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THE MORAL JUSTIFICATION OF
PUNISHMENT

DISSERTATION

Presented in Partial Fulfillment of the Requirements for the
Degree Doctor of Philosophy in the Graduate School of
The Ohio State University

By
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PUBLICATIONS

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INTRODUCTION

In view of the number of recent articles on the subject, there seems to have been a resurgence of interest in the problem of the moral justification of punishment. Yet much of the discussion has only added to the confusion that surrounds this topic. The confusion arises not only with regard to what the correct answer is, but with just what the problem is. Let us first examine, therefore, the problem for which so many solutions are being proffered.

If we turn to the writings of legal or philosophical scholars for a clear statement of the problem, we will be disappointed. Not only do we find them offering radically different views on the nature of the problem, but they also fail to agree on the meanings of the basic concepts they employ. For example, A. R. Manser claims that most contemporary philosophers fail to understand what their predecessors meant by the concept of desert and, thereby, the theory of retribution. He states:

And that we are confused over the whole issue of punishment is obvious from the remarks of professional philosophers and the comments of the 'man in the street.'

There are other aspects of the contemporary philosophical examinations of punishment that could be criticized, but I think that the most important of them is
the failure to understand what was meant by previous philosophers when they talked of desert.  


C. W. K. Mundle charges that Ewing, in his The Morality of Punishment, fails to present the retributive theory correctly; Armstrong makes the same charge against contemporary utilitarians. And, of course, Ewing maintains that Armstrong's explanation of the retributive theory is incorrect.

There are several reasons why present-day philosophers are so far apart in their discussion of the nature of the problem of punishment. It may be helpful to give some of the more important of these reasons here before we deal with them in detail later.

One reason for the confusion that presently surrounds the problem of punishment is a mistaken belief regarding the alleged separateness of various issues involved in the problem of punishment. A number of recent writers maintain that the different issues involved in the problem of punishment must be clearly distinguished in order to be sure whether we need one theory of punishment or a number of...
different theories for different and disparate aspects of a complex problem. 5 By distinguishing various issues and questions, it is hoped that certain objectives will be achieved, among which are (1) separation of the various kinds of issues involved, e.g., moral, logical, practical, etc.; (2) elimination of issues that are not relevant in deciding the moral issue; and (3) clarification of the various issues that are involved in the moral problem of punishment. Certainly no fault can be found with the desire to clarify the numerous complex issues involved, but most of these writers go further and maintain that the answers to many of the questions and issues which they have distinguished are logically separate in that the kind of answer that is given to one question about punishment has no connection with the kind of answer that may be given to another such question. In Chapter One, it will be argued that many of the claims made regarding the lack of logical connection among these issues cannot be maintained in the face of an examination of some traditional retributivist and utilitarian theories. The reason contemporary writers have made such mistaken claims is that they have failed to understand either the concept of moral desert that traditional retributivists held, or, and more importantly, the concepts of justice on which various views of punishment are based.

The last point mentioned brings us to a second reason for the present confusion regarding the problem of punishment. Insufficient attention has been paid to the relation between various theories of justice and the problem of punishment. Not only have few, if any, writers realized how intimately the concept of justice is connected with the defense of punishment; but also, they have failed to investigate the kinds of justification that would arise from the different views of justice. Since several different concepts of justice will be important for an understanding of the argument in the following chapter, some important points regarding this topic will be given at present.

When the concept of justice is discussed, it is often only vaguely distinguished from other moral concepts, sometimes even equated with them. What I want to do at this point is not to find a correct theory of justice, but to show in general where discussions of justice fit into moral discussions and especially those concerned with the morality of punishment.

Essentially, questions of justice are concerned with the comparative treatment of individuals when various goods or evils, rewards or punishments, are to be distributed. Thus, there are many actions that could be considered right or wrong which would not be...

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considered just or unjust. Suicide and incest, actions that are morally right or wrong, are not considered to lie within the sphere of justice because they are not concerned with the comparative treatment of individuals.

There is one factor that must be present for any act to be called just, i.e., that people who are similar in all relevant respects should be treated similarly. The paradigm example of an unjust act is that of one man being rewarded and another punished for performing an act that is the same in all respects considered important for the making of a moral judgment. Treating similar cases in a similar fashion is what several recent philosophers call a formal criterion of justice. 7 A number of other factors must be decided before we have any concrete statement of a theory of justice. For example, the characteristics that are to be considered in arriving at a judgment of similarity or difference must be determined. Perelman presents six substantive formulas of justice by means of which the formal requirement can be satisfied.

He gives the following list:

(1) To each the same thing

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(2) To each according to his merits
(3) To each according to his works
(4) To each according to his needs
(5) To each according to his rank
(6) To each according to his legal entitlement

The second possibility given by Perelman is what shall be called the meritarian theory of justice. For holders of this theory, merit is usually determined by moral virtue. It will be seen in the following chapter how this theory of justice has played a central role in the retributive theory of punishment.

While, as we will see, considerations of justice are of sole or overriding importance in determining the moral rightness of acts of punishment for some philosophers, they are of less importance for others. Utilitarians either consider justice to be a moral value subordinate to utility or consider it to be directly derivable from and defended by means of the principle of utility. The former position is important because it shows how an act can be considered just but not morally right. The utilitarian holding this position claims that just acts which are not the most expedient should not be performed.

Among the crucial issues raised for any theory regarding the moral justification of punishment is that of clearly delineating the relations between justice and the moral rightness of punishment. In the following chapters, this crucial issue will be explored to explicate

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8 Perelman, op. cit., p. 7.
the relations between and the importance of these concepts in the problem of punishment. Also, serious attention must be paid to the relation of various theories of justice to the justification of punishment. The argument below will be that nearly all of the previous debate regarding punishment has been concerned with only two theories of justice. This restriction has led to an impasse that may be overcome by adopting a third theory of justice.

In the discussion of the morality of punishment which follows, numerous examples of punishment by the state will be considered. While examples of punishments that occur in other institutions might have served equally as well, those of punishment by the state are stressed because of the importance which they have played in previous discussions of the morality of punishment.
CHAPTER ONE

A study of the philosophical literature dealing with the moral justification of punishment easily convinces one that the historically important theories of punishment are the utilitarian and the retributive. In fact, nearly all the debate, historical and current, regarding punishment centers around the apparent conflict between these two theories. Anthony Quinton states:

There is a prevailing antinomy about the philosophical justification of punishment. The two great theories—retributive and utilitarian—seem, and at least are understood by their defenders, to stand in open and flagrant contradiction.  

Quinton believes that the antinomy is a false one and we will argue that he is correct, but not for the reasons that he gives. Despite the claims made in the past, it will be made clear that there are not just "two great theories," but numerous ones which have often been jumbled together and labeled either "utilitarian" or "retributive." Consequently, in explaining the present conflict regarding the proper justification of punishment, we will have to explain a number of theories that have been presented under one or another of the two traditional labels.

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In order to present clearly the various versions of the retributive and utilitarian theories, a number of related questions that can be asked about punishment should be distinguished. Four questions any complete theory of punishment should answer are: (1) What does the word "punishment" mean? (2) How is the general practice of punishment justified? i.e., how do we justify having rules that provide that offenders against them should be made to suffer? (3) Who should be punished? and (4) How much should we punish someone? These questions were not often clearly distinguished and answered by past philosophers, though we can usually find some hint in their theories regarding the answers they would give to every question.

Since question (1) has not played a significant role in the long debate regarding the various theories, it will be considered separately later. Questions (2), (3), and (4) have traditionally been thought to have certain specific relationships to each other. Utilitarians, other than the present-day rule variety, have thought that a utilitarian answer given to (2) would entail that a utilitarian answer be given to (3) and (4). It was thought that if laws and the punishments

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2 For a discussion of this version of question (2) and its relation to questions (3) and (4), see S. I. Benn and R. S. Peters, The Principles of Political Thought (New York, Collier-Macmillan Ltd., 1964), pp. 203ff.

3 For a discussion of the manner in which utilitarians have traditionally attempted to apply their moral theory in answering these questions, see J. Rawls, "Two Concepts of Rules," Philosophical Review, LXIV (1955).
connected with them were justified by their beneficial consequences, then any particular instance of a broken law and consequent punishment could be defended on utilitarian grounds. That is, the manner in which you justify a practice and the manner in which you justify a particular act falling under a practice are the same.

Retributivists have split regarding the connection between the answers to the above questions. Whereas some retributivists have held that a retributive answer given to question (2) would entail that a retributive answer be given to questions (3) and (4), others have maintained that no such connection exists. As we will see below, a defender of a meritarian theory of justice as the main or overriding moral principle will be logically required to hold the former position. Those who hold that a meritarian theory of justice is only one among several main moral principles will often hold the latter.

In our examination of the various traditional positions that follow, an attempt will be made to explain in detail why the various relationships discussed above are held to exist. It should be noted that the main attempt in the twentieth century to provide a solution to perplexing problems surrounding punishment has been to argue that the contention that the kind of answer given to question (2) entails the kind of answer that must be given to (3) and (4) is incorrect.4 Many

4 For the most pointed discussions of this point, see Armstrong, op. cit., pp. 473ff; Hart, op. cit., pp. 2-3; Benn and Peters, op. cit., pp. 201ff; and Rawls, op. cit., pp. 3ff.
philosophers now hold that a retributive answer to question (3) is consistent with a utilitarian answer to questions (2) and (4). In later chapters we will show why this contention is held and why it is questionable on several grounds.

The various versions of the retributive theory have two elements in common. First, the claim that the possible good consequences of punishment are irrelevant in determining its justification. Second, that desert, merit, or guilt is the only morally correct reason for punishment. Beyond the acceptance of these two claims, there is little agreement on specific doctrines among the major retributivists.

The concept of moral desert that plays a central role in the retributive position has, of course, a long history. As traditionally interpreted, it involves the claim that a person should be rewarded or punished in proportion to his moral worth or virtue which is determined by the praiseworthy or blameworthy acts for which he is responsible. Desert is thus a "past-looking" rather than a "future-looking" concept.  

John Hospers stresses this point in his discussion of desert. He states:

When we consider what course of action has the greatest utility, we are concerned only with the future... But when we consider what course of action is just--in the sense of 'in accordance with desert'--we are concerned

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5A utilitarian interpretation of desert in conjunction with a utilitarian moral position is open to the objections that are raised against utilitarianism in this dissertation.
not with the future but with the past. What a person deserves depends not on what will occur in the future as a result of his actions but on what he has done in the past.  

Judgments of desert always require a consideration of the object that is deserved. One does not say that "A is deserving" unless there is an implicit understanding of the kind of thing that is deserved. One is always deserving of something. Further, the characteristics or actions that make one deserving affect the type or degree of what one deserves. If one is deserving of happiness because of moral virtue, the degree and type of happiness should be proportioned to the nature of the moral virtue which one possesses. We will see in discussing the views of a number of retributivists below how they attempt to proportion punishment to one's moral merit.

The criteria taken to be appropriate for determining desert may vary among different retributivists. Some consider motives to be primary, while others consider intentions to be so. Whatever criteria used, however, must be acts or characteristics for which the agent can be held morally responsible. A person can be deserving for his chosen behavior but not for his skin color or his parents' actions because the latter are not things for which he can be held responsible.

In our discussion of retributivism, we will examine in detail some of

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the criteria that have been offered for determining desert and the

effect that the use of this concept has had on the retributive theory of

punishment.

Treating men according to their desert is held by many to

be the only just manner of treatment. The claim that this view, the

meritarian theory of justice, is the cornerstone of an adequate theory

of punishment has been defended often. For example, C. S. Lewis has

recently stated:

But the concept of desert is the only connecting link
between punishment and justice. It is only as deserved
or undeserved that a sentence can be just or unjust. I
do not here contend that the question "Is it deserved?" is
the only one we can reasonably ask about punishment.
We may very properly ask whether it is likely to deter
others and to reform the criminal. But neither of these
two last questions is a question about justice.7

Perhaps the best approach we can make to an understanding

of the retributive theory and the role played in it by the meritarian

theory of justice is by briefly considering Kant's views. It is usually

his theory, or at least what is generally taken to be his theory, that

philosophers have in mind when they talk of "retributivism." His

position on punishment is given in the following often quoted passage

from the Philosophy of Law:

Judicial punishment.. can be inflicted on a criminal,
never just as instrumental to the achievement of some

7 C. S. Lewis, "Humanitarian Theory of Punishment,"
other good for the criminal himself or for the civil society, but only because he has committed a crime; for a man may never be used just as the means to the ends of another person or mixed up with the objects of Real Right--against which his innate personality protects him, even if he is condemned to lose his civil personality. He must first be found culpable, before there is any thought of turning his punishment to advantage either for himself or society. Penal law is a categorical imperative, and woe to him who crawls through the serpentine maze of utilitarian theory in order to find an excuse, in some advantage to someone for releasing the criminal from punishment or any degree of it, in line with the phrasical proverb "It is better that one man die than that a whole people perish;" for if justice perishes, there is no more value in man living on the earth... What mode and degree of punishment, then, is the principle and standard of public justice? Nothing but the principle of equality... Only the rule of retribution (lex talionis)--only, of course, before the bar of justice, not in your own private judgment--can determine the quality and quantity of punishment... Not it appears that differences of rank and class do not permit the exact retribution of like with like; but even if retribution is not possible according to the exact letter, it is still always valid in respect of effect, taking into account the feelings of the superior party.... So, for example, a fine for slander has little proportion to the insult, since any one who is well off can then permit himself the luxury of such behavior at his own pleasure; yet the violation of the honor of one person can be the equivalent of the damage to the pride of another party, if the court condemns the offender not only to retract and apologize, but to submit to some meaner ordeal such as kissing the hand of the injured person.

The essential points of Kant's position can be stated in the following

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following propositions:

(1) A person may be punished by the state only if he has committed a crime, i.e., broken a morally defensible law of the state.

(2) A person must be punished if he has committed a crime.

(3) Harm or evil given as punishment should be as equal as possible to the moral gravity of the offense.

Proposition (3) is certainly in need of explanation because the manner in which "moral gravity" is to be interpreted is not clear. Kant seems to hold two different views regarding the manner in which the moral gravity is to be fixed. At times, he seems to be saying that the only adequate method of fixing the penalty is by making the harm done to the offender equal to the harm which he has done. Yet, he also speaks of determining the amount and kind of penalty by considering the "internal wickedness" or evil of the offender. These two ways of determining the

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9 This difference is reflected in the different views various interpreters attribute to Kant. According to A. C. Ewing, The Morality of Punishment (London, 1929), pp. 15-16, Kant intends that the punishment should be equal to the injury caused by the crime. He states, "This leads him (Kant) into an obvious difficulty as to the possibility of fixing the right proportion between the guilt of the criminal and the pain of the punishment, but he meets it by an appeal to the lex talionis. This virtually means an abandonment of any attempt at correlating the pain with the real inward guilt and the substitution of an external resemblance between the outward nature of the punishment and the injury done by the offender as our sole criterion, but at least it has the virtue of being a workable method." M. R. Cohen, Reason and Law (Glencoe, Ill., The Free Press, 1950), p. 112, maintains, however, that Kant intended to have the punishment equal to the internal wickedness which doesn't correspond to the external harm. He states, "And to speak as he does elsewhere of making the punishment proportional to the internal wickedness of the criminal is to forget, that no human being can determine the internal wickedness of another..."
amount of punishment certainly seem incompatible since they could lead to different results. Also, both of these possibilities are faced with a number of serious difficulties which will be examined in the following chapter.

A fourth proposition which is held by Kant, and which is used to support the previous propositions is:

(4) People should be rewarded or punished according to their moral desert.

Kant states:

Even if a Civil Society resolved to dissolve itself with the consent of all its members...the last murderer lying in the prison ought to be executed before the resolution is carried out. This ought to be done in order that everyone may realize the desert of his deeds, and that bloodguiltiness may not remain upon the people.

Here we have Kant's statement of the meritarian theory of justice, and see that it is used to support the claim that criminals must be punished. Further, since for Kant crimes are always acts that are morally blameworthy, proposition (4) does more than merely support the earlier propositions, it entails them. A rejection of proposition (1), (2), or (3) involves a rejection of the meritarian theory of justice. If we reject proposition (3) and hold instead that only as much punishment as is

necessary to reform or deter the criminal should be used, we are not necessarily treating the criminal in accordance with his desert. (4) entails (2) since to treat a man as he deserves requires that the crimes for which he is responsible should be punished. (1) is also entailed by (4) since the latter would require that only those deserving of punishment should receive it.

We can now find in Kant an answer to the three questions with which we started. As an answer to question (2), Kant would hold that laws providing punishment are justified if and only if they distributed good and evil according to desert. His answer to question (3) is that all and only those who are guilty should be punished. In response to question (4), Kant would maintain that the penalty must be as equal as possible to the gravity of the offense.

From the preceding it is clear that Kant's answers to all three questions are necessarily connected, i.e., they are all entailed by the meritarian theory of justice. A rejection of any of the three answers is necessarily a rejection of the meritarian position. For this reason, later retributivists who try to modify Kant's position and still maintain the meritarian theory of justice have been unsuccessful.

Since Kant's version of the retributive theory entails what are generally held to be extreme views, i.e., that all criminals must be punished and that the punishment cannot be less than is deserved, a number of retributivists have attempted to present acceptable modified
theories. One important version is that presented by F. H. Bradley.

Unfortunately, he presents his version in a misleading and confused fashion. He states:

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

Thus Bradley holds that only someone who is guilty of a crime may be punished, but that the punishment may be modified for utilitarian reasons. While Bradley holds that desert gives the state the right to punish, unlike Kant, he does not hold that there is an obligation to punish all criminals even if the punishment is modified by the utilitarian considerations.

The problem in Bradley is to find what kind of moral theory or basic principles could be appealed to to defend the position he takes on punishment. His statements about not punishing an individual unless he deserves it would seem to indicate that Bradley would hold a merititarian theory of justice as an ultimate moral principle. Yet it seems

that holding the meritarian theory of justice as an ultimate principle
cannot be reconciled with the claim that the punishment can be modified
by utilitarian considerations for, as we have already seen, the meritarian view entails that punishment be given according to desert and not
utilitarian factors. The problem is that once utilitarian considerations
are taken into account, this might require that the punishment be more
or less than is deserved. If so, Bradley's claim that we do not have
the right to punish the criminal unless he deserves it would, at least on
occasion, be less important than considerations of utility. If utilitarian
considerations carry more weight than considerations of justice, then
it is hard to see how Bradley can claim so certainly that only the guilty
may be punished. If utilitarian consequences alone must be considered,
it may be moral that the innocent should sometimes be punished (or, if
this use of "punishment" is objectionable, victimized). At least if one
accepts the utilitarian position, the latter is a possibility; and if Bradley
wants to deny it, he will have to argue that utilitarianism never, in fact,
leads to the punishment of an innocent person.

A slightly different position that seems more tenable and one
that Bradley may have intended to assert is that only the guilty should
be punished and that they should not be punished to any greater extent
than they deserve.  

