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THE ETHICS OF DETERRENCE

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Preface

In legal philosophy, the relations between the individual and society come into sharp focus within the theory of punishment. We assume that society in the form of the state has the right to punish individuals for certain kinds of behaviour and that the right to punish is circumscribed by the law. What is the basis for this alleged right of the state to interfere with individuals in such fashion and within which limits can the practice of punishment by the state be morally accepted? The purpose of this paper is to discuss some aspects of these central areas within the philosophy of punishment on the basis of some recent contributions to the field.

In particular, I am interested in the conditions that must be fulfilled in order for punishment to be just. And here I have in mind not only intralegal criteria of justice like the principle of equality before the law and the *nulla poena sine lege* principle (“no punishment without the support of the law”). If punishment is to be morally acceptable, certain extralegal conditions must also be fulfilled. (On the distinction between intralegal and extralegal conditions of punishment, cf. Schmidhäuser 1972, pp. 38-74.) A “systematic and satisfactory treatment” of this cluster of problems is certainly needed. (Cf. Aubert 1972, p. 40.) Here we can only hope to take a few steps in that direction.

I should like to take the opportunity to express my sincere thanks to Professor Alessandro Baratta and his colleagues in the Department of Legal and Social Philosophy at

University of the Saarland, who have provided an unusually stimulating environment for this work. I am also greatly indebted to Professor Dietrich Böhler and his colleagues in the Department of Philosophy at the University of the Saarland for many stimulating contacts in the last few months. My thanks are, finally, due to the Alexander von Humboldt-Stiftung, which has provided me with a research grant enabling me to carry out this work.

It should be added that this draft is a first report on work in progress. I should welcome critical comments on it.

Saarbrücken, August 1973.

Tore Nordenstam

“Denn der vorsichtige und unablässige Um- und Ausbau des Rechts, der dafür sorgt, dass das gesamte rechtliche Handlungsgerüst seine Festigkeit behält, ohne an Geschmeidigkeit einzubüssen, macht ja den eigentlichen Kern der Rechtskunst aus.“

(Theodor Viehweg, *Topik und Jurisprudenz*, 3rd ed., Munich 1965, p. 64.)

1. The justification of punishment

Punishment by the state has traditionally been justified with reference to the inherent need to punish evil-doing (guilty and retribution theories) or with reference to the consequences of punishment (prevention, deterrence and reform theories of punishment). Historically, there has been a transition from a revenge, guilt and retribution oriented thinking about punishment to an ideology of deterrence in the 18th and 19th centuries (the classical deterrence theories elaborated by Beccaria, Bentham, Blackstone, Feuerbach and others). The Norwegian Penal Code of 1842, for instance, was explicitly based on the ideology of deterrence: “The Theory of Deterrence, which in fact forms the basis for our present legislation ... /appears/ to be the main factor to be borne in mind in determining the nature and magnitude of punishments” (quoted in Andenæs, “General Prevention – Illusion or Reality?”, in Grupp 1971, p. 139). In the 20th century, there has been a switch towards individual-oriented theories of punishment with particular emphasis on the idea of treatment. The ideology of treatment has come to play a dominant role in the criminal reform movement, in particular. That it is perfectly justified to talk of an “ideology” in a dyslogistic sense has been shown by Vilhelm Aubert, who has demonstrated the gap that exists between theory and practice within this field. (See esp. “Blir forbryterne

behandlet?”, in Aubert 1972, pp. 45-56, and ”Rettferdigheten og behandlingstanken”, op. cit., pp. 57-76).

At the present, the guilt, deterrence and reform theories tend to lead an uneasy life of co-existence. “The very aim is in doubt. The question of the aim of punishment is so doubtful and difficult that again and again it can be made the object of philosophical, juridical and social-scientific treatises” (Aubert 1972, pp. 29-30).

Sometimes, one factor is singled as *the* basis of the practice of punishment (onefactor theories of punishment), as in the Norwegian Penal Code of 1842, where deterrence was held to be the primary purpose of punishment, or in Mabbot’s classical paper on “Punishment” from 1939, where punishment was justified solely with reference to retribution: “No punishment is morally retributive or reformative or deterrent. Any criminal punished for any one of these reasons is certainly unjustly punished. The only justification for punishing any man is that he has broken the law.” (J. D. Mabbot, *Mind* 1939, reprinted in Acton 1969. The quotation is from p. 45 in the Acton volume.)

Other attempts to justify punishment by the state refer to two or more factors (multifactor theories of punishment, “compromise theories” as Ted Honderich calls them (Honderich 1971). As typical examples of multifactor theories one could mention Claus Roxin, “Sinn und Grenzen staatlicher Strafe”, *Juristische Schulung* 1966, pp. 377-387), where the author defends a “dialektische Vereinigungstheorie”, as he calls it, and F. J. O. Coddington, “Problems of Punishment”, *Proceedings of the Aristotelian Society* 1946, reprinted in Grupp 1971, pp. 333-353, who talks of “a wise blending of the deterrent and reformative, with the retributive well in mind” (Grupp 1971, p. 353).

Although general preventive thinking has had a renaissance in post-war legislation, as Aubert observes (op.cit., p.38), it is probably correct to say that on the whole the aim of general prevention has been overshadowed by individual prevention and retribution in recent writings on punishment. (There are exceptions. See Andenæs, op. cit.; Gordon Hawkins 1969; Schmidhäuser 1972, p. 51.)

Onefactor theories of general prevention, in particular, seem to be rare nowadays. I shall now proceed to discuss in some detail one recent attempt to defend a purely general preventive theory of punishment: Norbert Hoerster, “Zur Generalprävention als dem Zweck staatlichen Strafens”, *Goldammer’s Archiv für Strafrecht* 1970, pp. 272-281. (The same author has also treated theories of general prevention in a number of other short papers and notes. See e.g. Hoerster 1972, 1973a, 1973 b.)

2. The concept of punishment

Dr. Hoerster starts with the statement that punishment is “infliction of evil and interference with the free personal determination of the individual”, according to its intention as well as normally *de facto* (1970, p. 272). Punishment, when defined on such lines, is essentially different from treatment. Treatment is often unpleasant (painful operations, restrictions on the patient’s personal freedom etc.), but not necessarily so. It may even be positively pleasant, a fact which is sometimes used as an argument against treatment theories of punishment. (If the consequences of committing crime are more pleasant than unpleasant, this might encourage crime rather than contribute to keep the crime rate down).

The definition of “punishment” as a malum is no doubt in accordance with widespread usage. Black’s *Law Dictionary* defines “punishment” as a kind of suffering inflicted by an authority (cf. Hedenius 1972, p. 182ff.); *Der Neue Brockhaus* gives the definition “jedes Übel, das für begangenes Unrecht auferlegt wird”; Schmidhäuser suggests that “Strafe ist ein Übel, dass für ein missbilligtes (unerwünschtes, unerlaubtes) Verhalten auferlegt wird” (Schmidhäuser 1972, p. 11); etc. But this usage is not universal. Coddington uses the word “punishment” to designate “any treatment, pleasant or unpleasant, emanating from the Court” (op. cit., Grupp 1971, p. 339). According to Coddington, the essence of punishment is not that it is evil but that it involves “the

imposition of the will of the Court upon the behaviour of the offender for a limited period of time in the future” (op. cit., p. 338). It does not follow from this definition that punishment is normally experienced as an evil; whether it is or not is an empirical question according to Coddington’s concept of punishment.

