Deterrence: European Antecedent and Contemporary Perspectives

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Abstract

Deterrence is one of the main goals of the criminal justice system or punishment. Some philosophers and scholars had written on Deterrence, even before the articulation of the subject by the Classical School, to which the main protagonists of Deterrence, Cesare Beccaria and Jeremy Bentham belonged. Arguably, all these early scholars, including Beccaria and Bentham were from Europe, hence, 'European Antecedent'. This paper defines Deterrence and examines various theories of this aim of punishment, as presented by scholars and philosophers of different times. It also considers some present-day connotations of Deterrence, deducible from the positions of contemporary scholars, which suggest that, for Deterrence to be more efficacious, it has to be applied differently.

Keywords: Punishment, Deterrence, Retribution, Severity, Certainty.

1. Introduction

Deterrence theory is based on the concept that, if the unfavourable consequences of committing a crime outweigh the benefits of the crime itself, the individual will be deterred from committing the crime. This is founded on the idea that all individuals (being rational humans), are aware of the difference between right and wrong and the consequences associated with wrong or criminal behaviour. The intellectual formulation of the Deterrence theory as an explanation of crime and how to reduce it is rooted in the analysis of human behaviour developed by the early utilitarian/social contract philosophers and classical theorists, Beccaria and Bentham. Most modern theories of Deterrence have their origins in the work of these two Enlightenment – era legal philosophers[1].

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1 Nagin, Daniel S. (2013) `Deterrence in the Twenty-First Century' 42 CRIME & JUST. 199.

Cesare Beccaria, Italian nobleman (1738 – 1794), published a treatise, On Crimes and Punishment[2], where posited that the greatest deterrent was certainty of detection; the swifter and more certain the punishment, the more effective it would be; and that a less serious punishment will be effective if shame and an acknowledgement of wrongdoing were guaranteed response to society's judgment. His theory rests on three main principles, viz, all individuals possess free will, have a rational manner and are able to be manipulated.

Jeremy Bentham, Englishman (1748 – 1832), in his book, Introduction to the Principles of Morals and Legislation[3], believed that humans seek the pursuit of pleasure and the avoidance of pain. He advocated the philosophy of Social Hedonism which is the greatest amount of happiness for the greatest number; and that whatever is done should give the greatest happiness to the largest number of people in the society (the Felicitation Principle). For Bentham, man is a calculating animal who will weigh potential gains against the pains to be imposed.

The classical theory, to which Beccaria and Bentham subscribed, is based on the earlier stated position that man is a calculating animal who will weigh potential gains against the pains likely to be imposed. If the pain outweighs the gains, man will be deterred; and this produces maximal social utility. The highlights of the classical theory of Deterrence include the following:

(i) Principle of rationality: Human beings have free will and their actions are the result of choice.
(ii) Pleasure and pain are the major determinants of choice
(iii) Deterrence is the best justification for punishment

2. Definition of Deterrence

The Black's Law Dictionary[4] defines Deterrence as the act or process of discouraging certain behaviour, particularly by fear; especially as a goal of criminal law. It is also defined as the prevention of criminal behaviour, by fear of punishment. Deterrence is a theory that supports the passing of criminal laws with well-defined punishments to discourage individual criminal Defendants from becoming repeat offenders (Specific Deterrence) and discourage other members of the society from engaging in similar criminal activity (General Deterrence).

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2 Beccaria, Cesare (1764) 'On Crimes and Punishment'.
3 Bentham, Jeremy (1830) 'Introduction to the Principles of Morals and Legislation'.
4 Garner, Bryan A. (Ed. In Chief) (2004) 'Black's Law Dictionary' 8th Edition.

Deterrence is broadly classified into general and specific. General Deterrence focuses on reducing the probability of deviance in the general population. It is targeted at potential offenders, by threatening all members of the society with imprisonment. It focuses on future behaviours. The vicarious experience of offenders receiving imprisonment for commission of an offence allows others to learn that such behaviour results in punishment that is swift, certain and severe. Knowing the consequence, others are assumed to rationally avoid crime[5]. Specific Deterrence aims at punishing the actual offenders. Specific Deterrence focuses on punishing known deviants in order to prevent them from breaking the same laws they have broken, ever again.