12 Utilitarian considerations can be used to lessen.

12 H. Rashdall suggests this as a possible interpretation of
Bradley's position. See his The Theory of Good and Evil (Oxford:
the punishment, but not to increase it. The fact that a criminal is not
given what he deserves can be attributed to leniency or charity on the
part of the punishers. This view does not face the objection that utili-
tarian factors can override the claim that only the guilty should be
punished. There is, of course, no requirement that the guilty must be
punished. Not only is the meritarian theory of justice still rejected but
also the principle of utility is considered insufficient to outweigh non-
utilitarian considerations, i.e., the propositions that only the guilty
should be punished and that they should not be punished to a greater ex-
tent than they deserve. Either the position must be defended on intuitive
grounds or it must be shown to be deductible from some more general
moral view. Bradley does not do the latter; and a defense on the grounds
of intuition would seem inadequate not only because of the usual criti-
cisms against such a defense, but because if it were right to consider
utilitarian factors in determining whether to lessen a punishment, it
would seem right to consider them in determining whether to over-punish,
especially when over-punishment would produce extremely good results.

Thus any attempt to argue for this revised position seems doomed to
failure.

The main difficulty is that once the meritarian principle is
given up, as Bradley has done by allowing the punishment to be less than

\[13\] For some difficulties with making non-utilitarian principles ones that can never be overriden by utilitarian considerations, see Chapter Four, pp. 107-109.
deserved, a new principle of justice must be appealed to or utilitarianism embraced. Bradley rejects the latter course, but does not offer any moral principle in place of the meritarian view of justice.

The objections to Bradley’s position can also be raised against K. G. Armstrong’s recent defense of the retributive theory. Armstrong holds that the answers given to questions about the moral justification of punishment can be of a different kind than those given to questions dealing with the proper amount of punishment. For him, the retributive theory apparently consists of two propositions: (1) Only the guilty should be punished and (2) The guilty should not be punished more than they deserve. He states:

A vital point here is that justice gives the appropriate authority the right to punish offenders up to some limit, but one is not necessarily and invariably obliged to punish to the limit of justice.... For a variety of reasons (amongst them the hope of reforming the criminal) the appropriate authority may choose to punish a man less than it is entitled to, but it is never just to punish a man more than he deserves.

Armstrong holds that considerations of merit are of over-riding importance in considering the justification of the practice of punishment, but such considerations are not necessarily obligatory with regard to the amount of punishment. This position is the same as the one just considered above (which was suggested as the position that

14 Armstrong, op. cit.
15 Ibid., p. 487.
Bradley may have intended to hold). Of course, the same objections are equally relevant here. The main objection is that no principle that does not lead to an apparently untenable moral position is offered to explain when the requirements of justice are obligatory and when they may be modified.

Thus, since there is no satisfactory way of modifying the retributive theory as presented by Kant, we conclude that the retributive theory is indefensible unless based on the meritarian theory of justice.

The classical utilitarian or act-utilitarian view of punishment differs quite radically from that of the retribivist. The utilitarian denies both claims that were found to be basic to the retribivist view of punishment, i.e., that the good consequences of punishment are irrelevant in determining its moral justification and that guilt or desert is the only morally correct reason for punishment. As a result, the utilitarian also denies the correctness of the meritarian view of justice or at least its importance which we found to be basic to the retributive position.

\[^{16}\text{Act-utilitarianism holds that an action is right which will produce the greatest amount of utility in the given situation. Act-utilitarianism is usually distinguished from rule-utilitarianism which holds that the act is right which conforms to morally acceptable rules, the acceptability of the rules being determined by utilitarian considerations. In Chapter Three, we will consider whether the rule-utilitarian can offer a defensible position on punishment.}\]
Utilitarians maintain that punishment is morally justified if and only if it brings about a better state of affairs than would have existed if the punishment had not taken place. The meaning of "better state of affairs" depends upon the variety of utilitarianism that is held, hedonistic or non-hedonistic. Utilitarians have held that several different worthwhile consequences can be produced by punishment, e.g., preventing the criminal from committing the same kind of harmful act again, deterring others from committing the same kind of act, satisfying the society's feeling or need for vengeance, aiding in the reform of the criminal, etc.

There have been numerous statements of the utilitarian view. Jeremy Bentham's account is especially interesting not only because his views on punishment have been a model for later utilitarians, but also because his theory contains the most prevalent utilitarian view of justice.

Bentham states that punishment is:

an artificial consequence, annexed by the political authority to an offensive act in one instance; in the view of putting a stop to the production of events similar to the obnoxious part of its natural consequences, in other instances.¹⁷

Bentham gives a concise statement of the ends of punishment in which he states:

The immediate principal end of punishment is to control action. This action is either that of the offender, or of others: that of the offender it controls by its influence,

either on his will, in which case it is said to operate in
the way of reform; or on his physical power, in which
case it is said to operate by disablement: that of others
it can influence no otherwise than by its influence over
their wills; in which case it is said to operate in the way
of example. A kind of collateral end, which it has a
natural tendency to answer, is that of affording a pleasure
or satisfaction to the party injured, where there is one, and,
in general, to parties whose ill-will, whether on a self-
regarding account, or on the account of sympathy or antipathy,
has been excited by the offence. 18

Since, for Bentham, the purpose of punishment is to bring
about a better state of affairs primarily by preventing undesirable
behavior, he necessarily maintains that the decision whether to punish
a particular person and, if so, the amount of punishment to be given
depends upon its conduciveness to the desired end. Further, the
practice of punishment, or the laws which allow for it, are also so
justified. Thus, for Bentham, only utilitarian considerations should be
used in determining answers to each of the questions we distinguished
above. As with the meritarians, the kind of answer given to one question
may not be different from the kind of answer given to the others.

Since punishment is only justified by its beneficial conse-
quences, there are times when those guilty of an offense should not be
punished. Bentham gives a number of cases where he thinks that punish-
ment may be unprofitable. Among these are cases where the criminal

18 Ibid., p. 170.
19 Ibid., pp. 171-177.
if unpunished could perform useful services for the community, and cases where large numbers of people would be displeased.

Not only is it the case that some who are guilty should not be punished, but the amount of punishment given for an offense may have little relationship to the nature of the crime. Since the purpose of penalties is to prevent the criminal and others from repeating the crime, then the punishment should only be sufficient to bring about that purpose. Bentham did believe that crimes that produced greater profit should, as a general rule, be punished more severely than crimes that produced less profit. However, Bentham would allow exceptions to this in individual cases.

So far it can be seen that Bentham rejects propositions

(2) A person must be punished if he has committed a crime and (3) Harm or evil given as punishment should be as equal as possible to the moral gravity of the offense that were derived from Kant's position. However, he would maintain that (1) A person may be punished by the state only if he has committed a crime is acceptable, though his reasons for accepting it are different from Kant's. Bentham argues that the innocent, causing no pain should not be punished because it would serve no useful purpose; whereas Kant argues that no undeserving person should be punished. We will see in the following chapter that one of the main attacks on the utilitarian position is aimed at Bentham's defense of the claim that the utilitarian theory requires that only the guilty be punished.
In Bentham, we have not only a different moral theory from that of Kant, but a different view of the nature of justice. For Bentham, there is no difference between treating a man justly and treating him in accord with the principle of utility. Bentham states:

But justice, in the only sense in which it has a meaning, is an imaginary personage, feigned for the convenience of discourse, whose dictates are the dictates of utility, applied to certain particular cases. Justice, then, is nothing more than an imaginary instrument, employed to forward on certain occasions, and by certain means, the purposes of benevolence. The dictates of justice are nothing more than a part of the dictates of benevolence, which, on certain occasions, are applied to certain subjects; to wit, to certain actions.\(^{20}\)

Thus, we can see that for Bentham benevolence and justice are not two separate virtues, but one. Acting in accord with utility is *ipso facto* acting justly. The difficulty here is with the manner of distribution of the good. For Bentham, any distribution of pleasure or pain is apparently as acceptable as any other, just as long as it produces the greatest amount of good possible in the situation. For example, if one is considering how to donate funds for charity, it may be that one could give all his money to one needy person or divide it among several. If the happiness of the one were equal to the total happiness the money would produce if divided among the larger group, then either decision would be equally just. We shall see below that some serious objections to the

\(^{20}\)Ibid., pp. 125-126.
utilitarian position stem from this claim that any distributions that are
equal in welfare are equally just.

A different utilitarian view of the nature of justice is pre-
presented by John Stuart Mill. Mill claims to recognize the force of the
claims of the meritarian theory of justice. He says:

If it is a duty to do to each according to his deserts, return-
ing good for good, as well as repressing evil by evil, it
necessarily follows that we should treat all equally well
(when no higher duty forbids) who have deserved equally well
of us, and that society should treat all equally well who have
deserved equally well of it, that is, who have deserved equally
well absolutely. This is the highest abstract standard of
social and distributive justice, toward which all institutions
and the efforts of all virtuous citizens should be made in the
utmost possible degree to converge.  

Yet Mill is not clear how this position can be held while still maintain-
ing utilitarian principles. His one effort in this direction is to say that
the meritarian view of justice is part of the meaning of utility. He
states:

But this great moral duty rests upon a still deeper
foundation, being a direct emanation from the first
principle of morals, and not a mere logical corollary
from secondary or derivative doctrines. It is involved
in the very meaning of utility, or the greatest happiness
principle. That principle is a mere form or words without
rational signification unless one person's happiness, sup-
posed equal in degree (with the proper allowance made
for kind), is counted for exactly as much as another's.  

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21 J. S. Mill, Utilitarianism (Indianapolis: Bobbs-Merrill
Co., 1957), p. 76.

22 Ibid., p. 76.
Mill, however, apparently does not intend to hold that justice and utility are related by definition. In the next passage, he maintains that the claims of justice can be overridden by considerations of utility.

As every other maxim of justice, so this is by no means applied or held applicable universally; on the contrary, as I have already remarked, it bends to every person's ideas of social expedience.... All persons are deemed to have a right to equality of treatment, except when some recognized social expediency requires the reverse. 23

Thus, the best that can be obtained from Mill's position is the view that justice is subordinate to and distinct from utility.

For both Mill's and Bentham's versions of the relation between justice and utility there are a host of problems that non-utilitarianians raise. The attacks are usually made on the point that both Bentham and Mill seem to agree upon (though for different reasons), i.e., that considerations of utility cannot be outweighed by appeals to justice.

23 Ibid., p. 77.
CHAPTER TWO

In this chapter, some of the main arguments that have been raised against the traditional positions and several of the attempts that have been made to answer them will be considered. Some of the more recent attempts to defend versions of utilitarianism and retributivism will be considered in later chapters. Here our purpose is to show that the type of impasse that the two traditional antagonists have reached results from opposing views regarding correct distributions of punishment. The objections to the utilitarian position will be examined first.

The objections that will be considered against the act-utilitarian \(^1\) position are that (1) it may lead too often to the justification of punishment of a person known to be innocent; (2) it may lead to laws which prescribe punishment for a criminal's relatives; and (3) it may lead to a neglect of the types of excuses that are generally thought to excuse one from liability to punishment. There are other objections which will be raised in Chapter Four, but these will be sufficient to establish the weakness of the utilitarian position.

It should be clearly realized that the objections raised against the utilitarian position are not raised merely because utilitarian-

\(^1\) Unless the text indicates otherwise, the term "utilitarian" will refer only to the act-utilitarian position.
ianism conflicts with the tenets of an opposing moral position. Rather, the objections are aimed at those consequences of the utilitarian doctrine that conflict with views that seem to be ones that are generally and strongly held. Utilitarians themselves generally accept the correctness of these views and try to show that their position does not conflict with them.

For example, S. I. Benn has recently stated:

If utilitarianism could really be shown to involve punishing the innocent, or a false parade of punishment, or punishment in anticipation of an offense, these criticisms would no doubt be conclusive.²

Thus, when opponents charge that utilitarianism leads to collective punishments or the punishment of an innocent person, they are not advancing ethical judgments that utilitarians would reject. Rather, utilitarians want to show that they can on their own principles reject these possible consequences, at least in most instances. In so far as they cannot reject them, utilitarians, as well as their critics, consider their position unsatisfactory.

Before critically examining the objections to the utilitarian position, it would be well to distinguish the possible ends a utilitarian theory might stress. As we have seen in the last chapter, the traditional utilitarian holds that the practice of punishment, the determination to punish a particular person, and the amount of punishment decided

²S. I. Benn and R. S. Peters, op. cit., p. 211.
upon are all justified by the intrinsically or instrumentally good consequences that are produced. All consequences must be considered by the utilitarian in arriving at his conclusions regarding punishment. Primary among the consequences that the utilitarian has usually considered is the deterrence of people other than the offender from committing the same crime as the offender. In holding that deterrence is a worthwhile consequence that can be brought about by appropriate punishment, the utilitarian makes the implicit factual assumption that potential offenders of a certain law are deterred by the knowledge that others who have apparently broken the law are punished.

Usually coupled with deterrence as a possible good consequence of punishment is the direct prevention of the criminal from repeating his offense, e.g., by imprisonment, exile, or death. It should be realized, however, that in many cases where the utilitarian would justify punishments, there is no possibility of the penalty serving to prevent the criminal from repeating his act. In many instances, the criminal would apparently have no reason, ability, or inclination to repeat his offense. For example, as case may be cited where an individual has taken personal revenge against the murder of his father, or where a pickpocket loses his hands in an accident between the time he stole a watch and the time he is tried and sentenced.

Another possible good consequence of punishment is reform, i.e., getting the criminal to realize that he has acted wrongly and to
change his behavior in the future. Although a few utilitarians believe that reform is the only worthwhile goal that may be accomplished or promoted by means of punishment, most utilitarians hold that deterrence and prevention must also be considered in assessing the value of the practice of punishment or particular punishments. It would seem that the only grounds that one would have for leaving out considerations of the latter sort would be to argue that punishment does not in fact have any significant value in deterring others from crime and that pursuing the goal of reform will bring about better consequences than punishing for the preventive value. In the arguments that follow, we will consider the utilitarian position to stress deterrence and prevention since this is the position that most utilitarians take.

The objections against the utilitarian position will now be considered in turn. The objection that has been raised most often and which utilitarians have taken the greatest pains to refute is that their position leads to the justification of punishment for an innocent person. This objection is raised in opposition to the utilitarian answer to question (3) which we gave earlier, i.e., Who should be punished? and we will consider it in that connection.

The nature of this objection and the possibility of defending utilitarianism against it is often misunderstood. The objection may

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3 A detailed discussion of the role of reform and its importance in a utilitarian theory of punishment will be given in Chapter Five.
take one of two forms. First, it is often asserted that the utilitarian position would in fact lead to the punishment of the innocent in far too many instances. Even though the objectors might allow that in a very few extreme cases punishment of the innocent is justified, they hold that utilitarianism goes further than this and justifies it in many cases. Thus, it can be seen that this objection is based on empirical claims to the effect that in certain societal organizations, punishment of an innocent person would lead in many instances to beneficial consequences. A second form of the objection and one that is likely to be proposed by those who hold the meritarian theory of justice is that it is logically possible for utilitarianism to lead to the punishment of an innocent person. Until recently, most utilitarian efforts have been directed towards the first objection because it was thought to be most crucial. The mere possibility that utilitarianism might justify the punishment of an innocent person in an extreme case did not bother all utilitarians. In fact, some would say that there are possibly instances where such punishment is morally correct. When utilitarians realized, however, that they apparently could not defend their position against the first charge successfully, many changed tactics and claimed that the objection was irrelevant because it was logically impossible for utilitarianism to lead to such consequences. We will consider below the utilitarian claim that their position is unlikely to lead to the punishment of an innocent person. In the following chapter, we will consider
the utilitarian claim that their position cannot possibly lead to punishment of the innocent.

In arguing that utilitarianism is likely to lead to the punishment of an innocent person, non-utilitarians usually present hypothetical, but possible, cases where such punishment could occur. Take, for example, a situation where a prominent man has been killed and the public greatly desires that the killer be apprehended. The authorities, to calm the public and boost its faith in the security offered by the state, accuse and convict an aged derelict of the crime. Further, the fact of the derelict's innocence is known to only two or three of the highest officials who presented the false evidence on which he was convicted. With such an example, utilitarians can usually make a plausible case for the claim that the punishment would still be unjustified. Ewing gives an admirably succinct statement of the kinds of objections that a utilitarian could raise in the face of an example such as the one above. He states:

It is all very well to say that the innocence of the man punished might be kept secret, but could the authorities ever be quite sure that they would succeed in doing this (unless at least they imposed an extreme dictatorship, which would be open to other objections)? And, if they recognized that they might punish the innocent sometimes, would not there be a great danger of their going too far in this practice? Against the terrible advantages that they saw or might think they saw have to be set a number of considerations which are very important and yet hardly susceptible of measurement—the psychological effects of being punished when one knew oneself innocent, the risk of discovery, the effects on the relatives of the person punished, the bad psychological effects on the punisher.... For, although there probably are cases where it would do more good than harm to punish an innocent man, authorities
who did not make it a general law never to punish the
innocent, but allowed the making of exceptions on the
ground of consequences, would be likely to do more
harm by punishing innocent men when the consequences
were really bad, although thought good, than the author-
ities who stuck to the general law did by not punishing
innocent people in the rare cases when the consequences
would have been good. 4

Ewing is typical of many who attempt to defend utilitarianism
against this objection in that he stresses the possible bad effects of the
authorities' making the decision to punish an innocent person. Certainly
any error in their calculations could have very detrimental consequences.
However, it need not always be the authorities that are knowingly punish-
ing or allowing the punishment of an innocent person. To take a slight-
ly different case, it is certainly possible that a witness may have at
his disposal information that will clear the aged derelict of a crime
of which the authorities think he is guilty. Further, the witness may
realize that his withholding of the evidence could never be detected and
would cause very beneficial consequences. Here the utilitarian is much
harder pressed to show that the witness should not withhold the evidence.
Apparently, the only serious objection that the utilitarian can make
apart from the effect on the aged derelict is that such an act may have
bad psychological consequences for the witness. There is certainly
no necessity, however, for the witness to suffer any serious psychologi-
cal harm or to have pangs of conscience having done what he reasoned

"right." Further, the witness need not worry about his tendency to lie or withhold evidence, for he may be quite prudent about such matters, i.e., always refraining from doing so unless he is quite clear about the consequences. Thus, while it may not be justified on utilitarian grounds for any of the authorities to bring about the punishment of an innocent person, it may be justifiable for some other person to bring about such a result. This result is still one that utilitarians would want to condemn.

If the utilitarian is to defend himself against the above objection, he has to find some characteristic or set of characteristics which always make an act which produces them wrong and which are produced by punishing an innocent man. Since he apparently cannot find such characteristics, he must claim that in every given situation the good produced by punishing an innocent man will not outweigh the evil. Yet, if he can make no generalizations about the kind or amount of evil that will outweigh the good in every situation where an innocent man is punished, his contention certainly seems dubious. Thus the attempt to show that utilitarianism is unlikely to lead to the justification of the punishment of an innocent person seems fraught with difficulties.

Another point that is connected with our discussion of the punishment of an innocent person is that utilitarianism can apparently justify a law that prescribes harmful treatment of a criminal's wife, children, or other relatives as a means of punishing the criminal. A law, for example, which prescribed such treatment for the family of a
person that commits treason certainly seems to be one that a utilitarian would have to consider seriously. It might well have the effect of deterring many would-be traitors. In fact, some governments apparently do believe it useful to treat harshly the families of people who have committed treason. It is hard to see how the utilitarian could say that every such law is unlikely to be useful. And since, as Benn has asserted, the utilitarian considers punishment of an innocent person to be morally unacceptable, it seems that he is faced with a serious problem.

