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Chapter Eight

The Justification of Punishment

The question of whether it is suitable to inflict punishment, and if so, to what degree, arises in all areas of legal inquiry, and beyond them, most notably in religion, philosophy and social science. Punishment is generally defined as a painful or unpleasant consequence imposed on an offender for a breach of a legal rule. A central feature of any concept of punishment is some form of identification of punishment with legitimate authority¹. Without this we are left with little more than private, random and retributive violence. Such legitimacy may rest upon various grounds amongst which a legal basis is of outstanding importance and may, substantively, take many forms. Legitimation in general and, more specifically, the legitimation of punishment are issues rooted in the historically most remote areas of intellectual inquiry; essentially the religious and philosophical struggles to give meaning to the potentially meaningless round of human existence. Weber argues for a significant place for religious doctrines in the earliest formulations of this struggle to intellectualise and rationalise life; to wrest meaning from restless chaos². He points to a very general sense of merit or desert which, whilst

¹ H.L.A. Hart, *Punishment and Responsibility*. Oxford. Clarendon Press. 1968, p5.

² H. Gerth and C. Wright Mills (eds.), *From Max Weber. Essays in Sociology*. London. Routledge and Kegan Paul. 1948, p271.

addressed by him to problems in religious thought, contain, I suggest, a tacit underpinning for theories of legitimation and of punishment.

In relation to inchoate offences, any attempt to justify current approaches in relation to punishment is, as these preliminary remarks suggest, but one aspect of a much larger concept. However, while it would be possible to discuss the wider without reference to the narrower context, it is impossible to refer to any justification for the existence of inchoate offences without considering first the question of the justification of punishment in general. In raising this question it is clear that everything cannot be covered. An analysis of the theological, philosophical, socio-political and historical legal approaches to punishment in general would be a work in its own right and beyond the scope of this study. Whatever the merits, and they are considerable, of the history of ideas, too great emphasis upon this approach would direct the focus of this work away from criminal law.

If we accept these points, then it is reasonable to provide a brief framework of ideas, trends in thought and concepts within which approaches to punishment can be identified. There is no completely satisfactory basis through which this identification can be organised. Whether chronologically, individually or conceptually, all such organisational frameworks are to some degree arbitrary. Choices have been made in the hope of drawing out those assumptions which have informed and built both long standing and

contemporary views on the justification of punishment. At the same time it has to be recognised that thinkers and ideas will surface in more than one section, however these sections are constructed.

Punishment, Philosophy and Social Theory

As I have indicated in my opening remarks, the variety of approaches to the proper limits of punishment are as old as philosophical speculation itself. Much of classical philosophy foreshadows subsequent, more developed and coherent theories which will be discussed later. However, since these early philosophers did lay the foundations for later theorists, it will be useful to explore their ideas in brief. The earliest significant attempt to explore the rationale for punishment began with the Sophists, who provide, in dramatic form, lengthy discussions of punishment, expressed firstly and forcefully in Aeschylus' *The Oresteia*³. What I find interesting about the trial⁴ is the possibility of drawing out of it alternative strands which resonate through centuries of debate on punishment. These alternatives are, on the one hand, divine punishment and, on the other, punishment as the outcome of procedure bearing some resemblance to 'due process of law'. Aeschylus' work clearly marks the shifting emphasis in the justification of punishment. The debate over these respective rules of law was a characteristic of the

³ Aeschylus, *The Oresteia*. trans. G. Murray. London. Allen and Unwin. 1928.

⁴ *ibid.*, pp229-53.

“Greek Enlightenment”⁵. Protagoras felt that a rational infliction of punishment must proceed upon the hope of future deterrence of both the convicted and any witness, with improvement of the individual as the prime concern⁶. This approach anticipates Benthamite utilitarianism and, in common with Socratic philosophy, would look for the course which resulted in the greatest degree of benefit⁷. Plato’s argument took as its basis the notion that punishment was a way of restoring the divinely ordained nature of the universe. He holds the purpose of punishment to be correction and deterrence⁸, but also as the medicine used to cure the wicked soul⁹. However where cure is impossible, it is seen as best for both the criminal and others that he be put to death as the ultimate deterrent¹⁰.

A strong thesis in favour of the earthly origins of law and punishment appears amongst the younger Sophists, under which the legal system is used by governments to protect their own interests and punishment is visited upon those who infringe those interests. The interests of those in power frame the law of the time - a view which is directly comparable with that of Marx who later argued that “the ideas of the ruling class are in every epoch the ruling

⁵ W. Windelband. *A History of Philosophy*. vol. I.1891. trans. J.H. Tufts. New York. Harper Row. 1958. pp72-6.

⁶ von Bar, *op. cit.*, pp381-2.

⁷ *ibid.*, p382.

⁸ Plato. *Gorgias*. trans. F. Plaistowe. London. Clive. s32-3. Also J.M. Kelly. *A Short History of Western Legal Theory*. Oxford. Clarendon Press. 1992, p31.

ideas”¹¹. Moreover, this is a view which finds echoes in modern treatments of criminality and punishment, especially in Foucault¹².

Aristotle’s contribution to this field is seen by von Bar as unique¹³ as he distinguishes justification of punishment from the obligation to impose it. The justification for punishment is founded upon a contract between the State and offender which the criminal has entered into involuntarily when he impinged on society to too great an extent. Justice is seen as the balance which ensues when everyone has neither too much nor too little of his due. Roman philosophers moved the debate further by adopting the essential tenets of Stoicism, that the wicked were irredeemably so and should thus be left to be dealt with by the world in whatever way was seen fit¹⁴. Their overall concern was for deterrence, security, and to some extent, especially in early formulations such as the Twelve Tables, retaliation. *Si membrum rupsit, ni cum eo pacit, talio esto* ¹⁵ endorsed the concept of the *lex talionis* whereby punishment was meted out limb for limb. However, it is worth noting that even in this early formulation (and contrary to the popular belief in the

⁹ M. Mackenzie, *Plato on Punishment*. Berkeley. University of California Press. 1981. p183, discussing *Gorgias*,s36.

¹⁰ *ibid.*

¹¹ K. Marx and F. Engels. “The German Ideology” in their *Collected Works, vol. 5, 1845-7*. London. Lawrence and Wishart. 1976. p59.

¹² M. Foucault. *Discipline and Punish; the birth of the prison*. trans. A. Sheridan. New York. Pantheon. 1977.

¹³ von Bar, *op. cit.*, pp386-7.

¹⁴ *ibid.*, p389.

¹⁵ “If a person has maimed another’s limb, let there be retaliation in kind unless he makes agreement for composition with him.” *XII Tables*, viii, 2, quoting Festus, in *Remains of Old Latin III*. E. Warmington (ed.). London. Heinemann. 1938.

savagery of 'primitive law'), there is room for non-retaliatory, financial compensation in all but the most serious cases. Likewise for Grotius, punishment is essentially bound to the notion of retribution, with the proviso that the criminal law must be exercised in the pursuit of a rational purpose¹⁶. Medieval philosophy is scarcely less diverse than that of the classical world, but most relevant here is the role of the divine order on the justification of punishment. Punishment was, ultimately, justified in accordance with the law of nature, with God's commands, and with the legitimate ordering of the world. The need for natural law changes as a result of sin. In a less than perfect world, legislation is but a pale shadow of the divine law to which it must struggle to conform. Punishment may be an earthly activity but its ultimate justification rests with God¹⁷.

Hobbes follows in the long tradition of retributivism as his justification for punishment¹⁸. He defines punishment as

...an Evill inflicted by publique Authority, on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the Law; to the end that the will of men may thereby the better be disposed to obedience.¹⁹

For Hobbes, the essential feature of society is the existence of the social contract which transfers the innate right to punish to the sovereign. "At the

¹⁶ von Bar, *op. cit.*, p399.

¹⁷ For this complex body of ideas, see E. Troeltsch. *The Social Teaching of the Christian Churches*. trans. O. Wyon. New York. Harper Row. 1960, especially vol. 1.

¹⁸ A. Norrie, *Law, Ideology and Punishment*. Kluwer. Dordrecht. 1991, p 31.

root of the social contract lies the classical retributivist idea of the individual qualifying for punishment through his prior legislative act.”²⁰. This establishes Hobbes as the forerunner of modern retributivism, but however one interprets Hobbes in general, he seems to hold to the centrality of natural law²¹. Similarly Locke places his emphasis on the necessity of upholding the law of nature. For him, everyone has the right to punish criminals, but only to such a degree that it will prevent them from breaking the law which speaks of a deterrent outlook. However, the right to punish is expressly limited²².

Significant in this area, and of particular importance for a Scottish perspective, is the work of David Hume, for whom “all human laws are founded on rewards and punishments...”²³. Hume bases his acceptance of punishment on the view that justice is in everyone’s interests. The human condition and common interest give rise to the need for society and therefore the requirement for a rule-governed structure without which society would not be possible. Upon this he bases a need for justice which in turn provides a rationale for the use of punishment to maintain justice²⁴. Everyone benefits from the operation of justice, which is promoted by enlightened self-interest,

¹⁹ T. Hobbes, *Leviathan*. R. Tucker (ed.). Cambridge. Cambridge U.P. 1996, p214.

²⁰ Norrie, *op. cit.*, p32.

²¹ The natural law (or law of nature) is “*immutable and external*; what they forbid can never be lawful, what they command can never be unlawful.” Hobbes, *de Cive*, III, p29 quoted in Taylor, *op. cit.*, p25. See also Hobbes, *Leviathan*, chs. 14 and 15.

²² J. Locke, *Two Treatises of Government*, 1690. New York. Gryphon Editions. 1994, pp169-70.

²³ D. Hume. *Treatise of Human Nature*, L.A. Selby-Bigge (ed.). Oxford. Clarendon Press. 1888, p410.

even though justice is required because humans are prone to ignore their best interests, preferring instead the wages of selfish motivation. For Hume, government is there, among other things, to force the reluctant to consider their true interests, entrench equity and punish those who encroach upon justice, and thus punishment in general clearly has its place in society as a whole²⁵.

