take in its lofty and subterranean foundations. Only if we fully grasp the way the domes and pinnacles are upheld from the blind and earthly depths will we have a complete understanding. Certainly, any of the aspects may spark off such an awareness. They may invite us to go in the building in a certain way, but unless they lead to a grasp of the whole, supported on its base, we may still not be convinced.

Our problem in making a convincing case for the justification of punishment, then, rests with the full and complete

'display' or 'setting out' of the practice and its place in life. We need to see it from many aspects; we need to study its origins and look at its near relations, we have to get as full a grasp of it as we can. It is not enough to encompass the problems of definition; we need imaginatively to grasp its place in human life too, and this means filling out the picture by means of example, description and metaphor. We have, in fact, to see its necessity.

It is also claimed that the really crucial insight about punishment is that it is an end in itself. The fact that the activity of punishing may still sometimes seem pointless is due to the fact that our awareness of the value of expiation - however justly met - is wavering and uncertain. We still hanker after the responsibility of a rational extrinsic purpose that we have a right to believe will be served by our act instead of the 'trusting' belief that good may come of it. For it must not be forgotten that punishment involves causing a man to suffer. It definitely goes against the grain to submit to the 'demands' of something which appears to contradict a cherished insight and whose rationale we cannot fully divine. It is humbling to acknowledge our limited powers.

Nevertheless, in another mood, perhaps non-philosophical one, we do not find this absurd. This whole vocabulary of 'desert' seems to testify to something definitely positive here. We can, when immersed in practice, feel upon all question that the ruthless and grasping set of villains in

the dock before us thoroughly deserve the three-year prison sentence they have just been given. And the same experience may accompany our confrontation with moral evil and injustice of all degrees of seriousness.

Though we may yet well be inclined to answer when our judgement is challenged as though 'because he deserves it' were an independent reason for punishing, to draw attention to desert in such contexts is in the long run to do little more than draw attention to the values one feels oneself compelled to respond to or help to justify, the practice - whatever they may be.[9] There is thus a tendency for this in truth perhaps **unanalysable idea**[10] to be filled with one's favoured justificatory content - though Ewing is surely right when he says[11] that the meaning of 'desert' is corrupted if referrence to consequences is introduced into its analysis. Atkinson's 'utilitarian' desert seems a contradiction in terms.[12]

'He deserves to be punished', on the other hand, does not mean the same as "taking everything into consideration, he ought to be punished". That is, it is not necessarily a final judgement of fittingness, or of what ought here and now to be done. We can, for example, certainly say of some ruthless property-developer whose unscrupulous business methods are just beyond the reach of the law, "he really deserves to be punished". We can also say that in one sense he deserved the treatment he received since he deliberately ruined his business rival out of sheer vindictiveness, but

that in another sense he did not, since he was not warned of the likely consequences of his action, and there was no consistency in his 'punishment'. Appeals to desert, in the general sphere of retributive response to injury, injustice and crime seem thus to be appeals to some aspect of justice that has an important bearing on the justification or otherwise of what is done. "He deserves to be punished" may thus sometimes mean something like: it is completely and thoroughly just that he be punished (that is, all just claims will be thereby satisfied). Or they may be ways of pointing to some aspect or aspects of justice which are being ignored or which could point to a contrary verdict did not other considerations of justice perhaps outweigh them. To say, 'he deserves his punishment' is not just to point to his morally guilty mind. It also presupposes the justice of expiation. The question about moral guilt, where retributive matters are concerned, is logically secondary to the question about the demands of expiatory justice. Only if this is settled does the question of moral guilt become relevant. Thus 'he deserves it', said of a man who has just been sentenced to a term of imprisonment does not really give an additional reason for the punishment over and above the reason that this sentence is required or recommended by the various claims of justice. It rather draws attention to the moral state of the man himself, focusing the attention on him rather than on the injustice brought about. Thus 'he deserves it' has a kind of penitential ring

about it which 'justice demands it' does not have, because the appeal to justice includes an implicit reference to the state of affairs brought about by the man (which could equally well have been brought about by an imbecile, or an act of God); the appeal to desert, on the other hand, draws attention primarily (though not exclusively) to the moral evil in the man's mind.

The fact, however, remains that appeals to desert do not absolve us from having to confront the sometimes apparent 'absurdity' of the demand for expiation. And clearly it is the unpalatability of this which has led to the great 'flight' from 'Retributivism' in the last century and a half. Not only this; it has led to the situation where philosophers have professed to be completely unable to see in retributivism any kind of justification at all, or to the interpretation of retributivism in terms of extrinsic purposes. It is, of course, obvious that if one's notion of a justification is confined to the production of forward-looking reasons one will come to such a conclusion. The only way to resist them is to insist on a far more faithful moral phenomenology the utilitarian-inspired school of thought has provided us with. We have to recognise that the facts of morality are simply 'given'; it is not a matter of trying to impose on it what we would like it to contain.

The defects of the utilitarian - consequentialist approach are especially clear in the matter of the punishment of the innocent. In spite of some strenous attempts to get round

on the idea by utilitarian or utilitarian-inspired philosophers it can surely not be denied that, on occasion, such an action might be 'justified' on utilitarian grounds. Ross, admittedly not a utilitarian, certainly thought so. He states quite categorically that in an emergency the state's prima facie duty to respect the rights of the individual may be overriden by its prima facie duty of consulting the general interest; the state, that is, may be justified in 'punishing' an innocent man "that the whole nation perish not".[13] Ted Honderich, too, whose utilatarianism is modified by the introduction of an independent principle of equality, can envisage circumstances in which a 'victimization' - the 'punishment of the innocent' man - would be the best thing to do under the circumstances. It seems to me, on the contrary that there must be something wrong with a theory which would lead to such a conclusion. One might well almost put it as strongly as this - that if there is anything at all of which one can be certain it is that punishing the innocent is always wrong. One does not have in making this emphatic denial, also have to deny that many 'good' consequences might be achieved by it. Some mad dictator might be thereby induced to spare a whole society from atomic destruction - and indeed, if knowledge of the matter were confined to the officials responsible for the deception, hundreds of thousands perhaps millions, of people might be consequently saved from death or horrible suffering; quite innocent of the 'price'

of their happiness. Nevertheless the officials responsible for the injustice would if they were morally 'alive' never shake off the conviction that they had done wrong in their condemnation of the innocent man. As we have already discussed the problems involving the punishing of the innocent elsewhere in this work that matter will not be pursued.

We must now turn to what has been called the 'separation of issues' thesis. This theory, in its various forms is an attempt to combine what are usually regarded as the 'strengths' of the utilitarian and retributivist approaches to punishment, while ignoring their weakness. The strength of retributivism has always been admitted to be that, in its insistence on what is done to the criminal, it has always ruled out the punishment of the innocent. Even utilitarians who have accepted that sole reliance on utilitarian principles does entail the legitimacy of this loathsome practice have done so with great reluctance, and with a great many ingenious attempts to show how unlikely it would be that the calculation would sanction such a practice more than very occasionally, if at all. The weakness of retributivism is clearly what we shall call its 'absurdity', its apparent irrationality. It is therefore extremely tempting to evade the absurdity by providing the institution of punishment with a forward-looking justificatory purpose - generally 'deterrence' and the community interest in security and general happiness - while, as it were, applying the general happiness principle across the institution of pu-

tribution' by the assertion that the question of who should be punished is a completely distinct question whose answer has to be justified by appeal to quite different considerations.

The question to raise however, is, why should the major questions be separated for the purposes of justification? It is not easy to disentangle the reasons given by Prof. Hart. In his preamble he[14] suggests that the current (meaning 1959) discussion is confused. There is, or has, a general lack of incisiveness and clarity in the public debate and, in particular, "some persistent drive towards an over-simplification of multiple issues which require separate consideration". We should not try to replace a "single value or aim (Deterrence, Retribution, Reform, or any other)" by "a plurality of different values .....as a conjunctive answer to some single question concerning the justification of punishment. What is needed is the realization that different principles (each of which may in a sense be called a 'justication') are relevant at different points in any morally acceptable account of punishment." But, again, why? The answer seems to be that there just is no one justificatory principle from which answers to questions about generality, distribution and amount may be derived. It follows that if we can show that there is we can ignore his suggestion that the issues need to be considered separately.