One recent and perceptive criticism of utilitarianism has been made by H. L. A. Hart. He argues that the explanation given by utilitarians for accepting various factors which are considered to excuse an agent from punishment are incoherent. In many cases, our and other western legal systems recognize that factors such as insanity, provocation, duress, mistakes, and accidents are, at times, sufficient to excuse an agent from criminal liability. If an agent who has broken a law can offer no such excuse, he is considered responsible for his behavior. Since it would appear that a greater amount of good might be brought about by refusing to accept certain factors as excusing, the utilitarian must explain why he should accept such "excusing factors."

Bentham offers a utilitarian defense for accepting certain factors as sufficient for excuse from liability. He argues that punishing an agent who acted while insane or intoxicated or for acts that are done

5 Ibid., pp. 16ff.
unintentionally or from a mistaken understanding of the circumstances is not profitable because it does not prevent the agent from performing other acts with the same characteristics. 6

In reply to Bentham's utilitarian analysis of the grounds for these excuses, H. L. A. Hart argues that Bentham has committed a non-sequitur. 7 All Bentham has shown, he argues, is that the threat of punishment will not deter those who act unintentionally or who are insane. He has not shown that the actual punishment will not be effective in deterring many normal people from committing crimes and claiming the right to be excused. We may well find it to be the case that better results could be brought about if we allowed fewer kinds of excuses. If insanity, for example, were not allowed as an excuse, then some prospective criminals who plan to commit a crime, and, if caught, plead insanity, would be deterred. Yet, it is generally agreed that insanity does excuse an individual from criminal liability on the grounds that those who are insane are in no sense deserving of punishment. Thus, utilitarianism, in considering only consequences, could lead to the justification of punishment of those who are generally held to be undeserving of it.


7 Hart, op. cit., pp. 17ff.
A similar point can be made with regard to mitigating excuses. It is often thought that one's youth, one's poor past environment, or the fact that the offense is one's first is sufficient to lessen the gravity of the crime. Consider first offenses: A strict retributivist would say that the fact that the offense was one's first has no bearing on desert. A first offender would be as deserving of twenty years for grand larceny as a second offender who has already served the appropriate penalty for his first crime. For the utilitarian, it may be the case that the first offender should be treated with equal or greater severity than the recidivist on the grounds that harsh treatment of the first offender might increase the deterrent effect on those who are likely to commit the act for the first time; but a severe penalty may, in fact, not serve to deter second offenders any more than a lighter one.

Two further objections that can be raised against the utilitarian position will be considered in later chapters. One is directed at the kind of answer given to question (4) How much should we punish someone? Non-utilitarians have claimed that utilitarianism would lead to severe punishments for minor offenses. In our discussion of Benn's views, it will be seen that the utilitarian has a defense against this often raised criticism. A second, more forceful objection is that utilitarianism can lead to the justification of punishments that support a social order where important goods are unjustly distributed. It will be argued,

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8 Ibid., pp. 13ff.
for example, that utilitarianism can justify punishments which are
designed to promote slavery. An investigation of this criticism must
await the examination of the equalitarian theory of justice in Chapter
Four.

Thus, in our examination of the traditional utilitarian
position, we have found that it is unable to handle various problems
that are raised concerning proper distribution. Before we consider
some recent attempts to extricate the utilitarian position from the kinds
of problems we have raised, the objections to the retributivist position
will be considered.

Criticisms of the retributivist position are generally
directed at the answers given to question (3) Who should be punished?
and question (4) How much should one be punished? If retributivists
cannot find a satisfactory answer to either question, then the meritar-
ian principle, on which these answers are based, must be given up or
modified by the addition of a further principle. The objections to
question (4), which have generally been thought to be most crucial, will
be considered first.

We have already seen that one of the propositions that Kant
derived from the meritarian principle was that the severity of the
punishment should be as equal as possible to the moral gravity of the
crime, yet retributivists have been unsuccessful in arriving at a means
of determining moral gravity which will allow for a satisfactory system of punishment. In specifying those parts of a criminal situation that can be used to judge the moral gravity of an act, various authors have listed the actual harm done, the motive of the agent, and the intention of the agent. We will limit our discussion here to three main systems of judging the gravity of a crime and the difficulties that arise from them in establishing satisfactory penalties.

First, as was previously suggested, Kant may have been driven to hold that the penalty be proportioned to the actual harm produced by the crime. The trouble with this sort of position is that the criminal is not necessarily being treated according to his deserts, unless one means by desert that an individual should always suffer as much harm as he has caused. Such a view would have to reject the kinds of excuses that are generally accepted as being sufficient to mitigate or eliminate the culpability of the agent; and, therefore, the distinctions that are generally drawn between intentional and unintentional acts would be indefensible. Further, there would on this view be apparently no way of handling group crimes. How much should each of six men be punished who are convicted of a single murder? To put all six to death would certainly seem, for this theory, to be over-punishment; in fact, were one put to death, the others should be freed for the appropriate amount of harm would have been caused.

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9See Chapter One, note 9.
Before we discuss the consequences that would result from using either motives or intentions to determine the gravity of the crime, let us distinguish briefly between these. One's intention is the total set of consequences one expects to follow from a certain course of action. If, for example, one places a bomb upon an airplane to prevent it from reaching its destination, one's intention includes all the consequences that are expected to follow from the placement of the bomb. These include not only the prevention of the plane from reaching its destination, but the destruction of the plane, the killing of the passengers and crew, etc.

Motives differ from intentions in that they refer not to the total set of expected consequences of an action but to those factors of an action that moved the agent to perform it. Thus, an agent's motive for robbing a bank would differ from his intention in performing such an act. In robbing a bank, an agent may intend to scare the teller and obtain money; his motive, however, may be to get public notice.

If the moral gravity of the crime is determined by the motives of the agent who performed it, difficulties arise that differ from those we found to exist when we considered the actual harm done as the criterion. One problem is that of determining how severely we should punish acts that result from various motives; there is no clear way of classifying motives so that we can determine in every case which are

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10 The following discussion borrows heavily from R. Brandt, *Ethical Theory*, pp. 462-464.
worse than others and how much punishment a certain sort of act that results from a particular motive should receive. Another problem is that if motives alone determine the gravity of the act, then it may be that all crimes that result from a single motive such as jealousy should be punished equally, regardless of the harm caused.

Yet another problem is that many agents who purposely break morally defensible laws may well be morally blameless because they acted from good motives, but it seems imperative that such actions be punished for the welfare of society. It is certainly possible that an agent in breaking the law to perform an action that is actually bad may act from a mistaken sense of duty or from feelings of benevolence. For example, a scientist may, after careful consideration, decide to turn over military secrets to an enemy, because he believes that in this way he can lessen the chances for war by maintaining a balance of power. Even though the scientist may be mistaken about the results of his behavior, his action must be considered morally admirable. If so, the retributivist would have to maintain that such behavior should go unpunished regardless of the dire consequences that might follow from allowing each individual to follow his personal moral convictions. Certainly no legal system could function effectively if exceptions were made for those people who act from morally admirable motives. The

\[11\text{Ibid.}, \text{pp. 500-501.}\]
legal system would be powerless to protect the public against ignorant but well-meaning people.

A third manner of determining the moral gravity of the act that might be proposed is that of considering the intentions of the agent who commits the crime. Two approaches are possible. An agent might be considered blameworthy if the act that he intends to commit is one which if committed would be objectively wrong, or an agent might be considered blameworthy if the act he intends to commit is one that he thinks is wrong. The problem here is that if intentions alone are considered, there is no way of determining different degrees of an act such as the taking of another's life. Acts done in self-defense would apparently be treated in the same manner as acts which were done with premeditation. The only way one can distinguish between different degrees of an act such as murder would be by considering other factors such as motives.

There is yet a further problem with considering either motives or intentions or a combination of the two as a means by which the moral gravity is determined: one would have to consider attempted crimes to have the same gravity as successful crimes. One practical objection to this is that it could have the effect of making an individual caught in an attempted murder fight until he is subdued rather than surrender since he expects to receive the penalty for murder anyway.

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12 Brandt, Value and Obligation, pp. 641-642.

13 Brandt, Ethical Theory, p. 500.
Thus, we see that the retributivist apparently cannot arrive at a system of penalties by trying to proportion them to the gravity of the crime. Some retributivists have tried to strengthen their position in answering question (4), but fail. In examining C. W. K. Mundle's attempt at improvement, we will see that it is not only open to some of the criticisms we have already raised, but that it is also faced with other damaging criticisms.

Mundle attempts to avoid the objections to the retributive answer to question (4) by arguing that we must distinguish between the claim that the worse the offense the greater the penalty should be and the claim that for each offense there is a determinate kind of punishment that is the just penalty. He argues that whereas the former claim is acceptable, the latter is not. He states:

In order to supply the principle of proportion, all that is necessary is that we should be able (a) to compare different offences in respect of their relative moral gravity, and (b) to compare different penalties in respect of their relative unpleasantness—and surely we can make such comparisons in many, if not all, cases. Thus, Mundle wants to set up two scales and give a penalty that is considered severe relative to other penalties for an offense that is considered graver than other offenses. Mundle admits that we cannot find an exact penalty to fit each crime because to do this, "we should need

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14 Mundle, op. cit., p. 222.
15 Ibid., p. 222.
to be able to discern an alleged equivalence between the moral gravity
of each offence and some specific penalty--and in order to do this we
should presumably have to assess, on an absolute scale, both the moral
gravity of offences and the unpleasantness of penalties."\[^{16}\]

Mundle's proposal is unacceptable on two grounds. First,
we have already shown that the retributivist apparently has no accept-
able way of determining the moral gravity of an offense without refer-
ence to consequences. Muddle, therefore, cannot even set up a list of
offenses in order of gravity on strictly retributive grounds. Second,
even if we granted that the moral gravity of an offense could in some
manner be determined by reference to the offender's desert or moral
reprehensibility, Mundle's view would apparently still lead to absurdity.
The problem is that Mundle proposes two scales, one for crimes and
one for punishments, both graduated from the least to the most serious,
and the matching of these scales least crime to least punishment and
worst crime to worst punishment. Notice first that the list of crimes
must be finite in order that the legal system may function and that the
list of punishments is innumerable (it includes $1.00 fine, 1 day in jail,
2 days in jail, etc.). Any attempt to match these scales, using no
criterion other than their relative positions must result in an absurd
solution or at least in myriad solutions. Beginning the correspondence
at the serious end of the scales and working down both scales one factor

\[^{16}\textit{Ibid.}, p. 222.\]
at a time might result in equating murder with death and double parking with 99 years in prison. Beginning at the least serious end, in the same manner, murder could reasonably result in 512 days in prison. The point is clear: any satisfactory system of punishments obtained from the matching of these two scales must rely on a third criterion, namely the actual seriousness of the crime and the punishment that fits it.

So far we have seen that the retributive answer to question (4) leads to insoluble problems. Objections of a different sort have been raised to the retributive answer to question (3). In answering question (3), the retributivist holds that all those who are guilty must be punished. This, for most moralists, including nearly all retributivists antedating Kant, seems to be too strict a position. Later retributivists apparently would like to allow considerations of justice to be foregone in some instances in the interests of leniency, benevolence, or utility; as we have seen, however, a consistent retributive position cannot allow this. As a result of the retributivists' inability to amend their position with regard to the treatment of all those who are guilty as well as the strict proportion between penalty and crime that it requires, many philosophers have accused the retributivists of a failure to consider moral values, other than that of justice, such as leniency or benevolence. Further, since it appears that the retributivist cannot find any satisfactory way of apportioning the penalty to the crime without considering consequences, he must take other values into consideration in arriving at an acceptable moral theory.
CHAPTER THREE

A number of attempts have been made in the twentieth century to end the impasse between retributivism and utilitarianism by modifying the traditional positions. In this chapter, we will consider three such attempts. We will first examine the proposal that has resulted from analysis of the term "punishment." Second, Ewing's proposal to equate the primary good of punishment with moral education rather than deterrence or reform will be considered. Third, we will examine the rule-utilitarian theory and especially the tactic of separating issues.

In recent years a great deal of work has been done on the problem of defining the term "punishment." A number of writers once maintained that the conflict between retributivism and utilitarianism could be resolved by a correct analysis of the term, but this view is no longer generally held. In the following discussion, I want to show why it was thought that the problem of the moral justification of punishment could be clarified and perhaps solved by paying heed to the proper use of "punishment" and why this approach can no longer be considered a fruitful one.

Anthony Quinton has made one of the most notable attempts to end the conflict between retributive and utilitarian theories. Quinton

Quinton, op. cit., pp. 512-517.

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argues that retributivism is not, like utilitarianism, a theory concerned with the moral justification of punishment, but one that provides an elucidation of the correct use of the term "punishment." The essential thesis of retributivism, for him, is that only the guilty should be punished. This thesis is not a moral one, however, but a logical one, i.e., the retributivist thesis is a forceful one, not because it is appealing to an acceptable moral principle, but because the term "punishment" is only applied to a situation if it involves the suffering of an individual justly convicted of a legal offense. Quinton gives the following succinct statement of his position:

There is a very good reason for this difference in force. For the necessity of not punishing the innocent is not moral but logical. It is not, as some retributivist think, that we may not punish the innocent and ought only to punish the guilty, but that we cannot punish the guilty. Of course, the suffering or harm in which punishment consists can be and is inflicted on innocent people, but this is not punishment, it is judicial error or terrorism or, in Bradley's characteristically repellent phrase, "social surgery." The 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."²

Quinton does allow one limitation to this contention about "punishment." Whereas he admits that his theory holds for the first person present tense use of the verb, it does not hold for other uses. It makes no sense to say, "I am going to punish you for something you have done," but it does make sense to say, "He was punished for some-

²Ibid., p. 514.
thing he did not do." The point is that no second or third person statements to the effect that an individual has been punished are correct unless such a statement in the first person present would have been appropriate by those in charge of administering the punishment. Thus, for someone in authority to determine that an individual deserves punishment and to pronounce a sentence on an individual as punishment, he would at least have to believe the individual to be guilty. So, if one is in a position to deal out penalties, it is logically improper for one to say he is going to punish a person unless that person is guilty; and it is morally wrong to say that he is going to punish a person unless he believes that person to be guilty. To support these last contentions, Quinton offers the following argument:

This can be shown by the fact that punishment is always for something. If a man says to another "I am going to punish you" and is asked "What for?" he cannot reply "nothing at all" or "something you have not done." At best, he is using "punish" here as a more or less elegant synonym for "cause to suffer." Either that or he does not understand the meaning of "punish." "I am going to punish you for something you have not done" is as absurd a statement as "I blame you for this event for which you were not responsible."³

This will certainly not do. Even if it would be improper to say that a man was being punished when there has been no violation of a law, it is not absurd to say that you are punishing a man for something he did not do. Certainly we talk about teachers punishing a whole class

³Ibid., p. 515.
for something one of the students has done, or military authorities punishing a number of citizens because they cannot find those who committed the crime. In these cases, it would be quite appropriate for the person who was causing the harm to say to one of the group, "I am punishing you for something you have not done." If Quinton wants to call these uses of "punishment" improper, he must clearly explain why they are so, which he has not done and which he does not seem able to do without being arbitrary.

What Quinton is trying to do is avoid the moral questions involved in the topic of punishment by what Hart calls a "definitional stop," i.e., he is setting criteria which must be accepted before the word "punishment" is considered appropriately applied. If Quinton's criteria were accepted, it would allow the utilitarian to avoid one of the main criticisms against the utilitarian theory of punishment. It would appear, however, that Quinton's tactic would not avoid the moral issues that philosophers have been concerned with when they have discussed punishment. For example, one issue philosophers have been interested in is whether utilitarianism could lead to the intentional harm of individuals who are not responsible for breaking laws. Whether such intentional harm is called "punishment" or (as Quinton suggests) "victimization," the moral issue would still remain, only now the issue would be whether utilitarianism can justify victimization of the innocent.

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4 Hart, op. cit., p. 5.
rather than punishment of the innocent. Thus it would seem that Quinton's tactic, even if it were a correct analysis of "punishment," would not strengthen the utilitarian position on the moral issues that are usually considered to be involved.

Some philosophers have listed what they consider standard uses of "punishment" and relegated other uses to the category of substandard uses. For example, S. I. Benn gives the following five criteria for the standard use of "punishment":

1. It must involve an "Evil or unpleasantness, to the victims";
2. It must be for an offense (actual or supposed);
3. It must be of an offender (actual or supposed);
4. It must be the work of personal agencies (i.e., not merely the natural consequences of an action);
5. It must be imposed by authority (real or supposed), conferred by the system of rules against which the offense has been committed.

Calling this the standard use should not, however, lead one to neglect the moral problems raised by the substandard uses of "punishment."

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5 It should be noted that this substitution of "victimization" for certain instances of what might be called "punishment" forces "victimization" to take on a strange meaning. "Victimization" is ordinarily considered a value judgment; and whereas Quinton dislikes "punishment of an innocent person" on the grounds that it contradicts ordinary usage, surely he must object to "justified victimization" on these same grounds. Yet it is just his definition of "punishment" that forces him to consider whether victimization is justified or not.

6 For a brief statement of the argument, see Brandt, Ethical Theory, p. 495.

7 Benn and Peters, op. cit., p. 202. The chapter on punishment is a modified version of an article by Benn published in Philosophy (October, 1959).
For example, Hart gives the following cases of punishments which do not fit the standard use but which he believes must be considered in assessing the moral correctness of the utilitarian or retributive theories:

(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).
(c) Vicarious or collective punishment of some member of a social group for actions done by others without the former's authorization, encouragement, control or permission.
(d) Punishment of persons (otherwise than under (c) who are neither in fact nor supposed to be offenders. 8

We should not, says Hart, use the standard use as a definitional stop, as in the case of Quinton, to prevent investigation into serious moral issues.

It seems that the attempt to clarify and perhaps solve the problem of punishment by means of defining the term "punishment" is doomed to failure. If "punishment" is to be defined, it should be done in a way that will not eliminate serious moral issues. The problem is that "punishment" is vague and open-textured. Perhaps the best that can be done is to state the kinds of cases to which one is applying the term. Traditionally, when philosophers have discussed the moral justification of punishment, they have usually included as instances of punishment cases where the innocent are intentionally harmed by an

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8 Hart, op. cit., p. 5.
authority constituted by a legal system, cases of collective harm (see (c) above), etc. Even if it could be shown that the application of the term "punishment" to some of these acts is not in accord with proper usage, this would not affect the necessity of considering whether or not any theory of punishment would justify these acts.

One of the most significant attempts to present a satisfactory alternative to the retributive and utilitarian theories is that of A. C. Ewing. He presents a theory which he claims is not only more defensible than either the retributive or the usual utilitarian ones, but one which incorporates their valuable insights.

Ewing maintains that the nature of punishment is misconceived by earlier utilitarians. Punishment, although justified by the consequences it produces, has as its main goal neither direct reformation of the criminal nor deterrence of others. Rather, its primary purpose is to educate morally the particular offender and the community as a whole regarding the moral value of various acts. It should be realized that punishment thus conceived may, in fact, be of use in bringing about the reformation of many criminals, but this consequence need not occur for the punishment to be justified. In fact, Ewing feels that punishment is justified even though the expression of the community's disapproval may not be the best means of bringing about reform. He

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9 Ewing, The Morality of Punishment.
states:

The fact that punishment has a tendency to make the offender realize the wrong he has done by impressing upon him the disapproval of society is not altered by the existence of drawbacks and counteracting tendencies; but it is true that this tendency by itself would not justify the infliction of punishment by the State, since it is seldom that a criminal is reformed in this way, and since punishments are in other respects detrimental to moral progress. ¹⁰

Ewing holds that the place where the effects of the moral disapproval expressed by punishment will be most effective is in educating the community. Here he conceives his theory to be stronger than the traditional utilitarian theory which stresses deterrence in that the latter view holds that illegal acts should be avoided because of fear of punishment whereas the former holds that such acts are to be avoided because they are thought to be wrong.