For Kant, first awakened from his “dogmatic slumbers”²⁶ by Hume, questions of morality were no less central than they were for Hume²⁷. The sole justification for punishment is that the individual has committed a crime for which, as a morally autonomous agent, the offender bears responsibility. Thus punishment may have utilitarian value, but the touchstone for the infliction of punishment must remain desert. For Kant, equal distribution of punishment is already presupposed by the requirement of just deserts for the criminal. If he is to receive the punishment he deserves, it follows he should also receive the just degree of punishment²⁸, and this can only be achieved by use of the *talio* principle. Overall, Kant, like Hobbes, sees men as free and rational beings, and therefore creates a theory of punishment in accordance with this view of the human condition. Both theories founder when applied

²⁴ “But tho’ it is possible for men to maintain a small uncultivated society without government, ‘tis impossible they shou’d maintain a society of any kind without justice.” *ibid.*, p541.

²⁵ *ibid.*, pp534-39.

²⁶ I. Kant. *Prolegomena to any Future Metaphysics that will be able to present itself As A Science*. trans. P.G. Lucas. Manchester. Manchester U.P. 1953. p9.

²⁷ On the similarity between Hume and Kant see N. Kemp Smith. *The Philosophy of David Hume. A Critical Study of its origins and central doctrines*. London. Macmillan. 1949. p560, fn 1.

to the stark realities of the real world where criminals are seldom rational and almost always ruled by their passions.

Jeremy Bentham stands as quite possibly the most renowned and influential legal philosopher. He makes no attempt, as others before him had, to justify punishment as something willed or desired by the criminal, stating rather that it is imperative that crimes are prevented by punishments²⁹. In his theory, the prime foundation of the law is its social utility and thus the use of punishment to maintain the legal system is no longer (at least for Bentham) a point of controversy³⁰. The law is not permitted to impose punishments in cases where it serves no useful purpose, or indeed where it would be productive of harm³¹, in line with the utilitarian doctrine of the production of the greatest benefit or happiness for the greatest number³². This however presupposes that the human mind is always rational and, further, that every prospective criminal will pause to undertake what would essentially be a cost-benefit analysis of the possible outcomes of his actions. While the human capacity for logical reasoning is often outstanding, it would be overgenerous to impute to all an infallible capacity for rational action on every occasion. Moreover, many saw utilitarianism as a rather individualistic stance. The interest may be that of the 'greatest number' but these remain a group of

²⁸ Norrie, *op. cit.*, p41.

²⁹ von Bar, *op. cit.*, p435.

³⁰ J. Bentham. *An Introduction to the Principles of Morals and Legislation*. J. Burns and H.L.A. Hart (eds.). London. Athlone Press. 1970. Ch. XIII.i.1 and 2.

³¹ *ibid.*, ch. XIII.i.3.

individuals. Chief amongst nineteenth century attacks upon individualism was that provided by Marxism.

The essential point about Marxism in relation to punishment is that it is placed in the context of the economic interpretation of society. Punishment is inflicted by the State for infringements of its criminal legislation, and for Marx, both state and the legal system serve to further the interests of the ruling class rather than the ruled. Thus one of the main functions of punishment is to reinforce privilege by maintaining the *status quo*³³. This seems to stress an economic basis for the social structures (law, politics etc.), but this would be to oversimplify his teaching. Cavadino and Dignan not only show how later Marxist theories develop and modify economic determinism, but also doubt whether the man himself ever meant anything “so crude”³⁴.

Of those who succeeded Marx, perhaps one of the more interesting to those concerned with the study of law is Foucault. For him, the birth of the prison in the late eighteenth century represented the new industrial order’s need for a different way of exercising power and control over the inferior orders³⁵. Constant surveillance in prison allowed the authorities a new form of knowledge of the prisoner. This ‘knowledge’ becomes, for Foucault, a

³² *ibid.*, ch. I.2.

³³ M. Cavadino and J. Dignan, *The Penal System: An Introduction*. London. Sage. 1992, p59.

³⁴ *ibid.*, p60.

'discourse', that is, a way of representing and conceptualising a topic which provided a channel through which power to discipline the prisoner (and in another much discussed example, the mental patient) could be exercised.

These functions of the criminal justice system have been discussed, albeit rather more conservatively than by Marx or Foucault, by Durkheim who saw punishment as having a particular role in maintaining such solidarity and thereby society as a whole³⁶. For the early Durkheim, primitive societies are held together by mechanical solidarity through the similarity of their tasks and social roles. This gives rise to the "*conscience collective*", being the sum of the common beliefs of the average members of a society³⁷. Durkheim saw crime as that which runs counter to tenets of the collective conscience, provoking a response in terms of repressive or retaliatory punishment serving to reinforce and restore that conscience³⁸. Thus the purpose of punishment in primitive societies becomes retribution and denunciation aimed at the maintenance of social cohesion. However the collective conscience has less of a role in maintaining more advanced societies. This is because the population are engaged in differing tasks and so their consciences are likewise no longer the same. Social solidarity is now

³⁵ Cavadino and Dignan, *op. cit.*, p66.

³⁶ E. Durkheim. *Suicide. A Study in Sociology*. trans. J. Spaulding and G. Simpson. London. Routledge and Kegan Paul. 1952, p69. On this, see E. Durkheim, *The Division of Labour in Society*. London. Macmillan. 1984, *The Rules of Sociological Method*. S. Lukes (ed.), W. Hall (trans.). London. Macmillan. 1982, and "Two Laws of Penal Evolution". 2(1973). *Economy and Society*. 285-308.

³⁷ Durkheim, *The Division of Labour*, pp38-9.

³⁸ *Ibid.*, p43 on crime and the collective conscience and pp44-64 on repressive law.

organic rather than mechanical and the collective conscience is more vague and humanistic. As a result, punishment becomes less important in the face of the rise of restitutory rather than retributive punishments³⁹. Durkheim argues for two laws of penal evolution⁴⁰, the first of which states that punishments are more severe in primitive societies where the central power is more absolute. Much of this derives from the more religious character of less developed legal systems and the associated systems of shared beliefs which form the *conscience collective* of such societies. As societies develop, a more humanistic attitude predominates and this serves to lessen both the scope and severity of punishments. However the nature of punishment remains retaliation⁴¹. The second law states that as a society develops, it comes to use incarceration more as its primary means of exacting punishment. However much criticism has been levelled at Durkheim for this view based on an evolutionary approach which has subsequently been shown to be misconceived⁴².

Philosophical approaches to this question have, as shown, ranged far and wide, but most can be classified under one of two major schools of

³⁹ *Ibid.*, p68 *et seq.*

⁴⁰ "Two Laws of Penal Evolution".

⁴¹ D. Garland, "Durkheim's Theory of Punishment: A Critique", p44 in *The Power to Punish*. D. Garland and P. Young (eds.). London. Heinemann. 1983.

⁴² D. Garland, *Punishment and Modern Society*, Oxford. Clarendon Press. 1990, p26. In fairness to Durkheim it should be said that his views on 'primitive' society and its 'evolution' become muted. By the time of his last published book, *The Elementary Forms of the Religious Life* trans. J. Swain. 2nd edn. London. Allen and Unwin. 1976, Durkheim sees far greater complexity in the life of tribal societies. On this see S. Lukes. *Emile Durkheim. His Life and Work*. London.

thought, either retributive or utilitarian theories as to the proper justification of punishment with or without reference to denunciation. As to which school, if any, should predominate, the answer is unclear as each have both their strengths and weaknesses, but it may prove possible to find one which most suits the sphere of inchoate crime. Hence the major schools will be discussed first, in order to establish the criteria they employ to justify punishment, before turning to the search for a theory which will suit the crimes under consideration.

Main Theories of Punishment

These theories can be divided into a number of groups depending on how they are perceived. They fall into one of either the forward-looking, backward-looking or mixed categories of justifications⁴³.

Retribution

Etymologically, retribution is in essence the repayment of a debt, but it is manifested in a number of guises. The theory sees criminal justice as primarily concerned with the punishment of offenders. At heart, though, the varying forms are all retrospective in nature. The earliest form of justification uses the individual's desert as its foundation, and is found in various

Allen Lane. 1973. pp159, 167, and 450 *et seq.* However the evolutionary frame was not abandoned completely.

manifestations of the *lex talionis*. The paradigm here is the biblical provision allowing the avengers to take a life in recompense for the life lost. Lacey, and most would agree with her, asserts that this is far from satisfactory in that, although it provides a system for determining the punishment inflicted on a murderer, there are cases which are not amenable to a mirror penalty⁴⁴. However, it should be remembered that the *lex talionis* was not always applied strictly - for example the Twelve Tables allow for monetary compensation by agreement between the parties. However, the *talio* principle also fails to take account of a concept central to the use of punishment, that being the infliction of a penalty solely on those who can be held to be responsible agents. There is no room for different degrees of punishment according to the level of wickedness displayed by the particular actor, which should be central to notions of justice, and the theory also fails to suggest why an individual should be punished. As a result of this, Lacey concludes that the *talio* system is not sufficiently sure a foundation upon which to build a retributive theory of justification.

She then turns to examine the notion of culpability to see if it can provide a sound basis for the acceptance of retribution⁴⁵. It has the advantage of following our preconceptions about the institution of punishment in that it equates culpability to blame, and blame to the

⁴³ N. Lacey, *State Punishment*. London. Routledge. 1988, p16.

⁴⁴ *ibid.*, p17.

⁴⁵ *ibid.*, p18.

appropriate level of punishment. However, as she indicates⁴⁶, this principle is also fraught with difficulties in that established criminal offences exist wherein the conduct cannot be described as blameworthy, and yet it is still punished. These include both regulatory and strict liability offences. Secondly, our current system of punishment leaves some aspects of human behaviour outwith the ambit of the criminal law insofar as they are kept within the private sphere even though they may properly be said to be morally blameworthy. If the culpability principle were adopted, such 'self-regarding' behaviour would become criminally liable⁴⁷. Both these criticisms arise from within the theory itself, but moreover it is unclear why the attribution of blame should lead to the principled infliction of punishment so unquestioningly. The culpability principle does not explain why we should use previous blameworthy conduct as sufficient reason to punish⁴⁸. None of the desert-based explanations satisfy Lacey sufficiently for her to accept retributivism as a justification for punishment⁴⁹.

However an approach based on guilt does figure strongly in the work of some retributivists. Perhaps none more so, according to Bean, than F.H. Bradley⁵⁰.

⁴⁶ *ibid.*, p19

⁴⁷ *ibid.*, p20.

⁴⁸ *ibid.*, p21.