Now it seems that the definition of “punishment” is intimately connected with what kind of theory of punishment one is up to. Coddington’s value-neutral definition is compatible with treatment theories as well as with deterrence theories etc., whereas the conception of punishment as a kind of evil would seem less apt for a treatment theory. “Punishment” in the sense of the infliction of evil points in the direction of general prevention and/or guilt and retribution, it seems.

When Coddington chooses a value-neutral definition of “punishment” and Hoerster a value-loaded definition, this seems, therefore, quite consistent in view of the different theories of punishment they defend. To choose a definition of “punishment” which includes a reference to the infliction of evil in connection with a theory which sees therapy as the aim of punishment would, however, be inconsistent, although this is no doubt often done. What happens then is that a concept coloured by an older theory is taken over uncritically.

If it is correct that a theory of punishment may be adumbrated already by the definition of “punishment”, it follows that a critique of a theory of punishment may have to start with a critique of the very concept of punishment employed in the development of the theory. There is no commonly accepted theory-neutral concept of punishment that could serve as a common platform for discussions of punishment.

3. The infliction of evil upon criminals: two problems

Two questions arise: (1) Can punishment in the sense of the infliction of evil upon criminals be morally justified? (2) Are there any good reasons to prefer punishment to treatment of criminals?

The two questions should be separated for the following reasons. Punishment in the sense referred to above may turn out to be right, and not wrong, in certain circumstances. But from this it does not follow that punishment should be inflicted upon the criminal. It should be inflicted upon him only if there is no better alternative available in the circumstances, according to the principle that of several acceptable alternatives, one ought to choose the best.

If the general preventive theory of punishment can be defended against ethical objections of various sorts, it does not therefore follow that the practice of punishment in our societies should be continued. What follows is only that punishment is a possible alternative, which has to be weighed against other morally acceptable alternatives.

Hoerster concentrates on the first of these two questions. His aim is to show that the general preventive theory can be developed in an ethically satisfactory way, and that it is not necessary to resort to a retributive theory of punishment, nor to a multifactor theory. His aim is, in other words, to establish general preventive punishment as a morally acceptable alternative. In order to vindicate the general preventive theory of punishment, this is obviously not enough. Hoerster hints at the incompatibility which may arise between punishment, which involves the infliction of evil, and treatment, which may or may not do so (p. 279), but does not elaborate the issue.

4. A minimum condition on deterrence

Is the deterrence theory a viable alternative to the retributive theory and to the treatment theory, as Dr. Hoerster maintains?

Hoerster draws attention to two basic conditions of the deterrence theory of punishment, one empirical and one normative. The empirical condition is that punishment in fact has the deterrent effect which is claimed for it. What exactly does this claim amount to?

According to Dr. Hoerster, the theory does not claim that everybody is deterred in all cases (p. 273). The theory is therefore not refuted by the fact that criminal deeds occur in our societies in spite of the fact that there is such an institution as punishment. Nor does the deterrence theory claim that punishment is the only factor which keeps people from doing punishable acts. “Alles, was die Theorie in empirischer Hinsicht voraussetzt, ist, dass in *einigen* Fällen Menschen durch die Strafdrohung des Staates von Straftaten abgehalten werden (und selbst in diesen Fällen genügt es, dass die Strafdrohung *neben* anderen Faktoren für den Verzicht auf die Straftat kausal wird“ (p. 274).

This is obviously the very minimum of deterrent effects that any deterrence theory of punishment must presuppose in order to be at all acceptable from the moral point of view. If the threat of punishment did not deter at least some people to some extent in some situations, the deterrence theory would not deserve further consideration.

It is, however, doubtful whether this minimal claim is all that is usually presupposed by defenders of the deterrence theory. Could the deterrence theory be an alternative to the retribution and resocialization theories (as Hoerster claims), if punishment had only such weak effects? That is, would the general preventive theory of punishment be considered as a *prima facie* viable theory of punishment if those were the only empirical claims made for it?

Consider the following situation. The ruling class in a certain society wishes to criminalize behaviour of type A, and a law against A is passed, which threatens A-doers with some kind of punishment. Imagine that the society in point is divided into two classes, a small ruling class and a large ruled class. Imagine further that only members of the ruling class turn out to be deterred by the threat of punishment for A-doing. A minority of the society is deterred, but the large majority of the society is not. Would this be a case which is compatible with the assumptions that are usually made by deterrence theorists?

The question we are considering here is not the normative question whether such a law would be just. Most people would presumably say that this would be a paradigm case of an unjust law, as clear an example of *Klassen-Justiz* as one could wish. But if it is true that most people would reject such a law, then this is presumably also an indication that the empirical claims made for the deterrence theory are normally stronger than Hoerster submits.

It seems reasonable to assume that the deterrence theory makes some assumptions about *normal cases*. One possible version of the empirical assumption of the deterrence theory could be formulated thus: The threat of punishment for doing A helps to deter normal people in normal situations to an extent which is enough to justify the threat and infliction of punishment, everything considered. My proposal is, in other words, that the justification of punishment must include some assumptions on equality. If the deterrent effects were glaringly unequally distributed over the society, then the deterrence theory would lose its *prima facie* ethical acceptability. It could no longer be considered an alternative worth discussing.

It is obvious that it is difficult to separate empirical and normative issues at this juncture. If it is true that certain empirical conditions must be fulfilled for an alternative to qualify as a *prima facie* acceptable alternative, then the question of the empirical conditions of a theory of punishment cannot be strictly separated from its normative conditions.

The empirical condition that Hoerster draws attention to is one that presumably everybody can agree on as an absolute minimum. All remaining questions about the deterrence theory would then have to be discussed as “normative” problems. It seems perfectly possible to proceed in that fashion, although it might not be the clearest way of discussing the issues in question. One could, for instance, discuss whether it would be ethically acceptable to have a law which constitutes a threat only to a minority of the relevant section of the society. (It might be noted in passing that the passage I quoted above contains an ambiguity. Hoerster speaks of the case where “Menschen” are deterred to some extent etc. without specifying whether this means that some men are deterred or whether it means that men-in-general are deterred. I have assumed the first alternative in this discussion.) When Hoerster proceeds to discuss the normative assumptions of the deterrence theory, he does, however, not consider such cases. He discusses the question whether the deterrence theory will lead to the “punishment” of innocent individuals, but construes “innocent” (*Unschuldig*) as “not having done A” only (cf. section 8 below). This means that Hoerster does not consider the problem whether general preventive punishment in our kind of society might lead to victimization in the sense of punishing people with no real responsibility for their deeds. If members of the largest social class are predestined to do A, in contrast to the members of the small ruling class, then a law criminalizing A might well be regarded as a scapegoat principle which sacrifices members of the majority for the sake of the minority. The empirical material which will be considered in section 6 below does in fact indicate that such victimization does occur in our society.

We have arrived at the following point. A situation where only the minimum condition on deterrence is fulfilled would be *prima facie* objectionable from an ethical point of view. A law issued under such circumstances might well be a scapegoat principle in the sense that the society (the majority, the ruling class, etc.) would secure certain benefits at the cost of a certain category of individuals who would be predestined to be punished in a higher degree than others.

