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6

THE CONCEPT OF CENSURE

> Our feelings consist in desires, which we take to be justified, that the person of whom we disapprove should at least suffer ssome discomfiture. He should in some degree have distress for the wrong he has done, if perhaps only the distress of knowing that he has the disapproval of others, a disapproval which is not self-concerned or idiosyncratic but is based on moral convictions or principles. What we want is at least that what he has done should be brought home to him. In other cases, perhaps such as has been imagined, our desires in disapproving of a man are stronger, and do issue in resolutions to act and of course in actions itself.
>
> Ted Honderich, 1988, pp. 65–66.

Introduction

Nicola Lacey has argued that when it comes to criminal responsibility it is useful to delineate two things: the fact of the social meaning expressed in a criminal conviction and the discourse about fault, culpability and condemnation.[1] Lacey's point elegantly encapsulates the way in which we condemn (i.e. censure) criminals. It necessarily involves us in a process that attributes blame, in terms of the wrongness of an offence, and involves normative judgements which relate to a given jurisdiction or society. In other words, crime may be wrong but 'wrong' is not a simple concept and is always to be understood historically, morally and socially, and as part of a normative model of criminal law. The ideological treatment is an overtly political treatment of censure and the normative treatment is similarly political, in as much as it does not contest the historical, moral and social constitution of any given censure in using the term in a largely unproblematic fashion. This chapter will set out these two archetypal treatments of censure employed in Criminology by concentrating upon the work of Colin Sumner and Andrew von Hirsch, interestingly, for a number of years, colleagues at the Institute of Criminology in Cambridge. These two treatments are themselves dependent on antecedent political theory considerations derived from political theory. It is not so much the case that these two treatments ignore one another as it is a case of them defining the term 'censure' in radically different ways and employing the term in different theoretical and penological circumstances.

The ideological use of the term 'censure' is allied much more closely to sociological theory than to penology. It asserts the role of social structure, history and ideology, as opposed to the normative value, of the censure. In the ideological version, the censure itself is problematic for it is necessarily the result, to a greater or lesser extent, of ideological determination. The censure tells us more about the power relations that give rise to its application than it does about its necessity in any jurisprudentially determined model. Moreover, it is fundamentally related to traditional issues in Marxist scholarship, those of power and the state. It does not so much take issue with those theorists, such as von Hirsch, who employ a normative treatment of censure, as see that entire enterprise as part of a liberal jurisprudence that addresses different questions altogether, and which in the overall scheme of things serves the *status quo*.

Colin Sumner has addressed censure in books and articles since the early 1980s and is the pre-eminent scholar working in censure theory on the progressive left. After early work on ideology and deviancy theory, Sumner focused his attention on the concept of censure, culminating in 1990 with the influential collection of essays *Censure, Politics and Criminal Justice*.[2] This collection conceived criminology not in terms of a sociology of deviance but in terms of the enforcement of dominant social censures by understanding the criminal justice system as being ideologically and politically constructed by dominant capitalist forces. It was an overtly Marxist work which sought not only to critique the discipline of Criminology by developing a rigorous theory of censure drawing upon both historical and sociological research, but also to change the entire thrust of criminological research, which it saw as inadequate.[3]

The sociology of censure grew out of a frustration with existing criminological explanation. As Sumner rather pithily stated:

> Whether we take their abstract, discursive definitions or their practical definitions in the course of law enforcement or moral stigmatization, it is clear that the definitions of deviant behaviour, even within a single society, exclude what should be included, include what should be excluded, and generally fail to attain unambiguous, consistent and settled social meanings. To this we add massive cross-cultural differences in the meaning, enforcement and even existence of categories of deviance, and endless instances of resistance to them involving alternative categories. Clearly, they are highly acculturated terms of moral and political judgement.[4]

In other words, since there is no possibility of using the normal categories of crime and deviance in a scientific, or even consistent, fashion, it is right to analyse them as moral and political discourses. Crime categories should be understood as negatively conceived ideological categories. Moreover, it views crime categories in terms of their institutional forms and practices, i.e. how and why they arise in certain places, at certain times, in relation to certain groups. In Marxist terms, crime categories should also be understood as the hegemonic function they have in signifying, denouncing and regulating individuals and

groups. Policing and other functions of the criminal justice system, Sumner argued, reflect capitalist social, economic and political relations. The criminal justice system is in place to uphold the interests of the capitalist class. Accordingly, censures may be said not to reflect a *truth* about the extent of crime, but rather 'a world-view which had not come to terms with its repressed unconscious – the fear of women, blacks, radicals, the working class and the colonized'.[5]

Following Marxist theory on class, Sumner argued that in any society dominant groups, i.e. in terms of class, gender and race, will inevitably seek to maintain their control through the 'capacity to assert its censures in the legal and moral discourses of the day'.[6] He argues that this not only involves the courts and police authorities, but also the mass media. A process is set in motion which supports the discourses and practices of the state over against any dissenting voices. Sumner has frequently been said to be developing the symbolic interactionist's perspective in his work, but this is mistaken since 'labels' involve no reference to hegemonic forces or ideology. Moreover, the labels of the symbolic interactionists derive their philosophical origins from the American School of Pragmatism and philosophers such as Charles Sanders Peirce, John Dewey and William James, rather than from Foucault and Marxian theory. Censures are more than labels and should be seen as 'categories of denunciation or abuse lodged within very complex, historically loaded practical conflicts and moral debates'.[7] Censure theory typically relates social censures to broader issues of power, wealth and meaning, whereas social interactionism rarely attempts this.

In an important article in 1981 Sumner made the point that the Thatcher era was actually an important period in the development of Marxist Criminology.[8] He saw the structuralist Marxism of the 1970s giving way to a form of Marxist writing that was dependant upon cultural analysis. He saw that the 'sociology of deviance' approach was giving way to a broader approach that looked beyond narrow crime categories in order to account for the role of criminal law in the modern world and that related crime to cultural phenomena, though some criminologists have noted a 'romantic and naturalistic' aspect to this analysis.[9] Sumner's theory of social censures is reliant upon earlier criminological and sociological work relating to ideology and cultural studies, notably *Policing the Crisis*.[10] This work suggested that the censure of black mugging, which was expressed in the press and media and supported by the police at the time, had no real evidential basis. Instead, it was the result of the political situation then existing, and the police focus upon blacks in the inner cities. Hall et al. suggested that the censure of blacks was, at root, an ideological phenomenon rather than a criminal justice problem *per se*. Hall et al., as did Sumner, saw the black mugger as a scapegoat for wider social and economic failures. The attention that black mugging received was no more than a deflection away from a crisis in hegemony.

Sumner's work represents a dialogue with contemporary Criminology. Sumner was concerned that criminologists had both taken deviance to be a largely unproblematic term and overlooked the lack of consensus surrounding it. In fact, Sumner argued that deviance was being read off as a *deviation* from a dominant moral code; in other words, deviance was merely a deviation from a social convention. Moreover, he argued that concepts of crime, deviance and difference

were not only conflated but were radically subjective terms rather than scientific categories, and not up to the task of criminological analysis.[11] For Sumner, the sociology of deviance was progressive in that it focused attention away from issues of degeneracy and towards concerns around social regulation. He argued that 'crime and deviance cannot be disentangled from the social facts of collective life' and that criminologists ought to realise the sheer complexity of the social world before venturing further in theoretical terms.[12]

Sumner's contribution is immense: he developed his reasoning by suggesting that 'social censures combine with forms of power and economy to provide distinct and important features of practices of domination and regulation'.[13] This line of reasoning has opened up research into crime to encompass areas hitherto outside the domain of criminology, such as the study of the Holocaust.[14] Sumner gave us reasons to question the censures we commonly use and to ask questions about their origin and purpose. He pointed us away from the immediate issues surrounding crime and towards a contextualised analysis of crime and criminalisation, which focused upon the role of censures.

Sumner's analysis is undoubtedly radical. However, while it is easy to see how focusing upon certain groups affects policing and how this, in turn, affects the criminalisation process, it can nevertheless seem overblown. Sumner offers us an overtly political position which often overlooks empirical research and has a tendency to see huge socio-political significance in everyday criminal activity, or to see crime as an epiphenomenon of great historical and economic forces rather than the mundane and straightforward breach of law that it usually is. Moreover, by employing narrowly Marxist terminology, such as *hegemony* and *ideology*, he is forced into an analysis which cannot easily understand censure, and crime, without recourse to a theoretical framework, that can only ever see censure, and crime, as ultimately related to a repressive economic system, i.e. capitalism. If one doubts the Marxist theory upon which Sumner builds, then there is every reason to doubt Sumner's writing in total. His contribution will be either a footnote in criminological theory or nothing less than the development of a whole new social ethics, depending on how one views the role of ideology and economy in contemporary criminological explanation and theory.[15]

The Normative Use of Censure

We have already seen how censure is used to support a theory of punishment. Censure is a concept that has received a great deal of attention from philosophers and criminologists in the past 30 years.[16] However, such treatments tend to see censure operating as an element within a model, such as Just Deserts, in which case censures are always attached to blameworthiness. Censures are addressed to the criminal but also have preventive effects.[17] The actual form of the censure is, though, largely unexamined beyond its role in the normative model. Censure theory, in general, is limited to the view that the political community must punish criminals in proportion to the wrong they have done in

order to express proportionate disapproval of criminal behaviour. This view may be located in the Anglo-American liberal philosophical literature and is associated primarily with backward-looking (usually Kantian) justifications of punishment.[18] The importance of censure in Just Deserts theory cannot be understated here. Just Deserts offers a censure theory which holds that punishment is justified because it is the appropriate form of censure for certain crimes. In Just Deserts theory, punishment is structurally aligned with the censure through the elements of desert and proportionality. Proportionality is addressed in *Censure and Sanctions* which states that the argument for proportionality involves:

> 1. The State's sanctions against proscribed conduct should take a punitive form; that is, visit deprivations in a manner that expresses censure or blame. 2. The severity of a sanction expresses the stringency of the blame. 3. Hence, punitive sanctions should be arrayed according to the degree of blameworthiness (i.e. seriousness) of the conduct.[19]

Moreover, in following this three-part scheme, third parties are addressed. It therefore offers an expanded and educative role for the criminal law. As von Hirsch has written:

> The criminal law gives the censure it expresses yet another role: that of addressing third parties, and providing them with reason for desistence. Unlike blame in everyday contexts, the criminal sanction announces in advance that specified categories of conduct are punishable. Because the prescribed sanction is one which expresses blame, this conveys the message that the conduct is reprehensible, and should be eschewed. It is not necessarily a matter of inculcating that the conduct is wrong, for those addressed (or many of them) may well understand that already. Rather, the censure embodied in the prescribed sanction serves to appeal to people's sense of the conduct's wrongfulness, as a reason for desistence.[20]

Zedner has commented on how this multiple function in relation to censure, i.e. addressing not only criminals but also third parties as well as linking it to issues of proportionality and desert, overloads the theory and she raises the question of whether it is 'equal to the task'.[21]

The main idea in Andrew von Hirsch's treatment of censure is that it is justified as the rightful expression of our moral sentiments in relation to crime.[22] Censure is employed in his model of punishment in a proportionate fashion to express differing levels of blameworthiness. It is a moral theory at heart. Censure is seen not only as part of a moral and political conception of persons, which considers them responsible for their actions, but also it is employed to justify the community's condemnation of criminal behaviour. It assumes that criminal behaviour is straightforwardly wrong and largely ignores historical, moral and social considerations of censure and issues concerning the structural relationships between actors. It is not concerned with the socio-political processes which give rise to censures, as Sumner argues.

Censure, in the modern normative formulation, is the process by which the community confronts criminals with the appropriate disapproval of others. Duff has made the point that this appeals to the criminal's own sense of proper

action. In treating the criminals as rational actors, censure shows them that their actions were disapproved of and asks them to reconsider their future actions and to display personal restraint. In communicating moral disapproval, we too are exercising our nature as moral and rational agents.[23] In this way censure may be said to provide a disincentive to criminal behaviour. In expressing disapproval of the crime, the state treats the offender as a responsible and moral person. It also affirms the value of the victim through public denouncement. As von Hirsch has argued:

> Censure addresses the victim. He or she has not only been injured, but wronged through someone's culpable act. It thus would not suffice just to acknowledge that the injury has occurred or convey sympathy (as would be appropriate when someone has been hurt by a natural catastrophe). Censure, by directing disapprobation at the person responsible, acknowledges that the victim's hurt occurred through another's fault.[24]

Importantly, censure does not conceive punishment's justification in terms of its future results and this marks a difference from forward-looking justifications, such as deterrence, reform or incapacitation, which tend to be of a utilitarian nature. Censure theory, as a backward-looking account, has a ready-made moral rationale for why only the guilty should be punished. The state punishes and censures only those who have broken the law, regardless of any future considerations. In Just Deserts theory proportionate censure always entails proportionate punishment, and vice versa. The obligation to censure criminal activity entails the obligation to punish it as well – the two elements are entwined.

Criminal sanctions in modern liberal jurisprudence have two essential features: imposing painful consequences and censuring. Censure may be expressed through the imposition of unpleasant consequences, not because they have adverse consequences alone but because they impose public disapproval. The combination of these features is important because the severity of the hard treatment conveys the degree, or extent, of the censure involved. For this reason, even if prevention as well as censure help explain punishment, it is desert that ought to determine the amount of punishment for any criminal offences. The censure expressed by the penalty reflects how blameworthy and serious criminal behaviour is.[25] Employing censure in criminal cases maintains the disapproval of criminal activity in society and this also functions to maintain that general political principle of the general justifying aim of punishment.[26]

Censure is said to be an expressive theory of deserved punishment. It offers a plausible account as to why punishments should be commensurate with the gravity of the offence. However, it is important to point out that the norms governing expression are conventional ones. In equating expression (the act of expressing) and communication (the imparting of information), censure theory often fails to emphasise that definitions necessarily involve conventional representations when transmitting information. It is easy to see how censure theory relates to our everyday moral notions about crime and punishment, and accordingly there ought to be a rational and straightforward relationship between the

degree of punishment and criminal conduct. However, our notions about crime are largely a matter of convention and therefore are not necessarily the proper basis for criminal sentencing; for example the punishment of homosexuals prior to the law reforms of the 1960s and 1970s (notably the Sexual Offences Act 1967) may be said to reflect the prevailing conventions of the time, rather than the *rightful* response to private activity.[27] In Joel Feinberg's words:

> Punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation. ... To say that the very physical treatment itself expresses condemnation is to say simply that certain forms of hard treatment have become the conventional symbols of public reprobation. This is neither more nor less paradoxical than to say that certain words have become conventional vehicles in our language for the expression of certain attitudes, or that champagne is the alcoholic beverage traditionally used in celebration of great events, or that black is the colour of mourning.[28]

Problems associated with the existence of power relations

The main issue facing those who advocate a normative approach to censure is that of relating it to the broader social and political considerations that exist in the world, notably how power structures social relations and how such broader considerations frame censures. Writers using the normative version of censure, in particular von Hirsch, have cited Kant and Rawls as influences upon their work. It is right to take a closer look at the issue of power in these writers, since this issue is relevant to the institution of punishment and the application of censures. The way power structures the political and social world is surely crucial to issues of censure, desert and justice. Just Deserts is a neo-Kantian position and not a fully fledged political liberal theory *per se*. It relies upon a pre-existing liberal framework of jurisprudence and political theory. However, liberal moral, political and social theory, primarily of a neo-Kantian kind, always assumes the autonomy in the moral life and the centrality of the person, which are the elements that Sumner attacks in his work. It assumes that people are like-situated and free to act. Rawls is seen as especially important since his justice as fairness idea and his work on the original position can be argued to point towards a rational chooser determining a central role for desert (the rationale for the distribution of censure), since such a rational chooser would want to determine that he should be punished, and to what extent, only in regard to what he or she deserves.[29] Therefore, although Rawls does not advocate desert in the same fashion as Just Deserts, his work can nonetheless be seen as grounding desert through determining conditions for 'fairness'. Rawls is crucial because he showed in *A Theory of Justice* that punishment is an important component in any just social order. Andrew von Hirsch, in *Past or Future Crimes*, argued that sentencing theory needs to afford a 'central role to notions of equity and justice'.[30] Since von Hirsch has argued for the centrality of issues of equity and justice in his work, it is right to criticise his lack of any serious analysis of the role of power, and its potential impact upon censures. The problem for those using a normative model is

not to do with the model so much as a deficient account of those in the real-world operation of censuring. Therefore the argument against the normative model is directed not at the model as such, but at the built-in assumptions of the model, namely autonomous moral life. Autonomy and independence cannot be taken for granted in any theory. Rather, it has to be worked for by individuals, given power relations in the real world.