⁴⁹ *ibid.*, p26.

⁵⁰ Bean, *op. cit.*, p13.

Punishment is punishment only where it is deserved. We pay the penalty because we owe it for no other reason; and if punishment is inflicted for any other reason whatever than because it is merited by wrong, it is a gross immorality, a crying injustice, an abominable crime and not what it pretends to be⁵¹.

Bradley clearly asserts the need for a connection between punishment and guilt, and thus only the guilty can justifiably be punished. When stated this way, the contrast between retribution and utilitarianism is clear. Whereas punishment can be a means to another end for a utilitarian, this can never be so for a retributivist. "Punishment can never be administered merely as a means for promoting another good, either with regard to the criminal himself or to civil society..."⁵². The link between punishment and guilt can be upheld on logical grounds, but also morally when punishment is interpreted as a facet of responsibility⁵³. This link is the most substantial stick with which retributivists can beat utilitarians, for, unlike retributivists, they will allegedly allow for the punishment of the innocent if it provides a means to a social end. Clearly utilitarians would not justify this practice in general. Bean, however, gives an example of the type of situation where utilitarians have justified such punishment; where a teacher punishes the whole class in order to maintain discipline where the true culprit cannot be identified.

These are not the only ways of assessing the retributivist position. It is commonly perceived as the payment of debts owed to society. This is

⁵¹ F.H. Bradley, *Ethical Studies* quoted in *ibid.*, pp26-7.

⁵² I. Kant, *The Metaphysical Elements of Justice*, in Bean, *op. cit.*, p13.

criticised by Walker⁵⁴ in that, although some crimes will fit this analogy, for example where society feels a murderer repays the feelings of insecurity and fear he engendered by serving his prison term, others will not. Most importantly for this discussion, inchoate crimes, especially failed attempts, do not fit this framework since there is no debt owed. Yet since these crimes are commonly seen as deserving of punishment, a more comprehensive theory which takes account of such crimes must be sought. Another theory often used within retributivism is that of annulment, whereby the punishment is seen as removing the crime. Again, in practice, this argument is not defensible. As Walker highlights, although the victim can be compensated they can never, for example, be 'unmugged'⁵⁵.

This view finds its source in Hegel but is criticised by Ten as being founded on the notion of compensation which, although sometimes valuable, does not have the same focus as punishment⁵⁶. These criticisms are based on an interpretation of Hegel in which punishment is claimed to wipe out the crime and restore the *status quo ante*. However it is possible to give the theory a different interpretation. Hegel's argument can be reconstructed as follows: the victim has certain rights which the criminal implicitly denies by virtue of his conduct; failure to punish the criminal amounts to admitting that the denial of the victim's rights was correct; punishment annuls the crime in that

⁵³ Bean, *op. cit.*, p14.

⁵⁴ Nigel Walker, *Why Punish?*. Oxford. Oxford U.P. 1991, p73.

⁵⁵ *ibid.*, p74.

it establishes that the victim had those rights. Thus punishment is a means of asserting the existence of those rights⁵⁷. A less extreme version of this appears in claims that punishment removes the unfair advantage taken by the criminal when he broke the law⁵⁸. However this presupposes that in each criminal act, the actor acts with the explicit intention of taking an advantage to which he is not entitled. Much criminal behaviour is accepted as being too spontaneous, and too much driven by passion rather than reason, to uphold this supposition. There are numerous arguments which can be used to explain retribution as a justifying principle, but it is not the only theory capable of making sense of punishment.

Utilitarianism

This theory forms the basis of a number of forward-looking arguments used to justify punishment but is mainly concerned with the reduction of crime. The classic Benthamite theory is one in which the pain and costs involved in punishing the offender are outweighed by the increase in 'happiness' caused by a reduced crime rate and increased security. Thus the threat and the infliction of punishment are justified⁵⁹. Deterrence is perhaps the most readily understood of the theories. It is utilitarian in that it uses both

⁵⁶ C.L. Ten, *Crime, Guilt and Punishment*, Oxford. Clarendon Press. 1987, pp38-9.

⁵⁷ D.E. Cooper, "Hegel's Theory of Punishment" in Z.A. Pelczynski (ed.). *Hegel's Political Philosophy: Problems and Perspectives*. Cambridge. Cambridge U.P. 1971 cited in Ten, *op. cit.*, pp39-40.

⁵⁸ Walker, *op. cit.*, pp75-6.

⁵⁹ Lacey, *op. cit.*, p27.

the threat of, and actual, punishment in order to reduce the incidence of crime and thereby promote the 'happiness' of the majority, albeit at the expense of the minority. The aim is to control action by recognising harmful conduct, and responding with the lesser evil of punishment.

Deterrence may be subdivided into two further strands; individual and general deterrence. Individual deterrence is the process by which the criminal is punished and finds the experience sufficiently unpleasant to deter him from repeating his crime. In practice, it seems that, whilst there is some value in punishment as a deterrent, overall other factors militate against it. These are known as labelling effects. Labelling theory holds that to punish criminals labels and stigmatises them, thereby making future adherence to the law more difficult for them. As Becker says,

“...deviance is *not* a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an “offender”. The deviant is one to whom that label has successfully been applied; deviant behavior is behavior that people so label.”⁶⁰

There persists a view that prison gives the criminal the best possible schooling in crime⁶¹, and research supports the view that while lawful occupations and opportunities tend to be closed to them, criminal ventures based on acquaintances made inside remain ever open⁶². General deterrence holds that the individual is punished not to deter him from committing crime in the

⁶⁰ H.S. Becker. *Outsiders. Studies in the Sociology of Deviance*. New York. The Free Press. 1963, p9.

future, but as an example to others. Both statistical evidence, common sense and personal experience are said to substantiate the deterrent effect of punishment⁶³. However, for the Kantian, this theory does commit the cardinal sin of treating the offender as a means to an indeterminate social end, rather than as an end in himself. The same reservations apply to deterrence theory with reference to the specific individual. However it can be argued from the utilitarian view that a strict approach should be taken whereby punishment is justified purely because of its good consequences⁶⁴. From this, it is a short step, admittedly not taken by all utilitarians, to recognising that punishment cannot therefore be confined to the guilty since situations may arise where punishment of the innocent would create sufficient good consequences to outweigh the clear demerits. Thus, for Ten, utilitarianism “is therefore committed to punishing the innocent person”⁶⁵. This he sees as a major reason for its rejection as a theory justifying punishment.

Rehabilitation has, over the course of this century, been the subject of many studies in order to assess the validity of its claims. Programmes aimed at the rehabilitation of the offender have covered many areas, from retraining to the more extreme measures of psychotherapy and even surgery⁶⁶, all with

⁶¹ “Thus man is *tamed* by punishment, but by no means *improved*; rather the opposite”. F. Nietzsche, *The Genealogy of Morals*, p216 quoted in Garland, *Punishment in Modern Society*, p75.

⁶² Cavadino and Dignan, *op. cit.*, p34.

⁶³ *ibid.*, p28.

⁶⁴ Ten, *op. cit.*, p13.

⁶⁵ *ibid.*

⁶⁶ Lacey, *op. cit.*, p30.

the aim of reducing recidivism. However the data collected does not seem adequately to support the utilitarian argument. Rehabilitation does appear to treat the individual offender as an end in himself and thus avoids some of the criticisms levelled at the general deterrence theory, but given the wide range of the practical manifestations of the desire to rehabilitate, it is potentially open to serious abuse if used as a repressive tool⁶⁷. The view of crime as a manifestation of non-willed action requiring treatment has made it less popular in modern times. It begins to take on the appearance, if not the reality, of one social group playing God with the behavioural characteristics of another group for the former's own, allegedly justified ends. However, rehabilitationist ideas date back into antiquity. For Plato, the law stood as physician to the morally sick offender⁶⁸. This is a more complex theory than retribution and deterrence, in that it involves considerations of the individual's social and mental welfare, and the long term effects of incarceration. The aim is, as ever it was, to cure offenders of their sickness.⁶⁹

Ideas of social protection can only justify some forms of punishment, and likewise approaches based on reparation or restitution seem suited, ideally, only to areas such as theft. Also it can be argued that compensation should truly function as an addition to punishment rather than a substitute but insofar as the punishment itself has a reparatory aspect, that can be

⁶⁷ *ibid.*, p31. There are echoes here of Foucault's theme of discipline and punishment.

⁶⁸ Plato, *The Laws*, s862.

⁶⁹ *ibid.*

justified on utilitarian grounds⁷⁰. Overall, the main retributivist criticism of the utilitarian theory is that it treats the individual as the means rather than as the end. This amounts to a claim that the individual has a right to be treated as an autonomous agent capable of making moral choices⁷¹. Lacey questions whether this actually makes sense. She concludes that the true position must lie somewhere between the two camps. It is wrong to say that actions against individuals can never be justified on the basis of the good they will do others, and equally it is wrong to ignore the individual completely in the interests of the common good⁷². However she does extract from this a central and true criticism of utilitarianism, namely that it ignores “the separateness of persons” in favour of focusing on the overall satisfaction produced⁷³.

Lacey feels the existence of mixed theories has arisen from the context of the difficulties faced regarding both prospective and retrospective theories. Perhaps the most famous proponent of a compromise theory is H.L.A. Hart. For him the general justifying aim of punishment is general deterrence, thereby placing him within the utilitarian school of thought. Institutions aimed at inflicting punishment are set up with deterrence and social protection in mind - aims which justify the institution's existence. However when he comes to discuss whom we are justified in punishing, the principle of retribution applies as a limitation on his utilitarianism. It is only justifiable

⁷⁰ Lacey, *op. cit.*, p35.

⁷¹ *ibid.*, p36.

⁷² *ibid.*, pp36-7.

to punish offenders for actions they have undertaken responsibly, for which they deserve punishment.

Denunciation

For von Bar, the true purpose of punishment is “active disapproval” of the criminal’s acts⁷⁴. Thus it matters not whether the criminal finds his punishment to be an evil, and if he rather treats it as a correctional benefit, this should not constitute grounds for changing the punishment in order to cause him actual suffering. In order to express disapproval, there must be an element of disadvantage to the criminal, otherwise there is no incentive to obey the law, but disadvantage and physical suffering are not synonymous.