A practice fulfilling Hoerster's minimum condition need, perhaps, not be a scapegoat principle in the sense just indicated. The set of individuals deterred by the threat of punishment may not form a homogeneous category. If the threat of punishment operates in a random way in the sense that those who are not sufficiently deterred have no relevant properties in common which distinguish them from the rest of the population, would it then be *prima facie* acceptable from a moral point of view? This seems questionable. If there are no properties differentiating the offenders from the law-abiding except the very fact that they have not been enough deterred, then the empirical problem of deterrence is brought to a sudden stop. Some people happen to be deterred, others not, and there is absolutely no clue as why that is so. To treat the empirical side of deterrence as a brute fact, a datum, in such a way leaves it an open question whether the threat of punishment does not operate on scapegoat lines after all. It would seem reasonable to assume that one could uncover hidden regularities behind the seemingly random distribution of deterrence, which might prove the practice of deterrence to be unfair. Subtle victimization processes might be at work in such a case.

It seems, therefore, that laws and punishments which fulfil only the minimum condition on deterrence would be *prima facie* objectionable from the moral point of view. They would be acceptable only on condition that it could be shown that there are overriding reasons for accepting them in spite of their *prima facie* wrongness. If this line of argument is acceptable, then the minimal descriptive condition on general preventive punishment must be supplemented with ethical arguments showing that the practice is acceptable everything considered. This could be done by showing that the practice is the only available means for reaching certain ends which are so highly valued that the sacrifice involved in reaching them would be justified after all. Another line of argument would amount to a demonstration that the sacrifice of the category of individuals in point would be the lesser of two mala which cannot both be avoided.

Hoerster presents no considerations of that kind. The omission of considerations of the more subtle kind of victimization makes his defense of the deterrence theory of punishment unconvincing in its present shape. It has to be supplemented with arguments

to the effect that general preventive punishment is compatible with minimum assumptions on equality and that there are no viable alternatives available.

The last point is worth stressing. It seems to me that Hoerster gives far too little weight to the question where there are any viable alternatives to deterrence. In the recent literature, this aspect of punishment has been emphasized by Eberhard Schmidhäuser and Heinz Müller-Dietz, who both explicitly state that punishment must be resorted to only as a last means. Penal law has the character of *ultima ratio*. (See Schmidhäuser 1972, pp. 47 & 47, and Müller-Dietz 1973, pp. 33 & 56.) I shall return to this issue later (sections 7 and 11 below.)

5. The concept of deterrence

Before we continue the discussion of the conditions of deterrence, it might be clarifying to insert some comments on the notion of deterrence.

The classical deterrence theorists assumed that the threat of punishment exerts a deterrent influence on the individuals in each particular choice situation. The classical deterrence model “was conceived in terms of man as ‘a lightning calculator of pleasures and pains’, to use Veblen’s phrase, directly responsive to systematic intimidation by threat of punishment designed to outweigh any pleasure to be derived from crime” (Gordon Hawkins 1969, in Grupp 1971, p. 163).

In our century, the simple deterrence model developed by Feuerbach, Bentham et alii (cf. Aubert 1954, p. 24ff., who gives a number of appropriate quotations) has been modified by taking into account some of the indirect effects that the threat of punishment may have. In the Swedish tradition referred to as “the Uppsala school”, the educative-moralizing and habituating functions of punishment have been particularly stressed. According to Per Olof Ekelöf, for instance, punishment fulfils three functions in a

modern society: it deters through instilling fear, it has a moral-building function through the creation of a sense of obligation, and, above all, it helps to form habits that are exercised “instinctively” without conscious reflection upon the effects of following or breaking the law (Ekelöf 1942, p. 17, quoted in Aubert 1954, p. 37). (The views of Lundstedt, Ekelöf and Olivecrona are conveniently summarized in Aubert 1954, pp. 31-47. The tradition has been continued in Norway by Johs. Andenæs. See Andenæs 1952 and 1956, and the critical review by Hawkins 1969; also Andenæs 1956, *Alminnelig strafferett*, p. 71.)

The result of this modification of the classical deterrence theory model is a certain ambiguity in the concept of deterrence. Sometimes, deterrence is used as an umbrella term to cover all general preventive effects of punishment (direct deterrence, educative-moralizing or conscience-forming effects, habit-forming effects), as in Tappan 1960: “We would define deterrence as the term is generally used here today as ‘the preventive effect which actual or threatened punishment of offenders has upon potential offenders’” (p. 247; quoted in Hawkins 1969, in Grupp 1971, p. 164). “Deterrence” in this wide sense is thus virtually synonymous with “general prevention”. Examples of this usage can easily be found in the literature on punishment. And sometimes the term “deterrence” is used in a narrower sense to refer to the directly deterrent effects only. Andenæs, for instance, contrasts the deterrent effects of punishment with its moralizing and habit-forming effects (Andenæs 1952, in Grupp 1971, p. 142).

This is not only a verbal point, since the two conceptions of deterrence may be connected with different models of punishment. It is often difficult to decide in which sense a certain author uses the term “deterrence”, but one should presumably assume that recent writers on the subject have the modified model of deterrence in mind, unless there are indications to the contrary.

The unclarity of the term “deterrence” recurs in the writings of Norbert Hoerster, who does not explicitly consider the differences between the classical and modern models of

deterrence. Thus one critic has found occasion to criticize Hoerster for not giving due weight to conscience-formation and internalization of norms (Ostermeyer 1973).

In the name of clarity, one should, however, distinguish between deterrence and general prevention, since it is perfectly possible that some of the general preventive effects of a certain law are not due, directly or indirectly, to deterrence. There may be other factors at work which might be effectively masked by an inappropriate terminology. When I use the term “deterrence” in the title of this paper and elsewhere, it should therefore be construed as a common name for direct and indirect deterrence, unless the context makes another interpretation necessary. Whether deterrence in this sense exhausts the field of general prevention is an empirical question, which must presumably be answered in the negative.

6. The criminalization process

The reflection on the empirical conditions of the deterrence theory of punishment leaves us with two large problem areas:

- (1) the actual effects of threats of different kinds on different kinds of people in different situations;
- (2) critique of the facts uncovered under (1) from a normative point of view.

To inquire into (1) is a task for criminology, psychology and other empirical sciences. It is to be expected that such inquiries will uncover unequal distributions of deterrent effects over different strata. The prime concern for the normative critique just envisaged would be reflection on the fairness of the actual distributions of deterrent effects and the working out of alternatives which would be more satisfactory from a moral point of view (or at least working out criteria for possible alternatives).