Andrew von Hirsch is a neo-Kantian. Neo-Kantians have always assumed that the autonomy of moral life is the basis of political theory. As the philosopher Bernard Williams has argued: '...the most interesting recent work in moral philosophy has been a basically Kantian inspiration ... specially characterised by its impartiality and its indifference to any particular relations to particular persons'.[31] Williams also states, in the same passage, that this may 'make it very difficult to assign to those other relations and motivations the significance or structural importance in life which some of them are capable of possessing'. The assumption that there is an autonomous moral realm may be challenged given issues such as power, which may unduly impact upon the independence of persons and which may well structure social censures. It is the case that such issues as class, gender, poverty and race structure our world and show themselves in the power relations that obtain in society. Moreover, our moral choices too reflect such issues as class, gender, poverty and race. They shape the world in which choices, and censures, are exercised.

Experience is underplayed in the Kantian scheme, but nonetheless our knowledge is dependent upon our experience. The point Williams makes about structural issues and the persistence of power relationships would, again, seem to run counter to this scheme as both undermine the way the individual experiences the self. One might speculate that if the social world is no more than a space for persons to prove themselves morally, by acting out of a sense of duty, then the baggage of our given historical moral legacy is of no use in determining the correctness or otherwise of our social relationships. If we take the Kantian moral perspective, and implicitly identify the moral and rational with the universal, we are bound to play down the role of social life because it is of little use in affecting our equality and freedom as moral agents.

Given that our world is determined, our choices are never free but are conditioned by desire. Kant states: 'When we think of ourselves as free, we transfer ourselves into the intelligible world as members and recognise the autonomy of the will.'[32] In this way, the issue of autonomy is reserved for the intelligible world as an issue of moral autonomy. Kant therefore makes it difficult to ask questions about how persons might be undermined by social relations. The division of autonomy and dependence are divided into separate spheres. Moral beings are detached from social relationships because persons only choose freely when they are completely unconditioned by the contingencies of circumstance. It is easy to see how this sort of reasoning necessarily overlooks the sort of ideological analysis advocated by Sumner.

The idea of respect for persons is central to liberal moral and political theory, and yet, this is to focus our sense of respect on our capacity to make free choices within an independent moral realm. It also limits our notions of the good to the

quest for individual conceptions of happiness. In the Rawlsian scheme, as long as the original position works with the assumption of the veil of ignorance, one can be sure that it abstracts from personal differences between rational beings and from the content of their private ends. This allows him to think that: 'The original position may be viewed, then, as a procedural interpretation of Kant's conception of autonomy and the categorical imperative.'[33] When we act in accordance with the categorical imperative, we are supposedly expressing our nature as free and equal rational persons. He thinks we can always avail ourselves of this way of thinking, regardless of the social relations in which we find ourselves. Rawls is able to sustain what he takes to be the main Kantian insight – '[t]he idea that moral principles are the object of rational choice'[34] – while making clear that the principles of right are not legislated *a priori* by pure reason, but 'may be conceived as principles that would be chosen by rational persons'.[35] This is one of the merits of a social contract conception. If this strengthens Rawls' sense of people as free and equal rational beings, it also tempts him into thinking that we are always free to treat others with equal respect, since it is always possible for us to appreciate that others have ends they wish to be free to pursue. Paradoxically, it is this compromise that Rawls makes with the empirical characteristics of social life that limits his insight. Since we are assumed to have a desire to express our nature, we might put it as Rawls. We act 'as rational and equal members of the intelligible realm with precisely this liberty to choose, that is, as beings who can look at the world in this way and express this perspective in their life as members of society'.[36] One detects here no sense that there are pre-existing interests or social and political arrangements already in place. In other words, censures could be focused upon the preservation of an unjust set of arrangements.

The idea of justice as fairness is that the principles of justice are agreed in an initial situation that is fair. Rawls also realises that society cannot be a voluntary scheme of cooperation and that, in reality, 'each person finds himself [*sic*] placed at birth in some particular position in some particular society, and the nature of this position materially affects his life prospects'.[37] One of the features assumed by Rawls to be common to all human beings, and thereby non-contingent, is his sense that we all desire to choose our own ends. This is partly what defines us as free and equal rational beings and is embodied in the Rawlsian principle of equal liberty. It is this ability to choose our own ends which is threatened in the relationship of power and subordination between rich and poor. For Kant, it was crucial to realise that if someone was dependent for his or her means of livelihood, it would be difficult for him or her to truly choose his or her individual ends. Kant could only save his assumption from the autonomy of morality by assuming that this was a situation that was freely chosen, although Kant recognised that it grew out of an earlier unequal distribution of property, which in turn produced relationships of power. Rawls seems more willing to guarantee our existence as free and equal rational beings by making it an aspect of our nature, which we can choose to display. As Rawls states: 'Men exhibit their freedom, their independence from the contingencies of nature and society, by acting in ways they would acknowledge in the original position.'[38] This would seem at odds with the reality of pre-existing issues of economic,

political and social relationships and the determination of persons to maintain a privileged position, including the use of censuring activity in this process.

Sandel has noted that the priority of the right over the good mirrors the priority of the self over its ends and that '[t]o assert the priority of the self whose sovereign agency is assured, it was necessary to identify an essentially "unencumbered" self, conceived as a pure subject of possession, distinct from its contingent aims and attributes, standing always behind them'.[39] This assists in identifying an important weakness in liberal theory, though Sandel's wish to recognise how certain ends are 'constitutive' of our sense of self, rather than voluntarily chosen as an act of will, still poses the issue in terms of an individual's relationship to his ends. It does, however, recognise that Rawls and Dworkin type right-based theories, which seek to defend certain individual claims against utilitarian calculus of social interests, 'both rely on a theory of the subject that has the paradoxical effect of confirming the ultimate frailty, perhaps even incoherence, of the individual whose rights they seek above all to secure'.[40]

Kantian rationalism

In order to understand the political and social theory dimensions of justice, and the conditions for it, we need to engage with the character of Kantian rationalism. There is a profound tension between morality and reason on the one hand and emotions and desires on the other. It is embodied in Rawls' conception of us as free and equal persons. Even though Rawls wants to connect our principles of justice to the empirical conditions of human conduct, he still assumes that the contingent social and natural conditions are morally irrelevant, at least in the sense that they are irrelevant to the determination of what is just. Since he takes himself to be developing a theory of justice that is fair between persons, only those contingencies that differentiate people from each other need to be ruled out. This helps him develop a thin theory of the good, in which we can think of respect and self-respect, say, as primary goods that people will want whatever their individual ends and goals happen to be. Their inclusion does not threaten the basic idea of ourselves as beings that are free to choose our own ends. But of course this is not enough to develop a substantive theory of the person antecedent to social institutions. For Rawls, the worth of persons has to await the creation of social institutions with the power to create legitimate expectations.

A Kantian tradition which stresses the impersonal character of morality and that reasons have to be universally appropriate if they are to be moral, often fails to illuminate the individuality of our moral experience, even though this is supposedly one of its strengths. Kant would never recognise that there would be any moral significance in developing a sort of inner relationship with ourselves, and because of this he failed to substantiate the individualism he wanted to foster. In stressing moral impartiality as disinterested and impersonal, he oversimplifies the very essence of moral experience. The Kantian tradition encourages us to always see individuals as self-sufficient and self-determining, and always free to work out their individual relationships to the moral law. The downside is that this form of

theorising can impersonalise experience. Accordingly, in Kant it is only when we act out of a sense of duty that we exercise our autonomy. We are exalted to identify our sense of self with our reason, and that in turn gives us access to what we require. Similarly, within deontological liberalism, our rights are supposedly guaranteed through the independent workings of reason. However, as I have argued, this trades on Kant's notion that it is only in the exercise of our reason that we can express our choice and so our freedom. Rawls wants us to think of our conception of our happiness, goals and ends as a similar exercise of our freedom.

In Kantian theory. We learn to control our feelings through dominating them and work for a time when our emotions and feelings have less and less influence over our lives. This is a process of reformulating our experience and accepting a certain vision of our lives. I have shown the different ways it disorganises crucial features in our moral experience. It limits the respect we can learn to have for ourselves and our sense of the moral experience of others. I have argued that Kant, and the liberal tradition, leaves us with an attenuated conception of the individual, even though this is traditionally taken as a strength of the theory. Kant is unable to substantiate his idea of respect that we should not treat people merely as means but always as ends in themselves. This idea continues to echo and promises crucial insights into the realities of power. However, it is an idea that Kant and those working in the Kantian tradition cannot develop without challenging his basic conception of the autonomy of morality. This is recognised by Rawls when he writes: '... between equality as it is invoked in a connection with the distribution of certain goods, some of which will almost certainly give higher status and prestige to those who are favoured, and equality as it applies to the respect which is owed to persons irrespective of their social position'.[41] It is clear that Rawls sees the second kind as fundamental. Its deeper significance is explained in its basis in such natural duties as that of mutual respect and the fact that it is owed to human beings as moral persons. Rawls wants a theory of justice which, by arranging inequalities for reciprocal advantage and abstracting from the 'contingencies of nature and social circumstances within a framework of equal liberty, persons express their respect for one another in the very constitution of their society'.[42] Rawls is true to Kant in that he tends to see individuals as essentially free to act justly.[43]

Just deserts theory

The foregoing discussion is important to Just Deserts and to the application of a normative theory of censure. Just Deserts theory offers little in the way of any theoretical work on the nature of individuals, or the nature of society. Very telling are the words of Andrew von Hirsch, who wrote:

> Sentencing policy is not a good tool either for reducing criminality or promoting wider social justice. ... If we want a more equitable society, we will have to establish and pay for the requisite programmes of social assistance. That may also help shrink criminogenic conditions in the community, although one cannot be certain how much and when.[44]

Just Deserts is a form of jurisprudential theory. It rests upon two notions. First, the confining of issues of criminal sentencing to the legal sphere and, secondly, the adoption of a conception of wider notions of justice and the person that are rooted in contemporary liberal, more especially neo-Kantian, thinking. It is open to the charge that it ignores the issue of power and takes over an oversimplified account of moral life. While its central insight may be readily understood, it nonetheless cries out for a better account of moral life.

Desert theories are tied to claims about personal responsibility. A person must deserve something, in this case a punishment, which is contingent on a minimal level of voluntarism, in terms of an act committed. This backward-looking element is vital for in placing the emphasis on what has been done, rather than on something which will be done, it is clear that the desert basis of censure must be enacted before a person can properly deserve.[45] Punishment and desert (i.e. the level of censure) must relate to the individual's action and not some wider social goal or outcome. Desert is also a social concept because it is based on certain judgements about a person's blameworthiness (applied censure), which are socially and politically constructed. The Just Deserts doctrine is a bold attempt to place the issues of desert, proportionality (which implies the level of censure) and justice, in the broadest sense, at the heart of sentencing theory and practice. The focus on the proper basis for treating individual persons is a useful antidote to theories whose basis is the neglect of the individual in the pursuit of the greater utility, or some other measure, for the many.

The nub of the issue

Without doubt the issue of power is a challenge not only to Just Deserts but also to all normative theories of punishment in general. To conclude, one might argue that censures derive from specific norms, values and historical and political circumstances, and that any cogent theory involving censures needs to reflect that. However, to only see the historical and political circumstance is surely no useful guide as to the level of punishment a criminal 'deserves'.

Main Summary Points

- The ideological use of censure is a theoretical device for allowing us to understand the power relations that give rise to the application of a censure. It relates criminal and other censures with concerns about power and the state.
- Colin Sumner, the main proponent of censure theory in Criminology, built on the work of Stuart Hall et al. and the book *Policing the Crisis*. He followed Hall et al. in seeing the black mugger as a scapegoat for the wider social and economic failures of the 1970s and 1980s. He argued that the censure of black mugging was no more than a deflection away from a crisis in hegemony.
- Sumner's work on censure also represents a critique of academic Criminology. He argued that criminologists typically saw criminal behaviour as a behaviour from a social convention and that the concepts of crime, deviance and difference used in Criminology are subjective terms, rather than scientific categories, and not up to the task of criminological analysis.
- Andrew von Hirsch saw three main criteria in his Just Deserts view of censure: '1. The State's sanctions against proscribed conduct should take a punitive form; that is, visit deprivations in a manner that expresses censure or blame. 2. The severity of a sanction expresses the stringency of the blame. 3. Hence, punitive sanctions should be arrayed according to the degree of blameworthiness (i.e. seriousness) of the conduct.' (*Censure and Sanctions*, 1993).
- Censure, in the normative model, is said to be an expressive theory of deserved punishment because it offers a plausible account as to why punishments should be commensurate with the gravity of the offence.
- The Just Deserts doctrine is an attempt to place the issues of desert, proportionality (which entails censure) and justice, in the broadest sense, at the heart of sentencing theory and practice.

Questions

1. What are the things that Sumner and von Hirsch agreed upon in relation to censure?
2. In what way is von Hirsch's view of censure a moral one?
3. Is Sumner's theory a criminological or political theory?