It should be realized that moral education is not, for Ewing, the only purpose of punishment. The deterrent and reformatory effects must also be considered in determining its justification. He states:

The "educative" function of punishment must not be treated as the only one, but requires to be supplemented by the ordinary reformatory and deterrent views. If it is important to reform a man by punishment, it is equally important to reform him by other means such as training in prison, and, since these latter means are more likely to prove successful, they are more important in practice as regards the offender himself, though not as regards the moral education of the community. Also, since it is at least as certain that punishment will deter to some extent as that it

¹⁰ ibid., pp. 86-87.
will reform some offenders and do its "educative" work for the community, this end must be considered also and may sometimes justify more severity in punishment than would otherwise be admissible.\footnote{Ibid., p. 120.}

Ewing claims that his theory avoids the difficulties that retributivists have found in other versions of utilitarianism. He argues that his theory will not only establish the correctness of propositions (1) A person may be punished only if he has committed a crime, and (3) Harm or evil given as punishment should be as equal as possible to the moral gravity of the offense, but also satisfactorily answers several criticisms which retributivists have raised against utilitarian positions that stress reform.

In arguing that his position does not conflict with proposition (1), Ewing states:

\begin{quote}
The moral object of a punishment as such is to make people think of a certain kind of act as very bad, but, if it were inflicted otherwise than for a bad act, it would either produce no effect of this sort at all or cause people to think an act bad which was not really bad, and this is why we must first of all ask--Is a punishment just? Is it inflicted for a wrong act? If punishment expresses condemnation of acts and persons that ought not to be condemned, it will clearly not be fulfilling its function of expressing moral disapproval in the right way.\footnote{Ibid., p. 104 (italics mine).}
\end{quote}

Now this argument would be acceptable only if the punishment were being used primarily to educate the offender morally and not the public. However, since Ewing maintains that the consequences of the punishment on the public as a whole must be considered, there does not seem to be any
necessity that the individuals punished should be actual offenders. Certainly, the punishment of an innocent person who was thought to be guilty by the public might have greater educational value and better consequences overall than the failure to punish anyone because of inability to apprehend the guilty person. Thus, Ewing's modified theory is no better in answering the question "Who should be punished?" than other versions of utilitarianism.

Another of the usual objections to the utilitarian position which Ewing tries to answer is that it can justify severe penalties for what are usually considered trivial crimes. It is claimed that the utilitarian of either variety would be able to justify a severe penalty such as life imprisonment for parking offenses if such a penalty would lead to the diminution of such offenses and lead to more satisfaction than any other penalty. This criticism is directed at the utilitarian because for him, as we have previously seen, the type of penalty is not determined by any intrinsic character of the act but is arrived at by determining which type of penalty would produce the best consequences. Ewing assumes that the usual versions of utilitarianism can justify such a disproportion between penalty and crime (as we will see in discussing rule-utilitarianism, this is not the case). Under this assumption, Ewing presents a modified theory which he maintains avoids this problem. His analysis, however, is unsatisfactory. He states:

...it remains possible to compare the degrees of badness presupposed on the average by different offences, and having
done that, we can lay down the principle that a lesser offence should not be punished so severely as a greater one, e.g., that theft should not be punished so heavily as murder. For, as a general rule, the act of stealing is less bad than the act of murdering, though this may be reversed in individual cases, i.e., some thefts are no doubt worse acts than some murders. We cannot say exactly how much disapproval a murder deserves, but we can say that it generally deserves more than a theft, and so on.  

Ewing, if he is to avoid the type of objection we raised against Mundle, must be able to state how we are to determine which penalty fits a crime. Even if it is necessary to punish a grave crime more severely than a light crime to educate the public to the relative badness of the crimes, it is not clear that penalties for murder or grand larceny would be more than two or three months imprisonment if that were all that was needed to educate the public regarding the wrongness of these acts. A scale which had three months as the maximum penalty would as effectively show the relative seriousness of the crimes as one which had the death penalty. Ewing does not accept this conclusion and maintains that such light penalties would be wrong because they would conflict with the generally held opinions regarding the seriousness of these crimes, and as a result, these laws would be ridiculous and thus be ineffective in forming public opinion. He states:

We know perfectly well that certain kinds of acts are very bad and that some of these are generally worse than others.

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13 Ibid., p. 106.
and this is all that is really necessary for our purpose. We can also see that in some cases a punishment is far too small or far too great properly to express our moral sentiment as regards the crime, so great as to arouse horror or so slight as to excite ridicule, and so can avoid penalties of this excessive or inadequate kind....

Further the way in which disapproval should be shown depends on the stage of development of the people to whom it is addressed. The pain can only have even this value if it is the appropriate expression to their minds of the degree of moral condemnation required by the wrong act. 14

This argument is unacceptable. Ewing maintains that the degree of severity of the punishment must be determined, at least in many instances, by considering the public's present opinions about the nature of the crime. If the predominant public opinion becomes the criterion by which penalties are determined to reflect correctly the relative seriousness of the crimes, then there would be no way in which one could argue that the predominant view of the public was mistaken. Yet it is often believed that the general view is mistaken in these matters. Sociological and biological evidence regarding incest or sexual intercourse would be considered relevant by educated people in determinations of the seriousness of crimes concerning them. Ewing's views do not seem to accord with the way educated people think about the determinations of seriousness of crimes. In arguing which penalty is appropriate for a crime, they do not usually defend their views by claiming that the public agrees with them, but by citing harmful consequences that follow from the crime

14 Ibid., pp. 106-108.
regardless of whether the public generally recognizes these consequences or not. Thus it would appear that Ewing cannot escape the problems involved in determining correct degrees of punishment by using the predominant public opinion as his criterion.

We can now see that Ewing cannot give a more satisfactory answer to questions (3) Who should be punished? and (4) How much should one be punished? than other utilitarians have been able to give. Further, other serious difficulties with his position have been raised which have convinced many philosophers that Ewing's position on punishment is probably less defensible than traditional utilitarian views. First, Ewing, himself, admits that "men commit crimes as a rule not because they do not know they are wrong, but because the consciousness of their wrongness is lacking in the power to influence actions." If this is true, then, certainly on utilitarian grounds, the purpose of punishment should not be primarily to bring about in would-be criminals the recognition that various acts are wrong, but to supply, if possible, some motive for desisting from such actions. Second, it is not at all clear that merely placing a penalty on an action will "educate" the public regarding its wrongness. Mundle, in criticizing Ewing on this point, states:

Presumably the purposes of moral education are to convey the reasons why certain actions are wrong and to strengthen the moral motive. The promulgation of a new penal law...
may further the first purpose if it is accompanied by an explanation of the harm caused by the prohibited behavior. But in that case it is the explanation, not the threat of penalties, which performs the educative function.16

Thus, Ewing's attempt to strengthen the utilitarian position on punishment by stressing its educative function can be assessed only as a failure. Not only has he failed to avoid the problems that face traditional utilitarians, but his view has further problems of its own.

One of the most important attempts in recent years to strengthen the utilitarian position has been rule-utilitarianism. This theory attempts to reconcile the conflict between the traditional antagonists by means of a tactic which, as we have already seen fails for the retributivist, i.e., separation of issues. Since rule-utilitarians differ greatly in the details of their accounts, I shall present what seems to be their main argument regarding punishment.17

In dealing with the problems of punishment, rule-utilitarians claim that they can avoid the kinds of criticisms that are raised against act-utilitarian positions without modifying their position by the addition of any principle of distribution. They maintain that their position can answer what they usually consider to be the main objections that non-

16 Mundle, op. cit., p. 218.

17 Clear accounts of the rule-utilitarian argument on punishment are given by Benn and Peters, op cit., Chapter 8; and J. Rawls, op. cit. Rawls' discussion of question (2) is similar to the one given here.
utilitarians raise: that the utilitarian position can justify the punish-
ment of an innocent person and that it can lead to severe penalties for
trivial crimes. A clear statement of the general rule-utilitarian
position is given by W. Frankena:

That is, the question is not which action has the greatest
utility, but which rule has. We should ask, when we are
proposing to do something, not "What will happen if I do
that in this case?" but "What would happen if everyone
were to do that in such cases?"--a question we do, in
fact, often ask in moral deliberations. The principle of
utility comes in, normally at least, not in determining
what particular action to perform (this is normally de-
termined by the rules), but in determining what the rules
shall be. Rules must be selected, maintained, revised,
and replaced on the basis of their utility and not on any
other basis. The principle of utility is still the ultimate
standard, but it is to be appealed to at the level of rules
rather than at the level of particular judgments....

This means that for the rule-utilitarian it may be right to
obey a rule like telling the truth simply because it is so
useful to have the rule, even when, in the particular case
in question, telling the truth does not lead to the best con-
sequences. 18

The rule-utilitarian position is also explained by stressing the difference
between the manner in which a practice and an instance or application
of it are justified. 19 The various rules which specify the practice are
justified wholly on utilitarian grounds, i.e., they are ones which if
followed would in general produce the best consequences, whereas

18 Frankena, op. cit., p. 30-31.

19 For a discussion of the concept of a practice, see Rawls, op. cit.
particular cases are justified by determining whether they are specified by the rules. Another way in which this distinction is sometimes made is by defining the various roles or offices one can have in connection with a practice. A legislator has the role of determining the content of the rules, whereas a judge has the task of making decisions by reference to these rules. The judge, if he is to carry out his assigned task properly, must refrain from punishing any individual who is not specified as liable to punishment because of the infraction of a rule. The most fundamental office is that of the legislator since the judge is bound by the rules which the former makes. As a result of the distinction between a rule and its application, the rule-utilitarian claims that question (2) How is the practice of punishment justified? is given a strictly utilitarian answer, whereas question (3) Who should be punished? is given a non-utilitarian answer since it is answered by reference to a rule.

Let us first consider the rule-utilitarian answer to question (3) Who should be punished? Simply, rule-utilitarians maintain that their theory cannot possibly lead to the justification of the punishment of an innocent person because no one can be punished except upon the violation of a rule. No judge has the right to hand down a sentence until there has been a violation. J. Rawls states the point as follows:

The justification of what the judge does, qua judge, sounds like the retributive view; the justification of what the (ideal) legislator does, qua legislator, sounds like the utilitarian
view. Thus both views have a point (this is as it should be since intelligent and sensitive persons have been on both sides of the argument); and one's initial confusion disappears once one sees that these views apply to persons holding different offices with different duties, and situated differently with respect to the system of rules that make up the criminal law.

The answer, then, to the confusion engendered by the two views of punishment is quite simple: one distinguishes two offices, that of the judge and that of the legislator, and one distinguishes their different stations with respect to the system of rules which make up the law. 20

Although the rule-utilitarian position requires that the judge must always distribute punishment only to those who are liable as the result of a breach of a rule, it does not insure that those who are liable will be, in any usual sense of the term, deserving. There is no necessity for the rule-utilitarian to specify that only those liable for punishment as the result of an infraction are those who committed it. It appears that the rule-utilitarian may justify, at the level of the legislator, rules which allow punishment of a criminal's family or punishment of a group for crimes done by others over which the group had no control. 21 Since the rules are to be determined wholly on utilitarian grounds, rules which specify such penalties are certainly possible.

The practice that would be productive of the greatest satisfaction might include rules which allow for such distributions of punishment. Conse-

20 Ibid., pp. 6-7.

21 Hart, op. cit., pp. 11-12.
quently, it can be seen that the answer to question (3) is in fact determined fundamentally by rules which are justified on utilitarian grounds; and, as a result, the rule-utilitarian cannot be certain that the resulting distribution will be an acceptable one. Thus, the rule-utilitarian has not shown that by distinguishing a practice from an application his answer to question (3) is a non-utilitarian one; and therefore, his answer to question (3) is liable to objections regarding the manner in which punishment is distributed.

The rule-utilitarian attempt to give a satisfactory answer to question (4) How much should we punish someone? is given its clearest formulation by S. I. Benn. Although it will be seen that his answer is unsatisfactory in several important respects, he does offer a valuable analysis of the retributive claim that trivial crimes should not be given severe penalties.

If the claim that utilitarianism leads to severe penalties for trivial crimes were correct, the rule-utilitarian could not escape it by his tactic of distinguishing the justification of rules from the justification of particular acts falling under the rules. At the level of the legislator, it could possibly be beneficial to pass laws which allowed severe penalties for minor offenses.

This criticism of the utilitarian answer to question (4), however, is based on an indefensible notion of what it means to call an

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22 Benn and Peters, op. cit., Chapter 8.
offense "trivial." We have already seen that the retributivist has no satisfactory way of determining whether various acts are morally trivial or grave. For example, it has been shown how a retributivist might have trouble defending any punishment for an act of treason. Yet, such an act is certainly recognized to be grave. Such acts are generally considered grave because of the bad consequences to which they may lead. If the retributivist cannot, using his own principles, determine which acts are serious and which trivial, his objections seem groundless. Of course, the retributivist may admit that he has no satisfactory way of determining the appropriate penalty, but maintain that the utilitarian position is still indefensible because it can lead to the result that crimes which are judged to be trivial on utilitarian grounds be punished by severe penalties.

Benn sums up these last points very succinctly:

The retributivist's difficulty is that he wants the crime itself to indicate the amount of punishment, which it cannot do unless we first assume a scale of crimes and penalties. But on what principles is the scale to be constructed, and how are new offences to be fitted into it? These difficulties admit of no solution unless we agree to examine the consequences to be expected from penalties of different degrees of severity; i.e., unless we adopt a utilitarian approach. It remains to be seen whether this can be done without our having to concede the retributivist case that this might involve severe penalties for trivial offences.\(^{23}\)

If we use consequences to determine whether the crime is a serious or trivial one, we must recognize that for the utilitarian, a trivial crime

\(^{23}\)Ibid., p. 219.
is one that does not cause very bad consequences, whereas a serious one does. Since on utilitarian grounds, one is justified in causing pain only if the overall consequences are better than if the pain were never caused, a severe penalty is justified only if it is used to bring about more good than harm. Thus a severe penalty to prevent a crime that causes little harm would be unjustified. A penalty should be no more severe than is needed to offset the bad effects of the crime. If it were more severe than needed the excessive amount of harm would be unjustified.

Consider the example of severe penalties for parking offenses. Ordinarily such offenses cause only a slight annoyance to some members of society. If each parking offender were given life imprisonment, the harm would be greater than the offense would cause if left unchecked. Even if such a penalty prevented most of these offenses and so there would rarely be occasion to apply it, the fear drivers would have of breaking the law would be so great as to make the punishment unjustified. However, if parking offenses became quite numerous and were the cause of great annoyance and injury, then a severer penalty for such offenses would be justified. Once the harm caused by a particular offense increases, the offense becomes graver. Whether an act is considered trivial or grave is not determined by some intrinsic characteristic of the act (which could not change), but by the harm that it causes. If an offense is trivial, i.e., causes little harm, it should not be given
a penalty that would cause worse consequences than the crime would itself. The point is that we call an offense trivial because it does not cause much harm and as a result the utilitarians cannot justify giving it a severe penalty. To claim that an act needs a severe penalty is to say that it is an act that society must take stringent measures to prevent and thus is not trivial, but severe.

In concluding his argument, Benn states:

It is apparent that the criticism levelled at utilitarianism, that it would justify severe penalties for relatively trivial offences, is groundless. For part of what we mean when we call an offence "relatively trivial" is that we do not care so much about people committing that one as we do about the others; and that, in turn, implies that we should be unwilling to inflict so much suffering to prevent it. Similarly, "relatively serious" crimes are those that are relatively intolerable; and to describe them in this way is to say that we feel justified in going to much greater lengths to prevent them.24

Thus rule-utilitarianism (as well as act-utilitarianism) can satisfactorily answer the objection that it leads to severe penalties for trivial crimes. Yet, even if this is granted, the rule-utilitarian cannot answer other objections that can be raised regarding his answer to question (4). He is still faced at the level of the legislator with problems of just distribution that confronted the act-utilitarian.

We note that the rule-utilitarian answers not only question (2), but also, in a significant way, questions (3) and (4) on utilitarian grounds. Although the rule-utilitarian may be less likely to justify.

24 Ibid., p. 221.
unacceptable acts than the act-utilitarian, he has not shown that the ques-

tions we distinguished are logically separate; and so (at least at the

level of the legislator), he faces many of the same problems of just
distribution as does the act-utilitarian.

In this chapter, we have argued that various attempts that
have been made to end the traditional conflict between retributivism
and utilitarianism by an analysis of language or attempts to strengthen
the utilitarian position have been unsuccessful. In our examination of
both traditional and rule-utilitarianism we have found that their neglect
of considerations of distribution leads to inadequate theories. In the
following chapter, we will consider some of the attempts that have been
made to modify the utilitarian position by the addition of a principle
of justice and thereby to overcome the inadequacy that is inherent in it
in dealing with the issue of punishment. The question that will be of
paramount importance is whether the utilitarian position needs to be
modified by a meritarian principle of justice or whether a non-meritarian
principle will suffice.
CHAPTER FOUR

In previous chapters, we have seen that retributivist and utilitarian positions are faced with serious objections. The retributivist position is unacceptable because there seems to be no satisfactory manner in which we can determine the correct degree of punishment, whereas the utilitarian position is unsatisfactory because it does not present any satisfactory way of determining correct distribution of punishment. We saw that rule-utilitarianism, which is probably the strongest teleological theory, is confronted with problems of distribution at the level of the legislator. Since the objections that were raised against retributivism appear overwhelming, we will see in this chapter if it is possible to modify rule-utilitarianism by the addition of a principle of justice or distribution so that it can satisfactorily handle the objections that have been raised against it. Our problem is threefold: first, to state the specific principle or principles of justice that are required; second, to offer a rationale of these principles by determining what more general principles of justice seem to be required; and, third, to determine how the principles of justice are related to the utilitarian obligation to maximize welfare.

Perhaps the most satisfactory approach we can take in considering the above problems is by considering how several moral
theorists have attempted to handle the last of them. Although these theorists stress meritarian considerations, which we have found to be unsatisfactory as a guide in determining the degree of the penalty, their discussion of the relation between the obligation to act in accord with the principle of utility and the claims or obligations that arise from considerations of justice is enlightening as to the manner in which one can relate two conflicting claims.

One attempt to reconcile a principle of justice with utilitarian considerations was briefly examined in Chapter One when we discussed a position that Bradley may have intended to hold. ¹ A more explicit and detailed statement of a theory which is similar in many respects is given by John Hospers, and we will turn to him for an account of it. Hospers states:

We can say that in order to justify punishment it must meet two conditions.

1. The punishment must be deserved. Whatever else this condition may imply, at least it implies that a person who is innocent of a certain offense should not be punished for it, since obviously a person who has not committed an offense does not deserve to be punished for it. Nor should the punishment be more severe than is deserved for the particular offense (though as we have just observed, it is as yet far from clear how what is deserved is to be estimated)...