Hart is certainly right about the utilitarian attempt to derive morally acceptable answers to all three questions

from one principle. Even if, in consistency with our principle of utility, we did sanction the punishment of an innocent man, Hart argues, "we should be conscious of choosing the lesser of two evils and this would be inexplicable if the principle sacrificed to utility were itself only a requirement of utility."[15] But he goes on thus: "Similarly the moral importance of the restriction of punishment to the offender cannot be explained as merely a consequence of the principle that the General Justifying Aim is Retribution for immorality involved in breaking the law. Retribution in the Distribution of punishment has a value quite independent of Retribution as Justifying Aim. This is shown by the fact that we attach importance to the restrictive principle that only offenders should be punished even where breach of this law might not be thought immoral; indeed even where the laws themselves are hideously immoral as Nazi Germany e.g. forbidding activities (helping the sick or destitute of some racial group) which might be thought morally obligatory, the absence of the principle restricting punishment to the offender would be a further special iniquity; whereas admission of this principle would represent some residual respect for justice though in the administration or morally "bad laws". As far as I can understand the passage (is there a misprint for 'the' in the phrase 'breach of the law'? Otherwise it is not clear which law is being referred to). I think however that it means as follows: where the law itself is unjust (that is, where we have unjust laws), those punished in consequence of their breach do not

(fully) deserve their punishment; their punishment is (to a considerable extent) unjust. But they would deserve it even less, their punishment would be even more unjust, if they had not actually broken the laws in question. Certainly we may agree that different principles are appealed to in the matter of justifying a punishment but they are still all principles of distributive justice. It is not certain that Hart has proved his case at all where retributivism is called into play.

The same problem arises where he considers the question of the amount of punishment, paying particular and detailed attention to the matters of 'justified' crime, excuses and mitigation. Where the latter two are concerned, he argues convincingly that our intuitively acceptable practices cannot receive their rationale from a utilitarian 'General Aim'. But his attempt to show that retributivists are in the same case amounts to this: Retributionists (in General Aim) have not paid much attention to the rationale of this aspect of punishment; they have usually (wrongly) assumed that it has no status except as a corollary of Retribution in "General Aim".[16] This is all we hear about the retributivist case. Yet it is clear, that the heart of retributivism is its response to the various demands of justice. Hart himself goes on to argue that excuses excuse, and pleas of mitigation mitigate, as a matter of justice; and though he says that 'justified' crime is not punished because the policy or aims which in general justify the punishment of killing (e.g. protection of life) do not include cases such as this,[17]

it is absolutely obvious that it would be, on balance, unjust to punish under such circumstances. Where the normal or standard punishment for an offence committed under no special justifying, excusing or mitigating circumstances is concerned Hart[18] states that "the amount or severity of punishment is primarily to be determined by reference to the General Aim."[18] - that is, the public good. He also gives[19] one or two examples of how we are to understand this:"A utilitarian will, for example, exclude in principle punishments the infliction of which is held to cause more suffering from the offence unchecked, and will hold that if one kind of crime causes greater suffering than another then a greater penalty may be used to repress it. He will also exclude degrees of severity which are useless in the sense that they do no more to secure or maintain a higher level of law-observance or any other valued result than less severe penalties." But of course the two principles referred to in the first sentence, in so far as I understand them, almost certainly yield practical results which are also yielded by the retributivist principle of equality, the (symbolic) Lex Talionis. This indeed is invoked, though not as such named, by Professor Hart himself as a principle of justice which must qualify the pursuit of our (that is, Hart's) "General Aim."[20] In case we should think that he is invoking the Lex Talionis he says that the reason why we think that "Long Sentences of Imprisonment" would not be legitimately (i.e. justly) employed to "stamp out car parking offences" even though they might achieve

this end is "not because there is for each crime a penalty "naturally" fitted to its degree of iniquity (as some Retributionists in General Aim might think)"; rather "the guiding principle is that of a proportion within a system of penalties between those imposed for different offences where these have a distinct place in a common-sense scale of gravity."

The further principle of justice which Hart says must be taken as limiting the pursuit of a utilitarian General Aim is that of consistency. Any breach of this would, Hart rightly says, involved "some sacrifice of justice to the safety of society."[21] If we look back now to that part of a sentencing policy which, Hart claims, is justified by the utilitarian general Aim - the principle that "degrees of severity" are to be excluded "which are useless in the sense that they do no more to secure of maintain a higher level of law-observance or any other valued result than less severe penalties" - it should now be apparent that the two principles of Justice which Hart cites as limiting the pursuit of utilitarian aims give very little scope for the application of the principle. Any great reduction in the severity of the punishment for a very serious crime would be unjust even if it turned out that the 'deterrence rate' was the same as before, as this would either be unfair to those previously punished under the law, or to those who continue to be punished for offences of similar gravity or else be a matter of "confusing common morality or (of) flouting it and bringing the law into contempt."[22]

The refusal of Professor Hart to let the claims of justice be swallowed up by utilitarian principles also emerges most strikingly in his mention of three further principles which many people, he rightly claims, believe in, but which may, he warns, have to be considered "in the light of modern scepticism."[23] First, there is the idea "that the suffering involved in punishment is a return for the harm done to others: this is valued, not as the aim of punishment, but as the only fair terms on which the General Aim (protection of society, maintenance of respect for law, etc.) may be pursued." Secondly, there are the beliefs that a punishment is "not merely ...something useful to society (General Aim) but ...justly extracted from the criminal as a return for harm done" and that it is "a price justly extracted because the criminal had a fair ppportunity beforehand to avoid liability to pay." Thirdly, the system of criminal punishment "maximizes individual freedom within the coercive framwork of law." Not only does the individual have "an option between obeying or paying"; the present system (in which the existence of absolute liability is only tolerated in certain areas of life which are themselves, on the whole, entered by voluntary choice) gives the individual the opportunity freely to plan his life in the knowledge that he will not be inteferred with if he accomodates himself within the law.

One cannot but wonder why Hart finds it so necessary to refer whenever possible to the utilitarian "General Aim",

whose importance and scope are so progressively limited throughout the essay. One is indeed left with the feeling that his utilitarian General Aim is a kind of shield against the apparent absurdity or irrationality which we cannot help but see lying at the roots of an adequate theory of punishment. Indeed, the impression one gets from Hart's paper, I think, is of the comparative unimportance which he sees in the claims of utility as against the claims of justice. And this is exactly as it should be. Clearly it is unquestionably right that the state should concern itself with the public good. But this concern must, if it is to be morally justifiable, only very occasionally overstep the far more urgent and pressing claims of justice which themselves underly the institutionalizing of the otherwise almost inevitably unjustly handed pursuit of the justice of retribution.

We must now refer to the attempt to 'square' retributivism and utilitarianism - that of John Rawls.[24] He writes:[25]

> "Once the legislator decides to have laws and to assign penalties for their violation (as things are there must be both the law and the penalty) an institution is set up which involves a retributive conception of individual cases."

But this is ridiculous as an account of the matter. There is a difference between institutionalizing an ongoing and indeed 'natural' practice, and creating an institution, like a game, along with a set of rules to regulate it. But the 'rules' of the institution of punishment were already implicit in the informally regulated or unregulated practice of exacting retribution. And, granted the need to regulate this practice,

to make it more just, the question of what laws to have is not simply a matter of the legislator's free decision and calculation. To gain general acceptance any system of law should 'officialize' or 'sanction' at least the content of 'Natural Law'.

The issue of the purpose of legislation must now be faced. Are certain actions made or kept illegal because they are immoral, or are these things done to protect the public? If actions have the status of crimes purely because this protects society then this might be an argument to support some version of the 'separation of issues' thesis which would enable one to accept the obviously palatable parts of retributivism and not the unpalatable. This issue has been well and thoroughly discussed in what has been known as the Hart-Devlin controversy.[26] It seems to me, that Devlin's insight and argument are in most respects superior to Hart's. Devlin shows quite clearly that the criminal law and its administration in England presuppose the general principle that the law is concerned with morals and not just with the protection of the public - though he has no hesitation in accepting the latter as one of its concerns. He argues firstly that the law shows its concern with morality in the matter of sentencing. Though other considerations are admitted the degree of an offender's moral guilt is regarded as a very important determinant of the severity of the sentence both "in the gradation of offences in the criminal calendar" and also "by taking into account the wickedness in the way the crime is committed."[27] Hart,

of course, as we have seen, admits that moral considerations are important in sentencing but tries to block the implications Devlin sees in this fact with the distinction between the system of punishment "whereunder only harmful conduct should be punished" and the quantum of punishment. Devlin's own reply to this move, in agreement with the position argued above, is that these separate questions are a division, made for the sake of convenience, of the single question which is what justifies the sentence of punishment? He quite rightly adds "...there cannot be a law which is not concerned with a man's morals and yet which permits him to be punished for his immorality."[28] We may surely agree, on purely punitive grounds, that "the theory that the law may not be used to enforce morality as such" is inconsistent with "the theory that punishment under law may be adjusted according to the moral guilt of the act done."[29]

Devlin's second argument is that Hart's theory of legislation cannot account for the fact that, under criminal law consent is in general no defence. If the law really only existed to protect the public then how could it be justified in punishing a man who gave someone else what he asked for (for example, a lethal injection or in the case of a masochist a savage whipping)? Hart's answer is that the law here sees as its task to protect the public in a paternalistic way, by preventing actions which would be harmful to people, even if desired <u>sub specie boni</u>. But Devlin here presents Hart with a dilemma over the <u>extent</u> of such paternalism. A father

will not only be concerned for the physical, but also for the moral welfare of his child. But if the law is 'paternalistic' to this degree the principle of 'paternalism' becomes indistinguishable from that of 'legal moralism'. In protecting a man against corruption you are willy nilly concerned with morals. On the other hand, if the state's paternalistic licence is merely a matter of protecting the citizens' bodies, it is not clear what exactly justifies this unless it is moral principle: "It cannot seriously be suggested that, if there were no moral principle involved (in euthanasia), the law in a free country would tell a man when he was and he was not to die, obtaining its mandate from its paternal interest in his body and not in his soul. Or that in euthanasia the crime lies not in the moral decision to seek death but purely in the physical and no doubt painless act that causes it."[30] He points out, too, that all the reasons Hart gives in support of physical paternalism - people are not supposed to be such good judges of their interests as once was thought, their consent may be too hasty and ill considered, many likely situations are such as to cloud judgement, subtle pressures may be unknowingly exercised, etc. - apply just as strongly, if not more so, to questions of morals.