Suggested Further Reading

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4. Ibid. p. 26; Sumner, C. S. (ed.) (2004) *The Blackwell Companion to Criminology*. Oxford: Blackwell. pp. 25–27.
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13. Sumner, *Censure, Politics and Criminal Justice*. p. 35.
14. Amatrudo, A. (1997) 'The Nazi Censure of Art: Aesthetics and the Process of Annihilation', in C. S. Sumner (ed.), *Violence, Culture and Censure*, London: Taylor and Francis. pp. 63–84.
15. Sumner, *The Sociology of Deviance*. p. 315.
16. For example, Feinberg, J. (1970) *Doing and Deserving*, Princeton, NJ: Princeton University Press; and von Hirsch, A. (1993) *Censure and Sanctions*, Oxford: Clarendon Press. Both of these books examine censure.
17. von Hirsch, A. (1986) *Past or Future Crimes*, Manchester: Manchester University Press. p. 52.
18. See Duff, R. A. (1986) *Trials and Punishments*, Cambridge: Cambridge University Press, esp. Chapter 9; von Hirsch, *Censure and Sanctions*; Kleinig, J. (1991) 'Punishment and Moral Seriousness', *Israel Law Review*, 25: 401–421.
19. von Hirsch, *Censure and Sanctions*. p. 15.
20. Ibid. pp. 10–11.
21. Zedner, L. (2004) *Criminal Justice*, Oxford: Oxford University Press. p. 72.
22. von Hirsch, *Censure and Sanctions*. pp. 6–19.
23. Duff, R. A. (2001) *Punishment, Communication and Community*, Oxford: Oxford University Press. p. 101.
24. von Hirsch, *Censure and Sanctions*. p. 10.
25. Ibid. pp. 13–14.
26. Lacey, *State Punishment*. p. 200; Duff, *Trials and Punishments*. pp. 151–164.
27. von Hirsch, *Censure and Sanctions*. pp. 8–12.
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42. Ibid. p. 178.
43. Ibid. p. 256.
44. von Hirsch, *Censure and Sanctions*. pp. 97–98.
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7

DESERT AND PROPORTIONALITY

The idea of moral desert is not questioned. Rather, the thought is that a conception of moral desert as moral worth of character and actions cannot be incorporated into a political conception of justice in view of the fact of reasonable pluralism. Having conflicting conceptions of the good, citizens cannot agree a comprehensive doctrine to specify an idea of moral desert for political purposes.

John Rawls, 2001[1]

Introduction

This chapter will focus on personal desert and proportionality, which are both crucial to a proper understanding of contemporary criminological work on sentencing. Desert, especially personal desert, is vital to the issue of punishment for only when a punishment is deserved, is it proper. As Andrew von Hirsch has noted: 'The central organising principle of sentencing ... is that of commensurate deserts.' Sentences accord to the gravity of the defendant's criminal conduct. The criterion for deciding the quantum of punishment is retrospective: the seriousness of the violation the defendant has committed.'[2]

Most of the writing on punishment usually raises political and philosophical questions regarding its basis, i.e. desert, although this writing is not usually directed to the underlying political and philosophical basis of punishment, but only to questions about the allocation of punishment.[3] The two issues of 'why punish?' and 'how much?' are obviously linked, and recent scholarship on the basis of judicial sentencing has given perhaps the best accounts of how such considerations play out in the real world. Proportionality is important in maintaining that crimes of an equal nature should be treated equally and that there is a proper rank ordering of offences. This chapter is necessarily technical in nature but it concludes with some practical considerations. Nonetheless, these concepts have a very important function in our criminal justice system, not least in the way they may contain the excesses of penal populism when contained in statute or sentencing guidelines.[4]

Clarifying our Language: Personal Desert and Eligibility

When political philosophers discuss personal desert they usually do so in relation to rules, rights and obligations,[5] and when they make judgements about personal desert, the deserts they think of are those of punishments and rewards.[6] They try to show that desert is a natural moral notion and that rewards and punishments are only two things that persons may be said to deserve. It can also be argued that desert may be applied to the interests of a community, over and against the individual. So that when we say that a person deserves something, we are backing our statement with a sense of moral correctness. If he or she deserves it, then he or she should have it: it is that simple. However, this is also true where a person is qualified or entitled to something and has a special claim, or a right, to it.

Let us begin by considering what it is to be eligible for something. Eligibility we may understand as a base or minimal qualification for something: the state of just not being disqualified. Therefore, eligibility is no more than a basis for something else. For example, when we determine whether a person is eligible for a job, we determine first whether he or she has satisfied the basic eligibility criteria. Did he or she have the basic qualifications? Eligibility is only the satisfaction of certain basic preliminary, and necessary, conditions and it is what philosophers call a rule connected qualification.[7] However, eligibility criteria are not the same thing as desert criteria.[8] When we say that a person deserves some form of treatment, this must necessarily be because of either some possessed characteristic or some past activity. This is a crucial point because no person can deserve something unless there is some basis for that desert. Political theorists would say that desert judgements always carry along with them a commitment to give reasons. It is not possible to state that Marianna deserves commending though she has not done anything. If a person states that Marianna does indeed deserve commending, she must then answer the question 'what for?' If the basis of Marianna's desert is not known, then the language of desert is simply not appropriate. It is right to argue that we all ought to treat Marianna properly, but we cannot commend her desert because there is no basis for commending her on desert grounds.

Moreover, when dealing with the grounds for desert, it is important to note that not just any grounds will do. It must always be the case that the basis for a person's desert must be related directly to facts about the person.[9] For example, if a student deserves a high grade, their desert must be related to facts about them personally, in terms of their ability.[10]

Judgements about desert can be invalidated in one of two ways. They can either lack a proper basis altogether or else have a logically inappropriate basis. In other words, either the judgement may lack an appropriate reason or the reason may not be what is technically termed a justifying reason.[11] So we can see that it is necessary that a person's desert has a basis and that the basis itself consists of facts about him or herself, but that neither of these conditions is sufficient.

We surely cannot list all the necessary and sufficient conditions for personal desert in the abstract, for the bases of desert vary along with the mode of deserved treatment. All we can practically do is to outline the key generic properties of desert, which do not vary with context.

A proper political analysis of the concept of desert must pay attention to each of the major kinds of treatment which persons can be said to deserve. If we devise a scheme A deserves X in virtue of B where A is a person, X a mode of treatment and B some notable fact about A, then it is clear that the values of B (the desert bases) are determined in part by the nature of the various Xs in question. So it follows that what makes a person deserving of punishment, for example, is not the same as that which makes him or her deserving of medical treatment. The question always concerns what are the various kinds of treatment that persons may deserve from others? This is what philosophers call 'affective' in character.

Punishment and Reward

The Victorian philosopher Henry Sidgwick famously wrote that reward is 'gratitude universalised' and that punishment is 'resentment universalised'.[12] It can be argued that the services and deprivations which we typically term rewards and punishments are just conventional means of expressing gratitude and resentment, for these attitudes are simply those involved in the desire to punish and reward. Sidgwick's definition of punishment and reward as resentment and gratitude universalised has a psychological element to it because it relates our deepest feelings with our immediate reactions. We might say that our personal resentment and gratitude become social devices for sharing in the resentment and gratitude of all victims and beneficiaries. This seems a reasonable way of understanding our popular views about punishment. We can understand rewards, like Sidgwick, as conventionally recognised means of expressing gratitude for services. Rewards may also be a means of expressing recognition, appreciation or approval of merit or excellence. Punishment may be a vehicle for the expression of our resentment of injury received, but also for the expression of *recognition* and disapproval of wrongdoing.[13] (The word recognition is being used in its technical sense here.)

Our responsive attitudes, typically expressed through rewards and punishments, all have an important characteristic in common. They all have what sociologists term a phenomenological target. In other words, if we resent a person, then we do not merely dislike him or her. It follows that to have a negative feeling towards a person because of something he or she has done is as much a part of the feelings themselves. Feelings are not the sort of things that can have purposes, whereas attitudes have a notion of desert built into them. We do not use such words as resentful and grateful unless there is a proper desert basis to the logically appropriate sort of feeling. We may be very attracted to a someone

without any substantial reason, but we cannot be grateful for no apparent reason – that would not make any sense. Similarly, we can feel hostility for no obvious reason, but we do not resent someone without a proper reason. As long ago as 1927 the philosopher Bradley had argued that punishment without desert is not punishment at all.[14]

The theory and practice of legal punishment and official rewards is necessarily related to rules and regulations, offices and functions and duties and obligations. These rules and regulations, offices and functions and duties and obligations are then formalised beyond a straight correlation with the attitudes they typically express in practice. In the case of punishment, it may consist of such treatment as incarcerating a person, fining, and community service, but not resentment as such. Moreover, punishment may only be executed by those with the necessary authority and then only under certain strict conditions specified by law. Therefore, rewards and punishments are like all other modes of deserved treatment: they have qualifying conditions as well as desert bases, and these are always specified by rules and regulations and, in turn, confer rights and duties.

It is reasonably easy to generalise about punishment, i.e. judicial punishment. It must always have the universal qualifying condition of legal guilt. Although legal guilt is a far from straightforward matter, it is always dependent upon a conviction after a fair trial, held in accordance with due process, which is in turn defined by elaborated codes and procedural rules. Yet of all the official treatments for which a person might qualify under proper institutional rules, only punishment seems resistant to the contemporary language of rights. We do not, as a rule, say of a criminal who is qualified for punishment that he or she is entitled to it or that he or she has any special claim or a right to it.[15] It may be argued that a convicted criminal has a legal right to his or her punishment, whether he or she wants it or not, in the same way that a person who qualifies for a reward has a right to it, whether he or she wants it or not. The only substantial difference is simply that a renounced right ceases, sooner or later, to be a right, and the criminal's right, as Lyons has shown.[16]

In the case of compensation for some wrongful action what is known as a polar concept is often employed.[17] Where compensation is received by a victim, it will be given by the offender. In other words, if one person deserves to take, then another deserves to give. However, this is not usually how we typically frame the situation. What we would say is that the wrongdoer deserves to make compensation and deserves to be held liable for the harm he or she has caused. In other words, he or she deserves to be compelled to compensate the victim because the other pole of deserved compensation is deserved liability.

Desert Criteria

In the real world, conflict is not desert against advantage, justice against utility but desert against desert. Instead, we may describe the situation as a conflict

between desert and entitlement, or in political theory terms, between rival claims to justice.[18] It is necessary to detail two areas of concern: (1) utilitarianism, and (2) desert treated as moral entitlement.

Utilitarianism

For a utilitarian the best way to determine the merit or otherwise of a given course of action is to analyse it in terms of its overall social utility. In the case of the threat of punishment, the criminal is deterred. In this respect, utility seems to work very well but the problem arises when we think of the issue differently, as the noted economic and political theorist John Harsanyi has shown.[19] To begin with, utility is not a desert basis for any deserved mode of treatment and we must never forget that. A desert statement, such as A deserves X because giving something to them would be in the greater public interest, is simply a misuse of the word 'deserves'. The political philosopher Derek Parfit has commented that any form of utilitarianism that interprets utility as either a universal basis for desert or as a universal qualifying condition is either absurd or self-defeating.[20] The point of all this for punishment, Feinberg has argued, is that punishment might only be deserved by the criminal because it is the customary way of expressing the resentment or reprobation they have coming.[21]

It is also worth noting that Andrew von Hirsch, long ago, linked desert criteria with the issue of deterrence, although deterrence is often considered a utilitarian consideration.[22] The issue might be, then, not that Just Deserts theorists are indifferent to utilitarian criteria, but rather the priority that different theorists give to utilitarian criteria, and when and in what order utilitarian criteria arise, or are prioritised, in a given theory. Kleinig has recently posed this issue in regard to how punishment is enacted in the real world.[23]

Moral Entitlement

There are political philosophers who have a jurisprudential view of morality.[24] They use existing legal institutions as their models.[25] In our case, the distinction between entitlement and desert is obscured by making desert a special case of entitlement, instead of a notion in essential contrast to entitlement. Desert confers rights but not the usual type of right of the sort winners of competitions and claimants of rewards have, for example, but instead moral rights, which in turn are implicitly treated as regulations of a special moral institution. Moreover, nothing is gained by qualifying the alleged entitlements as moral. Deserved, fitting and appropriate, on the one hand, and right, entitlement and rule, on the other, are terms from altogether different parts of our ethical language. They are reflected in such a way that there is no paradox in saying of a person that he or she deserves certain modes of treatment which, nevertheless, he or she cannot claim as his or her due.

Desert: conclusion

The basic moral intuition that desert is prior to any operational system for it is important. We have seen the variety of conflicts that are possible between desert and entitlement. However, if desert and entitlement are not distinct in nature, the question of their relation cannot be difficult or complicated.[26] Then there could only be real or higher entitlement (desert) and lower or inferior entitlement (qualification), and in cases of conflict the higher would always take precedence over the lower. It is important to emphasise, then, that desert is a moral concept in the sense that it is logically prior to and independent of public institutions and their rules.

Retributive theories of punishment always maintain that desert is the only rightful way to punish persons. Cragg has stated: 'Retributive justice stresses impartiality. This is one of its strengths, since it ensures that individuals receive equal treatment at the hands of the court regardless of their station in life.'[27] Moreover, in stressing the role of desert a moral intuition about punishment is underscored, as Andrew von Hirsch has written: 'We feel there is something wrong, not simply counterproductive in the long run, about inflicting punishments that are not fairly commensurate with the gravity of offences.'[28] We have seen how desert coheres with many of our moral notions of what is rightful conduct and is a proper basis on which to organise a sentencing tariff. Perhaps, the philosopher Ted Honderich summed it up best of all when he wrote:

> Desert-claims are to the effect that someone deserves something for something else. In connection with punishment, they are to the effect that someone deserves a particular penalty, or something bound up with a particular penalty, for a particular offence, or something involved in a particular offence. As in the case of all desert-claims, at least as standardly made, these are somehow to the effect that there exists a certain relation, which relation serves or enters into a reason or justification for something, the thing said to be deserved. ... What, more clearly, is the thing for which an offender deserves something? The still inexplicit but correct answer must be culpable action, which by way of initial description, is an action somehow open to moral disapproval. In the ordinary course of things, this will also be an illegal action.[29]

The Concept of Proportionality in Punishment

Contemporary justifications for punishment

Many thinkers, notably utilitarians, have argued that punishment is justified purely in terms of its consequences, in terms of say crime prevention or rehabilitation. Yet both Beccaria and Bentham, the former arguably a utilitarian and the latter certainly a utilitarian, gave us the earliest theory of proportionality based on a graded system of penalties focused upon deterrence and general prevention rather than on an ethical standard *per se*.[30] Mackie has argued that punishment, though derived from basic human emotional roots, is justified in terms

of its social utility in reinforcing community bonds;[31] and that punishment has utility because it functions in consequentialist terms.[32] Andrew von Hirsch has objected to this reasoning because it fails adequately to support ethical limits on the distribution of sanctions.[33] Mackie overlooks the distribution of sanctions as this could lead to disproportionate punishments as well as criminal liability without fault. H. L. A. Hart made the point that relying on crime prevention as a general justifying aim leaves room for putting non-utilitarian limits on the distribution of penalties so long as the latter can be independently justified.[34] H. L. A. Hart pointed out that there must be an independent justification for a retributive limit on substantive criminal law; in other words, liability must be confined to the culpability of criminals alone.[35] Punishment must be proportionate to the seriousness of crimes and always be directed solely at offenders.