Beccaria and Bentham believed that people were/are motivated fundamentally to obtain pleasure and avoid pain. They, therefore believed that potential offenders could be deterred by increasing the pain associated with crime, especially by making legal punishment certain, swift and severe. Certainty, Celerity and Severity are the central elements of Deterrence. Certainty has to do with the likelihood of being caught and punished for crime. Celerity is about the swiftness of punishment. Severity concerns the amount/measure of punishment. The summation of their belief along this line is that the rate of commission of a particular type of crime or rate of deterrence from commission of that crime is determined by the certainty, celerity and severity of the punishment of the crime.

Deterrence, as a theory, is delicately predicated on the belief that every human being, every time, has the capacity to weigh potential gains against the pains likely to be imposed. This does not appear to be the case, as people have varying capacities to weigh options logically and judiciously. In fact, some individuals with low self-control can hardly be deterred, because they may not be able to refrain from offending, in spite of the prescribed punishment. This is a major drawback of Deterrence.

3. Early Theories of Deterrence/Punishment

As alluded to in the Abstract of this paper, some philosophers and scholars had written on Deterrence and/or punishment generally, even before Beccaria and Bentham. Some of the theories are hereinafter considered.

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5 Williams, F.P. and McShane, M.D. (1994) 'Criminological Theory' 2nd Ed. Englewood Cliffs NJ: Prentice Hall.

Thomas Hobbes (1588 – 1679) was an English political philosopher. He wrote a number of books, but his most famous work was/is LEVIATHAN[6], wherein his comments on punishment can be found. Hobbes[7] defines punishment as 'an evil inflicted by public 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.' Clearly, Hobbes' object of punishment was/is obedience; this is Deterrence, especially General Deterrence. From his definition of punishment, Hobbes makes eleven inferences. The fifth and seventh inferences are about Deterrence.

The fifth inference: 'All evil which is inflicted without intention or possibility of disposing the delinquent or, by his example, other men to obey the laws is not punishment, but an act of hostility, because without such an end no hurt done is contained under that name'.

The seventh inference:

> 'If the harm inflicted be less than the benefit of contentment that naturally followeth the crime committed, that harm is not within the definition and is rather the price or redemption than the punishment of a crime: because it is of the nature of punishment to have for end the disposing of men to obey the law; which end (if it be less than the benefit of the transgression) it attaineth not but worketh a contrary effect'.
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> The two inferences stated above support Deterrence as a justification for punishment. The problem with Hobbes' fifth inference is that it suggests that the 'evil' which he referred to, i.e. Deterrence, is the only object of punishment. Truly, ultimately, every object of punishment should make members of the society 'obey the law', however, the words used by Hobbes point to both specific and general Deterrence, viz, '…disposing the delinquent or by his example, other men to obey the laws…' Hobbes advances the argument that any punishment that does not make the offender or others

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6 Hobbes, Thomas (1660) 'The Leviathan'[Online]. Available from: <https//www.ttu.ee/public/m/martmurdvee/EconPsy/6/Hobbes_Thomas_1660_The_Leviathan.pdf> [Accessed 19 April, 2019].

7 Hobbes (n6) Ch. 28

> obey the law (i.e. deter either specifically or generally) is not worth being considered a punishment.

This inference does not recognize Rehabilitation, Retribution and other objects of punishment. In his seventh inference, Hobbes submits that if the harm brought on the offender by punishment is less than the contentment or benefit which he derives from the crime, the punishment will not deter. The question is, how can the harm on the one hand and the contentment on the other be measured or quantified to know when one overbalances the other?