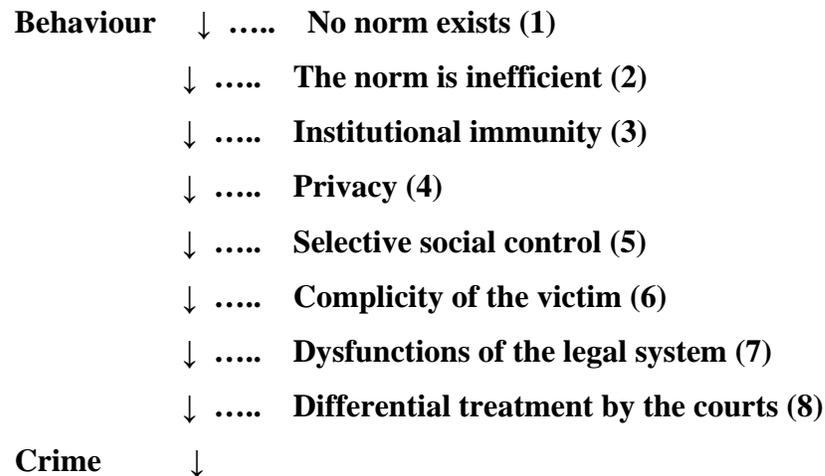
In this section, I shall consider some empirical findings and hypotheses of relevance for our problem cluster, and in the next section I shall comment on some consequences of the empirical material for the normative problems of punishment.

Philosophical discussions of punishment are often conducted in abstraction from social contexts. Mabbot makes the procedure explicit in his 1939 paper, where he distinguishes between punishment itself and its indirect consequences. Someone may be sentenced to imprisonment but not to imprisonment plus unemployment, as he correctly observes (Mabbot 1939, in Acton 1969, pp. 52-53). Abstract analysis of isolated institutions may be analytically clarifying, but when it comes to the question of the moral acceptability of punishment, it would amount to a kind of ostrich policy to disregard the indirect effects and accompanying characteristics of punishment. An analysis of the fairness of deterrent punishment, for instance, would be severely inadequate if it took no account of the relevant features of the social environment in which punishment takes place. We have, therefore, to make an excursion into the fields of criminology and the sociology of law at this juncture.

As has often been pointed out, very little is known about the deterrent effects of punishment, and little research is carried out in the field of general prevention generally. (Cf. e.g. Aubert 1954, Foreword *et passim*; Aubert 1972, p. 176; Schmidhäuser 1972, p. 56ff.; Törnudd 1969, p. 29; Andenæas 1952, in Grupp 1971, p. 143; Cottino 1973, p. 34ff.) As Andenæas has emphasized, it is essential to avoid sweeping generalizations in this area and to consider each important type of crime separately (*op.cit.*, p. 144), and, one could add, also each important type of criminal. The threat of punishment may, for instance, be considerably different for a professional thief (a “booster”) and a housewife or any other ordinary person who steals occasionally to improve upon the family’s budget (a “snitch”) (Mary O. Cameron, “The Booster and the Snitch”, 1966; cf. Cottino 1973, p. 37).

In an analysis of the reasons for the massive ineffectiveness of an Italian law from 1960 prohibiting the practice of certain forms of contracting and sub-contracting, Amedeo

Cottino has drawn attention to a number of factors which hinder “the criminalization process”. There exist a number of hurdles which have to be passed before a certain kind of behaviour can be punished and which thus constitute hindrances for the criminalization process. These hindrances are essentially tied to power and status. Powerful classes enjoy a series of immunities and can, in general, profit from existing social arrangements to a higher degree than the less powerful ones. Cottino drwas attention to eight such criminalization-hindering factors, which are conveniently summarized in the following diagram:



(Cottino 1973, p. 78.)

Some comments will help to clarify the nature of these hurdles blocking the road from the execution of a certain kind of action to the official declaration that the action constitutes a *crime*.

A powerful class or influential group can, in the first place, see to it that no legislation is passed against actions or arrangements which are advantegous to the class or group itself but detrimental from the point of view of other classes or society as a whole (1st hurdle).

A more sophisticated way of exercising power over criminalization processes is to influence the normative content of proposed laws so as to make them inefficient in practice (2nd hurdle). A classical case of this kind is the Norwegian *domestic servants' law*, which was intended by the lawmakers to be difficult to apply (V. Aubert et alii 1952; cf. Cottino's reinterpretation of the findings of this investigation, Cottino 1973, p. 73). Another good example is the Italian law of October 23, 1960 (No. 1369), as Cottino has demonstrated. "The important thing was to give the workers something without thereby providing the controlling and administering bodies with such instruments that they /could/ intervene too severely with 'private enterprise'" (op. cit., p. 101). In this connection, one could also mention the power to create criminalization of behaviour of other persons than those who have laid the foundations for that kind of behaviour, in other words, the ability to push the burden of responsibility on others. Leonard & Weber have coined the term "coerced crime" for this phenomenon in a study of the American car market, where the dealers seem to operate under such economic conditions that they are forced to commit frauds in order to survive in their roles as car dealers (Leonard & Weber 1970, referred to in Cottino 1973, pp. 57 and 124). Violations of the Italian law No. 1369 by small builders seem to have a similar background (op. cit., p. 130).

The 3rd hurdle on the road to crime-declaration is institutional immunity, the protection that certain institutions give to selected individuals. The following example gives a good illustration of the mechanism at work: "As treasurer of a club whose funds he /a university employee/ used for his own purposes, he was permitted to make restitutions by bankers' order, and, when he was found to have a large deficiency in his account in the university was invited to resign; but when later, in business on his own account and no longer in the area of institutional immunity, he defrauded his customers, he was found guilty and sent to prison (Chapman 1968, p. 64; quoted in Cottino 1973, p. 59, note 2). The fact that involvement in legal processes generally has detrimental effects for workers but not for physicians may be similarly explained with reference to the institutional immunity that physicians enjoy in our society (op. cit., p.60ff.).

Different classes enjoy varying degrees of privacy (4th hurdle), where “privacy” designates “the power not to be seen” as well as “the power to stop actions from controlling instances to intrude upon the area of privacy”, as Cottino puts it (p. 79). The legal existence of private places also makes for differential justice, as Chapman has observed (Cottino 1973, p. 60).

A function of varying degrees of privacy is varying degrees of social visibility. The lower classes are in general more exposed to social control than high-status groups since they are more visible (5th hurdle). A tramp may spend all his time in public places, thus exposing himself maximally to social control, whereas a rich person may be able to spend virtually all his time in private, thus withdrawing to large extent from public justice (Cottino 1973, p. 66).

Complicity of the victim (6th hurdle) may also be regarded as a function of inequalities of power and status. The victims of illegal contracting are often in such inferior positions that they will gain by employment under conditions of exploitation, at least in the short run.

Existing dysfunctions in the legal system (7th hurdle) may also be exploited to a higher degree by higher classes and influential groups than by workers, as some empirical studies indicate (see Cottino 1973, pp. 68-75). Extended court proceedings may for instance create difficult or impossible situations for individual workers but not for the more powerful party (C. Castellano; see the reference in Cottino 1973, p. 72).

Differential treatment by the courts, finally (8th hurdle), has been investigated in a number of studies, which have demonstrated a significant connection between social status and severity of punishment. (See e.g. V. Aubert, “Avskrekking med omhu”, in Aubert 1972, pp. 174-197, on the Norwegian High Court’s handling of some drug cases, and “Straff og lagdeling”, *op. cit.*, pp. 77-105.)