2. But a punishment's being deserved is still not enough to justify its infliction. The infliction of punishment must do some good (or prevent some evil)--to the offender, to other potential offenders, to society, preferably to all. There are some instances in which a punishment

¹See Chapter One, p. 19.
is deserved but in which nevertheless it should be lightened or even suspended entirely, namely when the most good will be produced by this course of action.²

Although the theory we have here is similar to one we discussed in examining the views of Bradley, there is an important difference. Bradley apparently maintains that the state has a right to punish when the punishment is deserved; Hospers demands a further condition before the state has a moral right to punish, namely, that the punishment cause some good. Whereas Bradley considers it morally permissible to consider consequences in determining whether to lighten the punishment, Hospers holds that it is morally necessary to consider them to determine whether one should punish at all.

It is interesting to note that Hospers is not asserting a meritarian theory of justice in that he is not asserting that we have an obligation always to treat people as they deserve; he wants instead to place certain limits on the use of utilitarian considerations to determine the character of various punishments. In order to make a sensible case for his claim regarding these proper limits, Hospers talks in terms of what people deserve. We will discuss the merits of this view and the necessity of adopting it in our discussion of Raphael's views below, but it might be worthwhile mentioning here that Hospers's defense of his

² J. Hospers, op. cit., p. 459.
claim that only people who are morally responsible for their behavior should be punished relies on the claim that people should not be treated in a way they do not merit.

Regardless of what we will find the adequacy of the defense of restrictions placed on utilitarian considerations to be, Hospers has presented one of the usual means of relating considerations of justice to the utilitarian theory. In this case, the following propositions provide absolute restrictions upon the uses to which the utilitarian theory can be put; only those who deserve it may be punished and they may not be punished more than they deserve. It should be realized that if his view is accepted, it eliminates the possibility of any over-punishment or punishment of an innocent person being justified. Utilitarian considerations, no matter how great, could never justify such acts of punishment since a necessary condition of such an act being right is that it be deserved.

A second view of the relation between considerations of justice and utility can be derived from the theory of W. D. Ross. Ross maintains that there are a number of prima facie duties among which are the duty to be beneficent and the duty to treat people in accord with their moral virtue. A prima facie duty is a duty which we must perform

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3 See previous quote.

in so far as there is no conflict with another prima facie duty. In the case of a conflict between two such duties, no criterion for its resolution can be given other than a reliance upon an intelligent, morally sensitive individual's ability to assess the relative weight of the various duties.  

Given this general position, we have a different relation between justice and the principle of utility than we find in Hosper's position. On this view, considerations of justice are not necessarily inviolable as they are for Hospers. Instead, justice is one of many prima facie duties as is utility. If the consequences of punishing an innocent person were great enough to outweigh the demands for just treatment in the situation, it would be right to punish such a man (though one might still consider it appropriate to call such treatment "unjust").

We have now seen two ways in which a principle of justice can be related to a utilitarian theory in an attempt to modify the obligations that result from the latter. Absolute limitations can be placed on the obligations that can be justified on utilitarian grounds, or a principle of justice can be considered a prima facie obligation which can be overridden if another prima facie obligation is a more stringent one.

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5 For discussions of a procedure that can be used to settle conflicts between prima facie duties, see R. Brandt, op. cit., pp. 241ff., and R. Firth, "Ethical Absolutism and the Ideal Observer," Philosophy and Phenomenological Research, XII (1952), pp. 317-45.
For our purposes, it will be found to be more satisfactory to consider
our principles of justice to be prima facie. Argument for this position
will be postponed, however, until we have determined what principle
or principles of justice are required to modify the rule-utilitarian
position so that a satisfactory theory of punishment can be arrived at.

We have previously discovered two main problems that
confront utilitarian positions in attempting to present a satisfactory
theory of punishment. First, we have found that such a position leads
to the conclusion that individuals may be punished for acts for which
they are not responsible and which may have been committed by others.
We have seen that on utilitarian grounds the sorts of factors that are
thought to eliminate responsibility, and thereby liability, may not be
ones that should be considered; and punishment of an innocent person,
collective punishments, or punishment of a criminal's family may be
justified.

What is demanded by critics who raise this first set of
objections against utilitarianism is that the responsibility of an individual
be considered in determining whether he is liable for punishment. This
demand, which is made on the basis of a view of justice, can be stated
as follows: No person should be punished unless it is for a criminal
act which he committed and at the time of commission of the act was in
such condition that he had normal capacities, physical and mental, for
doing what the law required and abstaining from what it forbade and a
fair opportunity to exercise these capacities. The moral view expressed in this statement seems to present the moral basis of the objections above. Since there will be frequent reference to this principle, we will henceforth call this statement of just treatment Principle (a). Of course, there will certainly be some difficulty in specifying the manner in which this principle is to be applied. The meaning of such terms as "normal capacities" and "fair opportunity" is certainly not clear. The manner in which this problem can be approached will become clear when the rationale of Principle (a) is discussed.

Second, in considering the objections to a utilitarian theory of punishment, it was claimed that this theory could lead to the justification of punishments that would result in the promotion of a social order which is generally recognized to be unjust. For example, it will be seen that this theory could lead to the justification of punishments that promote slavery. This objection is significant because it points to the fact that the practice of punishment is closely related to other aspects of society and an assessment of the justice of other practices to which it is related. A clearer specification of the types of unjust social orders to which utilitarianism can lead will be given below in discussing an equalitarian theory of justice. The demand which it is claimed utilitarian

ianism cannot satisfy can be stated as follows and will be called Principle (b): No person should be given a punishment that supports or promotes a social order that fails to distribute the facilities for self-development to all those who have a claim to them. The rationale which we will offer for Principle (b) will make clearer the reasons for this formulation and the manner in which it is to be interpreted.

The problem now is to determine the character of the concept of justice that is required to explain the basis of the above objections and demands. It is important to determine if we must fall back on the meritarian theory of justice or if another theory of justice is sufficient to provide a rationale of the objections and the demands that are made.

D. D. Raphael maintains that the view of justice that is invoked to modify the utilitarian theory is a meritarian one. Whereas Raphael's views are essentially the same as Hospers', his views are worth special attention because his analysis shows the kind of considerations that lead him to hold that a meritarian view of justice is the view that is required to modify the utilitarian theory. In examining Raphael's account of the relation between "desert" and utilitarian considerations, we can discover what appears to be a basic confusion that leads him to assert the need for a meritarian theory.

Like Hospers, Raphael asserts that we may never punish anyone unless it is socially useful and at the same time deserved. He states:

Punishment is permissible only if it is deserved. But this does not itself give rise to an obligation to punish. An obligation to inflict punishment where punishment is permitted by desert, arises from the social utility of its infliction.  

Raphael argues that the basis for asserting the correctness of Principle (a) is that the individual has a claim not to be used as a means for society's ends. Society has a right to use an individual for the good of society only when an individual has forfeited his claim by willfully breaking the law. It would appear that this is essentially all that Raphael wants to establish regarding the just treatment of individuals. He is primarily concerned to insure that people who are not responsible for having broken the law should not be punished. Raphael states:

Although the claims of desert and equality need separate treatment, my conclusions will suggest that the reason why they are both subsumed under the one concept of justice is that both represent protections of the interests of the individual, and as such, they are, I shall argue, not fundamentally different from the thought that is basic to the idea of liberty.... The strength of the so-called retributive theory (or, as I prefer to call it, the desert) theory of punishment lies not in the positive obligation to punish the guilty, but in the protection of innocence.  

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8 Ibid., p. 71.

9 Ibid., p. 67 and 70.
In his claim that the essential character of justice in punishment is protection of the individual against the claims of utility, Raphael tries to account for his claim of justice in terms of desert. Raphael believes that to say that all men have a claim not to be harmed by society is to say that all men "deserve" not to be punished. There certainly seems to be no necessity for Raphael saying this, nor does he offer any convincing reasons why one should hold it. It seems that Raphael is failing to make a distinction between two different uses of "deserves." To say that someone deserves something for a holder of the meritarian theory of justice is to say that he has performed some action or possesses some characteristic for which he is responsible and in virtue of which he should be rewarded or punished. Yet Raphael says that all men, by virtue of the fact that they are men, deserve not to be used as a means to society's interests unless they have willfully broken the law. Here Raphael is saying that men deserve something in virtue of a characteristic for which they are not responsible, i.e., their humanity. Raphael himself, in analyzing the concept of desert with regard to acts of punishment, says:

"A deserves punishment" is not equivalent to "Someone ought to punish A" nor to "The punishing of A will be useful." The expression implies that A has deliberately done wrong, but this is not the whole of its meaning...¹⁰

From this it would seem that Raphael would agree that the concept of

¹⁰Ibid., p. 70.
desert is only appropriately used in contexts where deliberate actions are involved. Certainly, if "A deserves punishment" implies that A has deliberately committed a wrong action, it would appear that "A deserves a reward" would imply that A has deliberately committed an action which merits it. It seems that the mistaken application of the concept of desert to actions for which one is not responsible has been instrumental in leading Raphael to hold that a meritarian theory of justice is essential to account for the claims of justice which we make regarding punishment. We will consider what appears to be a satisfactory rationale of why it is just to punish only those who are responsible for committing a crime shortly.

A second reason that has apparently been important in leading Raphael to hold a meritarian theory of justice is his belief that besides accounting for who should be punished, the theory of justice must be sufficient to explain why we believe that it is unjust to give an individual a severe punishment for a trivial crime. Raphael holds not only that we can punish a man only if he has committed a crime, but that we can punish only to the extent that the guilty individual deserves it. This for Raphael is still viewed as a protection of innocence because since it allows only the degree of punishment that is deserved, it protects the "degree of innocence" that remains. We have already seen that Raphael is mistaken in considering this to be a problem that re-
quires that we embrace the meritarian theory of justice. ¹¹ No satisfactory account can be given of the meritarian claim that an individual can be punished only to the degree to which he deserves it. Further, the argument proposed by S. I. Benn which was examined in the previous chapter is sufficient to support the conviction that severe penalties should not be given for trivial crimes without resorting to a meritarian view of justice.

Finally, it appears that Raphael does not wish to embrace the meritarian theory of justice wholeheartedly, but tries to limit its application by maintaining that it only places an upper limit on the amount that one may punish. Besides the general problems we have raised against the use of meritarian considerations to determine the proper degree of punishment, his attempts at placing limitations which cannot be overridden by utilitarian considerations get him into difficulties that he can get out of only by embracing a meritarian position which obligates the state to frame laws so that people are assured of treatment according to their desert or by making his meritarian principle a prima facie one. The difficulty is one we found in Bradley, and it will not be repeated here. ¹²

In summation, it can be said that although Raphael has addressed himself to a crucial issue, namely, what rationale can be

¹¹ See Chapter Three, pp. 65-68.

¹² See Chapter One, pp. 19-21.
given for the claim that only those responsible should be punished, his contention that a merititarian theory is required is not convincing. We will now consider whether a sensible claim can be made for a non-merititarian theory of justice. Certainly if we can account for the claims of justice in other than merititarian terms, this should be done for we have already seen that considerations of desert do not allow for a satisfactory answer to question (4) How much should we punish?

We have now seen that the views of justice or correct distribution adopted by either utilitarians or meritarians are unacceptable. The formal criterion of justice, i.e., that people who are similar in all relevant respects should be treated similarly would be accepted by both groups of theorists. The manner in which these theorists specify similarities and differences, however, leads to difficulties with their theories. For the meritarian, the criterion of relevant similarity and difference is merit; whereas for the utilitarian it is the consequences for the general welfare. Since both of these criteria fail to specify an adequate substantive theory of justice, we shall attempt to present still another view which appears to avoid the objections to the former.

The substantive theory which will here be defended has been called by a number of present-day writers an equalitarian theory of.

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13 For a classification of various criteria that have been offered for determining relevant similarities and differences, see A. Gewirth, "The Generalization Principle," Philosophical Review, Vol. 73 (April, 1964), p. 237.
The type of equalitarian theory which will here be defended is a theory which maintains that goods which are usually important in producing a better life for each man should be distributed as equally as possible rather than according to merit or in a manner in which they will maximize utility. In explaining this theory we must distinguish between its application to the distribution of economic and political goods and its application to distributions of punishment. We will see that its application in the latter case requires certain provisos regarding the proper distribution of goods to criminals. Before an attempt is made to explain how this theory of justice can be used to modify a utilitarian theory of punishment in such a way that it meets the objections we have previously raised, we will examine how the theory is applied to the distribution of economic welfare and how its application there differs from its application in dealing with punishment. This explanation of the application of this theory to distributions of economic welfare will be as brief as possible since this type of distribution is not our main concern. In elaborating upon and defending an equalitarian theory of justice, I will borrow much from two recent writers who have defended this position, Gregory Vlastos and William Frankena.


15 See previous note.
Let us start with an illustration of the distribution of economic and political goods. Later we will show how the principles that are arrived at in this area are with some slight modifications applicable in dealing with questions regarding the proper distributions of punishments. It might be found that in a certain society, utility could be maximized by allowing a very unequal distribution of economic and political goods and the means of achieving those goods. For example, by allowing almost unhindered accumulation of wealth by those who are economically most capable, we could possibly design a society which could produce a greater total amount of good than any differently organized society could, but at the same time a society which has a class structure with special privileges for those in the wealthiest class and definite disadvantages for those in the poorest class. Further, proposals which would give the lowest economic class opportunities for the acquisition of a more satisfactory economic life would require heavy taxation of the wealthiest class which would lower their incentive to work and thereby reduce the economic efficiency of the entire society. 16

Although utilitarians have often argued that it is normal for the marginal utility of income to decline, it is not clear, as many conservatives have claimed, that we would on utilitarian grounds have to distribute income in a very equal fashion.

16 One might consider the possibility of adding to the argument the Malthusian claim that inequality leads to cultural progress and the classical economists' claim that it leads to economic progress.
An even more blatant example of the type of society with an unequal distribution of economic and political rights that could be defended on utilitarian grounds is slavery. Both John Hospers and John Rawls have argued that utilitarianism could possibly lead to the justification of slavery. Hospers states:

The injustice of slavery, then, will hardly be questioned. Nevertheless, many will claim, slavery is not always wrong. May not the institution of slavery sometimes have very great utility, even, in some circumstances, maximum utility? Perhaps it is the best possible arrangement in a pre-industrial, agrarian society, with a labor shortage, not enough capital to hire people for money, and the danger of widespread starvation if there were no supply of slaves. Can we be absolutely sure that, on the whole, the institution of slavery in the American South lacked utility under pre-Civil War conditions—not, of course, after industrialization had dispensed with the need for unpaid labor? ¹⁷

The important point here for our purpose is that Hospers believes that in some situations slavery may be justified on utilitarian grounds even though he would consider it unjust. Yet if one used utilitarian criteria to determine the justice of the situation, slavery might have to be considered just. For Rawls, the possibility that utilitarianism can defend the justice of slavery is sufficient grounds for showing that utilitarian theories are mistaken insofar as questions of justice are concerned. Rawls states:

But as an interpretation of the basis of the principles of justice, classical utilitarianism is mistaken. It permits

¹⁷Hospers, op. cit., p. 421.
one to argue, for example, that slavery is unjust on the
grounds that the advantages to the slaveholder as slave-
holder do not counterbalance the disadvantages to the
slave and to society at large burdened by a comparatively
inefficient system of labor.... Utilitarianism cannot
account for the fact that slavery is always unjust, nor for
the fact that it would be recognized as irrelevant in defeat-
ing the accusation of injustice for one person to say to
another, engaged with him in a common practice and
debating its merits, that nevertheless it allowed of the
greatest satisfaction of desire. The charge of injustice
cannot be rebutted in this way. If justice were derivative
from a higher order executive efficiency, this would not
be so. 18

Thus, for Rawls, the utilitarian view of justice must be rejected for
it conflicts with the commonly recognized conceptions of justice.

In opposition to a utilitarian, an equalitarian would main-
tain that any society which gave educational opportunities, special
privileges in the holding of property, or wealth to some segments of
society and not to others that could benefit from them would be unjust.

In opposition to the above types of societies which a utilitarian could
possibly call just, an equalitarian would maintain that all men should
be given opportunities to develop their lives to the fullest extent to
which they are capable. Vlastos, in defending the equalitarian position,
gives the following proposition as the basic one:

(i) All persons have an equal claim upon society to the
fullest development of their powers.

On the basis of this proposition by means of considerations which will

18 J. Rawls, "Justice as Fairness," in F. Olafson, Justice
be elaborated below, Vlastos argues for the correctness of the following propositions:

(ii) All may rightly claim those facilities which constitute the minimal conditions of self-development.

(iii) Differential claims may be allowed to the degree which granting them to some would result in greater benefits to all. 19

(iii) allows for some differences in the distribution of goods but only after the minimum as stated by (ii) is satisfied. For example, once everyone has what is considered a living wage, we can then allow for differences in income insofar as such differences lead to the benefit of society. Thus, higher salaries can be granted to doctors than to bakers because there are fewer men that are capable of becoming doctors and granting high economic rewards might insure that a sufficient number of competent persons are acquired for this profession. Differences in treatment which benefit only one class, when a more equal distribution could be obtained, are considered unjust because such treatment involves considering one class as having a greater claim upon society.

Those things that constitute the minimal conditions of self-development are often referred to in ethical discussions as human or natural rights. The stress here is that those goods which are considered as being of great importance in the development of a good life for every man should be distributed to every man. In the previous example, with-

holding economic opportunities or a living wage from some men is a
violation of the equalitarian theory of justice. Some of these things
that are generally considered essential for the self-development of
each individual are a living wage, educational opportunities, opportunity
to seek satisfactory employment, freedom to choose one's own employ-
ment, and freedom from fear. Of course, the distribution of some of
these goods to all people may well be defended on utilitarian grounds.
However, as we have argued, it certainly does not seem to be the case
that all of them can be so defended. As we saw in our original examples,
a society which did not guarantee to the poorest class either a satis-
dfactory wage or adequate opportunities to change their status in life
might still bring about more total welfare than a society which granted
those things.

There are two important questions to be answered at this
point. First, how can proposition (i) which is the basis of the equali-
tarian position, according to Vlastos, be defended? Second, how can
propositions (ii) and (iii) be derived from proposition (i)? Let us
consider the first of these questions.

Proposition (i) is defended by Vlastos on the grounds that
all people are of equal worth and therefore are to be considered as
having equal rights to the goods that society can distribute. As we saw
previously in our discussion of Raphael, the belief that all people are
similarly important is certainly a non-meritan notion. A meritarian
would consider that men have a right to the goods that society can
distribute only insofar as they possess some meritorious character-
istic. The equalitarian grants equal rights to self-development to all
men regardless of any merit they possess. Vlastos maintains that if
human beings are equal in worth, then one man's well-being is as val-
uable as any other's. On the basis of this we can argue that one man's
right to those facilities that will allow for the fullest development of
his powers is equal to that of any other man. Thus, we can justify
(i) on the basis of the equal worth of each man. Further, (i) can be
used as a justification of the various types of rights that many people
believe all men are entitled to, e.g., decent working conditions, living
wage, etc. 20

Once it is granted that (i) is the basis of the equalitarian
view of justice, why should an equalitarian be satisfied with the rights
that would be granted in accordance with (ii) rather than maintaining
either that (a) all men may rightly claim all facilities which constitute
the conditions of fullest self-development or that (b) all men may right-
ly claim the facilities of self-development that are equal to those of any
other man? 21 Both of these would be unrealistic. Since society is not.