Lord Devlin cites eight specific crimes which seemed to him inconsistent with Hart's thesis: These are "bigamy, cruelty to animals, homosexuality, abortion, buggery in the form of bestiality, incest, obscenity e.g. the scale of pornography, and offences connected with prostitution, such as pimping,

poacing and brothel-keeping which can conveniently be categorized as the commercialization of vice." Only at the cost of much obvious special pleading could all these, or such of them as still remain crimes, as most of them do, be squeezed under Professor Hart's umbrella.

Even if Devlin is right, as he surely is, that the present law (at least of England) does concern itself with morals we may still ask whether it ought to. Certainly if we take it that the 'separation of issues' thesis is an artificial contrevance "made for the sake of convenience",[31] the answer is plainly 'Yes'. It would be quite unjust for the law to punish men without taking, into account the moral quality of the intention or will behind the act. However similar moral considerations also apply at the level of legislation - though it is clear that there is far more scope for other considerations here.

It must now be stressed that the 'retributivist' view which is being defended does not contain the idea that the law should punish immorality as such - though clearly the target of much anti-retributivist argument is such a view. Immorality as such includes the harbouring and encouragement of evil thoughts and desires and countless little pinpricks of evil with which the law could not posibly concern itself. To be the legitimate target of others' retributive responses, immorality must be appropriately experienced by them as an 'injury', something that disappoints their justified expectations of undertakings. At the level of society, then,

where such legislation is in question, no immoral act is justifiably made criminal unless it is grave enough to be legitimately experienced as an injury or moral outrage by an adult and sane member of the society.[32] Conversely it would be quite wrong for some of these acts not to be made criminal. They are too important, too much bound up with the very existence of society to be simply ignored, or left to the haphazard retributory responses of the private citizen. Criminal legislation in a democracy is bound to attend closely to public opinion. We may say, then that the 'immoral material' at the basis of the criminal law is, and ought to be, injustice. It is injustice, in the wide sense that both legislators and the judiciary alike hope, by legislation and punishment respectively, to deter men from, or educate them in respect of.

Hartmann[33] sums up as follows:

"...in justice the ought-to-be puts forth not the maximum of moral demand, but evidently the minimum. Its claim upon a man's conduct is purely negative: not to do injustice, to commit no transgression, not to encroach upon another's liberty, not to injure another nor anything that belongs to him." Thus justice protects elementary goods which are a means to personal freedom. But these are the conditions of higher goods. "Justice, then, makes room in the sphere of actuality for the higher values. The more diversified moral life cannot begin, till the simple conditions are supplied. Justice is the moral tendency to supply these conditions. It is the prerequisite of all further realiza-

tions of value. At the same time it is the pioneer among the virtues. Justice is the minimum of morality that paves the way for all higher goods." "Consonant with its being a minimum is the fact that the objective content of justice, law, pursuits of being pressed into fixed formulae, of being codified, and even within certain limits .....of being enforced by a public power....."

That it is in general in the public interest to punish injustice (qua a certain basic type of immorality) follows from the nature of injustice itself. Intrinsic to it is its disruption of society through the disappointment of justified expectations, the refusal to honour undertakings. But the enforcement of law is inevitably attended with certain injustices of its own, one of the most important being the inevitable intrusions on the privacy of innocent citizens. Again, the question of inefficient enforcement of law because it is hard to enforce also brings a certain amount of injustice on the unlucky few who are caught. There is also the danger that the law (and hence, underlying it, immorality) will come to be scorned or despised. This is both an intrinsic evil, since it is good in itself that men should respect just law, and an extrinsic, since it works against the intrinsic deterrent and reformatory effect of the law and its punishments. It is also, of course, obvious that a crime may be too difficult to detect by its very nature, or may need more material resources than are available for its detection. All these, and other similar principles, limit

the general principle that injustice should be made criminal, though there must always be a prima facie injustice about such limitations. For if the law does not act, then the private citizen may and, since he will not always avail himself of what civil remedies there may be, much injustice may result.

This is not to suggest that everything criminal is in itself unjust. The distinction between mala in se and mala prohibita is fairly clear. And though the latter crimes do not themselves consist of intrinsically immoral acts they do, as Lord Devlin shows,[34] protect morality by making it more difficult for people to get away with certain types of injustice whose direct legal prohibition would be too difficult or too costly to enforce, or by preventing people from unfairly snatching advantages from other people at their expense. Thus the breach of a malum prohibitum has a different significance from that of a malùm in se. The latter is the breach of a law, obedience to which must be presumed by all to be a good in itself, whereas the commission of malum prohibitum is the breach of law which may be presumed to serve a morally good end, but about whose fitness as a means to this end there may be legitimate difference of opinion - though the state must be presumed to have the right to decide.[35] Lord Devlin suggests that in the matter or mala prohibita the public condemnation which, we have shown, as an essential feature of punishment is, or should be, lacking, and that the most potent symbol of public re-

sentment - imprisonment - should be, along with trial by jury, reserved for mala in se. Mala prohibita should all be dealt with as summary offences and only punished by fine. Such a reform would greatly clarify the distinctions between genuine crime and quasi-crime, and between punishment and penalty respectively.

That there is a morally significant distinction between punishments and penalties brings us once more to the question of definition. A good deal of attention has already been accorded to the definition of punishment and its implications for justification of punishment elsewhere in this thesis. An additional point I want to make is that the usual contemporary definitions of 'punishment' seem to favour the retributivist rather than the utilitarian. Punishment seems inescapably 'given' in moral experience and understanding as by its very nature retributive. But what is this 'nature'? It is surely not simply the nature of usage or of language, the nature of the word. That can be changed. Perhaps then one can argue like this: It is clear that the contemporary justificatory emphasis follows the pattern set by Hart. We have a good end - a utilitarian one - whose legitimate attainment is limited by various 'retributive' factors, or at any rate by various considerations of justice. But the general end is served by all sorts of institutions. So, in order that 'punishment' may be differentiated from all the other institutional means of achieving our end (say, the happiness

or welfare of society), we incorporate into our definition factors that limit our legitimate pursuit of the end. All the elements of punishment which we have already discussed then reflect basic principles of retributive justice. But of course this is absurd. The prevention of crime, which is, of course, a more exact specification of punishment's end according to some utilitarians, bears the same relation to 'the welfare or happiness of society' as 'a high level of general physical health' and 'universal literacy'. But if we are devising institutions to serve these ends we do not incorporate into the definitions of these institutions a lot of conditions which limit the ways in which we may legitimately pursue our end, while omitting all reference to the end itself.

It looks as though then that the real reason for these facts about the general attitude to defining punishment is that it is indeed, as I have argued, an end in itself. This is its nature. It is emphatically not (at least for beings who have an adequate grasp of the values of justice and injustice) something whose end we can alter, or something that can even be made to serve additional ends outside fairly narrow limits without becoming quite quickly either unintelligible or something more like prosecution, victimisation, etc. - practices which have their negative moral quality bound in their very descriptions. The meaning of 'punishment' is thus in no way a matter for our decision; it is rather something which we may come to have a deeper or fuller understanding of. Once we grasp that punishment

has to do with the appropriate response to injustice, that it is a necessary part of a just moral and social life (where imperfect moral agents are concerned), we 'see' that it must incorporate retributive elements. This is a fact of great importance. But when philosophers then go on to argue that the primary pursuit of a general utilitarian end is limited by the considerations that - strangely enough - they find packed into the idea of punishment they are surely being disingenuous. Why should this institution be thus limited? If appeal is then made to the other values that limit the pursuit of the one utilitarian value - which we have usually identified with benevolence, or the provision of welfare - then the field is open for axiological arguments, and we can appeal to the relative positions of justice and benevolence in the heirachy of values. As has been repeatedly urged, justice is more basic, fundamental and urgent than benevolence. It must be 'answered' first. Indeed, if it is not, benevolence becomes twisted and distorted into something more like its contradictory.