John Locke (1632 – 1704) was a British philosopher and Oxford academic. In A Second Letter Concerning Toleration in The Works of John Locke, Vol. 5 (Four Letters Concerning Toleration)[8], Locke states that 'All punishment is some evil, some inconvenience, some suffering; by taking away or abridging some good thing, which he who is punished has otherwise a right to. Now to justify the bringing of any such evil upon any man, two things are requisite. First, that he who does it has commission and power so to do. Secondly, that it be directly useful for the procuring some greater good'.

Concerning punishment, Locke states in Section 7 of Book II of The Two Treatises of Civil Government[9], that:

'The execution of the law of nature is in that state put into every man's hands, whereby everyone has a right to punish the transgressors of that law to such a degree, as may hinder its violation: for the law of nature would as all other laws that concern men in this world be in vain, if there were nobody that in the state of nature had a power to execute that law and thereby preserve the innocent and restrain offenders'.

He states further[10] that:

> 'every man has a power to punish the crime, to prevent its being committed again,… every man, in the state of nature, has a power to kill a murderer, both to deter others from doing the like injury which no reparation can compensate,… and also to secure men from the

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8 Locke, John (1685) 'A Second Letter Concerning Toleration' in The Works of John Locke Vol.5 (Four Letters Concerning Toleration) [Online] Available from:<https://oll.libertyfund.org/title/locke-the-works-vol-5-four-letters-concerning-toleration> [Accessed 20 April, 2017].

9 Locke, John (1689) 'The two Treatises of Civil Government' (Hollis.ed.) [Online] Available from: <http://oll.libertyfund.org/titles/locke-the-two-treatises-of-civil-government-hollis-ed/simple> [Accessed 10 March, 2017].

10 Locke (n9) S. 11

> attempts of a criminal, who having renounced reason… hath, by the unjust violence and slaughter he hath committed upon one, declared war against all mankind and therefore may be destroyed as a lion or a tiger, one of those wild savage beasts, with whom men can have no society nor security: and upon this is grounded that great law of nature, whoso sheddeth man's blood, by man shall his blood be shed'.

Locke[11] posits that:

> '…this makes it lawful for a man to kill a thief, who has not in the least hurt him, nor declared any design upon his life, any farther than, by use of his force, so to get him in his power, as to take away his money, or what he pleases from him, because using force where he has no right, to get me into his power, let his pretence be what it will, I have no reason to suppose, that he who would take away my liberty, would not when he had me in his power, take away everything else. And therefore, it is lawful for me to… kill him if I can.'

From the copious quotations above, it is clear that John Locke strongly favours Retribution and Deterrence. This is evident in his words and strong recommendation of the death penalty, which is undoubtedly retributive and deterrent. It should be stated that Locke's brand of retribution, as can be gathered from his words, is vengeful and draconian. His Retribution can hardly pass the test of an object of punishment, as its essence borders on retaliation and viciousness. An attestation to this is Locke's position in S. 11, that a criminal 'may be destroyed as a lion or a tiger, one of those, wild savage beasts, with whom men can have no society nor security'. Further, words such as,'…everyone has a right to punish the transgressors of that law…' (S.7), 'everyone, in the state of nature, has a power to kill a murderer….' (S.11) and, 'this makes it lawful for a man to kill a thief, who has not in the least hurt him…' (S.18) will only make punishing an offender, brutish and lacking in structure. This will lead to arbitrariness and ultimately, chaos.

The celebrated German scholar, Immanuel Kant, in the metaphysics of morals[12] rejects Deterrence and strongly embraces

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11 Locke (n10) S. 18

Retribution, which is another goal of the criminal justice system. Essentially, Retribution supports the position that punishment is justified because it is deserved. A testimony to Kant's strong retributivist conviction is his well-known words:

'Even if a civil society were to be dissolved by the consent of all its members (e.g. if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment'[13].