7. Deterrence and justice

The normative conditions on punishment, i.e. the conditions that punishment must fulfil in order to be morally acceptable, can be divided into two groups. First, there are *criteria for the selection of modes and degrees of punishment*. The following criteria seem to play a central role in this group and might serve as illustrations of this type of conditions on punishment:

- (1) the criterion of human dignity, which specifies that punishment must not be incompatible with minimum conditions of human dignity;
- (2) the criterion of protection of vital social interests, according to which the penal system must be so arranged as to protect vital social interests as effectively as possible;
- (3) the criterion of minimization of human suffering, according to which punishment, defined as a *malum*, must be made as light as possible.

Wherever it is possible to dispense with punishment altogether, replacing it with other measures, this should be done according to the last criterion. It is, in other words, a moral duty to limit the penal system as much as possible. (Cf. Schmidhäuser's and Müller-Dietz's *ultima ratio* — requirement referred to above in section 4. Cf. also Aubert, *op. cit.*, p.181.)

The first criterion requires that certain minimum conditions on human dignity must be laid down, within which the legal system will have to operate. Within the framework of human dignity, the criteria of social protection and minimization of suffering may stand in tension with each other.

A penal system fulfilling the selection conditions one eventually opts for may, however, fail to live up to the ethical minimum because of unequal distributions of punishment over the society. Thus the selection criteria will have to be supplemented with *distribution criteria* specifying the ways in which the selected modes and degrees of

punishment must be distributed over the population in order to avoid injustice (cf. Hart 1968, pp. 11-12).

One could imagine a perfectly just society, in which everybody had the same ability to do or not to do actions of type x prohibited by the law, where everybody would run the same risk of being caught if doing x, and where everybody would be punished equally after being caught. As we saw in the foregoing section, our society is far from fulfilling such conditions of equality completely. The hurdles on the road to criminalization are so many unfairness-producing factors. We have different abilities to do or not to do x depending upon our physical and psychological make-ups and depending upon our social positions. We do not run the same risks of being caught if doing x because we enjoy different kinds and degrees of immunities, again depending upon our positions within the power and status system of our society. We are not punished equally, neither in the objective sense of getting like modes and degrees of punishment for like actions, nor in the subjective sense of getting punishments which somehow constitute equal burdens from the punished person's point of view.

Applying the findings on unfairness-producing factors in the criminalization process to the question of deterrent punishment, we find that not everybody is likely to be deterred to the same extent because of the unfair distribution of immunities etc. in our society. Existing social arrangements lead to differential immunities against threats of punishment.

The upshot is that it seems unavoidable that legal deterrence operates unfairly in our society. It would seem artificial to put the blame for this solely on extralegal features in our society like the inequalities of power that we live with, but it seems equally important to note that the unfairness is the result of the penal system in conjunction with a number of other features and that penal reform in isolation will therefore not be able to remove the existing unfairness.

Leaving the unfairness-producing factors surrounding legal processes aside, we shall now consider some distributional criteria of a more narrowly legal kind (intra-institutional criteria for the distribution of punishment). Three such criteria seem to me to be of particular importance: Predictability, Responsibility, and Equality.

The criterion of predictability requires that punishment must not be arbitrary. On the contrary, it must be foreseeable to a high degree. This principle, which is one of the fundamental principles of the “legal state” (*Rechtsstaat*), must, however, not be given too much weight, which might lead to blind obedience to the letter of the law, nor too little weight, which would make for legal insecurity. Examples of both types of misuses of the principle of predictability can readily be found in what Alessandro Baratta has called “the degeneration process” of the German legal system in the 1930s (Baratta 1968). The possibilities of misuse of the principle indicate the need for a specification of the principle and the need for weighing the principle against other principles of justice. This is, however, a problem cluster that we have to bypass here.

The criterion of responsibility states that only those responsible for an act of law-breaking may be punished for that act. The criterion is no doubt generally accepted *in abstracto* and functions as a guiding idea in the legal systems of our societies. But from this it does not follow that existing practices live up to the standard completely. Disagreements over the specification of this criterion might take the form of disagreements over the answer to the question “Who is responsible?” The problem becomes acute when it comes to criminogenic economic arrangements (the phenomenon of “forced crime”; cf. section 6 *supra*) and shared responsibility in family situations, for instance. In the excessively individual-oriented therapeutic ideologies which are still predominant in the penal area, an individual is selected for “treatment” while his environment is simply made to suffer, to put it sharply.

An utterly unjust system of law can fulfill the criteria of predictability and responsibility to a high degree. One could for instance think of the case of class justice which was sketched in section 4 above. It is, therefore, necessary to add further restrictions on

acceptable legal systems. The kind of restrictions needed can be indicated by the sentence “Like cases should be treated like”. What should be meant by the phrases “like cases” and “like treatment” in this formula gives rise to numerous problems, which cannot be treated here. One complication seems worth mentioning, though: the special difficulties that arise when the principle of equality must be used under conditions of inequality, for instance when a judge has to find the fair punishment for a crime committed in a society characterized by the unfairness-producing factors referred to in the foregoing section.

In legal theory and practice, a criterion of general deterrence is often used at the distributional level. This addition to the list of distributional criteria is, however, glaringly unjust, as I shall argue. Deterrence is (I think) appropriate at the selection level, the level of fixing the modes and amounts of punishments in general, and only there.

In a discussion of the ethics of general preventive punishment, Andenæs distinguishes between some types of cases which have to be treated differently from an ethical point of view (Andenæs 1970, pp. 175-178). The least problematic case is the use of general preventive considerations in legislation. A threat of punishment or similar sanctions (“Massnahmen”) is no doubt often necessary to create conformity to the law, and it seems equally plausible to assume that the threat must also be carried out in practice, to some extent at least, to ensure that the law is not regarded as a dead letter.

Such legislation cannot be regarded as the creation of scapegoat principles, although the point behind it is sometimes presented in a way which must give that impression. It is sometimes said that the point behind general prevention is to punish offenders in order to deter others from doing the same. If that were so, general prevention would involve the deliberate sacrifice of certain individuals for the sake of others. The point is often put in Kantian terms: “One should never use a person solely as a means.” But this is a misleadingly telescoped way of making a correct point. An individual offender should not be punished in order to deter others from doing the same, as retributionists rightly emphasize. The offending individual should be punished because he has broken a rule (a law) threatening punishment for deviance (cf. the quotation from Mabbot 1939 in section

1 above). The individual should thus be punished because his punishment follows from a certain law, and not to deter others. The reason why punishment follows from the law is, in its turn, that the lawmakers have thought that the threat of punishment must be attached to the law in order to make it effective and that the courts think that the execution of the threat is another *sine qua non* to achieve the desired aim. "The penal norm is set in order to make *everyone* abstain from committing such actions", as Andenæs observes (1970, p. 176). Jones is thus not punished in order that others shall not do the same; Jones is punished because he has violated a law threatening everybody who breaks it with punishment.

The standard Kantian argument against general prevention does, therefore, not seem to be valid. General preventive legislation must be criticized on other grounds, e.g. on the ground that a particular piece of legislation is bound to remain inefficient because of structural features of the domain in question. Forced crime would be a case in point. The threat of punishment will exert no influence worth mentioning when it comes to questions of survival in the game.