However, it is because most recent philosophers cannot accept the irrational 'absurdity' of the underlying demand for expiation - the subterranean 'push' that gives the practice of punishment its legislative impetus - that they have adopted the general utilitarian approach as regards the "General Justifying Aim" and as regards some aspects of sentencing (thereby giving the institution a rational and

manifest 'pull'). But there are, of course, 'utilitarian' features of the actual practice of punishment which we normally have no, or little, hesitation in approving. We have already noted how the institutionalizing of punishment (or of retribution) brings with it an inevitable tendency to ignore the nuances of the individual case. The attempt to fix a precisely equivalent sentence - perhaps an unattainable ideal at the best of times, since the human soul is rarely completely transparent - is thus both thwarted by the demands of 'consistency' and by the personal distance obtaining under the conditions of a public and ceremonial trial. There is thus in many cases an uncertainty about what punishment the convicted criminal really deserves. Under these circumstances there is much room for the consideration of utilitarian principles. Bradley, however, went too far in this direction. His well known sentences:[36]

> "We may have regard for whatever circumstances we please - our own convenience, the good of society, the benefit of the offender; we are fools, and worse, if we fail to do so. Having once the right to punish, we may modify the punishment according to the useful and the pleasant",

come as a slap in the face after his determined insistence that no man may be punished who does not deserve to be. But in thus representing the matter of sentencing as a question utterly divorced from principles of retributive justice he goes far beyond what the judges see themselves as doing and what any spectator might impersonally approve. Clearly the question of the degree of a criminal's guilt - his desert

- and the question of the seriousness of the injury he committed, themselves exercise a moral compulsion on the sentencing judge. He cannot ignore such demands, where they are clearly felt, or felt only confusedly, praticularly when morals in general are confused. And here there is room for the independent consideration of utilitarian principles. Occasionally, too, to stop the outbreak of a 'rush' of untypical crimes or of a certain kind of crime that has been widely publicized, the demand of justice, even when palpably felt, may have to give way to the demand of other principles. Indeed, these may even come to be an injustice in ignoring such principles. All these factors together may create the illusion that punishment is an institution whose prime function and justification does lie in serving such ends. But to do this too much or too frequently would be in the end to subvert justice and, indeed, to be counter-productive within the terms set by the demands of benevolence themselves.

However there is no need to imagine that because in justifying punishment we do not have the welfare of society and of the criminal at the forefront of our gaze we are therefore oblivious or heedless of it. It is partly that at least where society is concerned, and to a certain extent the individual also, part of welfare is the respect for justice which its scrupulous observance by the judiciary encourages. Welfare, considered as the good for man, is not just a matter of pleasures and pains, but also of the

general moral climate both in public and private life. Furthermore, the particular pursuit of welfare - in this case the 'prevention' of crime - is best carried out through a response to the demands of justice. This must inevitably be a matter of faith to a certain degree - though there is much plausibility in it. To be fully convinced of it one has to be fully aware of the relative urgency and importance of the claims of justice as well as benevolence.

Hitherto, nothing has been said about what is generally meant today by the term 'social justice'.[37] What about the wives and families of prisoners, what about the 'injustice' they already feel for which crime might be seen by some as a just compensation? Have we not made a mockery of the term 'justice' and the virtue of justice? Surely such arguments exaggerate the 'inhumanity' of retributivism. There is no reason to believe that a utilitarian theory of punishment will result in a greater leniency on the whole than retributivist. Indeed, a society whose 'public' emphasis is more and more laid on benevolence and less on (retributive) justice is not likely to have less crime, but more, since people's aspirations are raised and it begins to seem to them more and more unjust that they do not have as much of everything as anyone else. In such a society it would become more, not less, necessary to impose 'deterrent' sentences; and in the end crime would increase to the detriment of civilized living. Also, it is not, nor should it be, the task of the judiciary but of quite different organs of government to

concern themselves directly with benevolence. This is absolutely crucial. The justice of retribution may share the word 'justice' with what is known as 'social justice', but the two things are utterly distinct and must be kept vigorously apart. If we thought it right we could greatly ease the material and psychological lot of the wives and children of prisoners and of the 'deprived' in general. They will, of course, suffer something. But they could be helped to suffer much less, in some respects. But to expect the judiciary to be with such and similar matters, except very occasionally, would be, once again, to prevent the justice they are concerned to dispense. As for the fallacy that crime is largely the work of the underprivileged - this has long been exposed by criminologists.

2. RETRIBUTIVE JUSTICE IN EDUCATION

It is claimed that most discussions of punishment in an educational context have been concerned in the main with either how to keep order or moralizing about the inappropriateness of corporal punishment. This approach does leave out the interesting philosophical question which, in my view centre around whether or not punishment (and therefore reward also) are educative. Can we meaningfully talk about punishment as a form of education, and can punishment ever be part of teaching? In what follows it will be agreed that a utilitarian justification of punishment as a deterrent may have limited merit in the area of social control. It has a definite part to play in moral

education, which is one of the main functions of the school, and contrary to some opinion, it also has connections with the concept of teaching.

T.W. Moore[38] attempts to probe the actual role of punishment in education, and his main concern is with the following question: "...supposing punishment to be relevant to education, in what sense and to what extent is it relevant? And what connection, if any, is there between punishing a pupil and teaching him?" His technique is to set up three models which draws attention to different aspects of punishment. He then examines the extent to which they are applicable to the school situation, and also any connection between the three models and the practice of teaching. What will be considered here is not the appropriateness of his models but his denial that punishment can be a part of education.

Moore's argument rests upon "a logical distinction" he seeks to make between the central uses of the concepts of teaching and punishing. For Moore the process of telling or showing someone what to do, are quite different from the processes of getting him to do it. "Punishment may result in someone making the right moves but it isn't teaching him to do so." Punishment is thus "an activity of a logically different kind from the practice of pedagogy." To help us see this he provides with his notion of "teaching".:

> "Teaching" involves attempts at the communication of knowledge, skills and attitudes usually, but not necessarily to someone else. Its characteristic methods are, for example, telling, explaining, giving reasons, demonstrating, setting

problem-solving situations and so on. These activities, no doubt overlap, but whenever A is teaching B, he is likely to be doing one or more of these things. Teaching also involves some degree of systematic re-approachment between the teacher and pupil. Their minds must come into contact. The teacher must set himself to elicit some systematic response from the pupil who, in turn, must bring himself to attend to and co-operate with the teacher. It is true that 'teaching' may be merely 'intentional' as contrasted with 'successful', but 'teaching' even in its 'intentional' sense can hardly be said to be going on unless there is some element of consciously shared activity involving some degree of rational explanation.[39]

Moore admits that "...it is open to anyone to say that this limits the concept of 'teaching' unnecessarily"; and he is right to do so, for he certainly wishes to pack a great deal into his concept of "teaching". However, some other accounts are less stringent. G.H. Bantock,[40] for instance, defines teaching as "the conscious bringing about in others of certain desirable mental or dispositional changes by morally acceptable means", This could obviously be less damaging to a case for punishment as a form of teaching. On the other hand Scheffler's[41] account of teaching involves submitting "...oneself to the understanding and independent judgement for the pupil, to his demand for reasons, to his sense of what constitutes an adequate explanation". This account is, however, widely rejected as too light and too limiting. J.M. Cooper[42] successfully criticizes it and shows, amongst other things, that though it is well suited as a model for teaching philosophy to university students, it rules out much of what goes on in primary schools and what we would still want to call teaching.

It seems to me that the case for punishment as a form of teaching does not rest upon a stipulative definition of teaching and we could therefore allow Moore "his concept" without further argument. Using an example of punishing a child for coming to school late, Moore maintains "...we are not thereby teaching him not to come late in future. The lesson has already been learned; teaching a child to be punctual is to teach him not to come late in future. What we do when we punish him is: we try to get him to do what he knows. But what if the child does not already know that it is wrong to come to school late? He may have some understanding of the notion of "punctuality" but he may be unaware that his teachers consider it to be a virtue. Supposing the child cannot properly understand the reason why "lateness" is wrong, either because he is too young, too slow-witted, refuses to attend to the explanation or for any other reason; then by being punished for "lateness" he may not only be taught that "lateness" is wrong but also that "lateness" is to be avoided if he is to avoid its consequences (or one of them). Indeed, cause and effect relationship is what is learned. At this stage, this is the only way for the child to learn this. Later he may come to appreicate the reason why it is to be avoided, assuming it is pointed out to him what he is being punished for, and that he has at least some basic notion of right and wrong. Moore thinks that "punishment may result in the child making the right moves, but it isn't teaching him to do so." The

counter argument is that punishment may be the most effective way of teaching the child which are in fact the right moves. We can agree that the process of telling someone what to do, or showing him, are quite distinct from the process of getting him to do it; but in this case, punishment is a process of telling him what to do or what not to do but not necessarily one of getting him to do it. Of course there is no reason why punishment should not, contigently, fulfil both roles.

The way is now open for Moore to reply that what has been described is a technique of conditioning, a sort of negative reinforcement that is no part of his notion of teaching. But can such an objection be sustained? Where "punishment" is treated as part of the mechanism of conditioning and related kinds of psychological control, the emphasis is placed on directing the subject to follow a set of programmed moves. Pain is deliberately administered as a negative reinforcement to secure the kind of behaviour which is desired by the manipulator. Genuine instances of conditioning show no concern for "right" or "wrong" in a moral sense or for the "giving of reasons".