This approach to the justification of punishment holds that penalties are justified because they express disapproval of the criminal’s actions. This approach can be held alongside one or other of the main theories, but some have asserted its role as the main justification for punishment⁷⁵. Walker cites both Durkheim⁷⁶ and Stephen⁷⁷ as proponents of this view, although, until recently, felt it had not been taken up by philosophers. The first to take up

⁷³ *ibid.*, p37.

⁷⁴ *ibid.*, p508.

⁷⁵ Walker, “The Ultimate Justification” in C. Tapper (ed.). *Crime, Proof and Punishment*. London. Butterworths. 1981, p109.

⁷⁶ Durkheim, *The Division of Labour in Society*, p62-3.

⁷⁷ *History of the Criminal Law of England, vol.2* in Walker, *op. cit.*, p110.

the challenge, according to Walker, was Feinberg⁷⁸, who argues that punishments stand in a class of their own on account of their symbolic significance⁷⁹. The expressive function of punishment is shown in four ways; (1) authoritative disavowal (whereby a nation can disassociate itself from the wrongful acts of a citizen by punishing them)⁸⁰; (2) symbolic non-acquiescence (whereby society ensures that it does not condone criminal behaviour by allowing some conduct to go unpunished)⁸¹; (3) vindication of the law (where punishment is used to reinforce the law's bite, for there is little point forbidding acts while simultaneously failing to punish the offender)⁸²; (4) absolution of others (by punishing one of a group of suspects, the guilt is concentrated on him and the others absolved)⁸³.

Walker criticises Feinberg's approach in that his choice of obscure examples illustrates the fact that punishments only sometimes function expressively, and indeed he accepts that Feinberg himself does not see sentences as uniformly expressive⁸⁴.

⁷⁸ J. Feinberg, *Doing and Deserving*, Princeton. Princeton U.P. 1970.

⁷⁹ *ibid.*, p98.

⁸⁰ *ibid.*, pp101-2.

⁸¹ *ibid.*, pp102-4.

⁸² *ibid.*, p104

⁸³ *ibid.*, p105.

⁸⁴ Walker, "The Ultimate Justification", pp112-3.

Feinberg does not appear to see denunciation as the overall justification for punishment, but rather as an adjunct to the other central purposes of punishment⁸⁵. However, Walker pinpoints Gross as a proponent of the validity of the expressive theory of punishment⁸⁶. Gross sees the criminal sanction not as a deterrent, but rather as a means of maintaining standards in the face of violations although in practice it is unlikely that the public are greatly influenced by any claimed denunciatory effect of punishment⁸⁷. However it is perhaps worthwhile considering whether such an expressive function can be used to justify the punishment of inchoate crime. The argument in favour of punishment as denunciation relies on the need to restate, as firmly as possible, the authority of the legal system and its power to restrain the individual where appropriate. Here the individual has acted in some way which the law deems inappropriate and there is felt a strong need to express institutional disapproval of those acts. This disapproval can go beyond that which, on an *ex facie* examination of the conduct, is truly merited by the seriousness of the crime. Such a response is felt to be justified because the need to uphold the law is paramount, and if individuals are permitted to act in certain ways without fear of sanction, the law is thereby weakened. A law more honoured in the breach than the observance is, in effect, no law at all. From this argument it can be seen that a denunciatory justification does fit those crimes described as inchoate,

⁸⁵ *ibid.*, p113

⁸⁶ *ibid.*

⁸⁷ *ibid.*, p121.

although perhaps alone it is insufficient to justify the level to which such crimes are punished.

The Harm Principle

This principle is often discussed in relation to the punishment of complete crimes. It is defined by Gross as "...an untoward occurrence consisting in a violation of some interest of a person"⁸⁸. The essence of the concept is that the intentional creation of harm or risk is the trigger for criminal liability. As a whole, inchoate crime can be viewed as a continuum within which attempts clearly cause the most harm. There can be no doubt that in many cases of attempt, there will have been the intentional creation of some harm, although clearly less than would be caused by the complete version of the crime. In incitement too it can be argued that encouraging someone to commit a crime causes a level of moral harm which society would find unacceptable, although this argument is much weaker than that raised for attempted crimes. It can be said to be both morally wrong and harmful to the incitee to put temptation in their way. Whether the inciter is a causal agent and therefore morally responsible for the harm he has in mind is an initially plausible argument, but it must be remembered that for the inciter to function as the causal link which brought about the harm, there must be actual harm. In incitement, the real harm is only potential, except in the weak

⁸⁸ Gross, *op. cit.*, p115.

sense in which incitement can be said to cause harm. However in relation to conspiracy, it is harder to say that any harm has been caused. Is it inherently harmful to society for a number of individuals to meet and privately agree to commit a crime at a later date? It seems clear that there is little, if anything, which can properly be called harmful conduct. In the light of this, the harm principle is perhaps not the best guide in seeking a justification for the punishment of inchoate crime as a whole.

With these philosophical stances in mind, we can now turn to the more practical aspects of how the punishment of the inchoate crimes is, or should be, justified.

Justification for the Punishment of Inchoate Crimes

Incitement

All three inchoate offences can be justified along the lines that prevention is better than cure. It has been noted that

Without regard to whether it is correct to say that solicitations are more dangerous than attempts, it is fair to conclude that the purposes of the criminal law are well served by the inclusion of the crime of solicitation within the substantive criminal law.⁸⁹

⁸⁹ LeFave and Scott, *op. cit.*, p488.

If conduct which as yet does not amount to a full offence can be caught while still at the inchoate stage, this will further the common good. This applies in varying degrees to all three offences, although conspiracy also has a more political aspect to the justification used for its existence. The argument in relation to incitement is that the criminal has shown himself to be dangerous to some extent. However, arguments based on social protection can also be used here to justify punishment to a degree in the name of protecting those who are the targets of incitement from being turned into criminals. It is clear, though, that the type of conduct involved (persuasion, encouragement, advice) is all at a very early stage in relation to the commission of any crime, and therefore it is harder to justify the imposition of punishment. It can also be argued that the degree of harm caused by such acts is minimal, if present at all since it is not necessary for the incitee to act upon the encouragement.

It is, however, possible to formulate a more political argument for the criminalisation of incitement, in that such persuasion towards crime can be aimed at an individual or a group, and can also be disseminated through the press. Thus it could be seen as a useful weapon against both propaganda and malicious conduct designed to arouse unrest among larger groups. Both of these arguments, if used, would lead to justification of incitement under the guise of social protection.

Conspiracy

In order to safeguard its legitimacy, the law must provide an adequate justification for its actions. Thus each sanction must be supported by a convincing rationale for its existence. The offence of conspiracy has proved complex, not least because of the ambiguous nature of the crime itself - indeed Sayre describes it as "a veritable quicksand of shifting opinion and ill-considered thought"⁹⁰.

The heart of this rationale lies in the fact - or at least the assumption - that collective action toward an antisocial end involves a greater risk to society than individual action toward the same end.⁹¹

Conspiracy is thus structured so as to allow for the easier prosecution of groups which have plotted to effect proscribed activities and indeed this has often been used as a significant government weapon against the proliferation of controversial political associations. This means that it is more likely that members of the group will be penalised for what they have said or the identity of their associates than for their actions and is a cause for concern among civil libertarians, especially in the United States where it is seen as a breach of first amendment freedoms⁹².

⁹⁰ Sayre, "Criminal Conspiracies", p393.

⁹¹ "Developments in the law - Criminal Conspiracy". 72(1959). *Harvard Law Review*. 920-1008, 923.

⁹² P. Johnson, "The Unnecessary Crime of Conspiracy". 61(1973). *California Law Review*. 1137-88, p1139.

As with all inchoate offences, the rationale for punishment only exists within preventive and reformatory theories of punishment. It cannot function within retributive systems since they rely on inflicting punishment in relation to harm caused. Here there is no harm against which to measure the punishment and Snyman feels this is why inchoate offences do not figure in early systems where the *talio* principle is strong⁹³. However, this is not the only theory advanced to support the existence of conspiracy as a crime. Explanation is also sought within the general concept of inchoate crime as preventive action without reference to the features unique to this particular offence and also as a supplement to liability for attempts in catching behaviour at a yet earlier stage. Thus there is some controversy as to whether punishment of conspiracy can be justified, and if so which theory should triumph.

Inchoate crime theory

This approach takes as its starting point the nature of conspiracy as an inchoate offence together with incitement and attempt. All three aim to prevent crime by penalising conduct while the prospective offence remains unconsummated. Thus the criminal law takes a long term view of the effect their actions will have should the parties be allowed to continue, and on the basis of preventing further harm, finds its rationale for early intervention.

⁹³ C.R. Snyman, *Criminal Law*, 2nd edn. Butterworths. Durban. 1989. pp278-9.

This approach, where the ultimate objective has yet to be effected, could conceivably be borne out by the facts of a case, for example where thieves are apprehended outside a building with tools clearly intended for the implementation of their criminal purpose. However the majority of cases do not fit into this theory since most conspiracies are brought to light only after the crimes involved have been partially or fully completed. In these cases, the only preventive effect of prosecution for conspiracy would be the deterrent effect associated with any legal sanction.

Collective action theory

This theory assumes that some actions, although harmless and insignificant when contemplated by an individual, become dangerous and worthy of punishment when a group is involved⁹⁴. The illogicality of this rationale is highlighted by Gillies who feels that the real crux of the argument should be the character and consequences of the act, not the number of participators⁹⁵. By imposing liability for conspiracy, the courts have attached great significance to the fact of agreement⁹⁶. This is the element which distinguishes individual from collective action as it is seen as the step towards completion of the crime which removes the need for the proximity

⁹⁴ *Quinn v. Leathem* [1901] A.C. 495, 530.

⁹⁵ Gillies, *op. cit.*, p683.

⁹⁶ Smith and Hogan, *op. cit.*, p303.

required for an individual's non-consummate actions to amount to the inchoate offence of attempt.

A number of arguments are used to justify the supposition that an act contemplated by a group is intrinsically more dangerous than the same act contemplated by an individual. Often these arguments can be reduced to the claim that it is less likely that every member of the group will hear the voice of his conscience and withdraw before the conspiracy is put into effect. It is supposed that the existence of a group in these situations provides mutual support and encouragement⁹⁷, and that the increase in numbers allows for a more efficient division of labour and therefore a greater prospect of success and the infliction of greater harm. However, cases can be constructed where one resolute individual will be seen as substantially more socially dangerous than two vacillating conspirators. Arguments can be advanced on each side.