The notion of censure may offer good grounds for justifying a non-utilitarian account of proportionality consistent with a consequentialist general justifying aim. The censuring of crime is something we often taken for granted, even where punishment is allocated in terms of crime prevention. The sanction of censure is directly related to how blameworthy, or otherwise, the crime is. If proportionality is not adhered to, then criminals are treated unfairly, as von Hirsch has indicated.[36]

The benefits and burdens approach was advanced, in its contemporary form, by Herbert Morris and Jeffrie Murphy and subsequently by John Finnis and Wojciech Sadurski.[37] This is a view of retribution that accounts for why criminals need to suffer. The idea is that the law itself requires every person to refrain from criminal activity and that this, in turn, benefits from the self-restraint of others. Criminals are unfairly benefiting from the self-restraint of others and are obtaining an undeserved advantage because they do not reciprocate self-restraint: you could call them freeriders. It is the proper function of punishment to impose on criminals a disadvantage in order to restore the rightful balance. This view has been attacked vigorously by Andrew von Hirsch in *Doing Justice*, and latterly by Duff.[38] One of the many shortcomings that this position raises is that it seems that restoring a balance of advantages may not be sufficient reason to invoke the state's coercive powers.[39] The benefits and burdens of retributivism may be said to endorse an expansive contractarian theory of the state, as von Hirsch explains in *Past or Future Crimes* (1986).

As we saw in chapter 5, censure in the form of a public morality has been typically used to account for the degree to which criminals are held responsible for their actions. In other words we intuit a strict relationship between the level of censure and the level of seriousness of offences. We noted that this form of reasoning became central to the understanding of our moral lives, and how in the 1970s work by Feinberg and Strawson placed censuring behaviour at the heart of both criminological theory and philosophical explanation.

Censure

Strawson's account does seem plausible as far as it goes. Blaming persons does seem part of holding them responsible for their actions. Censure expresses the

message that certain actions are wrong and that actors are blameworthy. Censure always expresses the rights of the individual censured, as Feinberg and Primoratz in the late 1980s have demonstrated.[40] It is because we share certain moral standards that a response is required which recognises both the wrongness of the action and the blameworthiness of the criminal. Indeed, Primoratz argued that censure can be seen as intrinsic and non-consequentialist, rather than a means of preventing crime.[41] Censure may also maintain the disapproval of persons to criminal and reprehensible acts, a point Duff makes.[42] Censure in confronting the criminal with the disapproval of others (the community, society) has a further function that Duff has commented upon, namely the criminal's own sense of proper action. What censure does, in part, is to draw the attention of the criminal to his or her wrong action and persuade him or her to reconsider future actions and maintain greater self-restraint. In censuring, we are confronting the criminal with a judgement that he or she has done wrong and should be blamed for his or her behaviour.[43]

In communicating censure we are exercising our rightful natures as moral and rational agents. It is not sufficient just to change behaviour, for we need to convey certain critical judgements (censures) about certain behaviour that we wish criminals to reflect upon. Censure may be conveyed through imposing unpleasant consequences, not solely because they have adverse material consequences but also because they are inflicted as a mark of disapproval. The intertwining of these features is crucial for the severity of the hard treatment will convey the degree of censure involved. Ashworth and von Hirsch have summed up the case for censure in the following terms: 'The nexus between punishment and blame has deeper roots than the sentencing rules of the particular jurisdiction. Censure is integral to the very concept of punishment.'[43]

Cardinal and ordinal proportionality

We turn now to the technical issue of how one goes about determining the deserved amount of punishment. Andrew von Hirsch best addresses the resolution to this problem in his book *Censure and Sanctions* (1986), and it relates to the distinction between cardinal and ordinal forms of proportionality.

Ordinal proportionality maintains that comparable offences should receive comparably severe punishments. The basic notion in ordinal proportionality is that persons should receive equal punishments where their offences are similar. Ordinal proportionality is easily explained in terms of an expressive theory, which stresses censure: whenever one crime is treated more harshly than another, it reflects the level of seriousness involved, and the level of censure should follow that.

However, cardinal proportionality addresses the overall magnitude and anchoring points of a penalty scale. Cardinal proportionality relates to the comparison of, for example, robbery by comparing the typical seriousness of this crime with the seriousness of other crimes. It is a conventional mechanism, i.e. a penalty scale is devised and it reflects the relative scaling of crimes and any

alteration to the scale's magnitude and anchoring represents a change to that convention. Andrew von Hirsch tackles the idea of parsimony within a Just Deserts framework in his 1986 book, *Past or Future Crimes*.[44] This argued in favour of the possibility of affording a useful censure within the broader political and historical context of sentencing and the width of the bounds.

The important point about recent retributive writing is that proportionality is gauged with regard to moral seriousness with more serious crimes being punished more harshly. This principle is not a new one and Bentham wrote: 'The greater the mischief of the offence, the greater the expense, which it may be worthwhile to be at, in the way of punishment.'[45] In retributivist rationales, moral seriousness is ascertained by looking at two factors: (1) the harm done by the offence, and (2) the culpability of the offender.[46]

Thin proportionality is characterised by constructing solely ordinal scales of crime and punishment and by punishing serious offences more harshly relative to less serious ones. In other words, the level of punishment, the amount and the intervals between adjacent offences on the ordinal scale are not considered. Thin proportionality can never determine the amount of punishment. Thick proportionality, on the other hand, goes beyond the construction of ordinal scales and considers that serious crimes should be punished more harshly. This is a stage beyond just ensuring the scale is maintained since an ordinal scale may be entirely moderate in its punishments or unerringly harsh for all offences. As Andrew von Hirsch has argued when discussing proportionality in sentencing: 'It is less concerned with the supposed crime-prevention effect of this or that penalty, and more with the fairness of penalties' distribution.'[47]

The *lex talionis*

As we saw in chapter 5, under the *lex talionis* the criminal receives exactly what he or she has inflicted on another – 'an eye for an eye'. John Kleinig has shown up the shortcomings of the *lex talionis* in his book, *Punishment and Desert*. He makes the point that 'what punishment would you inflict on a rapist, a blackmailer, a forger, a dope peddler, a multiple murderer, a smuggler ...'.[18]

It would appear that the *lex talionis* only works effectively in one case – where a single murder has been committed.[49] The *lex talionis* would appear to be too crude and brutal to be allowed to function in a modern legal code. Reiman has made the point that the *lex talionis*, if enacted, would destroy the civilising progress of modern states.[50]

The shortcomings of the *lex talionis* have only served to make retributivists think through the concept of equivalence, according to which the offender only gets his just deserts when he is deemed to have suffered what is judged equivalent to the degree of suffering caused by his crime. This may appear similar to the utilitarian position in that it reduces both crime and punishment to a common denominator. However, it is different from utilitarian formulations in two important regards: (1) it sees punishment as equalling the crime

without regard to the consequences of punishment; and (2) the equivalence between the crime and the punishment restricts the relevant suffering, i.e. the criminal can only be punished with reference to the suffering he or she caused and no more.

Restorative justice and proportionality

In Chapter 5 we examined restorative justice in relation to theories of punishment and saw how it eschewed strict notions of proportionality in the criminal justice system in favour of sentences derived through a mediated process entered into by several parties, including victims and offenders themselves; and how the parties are expected to agree upon an outcome on punishment which is always focused on social reintegration. The central aims in the restorative justice process are always the mending of social relationships and the public acknowledgment of the harm done to victims, offenders and the community.

Those theorists working with a concept of proportionality are often wary of restorative justice because of what von Hirsch, Ashworth and Shearing have called 'the multiple and unclear goals, underspecified means and modalities, lack of clear criteria, loose criteria for evaluation and inadequate limiting principles of restorative justice, in practice'.[51] In other words, whereas there may be value in the restorative justice procedure of dealing with crime through mediation and interaction between offenders and victims, it is often undermined by unclear or unspecified procedural and legal goals. For example, without proportionality constraints there is every reason to be concerned that restorative justice could actually result in inconsistent, unfair and unduly harsh, or lenient, sentences. Indeed, restorative justice theorists themselves have often been at odds with one another in regard to whether or not proportionality constraints have any place at all in a restorative model of justice. Moreover, leading restorative justice theorists, such as John Braithwaite, have shifted their personal positions regarding the importance of proportionality in relation to the main principles of restorative justice.[52]

'The Project of Sentencing Reform'[53]

It will be very useful to set out the main points of Andrew von Hirsch's 2001 chapter 'The Project of Sentencing Reform', which elegantly draws out some of the main issues we are dealing with here. Foremost in von Hirsch's argument is that sentencing, and sentencing reform, must always be guided by principle, and not by intuition. In the case of desert, he argues that: 'Desert sets the limits for the permissible sentence, within which crime prevention goals (including rehabilitation) may be pursued.'[54] He also upholds fairness as a consideration and links it to proportionality:

> The sentence should visit a fair and proportionate sanction on the offender. Debate exists about the criteria for proportionality. Notwithstanding such divergence of view, however, there is agreement that proportionality should be an important, not just a marginal, constraint; and that disproportionate sentences should be impermissible – irrespective of their possible crime preventive effects. This concern with the justice of sentences depends on the assumption of convicted offender's having membership in the moral and legal community.[55]

Andrew von Hirsch demonstrates how a political consideration, that of membership of a moral and legal community, is at the heart of sentencing theory and reform. In other words, penal populism or vengeance, or any other objectifying criteria, ought never to lose sight of or override the humane and rational project of ensuring a fair political and legal settlement for citizens, which sentencing should always aim to uphold.[56]

A move away from proportionality and its consequences

In recent times, criminal sentencing policy has been a fairly confused affair in terms of recent legislation. For example, the Crime (Sentences) Act 1997 promoted mandatory sentences without much regard for the lack of empirical support for them, and the Criminal Justice Act 2003, which aimed to modernise the criminal justice system, has promoted the principle of deterrence. Accordingly, it has raised sentences and the prison population, although the UK is not unique in this regard.[57] However, it is at the lower end of the criminal seriousness range, and in the area of youth justice, that we have seen the greatest departures from the principle of proportionality, notably with civil measures such as ASBOs, the final warning procedures now in place and the increased role of 'diversion' in the criminal justice system.[58] The whole thrust of crime and disorder enforcement policy is now largely decided upon by crime and disorder reduction partnerships, as well as a plethora of multi-agency groupings, including community safety partnerships and crime reduction partnerships. This has tended to impact negatively upon proportionality as discretion, local conditions and target priorities have all undermined the overall fairness of ASBO enforcement policy. This had led to enormous discrepancies of enforcement from one part of the country to another, and even from one part of a city to another, for the same types of offence.[59]

Moreover, between the Criminal Justice Act 1991 and the Criminal Justice Act 2003 the whole of the criminal justice system was reoriented from primary considerations of rights and procedures to ones more taken with issues of future risk, and the Criminal Justice Act 2003 accordingly had special measures reserved for 'dangerous' offenders.[60] Under New Labour, the criminal justice system had to be seen to be responding to the general public's concern about crime, especially in relation to youth offending, anti-social behaviour and the treatment of victims. This all had the effect of undermining proportionality to the extent that those objectively less serious crimes were often prioritised over the more serious,

in large measure due to the politicisation of the criminal justice system by New Labour. A good example of this is the anti-social behaviour order (ASBO), ushered in by the Crime and Disorder Act of 1998. These have had the effect of undermining the entire criminal process, with its plethora of safeguards, by imposing civil orders that, if breached, are dealt with by criminal proceedings, with the resulting disproportionate penalties, often for trivial matters, not necessarily even the subject of criminal law.[61]

It is worthwhile looking at recent critical research study undertaken by Keightley-Smith and Francis on the role of final warnings in the youth justice system in northern England which raises serious questions concerning the undermining the proportionality of tariffs.[62] Keightley-Smith and Francis have demonstrated how the final warning scheme, though trumpeted as a progressive measure by policy-makers, has actually worked to 'the detriment of young people involved' and failed to promote 'individual self-responsibility', which was the original policy intention.[63] Final warnings were brought in to replace a previous system of cautioning but they have proven unhelpful in four main areas, all of which impact negatively upon proportionality criteria:

(1) Final warnings may be said to be disproportionate because they are far more extensive due to the relationship they have to the Youth Offending Team (YOT). Final warnings involve a period of YOT intervention, unlike the old reprimands, which did not necessarily.
(2) The institution of the final warning scheme has been patchy, partly due to poor investment in it and partly due to variations in local priority setting. This is disproportionate to the extent that final warnings have been instituted in an inconsistent manner. Therefore, similar cases are not being treated similarly.
(3) The final warning scheme has led to increased police discretion, especially since final warnings do not require the young person's consent, or their guardian's consent, which is not the case with adult offenders. Therefore, young people cannot opt for their day in court, and this can have massive consequences for the young person in terms of their future employment and criminal record status, and for justice *per se*. Alastair Gillespie has shown there are also serious concerns that in practical settings young people may feel pressurised into accepting a final warning in a process that does not sufficiently balance their legal rights with the efficient processing of offenders.[64]
(4) Final warnings are also a *de facto* sentence to the extent that they have to be declared and so still negatively impact upon young people's chances of rehabilitating themselves through education or employment. They are held on the Police National Computer (PNC). However, there is little research to determine how employers, training and education establishments and charities, for example, deal with final warning disclosures.

Final warnings show up very clearly the dangers of discretion, inconsistent implementation of policy and the very real diminution of justice that results from cutting out a person's right to a hearing in court. They demonstrate how a move away from strict notions of proportionality can actually undermine the proper operation of justice. They are, as Keightley-Smith and Francis have argued, '[a] total police administrative process [that] defies the principle of due process

on a number of counts ... there is no judicial review of final warnings, no direct lines of police accountability and no means of address through the court'.[65]

Proportionality: conclusion

It is important to note the Kantian lineage of many of the retributivist writings of our current age. The notion Kant gave us of a rebounding maxim whereby criminals bring punishment on themselves is, perhaps, even older and versions of it can be found in all the great world religions. The main point we take from Kant is centrality of proportionality. The notion that there ought to be a strict correspondence between the seriousness of offences and the level of punishments rather than any broader social or predictive considerations is something of a shibboleth in neo-Kantian jurisprudence. It is proportionality that ensures fairness and legitimacy to the system of punishments. Moreover, it is this appeal to fairness that implicates the work of John Rawls. It was Rawls who saw the necessity of fairness in any society but who also realised that no society could ever achieve perfect agreement on moral and political matters. Rawls therefore furnished us with an idealised original position that aimed at moral objectivity behind a veil of ignorance. If you did not know what position you would occupy in society then what rules would you devise to ensure fairness in that society? The point for Kant and, subsequently, Rawls is the necessity to treat persons equally and fairly. That is a political objective as much as a legal one.

The distinctiveness of Just Desert theory lies in the way it stresses the criminal's moral desert in the distribution of punishments and the way it conceives the criminal justice system as concentrating on issues of culpability and proportionality, rather than on wider social considerations. It takes inspiration from older versions of retributive writing, notably the writings of Kant, but it is essentially a practical approach which is underpinned by a commitment to a modern liberal political framework, as has been noted by Lacey.[66]

Practical Considerations

Beneath all the complex theoretical language used to explain desert and proportionality are a few, very simple, propositions. All punishments should be deserved, and all punishments should be proportionately in accord with their seriousness. For justice to be fair and proper it must connect with our basic moral intuition that more serious crimes should be treated more seriously than less serious crimes. Of course, our basic moral intuitions can alter. For example, we now no longer think that homosexual acts between consenting adults are crimes and we hold that violence in domestic settings is the subject of our criminal law, which was not always the case. We see, then, that behind our views on punishment are political notions about how we ought to live. We should acknowledge that many of our views on punishment are conventional. The practical point is that there

needs to be a coherent and logically defensible justification for punishment: the concepts of desert and proportionality operate in that regard. Punishments can never be arbitrary and the concepts of desert and proportionality address this systemic necessity to uphold a fair and transparent criminal justice system. It is necessary to determine that persons deserve any punishments they may receive, and to what extent. Thus it is necessary to determine how we rank crimes, both between similar offences as well as between different offences. Who could defend overly harsh or overly lenient sentences?