The situation is, however, different when it comes to the use of general preventive considerations in particular cases. The courts often use the latitude given by the law to mete out extra severe punishments with reference to general prevention (the need to curb a wave of crimes of a particular kind, for instance). But it is clear that in such cases individuals are used solely as means for external purposes in a way which is unacceptable. The individual who is given an extra year in prison solely with regard to general prevention is used as a scapegoat. Clearly, such scapegoating must be narrowly circumscribed by a number of conditions for it to be at all acceptable from a moral point of view. Considerations of general prevention can only be accepted provided that the punishment does not interfere severely with the life of the punished person, that the action is dangerous, and that there is a high probability that the punishment actually will have the desired effect on the general public (Aubert 1972, p. 41). In view of the lack of knowledge of the deterrent effects of individual judgments, these requirements would

probably rule out virtually all use of general preventive considerations in the law-courts. One can only hope that it will not take too long to change existing practices in this field.

When law-courts use general preventive considerations in individual cases, they do, in fact, violate at least two of the conditions on fair distribution of punishment. The practice involves an amount of retroactive legislation, as also Andenæs has noted, and is thus in conflict with predictability. It also breaks the conditions of equality. When considerations of general prevention are used to differentiate between cases, it is bound to happen that like cases are treated unlike.

These conditions on justice are even more flagrantly violated when the court appeals to the amount of publicity that a case has got or is likely to get. Andenæs seems prepared to accept also this practice “within very narrow limits” (op. cit.), without, however, specifying any limits. But this is not acceptable. Appeal to publicity is not an admissible criterion of justice.

8. The protection of the innocent

The normative critique of the distribution of deterrent effects over different strata makes it necessary to adduce more empirical material than is usual in philosophical discussions of punishment. As we have seen in the two foregoing sections, the very formulation of the issues requires concepts from the social sciences (immunity, differential social control, etc.).

When we now turn to Hoerster’s handling of the normative side of general prevention, we are back on more familiar philosophical ground. According to Dr. Hoerster, the deterrence theory of punishment rests upon two premisses, one empirical and one normative (cf. section 4 above). It does not become quite clear what the normative premiss of his theory of punishment is. His treatment of the normative side of the theory

takes the form of a consideration of various objections against the theory, from which it might be inferred that the normative premiss of this theory of punishment is that the theory is normatively acceptable. The strategy seems to be the sound one that if there are no valid objections against the theory, then it might be provisionally accepted.

Hoerster considers four types of objections:

- (1) the objection that the deterrence theory leads to punishment of the innocent;
- (2) the objection that the deterrence theory leads to unproportionately strong punishments in some cases and to unproportionately soft punishments in other cases;
- (3) various objections from the point of view of rival theories;
- (4) the objection that deterrence would be unacceptable if it turned out to be the case that it led to only a very small increase of positive consequences.

A classical objection against all sorts of utilitarian theories of punishment is that they give no guarantee for the protection of the innocent. If it turns out that the consequences of punishing an innocent person are in all likelihood better than any other alternative, then a utilitarian would be committed to the *prima facie* strange view that it would be morally right, and even a moral duty, to “punish” the innocent person for the crime he has not committed.

Hoerster considers the case first from the judge’s point of view, then from the lawgiver’s point of view.

(a) Would it be right for a judge to punish an innocent man for a deed he has not done if this could set an example which is required in the circumstances? (One could think of a sudden flood of kidnappings, for instance.) The answer is No, according to Hoerster, because that would fall outside the judge’s field of competence. The judge is not entitled to punish a legally unpunishable person. Nor is he entitled to omit the punishment of legally punishable acts (Hoerster 1970, p. 274). It would e.g. be wrong not to punish a

Nazi criminal on the ground that such an act of punishment would have no deterrent effects in the present situation. It is clear from this argument that Hoerster does not accept an act-utilitarian defense of punishment: the existence of the institution of punishment with set role obligations for judges and other parties concerned rules out the consideration of the value of the consequences in each particular case. It is the institution, and not all the particular acts falling under the institution, which has to be defended with reference to its good consequences, according to the rule-utilitarian strategy. (On the distinction between act- and rule-utilitarianism, see e.g. Frankena 1966 (also German translation by Norbert Hoerster) and the collection of papers edited by Baruch B. Brody, *Moral Rules and Circumstances*, 1970).

In the present case, the institutional or rule-adducing defense takes the form of an appeal to the value of legal security: “Ohne eine generelle Regelung und die sich daraus ergebende Konstanz richterlicher Strafpraxis hätte das Individuum ja keinen Grund, sich von der Begehung solcher Handlungen, die den in der Vergangenheit abgeurteilten *gleichen*, abschrecken zu lassen“ (Hoerster 1970, p.275).

In the background of the argument lurks the principle *nulla poena, nullum crimen sine lege*, which goes back to the first great German defender of general prevention by deterrence, Anselm von Feuerbach. The principle expresses an essential safeguard against legal arbitrariness. (Cf. section 7 above on predictability). It is significant that one of the first changes undertaken by the Nazi regime in Germany was to replace the principle *nulla poena sine lege* with a principle of “Willensstrafrecht”. (See e.g. Karl Schäfer, “Nullum crimen sine poena”, in Gürtner 1935, and Roland Freisler 1935 a & b.)

But the principle of legal security (predictability, *Rechtssicherheit*) and the ensuing division of labour between lawgiver and judge are not quite so problem-free as Hoerster seems to submit.

(i) First, there is the problem of the judge’s scope of freedom. When the law leaves it to the courts to decide within a given latitude which punishment is appropriate in a given

case, is it then morally defensible for the law-court to use this freedom for considerations of general prevention (as is often done)? As I have already argued (in section 7), this practice of the law-courts to mete out extra severe punishments with reference to the general preventive consequences seems unacceptable from a moral point of view. The practice does, however, not conflict with the principle of predictability (*Rechtssicherheit*) formulated by Hoerster. The individual can foresee that the punishment will lie within the stipulated latitude, although he cannot foresee the exact amount. But it does conflict with a principle of fairness, which might be formulated in the following way:

It is unfair to to inflict severe suffering on an individual, without his previous consent, merely in order to secure common goods.

This might be regarded as one way of expressing the point made by Kant. (Cf. Jan Narveson in *Morality and Utility* on the illegitimacy of weighing one man's suffering against other men's happiness.)

The immediate criminal-political consequence of this principle of fairness is that law-courts should not have the competence to make use of general preventive arguments when fixing the amount of punishment in individual cases. The latitude given by the laws should be used only for individual considerations. Hoerster seems to be in substantial agreement with this conclusion: "Das Gebot der Gleichbehandlung durch den Staat ... dürfte auch dann verletzt sein, wenn der Richter, innerhalb des gesetzlichen Rahmens, das Strafmass nach generalpräventiven Gesichtspunkten bemisst. Denn darin liegt die Verknüpfung des Strafübels mit einem – vom Standpunkt des einzelnen Täters aus – ganz zufälligen Faktum." (Hoerster 1970, p. 275.)

(ii) The second problem which Hoerster's argument gives rise to is one which he shares with the whole Kantian tradition and indeed all moralities which are founded on the prominence of rules and institutions over individual cases. It is the problem of unnecessary sacrifice. The possibility of unnecessary sacrifice is the danger that the

emphasis on rules entails. In the legal literature, the problem is sometimes referred to under the heading *legal formalism* (Roscoe Pound).