Attempts

The question of justifying the punishment of attempts, and of the appropriate level of punishment in relation to the completed crime are both somewhat vexed topics.

The purpose of punishing attempts

⁹⁷ Ashworth, *op. cit.*, p410.

The clearest argument used to justify the sanctions imposed on attempters emphasises its preventive and deterrent role in the criminal law. Whether the aim is rehabilitation, incapacitation, or deterrence, there is good reason for punishing attempts in furtherance of crime prevention. There is precious little point in allowing the criminal to attempt his contemplated crime without fear of reprisal. If there is a sanction for both successfully and unsuccessfully carrying out his intentions, the potential criminal is given greater pause for thought and a more forceful reason to desist at an earlier stage. Few criminals can conceivably proceed to effect their intended course of action with failure in mind as the end result. However, many must be aware that failure is a possibility, and thus as the threat of punishment hangs over an attempt as well as a completed crime, this can only add to the overall deterrent effect of the criminal law⁹⁸.

The appropriate level of punishment

The question often asked is whether or not attempts deserve as severe punishment as is meted out for the full offence. The answer most commonly given in legal practice is that attempts merit only a lesser degree of punishment⁹⁹, whereas a great many theorists hold to the view that both should be punished to the same extent. Rehabilitation theory favours equal

⁹⁸ M. Davis, "Why attempts deserve less punishment than complete crimes". 5 (1986). *Law and Philosophy*. 1-32, pp5-6.

⁹⁹ Note, however, s846 of Title 21 of the United States Code, which imposes the same punishment for the attempted version of the crime as for the complete version.

punishment because here the aim is to prevent dangerous acts by correcting the offender's dangerous behaviour¹⁰⁰. Unless the failure stems from a change of heart, it is unlikely that the attempter is any less of a social danger than the successful criminal and therefore the aim, and so the level, of punishment should be the same regardless of success or failure.

Duff highlights the subjective argument that attempts should be punished as severely as completed crimes because there is no moral difference between the two.

Justice requires that criminal liability should depend on choice, not chance; on what an agent freely and responsibly does, not on what happens as a matter of chance; on what is within her control, not on factors lying beyond her control.¹⁰¹

This, he feels, requires us to look at the subjective aspects of the attempter's behaviour because it is that which he has chosen to do which truly describes the character of his actions. Factors outside his control, which determine the objective quality of his acts, should have no bearing on liability. He uses that example of two actors - one fires and kills his victim, the other fires and misses because his victim moves. Subjectively both acts have the same murderous quality¹⁰². However the law clearly does distinguish between the two because it imposes different levels of punishment and to justify this,

¹⁰⁰ *ibid.*

¹⁰¹ Duff, *Intention, Agency and Criminal Liability*, p187.

¹⁰² *ibid.*, p188.

Duff feels it is necessary to show that the different objective aspects of each act make a difference in terms of the actors' culpability. As he has shown, the subjective stance highlights how an attempt does not differ from a complete crime, and argues that is the limit of its relevance to guilt.

He feels however that our reaction to the objective aspects of the act provide the reason for the lesser punishment of attempts.. The natural and proper reaction to an attempt, for example to murder, is relief that the final evil of an intentional death has not been realised. The fact of failure matters, at a moral level, to both the actor, and to society at large¹⁰³. It is this reaction which the law reflects in its gradation of punishments. To punish attempts and complete crimes equally would be to deny the validity of this moral response. This, he feels, is not to reject the subjective argument that liability cannot be allowed to depend on chance, but instead to acknowledge that the subjective and objective aspects of actions cannot be separated wholly one from the other. This argument has two central attractions. It both explains current practice and accords with the instinctive approach to this issue. That is that, in order to attach due opprobrium to the full offence, an attempt must be seen to be punished more lightly. This does not remove the deterrent effect of punishing attempts, but introduces a welcome sense of proportion into the law and seeks to hold to an important philosophical insight, namely the autonomy and responsibility of the human agent.

¹⁰³ *ibid.*, pp189-91.

For a deterrence theorist the purpose of punishment is to make the prospect of committing an antisocial act as unappealing as possible. If attempts were to be punished less severely, these would become less unattractive, thus defeating some of the purpose of the law. Traditional retributivists have tied punishment to the gravity of wrongdoing, the paradigm being the *talio* system. Wrongdoing was seen as the evil intention and therefore primarily as a moral wrong. The intention was paramount rather than the particular outcome and thus the actor was just as blameworthy morally for intending to rob a bank and succeeding, as for intending and failing. Punishment was tied to moral blameworthiness and thus attempts and completed crimes held punishable to the same degree. However Davis feels that this represents an older view of retributivism and that modern proponents take a different approach¹⁰⁴. This approach focuses on the loss involved, either to the victim or to society in terms of the loss of security and, although he feels it would allow some attempts to be punished to a lesser degree, he feels it is unsatisfactory in that it does not explain why an attempt creates less individual or social harm than a complete crime.

Davis does seem more interested in what he sees as a third form of retributivism which measures the degree of wrongdoing by reference to the

¹⁰⁴ Davis, *op. cit.*, pp6-7.

unfair advantage the criminal has seized in breaking the law¹⁰⁵. He proceeds to apply it to the law of attempts by asserting that retributivism presupposes a reasonably just legal system. He does so because he sees retribution as setting out a system of just punishment, which would require to be grounded in a just legal system. The important point here is that a just legal system protects each of its subjects from the somewhat Hobbesian fear of what others may do if unchecked. This can only function within a reciprocal system where everyone does or refrains from doing that which the law requires, and this reciprocity can be assured in a number of ways. Davis feels that a truly 'good' person will conform to these requirements because "doing otherwise is unthinkable"¹⁰⁶ and a morally self-conscious agent will conform because to behave otherwise would be to unfairly prejudice those who behaved properly. The third reason for conforming to the law is the fear of punishment, but this is only motivation for a select group of potential criminals. The unfair advantage gained by breaking the law only arises because the law itself creates this reciprocal arrangement which then allows room for a form of cheating whereby the criminal exploits the advantage while relying on others to conform.

Davis sees taking this advantage as comparable to buying a licence to do the act in question¹⁰⁷. Imagine, he suggests, a society in which the

¹⁰⁵ *ibid.*, pp9-15.

¹⁰⁶ *ibid.*, p10.

¹⁰⁷ *ibid.*, pp12-13.

authorities use an auction to sell a specified number of licences or advance pardons. The price of these licences would equate to both the degree of unfair advantage taken by the criminal and the appropriate level of punishment, and thus crimes could be ranked. The number distributed would reflect the level of incidents of that particular crime which the society was prepared to tolerate, and licences for the more serious crimes would be more limited. He also conjectures the emergence of what he calls “protective associations”¹⁰⁸ which would aim to buy up and not use as many licences as possible in order to restrict the number available for true criminals. He then moves to consider the position of attempted crimes within this framework.

He feels that if an attempt deserves less punishment than a complete crime, the licence to commit an attempt should likewise be worth less, but the question remains as to the content of a licence to attempt¹⁰⁹. He maintains that the crucial point about an attempt is that for some reason the harm which characterises the complete crime fails to arise. This leads him to the conclusion that attempt is primarily a crime of *mens rea*¹¹⁰ and, within that, requiring an intent to bring about the *actus reus* of the complete crime. Thus he feels that a licence to attempt must identify the *actus reus* of the complete crime and then excuse the holder from intending and beginning to do the act,

¹⁰⁸ *ibid.*, p14.

¹⁰⁹ *ibid.*, p15.

¹¹⁰ *ibid.*, p18.

but not excuse him for bringing about the characteristic harm of the complete crime.

He recognises that several objections have been raised against this theory, one of which is that licences for attempts would in reality be worth nothing. Primarily because it would constitute no more than a licence to fail, and since no self-respecting criminal intends to fail to bring about the crime in question, no-one would want one or bid for one, and therefore it would be worth nothing in an auction¹¹¹. Davis counters this by raising the issue of supply and demand. The criticism relies on the idea that there are sufficient licences to commit the complete crime for all those who want one, and that the licences are circulating at a price the potential criminal can afford. This would clearly not be the case since society could neither afford nor tolerate an indeterminate number of instances of every crime equal to the number of so disposed criminals. Thus, he argues, there will always be fewer licences to commit the complete crime than there are criminal desirous of one and hence many would feel that it would be better to have a licence to attempt than none at all. If they do fail, and assuming they have thought rationally about their intended actions they must recognise this as a possibility, they will be covered by the licence to attempt. He also goes on to postulate a further reason why a criminal may wish to buy a licence to attempt¹¹². If such a licence is to be cheaper than a full licence, it may appear desirable to the potential criminal to

¹¹¹ *ibid.*, pp20-1.

buy the appropriate one even though he already has the full licence. If caught at the attempt stage, he can then trade in his cheaper licence to attempt in order to escape, rather than wasting a valuable full licence which would be better used at a later date to excuse his success rather than a failed attempt. This leads him to feel that there should be a market for licences to attempt, especially if they are cheaper than full licences¹¹³, which then opens the debate as to whether they would necessarily be cheaper.

This brings him to the second objection raised to his theory, that being that a licence to attempt would be worth precisely the same as a full licence. If this objection is valid it would mean that attempts should be punished hand in hand with the complete crimes. The objection gives an important role to the protective associations. They are seen to be as concerned to buy up (and so take out of circulation) licences to attempt in much the same way as licences for the complete crimes. They do not want potential criminals to try their hand at a range of crimes because they fear attempts as much as they do successes. Thus they would raise the price of attempt licences at auction to be roughly equal to that of full licences. However, Davis argues that there will always be more licences on the market than the protective associations can buy. This is because the auctioneers will look at the level of crime produced by the last issue of licences in order to determine the number of new licences to issue. The number bought up by the associations will not have resulted in

¹¹² *ibid.*, p22.

¹¹³ *ibid.*, p23.

criminal activity and thus the auctioneers will be happy to issue that amount again, before they consider how many more they should issue in relation to the acceptable level of crime thereby tolerated¹¹⁴. It should be noted that this argument seems to defeat its own purpose - if this is so, surely it removes the reason for the existence of the associations. This would mean that irrespective of the number they buy up, the auctioneers will always issue as many extra as they feel society will tolerate. What then is the point of buying them up in the first place? Thus Davis concludes that attempt licences will always be useful as an alternative, although clearly not as useful as a full licence, and thus the price of the former should normally be less than that of the latter.