Moreover, the need to justify any system of punishments links to the defence of the state itself. A legitimate political system needs a fair judicial system as well as a rational, fair and transparent sentencing system. If desert criteria and proportionality were set aside and punishments were randomly allocated, or allocated without regard to desert and proportionality, that would jeopardise the state itself. The perceived legitimacy of punishments is a fundamental necessity for democratic government. The legitimacy of punishments supports the state and vice versa. Indeed, one could not imagine the state maintaining popular support if it supported a criminal justice system which did not allow for desert and proportionality to be a major aspect of any system of punishments. Moreover, whenever we think of totalitarian governments we usually also conceive a system of courts meting out undeserved and disproportionate punishments; we have only to think of the Soviet Union, Mao's China or Hitler's Germany.[67] Therefore, desert and proportionality are not only necessary to the proper determination of criminal sentencing, but their proper functioning in the criminal justice system, in terms of the system of punishments, is closely linked to legitimate democratic government.

Main Summary Points

- Proportionality requires that crimes of an equal nature should be treated equally and that there is a proper rank ordering of offences.
- Retributive theories of punishment, such as Just Deserts, always maintain that desert criteria are the only correct basis for criminal sentencing of persons. In stressing the role of desert, they relate a moral intuition about punishment. Andrew von Hirsch has written: 'We feel there is something wrong, not simply counterproductive in the long run, about inflicting punishments that are not fairly commensurate with the gravity of offences' (*Past or Future Crimes*, 1986).
- The legal theorist H. L. A. Hart stated that there must be an independent justification for a retributive limit on substantive criminal law in order that liability is confined to the culpability of the criminal.
- Neo-Kantian theorists, such as Andrew von Hirsch, always stress the criminal's moral desert in the distribution of punishments. Like Kant, recent retributive theorists have emphasised the fairness of punishments in terms of the relationship between the offender and the punishment rather than between the punishment and its consequence for society.

Questions

1. What are desert criteria?
2. Why should sentencers consider proportionality when sentencing in criminal cases?
3. What is the *lex talionis*?

Suggested Further Reading

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Hanna, N. (2008) 'Say What? A Critique of Expressive Retributivism', *Law and Philosophy*, 27 (3): 123–150.

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1. Rawls, J. (2001) *Justice as Fairness: A Restatement*, Cambridge, MA: Harvard University Press. p 73.
2. von Hirsch, A. (1986) *Past or Future Crimes*, Manchester: Manchester University Press. p. 10.
3. For a discussion of this see von Hirsch, A. (1976) *Doing Justice: The Choice of Punishments*, New York: Wang & Hill; and Ashworth, A. (1989) 'Criminal Justice and Deserved Sentences', *Criminal Law Review*, May: 340–355.
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8

FAIRNESS

When any number of persons conduct any joint enterprise according to rules, and thus restrict their liberty, those who have submitted to these restrictions when required have a right to similar submission from those who have benefited by their submission.

H. L. A. Hart, 1984[1]

Introduction

Legal theorists, such as Andrew von Hirsch and Andrew Ashworth, have made a huge impact upon contemporary Criminology, notably around their work on criminal sentencing. The underlying principles they uphold are to a large extent focused on the issue of fairness and this chapter will set out the basic issues, derived from political theory, which inform their work. It will concentrate upon the work of the pre-eminent American political theorist John Rawls, the work of Kant and the basic notions of justice as fairness, as well as outlining the difficulties of appealing to a moral consensus and justifying a non-utilitarian ethical theory. The chapter will show how many of the ideas used in contemporary Criminology are ultimately based upon solid principles of political theory and demonstrate just how indebted to political theory a great deal of criminological work is.

The Notion of 'Fairness' Derived from John Rawls

Different theorists understand the notion of 'fairness' differently, and I shall explore these differences later, but there is one element which unites all contemporary theorists, and that is the concept of the rational chooser. In other words, fairness is that state of affairs that would be preferred by a rational chooser. A debt to the political theorist John Rawls should be noted here – to his notion of the rational chooser operating behind a veil of ignorance in an 'original position' where the individual does not know what place he or she will occupy

in society and does not know his or her gender, race or other fundamental characteristics.[2] What Rawls has in mind is the notion that if we could dispense with the baggage associated with knowing who we are, then we would, he argues, choose a 'fair' distribution of justice, rather than one based on pre-understood attributes. Rawls', arguments are employed by retributivist and deterrence theorists working in criminological theory. However, retributivist thinkers, in particular Andrew von Hirsch, maintain that this use of Rawls by deterrence theorists is incorrect since it goes against the non-utilitarian thrust of the original position argument (i.e. it is not based on utility but fairness), and that to apply deterrence considerations is to adopt utilitarian criteria (i.e. considerations based on future outcomes) and to abandon Rawls' intended concept of fairness based on an original position. Retributivists, especially Just Desert theorists, maintain that the rational chooser in the original position would never use utilitarian criteria since any policy which could punish disproportionately to just deserts would inevitably be unfair. Moreover, the adoption of the original position criteria, it is argued, dispenses with emotional, religious, cultural, political and prejudiced reasoning.

Just Desert theorists infer from this that the practice of indeterminate judicial sentencing, derived from utilitarian and rehabilitationalist principles, should be abandoned. They argue that no rational chooser would ever agree to such indeterminacy. Andrew von Hirsch has reasoned: '...the potential benefit done to any one offender under a system of massive discretion is more than offset by the harm done to the vast majority of persons through such a normless system'.[3] This may sound utilitarian, but what von Hirsch is actually pointing to is the essential normlessness of discretionary and rehabilitative regimes. Under a system of Just Deserts, rigorous sentencing standards should be set and judicial discretion severely curtailed. Mitigation should be similarly severely curtailed, as Kellogg has argued: 'The use of plea bargaining and deferred prosecution, not to mention the indeterminate sentence, have constituted a *de facto* abrogation of the principle of punishment strictly regulated according to offence.'[4]

The rejection of utilitarian principles is fundamental to Just Deserts and all other retributive theories and, once again, Rawls becomes important as the theorist whose ideas underpin contemporary retributive theories of criminal justice. Interestingly, Rawls himself was once a utilitarian and had developed a form of rule utilitarianism before rejecting utilitarianism entirely in favour of his new theory of fairness, based on the original position.[5] The perceived failure of rehabilitation as a practice, in the 1970s, enabled fairness to gain ground in academic and policy circles and moves were made to ensure uniform standards in sentencing practice. Andrew von Hirsch famously made the point that this could be seen as 'a shift in perspective from a commitment to do good to a commitment to do as little mischief as possible'.[6]

To the uninitiated, a move to curtail judicial discretion might be interpreted as consistent with deterrence theory, which also advocates uniform sentences and the withdrawal of judicial discretion. However, there is a substantial disparity beneath

the superficial surface similarity between deterrence and retribution, as Kellogg has noted: 'On the utilitarian premise punishment would be justified if it deterred sufficiently'.[7] This is because of the utilitarian inability, in theoretical terms, to avoid unfair treatment of the individual while also aiming at the benefit of the greatest number.

There then arises the crucial issue of the individualisation of the treatment of offenders. Frederic Kellogg, following Kant, maintains that only desert criteria, i.e. deserved punishment, can respect individuals as ends in themselves and that rehabilitation and deterrence treat offenders as a means to someone else's ends. So, for example, it would be wrong to make an example of an offender by punishing them harshly to deter others if that also meant treating that person differently from other persons in the same position just to make a point in that instance. The basic argument is to treat persons individually in terms of their punishment in relation to what they have done and there is also the requirement to maintain a close relationship between cases of a particular offence in terms of how seriousness is dealt with. In other words, one must treat individual serious cases more harshly than minor cases, even if this conflicts with broader issues of social justice. This issue of whether there are individual excuses for offences or whether every person committing a crime should be treated the same is tackled by Andrew von Hirsch, who conceives the issue thus: 'If two offenders convicted of the same offence receive different sentences, is that disparity? That depends on what other similarities and differences there are between the offenders and how these relate to the aims of punishment.'[8]

Kellogg advocates, instead of absolutely determinate sentences, a form of 'presumptive sentencing' whereby judges might raise or lower the tariff to adjust for the seriousness of any given offence. The view of individualisation left by the positivism would then remain according to many retributive theorists, though for different reasons. Kellogg states that: 'No longer must it rest upon the ephemeral capacity to understand causation or to administer treatment but it is now a matter of principle, of fairness, of desert.'[9] However, it has to be stated that desert always presupposes culpability.

The big question in modern theories of punishment is how one establishes desert criteria. The essential elements here are harm and culpability. No punishment can be deserved if no harm was done: or put another way, if no harm was likely to result from the offender's actions or where no harm was intended. The harm principle in this contemporary formulation of harm done, intended or risked, distinguishes it from its Durkheimian ancestor.[10] The second factor at issue is culpability, which means that the offender must have known what he or she did was wrong, or illegal, and that the offender must have had the power to commit, or not to commit, a given criminal act. As Andrew von Hirsch has shown:

> Different crimes may not be readily comparable in harmfulness, because the interests affected are dissimilar. How likely must the risk of harm be? Should it ... be a mitigating circumstance that the offender was motivated by a desire to help someone, or that he sincerely believed the law he violated to be wrong? ... Whose standards should govern?[11]

Determining the Seriousness of Offences and Appealing to a Moral Consensus

Determining the seriousness of offences is a crucial matter for criminologists and it is one that bears on morality and moral relativism. One aspect of moral relativism was pointed out by, among others, Northrop in his classic work *The Complexity of Legal and Ethical Experience*, which is how to judge what is right and wrong across cultures.[12] The culture of eighteenth-century England saw nothing morally wrong in slavery, and similarly in other slave-owning cultures, whether of the classical or modern eras. However, today slavery is universally outlawed. One could also invoke such issues as the use of child labour or animal cruelty, where views have radically changed over time. In a modern multicultural climate there is also the issue of religious diversity and the conflicting moral codes that arise, for example in relation to sexuality, the rights of women or attitudes to sexual behaviour. Theorists have examined the question of whether an individual's religious beliefs can be trumped by another's morality. Inevitably there are clashes. People have different moral consciences and yet live in the same socio-political space. Isaiah Berlin observed that what bothers the poor man does not bother the banker[13] and Alexis de Tocqueville pinpointed the 'tyranny of the majority'.[14] In modern multicultural societies, the dangers of mistreating minorities is a constant danger, given all we know about issues of power and access to influence. Political and moral philosophers themselves do not agree about a whole host of issues, such as the status of private property and the proper basis for distributing goods and services in society. The issue for our purposes is simply that there *is* a disagreement on moral issues and no agreed standard of 'wrongness'.

Moreover, there is also the basic political issue of whether people are capable of distinguishing their personal moral beliefs from their personal self-interest. The majority of people disapprove of whatever causes the most harm on simple utilitarian grounds since that is how most of us operate. The perceived wrongness of an action is usually understood in terms of the harm it does. So we need to note an important tension here between basing the measure of an offence on quasi-utilitarian grounds, i.e. the beliefs held by the majority of people, and rejecting utilitarian notions of rehabilitation and deterrence, which also have popular support within the community that gave us the measure of offences in the first instance.

The issue of how to gauge the unpleasantness of penalties is at least as difficult in real-world situations as gauging the seriousness of crimes. In looking at fines, for example, does the rich man or woman pay the same fine as the poor man or woman? Do we treat the habitual offender more severely than the first-time offender, given that both committed the same crime? The tendency to treat defendants unfairly when using their prior offence records as part of the relevant background information for sentencing was dealt with in a classic study by

Farrell and Swigert, where it was found that this did disproportionately affect sentencing far more than may be expected, and subsequent academic studies have confirmed this.[15]

Erickson and Gibbs gave us the classic study of gauging severity of penalties and a host of scholars have followed in their wake.[16] The original Erickson and Gibbs study involved asking people how they would rate the unpleasantness of a given judicial penalty, but they pointed out flaws in this anecdotal methodology themselves. First, it does not overcome the bias likely to arise from the personal perceptions of those interviewed, and secondly, it raises the issue that the people interviewed were entirely without any personal experience of the penalties they graded in terms of their severity. The study did highlight the problem of relying on the perceptions of ordinary people and the discrepancy between the perceptions of justice system professionals, such as police, lawyers, and the general public. Erickson and Gibbs noted vast differences on the issue of probation, for example, between the police, who see it as a severe sanction, and the general public, who see it as a minor sanction. They showed that the issue of determining severity of sanctions depends largely on who is asked. The point being that retributive theories can never solely rely upon individual perceptions of seriousness.

One of the major failings that retributivist theories, such as Just Deserts, face is the variability of opinions on moral questions, which includes punishment. There is little consensus on the crucial issue of whether moral desert should be a criterion at all among theorists, legal practitioners or the general public. Even when people agree, there is often a great confusion about the principles at stake. The death penalty, for example, is advocated on the grounds of deterrence and moral desert.[17] Among those who uphold the desert principle there is confusion and a lack of consistency, as the political philosophers John Braithwaite and Philip Pettit have shown.[18]

The harsher criticism is whether we should take serious notice of the ordinary person's view at all. It is important to be clear on which of the following consensual validation techniques is to be used as the moral basis of any retributivist theory. Surely, we should not follow the moral judgements of the majority, regardless of just how ill-informed they are or how unaware they are of philosophical or moral considerations? Or should we blindly follow the moral judgements of those who are well informed about the empirical facts and the philosophical reasoning employed? It is obvious that Andrew von Hirsch and other new retributivists favour the latter since their position is derived from a Rawlsian concept of 'fairness' and that is in turn derived from a methodology (the original position). To recap, the original position is a hypothetical situation in which abstracted rational calculators choose those principles of social relations under which their principles would do best without knowing what position they would occupy in society and being unaware of their own attributes. Those choices are subject to certain constraints, which embody the specifically moral elements of Rawls' original position. The rational calculators do not know

even the basic facts about their principles. This restriction on their reasoning is embodied in Rawls' veil of ignorance, which precludes information about a person's age, gender, race, etc.[19]

Moral Philosophy

The general approach that theorists have taken to justify non-utilitarian ethical beliefs and practices has usually been driven by the deep-rooted problem of the absence of a moral consensus on controversial issues, notably punishment. The old notion that we can derive our ethical knowledge through intuition has been discredited, and the notion of the disinterested observer has become the dominant view. However, it is still useful to say something about the moral intuitionists, notably Bishop Butler.[20] Bishop Butler conceived that the human conscience is the source of all of our intuitions. This view was termed the 'conscience theory' and is now generally rejected as a valid method for determining ethical beliefs. Moreover, there are also good persons who are unduly troubled by their conscience and this would seem to be at odds with the theory too. The issue of being bothered by one's conscience would seem itself to rest upon what the given ethical beliefs of the person were in the first place, and that would appear random, or at least dependent upon a great many contingencies, notably context, age, and sex, to name three. To argue that our consciences determine our beliefs in many ways is to put the issue in the incorrect order. Butler is writing with a belief in the moral consensus of the eighteenth century, which, in turn, was guided by his Anglicanism.