So, Kant held that the principle of *Lex Talionis* mandated the State to execute a murderer. Kant's idea of Retribution emphasizes that, like is to be exchanged for like, in matters of offence and penalty. He preaches the equality of crime and punishment. The offender, in committing a criminal act is in a sense inflicting a harm upon himself, because if this offensive act becomes universal, it will fracture the social contract, which is instituted to protect the freedom of all citizens, and would therefore lead to the disintegration of the civil community, of which he is supposed to be a part. In effect, by committing a crime and violating the law, the offender forfeits his civil personality.

Per Kant's principle of equality, the punishment should consist in a loss to the offender, equal to the loss or harm suffered by the victim. Punishment must be commensurate to the crime. What justifies the offender's punishment is the fact that he has violated a contractually fixed law or contravened a just distribution of rights and duties. Kant's position is that only the criminal may be punished, and only because he has committed a crime and for no other reason; much at variance with the practice of preventive or deterrent punishment. Kant believes that the Deterrence theory degrades man to a mere tool of society, deprives him of his inalienable dignity, and is unjust[14].

For him, the criminal should be seen as a free agent who is capable of morality. He also states that the primary purpose of punishment is the suppression of crime. According to Kant:

> 'Judicial punishment can never be used merely as a means to promote some other good for the criminal

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12 Kant, Immanuel (1797) 'Metaphysical Elements of Justice: Part 1 of The Metaphysics of Morals'. Translated by John Ladd.

13 Kant (n12) 140

14 Hoffe, Otfried (1994) 'Immanuel Kant'. State University of New York Press.

> himself (Rehabilitation) or for civil society (Deterrence and Incapacitation), but instead, it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated as a means to the purposes of someone else'[15].

The truth is that Kant's theory, though clearly retributive, also serves deterrent purposes. Whenever a criminal is punished in a society, some members of the society, no matter how few, will be deterred. In fact, his position that the primary purpose of punishment is the suppression of crime, suggests that punishment will deter and thereby reduce the crime rate. His rejection of Deterrence is therefore not justified. The attempt to harp on the need for the criminal only, to be punished and for the crime only, serves no meaningful purpose, as, without saying, that is the way punishment is normally meted out - only convicted criminals are punished and for specified crimes. Further, Kant appears inconsistent by advocating death penalty by one breath and yet believing that the criminal is a moral agent capable of morality. Why kill him then?

Kant's position that judicial punishment should not be used to promote some other good, apart from punishing the offender is not acceptable. Kant makes it seem as if it is possible to punish an offender strictly for retributivist purposes without the punishment deterring either the offender or the society, if only slightly. This is unlikely. His aim of punishing only for *Lex Talionis* purposes and not for rehabilitation of offender or deterrence or incapacitation is almost impossible to achieve. Further, judicial punishment can and should serve not only the just desert purposes, but other (including deterrent) purposes also. As long as both purposes (for offender and society) are served well, then, the human being is not being 'manipulated as a means to an end'.

Also, Kant believes that death penalty is acceptable; just that the manner of the execution matters. For him, execution does not degrade the murderer. Kant says, 'The death of the criminal must be kept entirely free of any maltreatment that would make an abomination of the humanity residing in the person suffering it'[16]. This position of Kant's is confusing. He believes that Deterrence degrades man but does not believe that death penalty does. One

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15 Kant (n12) 138

16 Kant (n12) 139 - 140

would have thought that the execution of a man per se degrades man more than making his execution a deterrent (this at least serves a purpose). In addition, Kant's rejection of Deterrence is once again called into question here, as the death penalty he preaches, even if retributive, will also deter.

4. Contemporary Views

Having considered some theories of Deterrence over the ages, it is appropriate to examine the place of Deterrence in modern-day sentencing, to be able to determine whether it is still as it was or has changed. It appears that, traditionally, the Severity component has been more prominent than the Certainty and Celerity components, in the application of Deterrence[17], [18]; and the Severity component, arguably aligns with Retribution more than the other two components do. Consequently, Deterrence-oriented punishments have been known to be stern. However, varied views that are opposed to this position (that Deterrence-oriented punishments should be severe) have emerged. Some of them are considered below.