A more promising objection might be that, if the child cannot properly understand the reasons why "lateness" is wrong, then "teaching" him by penalizing him is indoctrination, not teaching. A number of moves could be made here, one being that indoctrination is one kind of teaching. However as we are staying with Moore's notion of teaching and

it is unlikely that indoctrination could find a logical place under the concept of education this will not be pursued. The problem however is about whether or not teaching moral values without rational backing to young children incapable of understanding such rules is indoctrination. But the answer to the problem depends upon one's definition of indoctrination. If one agrees with Hare[43] that it is not indoctrination so long as there is no intention to stop the growth in children of the capacity to think for themselves, then a little more needs to be said. If one is punishing a child in order to teach him that something is wrong, one is not necessarily intending to implant an unshakable belief; "indoctrination only begins when we are trying to stop the growth in our children of the capacity to think for themselves about moral questions."[44]

Much more difficult to meet, however, would be the objection that punishingta child in order to teach him that something is wrong or to be avoided is not really an instance of punishment because the child is not guilty of an offence. Was it not argued previously that for unpleasantness to count as an instance of punishment it must be imposed on an offender? How can the child be guilty of an offence if he did not previously know that "lateness" was to be avoided? But couldn't one offend unknowingly?

Well it may be that this objection cannot be disposed of to everyone's satisfaction for here tolerance is required of the special teacher-pupil relationships[45] and for the peculiarities of educational situations in general. The point is that so long as the child is only punished when he is actually guilty of "lateness", by being punished he can be made to see by the force of punishment that he has broken a rule and deserving of punishment. This distinction between "force" and "meaning" was elaborated by J.L. Austin,[46] chiefly with the language of words in mind, rather than of deeds, but it is no less applicable to the latter. With highly articulate young children teaching that certain things are morally wrong may often be accompanied by "doing things with words" with others it will be a matter, at least, to begin with, of saying things with deeds. To a young child the meaning of a smack can be educative, while its force hurts.

Moreover it was also agreed earlier that the notion of "offence" is far from clear and straightforward when related to punishment in educational situations. A teacher need not always have announced before punishing a child who has done something wrong that no one was to do "that". As the moral development of children is a crucial function of educational institutions it is often desirable that more emphasis is placed upon the question of motive than the nature and severity of the offence. It can therefore be seen that the "criterion" is far more complicated in educational situations than in legal systems.

If it is accepted that punishment can be a part of teaching the question then arises as to the part it plays in the teaching of morality. In the case against Moore it was suggested that punishment can teach a child that something is wrong or is to be avoided. It may now be argued that, strictly speaking, the child hasn't learnt that something is wrong but merely that it is disapproved of by his teachers. To learn a moral concept requires an understanding of the reasons why something is right or wrong, good or bad. This is true, but does it not invalidate the previous argument? Even if the child has not learnt the moral concept as a result of punishment, he has learnt that a certain action is regarded as wrong by his teachers, which is a significant piece of learning in the context of a child's moral development. As piaget has argued, young children regard rules as more or less transdentally laid down. The notion of the validity of rules and their grounding in principles takes a long time to dawn. "It is quite pointless to expect very young children to do what they should because they see the reasons for it. In the early stages they have to learn to do what is right without properly understanding why."[47]

It may safely be said then, certain things learnt as a consequence of punishment have significance for moral education. It is hard to see in fact how any child can properly grasp a moral principle unless he has undergone a certain minimum training in moral rules. To understand a moral

principle involves being able to recognise certain rules as instances of it. This is a logical point applying to the formation of all concepts. Having experience of some instances to which the concept can apply is logically prior to having the concept. Children therefore need to pass through a stage of training in moral rules and right habits before they can progress to the stage of being autonomous moral agents. The contention here is that punishment has a crucial role to play in this period of training in moral rules. To this extent at least it is part of our education. It helps to initiate us into a moral dimension of life.

Professor R.S. Peters[48] thinks that the case for punishment as an aid to education is pretty weak. He declares that "the truth of the matter is that punishment in a school is at best a necessary nuisance. It is necessary as a deterrent, but its positive educational value is dubious. Education cannot go on unless minimum conditions of order obtain, and punishment may on occasions be necessary in order to ensure such conditions". It would, of course, be foolish in the extreme to deny that general conditions of order have to be maintained if teaching is to proceed. However, where there is some mutual agreement on the intrinsic value of attempting to live and work together in an orderly way, the form of order is a moral as well as a social one. Accordingly its development is a matter of discipline, rather than of control. Now this distinction between discipline and control is crucial to the thesis that punishment is an intrinsic part of education.

The form of argument to be employed here will be similar to that pursued in chapter six. The crux of the argument is that discipline is a kind of compulsion to which it is <u>right</u> that one should have to submit, while punishment is the infliction of a kind of pain which it is <u>right</u> that one should have to suffer, not for breaking the rules of a particular system of control, but for moral wrongdoing. In other words for faults of discipline. As I pointed out earlier, discipline and control are forms of order but the order in each case is of a logically different kind. In a "disciplined" activity order is achieved by virtue of reasons implicit in, or for the sake of values intrinsic to the activity itself. Thus a 'control' is a way of ordering things which is considered necessary for getting something done. By contrast, a 'discipline' is the form of logical and evaluative order which must be learned if one is to understand what is involved in doing something. Both control and discipline involve compulsion, but in the former the compulsion is not in the first instance a logical or a moral one. It is not achieved through the force of a logical imperative. The force is physical, ...or psychological. In discipline, on the other hand, the compulsion involved has nothing to do with the physical and psychological force which backs orders and instructions in the sense of commands. When instruction enters into the achievement of discipline, it is 'instruction' in the sense of teaching, not in the sense of giving orders. When we 'order' or 'instruct' someone to

do something, as in giving commands, we are not teaching him what to do. We are telling him.

The point is that when we exercise 'control' over children we are not "disciplining" them, as is frequently taken to be the case. In so far as the relationship between teacher and class is simply one of means to ends, in which the teacher tries to get the children to do something, the purpose is accomplished at the moment when the children obey. Whether or not the children can see the intrinsic point of what they are being ordered to do is quite irrelevant, so long as they do it. When punishment is used to gain "control" Peters is right to suggest that it is "at best a necessary nuisance". It would seem that its positive educational value is not merely "dubious" but entirely non-existent.

Entwistle[49] endeavours to contrast discipline not with control but with order. This, however, seems misguided since discipline is itself a form or order. As was pointed out earlier, it is confusing to speak of control metaphorically as "external discipline" for the whole point of the term "discipline", in the sense that is now being explicated, is that the orderliness characteristic of it is "external" to the activity or relationship in question. To say that a child is being "externally disciplined" is really a contradiction in terms, since, unless the child can see at least something of the valuable point of the proposed order he will not submit to it for the sake of its intrinsic value,

but only, if at all, for the sake of values "external" to it - perhaps, the authority of the teacher or the threat of "punishment". Only in this limited respect may a utilitarian justification of "punishment" have possible merit.

But the general argument has been that instances of extrinsic control are misrepresented as punishment. Where the hurt which we inflict upon children is calculated by standards and imposed for purposes extrinsic to those of the situation in which they occur, we are dealing not with discipline but with control, and therefore with penalties, not punishments. Thus penalties can be awarded only by some agent formally authorised to do so, but one can be punished by anyone with whom one shares an interest. This was the reason for ruling out the fifth of Anthony Flew's criteria.

We should once again emphasize that the rules governing the authorisation of those empowered to impose penalties are quite separate and different from the rules which they are thereby made responsible for enforcing, but in the case of punishment the two sets of rules are identical - only a moral agent, in other words, is capable of punishing and being punished. One is penalized for infringing the authorized rules of any social practice in which one engages, but one is punished for breaking specially moral rules. A rule-breaker is liable for penalty whether or not he can see good reason for the rules, but a wrongdoer is liable for punishment because he can see good reason for the rules (and has nevertheless broken them). ...One is penalized for failing to behave in a way which neither you nor your judge necessarily regard as being of any intrinsic importance,

but one is punished by someone with whom one claims to share an interest but towards whom one has failed to behave in a way appropriate to the interest which you have.

Thus discipline, unlike control, does not involve the setting up of some previously non-existent order. It involves to understand more of the sort of order which is already more or less explicit in what one is trying to do. A teacher does not set out to 'get' discipline over his pupils, although he may try to get control in this way because the teacher is in control over them and has responsibility for them, but because they are themselves concerned to discover increasingly the "form" or order of the task or situation in which they are engaged. Their "disipline" is the educative order in virtue of which there is some intelligible point in their presence as pupils. It is when this discipline is absent that teachers are inclined to fall back on extrinsic controls. Our educative concern is therefore necessarily with matters of discipline and contingently with matters of control. Because teachers are deliberate agents in the education of others, and because it hurts to be shown that one has failed to do the very thing that one was ostensibly endeavouring to do, what teachers deliberately do on occasions will hurt, just as on other occasions it will please. Reward and punishment are essential ingredients in what goes on in educational situations since such situations are intrinsically rewarding, and therefore intrinsica-

lly punishing too. They could not be one if they were not also on occasion the other. In a sense then, retributive punishment is, logically, a feature of education.