He then turns the application of this theory to our own society¹¹⁵. He sees the attempter as having risked committing the harm envisaged by the full offence even though he did not actually commit it, and therefore he is deserving of an punishment. This is because risking the harm is a means of taking an unfair advantage over law abiding citizens, but deserves less punishment because he has not taken such an advantage as the successful criminal.

Duff raises a number of objections to Davis' theory¹¹⁶ as to whether it will lead to a complete ranking of crimes in relation to their seriousness. One

¹¹⁴ *ibid.*, pp23-5.

¹¹⁵ *ibid.*, pp28-32.

problem he foresees is that there are two classes of bidder at the proposed auction - the potential criminal and the protective association¹¹⁷. Each of these bring their own particular ranking of crimes with them; the potential criminal will rank crimes in terms of the potential for satisfaction or gain, whereas the association will use the degree of threat posed to an interest as its criterion. On this basis, it is clear that the association will view attempted murder as a higher ranking crime than attempted theft since preservation of life ranks above that of property. However, it seems to me likely that many criminals would view attempted theft as a more desirable crime to commit since they would be less likely to be apprehended and even if they were, the penalties would be less severe. Thus the associations might bid more for a licence covering attempted murder, while the more realistic criminal might see a licence for attempted theft as more inviting. Since the two groups use differing criteria, it is difficult to see how this can produce an overall ranking of all crimes. It may produce a ranking of the different crimes within any one type of criminal activity, but a further theory would, according to Duff, be required to establish how different types of crimes ranked as against each other, and therefore how they should be punished proportionately.

¹¹⁶ R.A. Duff, "Auctions, Lotteries, and the punishment of Attempts". 9(1990). *Law and Philosophy*. 1-37.

¹¹⁷ *ibid.*, pp9-10.

Davis' theory has also been subjected to attack by Andrew von Hirsch¹¹⁸. He sees the approach discussed by Davis as emanating from a theory of desert which balances benefits and burdens by imposing punishment in order to restore the imbalance created by the unfair advantage taken by the criminal. He questions how much guidance the benefits-burdens theory gives when deciding the *quantum* of punishment in a given case. Davis' argument focuses on the unfair advantage taken by the criminal when he fails to restrain his own conduct while benefiting from the restraint exercised by the rest of society. The *quantum* of punishment should reflect the extent of the advantage thus taken, but since this cannot be measured directly, guidance should be sought indirectly from the price of a licence to commit the crime in question in the hypothetical auction. However the licence analogy is something of a puzzle to von Hirsch; licences, in his eyes, are permissive (in return for the payment of a fee, the licensee may legitimately engage in the conduct in question), whereas the criminal law is both prohibitive and condemnatory (conduct is made subject to a sanction as an indication of the inappropriateness of such behaviour, and so the actor ought not to engage in the conduct even if he would be willing to pay the price for so doing). In the light of this, von Hirsch feels it would be very strange if the analogy of a licence were to help clarify the question of the distribution of punishments¹¹⁹. When inspected closely, he feels that the model Davis

¹¹⁸ von Hirsch, A. "Proportionality in the Philosophy of Punishment: from "Why Punish?" to "How Much?". 25(1991). *Israel Law Review*. 549-580, at pp554-9.

¹¹⁹ *ibid.*, p555.

advocates is unsatisfactory in a number of respects, one of these being the shift in the meaning attached to 'advantage' in later versions of this theory. He maintains that earlier proponents of this view were keen to point out that the benefits accruing to the offender and the burdens imposed on the lawful were not to be taken in a literal sense¹²⁰. The advantage lies rather in the freedom of action which the criminal gains. Von Hirsch's criticism of Davis' version of the unfair advantage theory is that the auction model presupposes exactly that literal advantage which earlier advocates tried to exclude¹²¹. He also queries the ranking of crimes that would result from an auction model¹²². The seriousness of a crime is often related to its harmfulness and the degree of culpability involved in its commission but Davis prefers the auction model as a simpler means of ranking crimes. However, for von Hirsch, the auction model provides a different standard for evaluating the seriousness of a crime, which in turn stresses what he feels to be an alien feature of criminal conduct. The ranking of the crime will depend on the offenders' bids for licences, and these will reflect their assessment of how profitable they expect the conduct to be, rather than any measure of the harm likely to be caused. Thus a licence to steal a substantial sum of money would be more attractive, more expensive and therefore the crime would be of a higher ranking than, say, aggravated assault which would seem less appealing. This does not reflect the way most people would view the two

¹²⁰ *ibid.* He cites Jeffrie Murphy in his *Retribution, Justice and Therapy*. London. Reidel. 1979 as a prime example.

¹²¹ *ibid.*, p556.

crimes. The interest violated by aggravated assault (the victim's physical safety) would be deemed more important than the financial interest violated by the theft, and so most commentators would view the assault as the more serious crime.

Thus von Hirsch disagrees with the auction model in relation to the provision of a grading of offences since it leaves the seriousness of the crime dependent on the size of bid the offender is prepared to make, which in turn depends on his view of the profitability of the conduct involved. He concludes that some crimes can indeed be conceived of as taking an unfair advantage over others. In this category he would place such crimes as tax evasion which do not directly injure anyone else but can be seen as taking a benefit to which the offender is not entitled. He has refused to pay his own tax but continues to reap the benefits of others' compliance by way of the services he receives. However, tax evasion is hardly the archetypal criminal offence and to explain more straightforward offences this way involves placing considerable strain on popular conceptions of their relative seriousness¹²³.

Questions relating to the appropriate level of punishment for attempted crimes inevitably raise issues covered in discussions of the proper role for the result of a crime in its punishment. This area focuses on whether

¹²² *ibid.*

¹²³ *ibid.*, p559.

the element of luck (often termed 'moral luck') involved in whether the outcome is criminal or not should have any bearing on the degree of culpability imputed to the actor. The area is of general application and will be considered as such before reference is made to attempted crimes in particular. Richard Parker takes up discussion of this area in an often cited article¹²⁴. He illustrates the effect that chance occurrences can have on the final outcome of an act with a memorably 'exotic' (to borrow his phrase) example. He chooses the fate of Rasputin. We are told that his captors poisoned, shot, bludgeoned, stabbed and castrated their victim, bound his body, wrapped it in cloth and dumped it into a frozen river. The result of this was the death of Rasputin, but not, as one might suppose, as a result of his injuries, for when the body was found, it was clear he had partly freed himself, and had died of drowning. In Parker's example we are asked to imagine a further twist to the tale; that the victim actually proved sufficiently hardy to survive the ordeal¹²⁵. Parker feels this chance occurrence would obviously have no effect on the intentions of his captors, nor would it effect their conduct since they had done all they felt necessary (and, arguably, more) to be sure of his death. Thus, with no alteration to the intentional or conduct-orientated aspects of the offence, how could it be said that the victim's survival, due solely to his own strength and against all the odds, should diminish the seriousness of the offence charged against his captors? Yet, as Parker notes,

¹²⁴ R. Parker, "Blame, Punishment and the Role of Result". 21(1984). *American Philosophical Quarterly*. 269-76.

¹²⁵ *ibid.*, p269.

this is exactly what would happen in virtually every Anglo-American jurisdiction¹²⁶. Penalties for aggravated assault or attempted murder can be extremely punitive, but these options available to the court in the imagined example are as nothing compared to the possible penalties for murder, especially in the United States.

Parker formulates this problem in general terms;

On what rational grounds can we proportion punishment to the results of an actor's conduct when those results are largely or entirely beyond the actor's control?¹²⁷.

However, in practice, those results - the harm caused - form a major part of the method used to assess the seriousness of the crime and therefore the severity of the punishment¹²⁸. He feels there is a connection between this concern with 'harm' and some of our shared moral intuitions. Many would think it pointless to punish someone who has caused no harm, since there is nothing for which to punish him. *Vice versa* it is clear that if the actor has caused some harm, there is a reason for his punishment - the causation of the harmful result. He also maintains the existence of a link between criminal law and blameworthiness and finds it less than surprising that most of us would be content to blame an actor who causes harm more than one who does not. He feels that an actor's blameworthiness and his chances of being punished

¹²⁶ *ibid.*

¹²⁷ *ibid.*

should if possible go hand in hand but thinks "...it is false that results are generally relevant to either one's blameworthiness or his punishability."¹²⁹.

Again illustration is provided in an imagined situation¹³⁰. He envisages a situation where two friends (I shall call them F₁ and F₂) go to a party and become very drunk. They discover two loaded rifles belonging to their host and decide to see who has the best aim using the street lamp outside the window as a target. Each try several times without hitting the lamp, but one of F₁'s shots ricochets and unfortunately fatally strikes a passer-by whose presence was unforeseen by either actor. Parker examines the conduct of both F₁ and F₂ and feels that "given the similarity of (their) conduct, it seems perfectly appropriate to claim equal blameworthiness on each of (their) parts"¹³¹. For him this argument is proved by the fact that, had it been unclear at first whose bullet had done the deed, most commentators would still have been content to apportion blame equally between them. This is so because there is no morally relevant difference between the two - the fact that one actor killed the passer-by and the other did not is purely a matter of chance, since both were involved in conduct which could easily have led to that outcome. "Hence (they) are equally blameworthy despite the unequal results of (their) conduct"¹³². Opponents

¹²⁸ *ibid.*, p270.

¹²⁹ *ibid.*

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² *ibid.*

of his view would treat these two actors rather differently. He paraphrases their argument in saying that here, F₁ is to be blamed more because he is to blame for more. However, Parker feels this argument is flawed; to say that F₁ is blameable for more because he has caused more in the way of a result is merely misleading, whereas to say that someone who is caused more of a result is more morally blameworthy is simply not true¹³³. A second interpretation of the opposition's argument involves separating the actor's conduct from the results and holding him blameworthy for both, thus adding up to a greater level of blameworthiness than the actor who did not cause the results. Again, Parker rejects this because he feels an actor can only be punishable within the criminal law, and held to be blameworthy, for his conduct (encompassing acts and circumstances), not for the consequences that flow from it. Even though he knows an event is underway, A recklessly fires towards the grandstand of a stadium narrowly missing the crowd, but fortunately his shot harmlessly finds an inanimate target. B does much the same, but on a day when he knows the ground will be empty. However a custodian is patrolling the area and is shot and killed. Thus B has caused the greater degree of 'result' but it requires an elastic imagination to declare B more blameworthy than A. This highlights the criterion Parker would rather use to assess the existence and degree of blameworthiness and hence punishment, that being the risk of harm created by the actor's conduct.