4.1 Professor Herbert Lionel Adolphus (HLA) Hart was a British legal philosopher and Professor of Jurisprudence at Oxford University. Hart defines punishment by stating its five elements, viz:

1) It must involve pain or other consequences normally considered unpleasant
2) It must be for an offence against legal rules
3) It must be of an actual or supposed offender for his offence
4) It must be intentionally administered by human beings other than the offender
5) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed[19].

The above definition points to the retributivist object of punishment. He states further[20], 'I shall assume that Retribution,

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17 Nagin (n2)

18 Wright, Valerie (2010) 'Deterrence in Criminal Justice: Evaluating Certainty vs Severity of Punishment'. The Sentencing Project Report (November).

19 Hart H.L.A. (2009) 'Prolegomenon to the Principles of Punishment'. Punishment and Responsibility, Essays in the Philosophy of Law [Online] Available from <www.oxfordscholarship. com/view/10.1093/acprof:oso/97801995 34777.001.0001 /acprof- 9780199534777-chapter-1.> [Accessed 19 April, 2017].

defined simply as the application of the pains of punishment to an offender who is morally guilty, may figure among the conceivable justifying aims of a system of punishment'. He goes on to distinguish between Retribution in an account of the principle of punishment in order to designate the General Justifying Aim of the system on the one hand and Retribution which is used to secure the answer to the question, `To whom may punishment be applied', on the other.

In rejecting Deterrence, Hart states that '…the old Benthamite confidence in fear of the penalties threatened by the law as a powerful deterrent, has waned with the growing realization that the part played by calculation of any sort in anti-social behaviour has been exaggerated'. He also states concerning Retribution that, '…a cloud of doubt has settled over the keystone of "retributive" theory'[21]. Even as he leaned towards Retribution, Hart did not believe that it was the only object of punishment. This is deducible from his statement quoted above, 'retribution...may figure among the conceivable justifying aims of a system of punishment'.

Hart stood for the mixed theories; that is to say, no one object of punishment can actually answer all the pertinent questions surrounding punishment. He therefore sought 'to show that any morally tolerable account of this institution (Criminal Punishment) must exhibit it (the institution) as a compromise between distinct and partly conflicting principles'[22] (Words in parentheses, mine). He further states that:

'A glance at the parliamentary debates or the Report of the Royal Commission on Capital Punishment shows that many are now troubled by the suspicion that the view that there is just one supreme value or objective (e.g. Deterrence, Retribution or Reform) in terms of which all questions about the justification of punishment are to be answered is somehow wrong, yet from what is said on such occasions no clear account of what the different values or objectives are, or how they fit together in the justification of punishment can be extracted'[23].

It can be said that Hart's position that no one object or goal of punishment can adequately answer the questions surrounding punishment and its justification is valid. However, the problem with Hart's mixed theories is ironically stated in his statement quoted

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20 Hart (n19) 9
21 Hart (n19) 1
22 Hart (n21)
23 Hart (n19) 2

above, that is, '…. No clear account of what the different values or objectives are or how they fit together in the justification of punishment can be extracted'. Hart's position has failed to present how the different goals of punishment fit together in the justification of punishment.

Further, even if the different objects of punishment are fitted together as recommended by Hart, the product will yet fail to cure all defects. For instance, the mix will still be unable to creditably answer the question about the severity of punishments for different crimes.

4.2 Walter Berns was an American Constitutional Law and Political Philosophy Professor. In his essay, MORALITY OF ANGER, in his book, For Capital Punishment: Crime and the Morality Of the Death Penalty[24], Berns is stoutly in favour of the death penalty and Retribution. Even if he does not expressly denounce Deterrence, he suggests its inefficacy. He recommends death penalty, however, he is not convinced that death penalty effectively deters crime, so, he does not base his justification of same, on it having any deterrent effect. Rather, he argues that righteous indignation or revenge is the proper motive for punishment. This is pure Retribution, to the exclusion of Deterrence or any other goal of punishment.