To persuade those who remain unconvinced and still believe that the only strong case for punishment in school is in the sphere of general rules concerned with the smooth running of the school, the argument can perhaps be put in a different way. The source of perplexity might come from a simplistic view ...of school rules. Rules exist not merely to maintain conditions of order. They also have educational value in the sense that conforming to rules helps to develop the child's ability to choose, restrain himself, and develop as an autonomous moral being. The presumption in punishment in dealing with adults is that they are rational beings in the sense that they know the difference between right and wrong and can adjust their actions in the light of consideration of possible consequences. Children do not naturally achieve this state. They achieve it gradually and only if they are treated progressively as if they are autonomous persons. It happens under a stable system of rules that guarantees a predictable environment. It does not happen by allowing them to do what they want. Children have to learn to exercise self-restraint. So the argument is that since learning to obey rules is necessary to developing autonomy, and since autonomy is generally accepted as an end-state of education, the connection between rules and education is something more than mere social control.

Whether or not children can learn to obey rules without the assistance of rewards and punishments is an empirical matter. What is being suggested here is that, where punishment is called upon in connection with teaching children to obey rules, it is mistaken to view it as merely part of an unpleasant duty to make children suffer so that they will control their behaviour in future and conform to rules out of self-interest. Its function is also educative.

To appreciate this argument it has been seen that the rules of a purely manipulative situation and rules of an educative one have different logical status. In the former the rules are only "right" in the sense that you get hurt if you break them. In the latter it is because the rules are right that it hurts to break them. In the first situation there is nothing worth learning except that you will get hurt if you break the rules. In the second there is the possibility of learning something of the intrinsic point or rightness of rules. Manipulative rules have no intrinsic point in the situation they govern; they have no value in themselves. The values are other than those implicit in the situation itself - probably the values of the manipulator. This is what is meant by suggesting that the rules connected with education are far from simple. Children have to learn not only to obey rules associated with social order, but also those associated with educative order, which is discipline. The real justification of punishment in schools is therefore

not as an agency of psychological manipulation but as a logically implicit feature of the notion of discipline. In this way, punishment is an intrinsic part of education.

In conclusion, it has been argued that the view that punishment in education is a necessary evil is based upon a misunderstanding of the concept. It is a mistake to think of punishment merely in terms of a penalty which one has to pay for stepping outside the limits of social control. In fact, paying a penalty may only be interpreted as punishment if it is felt that breaking the rules is "wrong" in moral terms. Unfortunately identifying punishment with the apparatus of control is quite commonplace. The Plowden Report, in its discussion of punishment, sees its role as entirely connected with control and the general management of children.

> "Few indeed will now consider it in any way positively "good for children" to be punished, and few will regard punishment as a cure either for deep seated evils, such as persistent cruelty, or for laziness, in attention and poor work. Punishment will be defended simply as a means to order."[50]

Unfortunately, too, in most philosophical writings, the matter of punishment and reward, like that of discipline, is commonly treated as though it were just a part of the business of control. Even Professor R.S. Peters declares:[51]

> "It is important to grasp that the case for punishment does not depend on the possibility that they will benefit the individual punished. Their justification is that they are necessary for preserving the system of order which is necessary for educational activities to proceed."

Onethe account which is being presented here punishment is a part of education and is only evil when it is undeserved or in-appropriate. The morally distinctive feature of punishment is that it is pain which one deserves rather than something which is merely expedient to avoid. Punishment may therefore be thought of as moral desert. Consequently, it would not be possible to abandon punishment in schools, without abandoning moral relationship with children.

Now this argument that punishment is in some sense a "morally fitting" response to wrongdoing rather than a "necessary evil", commits one to defending the "moral right" of wrongdoers to be punished. As Anthony Quinton[52] points out, this is an odd sort of right:

> "...if we are to treat offenders as moral agents, as ends and not as means, we must recognise their right to punishment. It is an odd sort of right where holders would strenuously resist its recognition."

Quinton implies that whether or not it is in fact true that those who believe themselves to deserve punishment "strenuously resist" it, is an empirical matter. But isn't Quinton misconstruing the expression "a right to punishment"? Surely what we mean when we talk about "a right to punishment" is that offenders have the right to be regarded as responsible persons, worthy of recognition. Not to be punished when one feels that one deserves it is to be treated either as not being worth bothering about, or as being beyond redemption. In the writer's experience children only stre-

nuously resist their "right to punishment" when they interprete it merely as an attempt at psychological coercion. To the extent that children see their punishment as confirming their existence in a moral and stable order, most of them recognise their right to be punished when they deserve it. On the other hand, it would not be odd for children to "strenuously resist" their punishment if they did not see the point of it, for how could they then conceivably regard themselves as being entitled, or as "having a right to it". It is being punished when one does not see the point of it that cause "alienation". Not being punished when one feels that one deserves it leads "only to bewilderment, dispair or indifference".

Morality, is a set of rules (or quasi-rules). It is an intrinsic part of morality that those who do wrong morally deserve to be punished. So one cannot initiate children into morality without initiating them into the practice of punishment with its attendant notions of responsibility, excuses etc. The function of the school is not just to teach Mathematics, English, History and so on, but to initiate children into 'the moral institution of life'. Morality is not a separate kind of activity but applies to us whatever we are doing, so even in a Mathematics lesson the teacher must be concerned to initiate children into the moral way of life. Thus, punishment is a necessary part of education seen in this way.

In conclusion, however, the view I take of punishment in education is part and parcel of my overall view. That is to say, we must treat others as rule following members of a kingdom of ends. Education must involve initiating children into that kingdom. So in so far as rewards and punishments are a necessary condition of a rule-governed community education must involve these.

NOTES AND REFERENCES

CHAPTER TEN

1. Nietzsche, F., On The Geneology of Morals, trans. F. Golffing.
2. Ewing, A.C., The Morality of Punishment, Routledge and Kegan Paul, London, 1929.
3. See Jouvenal, de B., Sovereignty, trans. J.F. Huntington, Cambridge University Press, 1957, p.142. Because people realise that breaches of trust etc. are going to be taken seriously.
4. Hegel, G.W.F., Philosophy of Right, Trans. T.M. Knox; Oxford University Press, 1952, Sec. 100, p.70.
5. Findlay, J.N., Values and Intentions, Allen & Unwin, London 1961, p.321.
6. Bradley, F.H., p.27.
7. They are all cases where the principle of caveat emptor suitably extended applies. One does not have to enter into some of those sorts of relationship.
8. Particularly stressed by Max Scheler, pp.370-380.
9. See Honderich, Ted., pp.15-22 where the point is fully discussed.
10. Cf. Feinberg, J., 'Justice and Personal Desert, and the Expressive Function of Punishment' both in Doing and Deserving, Princeton, U.P., 1970.
11. Cf. Ewing, p.14.
12. Atkinson, M., 'Justified and Deserved Punishments', Mind, 1969.

13. Ross, W.D., The Right and the Good appx.2, to ch.2.

14. Hart, pp.158-60. References are to the pages of Laslett and Runciman where the article is reprinted.

15. Ibid., p.168.

16. Ibid., p.173.

17. Ibid., p.169.

18. Ibid., p.179.

19. Ibid., p.170

20. Ibid., p.179.

21. Ibid., p.179.

22. Ibid., p.180.

23. Ibid., p.178. For arguments against such 'modern scepticism' see Strawson, P.F., "Freedom and Resentment".

24. Rawls, J., 'Two Concepts of Rules' in Acton, H.B.(ed.) The Philosophy of Punishment, 1969.

25. Ibid., p.108.

26. See especially H.L.A. Hart., Law, Liberty and Morality, London, 1964; and Lord Devlin, The Enforcement of Morals, OUP, 1968.

27. Devlin, p.129.

28. Ibid., p.130.

29. Ibid., p.131.

30. Devlin, p.135.

31. Honderich also rejects it - his more thorough-going commitment to consequentialism enables him to dispense with it anyway - as does M. Goldinger, 'punishment,

Justice and the Separation of Issues,' The Monist, 1965.

32. The conception of what may be legitimately made criminal - seems to differ from that of the many philosophers who have stressed that it is the business of the law to protect 'rights' - unless 'rights' is given an exceptionally wide sense, and includes the right not to be morally outraged.

33. Ethics, trans. Stanston Vol.2, pp.230ff.

34. Morals and the quasi-criminal law and the Law of Tort, pp.26ff of Devlin op.cit.

35. Devlin, p.31.

36. Bradley, p.27.

37. Ted Honderich pays quite a lot of attention to this. But it is vital to see that questions of 'Social Justice' must not be confused with questions of 'retributive justice'. These justices are completely distinct.

38. Moore, T.W., "Punishment and Education" Proc. of Phil. of Education Society of Great Britain, 1966.

39. Ibid., pp.32-33.

40. Bantock, G.H., Education and Values, Faber, 1965, p.167

41. Scheffler, I., The Language of Education, C.C. Thomas, Springfield, Illinois, 1960, p.57.

42. Cooper, J.M., "Criteria for successful Teaching or Apple for The Teacher", Proc. of the Phil. of Education Society of Great Britain, 1966.