20 Various types of freedoms are taken to be included here
as freedom is considered as a means to happiness and full self-develop-
ment. Thus, on the basis of (i), we can infer man's rights to such
freedoms as freedom of speech, of thought, of employment, etc.

in a position to grant (a), it can scarcely be called a right that men
may claim. (b) would not only be impractical but unjust. Men should
be given equal chances to develop their powers. This involves that
some men such as the handicapped be given a great deal more aid than
other men. While society cannot grant (a) or (b), it can, at least,
insure that the minimal conditions of self-development for all men are
met. Therefore, these conditions may rightly be claimed by its
members.

What must be done is to show how an equalitarian theory
of justice can be used to modify a utilitarian theory of punishment in
such a way that the traditional objections to the latter can successfully
be avoided. Both Frankena and Vlastos believe that the practice of
punishment can be justified in a satisfactory manner if the utilitarian
position is modified by an equalitarian theory of justice, but neither has
worked out the details of such a justification. Frankena makes only
the following brief comment on this point:

Critics of the retributive theory of punishment might
prefer to argue that punishment is made just, and
perhaps obligatory, but the fact that it tends to promote
the most equality in the long run by preventing people
from infringing on the rights of others. This is a non-
utilitarian line of reasoning which looks not to the past,
but to future equality.  

One serious problem that must be confronted in applying an
equalitarian theory of justice to the practice of punishment is that of

\textsuperscript{22} Frankena, \textit{op. cit.}, pp. 16-17.
determining how one can justify the obviously unequal treatment that results from the punishment of only some people in society. We cannot apply (iii) straight-forwardly to the practice of punishment and maintain that everyone has the possibility of benefiting from such unequal treatment. Certainly the criminal in many cases will not benefit from such treatment. What can be argued, as Frankena suggests, is that the punishment of criminals will promote greater equality of distribution of goods in the long run. Thus, punishing the criminal will promote a more equal distribution of basic goods than could otherwise be achieved. The elimination of the criminal from benefiting from the distribution of some of these goods is necessary to provide for as equal a distribution as possible. Thus, it is justified on the grounds that it promotes equal welfare and not that it brings about a greater total quantity of good. Treating criminals in this way is in no sense to be considered a violation of (i): All persons have an equal claim upon society to the fullest development of their powers. While all men, including the criminal, do have an equal claim upon society, the fact that the criminal violates the claims of others necessitates that he be punished in order that society can satisfy the largest number of such claims and thus bring about a more equal society than would otherwise be achieved. In applying our equalitarian theory of distribution to the practice of punishment, we need to add the following principle as a limitation to (iii):
(iv) In the case of criminals, punishment is justified insofar as it results in greater and more equal distribution of benefits for all non-criminals.

One might think that (ii) would have to be modified because the criminal insofar as he is being punished has no opportunity to benefit from many of the conditions of self-development. Yet, as the following discussion will bring out, all criminals who commit crimes as the result of not having been given some of the minimal conditions of self-development may claim that any resulting punishment is unjust. We can accept (ii) and maintain that it is only when a man fails to avail himself of his opportunities and breaks the law that his punishment is considered just. One should keep in mind, as we stress later in dealing with strict liability laws, that sometimes it may be morally right to punish for utilitarian reasons regardless of its injustice. This would account, no doubt, for those extreme cases where it is necessary to punish a criminal even though he has not been treated in accord with (ii).

How can a rule-utilitarian theory modified by an egalitarian theory of justice successfully answer the objections we have raised against an unmodified rule-utilitarian theory? It has been seen that a rule-utilitarian theory can lead to the justification of punishment of people who are not responsible for committing a crime, and that it can lead to the justification of punishments that promote or support societal organizations or institutions that fail to distribute the conditions of self-development to all those who have a rightful claim to them. This
latter objection will require a good deal of elaboration because our
theory must show who should be treated equally and under what types
of situations utilitarian considerations can lead to unjust treatment.

H. L. A. Hart offers an analysis of the moral basis of the
first objection which shows that an equalitarian theory of justice can
give a rationale of our concern that only those who are responsible for
the commission of a crime be punished.23 In stating that we defend
Principle (a) on the basis of a view of justice, Hart maintains that the
view of justice that is invoked can be considered from two points of
view. On the one hand, as the meritarians have done, it may be con-
sidered as insuring that the punishment will be given only for moral
evil. On the other hand, it may be considered as offering equally to
all men an opportunity to choose the type of life they desire from among
the various alternatives that are open to them and to feel secure that
their choice will not be upset by something which they do accidentally,
in ignorance, etc. For Hart, the legal system of punishments

is a method of social control which maximizes individual
freedom within the coercive framework of law in a
number of different ways, or perhaps, different senses.
First, the individual has an option between obeying or
paying. The worse the laws are, the more valuable the
possibility of exercising this choice becomes in enabling
an individual to decide how he shall live. Secondly, this
system not only enables individuals to exercise this
choice but increases the power of individuals to identify

beforehand periods when the laws' punishments will not interfere with them and to plan their lives accordingly. The more general principle of justice that Hart is apparently appealing to here as a rationale of Principle (a) may be stated as follows: All men should have an opportunity freely to plan and determine their lives without fear of undue interference from society. Let us call this more general principle of justice that is used as the underlying moral basis of Principle (a), Principle (A). If men cannot be sure that by taking reasonable precautions they can avoid punishment by the state, then their freedom to choose the type of life they desire would be considered abrogated. Only when an individual has had a fair opportunity (i.e., free from undue interference by society) of which he has failed to avail himself is it just for society to punish him.

In order to see more clearly the relation between (a) and (A) as well as the equalitarian basis of (A), let us consider the grounds for punishing the criminal once he has had opportunity to keep the law and failed to use it. Our equalitarian theory will not admit the claim by the criminal that his punishment is unjust because it involves eliminating some of the opportunity which non-criminals receive. While according to (ii) an individual may claim facilities which constitute the minimal conditions of self-development, there are no grounds for claiming that one should receive every facility which increases self-development. If

24 Ibid., p. 178.
the criminal has failed to receive these minimal conditions of self-
development, then he can claim his punishment is unjust. Principle
(iv) which allows for punishment of criminals is considered a justifi-
able exception to the type of differential treatment prescribed by (iii)
because it promotes a greater equality of welfare by satisfying the
largest number of claims to the equal distribution of benefits. This is
a teleological but non-utilitarian justification of (iv). The appeal is
not to the production of the greatest total welfare, but to the production
of the greatest equality of welfare. 25

We can now see more clearly the relation between (A) and
(a). (A) states a minimal opportunity which all men should have. (a)
specifies one set of conditions under which (A) is to be applied. The
essential characteristic of Principle (A) can be stated in terms of insur-
ing for each man a certain good that is considered of value to everyone.
Certainly the opportunity to choose freely, within certain limits, the
kind of life one wishes to live would generally be considered instrumental
to a good life. Principle (A) is thus a specification of one of the goods
that (ii) requires should be distributed equally. As we have seen in our
discussion of Raphael, to grant to all people this kind of opportunity is
not to say that all people deserve it, unless one uses the term "deserve"

25 See Vlastos, "Justice and Equality," op. cit., for a dis-
cussion of how an equalitarian theory of justice obligates one to produce
equality of welfare at the highest possible level.
in a manner which is not consistent with the holders' of the meritarian theory of justice use of that term. Thus, while Principle (A) can be explained in terms of our equalitarian theory of justice, it cannot be interpreted in meritarian terms. If we apply our interpretation of Principle (A) to our illustration in Chapter Two of the wife of the traitor, it can be seen that she should not be punished, not because she does not merit it, but because she has not been given a fair opportunity (i.e., free from undue interference by society) to choose the type of life that she desires.

It should be realized that all the criteria that are to be considered in determining whether an individual is being given a fair opportunity to plan freely his life or when interference by society is appropriate or inappropriate cannot be specified. Rules as general as Principle (A) do not clearly specify that only certain types of decisions or courses of action can be deduced from them; no set of necessary and sufficient conditions can be given for determining when interference by society is justified. This does not mean, however, that statements of the generality of Principle (A) are of no value. They do indicate interests and concerns of most men and that special consideration is to be given to these in dealing with men. Principle (A) indicates that the possession of sufficient freedom to plan and determine the course of one's life is an interest of most men and that an effort should be made not to abrogate this freedom. To state a principle such as Principle (A) is, in effect,
to maintain that any type of action which limits one's opportunity to determine the course of one's own life is in need of justification. Further, there is usually a limit beyond which one would feel that Principle (A) was definitely being violated regardless of the interests of society. It would seem that an individual who realized that he might be punished by society for some action which was entirely beyond his control would feel that he lacked freedom in any important sense to determine the course of his life. Thus, Principle (a), which is required to modify the utilitarian theory in order to achieve a more satisfactory theory of punishment, is interpreted to state such a limit which if violated would generally be considered a violation of Principle (A) also.

In discussing this type of general principle, Benn and Peters recognize the necessity of explaining it only in terms of limiting or exceptional conditions:

"Everyone has the right to choose his own employment" does not necessarily rule out military conscription, or even under emergency conditions the direction of labour. These are limiting or exceptional conditions that would defeat the right. It might be preferable, perhaps, to state the right with the principal exceptions included, but we simply cannot foresee all the conditions in which we should feel it proper to make exceptions. Moral and legal growth is very largely a process of discovery by experience; of refining rules of thumb by distinguishing the cases which, while apparently falling under a rule, are in relevant ways exceptional. We can never lay down, therefore a single formula, however, complex, to determine the conditions in which a right will hold, or conversely all the conditions that would defeat it. This is not a reason for rejecting all generalized
statements of rights as useless, if only because it is a characteristic that they share with every general rule.26

In the light of Principle (A), we can give a rationale, as the utilitarians could not, for the acceptance of certain types of excuses as sufficient to exculpate one from punishment. With regard to the various factors that are generally considered exculpating, e.g., insanity, extreme duress, infancy, etc., the rationale of their acceptance is not that they are useful, but that they are factors whose presence eliminates one's control. If an individual is punished for a homicide committed while insane, this is considered a violation of Principle (A) since an insane individual is not able to avail himself of the opportunity to choose the type of life which he desires and, therefore, has not been granted the minimal conditions of self-development. The absence of any exculpating factor is taken as evidence that the individual exercised his opportunity and made a choice for which he can be held responsible.

Another group of factors that can be explained in terms of (a) and, thereby, (A), is often considered in conjunction with exculpating factors. Once an individual commits a crime in the absence of exculpating factors, there is a possibility of lessening the gravity of the crime by claiming the presence of mitigating factors such as intoxication, negligence, or acting on impulse. If while driving in an intoxicated condition, an individual kills a pedestrian, he might claim that there

26 Benn and Peters, op. cit., p. 115.
grounds for lessening the penalty that he would receive if such factors were not present. It is clear that one is liable for punishment for the action of driving while intoxicated; although one did not have the ability to prevent the homicide once intoxicated, one did have an opportunity to avoid driving while intoxicated.

It is true that according to Principle (a), we must consider the responsibility of the agent who performed the crime. This requires, as opposed to a strict utilitarian theory, that we take into account factors that may change the act for which one is responsible. Among the excuses that are called "mitigating" are ones that allow an individual to claim that he is not responsible for some result or aspect of his action. Yet these factors are not exculpating in that they still show responsibility for some other aspect of the action that is culpable. Once it has been determined which specific act or crime one has been responsible for, then utilitarian factors must be used to determine the penalty that is appropriate. "Mitigating" excuses are so called because they are generally factors of crimes which on utilitarian grounds are given lesser penalties. Factors like negligence and intoxication may change the act for which one is responsible, but they need not lessen the penalty. Only insofar as acts with factors of gross negligence or intoxication are considered less important crimes than they would be if these factors

27 Another type of mitigating excuse will be considered in the discussion of Principle (b) below.
were not present are negligence and intoxication to be considered
"mitigating" factors.

Other factors which usually affect the act for which one is responsible and in that respect are the same as "mitigating" factors, are not termed "mitigating" because crimes that involve them are not given lesser penalties than the same crimes not involving them. Driving on the wrong side of the road because of ignorance of the law would change the act one is morally responsible for, yet it can be on utilitarian grounds a crime that should receive as severe a penalty as willfully driving on the wrong side.

With this distinction in mind, we must realize that exculpating excuses are not as similar to mitigating excuses as is often thought. Exculpating factors provide grounds for eliminating penal liability, whereas grounds for lessening penal liability would also be grounds for claiming a factor is mitigating. If vehicular homicide is committed by someone while he is intoxicated, intoxication is usually considered a mitigating factor; yet if the situation became such that drunken drivers were constantly a menace to society, such homicide while intoxicated might receive the same or a harsher penalty than ordinary homicide. In this case, intoxication would no longer be considered mitigating.

The type of considerations that are being appealed to to support the feasibility of accepting Principla (A) as the rationale of Principle
(a) might be summarized. It has been shown that in order to achieve a satisfactory theory of punishment, a rule-utilitarian theory must be modified by one or more non-utilitarian principles of justice. One of these principles is Principle (a). It was then considered whether the rationale of this principle must be given in terms of treating people as they deserved or whether it could be given in another manner. A meritarian theory of justice when invoked as offering a rationale of Principle (a) was found to be based on a confusion of the term "deserve"; but it was also unsatisfactory on other grounds because there was no adequate way of determining what an individual deserves. There was discovered, however, an equalitarian principle, Principle (A), which requires the distribution of a basic good to all men, that offers satisfactory grounds for explaining the obvious forcefulness of Principle (a).

The second objection to the rule-utilitarian theory, though more general, is closely related to the first. While the first objection is concerned with distributing to all men one of the rights which an equalitarian believes all men should have, the second objection made by an equalitarian is concerned with whether society distributes all the rights that men may rightfully claim in an equal manner and that differential treatment is not for the benefit of a special group. In this sense, the first objection is a species of the second. They are distinguished here since the first is one that is so often raised against utilitarian
positions. In raising the second objection, the equalitarian holds that punishment is used to promote or support an unequal distribution of rights or differential treatment that cannot be supported on the basis that it ultimately brings about greater benefit for all is unjust. We have called the following principle which will be defended by the equalitarian, Principle (b); No punishment should be given that has the tendency to support or promote a social order that does not distribute the minimal conditions of self-development to all those that have a rightful claim to them. Principle (b) clearly brings out the need to assess the justice of the whole social order to determine the justice of various types of punishments. Certainly in one's everyday assessment of the justice of punishments, questions regarding the justice of the social order are raised. For example, if one questions the justice of laws which placed restrictions on Jews in Germany, one must consider issues regarding the proper distribution of rights in the society. This connection between the nature of the social order and the justice of punishment is an important one. It shows that many of the principles that are appropriate for determining just distributions of economic goods are also appropriate in determining just punishments.

While Principle (b), like principle (a), might be asserted by a meritarian and the phrase "all those who have a rightful claim to them" interpreted in meritarian terms, such an interpretation would be acceptable because of the previous difficulties which we have found with
that position. Principle (b) can, however, be interpreted in terms of the equalitarian theory of justice. As will be seen in the discussion of important examples below, Principle (b) can be interpreted by means of (ii), (iii), and (iv) which state the equalitarian theory of justice, in a manner which seems to handle successfully the types of difficulties that a strictly utilitarian theory leads to.

Let us consider some examples of punishments which would possibly be justified on utilitarian grounds but which would violate Principle (b) as interpreted by an equalitarian. Later, it will be shown how some actual legal practices which are generally regarded as just could be shown to be so on equalitarian grounds.

First, in our examples of societies which maximize utility but which distribute basic rights unequally, it is possible for the utilitarian to justify stronger penalties for those in the lowest class. It may be found that an individual as a result of being placed in the lowest order of society with restrictions on economic opportunities is more likely to commit crimes, especially those against property, than an individual in a higher class. If severe penalties for the lowest class would deter those in it from committing such crimes, then, on utilitarian grounds, these severe penalties would be justified. The factor that strikes one as unjust here is that the difference in penalties is being used to support an unjust order in society. There would be nothing unjust about placing heavier penalties on one class of society if, thereby,
all people who kept the law would be benefited by the differential treat-
ment. Of course, there are certainly times when it would be just to
punish the lowest class more severely than other classes. One would
have to show, however, that such punishment would aid all non-
criminals including those in the lowest class and not lead to a social
order where rights are unequally distributed. If members of the lowest
class could be deterred from murder only by more severe penalties,
then such penalties would be justified insofar as they did not lead to
a heightening of an unjust class distinction, but only to a greater ob-
servance of the law.

Another example illustrating this point is the often heard
claim that Negroes receive unjust treatment in parts of the United
States when they are given the heaviest penalties allowed by the law for
the commission of various crimes while whites often receive the light-
est penalties allowable. This difference in treatment, though legal,
is unjust insofar as the difference in treatment results in keeping
Negroes in a position of inferiority with regard to basic rights and
opportunities. The severe punishments here deter Negroes from claim-
ing their rights to equal treatment. This treatment of Negroes could
be justified only by showing that it would benefit both Negroes and
whites who kept the law.

It would appear that some of the current appeals made in
treating criminals that are considered just by many can only be ade-
quately justified on the grounds of an equalitarian theory of justice.

Consider the claim that is often made that offenders who have been reared in the slums should be treated more leniently than first offenders who have had a better home environment. The offenders reared in the slums, though legally and morally responsible for their behavior, are considered to have had greater pressures placed upon them as the result of an unequal distribution of the basic rights by society. While it may on utilitarian grounds be necessary to punish them, to punish them as severely as any other offender would be to fail to recognize the unjust order of society and, thereby, to aid in its perpetuation.

Further, a less severe sentence for a criminal who has been limited in his opportunities is one way of remedying, at least partially, the situation. It is interesting to note here that R. Brandt, who in general defends a rule-utilitarian theory of punishment, believes that that theory must be modified by equalitarian considerations to account for allowing milder penalties for those who have had few opportunities in life. He states:

...at least the extended rule-utilitarian can say in defense of the practice of punishing less severely the crime of a man who has had few opportunities in life, that a judge ought to do what he can to repair inequalities in life, and that a mild sentence to a man who has had few opportunities is one way of doing this. 28

For Brandt, an extended rule-utilitarian position is one that stresses

28 Brandt, op. cit., p. 493.
the need to bring about an equality of certain types of opportunity and
welfare as well as maximize the total good. On wholly utilitarian
grounds, one would not necessarily be concerned about the lack of
opportunities in the criminal's life if the criminal belonged to a class
which was, according to a purely utilitarian theory, rightfully denied
opportunities.

With the introduction of Principle (b), we can now explain
another sort of mitigating factor such as being a member of an oppressed
class or being raised in the slums in which the individual does not claim
to be responsible for a different act. Instead, on the grounds of Principle
(b), it may be claimed that because of the injustice of society to an
individual, he should be treated more leniently. This type of mitigating
factor, unlike the mitigating factor which changes the act for which one
is responsible, is intrinsically tied to the lessening of the penalty.
Whereas a factor was earlier termed mitigating because on utilitarian
grounds the penalty was lessened, now we have another group of miti-
gating factors wherein there are prima facie grounds for lessening the
penalty even if it is done in opposition to utilitarian considerations.
Thus, Principle (b) plays an important part in explaining why we consider
mitigating factors to be ones that determine that a penalty be lessened.