¹³³ *ibid.*, pp270-1.

In the examples he uses, Parker feels that each actor could be said to have caused the harm and so be guilty by misfortune; likewise it is possible to be innocent of the complete crime by good fortune¹³⁴. It is into this latter category that Parker puts those attempts where the actor has done all he can to achieve his result. If the failure of the attempt is purely a matter of chance and does not depend on any factor which could be said to be in the actor's control, then he is as blameworthy and should be as punishable as the successful criminal¹³⁵. The only possible reason for punishing them differently requires that the element of luck which determines exactly what result is achieved be morally relevant, and Parker has already dismissed this argument. He feels that

...if a given punishment is the just dessert for a completed crime, then no less a punishment is the just dessert of at least some attempts to commit that crime¹³⁶.

Equally, were there to be a difference between the punishment of each (in other words, were the attempter to be punished less) the successful criminal would in effect be punished beyond that which he deserved since they are equally blameworthy.

Parker anticipates that some readers may find the argument strange and seeks to avoid this conclusion¹³⁷. Any perceived strangeness in his

¹³⁴ *ibid.*, p272.

¹³⁵ *ibid*

conclusion as to punishability and moral luck is, he feels, due to difference in the underlying concept which his theory employs. He explains it as follows; it is the creation of risk rather than the results of conduct that make it a fit subject for punishment. This entails a change in the perception of what it is that makes a crime, since it removes from the ambit of 'crime' anything which is a result of the conduct rather than a part of it. Whatever the merits, or need for this conceptual change of heart, there is a clear appeal in the view that luck should have no place in the criminal law. However Parker is not alone in discussing moral luck or the relevance of factors outwith the actor's control on his responsibility for them.

Thomas Nagel has also considered the question. According to him,

(p)rior to reflection it is intuitively plausible that people cannot be morally assessed for what is not their fault, or for what is due to factors beyond their control.¹³⁸

He feels that when someone is blamed for their actions, it says not only that the actions themselves are bad things, but that he too is 'bad'. Further, without really knowing why, it is commonly felt that we should not assess someone at a moral level for acts (good or bad) which are not under the actor's control. Thus an involuntary movement, physical force or ignorance of the attendant circumstances will all excuse the actor from becoming the

¹³⁶ *ibid.*

¹³⁷ *ibid.*

¹³⁸ T. Nagel, *Mortal Questions*. Cambridge. Cambridge U.P. 1991, p25.

subject of moral assessment. But, as Nagel remarks, there are many other external influences over which we have no control which affect the outcome of our actions, and these broader influences are generally not thought to excuse liability¹³⁹. Our actions, and so that which is also the subject of any moral assessment, is always to some extent determined by external factors. There is a moral distinction between the crimes of reckless driving and manslaughter, but Nagel points out that the actor will only be guilty of, and morally judged for manslaughter if by chance a pedestrian happens to be in the road when he runs the red light¹⁴⁰. He then formulates this into a general statement; where a significant part of the conduct in question depends on factors outside the actor's control and yet he is still morally judged, the situation can be classed as one of moral luck¹⁴¹. However, this suffers from the possibility of infinite application. If control over all significant factors is applied uniformly, then most natural moral assessments will be flawed because control will be found to rest with other factors rather than the actor.

He sees four ways in which situations can be subject to luck¹⁴². The first he calls constitutive luck, by which he means the actor's personality, including his inclinations, moods and capacity. This is followed by luck which arises from the types of circumstances, problems or situations faced,

¹³⁹ *ibid.*

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*, p26.

luck in the way the actor had been shaped by earlier circumstances, and finally luck in the way the chosen course of action turns out. It is this final category which he chooses to examine first, and it should be remembered that here, luck can equally be good or bad. In this category Nagel would include such cases as a lorry driver who accidentally runs over a child. Here, if he has been even slightly negligent in checking his brakes, the situation will become one of moral bad luck, for the negligently maintained brakes will remain constant while the factor of a child in the road causing sudden, heavy braking is something over which the driver has no control¹⁴³. The same holds as the degrees of negligence rise; if a driver is well over the limit and swerves onto the pavement with no unfortunate results, he may count himself lucky that there were no pedestrians in the vicinity. Had someone been walking down the pavement and been injured or killed, he would have been liable for those results, yet the difference between these cases is purely attributable to the element of luck involved. This luck is determinant of whether the actor and society judge him morally accountable for reckless drunken driving, or for culpable homicide in situations where the intended actions of the actor were the same. Thus the degree of his culpability comes to depend on matters wholly outwith his control¹⁴⁴. If the situation is one where the appropriateness of the decision taken is uncertain, Nagel feels it must be tempting to see it as irreproachable given what was known at the time no

¹⁴² *ibid.*, p28.

¹⁴³ *ibid.*, pp28-9.

¹⁴⁴ *ibid.*, p29.

matter how things may turn out¹⁴⁵. However, he disagrees with this; when someone makes a decision in this type of situation (one of his examples is Chamberlain's decision to sign the Munich agreement) he takes his 'moral position' in to his own hands because the way things will turn out will determine the character of his earlier decision¹⁴⁶. It is possible to assess morally the decision in the light of what was known at the time, but this gives, he feels, less than the whole picture.

If Hitler had not overrun Europe and exterminated millions, but instead had died of a heart attack after occupying the Sudetenland, Chamberlain's action at Munich would still have utterly betrayed the Czechs, but it would not be the great moral disaster that has made his name a household word.¹⁴⁷

However Nagel concedes that it is sometimes difficult to foresee the outcome clearly; the decision can be assessed in one way before the event, but another interpretation must wait for the events to unroll themselves first because they will determine the colour of the actions.

The same degree of culpability...in intention, motive, or concern is compatible with a wide range of judgements, positive or negative, depending on what happened beyond the point of decision¹⁴⁸.

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.*, p30.

¹⁴⁷ *ibid.*

¹⁴⁸ *ibid.*

Further, he denies that these judgements are the expression of a fleetingly held attitude, rather seeing them as genuine moral judgements. He takes this from the fact that we can say in advance how the moral judgement of the decision will depend on the results¹⁴⁹. His example is as follows; if a parent leaves the bath taps running with the baby in the bath, they will realise as they rush for the bathroom that if the baby has drowned, they will have done something dreadful, whereas if the baby is as still alive, at most they will have been careless¹⁵⁰. This hypothetical prior judgement can be made as easily by an observer as by the actor. Nagel admits that for those who see responsibility as a facet of control, "all this seems absurd"¹⁵¹ - how can the degree of culpability depend on whether or not a child gets in the path of the car? It requires that actors are held responsible for both their own actions and any interventions of fate.

If the object of moral judgement is the *person*, then to hold him accountable for what he has done in the broader sense is akin to strict liability, which may have its legal uses but seems irrational as a moral position.¹⁵²

He notes that the trend is very much to minimise the scope of moral assessment.

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*, pp30-1.

¹⁵¹ *ibid.*, p31.

¹⁵² *ibid.*

He then returns to another area where luck may play a role in determining the result. This arises from the variety of personality traits which can be found within the human character. From a Kantian perspective these are morally irrelevant, but it is clear that in everyday life, people are assessed on such qualities even though they are not under conscious control. Intuitively we assess people by looking at what they are like¹⁵³. A further category is that of luck in the circumstances of a situation. This arises where a person could be found to be cowardly or heroic in a given situation, but if the situation never arises, he will never have the chance to earn approbation or opprobrium, and thus his moral standing will not be altered, to either good or bad¹⁵⁴. Whether he is judged to have behaved well or badly depends solely on whether the situation in question arises, which in turn depends on chance. Overall his conclusion seems to be that, although the concept of moral luck is complex, it cannot be ignored because we do not judge ourselves or others solely on the basis of the acts we have performed. A wide range of external influences that bear on actions and determine the course of events must also be brought into consideration.

With this more general approach questions of luck, it is now time to turn to considerations of luck in relation to attempts. This has been discussed

¹⁵³ *ibid.*, pp32-3.

¹⁵⁴ *ibid.*, pp33-4.

by Feinberg at some length¹⁵⁵. His primary question is whether the completed crime and the unsuccessful attempt should be punished alike¹⁵⁶. As is common in such discussions, he furnishes the reader with two almost identical hypothetical situations¹⁵⁷. A₁ has formulated the intention of killing B₁ and, with a view to doing so, aims and pulls the trigger. His actions have their intended results and B₁ dies from the bullet. The second situation involves A₂ and B₂, both of whom stand in the same relation to each other as A₁ and B₁. A₂ has the same motivation and intention to kill as did A₁ and is thus in a morally equivalent position. The important difference between the two versions lies in the fact that B₂ somehow escapes death (he is often imagined to have fortuitously worn a bullet-proof vest, or A₂ is supposed to have mis-fired due to an involuntary movement on his part). The consequences visited upon the two actors now differ wildly - A₁ is guilty of murder and subject to the severest of penalties, whereas A₂ is merely guilty of attempted murder. Feinberg views the actors as morally equally blameworthy in respect of the same criminal acts, and thus feels that the difference in sentence applied to them shows that the legal system concerned does not uphold the principle of proportionality. The severity of the punishment is not in proportion to the blameworthiness of the actor. To him it seems that the difference in sentence between the two actors depends

¹⁵⁵ J. Feinberg, "Equal Punishment for Failed Attempts". 37(1995). *Arizona Law Review*. 117-133.

¹⁵⁶ *ibid.*, p117.

¹⁵⁷ *ibid.*, p118.

wholly on luck, rather than on their deserts¹⁵⁸. Since A₂ did not chose either of the imagined life-saving factors, surely he cannot be given any credit for B₂'s survival. Feinberg sees it as of pre-eminent importance that arbitrariness is removed from the decision since the potential severity of the punishment is so great. He sees the use of criteria which depend on luck, or reliance on factors which were neither foreseen nor within the control of the actor as an invitation to arbitrariness¹⁵⁹. "Arbitrariness is to a legal system what corrosive rust is to machinery"¹⁶⁰. In his opinion, this is sufficient reason to support the theory which subjects completed crimes and attempts to the same level of punishment, all else being equal. However he does note that this flies in the face of almost world-wide practice.