43. Hare, R.M., "Adolescents into Adults" in Aims of Education ed. Hollins, T.H.B., 1964.

44. Ibid., p.52.

45. See detailed discussions of this point in Downie, R.S., Loudfoot, E.M., and Telfer, E., Education and Personal Relationships, 1974. Also Downie and Telfer on Respect for Persons, 1969.

46. Austin, J.L., How to do Things with Words, Oxford, 1962.

47. Peters, R.S., "Moral Education: Tradition or Reason?" in the Nation, 1969, U.S.A.

48. Peters, R.S., Ethics and Education, Allen & Unwin, 1966, p.279.

49. Entwistle, H., Child-Centred Education, London: Methuen, 1970, p.67.

50. Plowden Committee, Children and Their Primary Schools, London: H.M.S.O. (Plowden Report), 1967, para.743.

51. Peters, R.S. Ethics and Education, Allen & Unwin, 1966, p.274.

52. Quinton, A.M., "On Punishment", Analysis, 1954.

B I B L I O G R A P H Y

Abbot, T.K., trans. 5th Ed. Book I, Ch.1 Sect.VIII, Theorem IV, Remark II. (Revised, London, 1898).

Acton, H.B.(ed.)., The Philosophy of Punishment, London: Macmillan, 1969.

Archambault, R.D., "The Concept of Needs and Its Relation to Certain Aspects of Educational Theory", Harvard Educational Review 27, Winter, 1957.

Armstrong, K.G., "The Retributivist Hits Back", Mind, 1961.

Aristotle, Ethica Nicomachea, 1180a.

Atkinson, M., "Justified and Deserved Punishments", Mind, 1969.

Austin, J., The Province of Jurisprudence Determined, London, 1954.

Austin, J.L., How To Do Things With Words, 1962.

Baier, K.E., "Is Punishment Retributive?" Analysis, Dec., 1955.

Baier, K.E., The Moral Point of View, 1965.

Bantock, G.H., Education and Values, Faber, 1965.

Barnes, H.E. and Teeters, N.K., New Horizons in Criminology, New York, 1943.

Barry, B., Political Argument, London: Routledge and Kegan Paul, 1965.

Benn, S.I., "An Approach to the Problems of Punishment", Philosophy, 1958.

Benn, S.I. and Peters, R.S., Social Principles and the Democratic State, London: Allen & Unwin, 1959.

Bentham, J., An Introduction to the Principles of Morals and Legislation, ed. Harrison, W., Oxford, 1948.

Bentham, J., Theory, Principles of the Penal Code, II, XVI.

Bentham, J., Theory, Principles of The Penal Code, Part II, Bk.IV.

Bentham, J., "Of Mis-Seated Punishment" in Principles of Penal Law, Part., Book IV.

Bentham, J., "Principles of Penal Law" in the work of Jeremy Bentham Vol.I, ed. Bowring, J.

Bentham, J., Principles of Morals and Legislation, XIV, 28.

Berg, C., Fear, Punishment, Anxiety and the Wolfenden Report, London, 1959.

Bernstein, B., 'A Critique of the Concept of "Compensatory Education"', in Rubinstein and Stoneman (ed.) 1970.

Best, E., "The Supposed Premiss in Educational Psychology" in Komisar and Macmillan (ed.) 1970.

Bradley, F.H., Ethical Studies, 1876.

Broad, C.D., Five Types of Ethical Theory, London, 1930.

Bromberg, W., Crime and the Mind, Philadelphia, 1948.

Brubacher, J.S., Modern Philosophies of Education, McGraw-Hill Inc., New York, 1969.

Campbell, C.A., "Free-Will As Pseudo-Problem?" in Mind, Vol.IX, 1951.

Campbell, T.D., Adam Smith's Science of Morals, London: Allen & Unwin, 1971.

Clark, M., 'Discipline: A Developmental Approach' in Stenhouse (ed.) Oxford: Pergamon Press, 1967.

Cofer, C.N. and Appley, M.H., Motivation Theory and Research Wiley, 1968.

Cooper, J.M., "Criteria for Successful Teaching: or An Apple for the Teacher", Proc. of Phil. of Education Society of Great Britain, 1966.

Cowan, J.L., Pleasure and Pain, London: Macmillan, 1968.

Cremin, L.A., The Transformation of the School, New York: Random House, 1964.

Dearden, R.F., The Philosophy of Primary Education, RKP, 1968.

Dearden, R.F., "Needs in Education" British Journal of Educational Studies, November, 1966.

Dearden, R.F., "Instruction and Learning by Discovery" in The Concept of Education, Peters, R.S., (ed) London, RKP, 1967.

De Cecco, J.P., The Psychology of Learning and Instruction: Educational Psychology, Englewood Cliffs, N.J. Prentice-Hall, 1968.

Devlin, Lord P., The Enforcement of Morals, OUP, 1968.

Dewey, J., Interest and Effort in Education, Boston: Houghton Mifflin, 1913.

Dewey, J., Democracy and Education, 1966 ed., Toronto: Free Press, 1916.

Dewey, J., School and Society, The University of Chicago Press, Chicago, 1899.

Downie, R.S., Loudfoot, E.M., and Telfer, E., Education and Personal Relationships, Methuen, 1974.

Downie, R.S. and Telfer, E., Respect For Persons, London: Allen & Unwin, 1969.

Downey, M.E. and Kelly, A.V., Theory and Practice of Education: An Introduction, Harper and Row, Publishers, London, 1975.

Doyle, J.F., 'Justice and Legal Punishment' in Philosophy Vol.42, July, 1967.

Dreeben, R., On What is Learned in Schools, Reading Moss: Addison-Wesley Publishing Company Inc., 1968.

Dumont, E., The Rationale of Punishment, London, 1830.

Encyclopaedia of Religion and Ethics, Vol. 3, New York, 1910.

Entwistle, H., Child-Centred Education, London: Methuen, 1970.

Evans, K.M., Attitudes and Interests in Education, London, RKP. 1965.

Ewing, A.C., The Morality of Punishment, London, RKP, 1929.

Ewing, A.C., "Punishment as a Moral Agency", Mind, 1927.

Ewing, A.C., "Punishment as Viewed by the Philosopher", Canadian Bar Review, XXI (1942)

Exodus, 21.

Feinberg, J., "Justice and Personal Desert and the Expressive Function of Punishment" in Doing and Deserving, Princeton, U.P., 1970.

Feldman, F., Introductory Ethics, Prentice-Hall, Inc. Englewood Cliffs, N.J., 1978.

Findlay, J.N., Values and Intentions, London: Allen & Unwin, 1961.

Flew, A., "The Justification of Punishment", Philosophy, 1954.

Foot, P.R., "Moral Beliefs" in Proceedings of the Aristotelian Society, 1958-9.

Gallie, W.B., "The Lords' Debate on Hanging, July, 1956: Interpretation and Comment", Philosophy, 1957.

Garforth, F.W., "Values in Society and Education" in Education for Teaching, No.64, May, 1964.

Geldart, W., Elements of English Law, 1966 ed. (ed. Yardley, D.C.M.) OUP. 1911.

Glanville, W., The Criminal Law: The General Part (2nd ed.) London, 1961.

Goldinger, M., "Punishment, Justice and the Separation of Issues", The Monist, 1965.

Grazia, E. de., "Crime Without Punishment: A Psychiatric Conundrum", 52 Columbia Law Review, 754 (1952).

Gribble, J., Introduction to Philosophy of Education, Boston: Allyn & Bacon, 1969.

Griffiths, A.P., "A Deduction of Universities" in Philosophical Analysis and Education, ed. R.D. Archambault, RKP, 1965.

Guttmacher, M., "The Psychiatrist As An Expert Witness" 22 University of Chicago Law Review, 1955.

Hall, J., General Principles of Criminal Law (2nd edn.), Indianapolis, New York, 1960.

Hare, R.M., "Adolescents into Adults", Aims in Education, ed. Hollins, T.H.B., Manchester University Press, 1964.

Harrison, W., ed., Introduction to the Principles of Morals and Legislation, Oxford, 1948.

Hart, H.L.A., Law, Liberty and Morality, London, OUP., 1964.

Hart, H.L.A., Punishment and Responsibility, OUP., 1968.

Hart, H.L.A., "The Prolegomenon to the Principles of Punishment" in Philosophy, Politics and Society, ed. P. Laslett and W.G. Runciman, Oxford, Basil Blackwell, 1962.

Hastie, E., trans. Rechtslehre, Part Second 49, Edinburgh, 1887.

Hegel, G.W.F., Philosophy of Right, trans. T.M. Knox, OUP. 1952.

Hirst, P.H., 'The Logical and Psychological Arts of Teaching A Subject', Peters, R.S.(ed.), London, RKP, 1967.

Hirst, P.H., "The logic of the Curriculum" in Journal of Curriculum Studies, Vol.I, May, 1969.