It can now be seen from the foregoing examples how Principle
(b) can be interpreted in terms of our equalitarian theory. It appears
that these equalitarian considerations can account for many of the cases
where generally held opinions regarding the justice of various types of punishment would conflict with the views that would probably be reached on utilitarian grounds. Further, Principle (b) can give a rationale for considering a factor like poor social background as a mitigating one.

We can now see the two principles of justice that are required to be asserted in addition to a principle of utility to bring about a satisfactory theory of punishment. It is important to decide how we shall relate the obligations that are derived from considerations of justice with those that can be derived from considerations of utility.

In examining the views of Ross and Hospers, two alternative views that can be taken regarding the relative weight and importance of the obligations derived from these principles were stated. The obligations derived from the principles of justice can either be considered limitations which may never be overridden by considerations of utility or they can be considered prima facie obligations which may be overridden on occasion by considerations of utility.

Of these two alternatives, we consider the latter to be preferable. First of all, it should be realized that holding that the obligations derived from principles of justice are only prima facie does not entail that they will ever in fact be overridden by considerations of utility. It might well be that obligations derived from principles of justice would be felt to be stronger than those derived from a principle of utility. Yet, by maintaining that the obligations derived from principles of justice are
prima facie, the possibility is left open for some future cases where it might be felt that considerations of utility are of such great moment that they do outweigh non-utilitarian factors. If we adopt a view which places absolute limitations on the utilitarian position, we would be debarred from even considering the possibility that utilitarian factors might lead us to justify such things as the punishment of an innocent person. The claim that non-utilitarian principles can never be overridden seems to conflict with the fact that for any such absolute principle we can usually imagine an extreme case where we would believe that the principle should be overruled because of the great good that would result.

Also, considering the principles of justice to state only prima facie obligations does explain a very prevalent aspect of our moral life, i.e., the fact that in many situations we do feel a conflict between different moral principles and feel that we must make a choice from among competing claims. If we adopt the view that principles of justice impose absolute restrictions, then this aspect of our thinking about moral issues could not easily be accounted for. As we will see below, the types of arguments that are given regarding "strict liability" laws is evidence that in the area of punishment we do feel a conflict between the desire to treat people justly and a desire to maximize utility.  

29 "Strict liability" laws are laws which do not allow exculpating or mitigating factors to be considered in determining the penalty.
Thus, the most satisfactory view to take in presenting a theory of punishment is to consider Principle (a) and Principle (b) to state prima facie obligations that may conflict with those prima facie obligations that are derived from the rule-utilitarian position. This theory seems more defensible than any we have hitherto examined. Although it does leave open the possibility that it may, in extreme cases, be morally correct to justify laws which allow for punishment of people who are not responsible or for punishments that would support an unequal social order, it does explain, as the utilitarian theories do not, our hesitancy to do these things. By making the principles of justice prima facie, a position is arrived at which would not satisfy those who maintain that we have an obligation never to punish an innocent person, but the position is one which more satisfactorily answers what was previously found to be one of the main objections against the utilitarian position, i.e., that it leads too readily to the justification of the punishment of an innocent person. Since our theory holds Principle (a) as a principle which must always be considered in making a moral judgment, we can see that our theory is less likely to allow the punishment of individuals in violation of Principle (a). Also in considering the other objectionable consequences that can be justified by a rule-utilitarian position, it can be seen that by adding Principle (a) and Principle (b) to the obligations that are derived from a rule-utilitarian theory and making them all prima facie, the present position is less likely to lead to their justification.
CHAPTER FIVE

In Chapter Four we maintained that an adequate theory of punishment would consist of a prima facie principle of utility and prima facie principles (a) and (b) derived from our equalitarian theory of justice. It must now be decided whether the utilitarian aspect of our theory should, as we have assumed, stress deterrence. Probably the most strenuous objections that would be raised against the deterrent emphasis involved in the theory of punishment we have defended would come from those theorists who maintain that the manner in which criminals are treated should be designed to bring about the reformation of the criminal rather than the deterrence of the would-be criminal. No serious difficulties arise from those theorists who believe that criminals should be reformed or rehabilitated insofar as this is possible within the framework of a system of punishments which has as its primary goal deterrence in conjunction with prima facie principles (a) and (b); the theory of punishment which was arrived at in Chapter Four does not eliminate on moral grounds the possibility of applying certain measures which might reform an offender while he is imprisoned for an offense. As we shall see, however, many measures which have been proposed by theorists favoring reform and which seem necessary if their ends are to be achieved are ones which would conflict with the principle that trivial
crimes should not receive severe penalties which has here been held necessary for an adequate theory of punishment. Before we proceed to an analysis of the conflict between those who favor reform rather than deterrence, let us clarify the goals that the theorists who favor reform desire to achieve and the means by which they desire to achieve them.

Treatment of criminals which is called "reformatory" is distinguished from that which is called "deterrent" by being specifically designed to bring about in an offender a disposition to keep within the law by means other than by fear of punishment and to aid the offender to become a productive member of society. Thus, reformatory treatment could include such diverse forms as moral exhortation, psychiatric treatment, dispensing of tranquilizers and other drugs, and formal education. One who maintains that the treatment that is given an offender should always be designed to bring about reform will here be called a reformist.

Reformists are generally disinclined to call the treatment which they propose for criminals "punishment" even though it sometimes corresponds to the treatment that a defender of a theory which stresses deterrence would prescribe. Reformists argue that although they are at times required to use imprisonment or other traditional...

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"punishments," this is not to deter the criminal or others by arousing fear but a means to reform. Thus, the treatment prescribed by reformists differs principally from the treatment prescribed by those who emphasize deterrence not in the devices used but in the use to which they are put. The terminological difference between reformists and others should be kept clear or confusion can easily result. For example, reformists often maintain that the concept of punishment should be eliminated. They do not necessarily mean that any or all of the sorts of treatment defended by those supporting a theory which emphasizes the goal of deterrence should be eliminated; they mean that these devices are considered acceptable only if they are used to bring about reform.

By far the most prominent group of reformists in the twentieth century have been those who are associated with various schools of psychiatry. From these reformists and others, a number of proposals for the treatment of criminals have come which are incompatible with the treatment of criminals prescribed by those who maintain that deterrence should be the main goal. These proposals stress the individualization of the treatment of criminals. Individualization usually involves placing a convicted criminal in the hands of "experts" (counselors, psychiatrists, etc.) who determine the appropriate treatment of each criminal.

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Among the types of treatment proposed are indeterminate sentences, treatment of criminals by psychiatrists without confinement if possible, extended use of parole and probation, and schools for retraining those who can profit by it rather than prison. The indeterminate sentence is perhaps the most basic of all reformist proposals. This involves keeping the offender in custody and undergoing rehabilitative treatment until the appropriate authorities consider him reformed. In explaining and defending the indeterminate sentence, a prominent criminologist states:

Yet, it is clear from the new statutes and the court decisions referred to concerning the time a man may be kept on parole that public opinion is slowly but surely coming to see that short sentences and sentences expiring at a definite time, no matter what the condition of the prisoner, vitiate the whole program of treatment of the prisoner.

The tendency of modern penological thought is toward sentencing for an indefinite period, placing the responsibility for release on parole and ultimate discharge in a carefully selected board who shall base their judgments upon a thorough knowledge of all the facts concerning the prisoner and his community. If that tendency realizes its logical outcome, both definite sentences and short sentences will be done away with, and the board will determine the length of his sentence. There is no social reason for releasing a man from safekeeping until society can be assured of its security from his menace.  

The proposals recommended by the reformist, especially the indeterminate sentence, would lead to treatment that would generally be

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considered by the educated public as unjust. One could receive severe punishment (or, if one prefers, years of undesired reformative treatment) for a trivial crime, i.e., one that is not a serious threat to society. On the reform theory, an offender who committed a trivial offense but whose therapy was not successful might be kept in custody indefinitely and thus be caused suffering greater than was necessary to protect society. The length of a criminal's custody by the state would not depend on the type of crime he committed, but on the time it would take him to be reformed or to convince "experts" that he was reformed. Thus, we would appear to have a paradigm case of violation of the requirement that trivial crimes not be given severe penalties. Unlike the reform theory, a deterrent theory based on classical utilitarian doctrine has in it certain restrictions which would prevent one from punishing severely an offense that was trivial. For the deterrent theorist, as we have seen in the discussion of Benn's position above, the penalty should not cause more harm than the offense would if unchecked. The penalty is designed to protect the community but not at the expense of the offender; if the harm to the offender is greater than the benefit to the community, the punishment is unjustified.

The reformist might well recognize the ostensible strength of these considerations of proper distribution of the amount of the

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4 For a discussion of this point, see Chapter Three, pp. 65ff.
penalty but still maintain that in assessing their strength in comparison with the utility of reform, it is morally justifiable to choose measures which reform rather than act in accord with the requirement that trivial crimes not be given severe penalties because of the very good consequences that will result. The crux of the reformist argument here is that the only way, or at least by far the most effective way, that utility can be maximized is by adopting reformative treatment even though the measures required for such treatment are not ones that coincide with generally recognized principles of proper distribution of the amount of punishment. Thus, one way to defend the reformist position is to show that treating criminals in a manner which will bring about their reform is much more likely to maximize utility than any other manner of treating them. If the reformist adopts this defense, the burden of proof is on him. Not only must he show that reformative treatment produces better results than punishment designed to deter, but he must show that we should not act in accord with generally accepted principles of proper distribution of the amount of punishment that would be considered at least prima facie obligatory.

There is still another defense that many reformists have adopted. Besides maintaining that there is empirical evidence to show that punishment does not deter and that reform will bring about more beneficial consequences or even if punishment does deter, reform will bring about more benefit, one can maintain that human beings are never
responsible for their behavior; and, therefore, on grounds of justice, we should not attempt to punish since such offenders have never had an opportunity to abstain from doing what the law forbids. In this latter defense, the reformist argues that in the case of each offender there is an exculpating factor which excuses the offender from punishment.

Let us examine in turn each of these means that the reformist might use to defend his position. In basing his claim on the probable good consequences that will be produced, the reformist must argue that society and the individual criminal are most benefited by methods which reform rather than by methods which deter. To defend his position, the reformist seems required to maintain the correctness of the following two propositions: (1) Methods of deterrence do not bring about as good consequences as reformative procedures; and (2) The good consequences produced by reform methods are sufficiently great to outweigh the violations of just distribution of the amount of punishment which reform methods sometimes entail.

Even if the reformist could establish the first proposition above, he has not established the moral correctness of his position. It might well be the case that reform methods might produce slightly better consequences but at the same time produce a distribution of penalties that one would be disinclined to accept for the slight additional benefit involved. For example, it might be possible to reduce crime by keeping
all criminals in a mental hospital until a psychiatrist considers them unlikely to repeat the crime. This might involve keeping a small number of men who do not respond to treatment incarcerated for life. Since some of the men held in custody may have committed only a minor offense, this procedure would be considered by many to be so distasteful as to be justified only under the most stringent conditions.

In considering the reformist position, an attempt will be made to show that in the face of a lack of scientifically validated evidence that would clearly establish the superiority of either the reform position or deterrent position, the latter is the most acceptable. Further, it will be seen that the kind of evidence that is required to support the reformist position is such that if it could be acquired at all, it could be done only by showing that widely held beliefs regarding human motivation are mistaken.

The first point to realize is that at present the little evidence there is regarding the efficacy of reformist proposals fails to show that they are successful in reducing recidivism. It appears that those criminals who have received psychological treatment while in prison are as likely to commit another crime as those criminals who have been released from custody without psychological therapy. While...

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5 For a discussion of various aspects of the efficacy of psychiatric treatment and the status of psychiatry among the sciences, see J. Hall, General Principles of Criminal Law (Indianapolis: The Bobbs-Merrill Co., Inc., 1960), Ch. 13.
the evidence does not show that all reformist proposals will not be successful, it does show that there is apparently no evidence to show that they are successful.

But the argument against the reformist position is not merely that they have failed to produce convincing evidence that their rehabilitative techniques are successful and since these techniques sometimes lead to violations of commonly accepted principles of distribution of the amount of the penalty they should not be adopted. There are other difficulties which indicate perhaps more fundamental problems of the reformist position. One of the most important of these difficulties is that the treatment proposed by the reformists does not take account of the possible good effects that traditional types of punishment can have on the general public. It may well be true that the threat of traditional punishments may not deter certain types of people, but it is certainly possible and it is generally held to be the case that such punishments have a great effect in preventing "ordinary citizens" from becoming first offenders. The kinds of treatment proposed by reformists need have little or no deterrent value. If, for example, a conviction of robbery by someone who is economically destitute and untrained for any occupation would be likely to lead to a six-month training course in a woodworking shop, there would be little incentive for such a person not to commit the robbery.

The problem that the reformist faces is that his methods are designed to prevent recidivism and not to deter people from becoming
first offenders. The objection to doing this is stated very clearly by

H. L. A. Hart:

There is indeed a paradox in asserting that Reform should "predominate" in a system of Criminal Law, as if the main purpose of providing punishment for murder was to reform the murderer not to prevent murder; and the paradox is greater where the legal offence is not a serious moral one: e.g., infringing a state monopoly of transport. The objection to assigning to Reform this place in punishment is not merely that punishment entails suffering and Reform does not; but that Reform is essentially a remedial step for which ex hypothesi there is an opportunity only at the point where the criminal law has failed in its primary task of securing society from the evil which breach of the law involves. Society is divisible at any moment into two classes (i) those who have actually broken a given law and (ii) those have not yet broken it but may. To take Reform as the dominant objective would be to forgo the hope of influencing the second and---in relation to the more serious offences---numerically much greater class. We should thus subordinate the prevention of first offences to the prevention of recidivism. 6

Thus, there seems to be good reason to suppose that the reformist by directing his efforts at the numerically smaller class is acting in a manner that would produce fewer good results than could be produced by methods directed at the deterrence of potential criminals.

The main objection that a reformist might raise to the above argument is that it assumes incorrectly that the threat of punishment is valuable as a deterrent. The reformists, however, seem unable to make a good case for their contention. The main difficulty the reformist has is in showing that the threat of punishment does not deter normal

6 Hart, op. cit., p. 25.
individuals who might be tempted to commit a crime. In considering the deterrent effect of punishment, they often stress only the effect punishment has on the criminal to whom it is applied. Those few who address themselves to the deterrent effect of punishment on the general public do not seem to appreciate the strength with which this view can be defended. John Hospers, in arguing for the adoption of reformist views, is a good example of a theorist who ignores at a crucial stage in his argument the strength of the deterrent view. He argues that whereas punishment can be a deterrent in dealing with some crimes, it is not an effective deterrent for serious crimes. The reason for this is that many people who commit serious crimes are mentally ill and as a result could not have been deterred by threats. Then he asserts that in dealing with these and other criminals the threat of punishment does not work. He states:

The daily devices of blaming and punishing, back-slapping and pull-yourself-together talk, are no more effectual here than a drop of water in a desert. Yet, in spite of the complete failure of our legal practices in dealing with crime, we continue to beat the same old useless drums of blame and punishment, threat and deterrence. We put a man in prison for two years for a theft, five years for armed robbery, and twenty years to life (or the electric chair) for homicide, assuming smugly that these penalties will lessen his tendency to repeat his crime. We assume that being behind bars with nothing to do but build up resentments or go mad will make him emerge from prison a better man, renewed and chastened, and that when he does emerge from prison after the five years or the twenty, he will be able to resume his role in a society that refuses to employ him.
spiritually prepared at last to conform to the moral ideals of middle age and the middle class. 7

Hospers might be correct in maintaining that many criminals who commit serious crimes are mentally ill, but certainly some who do so are not; with regard to those criminals who are sane, we would seem to have good grounds for considering the adoption of deterrent policies. Hospers stresses the ineffectualness of traditional punishments on actual criminals and in this he seems quite correct, but in ignoring the effect of such punishments on the general public, he has failed to present a convincing case. When one considers that the threat of punishment may act as a deterrent to citizens who are not mentally ill, which we certainly assume to be the numerically greater class, it would seem that we might well be justified in giving punishments designed to deter to all those criminals who are sane. Thus, even if punishment did not aid in the rehabilitation of any criminal, there would still seem to be good grounds for continuing deterrent policies.

The fact that the reformist must take if he is to defend his position is to maintain that the threat of punishment is ineffective with both actual and potential criminals. Certainly, if the threat of punishment can be used to deter large numbers of possible criminals, it would be hard to maintain that reform of a much smaller group produces better results. What little evidence we have would seem to indicate that the

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7 Hospers, op. cit., p. 462.
threat of punishment does in fact deter many people from committing
many types of crimes. Even Hospers, who argues that the threat of
punishment does not deter certain types of criminals from committing
some serious crimes, admits:

It is true, of course, that punishment and the threat of it
can be a deterrent. When people park their cars in a
prohibited area day after day because the parking laws
have not been enforced and then suddenly the policemen
start tagging their cars, after a few days not many cars
will be found parked in that area. Here our common-
sense egoism comes into play; it is less painful to park
further away from work than it is to appear in court and
pay frequent fines. 8

What Hospers is admitting here, and what would generally be main-
tained, is that the threat of punishment is an important motivating
factor in the behavior of people who are sufficiently rational to dis-
riminate between those actions which are in their interests and those
which are not.

The widespread belief that the threat of punishment influ-
ences behavior gives an initial weight to the deterrent position which
can be overcome only by strong counter-evidence to the contrary.
Further, the contention that human beings are not responsible for their
behavior, even if true, would not strengthen the reformist contention
that his position produces better consequences. If all human behavior
were determined by factors for which the individual could not be held
responsible, it could still be maintained, for the reasons given above,

8 Ibid., p. 460.
that the best consequences could be brought about by using the threat of punishment as a factor to influence human behavior.

R. Brandt, in suggesting the possibility of justifying the adoption of reformatory methods rather than deterrent ones, presents an argument that differs from that given above by Hophers, but which seems equally faulty. He states:

One might object to this proposal that it overlooks the necessity of disagreeable penalties for crime, in order to deter prospective criminals effectively. But it is doubtful whether threats of punishment have as much deterrent value as is often supposed. Threats of punishment will have little effect on morons, or on persons to whom normal living offers few prospects of an interesting existence. Moreover, persons from better economic or social circumstances will be deterred sufficiently by the prospect of conviction in a public trial and being at the disposal of a board for a period of years.  

The main difficulty with Brandt's position is that he is assuming that reform methods are going to be sufficiently unpleasant to deter most normal people. He is, in effect, maintaining that reform methods are also deterrent ones. This is certainly questionable; reformatory methods can be extremely harsh or fairly pleasant. If the type of treatment that is given to certain types of people for various crimes is not very undesirable, then it could well be the case that there would not be sufficient deterrent to affect the behavior of some people who are neither mentally ill nor whose life offers insufficient prospects of an interesting existence. If, for example, a man knows that for killing

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9Brandt, op. cit., p. 504.
his wife he will likely receive six to twelve months treatment in a
mental hospital, then he might decide that the treatment is preferable
to living with an unbearable wife who will not grant him a divorce. And
if Brandt believes that most people would be ashamed of such treatment,
he has failed to notice that at present an ever increasing number of
people are coming to regard psychiatric treatment as commonplace.