In the twentieth century, the moral theorists David Ross, C. D. Broad and G. E. Moore attempted a far more rigorous intuitionist approach, which rests on the assumption that 'reason', as opposed to conscience, is the source of all our direct intuitions of moral qualities.[21] They held that our personal moral values cannot be pre-defined for us. They also held that anyone who tries to define morality in non-moral terms, such as happiness, ultimately misunderstands the meaning of them. This was the basis of G. E. Moore's criticism of utilitarianism – that by trying to define desirable to mean what people actually do desire, utilitarianism collapses our moral concepts into a form of egoistic hedonism. Moore's argument is that this misses the entire point of ethics, which he understood as showing people that their moral responsibility can conflict with their own personal happiness and self-interest. Moreover, as moral terms cannot be defined in non-moral terms, the only way to understand what they mean is to directly experience, or intuit, the phenomena for which they stand. However, the basic problem with this rationalistic-intuitionist approach is that if its basic point were true (i.e. if every person was actually capable of intuiting moral qualities correctly), then there would be no real moral disagreement among people concerning the fundamental moral principles they should follow, unless, that is, only a select few were equipped with the needed intuitive moral sense. In that case, there

would be no way for the rest of us to discover the truth, or to know whose alleged intuitive sense to trust.

Moore argued that only those moral principles that any 'reasonable man' would accept ought to be accepted. The key word here is 'any'. If a substantial number of reasonable men disagree, then the principle should be rejected altogether.[22] Moore maintained that there were examples where all reasonable people would agree on moral decisions. However, even if there is a consensus on a given point, that would not also necessarily equate with a similar consensus on the reasons that lie behind the consensus. Universal agreement, in itself, can never give us adequate evidence of a common morality. Indeed, the existence of reasonable and disinterested people that do disagree should itself be adequate evidence that moral qualities are not directly intuited in specific cases.

All contemporary formulations of a non-utilitarian kind of social policy can be understood as attempts to overcome this problem, and this certainly covers Rawls. In one way or another, political philosophers attempt to demonstrate that any rational and disinterested person must agree with the value judgement in question; they do so by introducing the notion of an ideally objective deliberative context in which rational deliberators could not possibly disagree, because to do so would be demonstrably irrational. Among those who are seriously concerned about the lack of consensus on controversial value issues, such as the purpose of punishment, Rawls has become paradigmatic for this sort of approach. Rawls attempts to show that the one principle that any rational chooser would agree with is 'fairness' – not because there is any special moral sense that would allow us to directly intuit the meaning of fairness, but because it would be irrational for a rational chooser, behind a veil of ignorance, to prefer unfairness. Rawls argues that if you could imagine what opinions you would hold regarding the distribution of benefits without any knowledge of your own interested circumstances (i.e. the original position), then you would know what the rational chooser, behind a veil of ignorance, would prefer. However, Rawls also states that it would be irrational for a person, in the original position, to prefer unfairness in the society which he knows he will live in.[23] Of course, this is because in the original position, and behind a veil of ignorance, nobody knows what place they will occupy in society.

The position that Rawls sets out in *A Theory of Justice* may well be rejected, though, if you remember that not everyone would agree about the degree of inequality to accept in society or how to treat offenders. It has been charged against Rawls that he does not take seriously enough the nature of human desire. Emotions arise out of definite situations, so it is meaningless to discuss what the person in the original position, divorced from concrete reality, would want.[24] A Rawlsian may argue that the person in the original position has knowledge of general human nature and so would know what suffering and emotion are. But this would be a pretty thin form of knowledge. Moreover, it would not begin to address the richness of human emotional life that animates the social and political imagination, notably in relation to issues concerning the criminal justice system. Similarly, it is difficult to imagine what a person in the

original position would think of something like poverty without any experience of it. In the context of the criminal justice system, how can a person who has never experienced violent crime make a rational assessment of how much deterrence he or she is willing to sacrifice for the sake of fairness of treatment of offenders?

There is also the huge issue of deciding how much risk-taking behaviour is to be deemed irrational. It is around this point that much recent discussion of Rawls has centred. Rawls' analysis of the kind of decision-making that would be made in the original position is based on game theory.[25] Rawls' application of this principle, in a risk-taking situation, requires that we should begin by determining the worst that can possibly result from each possible decision, and then pick the decision that is the least worst. However, David Kaye has argued that this is far too conservative a rule, and assuming an aversion to risk-taking is highly questionable on Rawls' part.[26] In spite of these very serious objections, Rawls still holds a strong attraction for many criminal justice theorists.

The Idea of 'Justice as Fairness'

The essential idea behind justice as fairness is that the principles of justice are agreed in an initial situation that is fair. Rawls also realises that society cannot be a voluntary scheme of cooperation and that, in reality, 'each person finds himself [*sic*] placed at birth in some particular position in some particular society, and the nature of this position materially affects his life prospects'.[27] How are people to think about justice in the unequal situations in which they find themselves? Should they compare themselves with the principles of justice as fairness knowing that these are the principles, which free and rational persons would accept in an initial position of equality? Would this help to strengthen people or are there ways in which it serves to undermine them, making it much harder to think clearly about the unequal situations in which they actually find themselves? One of the features assumed by Rawls to be common to all human beings, and thereby non-contingent, is his sense that we all desire to choose our own ends. This is partly what defines us as free and equal rational beings and is embodied in the Rawlsian principle of equal liberty. It is this ability to choose our own ends which is threatened in the relationship of power and subordination between rich and poor, for example. For Kant, it was crucial to realise that if someone was dependent for his or her means of livelihood, it would be difficult for him or her to truly choose his or her individual ends. Kant could only save his assumption from the autonomy of morality by assuming that this was a situation that was freely chosen, though Kant himself recognised that it grew out of an earlier unequal distribution of property, which in turn produced relationships of power and inequality. Rawls is keen to secure our existence as free and equal rational beings by making it an important aspect of our nature. It is useful to note what Rawls states on the

matter: 'Men exhibit their freedom, their independence from the contingencies of nature and society, by acting in ways they would acknowledge in the original position.'[28]

Rawls wants to guarantee a situation in which people are equally free to pursue their own ends, within the framework of a society whose basic structure is just or defined by what reasonable persons would rationally derive in the original position. This is the way we show our respect for others. The essence of Kant's moral writing, for Rawls, is not 'a morality of austere command' but 'an ethic of mutual respect and self-esteem'.[29] The notion that we are equally able to live independent and self-sufficient lives was shown to be an implicit assumption of the autonomy of morality: it also remains implicit in Rawls' work on justice as fairness.

When Rawls thinks that the 'essential unity of the self is already provided by the concept of right',[30] he is also confirming the independence of people from each other. We are free to choose our ends and follow our own conception of happiness. It is the autonomy and independence of the person which is guaranteed. However, as the political philosopher Michael Sandel has noted, the priority of the right over the good mirrors the priority of the self over its ends: 'To assert the priority of the self whose sovereign agency is assured, it was necessary to identify an essentially "unencumbered" self, conceived as a pure subject of possession, distinct from its contingent aims and attributes, standing always behind them.'[31] This assists in identifying an important weakness in liberal theory, though Sandel's wish to recognise how certain ends are constitutive of our sense of self, rather than voluntarily chosen as an act of will, still poses the issue in terms of an individual's relationship to his ends.

H. L. A. Hart is surely correct when he states that 'a satisfactory foundation for a theory of rights will [not] be found as long as the search is conducted in the shadow of utilitarianism'.[34] We go astray as long as we separate the right from the good. Kant, the inspiration for Rawls and von Hirsch, left us with a clue in the difficulties he himself faced in giving a more substantial account of respect as not treating others merely as means but as ends in themselves. Criminologists and socio-legal scholars need an account of the ways we, as human beings, hurt and mistreat each other which are not set in utilitarian terms.

The Issue of Respect for Persons and Moral Worth

Kant writes in terms of respect for persons only to prepare us for the recognition that it is only the Moral Law which is due our respect. Rawls states that people having equal liberty to pursue their own ends is a basic principle of justice. Kant thinks that people will naturally pursue their own happiness, but that this is of no moral worth. However, if people learn to act out of a sense of duty, their actions can accumulate moral worth. The focus is upon the moral worth of our individual actions, not, as in Aristotle, on the cultivation of qualities such as honesty,

which are considered intrinsically worthwhile in themselves.[35] It is part of the attenuated conception of the person we inherit within a Kantian tradition that we can only attribute moral significance to particular qualities and capacities to the extent that they result in our acting out of a sense of duty. This makes it difficult to investigate the different ways we mistreat and hurt others. Rawls has inherited this difficulty in the priority he gives to right over good and the way he conceives the right as the product of a collective choice in the original position, while conceptions of the good are the products of individual choices in the real world. The fragmentation of the moral universe, which this creates, leaves no room for consideration of intrinsic moral worth or determining want from need. Rather, we are taken in by the idea that different things are good for different people and that it is wrong to make value judgements about the relative value of the ends which individuals are supposedly free to choose for themselves.

We find it difficult to articulate the moral significance of social relationships of power. Rawls is concerned that principles of justice have to be previously derived if we are to be able to guarantee 'the freedom of choice that justice as fairness assures to individuals and groups within the framework of justice'.[36] This depends upon the ideas of independence and self-sufficiency which Kant brought into question in his reflection upon the relations between rich and poor and which, in Rawls, are morally invisible since individuals choose their own ends. Rawls articulates the need of a conception of justice, which will respect persons. This is given in the classic formulation:

> For when society follows these principles, everyone's good is included in a sense of mutual benefit and this public affirmation in institutions of each man's endeavour supports men's self-esteem. The establishment of equal liberty and the operation of the difference principle (in which economic inequalities are allowed only if this improves everyone's situation, including the least advantaged) are bound to have this effect.[37]

In this acknowledgement of the importance of a public recognition of the equal value of the ends people choose for themselves, Rawls is enriching the territorial conception of respect. He recognises the importance of self-respect and he takes this to be one of the primary goods people will value, whatever their individual ends happen to be. Moreover, self-respect is afforded a dual role by Rawls when he writes:

> First of all ... it includes a person's sense of his [*sic*] own values, his secure conviction that his conception of his good, his plan of life, is worth carrying out. And second, self-respect implies a confidence in one's ability, so far as it is within one's power, to fulfil one's intentions. When we feel that our plans are of little value, we cannot pursue them with pleasure or take delight in their execution.[38]

This is a solid conception but it assumes that individuals can meaningfully abstract themselves from relations of power, whether of a political or economic kind. It marginalises the striving for autonomy. The autonomy and independence

that people enjoy in the moral realm is somehow taken to guarantee the independence people have to work out their own conceptions of the good. Unlike Kant, Rawls wants to value this as an exercise of people's freedom and autonomy. He is left without a moral language in which to explore how people can be undermined and their autonomy threatened through the workings of relationships of power. It assumes that autonomy is compatible with persons choosing their own ends, taking account of their position and relations in a society whose basic structure is just. In such a society, power relations would be compatible with justice. This brings the issue of autonomy into sharper focus, since if you take for granted that your happiness will only come in caring for others, it can be frightening to even formulate a notion of individual dual ends.

Rawls enriches political theory by bringing in the need for public institutions of society to express the equal value of all citizens. However, his idea of the way this is expressed, in the recognition that people should have an equal liberty to pursue their own conceptions of the good, is a shibboleth of liberal theory, not a limitation upon it. We are left powerless to theorise a distinction between human needs and wants and so investigate different ways people can be hurt, denied, negated, etc. Even though individuals will differ over how to define a conception of shared human needs, we should not thereby think this is the same as defining our individual ends. This could be no less contingent than the other features, which Rawls takes to be common to all human beings as such. Rawls wanted to restrict the description of the parties in the original position to those characteristics which all human beings share as free and equal rational beings. If Rawls does not want to rely, even implicitly, on the idea of a noumenal realm[39] (i.e. noumena are objects of pure reason, and have no relation to our sense perceptions), then he has to ponder, as Kant did, the assumptions of independence and self-sufficiency which underpin our conception of ourselves as free and equal rational beings.

We should be able to concede easily that things that are good for one person may not be good for another, without thereby thinking we have dissolved the possibility of an investigation into human needs. Rawls acknowledged that in different situations different kinds of agreements are called for. Rawls states that 'individuals find their good in different ways, and many things may be good for one person that would not be good for another. Moreover, there is no urgency to reach a publicly accepted judgement as to what is the good of particular individuals. The reasons that make such an agreement necessary in questions of justice do not obtain for judgements of value.'[40]

Of course, recognising the moral importance of an investigation of human needs is not connected to drawing up a list to which people can agree. This quest has often been misplaced since it has classically conceived needs as being given prior to people's relationships in society. In traditional contract theories, it is usually conceived that we enter society to fulfil pre-given needs.[41] Against this it has been taken as a strength of deontological liberalism that it does not depend upon any particular conception of human nature. Therefore, Rawls can claim that the key assumption of justice as fairness is to involve 'no particular

theory of human motivation'.[42] Likewise, the political and legal theorist Ronald Dworkin can say, 'liberalism does not rest on any specific theory of personality'.[43] But as Dworkin makes clear, the force of this is in the idea that liberals can be 'indifferent to the ways of life individuals choose to pursue'.[44] Contemporary versions of political liberalism take pride in the fact that they do not depend upon any particular theory of the person, at least in the traditional sense that they do not attribute a determinate nature to all human beings. For example, Rawls' *A Theory of Justice*, which gives us the archetype of this sort of liberalism, might well be juxtaposed with, for example, Thomist or utilitarian accounts which offer elaborated accounts of the person. However, rather than being a strength, this turns out to be a fatal flaw.

The Disputed Kantian Conception of Justice

Rawls is concerned to develop a viable Kantian conception of justice. This means denying a prior and independent self that is distinct from its values and ends can only be a transcendental or noumenal subject, lacking all empirical foundation. For Rawls, this means detaching the content of Kant's doctrine from its background in transcendental idealism and recasting it within the 'canons of a reasonable empiricism'.[45] It is an essential part of Sandel's argument in *Liberalism and the Limits of Justice* that for justice to be primary we must be independent and distinct from the ends and values we hold. As subjects we must be constituted independently of our ends and desires. He seeks the limits of justice in the partiality of this self-image and argues that 'Rawls' attempt does not succeed, and that deontological liberalism cannot be rescued from the difficulties associated with the Kantian subject'.[46]

Practical Considerations

Fairness in matters of justice is not just an abstract theoretical position: it is a necessary prerequisite to the criminal justice system itself. Nobody could seriously argue for an unfair criminal justice system. Moreover, it underscores the concepts we examined in Chapter 7 – desert and proportionality. We can see that fairness is the foundational element in the criminal justice system. Fairness curtails the excesses of exemplary sentences. It ensures that the police and courts are even-handed. The concept of fairness is the basis of all anti-discrimination legislation and informs the practical workings of equal opportunities policies in the criminal justice system: it is a bulwark against the tyranny of the majority. Irrespective of what qualities individuals bring to the world, fairness ensures their proper treatment and asserts the moral worth of all citizens. Fairness is a primary consideration for those who draft future legislation as well as for those who work in the police, courts, and probation and prison services.