In Kant's philosophy of rules, the individual case may be sacrificed in a way which seems repugnant to me. Remember the case of the people who before deserting their island and spreading into the world, have to kill their last murderer for the sake of Justice: "If Justice and Righteousness perish, human life would no longer have any value in the world" (Kant, *Philosophy of Law*, translated by W. Hastie, Edinburgh 1887). According to Kant, one should always act upon those principles which one could wish that everybody should follow. To act on such a wish must necessarily lead to unacceptable consequences in individual cases. What if there is no real chance that others will follow my precedent? Then my act will have moral worth, according to Kant, but it may also become a meaningless moral gesture.

The same problem arises in some versions of the modern development of utilitarian ethics, so-called rule-utilitarianism. If rule-utilitarianism is taken to mean that I should always act on those rules which would lead to the best consequences *if they were generally followed*, then this again acting on a wish. (R. B. Brandt defines "rule-utilitarianism" on such lines in his *Ethical Theory*, 1959, p. 254.) If there is no chance that all or most people will act on those rules, then my doing so would turn out to be meaningless gestures and unnecessary sacrifice. (Cf. Lyons 1965 on the importance of "thresholds" in ethics.) If, for instance, it would be good if everybody paid their taxes in full, but few do so, why should I act on a principle which most people disregard? Why should I sacrifice my interests for the sake of a principle which would be good in other circumstances (viz. if generally followed)? If there is a chance that my acts will have an influence on general practice, the situation is different. But there is perhaps a general tendency amongst moralists with a Kantian penchant to over-estimate the possible consequences of individual actions on general practices. (Cf. further my remarks on moral strategies in 1972 b.) It might be noted that not all versions of rule-utilitarianism are open to this kind of criticism. When I. Hedenius refers to rule-utilitarianism in his recent book *On the Moral Conditions of Man* (1972), he means a doctrine which

recommends me to choose the action-type with “the best statistics”, as he puts it (p. 88). A rule-utilitarian of this kind could not be said to be acting on pious wishes, but like other rule-moralists he would be prepared to sacrifice individual cases with reference to general rules.

In the law, the tension between rules and individual cases has taken the form of a tension between general justice and individual justice or *Billigkeit*. (Cf. Aristotle, *The Nichomachean Ethics*, Book V, 1137 a/b. Commentary and further references to the literature in Engisch 1979, p 179ff.) General rules are required for the sake of predictability, to rule out arbitrariness, yet it is impossible to foresee all constellations which may turn up in the future.

The traditional ways of coping with the problems of unforeseen and unwished consequences of existing rules for individual cases include: (1) individualizing considerations of the kind referred by Aristotle (*Billigkeitsargumentationen*); (2) mercy; (3) sacrifice of the individual (the counterpart of acquittal on the basis of existing loopholes in the law); (4) the introduction of elastic laws (*Generalklauseln*); (5) avoiding legislation. Such devices give rise, in their turn, to new normative problems, e.g. the tension between the desire to make the law flexible and the desire to make it foreseeable.

It is obvious that Hoerster’s way of shifting the whole burden from the judge to the lawmaker does not do justice to such complications. Like Kant, Hoerster overemphasizes the role of rules at the expense of individual considerations. And like other legal positivists, he overemphasizes the role of predictability (general justice, *Rechtssicherheit*) at the expense of individual justice (*Billigkeit*).

(b) So much for the judge. And now to the law-maker. Does the general-preventive theory of punishment entail that the legislator might have a duty in certain circumstances to introduce a law which would make it possible or even obligatory sometimes to “punish” innocent men for deeds that others have done? The standard argument against such proposals is to refer to the insecurity that would be the result of such legislation. (Cf.

Hoerster 1970, p. 277.) If the individual knows that he may be punished irrespective of whether he has committed a certain deed or not, then the motive for abiding to the law is removed. The public enactment of laws threatening innocent and culpable men alike with punishment would thus interfere with the aim of deterrence through the law: to make people abstain from certain kinds of actions.

Similar argument can be adduced against more refined versions of punishing the innocent, e.g. the introduction of a small number of laws which are not published on a grand scale but kept as secret as possible. (Cf. Ofstad 1970, p. XXXV.) It is a polar game in the utilitarian tradition to discuss whether such laws could be ruled out on general utilitarian principles or whether it is necessary to introduce a special principle safeguarding the rights of the innocent against possible misuses of utilitarian principles. The whole controversy is of marginal interest in the present context, since we are not here concerned with the possibility of reducing ethical theory to a small number of basic principles. The important point is that the innocent must be protected (cf. the criterion of responsibility, section 7 above). Whether general utilitarian principles are enough to accomplish this or whether it is necessary to destroy the simplicity of traditional utilitarianism through the introduction of a special principle to this effect, need not bother us here. That problem is a problem within a certain kind of reductionist programme, which seems unable to do justice to the complications of normative ethics. (Cf. Ofstad's review of outstanding difficulties for utilitarian ethics, Ofstad 1970, "Introduction"; Lyons 1965, Ch. V, "Limits of Utility"; also my *Sudanese Ethics*, 1968, Part 1; etc. Hare's case of the utilitarian striptease girl and her questionable human dignity (in *Freedom and Reason*) is very illuminating.)

9. Proportion between crime and punishment

To talk of proportions between crimes and punishments may lead in the direction of a guilt metaphysics, in which the punishment is assumed to be in proportion to the inherent vicissitude of the crime. The very idea of proportion between crime and punishment has therefore come into disrepute. (Cf. Aubert 1972, pp. 32-33.) But one must now throw the baby out with the metaphysical bathwater. The idea of proportion between crime and punishment rests upon an insight into the considerations of fairness. And fairness criteria must, as I have already argued, play a crucial role in the theory and practice of punishment. (See section 7 on selection and distribution criteria for punishment.)

When Hoerster gives a prominent place to the idea of proportion between crime and punishment, he seems, therefore, to be on the right track, although I have a number of objections to the details of his version of the idea. The general preventive defense of punishment, when correctly understood, claims only to justify “the institution of punishment by the state as such”, he asserts (1970, p. 278). How the state uses its right to punish, that is, how it distributes mala over the set criminals, is a matter of justice and not of deterrence (ibid.). Therefore, he claims, it would be right to punish murder severely, if this happens to be in accordance with generally accepted values, even if such punishment has no influence at all on the murder rate.

This is a weird argument. The state is claimed to have the right to punish in general on the ground that punishment is good in some cases. The reference to “generally accepted values”, i. e., the general evaluation of the damaged interests, is in fact a loophole for considerations of guilt, retribution and revenge. Hoerster’s theory turns out to be no alternative to a guilt theory. For a guilt theorist would hardly quarrel with the assumption that the threat of punishment sometimes act as a deterrent, which is the only claim that Hoerster makes for it. (Cf. section 4 *supra*.)

This is as good an illustration of the shortcomings of rule- and institution-oriented ethical thinking as one might wish. When utilitarian considerations are limited to the level of

institutions and rules, the result is either a disregard for the individual case or a way of leaving the field open for all sorts of non-utilitarian considerations.