His proposal begins by removing the requirement of a caused result from the definition of the complete version of crimes. Thus there would be no need for death to result from the criminal acts in order to found a conviction for what was previously termed murder. In order to avoid the linguistic oddity of saying that someone had been murdered although they were still alive, he envisages a new term - wrongful homicidal behaviour (WHB) - to cover situations previously labelled as murder, but without the requirement that a death occur. This would also remove the distinction between murder and attempted murder, as all situations would be covered by the wider WHB,

¹⁵⁸ *ibid.*

¹⁵⁹ *ibid.*, p119.

¹⁶⁰ *ibid.*

or be deemed legally irrelevant¹⁶¹. “The important advantage of this change would be that luck factors would be purged from the sentencing guidelines”¹⁶². He envisages that distinctions in sentencing would then be made on the basis of the degree of culpability involved rather than the existing criterion of completeness of the criminal purpose¹⁶³.

He then progresses to some of the arguments which have been put forward against this case for reform. The first of these he takes from LeFave and Scott and it has as its basis the conception of crime as a harm which the law exists to prevent. If there is no harm, equally there is no crime. This Feinberg sees as a manifestation of a liberal approach to the acceptable limits of the law, with which he has no quarrel. However he does disagree that attempts to commit very harmful crimes should be categorised as harmless and so beyond the scope of the criminal law¹⁶⁴. Other opponents try to argue that if the actor has caused more harm, then he should be made to pay a higher price. However Feinberg criticises this as applicable

...only in the law of torts where we are adding up amounts so that we can present a bill to the harm-causer, not trying to assess the exact character of her moral desert¹⁶⁵.

¹⁶¹ *ibid.*, pp119-120.

¹⁶² *ibid.*, p120.

¹⁶³ *ibid.*, pp120-1.

¹⁶⁴ *ibid.*, pp122-3.

¹⁶⁵ *ibid.*, p123.

Beyond these two arguments which he sees as less than convincing, he acknowledges the existence of more cogent arguments. One of these takes as a salient feature the world-wide acceptance of lesser punishment for attempts and evidence that most of the adult population agree with this approach, which is important in a democracy in order to avoid the charge of tyranny¹⁶⁶. However, Feinberg's criticism of this attitude is clear.

That the bulk of people believe that a particular proposition is true is a good reason, I agree, for tolerance and respect. But it is not a good reason, even in a democracy, for believing that proposition to be true.¹⁶⁷

In summary he sees his own approach as, at least initially, highly plausible in that the sentencing of the attempter falls within the overall guidelines of the principle of proportionality¹⁶⁸. This approach relies on the criterion of blameworthiness rather than the traditional approach which assesses the amount of harm caused and thus avoids the trap into which the traditional theory falls, that being the supposed relevance of factors based purely on chance. The 'modesty' of his proposal may be in doubt, but his argument has attracted further comment.

¹⁶⁶ *ibid.*, p125.

¹⁶⁷ *ibid.*, p126.

¹⁶⁸ *ibid.*, p131.

Herman considers Feinberg's proposals with particular emphasis on the discussion of attempts¹⁶⁹. She feels that it may well be appropriate to maintain a separate approach to the problem of attempts, since there are many other types of attempt which do not conform to the pattern of the shooting cases¹⁷⁰. These cases have been constructed deliberately to maintain every aspect exactly the same except for the result. Every aspect over which the agent could exercise control is mirrored across the two situations so the only difference that can arise is in the result as caused by something exterior to the actor. For a Kantian, the moral worth of an action is to be found in the agent's motive and intention and so where these agent-related aspects are the same, the actions must also equate one to another, at least at a moral level. However in most cases of attempt, the situation is much more complicated and all factors depending on the actor are rarely held absolutely constant.

She constructs her own hypothetical situation to show the greater complexity of attempt situations. A number of people set off to climb a mountain. D reaches the summit whereas A, B and C all turn back; A because his water supply runs out, B hurts his foot and C has an allergic reaction. E had a phone call just as he was about to join them and was thus prevented from setting out. Who, she asks, has attempted to climb the mountain? Clearly, there is more depth to cases of attempt than is presupposed by the

¹⁶⁹ B. Herman, "Feinberg on Luck and Failed Attempts" 37(1995). *Arizona Law Review*. 143-9.

shooting cases¹⁷¹. Feinberg's argument relies on the moral arbitrariness of what distinguishes an attempt from a complete crime, and uses this as the reason for treating both alike. However, as Herman notes, if (as seems the case) there are other types of attempt beyond the shooting cases he uses, then it is conceivable that what distinguishes attempts from complete crime is more morally complex and may therefore be worth preserving¹⁷². She also criticises the argument that it is luck which makes the distinction between attempts and complete crimes arbitrary. "That the success of our actions is contingent on factors outside our control is too general a fact to explain anything"¹⁷³. We do not always have greater control over our own actions than we do over outside forces. For example, she feels significantly more confident that her computer will perform the tasks required of it than that she will find the discipline to concentrate on her writing¹⁷⁴.

Whether or not the world cooperates in our efforts is out of our control, but it is *not* a matter of luck...It is an ordinary component of rational agency that we act on the assumption that things are as they seem...Because it is reasonable to trust that normal actions will not misfire, we are not lucky when they succeed, even though, as we know, there may be a littered field of "almost mishaps" in our wake.¹⁷⁵

¹⁷⁰ *ibid.*, p144.

¹⁷¹ *ibid.*, p145.

¹⁷² *ibid.*, p146.

¹⁷³ *ibid.*, p147.

¹⁷⁴ *ibid.*

¹⁷⁵ *ibid.*

Theoretical Approaches to Inchoate Crime

With regard to the arguments used to justify the practice of punishing incitement, conspiracy and attempt, it seems clear that the more favoured approach is utilitarian rather than retributive. A retributive approach would encompass a retrospective point of view which looked for the repayment of a debt the criminal owes to society, whilst ensuring that he is not used as a means to a further end. Does a retributive justification of punishment cater for the inchoate offences? The overall point to note about retribution is that it is retrospective in nature; it looks back to see what has been done. Clearly, in all three inchoate offences this will often amount to precious little; incitement requires solicitation, encouragement or instigation of another person to commit an offence, conspiracy requires the agreement of two or more persons intending to commit a crime and attempts require the actor to have moved beyond preparations to acts which can amount to perpetration. Hence, potentially, there will be very little to look back to, although clearly more in an attempt than in incitement. Oldest versions of the retributive approach take a talionic form (an eye for an eye). This is unsuitable for the vast majority of cases of inchoate crime since there will often be very little for the victim to replicate in order to exact revenge.

However, retribution is also often conceived of in terms of the repayment of a debt owed to society by the offender. Here 'debt' has to be

seen more in the nature of harm which needs to be required. In cases of incitement it may be possible to argue that there is harm inherent in the effort made to turn another person to crime. Likewise in conspiracy it could be argued that the harm lies in setting the scenario for criminal conduct, although since neither offence requires the actual commission of a crime, the paradigm of 'harm' (the criminal act) is absent. In the case of attempts, the argument is stronger since what is required are acts which are more than merely preparatory to the commission of the crime. Hence, even though the harm inherent in the full crime will not arise, there may be harm occasioned by these acts. On this interpretation of retribution, the justificatory argument is strongest for attempts, but it remains an unconvincing approach. In the light of this, it would seem better to construct a justification which would apply to the punishment of all three offences in order to maintain their respective positions as three parts of an intrinsic whole.

A utilitarian justification for the punishment of inchoate crime would, unlike retributivism, be forward-looking. Its aim is to reduce the incidence of crime, to which end a number of approaches are used. These include deterrence, rehabilitation, social protection and denunciation. Of these, deterrence is the most favoured option. It can certainly be argued that punishment of the criminal for incitement and conspiracy may deter him and others from similar courses of action in the future. Whether this result is actually achieved is questionable in the light of crime statistics, but there is no

reason why there should not be at least some deterrent effect in punishing these two crimes. The deterrent effect created by the punishment of attempts is clearer since the offender has generally come much closer to commission of his crime, and will therefore be more sensitive to the possible repercussions of conviction. Likewise it will give others who may have thought of emulating him a salutary lesson. Again statistics tend to show that deterrence is not always as effective as the authorities would like it to be, but it is clear from both public opinion and the language of the courts that attempts are punished in order to prevent both repetition and imitation. Thus in practice, the justification that is used for the punishment of attempts is both general and individual deterrence. This will however not find favour with Kantian retributivists who will see it is an example of the actor being used as a means to the further end of social peace. Rehabilitation in all its forms is relatively unpopular in current opinion and its efficacy is rather controversial, all of which leads to the conclusion that it is perhaps not the best theory on which to found a justification for punishment. As for arguments based on the need for social protection, these are more suited to one aspect of conspiracy than either of the other crimes in question. In incitement and attempt, it is not clear why society as a whole really needs to be protected from the criminal; neither inciter nor attempter is likely to embark on a campaign of mass incitement or attempt a crime on a daily basis. However, social protection does suit the group-conduct aspect of conspiracy as a justification for its punishment. Clearly a group represents a greater source of danger and

greater potential for success than individuals, and thus it is often used as a political offence in order to control, limit or eradicate group activities. This argument is strong, but again only really suits one aspect of one of the three offences.

How then are we to justify the punishment of inchoate crimes? It would be desirable to find a theory which will cover all three in order to maintain some sense of homogeneity. Perhaps the best approach, in the light of this, is the deterrence theory; retributivists will always criticise this approach but it is clearly the one used in practice and is also alone in applying in a relatively strong form to all three crimes. The aim is to catch conduct before it becomes dangerous and prevent future repetition of that behaviour by the offender or anyone else. At a practical level, whether or not criminals are actually deterred by the prospect of punishment, and whether it could be employed more effectively are both issues beyond the scope of this thesis. Clearly the theory works best for attempts, which are the most 'complete' of the three crimes, but it is important that it also covers conspiracy and incitement. The deterrence theory does this with a greater degree of success than any of the other theories discussed.