Berns posits that we punish criminals, principally to 'pay them back' and that the worst of the criminals should be banished or executed as a moral imperative.

He believes that some crimes are perceived to be heinous and that for such crimes, the severest punishment is morally necessary, and nothing less than the severest will suffice. For him, we must come to the realization that it is morally right to be angry with criminals and to express that anger publicly and officially, which may demand that the worst of them must suffer the ultimate penalty. Punishment arises out of the demand for justice and justice is demanded by angry and morally indignant men. Berns's position is that the pleasure of the victim arises out of an expectation or anticipation of the infliction of revenge on an offender who is thought to deserve it.

Berns advocates anger against criminals. However, if offenders are punished on the basis of a transient emotional reaction like anger,

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[24] Berns, Walter (1979) 'For Capital Punishment: Crime and the Morality of the Death Penalty' Basic Books; University Press of America.

it would lead to inconsistencies in punishment and an offender may thereby be punished far beyond the severity of his offence, as anger cannot be measured. In publicly expressing anger against criminals, there may be chaos in the form of mob action. Further, if punishment were to be meted out, just to redress the anger of victims, then decisions concerning punishment will be arbitrary, without any order and will be grounded in vengeance. Punitive action should be informed by adherence to the rules of criminal justice and reason. However, Berns's position flies in the face of this sound principle.

4.3 Robert A. Pugsley is a Professor of Law of the South Western Law School, Los Angeles, California, USA. He is also averse to Deterrence, while he supports Retributivism. Pugsley criticises Deterrence thus:

'The essence of Deterrence is publicity; making known the infliction of pain on one person to inhibit others from committing similar acts. The desired effect could be achieved by punishing either an innocent or a guilty person. The critical factor is what the public believes the person did, and is being punished for, not what the person actually did'[25].

According to Pugsley, when a criminal commits a crime, he expresses his moral depravity for which he deserves to be punished. He argues that Retributivism is concerned with the assessment of moral culpability as the basis for legally imposing condign punishment, which the offender deserves due to past criminal conduct'[26].

Pugsley, in expressing what could be said to also be the Kantian position, states that when a criminal act is performed and the criminal is not punished, there is a moral disequilibrium between the criminal's status, which is his freedom to exercise the same right as the innocent, and what he merits. Punishing the criminal restores the moral equilibrium by establishing an appropriate correspondence between what the criminal merits and his status as a criminal[27]. Pugsley reckoned that the genuinely retributivist idea is that punishment is not a necessary mischief, rather, 'the delivery of

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25 Pugsley, Robert A. (1979) 'Retributivism: A Just Basis for Criminal Sentences', 7, Hofstra Law Review 379.

26 Pugsley (n25) 398

27 Pugsley (n25)

punishment is itself a moral good'[28] and the State has the obligation to bring about this good by restoring the moral equilibrium.

In faulting Pugsley's stand, Pearl[29] states that 'the principle that an innocent person should not be sacrificed for the social good is not, however absolute. There could be situations in which an innocent person might have to be harmed in order to avoid a great disaster. In situations like this, the Authorities will take this step, whether they are Retributivists or Utilitarians'. So, this does not seem like a problem exclusively associated with Deterrence. Besides, Pugsley just avers that there is a justifying reason for punishing, but fails to state the reason; and so, fails to show why the State is morally obligated to punish.

Moreover, in assailing Pugsley's position that failure to punish the offender creates disequilibrium, it has been argued that `the same disequilibrium should result when a person commits an immoral noncriminal act (e.g., spreading malicious gossip or ignoring a stranger when one is in a position to save his life without any personal risk) and is not deservedly punished or made to suffer in any way because of his offence'[30]. For Pearl, in accordance with Pugsley's concept of moral desert, `the disequilibrium is the same in both cases, since in both cases, there is a responsible moral agent who failed in his duty and therefore, merits harm because of his offensive behaviour'[31]. In his view, it follows then that if the State has an obligation to restore the moral equilibrium by punishing the criminal, it also has an obligation to punish all forms of immoral activity, unless, overriding considerations would preclude such punishment.