The solution to this problem does not seem to me to lie in the direction of classical utilitarianism or act-utilitarianism à la G. E. Moore and Bertrand Russell, for instance. The restriction of rule-utilitarian considerations to the general level of institutions, practices, characters etc. is a result of a valid critique of the classical overemphasis on individual acts. But the modern emphasis on institutions and rules is equally onesided. Neither act- nor rule-utilitarianism manages to cope with the dialectics of rules and individual cases, general justice and particular justice, *Rechtssicherheit* and *Billigkeit*. Assuming the truth of these sweeping hypotheses, I shall therefore continue the discussion without any feeling of obligation to stick some kind of utilitarian framework.

If punishment is not meted out in proportion to the damage done to the general good, what criterion could one use to decide whether e.g. murder or theft should be punished more severely, asks Hoerster rhetorically (1970, pp. 278-279). When formulated in that way, the answer might seem obvious, but there are some unclarities here which must be cleared. “The damage done to the common good” could be estimated in different ways. One way would be to resort to generally accepted value scales in one’s society. Murder would then be regarded as a severe crime as long as the public agrees that that is so. If the general public changes its opinion, for instance in the direction of condoning or even applauding certain types of murder (one could think of the killing of “enemies of the people” or “Volksschädlinge”), then murder would no longer always be a severe crime. Alternatively, the estimation of the damage done to the common good could be left to a group of experts (party members, for instance, or a body of specialists trained in the application of a utilitarian calculus of pleasures and pains).

But such specifications of the damage criterion seem unacceptable to me. I do, in fact, find it difficult to agree with the proposition that all cases of murder involve severe damage to the common good. The phrase “the common good” might be appropriate in some cases where the victim is a figure of public standing and where one could therefore

say that his death has consequences for the society as a whole. With most murder cases the situation is different. To talk of “reduction of common advantages” would seem out of place in many cases, in which it would be more appropriate to appeal to principles of human dignity or the sacredness of life. It might also be noted that the utilitarian criterion proposed by Dr. Hoerster is not used in practice, e.g. when it comes to the distinction between murder and manslaughter. On the damage criterion, there might be no reason to distinguish between different types of killing in that way.

Generally accepted values seem to play another role within the theory of punishment than that assigned to them by Dr. Hoerster. To justify the punishment of murder, for instance, with reference to general attitudes to the subject seems unacceptable. The valid point behind the argument seems to be the fact that a legal system requires some kind of backing by the general public to be practicable. But to infer from the need for such general backing to the rightness of complying with the “generally accepted value scales” on all matters of punishment is a howler. Generally accepted values must not be imported uncritically into penal law. They have to be weighed against utilitarian and humanitarian considerations for each category of crime. If no good consequences seem to follow from the punishment of a certain type of crime, then there is a *prima facie* case for abolishing punishment for that crime. It would seem inhuman to continue meting out severe punishment in cases where doing so would serve no other purpose than the satisfaction of generally accepted opinions on the appropriate punishment.

In the cautious reconstruction of the law, which Viehweg regards as the essence of jurisprudence (1965, p. 64), the regard to proportion between crime and punishment is relevant at two levels. First, generally accepted values must be taken into consideration, and secondly, one must try to achieve some kind of consistency within the penal system. In both cases, the underlying rationale is the importance of fairness. The general public as well as the law-courts might be unwilling to accept value rankings which deviate too much from “the generally accepted values”, and individual persons are bound to react strongly against inconsistencies in the penal system itself. Why is that so? The principle of proportion between crimes and punishment might, as Aubert has suggested, be related

to a general principle of balance between service and return. If this is correct, “it would be paradoxical if we could not also understand penal law as an expression of the same principle” (Aubert, op. cit., p.34). One could look upon the penal process as a form of communication in analogy with linguistic communication, in which the principle of balance between service and return functions as a common framework for mutual understanding (loc. cit.). When the principle of proportion between crime and punishment is not followed, the penal communication process will break down, if this line of argument is correct. And if one of the basic conditions for meaningful contact between offender and authorities is not fulfilled, one should not be surprised to find that punishment does not have the desired effects on the offender.

10. Deterrence and retribution

Hoerster claims that his theory of general preventive punishment is a coherent and plausible alternative to the retribution and therapeutic theories. His polemic is above all directed against the guilt theory. When Hoerster claims that his deterrence theory can do without support from the guilt theory, this is, however, as we have seen, somewhat misleading. Hoerster’s deterrence theory limits itself to the justification of punishment in general, which makes it possible for guilt and revenge to creep in through the back door. His brief comments on the therapeutic theory supports the impression that retributive ideas play an essential part in his philosophy of punishment. The therapeutic theory relies on the doer’s need for treatment, he comments, in contrast to the deterrence theory which is founded *founded on the severity of the committed crime*. His own theory makes “die Schwere der begangenen Tat zum Anknüpfungspunkt der Strafe”, as it is formulated in the German text (Hoerster 1970, p. 279).

Whether it is ethically right to base punishment on the needs of the criminal rather than on the severity of the crime is a question which Hoerster raises without attempting an answer (p. 279). He limits himself to trying to establish the deterrence theory as a possible

alternative to other theories of punishment, and leaves it to other papers to weigh the deterrence theory against its rivals. It is, however, clear enough that his sympathies go in the direction of deterrence rather than therapy. On p. 280, for instance, he talks of the “sentimentalism” which runs the danger of putting the interests of the criminals above the interests of their potential victims.

My sympathies go in another direction. If there is a choice between basing punishment on the needs of the criminal and on the severity of the crime, I should opt for the first alternative with reference to the criterion of minimization of human suffering (cf. section 7). To inflict suffering on a person only for the reason that he has damaged the interests of others would seem inhuman in a case where no good consequences would follow from doing so except perhaps the satisfaction of some people’s views on the appropriateness of the punishment.

11. Conclusion

Would the institution of punishment be justified if it turned out to lead to only a slight balance of good effects over bad ones, asks Hoerster finally (1970, p. 280). If the sum of the values protected by the institution of punishment is only slightly bigger than the sum of the negative consequences for the offenders, then it would perhaps not be “quite amiss” to reject punishment by the state, comments Hoerster somewhat vaguely (loc. cit.). I should like to make two brief remarks on this in conclusion. The first remark concerns expressions like “the sum of the values of ...”. In view of the long series of abortive attempts to quantify happiness and suchlike in the utilitarian tradition from Bentham and Mill, it seems rather questionable whether any clear sense can be given to such expressions. The question “Would a society including the institution of punishment be preferable to a society excluding the institution of punishment even if it were only slightly better than the society without punishment?” had better be replaced with the question “Can punishment be replaced, wholly or partly, with other measures without

jeopardizing vital interests to an intolerable degree?” There is no need to consider the wholesale question “Only punishment or no punishment?” to begin with. The complete abolition of punishment is not possible without a number of changes in the existing society. The treatment of criminals is indeed a field where there is room for piecemeal experiments.

Secondly, the way in which Hoerster raises this question betrays the relatively small weight he seems to attach to the criterion of minimization of human suffering. If it is right, as I believe, that a slight increase in human welfare must never be bought at the expense of added suffering for other persons who may not even have been consulted, then the immorality of the kind of situation envisaged by Hoerster should be obvious. We are again reminded of the requirement that punishment should have the character of *ultima ratio*.

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