Hirst, P.H. and Peters, R.S., The Logic of Education, RKP, 1970.

Hobbes, Leviathan, Part II.

Hofstadter, R., Anti-Intellectualism in American Life, New York: Cape, 1962.

Holmes, O.W., The Common Law, Boston, 1881.

Honderich, T., Punishment: The Supposed Justifications, Hutchinson, London, 1969.

Holt, J., How Children Fail, 1969 ed., Harmonds Worth: Penguin Books, 1964.

Hook, S., "Necessity, Indeterminism and Sentimentalism" in Determinism and Freedom, New York, 1961.

Hudson, W.D. (ed.) The Is-Ought Question, London: Macmillan, 1969.

Hughes, A.G. and Hughes, E.H., Learning and Teaching, Longmans, 1959.

Jarvis, F.V., "Inquiry Before Sentence" in Criminology in Transition, ed. T. Grygier, H. Jones, J.C. Spencer, London, Tavistock Publications 1965.

Jensen, O.C., "Responsibility, Freedon and Punishment" Mind, LXXV, 298, April, 1966.

Jones, H., "Punishment and Social Values", in Criminology in Transition, ed. T. Grygier, H. Jones, J.C. Spencer, London, Tavistock Publications, 1965.

Jouvenal, B. de., Sovereignty, trans. J.F. Hutington, Cambridge University Press, 1957.

Kant, I., Groundwork of the Metaphysic of Morals, translated and analysed by H.J. Paton, New York: Harper and Row, 1964.

Karpman, B., "Criminality, Insanity and the Law", Journal of Criminal Law and Criminology, 1939.

Kemp, J., "Pain and Evil", Philosophy, 1954.

Kleinig, J., "Peters on Punishment" in British Journal of Educational Studies, Vol.20, No.3, Oct., 1972.

Knox, T.M., Hegel's Philosophy of Right, Oxford, 1942, translation of Naturrecht and Staatswissenchaft in Grundrisse; Grundlinien der Philosophie des Rechts (Natural Law and Political Science in Outline; Elements of the Philosophy of Right.

Knox, T.M., trans. Philosophie des Rechts, Sect.93, 1942.

Kohlberg, L., "Moral Development" in Child Psychology, 1963.

Kohlberg, L., "Moral Education in Schools: a developmental View," School Review, (University of Chicago), Vol.24, 1966.

Laird, J., "The Justification of Punishment" in Monist, 1931.

Langford, G., Philosophy and Education, London: Macmillan, 1968.

Locke, D., "The Many Faces of Punishment", Mind, 1963.

Locke, J., Essay Concerning Human Understanding, Book II.

Mabbott, J.D., "Excursus on Indirect Utilitarianism", Mind XLVIII, 1939.

Mabbott, J.D., "Punishment", Mind, 1939.

Mabbott, J.D., "Freewill and Punishment", Contemporary British Philosophy, 3rd Series, ed. Lewis, H.D., 1956.

Maclaglan, W.G., "Punishment and Retribution", Philosophy, 1939.

Manser, A.R., "It Serves You Right", in Philosophy, 1962.

Manser, A.R., "Games and Family Resemblances" in Philospphy, Vol.42, July, 1967.

Maslow, A.H., Motivation and Personality, Haper & Row, London,1954

Maundsley, H., Responsibility in Mental Disease, London, 1896.

McCloskey, H.J., "The Complexity of the Concepts of Punishment", Philosophy, October, 1962.

McConnell, Ray M., Criminal Responsibility and Social Restraint, New York, 1912.

McPherson, T., Social Philosophy, Van Nostrand Reinhold Co. Ltd., London, 1970.

McPherson, T., "Pubishment: Definition and Justification", Analysis, October, 1967.

McTaggart, J.M.E., Studies in the Hegelian Cosmology, Cambridge, 1901.

Melden, A.I., Free Action, London: RKP, 1961.

Menninger, C.A., "Psychiatrist in Relation to Crime", American Bar Association Reports, LI (1926).

Mill, J.S., An Examination of the Philosophy of Sir William Hamiltton, London, 1865.

Mill, J.S., System of Logic, Vol.II, Book V, 1868.

Moore, G.E., Principia Ethica, Cambridge, 1903

Moore, T.W., "Punishment and Education" Proc. of Phil. of Education Soc. of Great Britain, 1966.

Morris, H., Ed., Freedom and Responsibility, Stanford University Press, Stanford, California, 1961.

Morris, H., "Persons and Punishment", The Monist, 1968.

Murphy, J.G. (ed.) Punishment and Rehabilitation, Wadsworth Publishing Company, Inc., Belmont, California, 1973.

Nietzsche, F., On The Geneology of Morals, trans. F. Golffing.

Nowell-Smith, P.H., Ethics, Basil Blackwell, Oxford, 1957.

Ogden, C.K., The Theory of Legislation, London, 1931.

Paley, W., The Principles of Morals and Political Philosophy, 6th Ed. (corrected), 1788.

Paley, W., The Principles of Morals and Political Philosophy, Vol.II, Book VI.

Partridge, G., Generic Philosophy of Education, Sturgis and Watton, New York, 1912.

Pe'cault, F., "The Philosophy of Understanding the National System of Education in France", International Institute, Educational Year Book, 1929.

(Teachers College, Columbia University, N.Y.,) 1930.

Peters, R.S., Ethics and Education, London, Allen & Unwin, 1966.

Peters, R.S., "Reason and Habit: The Paradox of Moral Education", Moral Education in a Changing Society, ed. Niblett, W.R., 1963.

Peters, R.S., "Moral Education: Tradition or Reason?" in The Nation, U.S.A., 1969.

Plowden Committee, Children and Their Primary Schools, H.M.S.O., 1967.

Quinton, A., "On Punishment", Analysis, June, 1954, Sec.4.

Radzinowicz, L., A History of English Criminal Law and Its Administration from 1750, London, 1948.

Rashdall, H., The Theory of Good and Evil, 2nd Ed., Clarendon Press, Oxford, 1924.

Rawls, J., "Justice as Fairness" in Philosophical Review, 1958.

Rawls, J., "Two Concepts of Rules", Philosophical Review, Vol.64, No.I, 1955.

Rawls, J., A Theory of Justice, Oxford, 1972.

Reyburn, H.A., The Ethical Theory of Hegel, Clarendon Press, Oxford, 1967.

Ross, W.D., "Punishment" in the Right and the Good, Oxford, 1930.

Rousseau, J., Emile, Preface I., Dent, London, 1974.

Royal Commission on Capital Punishment Report, London, 1953.

Scheffler, I., Conditions of Knowledge, Illinois: Scott, Freeman, 1965.

Scheffler, I., The Language of Education, Thomas, Springfield, Illinois, 1960.

Sears, P.S., and Hilyard, E.R., "The Teacher's Role In The Motivation of the Learner", in Hilyard(ed.) 1964.

Sellars, W., and Hospers, J., Readings in Ethical Theory, N.Y., Appleton-Century-Crofts, 1970.

Sidgwick, H., The Method of Ethics, London, 1962.

Spiel, Oskar, Discipline Without Punishment, Faber & Faber, 1947.

Stenhouse, L.,(ed.) Discipline in Schools: A Symposium, Oxford, Pergamon Press, 1967.

Stephen, Sir J., A History of Criminal Law of England, London, 1883.

Stephen, Sir J., General View of the Criminal Law of England, London, 1885.

Swift, D.F., Sociology of Education, London: RKP., 1969.

The Westminster Confession.

Thompson, K., "Not So Simple" in New Society, 30 April, 1970.

Tyler, A., Memoirs of Henry Home of Kanes, Vol.I. Appx.1807.

Waelder, R., "Psychiatry and the Problem of Criminal Responsibility", in University of Pennsylvania Law Review, 1952.

Waller, W., The Sociology of Teaching 1965 (ed.) N.Y., Willey, 1932.

Wesserstrom, R.A., "Strict Liability in the Criminal Law", Stanford Law Review, XII, 1960.

White, A.R., Attention, Oxford, Blackwell, 1964.

White, A.R., The Psychology of Mind, N.Y., Random House, 1967.

White, J.P., "Learn as you will" in New Society, 4 Dec., 1969.

White, W.A., Crimes and Criminals, N.Y., 1933.

Williams, B.A.O., Morality and Emotions, London, 1966.

Wilson, P.S., "Review of Dearden, The Philosophy of Primary Education" in Education for Primary Teaching, No.77, Autumn, 1968.

Wittgenstein, L., Philosophical Investigations, Oxford: Blackwell, 1953.

Wittgenstein, L., The Blue and the Brown Books, Oxford, Blackwell, 1958.

Woodworth, R.S., "A Behaviour Primary Theory of Motivation" 1958 in Teevan and Birney (eds.) 1964.

Wootton, B., Social Science and Social Pathology, London, 1959.

Wootton, B., Crime and the Criminal, London, 1963.

Yorke, Hon. P., Considerations in the Law of Forfeiture.

Zilboorg, G., The Psychology of the Criminal Act and Punishment, N.Y., 1954.