The nature of the foregoing argument against the reformist
position might perhaps be beneficially reviewed by framing replies to
the objections made by Stanford Kadish against a position similar to
the one we are defending, i.e., a position which holds that the amount
and kind of punishment should be determined primarily by deterrent
considerations. Kadish states:

But why should the rehabilitative purpose be subordinated
to the deterrent, vindicatory, and incapacitative purposes
so that the former may be accomplished only within the
limits of confinement appropriate to the latter? On what
principle is this principle asserted? Our ignorance of the
reformative processes, possibly. Yet the authors concede
that our knowledge about the effectiveness of deterrence
and the duration of the need to restrain is also limited.
How can the requirements of these programs provide an
outside limit? Do they not themselves require limiting
precisely as the reformative programs do, and for the
same reasons? Now if the authors mean their limiting
principle to govern only pending the development of proven
therapeutic knowledge and techniques, the answer may be
a political and practical one: Namely, that during this
period...the historic functions of deterrence and incapacita-
tion provide the most likely practical protection against
the great potentialities for extended deprivations of freedom
in open-ended rehabilitative programs. (Even then, however,
the authors would have to explain their readiness to accept
deprivations of freedom in the cause of an unproven theory
of deterrence and moral vindication.) The ground becomes much shakier if the authors mean their principle to operate even on the assumption of assured rehabilitative success. 10

Kadish has two main objections. First, there is the demand for the justification of punishments that are designed to deter. The contention here is that there is equally little evidence to support the claim that punishment deters as there is to support the claim that rehabilitative methods can be successful. In this case, if one is not justified in punishing to reform, then, also, one is not justified in punishing to deter. Second, there is the demand to know what objection there could be against reform procedures if they, in fact, prove successful.

In reply to the first objection, we have maintained that although many criminals might not be deterred by the threat of punishment, there is a generally held belief that many potential criminals are deterred by such threats. There are, as far as I know, no statistics which show how many persons are deterred from criminal actions by the threats of punishment. Yet, even many reformists, as was seen in our discussion of Hospers, recognize that the threat of punishment does have some efficacy. Thus, even though we do not have clear statistical evidence to show how effective the threat of punishment is as a deterrent, we do have good reasons based on widely held views.

of human motivation for believing that it is a valuable means of controlling behavior. Further, when one considers that the threat of punishment operates on a large segment of society, one must consider the evidence, such as it is, to favor a deterrent over a reform theory.

The second point raised by Kadish is a most serious one: if reform methods are successful, what objection can be made against their adoption. There are, in fact, two replies to be made. First, to show that reform methods are successful is not to establish a claim regarding their utility. Reform methods can be successful, but since there may be more first offenders as a result of their adoption, the number of crimes may increase. Our second objection is that the reformist must further show that reform methods produce not only as much utility as deterrent methods but more utility in an amount sufficient to outweigh the considerations of just distribution of the amount of punishment that reform methods violate.

The second argument in favor of reform, one which we will only describe and briefly comment on, is based on the claim that criminals are not morally responsible for their behavior. Punishing people who do not have the ability or opportunity to avoid performing certain actions would be a violation of Principle (a) which we found to be an essential one in the modification of a utilitarian view. The reformist claim that criminals should not be punished because they cannot be held
responsible for their behavior and thus could not freely choose between alternative courses is an argument against their punishment on the grounds of justice. This last point, that the reformist is arguing here on the basis of justice, though often neglected, is very important. If the reformist were defending his position on utilitarian grounds, the claim that criminals are not morally responsible would not necessarily affect the issue of the utility of their punishment (unless one determines responsibility in terms of the efficacy of punishing certain acts).

We might best acquire an understanding of the reformist position by examining the basis of their claim that criminals are not responsible. We must distinguish between those reformists who maintain that more criminals are not responsible for their behavior than is generally recognized by the legal standards to be the case and those reformists who maintain that it is morally wrong to punish any criminal because he is lacking in responsibility, usually as a result of mental illness. The first group of reformists raise serious issues regarding what criteria are to be used to determine when an individual has an opportunity freely to make decisions. One of the main places where this issue arises at the present time is with regard to the legal definition of insanity.\(^{11}\) Although this group of reformists raise important problems regarding the proper limits of the application of the

\(^{11}\) For a discussion of the arguments regarding legal insanity and the M'Naghten rules, see Royal Commission on Capital Punishment 1949-53 Report and J. Hall, op. cit., Ch. 13.
principles of justice which have been previously described, they do not raise objections regarding the general method of the justification of punishment that has here been defended. The second group of reformists, those who maintain that criminals are not responsible for their behavior, do, however, raise serious objections to the theory of justification that has heretofore been advanced. It is the objections of this latter group to which we now turn.

The view that criminals are not responsible for their behavior, whether it be advanced by psychiatrists or others, is usually defended on grounds of philosophical determinism. These reformists, as so many others in the course of philosophical speculation on this problem, have taken the theory of determinism which maintains that every event is caused by preceding events to entail that no human action could ever be other than it was. If this is so, then, according to these theorists, it makes no sense to hold a man responsible for his behavior for he could in no way have helped performing the actions which he did in fact perform. Clarence Darrow is typical of the reformists who take this position. He states:

Before any progress can be made in dealing with crime the world must fully realize that crime is only a part of conduct; that each act, criminal or otherwise, follows a cause; that given the same conditions the same result will follow forever and ever; that all punishment for the purpose of causing suffering, or growing out of hatred, is cruel and anti-social; that however much society may feel the need of confining the criminal, it must first of
all understand that the act had an all-sufficient cause for which the individual was in no way responsible, and must find the cause for his conduct, and, so far as possible, remove the cause.\textsuperscript{12}

Some psychiatrists in recommending changes in the treatment of criminals hold this view. The following statement by Roche is typical:

If the law should find a way to abandon its untenable concept of criminal responsibility as it pertains to the subjective element in crime and come to the view that all felons are mental cases, there should be a reformation in penology.\textemdash As matters now stand, the law conjoins with the criminal in a resistance to the idea that a crime is a disturbance of communication, hence a form of mental illness.\textsuperscript{13}

The questions whether a deterministic view is correct, and, if so, whether it is compatible with ordinary views of moral responsibility are ones which cannot be dealt with within the scope of this paper. However, some obvious points should perhaps be mentioned here. They are that the acceptance of the claim that all human beings are lacking in moral responsibility would drastically affect the whole institution of morality and that a determinist position so formulated that it would eliminate moral responsibility has certainly not been defended to the satisfaction of large numbers of philosophers. Until the

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lack of all moral responsibility is conclusively established, we might well continue to defend a theory of the justification of punishment which assumes that men can sensibly be held responsible for their actions.
CHAPTER SIX

In this chapter, two presently controversial topics will be considered: the morality of strict liability rules and capital punishment. Our main purpose will be to consider how the moral theory which we arrived at earlier applies to these topics. We will see that while questions of utility are of great importance in the discussion of these topics, issues that arise from considerations of justice are also significant. The application of our theory of punishment will clarify many of these issues.

As we have argued, on the basis of an equalitarian theory of justice, there are grounds for demanding that offenders must have voluntarily broken the law before they can be justly punished. This demand is usually accepted and followed by the legal systems of western countries. Yet there are a number of offenses for which the requirement that the offender acted voluntarily is dropped. A law where the sole determination of an individual's liability to punishment is the commission of an act regardless of its voluntary character is said to be a strict liability offense. ¹ Strict liability offenses may be briefly characterized

¹For discussions of the nature of strict liability laws, see R. A. Wasserstrom, "Strict Liability in the Criminal Law," reprinted in H. Morris, ed. op. cit., pp. 273-281; J. Hall, op. cit., Ch. X; and N. Morris and C. Howard, op. cit., Ch. VI.
as those offenses for which one can be punished regardless of one's responsibility for having committed the offense. The mere commission of the offense is sufficient to show liability for punishment. The types of strict liability offenses are quite varied. They include such offenses as the sale of narcotics, the sale of adulterated food, the sale of intoxicating liquor to minors, and various sex and traffic violations.

The controversy that surrounds the punishment of criminals for these offenses is a moral one. Those who object to strict liability laws either maintain that on the grounds of justice or on the grounds of utility such laws are unjustified. The defender of these laws generally maintains that the utility of these laws is so great that they are morally justified regardless of their violation of commonly recognized principles of justice. Let us examine the various claims made regarding these laws.

The claim of those who defend strict liability laws is that they are the only effective deterrents of certain types of crimes. The types of crimes for which strict liability laws are held morally justified are those where it would be exceedingly difficult to prove voluntary intent or negligence. If strict liability were not applied, it is assumed there would be a significant increase in these crimes because of the realization that these crimes could be committed with impunity. Further, the defenders of these laws maintain not only that they bring about greater caution in those people who contemplate breaking them, but they
supposedly keep many potential criminals from engaging in those occupa-
pations or practices that are covered by such laws.

There are two important objections that are raised against
strict liability laws. First, it is argued that such laws violate the
demand of justice that only those who are responsible for their behavior
be punished. Second, there is the claim that there is no evidence that
these laws produce higher standards of caution and, therefore, no
evidence that they are more efficacious than more traditional types of
laws. Since, it is argued, no greater utility is produced and a principle of justice is violated, there are good grounds for rejecting these
types of laws.

In assessing these arguments for and against strict liability
laws, it would appear that no definitive solution can be reached. It is
true that these laws violate principles of justice, but such violations
could be justified if it could be shown that sufficient utility could be
produced by their adoption. The crux of the argument is the opposing
contention made regarding the utility of these laws. The defender of
these laws must show not only that good consequences are produced,
but that the increase in utility is significant enough to outweigh the
violations of justice incurred. His opponent must argue that a significa-
cant increase in utility is not likely to be produced.

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2 For a discussion of this criticism, see J. Hall, op. cit.
One usual contention made by the opponents of strict liability laws is that there is no evidence that they are more efficacious than traditional types of laws. Even if this contention is correct, it does not offer good grounds for rejecting the claim that these laws are productive of greater deterrent effect. Even though statistics are inconclusive regarding the efficacy of these laws, one would have to say that there is a prima facie plausibility in favor of the claim that strict liability laws have a stronger deterrent effect. If we work on the assumption that the threat of punishment is somewhat efficacious, then there are good grounds for believing that strict liability laws are more of a deterrent than those which allow an offender a possible escape. Because of the greater certainty of the punishment for the commission of the act, it does seem plausible to assume that this type of law might prevent some potential offenders from engaging in a practice in which they might otherwise engage. Thus, even though statistical evidence is at present lacking there seem to be good grounds for believing in the greater efficacy of these laws than traditional ones.

We have now seen the main arguments for and against strict liability laws. On solely utilitarian grounds, the defenders of strict liability laws apparently have a strong case. Yet, considerations of justice would lead one to maintain that strict liability laws are unjust.

3 See Wasserstrom, op. cit., p. 274.
If the situation had to be left at this point, there would be no way of resolving the conflict. At best, one could perhaps try to assess each strict liability law with regard to the amount of utility produced and determine if that was sufficient for the violations of justice involved.

Yet matters can be taken further. Without significant loss of utility, it would seem that we can mediate between opponents and defenders of these bills by a compromise adopted by the High Court of Australia. Rather than enforce strict liability for certain crimes, in the occurrence of those crimes, the Australian court holds one liable for negligence and puts the burden of proof of non-responsibility on the defendant. For example, if an individual sells adulterated food, he is held liable for punishment unless he can present positive evidence that he was not responsible for the adulteration. Two eminent Australian lawyers state this position quite clearly:

These considerations lead us to suggest that strict responsibility might with advantage be replaced by a doctrine of responsibility for negligence strengthened by a shift in the burden of proof. The effect would be as follows. If from the statutory words no requirement of mens rea could be gathered, D would be prima facie liable to conviction on proof by P of actus reus only. However, D should be allowed to exculpate himself by proving affirmatively that he was not negligent. The issue of negligence would be a question of fact to be decided according to the circumstances of each case. It is submitted that such a doctrine could not possibly be less effective than strict responsibility as an

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instrument of law-enforcement, and might well be more effective by eliminating injustice.\(^5\)

The strength of this compromise position can be found in the following considerations. First, there is no lessening of the pressure put upon possible offenders of these laws to take precautions. Potential offenders know that if a violation of the law occurs, the burden of proof that all reasonable precautions were taken is on them. Thus, it is reasonable for a potential offender to take all the precautions he would take if a strict liability law were in effect. Since this is the purpose of strict liability laws, it appears that their purpose could be achieved by this compromise. Second, violations of justice, though they still might occur, would be less frequent. Many of those who would be punished under strict liability laws would escape punishment by proving lack of responsibility under this compromise system. Thus, the compromise has the effect of keeping the utility produced constant while lessening the number of violations of justice.

We have seen in our brief discussion of strict liability laws that Principle (a) plays a prominent role. Our theory of punishment does not offer any definite solution to the controversy regarding these laws; but it does serve to delineate the various issues quite clearly and, thereby, to point the way to a possible solution. Further, our theory shows that the solution offered by the utilitarian fails to take account of

\(^5\)Ibid., p. 201.
the full complexity of the problem because it fails to consider the significance of questions of justice. In turning to the issue of capital punishment we will see that another aspect of our theory of justice plays a prominent role in clarifying the issues and pointing the way to a possible solution.

A second issue about which there is much controversy at present is capital punishment. In the following discussion, I want to show how some of the issues that are relevant in considerations of this topic are related to the equalitarian theory of justice which we have defended.

In dealing with the arguments against capital punishment, we must distinguish between those that are directed at the unjust manner in which it is actually applied in various countries and those which are raised against the practice regardless of the justice of its application. The first type of objection clearly shows one application of Principle (b) to discussions of punishment. One of the usual objections that is raised against the manner in which capital punishment is actually applied is that it is most often meted out to certain racial or economic groups without good grounds for these groups being so distinguished. In southern areas of the United States, whites are often given less severe treatment than Negroes even though they have committed the same crime.  

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The only sensible explanation that can be found for such difference in
treatment is the dislike of the Negro by the jury which is almost always
totally white. Hugo Bedau gives the following assessment of the pre-
judice that probably exists in the distribution of the death penalty:

...there are two features of capital punishment in
certain areas which do strongly suggest that its administra-
tion is affected by racial prejudice. Not until recently
have Negroes even been allowed to serve on criminal
juries in many states. It almost goes without saying that
a racially-mixed jury would have had a harder time bring-
ing in a death sentence against a Negro defendant in at
least some cases than did the all-white jury. Also, as
National Prisoner Statistics shows, of the nineteen jurisdic-
tions that have executed men for rape since 1930, a
third of them have executed only Negroes. In these six
states, the very existence of rape as a crime with an
optional death penalty is, in the light of the way it has
been used, strong evidence of an original intent to dis-
criminate against non-whites. This was probably the
purpose behind the decision in Tennessee in 1915 to
abolish capital punishment for murder and treason, but
to retain it for rape.7

Thus, because it conflicts with our equilibrarian theory of
justice, it would appear that there are good grounds, at least in some
countries, for rejecting the manner in which capital punishment is
actually distributed.

It is certainly possible for capital punishment to be applied
in a just manner, i.e., while taking due recognition of Principles (a)
and (b). If the punishment is conceived of as being applied in such a
manner, then the important arguments for and against it are utilitarian.

7Ibid., pp. 412-413.
ones. We shall see by means of a careful examination of these arguments that capital punishment does not seem capable of being defended successfully on utilitarian grounds.

The main question that concerns us is whether capital punishment is a greater deterrent than long imprisonment. The defenders of capital punishment must show that it is or their position is indefensible. If it could be shown that capital punishment was as good but no better a deterrent than long imprisonment, there would be good reasons for rejecting it. (The main reason is the possibility of punishing an innocent man.) If the most severe punishment given is one of long imprisonment, there is the possibility of correcting legal errors after an individual has been unjustly sentenced. Of course, in a legal system which employs capital punishment, there is no possibility of correcting error after a mistaken death sentence is carried out. There are several other reasons which make the death penalty the less desirable type of punishment if it produces only equal deterrent effect. The most prominent of these are (i) it is offensive to the moral feelings of many people in society, and (ii) it seems more expensive to administer than long prison sentences. 8

We must consider the main issue: is long imprisonment a more effective deterrent than capital punishment? There are two main types of arguments which we might call the statistical and the common-

8Ibid., pp. 405ff.
sense. The details of the statistical studies need not concern us here. The various statistical studies that have been made are inconclusive with regard to the effectiveness of capital punishment as a deterrent. Since the burden of proof is on the defender of capital punishment, the failure of statistics to establish the efficacy of the death penalty necessitates that other evidence of its efficacy be found if the defender is to maintain his position. The most important argument used by the defenders of capital punishment is what we call the "common-sense" argument. Though it shall be maintained that this argument is probably not sufficient by itself to establish the correctness of capital punishment, it is a stronger argument that it is often taken to be. The common-sense argument is simply that men generally fear death more than any other penalty; and, therefore, its deterrent value will be greater. James Fitzjames Stephen gives the following statement of this argument:

No other punishment deters men so effectually from committing crimes as the punishment of death. This is one of those propositions which it is difficult to prove, simply because they are in themselves more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction.

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The claim that men fear the death penalty more than imprisonment is given additional weight from interviews with criminals who claim to have avoided some crimes that carry the death penalty in favor of those that do not. 11 It is, of course, possible to maintain that the death penalty is not more feared than long imprisonment. Yet, at least among the less educated part of the public there does seem to be greater concern about the death penalty than any other. For the purposes of our argument which will be seen later, we shall assume that the death penalty is more feared than any other.

The most often made objection to the common-sense argument is that most criminals who commit capital crimes are not ones who would be deterred by this threat. Hart makes this point in the following objection:

But there is a more important reason why this insistence on the unique status of the fear of death as a motive helps us very little here. In all countries murder is committed to a very large extent either by persons who, though sane, do not in fact count the cost, or are so mentally deranged that they cannot count it. In all countries the proportion of "insane" murderers is very high. 12

Hart's reply is open to the objection that while the death penalty does not deter murderers, it does deter members of the general public who are sufficiently sane to calculate their self-interest. It is not enough to show

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11 Bedau, op. cit., pp. 266ff.

12 Hart, op. cit., p. 459.
that most actual murderers are not deterred by capital punishment.

What must be shown is that potential murderers in the general public are not deterred by it.

Even if it is granted that capital punishment is a greater deterrent than long imprisonment, there still seem to be good objections against its use because of the other consequences that might result. From the evidence that we have, it would seem that we can safely say that the death penalty is not a much greater deterrent than life imprisonment. Further, capital punishment has unique drawbacks as a punishment: mistakes made in its administration are irreparable, the hesitancy on the part of the public to apply it leads to difficulty in its administration, the great caution with which the law operates in applying this penalty often results in a criminal spending years under sentence of death while appeals are pending, and at present, it is often applied prejudicially. In considering the weight of the deterrent effect of capital punishment in relation to other factors related to its application, the Royal Commission on Capital Punishment concluded:

The general conclusion which we reach after careful review of all the evidence we have been able to obtain as to the deterrent effect of capital punishment may be stated as follows: Prima facie the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment, and there is some evidence (though no convincing statistical evidence) that this is in fact so. But this effect does not operate universally

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13 For a discussion of these and other drawbacks, see Bedau, op. cit., Ch. 8.
or uniformly and there are many offenders on whom it is limited and may often be negligible. It is accordingly important to view this question in just perspective and not to base a penal policy in relation to murder on exaggerated estimates of the uniquely deterrent force of the death penalty. 14

Since the evidence for the greater deterrent effect of the death penalty is so slight and the drawbacks connected with the penalty so numerous and evident, there seem to be good utilitarian grounds for rejecting the penalty.

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