Main Summary Points

- By 'fairness' the political theorist John Rawls had in mind the notion that if we could dispense with the baggage associated with knowing who we are, then we would choose a 'fair' distribution of justice, rather than one based on our pre-understood attributes.
- Just Deserts theorists argue that a rational chooser in the 'original position' would never use utilitarian criteria because any policy that could punish disproportionately to just deserts would inevitably be unfair.
- The idea of 'fairness' is related to the perceived failure of rehabilitation as a practice, in the 1970s, notably in relation to criminal sentencing. Andrew von Hirsch argued that this was 'a shift in perspective from a commitment to do good to a commitment to do as little mischief as possible' (*Doing Justice*, 1976).

Questions

1. What is 'justice as fairness'?
2. In what ways does Andrew von Hirsch use John Rawls' ideas?
3. What is the 'original position'?

Suggested Further Reading

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Notes

1. Hart, H. L. A. (1984) 'Are There Any Natural Rights', in J. Waldron (ed.), *Theories of Rights*, Oxford: Oxford University Press. p. 85.
2. Rawls, J. (2001) *Justice as Fairness: A Restatement*, Cambridge, MA: Harvard University Press. pp. 14–38, 80–134, 188–189.
3. von Hirsch, A. (1976) *Doing Justice: The Choice of Punishments*, New York: Wang & Hill. p. xxxv.
4. Kellogg, F. (1977) 'From Retribution to Desert', *Criminology*, 15: 179–192.
5. Rawls, J. (1955) 'Two Concepts of Rules', *The Philosophical Review*, 64: 3–32. Rule utilitarianism maintains that something is morally right if the consequences of adopting a particular rule are more favourable than unfavourable to everyone. It differs from act utilitarianism, which weighs the consequences of each particular action.

6. von Hirsch, *Doing Justice*. p. xxxiv.
7. Kellogg, 'From Retribution to Desert'. p. 185.
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9. Kellogg, 'From Retribution to Desert'. p. 189.
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11. von Hirsch, *Doing Justice*. p. 81.
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16. Erickson, M. and Gibbs, J. (1970) 'On the Perceived Severity of Legal Penalties', *Journal of Criminal Law and Criminology*, 70: 102–116; see also May, D. C., Wood, P. B., Mooney, J. L. and Minor, K. I. (2005) 'Predicting Offender-generated Exchange Rates: Implications for a Theory of Sentence Severity', *Crime & Delinquency*, 51 (3): 373–399; Apospori, E. and Alpert, G. (1993) 'Research Note: The Role of Differential Experience with the Criminal Justice System in Changes in Perceptions of Severity of Legal Sanctions over Time', *Crime & Delinquency*, 39 (2): 184–194; Drazga Maxfield, L. (2002) 'Prior Dangerous Criminal Behavior and Sentencing under the Federal Sentencing Guidelines', *Iowa Law Review*, 87 (2); O'Neill, M. E., Drazga Maxfield, L. and Harer, M. (2004) 'Past as Prologue: Reconciling Recidivism and Culpability', *Fordham Law Review*, 73: 245; von Hirsch, A. (2002) 'Record-enhanced Sentencing in England and Wales: Reflections on the Halliday Report's Proposed Treatment of Prior Convictions', *Punishment and Society*, 4 (4): 443–457.
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22. Moore, *Principia Ethica*. p. 67.
23. Rawls, J. (1973) *A Theory of Justice*, Oxford: Oxford University Press. pp. 17–22.
24. There is a wealth of writing on this point. See especially: Machan, T. (1983) 'Social Contract as a Basis of Norms: A Critique', *Journal of Liberal Studies*, 7: 141–146; Sadurski, W. (1983) 'Contractarianism and Intuition: On the Role of Social Contract Arguments in Theories of Justice', *Australasian Journal of Philosophy*, 61: 321–347; Schaefer, D. (1979) *Justice or Tyranny? A Critique of John Rawls' Theory of Justice*, Port Washington, New York: Kennikat Press; Barry, B. (1989) *Theories of Justice*, Hemel Hempstead: Wheatsheaf Press. p. 196; Barry, B. (1995) *Justice as Impartiality*, Oxford: Oxford University Press. pp. 57–61.

25. Game theory is a branch of economic and political theory that studies the ways in which strategic interactions between rational players produce outcomes with respect to the preferences of the players. See Myerson, R. B. (1997) *Game Theory: Analysis of Conflict*, Cambridge, MA: Harvard University Press.
26. A good example is Kaye, D. (1980) 'Playing Games with Justice', *Social Theory and Practice*, 6: 33–52.
27. Rawls, *Theory of Justice*. p. 13.
28. Ibid. p. 256.
29. Ibid. p. 256 and see also p. 178.
30. Ibid. p. 563.
31. Sandel, M. (1982) *Liberalism and the Limits of Justice*, Cambridge: Cambridge University Press. p. 121.
32. Ibid. p. 138.
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35. Aristotle (1985) *Nicomachean Ethics*. London: Penguin §§ 1.7 and 10.6.
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9

ETHICS AND OUR MORAL ACTIONS

> Justice was once celebrated as a virtue, indeed a cardinal virtue. Although few have shared the heady metaphysical vision that once led Plato to claim that virtue is enough and that good men need no others, many have thought that justice is not simply one virtue among others, that good laws and good character complement one another and that politics and ethics are distinct but complementary spheres of practical reasoning. Accounts of justice – of good laws and institutions – have nearly always been allied with accounts of the virtues – of the characters of good men and women.
>
> O'Neill, 1996[1]

Introduction

Up to the nineteenth century, issues of ethics and morality relating to the principles and practices of how individuals, groups, corporations and the state operate in the world have been the preserve of philosophers, theologians and legal theorists. This has long since changed and criminological explanation increasingly tackles moral and ethical issues head on. This is partly because some of the best contemporary criminological writers are primarily concerned with practical ethical issues, e.g. Stan Cohen (human rights), Andrew von Hirsch (moral issues and punishment), Colin Sumner (censure) and Jock Young (social exclusion), and partly because Criminology, as a discipline, is increasingly thrown up against ethical and moral issues in terms of the topics it researches, e.g. the treatment of young offenders or the limits of recreational drug use. Moreover, we increasingly feel, as a society, that social scientists should comment on the ethical and moral matters – after all it is they who are the *experts*. When we turn on our televisions to watch serious documentaries it is more often the case that social scientists are the ones commenting upon the ethical and moral issues of the day, rather than philosophers and theologians. However, there is nothing new in social scientists commenting on ethical and moral issues. Adolphe Quetelet had been interested in morality. His work showed how some of the poorest regions of France were the ones with the lowest crime rates and that inequalities of wealth between citizens and their likelihood of committing crime were related to issues concerning moral instruction, as well as opportunity. Karl

Marx was motivated by what he saw as an unfair distribution of wealth and the problems that caused.[2] Emile Durkheim was concerned with moral regulation and the functioning of a moral community.[3] Ervin Goffman's work, notably in his book *Asylums*, represents a moral critique of societal intolerance of difference.[4] More recently, Jock Young has, in his *The Exclusive Society*, set out the moral case for a new form of citizenship to combat crime.[5] So, having established that the treatment of ethical and moral matters is both historically part of the script of Criminology, and is in any case unavoidable given the most basic research material of the criminologist concerns rules and their enforcement, this chapter will look at ethics and morals, even though I would argue that all the previous chapters in this book are necessarily shot through with ethical and moral analysis. This chapter aims to raise awareness of some practical moral issues, especially those associated with late modernity, such as the proliferation of law and the lack of a moral consensus.

The Criminal as Freerider

In *A Theory of Justice*, John Rawls set out the issue of freeriders.[6] He did this in relation to distributive justice.

> The sense of justice leads us to promote just schemes and to do our share in them when we believe that others, or sufficiently many of them, will do theirs. But in normal circumstances a reasonable assurance in this regard can only be given if there is a binding rule effectively enforced. Assuming that the public good is to everyone's advantage, and one that all would agree to arrange for, the use of coercion is perfectly rational from each man's point of view. Many of the traditional activities of government, insofar as they can be justified, can be accounted for in this way. The need for enforcement of rules by the state will still exist even when everyone is moved by the same sense of justice. The characteristic features of essential public goods necessitate collective agreements, and firm assurance must be given to all that they will be honored.[7]

The criminal can also be seen as a freerider, and in legal doctrine the criminal is the person who breaches the principles of fairness and trust, in terms of what is acceptable, in any rules-based system.[8]

The legal theorist H. L. A. Hart tackled this problem in view of political obligation and fair play in his essay 'Are there any natural rights?': 'When any number of persons conduct any joint enterprise according to rules, and thus restrict their liberty, those who have submitted to these restrictions when required have a right to similar submission from those who have benefited by their submission.'[9] In other words, we are all morally duty bound to abide by the laws because we benefit from them. If all other members cooperate in order to create a society of mutual benefit and support, as in the Hart case, then no person should fail to do his or her share or undermine the system, which benefits all. The benefits that accrue from a fair legal system only follow from their being

upheld. The criminal deserves punishment because they are not obeying the rules they ought to live by and which secure the free and optimal functioning of society. Ronald Dworkin has further developed this line of thinking in relation to what legal theorists call associative obligation. In Dworkin's scenario, in societies which are characterised by equal and substantial policies focused on the well-being of the people, all individuals are obligated to support that system in general terms, and obey its laws. It is the law which secures the general well-being and it has to be defended. In the Dworkin scenario, it should be noted that it specifically outlaws totalitarian political and legal systems, and ones not focused on the general well-being.[10] Seeing the criminal as a freerider may work in a normative legal model as it undoubtedly has a deal of explanatory force. However, it obviously misses out a great deal of sociological and real-world empirical detail. It is also ahistoric and does not raise serious questions about the fair distribution of goods and services in society, even in the case of Dworkin. The freerider view of criminality is obviously indebted to the liberal rights and obligations thinking we discussed earlier in Chapter 3, but it is easy to see how it can lead to a zero-tolerance regime which completely overlooks broader issues of social inequality. As Jock Young stated in *The Exclusive Society*: 'Crime rates relate to the material conditions within a society: the criminal justice system, whether scripted by liberal ideals or by draconian conservative morality.'[11] The freerider formulation cannot address Young's point.

No Consensus on Crime

One of the problems any ethical theory has to grapple with is the issue that there is no complete agreement about what are the nature and scope of crime and its causation, to say nothing of the criminalisation process. This is a seemingly insurmountable problem for any ethical or moral theory. If there is no rigorous answer to the issues of what exactly the nature and scope of crime and its causation are, then how can any ethical or moral theory address the issues of injustice, which are at its core?[12] A great many people today are in prison for things which at other times or in other places would not be criminal at all. The internet makes determination of jurisdiction problematic in such cases as international fraud, pornography or the downloading of movies. Laws change constantly: expressed homosexual behaviour was once a criminal offence and dog-fighting was once legal. As criminologists and legal scholars have noted, the volume of law has grown exponentially, as has its scope, and it now covers activities which we all take part in, such as downloading music, and this has tended to break down the 'them' and 'us' distinction between criminals and everyone else in society.[13] It is a messy picture and getting messier. Even where there is criminal law, for example in relation to marijuana, confusion often reigns on the street and among prosecutors about the exact way to proceed. Laws are routinely enacted in response to media and ginger group pressure. Many laws are

systematically overlooked by the police for practical operational reasons and many crimes of a corporate nature, such as pollution, are ignored for political reasons.[14] Then there is the shifting basis of proof in criminal cases, alterations to criminal liability and new, and complex, policing functions which all further add to the uncertainty. This has led Andrew Ashworth to ask 'Is the criminal law a lost cause?'[15]

Some jurisdictions have tried to overcome many of the problems of determining what exactly are the nature and scope of crime and its causation by resorting to technical definitional measures such as 'dangerousness' or 'seriousness' in an attempt to define core, or prioritised, areas of crime, or at least restrict the problem. The Criminal Justice Act 2003 might be understood as such an attempt in that it distinguishes 'dangerous' and 'serious' offences from less 'dangerous' and less 'serious' offences. However, Monahan has shown, conclusively, that this has not worked either.[16] Leaving aside the issues of objectivity and moral panic that may well arise in relation to 'dangerousness' and 'seriousness', the idea that the criminal law can be restricted to its core, or prioritised, elements (especially in relation to 'dangerousness' and 'seriousness') is almost bound to fail. Robinson has shown the mess, and injustice, that such a move has had in relation to increasing the incarceration rates for certain crimes.[17] The truth is that the criminal law has expanded so far that notions of core and non-core crime are, though initially tempting to some liberal theorists, *practically* useless because they do not add anything to the analysis or the bigger problem of legitimating the criminal law in late modernity. Moreover, we already know that murderers are on average more dangerous than marijuana users, so why waste time on this classificatory enterprise, unless to shore up the legitimacy of criminal law?[18]

There is, then, a crisis in the determination of the criminal law. At the most basic theoretical and practical level there is confusion, with obvious consequences for ethical and moral considerations. It is easy to sustain the charges that there are too many laws and too much punishment, and because of confusion about the nature and scope of crime and its causation, to say nothing of the criminalisation process, there is too little moral communication through the criminal justice system. Moreover, this confusion has only added to state power.[19] If the criminal justice system not only fails to do its job, but also fails to communicate what is and what is not acceptable behaviour, it is not surprising that this impacts negatively in terms of a failure to so order things that individuals know what is and what is not ethically and morally acceptable.[20] Moral communication is, at least partly, a key function of the criminal justice system.

Lack of Moral Consensus

In the epilogue to *Censure and Sanctions*, Andrew von Hirsch spends time to deal with the issue of the lack of consensus surrounding morality, especially in relation to punishment. He argues that:

> Traditional societies, it is said, have a considerable degree of agreement about what is right and wrong. In matters of dispute, there are authoritative figures to consult. In such a society, there would be little difficulty grading penalties to fit the supposed degree to reprehensibleness of conduct. Our own societies are not so constituted, however. There are contending groups having differing outlooks about how people should behave. The State also carries no particular authority to resolve ethical disputes. How then, the objection runs, can the degree of various acts' wrongfulness be determined, sufficiently to construct a desert-based sentencing scheme?[21]

He admits that there is 'legal and ethical' dissensus (lack of consensus), notably around drugs, and concedes that this makes the use of the criminal law in such areas problematic. However, von Hirsch goes on to argue that there is consensus, or at least a greater degree of consensus, in core areas of the criminal law, such as 'victimising crime', theft and fraud.[22] He advocates a practical solution based upon a measure of harm and relying on two criteria, which address seriousness: (1) the impact upon an individual's living-standard, and (2) a measure of culpability based on the 'degree of purposefulness or carelessness'. However, even getting agreement on these two measures may itself be problematic, and von Hirsch admits that:

> Matters admittedly become more complicated when one leaves the core area of victimizing offences, and goes to crimes (such as drug offences) the wrongfulness of which is in dispute. Here, analysis is impeded by the lack of an adequate theory of criminalization – a theory of when, and under what circumstances, conduct may be deemed sufficiently reprehensible to warrant the blaming response of the criminal sanction. But if assessing the gravity of these crimes is more difficult, that would seem to me to be a strength, not a weakness, of a proportionalist sentencing theory. When it is doubted whether and why the prohibited conduct is wrong, it should come as no surprise that the gravity is hard to gauge.[23]

The lack of a solid agreement about morals and the proper nature and extent of the criminal law has led some theorists to argue for an imposition of morality.

Legal Moralism

The lack of consensus on what should and what should not be criminalised has led some theorists to advocate legal moralism. Legal moralism is now gaining ground and was the subject of the prestigious 2008 Dewey Lecture in Law and Philosophy at the University of Chicago Law School, where the leading political theorist Robert E. Goodin delivered a lecture entitled 'An Epistemic Case for Legal Moralism'.[24] Goodin and other legal moralists have argued not only for the legitimacy of criminalising *immoral* behaviour, but also for an ideal set of rules and values which the law is to enforce. Beyond that they argue that the state should enforce a moral consensus in society, in lieu of agreement about public morals.[25] The archetypal legal moralist text is Lord Devlin's argument that a shared morality is essential to the proper functioning of society:

> [I]f men and women try to create a society in which there is no fundamental agreement about good and evil, they will fail; if having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.[26]

Devlin's view is that individuals cannot have a meaningful existence without the help of society and he saw an expanded role for the law in both maintaining a shared morality and, at a deeper level, maintaining society itself.[27] Ronald Dworkin, the leading contemporary legal moralist, has defended an enlightened form of legal moralism on the grounds that it is a requirement of democratic government. He argues that without it, normal civic life is impossible. Dworkin claims to have developed a set of rational standards for determining when a judgement is a proper moral judgement, although this does not determine whether or not a judgement is correct.

However, the ability of the criminal law to convey morality, i.e. to convey the immoral nature of something as a basis for then criminalising it, is nonetheless contested in legal and criminological circles. The classic anti-legal moralist statement was made by John Hospers. Hospers' argument is drawn from Bentham's work in the *Principles of Morals and Legislation* and amounts to an attack upon the implicit tyranny of legal moralism, in that it seems to leave no room for alternative perspectives.[28] Moreover, H. L. A. Hart pointed out that Devlin's argument, and that of other legal moralists, is overstated in that it argues that without a shared morality, the existence of society as a whole is jeopardised. In the area of sexual morality Hart noted that it is ridiculous, for example, to claim that 'deviation from accepted sexual morality, even by adults in private, is something which, like treason, threatens the existence of society'.[29] So while we need to enforce certain norms which are essential to society, society can nonetheless get along very well with a degree of diversity – in the case Hart cites, homosexuality. The main point here is the extent to which moral, and implicitly political, considerations are at the heart of debates about the extent and scope of the criminal law.

Legal Paternalism

Legal paternalism, in the form we typically encounter it, follows John Stuart Mill's notion in *On Liberty* that is permissible to intervene in a person's affairs to prevent them from inflicting harm, in a variety of forms, on themselves.[30] The political and legal theorist Gerald Dworkin has argued that legal interference is a necessary element in the proper running of society, if needs be by coercion to the 'welfare, good, happiness, needs, interests or values of the person being coerced'.[31] For Dworkin the law can be used to promote general welfare by coercion. He has in mind such things as health and education where the law should, if necessary,

be employed to coerce something which is a public good. In other words, we should prosecute those who do not send their children to school and, in the last resort, force a person to obtain medical treatment for a contagious disease. Joel Feinberg follows this and argues: 'It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offence (as opposed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end.'[32]

Knowledge of the Law

One very old issue in legal theory is the issue of knowledge of the law and it follows from our previous discussion about moral communication and the massive expansion of the law. From an ethical standpoint, surely, people need to know what constitutes a breach of the criminal law. The legal theorist H. L. A. Hart argued:

> ... laws should ... be brought to the attention of those to whom they apply. The legislator's purpose in making laws would be defeated unless this were generally done, and legal systems often provide, by special rules ... that this be done. But laws may be complete as laws before this is done, and even if it is not done at all. In the absence of special rules to the contrary, laws are validly made even if those affected are left to find out for themselves what laws have been made and who are affected thereby.[33]

In other words, Hart highlights the fact that law as such does not need to be made known to those whom it affects, though he concedes that it is better if it does. The rather dry words Hart wrote were first penned back in 1961 and it would appear much has moved on since then. Rapid changes in the criminal law, the proliferation of rules and regulations, an increasingly multicultural society and the complexities of life in the twenty-first century all seem to call for more public education about the content of the law. To leave it as Hart does is no basis for a proper ethical standard of culpability in terms of the criminal law. Asking individuals to know when they are breaking the law is not a simple matter of finding out for themselves. So whereas we might consider murder, rape and stealing straightforward cases covered by the criminal law, that assumed prior standard of knowledge may well be inappropriate to such things as purchasing some forms of pornography. Moreover, in a world increasingly characterised by the free movement of people, it seems unrealistic to assume that individuals will be aware of all the laws of a country in which they have not grown up, or are new to. Even Jeremy Bentham, writing back in the early nineteenth century, saw an expanded role for education in the laws and customs of his society, but today this aspect of law, its need to be communicated, is becoming less of a priority for government.[34] If the general content of the criminal law is unknown to the community over which it has authority, and prosecutions follow upon Hart's dictum that 'laws are validly made even if those affected are left to find out for themselves what laws have been made and

who are affected thereby', we can expect the law to lose some, or much, of its ethical legitimacy.

Crime as a Social Construct

Lucia Zedner has put forward a convincing case that we ought to think of crime less in terms of the well-worn and problematic naturalistic categories of normal and deviant and adopt an approach that: 'illuminates the artificial way in which normality and abnormality is defended.'[35] This approach has some common elements with the censure approach of Colin Sumner, which we looked at in Chapter 6, and which also takes a more constructivist approach.[36] Social constructivism does, however, raise serious issues for any ethical theory. Traditionally, in religious systems of ethics, the rightness or wrongness of something is related to either (a) something stipulated in a religious text, such as the Koran or Bible, or (b) something developed from a religious text by authorities within a designated religious community, as in the case of where it is not tackled directly in a religious text, e.g. embryo research. Of course, there will be disagreements within religious communities, but at least there are agreed core texts or ways of doing things in the first place. Once religious certainties are dispensed with, the issue of rightness or wrongness is generally decided upon by a community in a variety of ways, e.g. based upon precedent, common law or through deliberation. Nevertheless, without the anchorage that religion can afford (whether right or wrong) there is a great deal of latitude for the agreed morality of a community to alter, including issues of crime.[37] If we are aware of an innate social constructivism to much of our discussions surrounding crime, this is probably a good thing in that it highlights the essentially sociological and political nature of much of what we typically call crime. Crime is constructed by communities, and as those communities alter so do the crime categories. Leaving aside the ideological aspects of crime construction, which we looked at in Chapter 6, it is easy to see how agreeing what constitutes crime is something that shapes the world in which we live and how the morality which mirrors crimes is largely a matter of convention.

The social construction of crime can be directly linked to the way we are governed. Zedner has highlighted the work of Jonathan Simon.[38] Simon has argued that '[w]e govern through crime to the extent to which crime and punishment become the occasions and institutional contexts in which we undertake to guide the conduct of others (and ourselves)'.[39] Simon argues that all sorts of issues, such as education, housing, poverty, unemployment and much else, are given a 'crime' spin. In this way, local and national government busily reframes these issues in terms of crime to obtain the special funding that attaches to crime. Moreover, the fear of crime has completely altered the way we *construct* our lives, e.g. by living in gated communities and using mobile telephones, the sales pitch for which is often in terms of crime prevention. Simon has developed his thinking in his book, *Governing through Crime: How the Criminal Law Transformed American*

Democracy and Create' a Culture of Fear.[40] In it, he shows how such things as an increasingly harsh regime of detention and deportation and employee background checks are all part of this process. The everyday moral code we all live by is increasingly built upon a defensive attitude to criminal attack. We now regularly talk of the morality of preventive detention in terrorist cases, the rightness of prying into an employee's life history, and the impropriety of living near poor communities, precisely because crime now orders our lives, even when we are not subjected to it.

Main Summary Points

- Criminals can be said to be freeriders in as much as they benefit, or try to benefit, from the work of others, while not adding to the general welfare of others.
- The fact that there is no consensus on what crime is directly undermines a key function of the criminal justice system – that of moral communication.
- In the absence of common agreement on moral and ethical matters, including crime, some theorists have argued for a legal moralism in order to maintain civic life.
- Laws are often not communicated properly to people and while ignorance of a law is no defence, this nonetheless undermines the need to communicate law to citizens.
- Crime may be socially constructed, in which case we need to be aware of its political and sociological aspects.

Questions

1. Are freerider arguments useful in criminological research?
2. If crime is a social construct does that rule out universal explanations of it?
3. Does a lack of consensus about the nature of crime mean that some version of legal moralism is inevitable?

Suggested Further Reading

Galvin, R. (2008) 'Legal Moralism and the US Supreme Court', *Legal Theory*, 14: 91–111.
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22. Ibid. Chapter 4, pp. 29–35. Here von Hirsch discusses seriousness and severity.
23 Ibid. p. 106.
24. The lecture is available in full at: http://law.anu.edu.au/news/Bob_Goodin.pdf.
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GLOSSARY

Capitalism Capitalism is an economic system, both in theory and practice, which is based on private rather than state ownership of businesses and the profit motive. It stresses commercial competition and self-reliance.

Censure Censure is the rebuke of an individual, group or idea by another person, persons, official body or corporation. It may have a normative role in criminological theory or contain an ideological aspect.

Chicago School The Chicago School is the name given to a group of sociologists based at the University of Chicago. The Chicago School stressed the importance of ecological and environmental factors in causing and controlling crime. The Chicago School also developed innovative research strategies in both qualitative and quantitative analysis. Although the work of the Chicago School implied a view of political and economic life, it has been criticised for not relating the social processes of the city to deeper factors relating to the role of economic and political conditions beyond, or beneath, the life of the city.

Communitarianism Communitarianism is a theory of civil society and social cooperation. It attempts to balance the rights of individuals with those of the wider community. It maintains that views of individuals are formed by the culture and values of their community.

Conservative This is a form of political thought that gives priority to the established tradition. It favours order, stability and existing social customs and institutions.

Control theory Control theory places a stress upon social conformity. It has often been associated with psychological and psycho-analytical explanation with concepts related to a 'positive self-concept' and 'attachment'. It has tended to concentrate upon the 'juvenile delinquent' and youth crime.

Desert Desert theory argues that punishments must be fairly deserved and proportionate to the degree of seriousness of the offence.

Deterrence Deterrence theory is based on the notion that if the consequences of committing a crime outweigh the potential benefits of crime, then the criminal

will be deterred from committing the crime. It assumes a high degree of rationality and forethought. In terms of punishments, it may argue for exemplary sentences to deter would-be criminals.

Deviance This is a sociological concept that was popular within Criminology up to the 1990s. It always measures 'deviance' from the standpoint of the dominant culture. It largely ignores inequality, health and globalisation. It is an approach that came under sustained attack from Colin Sumner in the 1980s and 1990s.

Enlightenment The political era that saw the rise of liberal and humane thinking. It marked a break with religious thinking and the embracing of ideas relating to objectivity, rationality and social progress.

Equality The political notion that all persons should be treated the same.

Feminism This is the movement and political view which advances the case of gender equality and challenges patriarchy.

Freerider The freerider issue has been developed mainly in Economics, Political Theory and Psychology. Freeriders are those individuals who take/consume more than their fair share or do not share equally in the costs. The freerider problem is the problem of how to limit the negative effects of individuals taking more than they contribute. This rationale has been applied to criminals.

Functionalism In Criminology this is employed as parts of a structuralist account that sees crime as something that advances, or maintains, the social and political stability of existing state and social relations.

Hegemony Hegemony is a key concept in theory, notably Marxist theory, that describes and explains the domination of one group, or class, over another. It is typically understood as requiring some consent from the subordinate group and is therefore often linked to cultural domination.

Historical materialism Historical materialism is a theory first developed by Karl Marx that argues for a materialist conception of history. It posits that human history is the history of economic development and class struggle.

Human rights Human rights are those basic rights that follow equally, indivisibly and universally from being a member of the human race. They are enshrined in the United Nations Charter and within EU and UK legislation. Within Criminology, Stan Cohen has shown how they relate to victimology as well as the crimes of genocide, hitherto overlooked by criminologists.

Ideology An ideology is an organised system of ideas that facilitate a comprehensive understanding of the social world. Ideology may be said to be made up of

the deepest set of notions at work in every organised set of beliefs. The common set of shared beliefs that a community has may be said to be an ideology. The origin, content and function of ideology are often disputed, notably by Marxists.

Just Deserts Just Deserts is a theory of punishment which stresses that the criminal sanction should always be commensurate with the seriousness of the offence.

Legal moralism This view justifies the laws against certain actions on the basis that they are immoral.

Legal paternalism This is a justification for a law where the welfare of an actor is in question. For example, we may outlaw drug use on the grounds that it harms the user.

Liberalism This is a view of political and economic life that gives priority to the freedom of the individual to act unhindered by others or by the state.

Marxism Marxism is the name given to those theories that follow from the writings of Karl Marx. It argues that the struggle between opposing classes is the main influence on political and economic change, leading to an eventual overthrow of capitalist social relations.

Multi-social This is the idea that the social world is fragmented, complex or functioning on different levels.

Obligations Obligations are those actions or duties we undertake due to an explicit or implicit reciprocity linked to rights. Obligations can be to individuals, groups, corporations or states.

Patriarchy This is a social and political system built upon the domination of women by men.

Positivism Positivism is a position that tends to reduce reality to that which is quantifiable and measurable. It employs natural science methodology to study social relationships. It has been criticised for ignoring political and social relationships, which are not easily quantifiable or are open to various interpretations, or reducing them to measurable categories.

Proportionality Proportionality is the idea, found in legal theory, that punishments should always be proportionate to the seriousness of the crime.

Rehabilitation This is the view that it is better for the offender and the wider society for the offender to be helped into a useful role in society rather than simply punished. It stresses education, therapy and development rather than retribution.

Restorative justice Restorative justice (RJ) is a view that tends to see criminality as a violation of an individual, or community, rather than as an act against the state. It therefore emphasises the role of restorative meetings between victims and offenders in an attempt to demonstrate to the offender the harm they have done to an individual or community. Accordingly restitution is often an element in this process.

Retribution This is a view of punishment that maintains that proportionate punishment is the only response to criminal action, regardless of the consequences. In its modern form it is indebted to the work of contemporary neo-Kantians, such as Andrew von Hirsch.

Rights Rights are legal and moral entitlements that derive from specific political circumstances. They usually place a duty of obligation on those who hold them.

Social control A term often used by Marxist criminologists, sometimes in relation to surveillance, that sees the state as preventing those challenging its rule through stopping persons collectively mounting a challenge to capitalist social relations.

Sovereignty Sovereignty is a notion found in political theory and jurisprudence that sets out the degree of political and legal independence a state or body has. Full sovereignty is therefore the exercise of complete, independent and supreme political power.

State of nature The state of nature is a concept drawn from political philosophy and used to advanced social contract theories. It details a hypothetical situation, before the creation of the state, in which there are no rights.

Strain theory Strain theory is a sociological theory that argues that crime is committed when persons cannot meet their acquisitive desires through legitimate means.

Stratified society This is the idea found in Sociology that there is a hierarchical structure to a society in terms of class, caste or other variable.

Utilitarianism This is the view that the worth of an action is determined in terms of its contribution to overall utility alone, i.e. the greater good of all persons. It is a consequentialist theory of action.

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