4.4 Antony Duff is a Professor of Philosophy at the University of Stirling, Scotland. He is a renowned scholar whose research has focused on philosophical issues in criminal law, including the philosophy of punishment. Duff is opposed to Deterrence as a justification for punishment. According to him, 'though deterrent punishments aim to persuade potential offenders to obey the law by giving them reason to do so, that reason, the prudent decision to avoid some unpleasant imposition - is irrelevant and coercive; we do not appeal as we should, to those moral reasons which

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28 Pugsley, Robert A. (1981) 'A Retributivist Argument Against Capital Punishment' Hofstra Law Review, 9, (5) (7), 1501 – 1523

29 Pearl, Leon (1982) 'A Case Against the Kantian Retributive Theory of Punishment: A response to Professor Pugsley' Hofstra Law Review: 11. (1) (6) 9.

30 Pearl (n29) 17 – 18

31 Pearl (n29) 18

supposedly justify the law's demand, but create a new and irrelevant reason for obedience'[32].

Duff advocates communitarianism and liberalism. He avers that punishment 'should communicate to offenders the censure they deserve for their crimes and should aim through that communicative process to persuade them to repent those crimes, to try to reform themselves, and thus to reconcile themselves with those whom they wronged'[33]. Duff believes that punishment is justified when it communicates censure; and this leads to a species of 'secular penance'[34]. It will appear that Duff's kind of penance is not the usual penance which comes to a person who feels bad for having done something wrong. It seems more like such penance that is imposed on a person by another person, through communication of the censure. Concerning an offender, Duff states that:

> `…the law should aim to bring him to recognize and repent that wrongdoing: not just because that is a method of persuading him not to repeat it, but because that is owed to him and his victim. To take wrongs seriously as wrongs involves responding to them with criticism and censure; and the aim internal to censure is that of persuading the wrongdoer to recognize and repent his wrongdoing. This is not to say that we should censure a wrongdoer only when we believe that there is some chance of thus persuading him. We may think that we owe it to his victim, to the values that he has flouted, and even to him, to censure his wrongdoing, even if we are sure that he will be unmoved and unpersuaded by the censure, but our censure still takes the form of an attempt (albeit what we believe is a futile attempt) to persuade him'[35].

Duff's view is that an offender has a right to be punished, rather than ignored or dismissed. This position is not very clear. Will the censure that will be communicated to the offender be in addition to real punishment or will the censure be all that the offender will

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32 Duff, A. (1991) 'Retributive Punishment – Ideals and Actualities'. Israel Law Review, 25, Summer-Autumn, 422 - 459.

33 Duff, A. (2001) 'Punishment, Communication and Community' Oxford University Press. XVII

34 Duff (n33) XIX

35 Duff (n33) 81 – 82

suffer? The lack of clarity is a problem. Further, if the censure is all the offender will suffer, then this will likely be inadequate, and may not serve a great purpose. This is evident even in Duff's own words - 'We…owe it…even to him, to censure his wrongdoing even if we are sure that he will be unmoved and unpersuaded by the censure'. This statement casts a doubt on the efficacy of the recommended censure.

It is also difficult to understand why Duff enjoins us to censure an offender's wrongdoing, 'even if we are sure that he will be unmoved and unpersuaded by the censure'. Why bother then?

4.5 Paul H. Robinson writes about the capacity to deter, which the criminal justice system derives from its moral credibility. He argues that the moral credibility is based on the perception of the criminal justice system by the public, as being in the business of doing justice. He avers that the justice system now focuses on preventing future violations through the incarceration of offenders, rather than punishing past crimes[36]. He states:

'The justice problems resulting from the conflict between incapacitation and desert are significant not only because doing justice is an important value in its own right – the non-consequentialist, retributivist view - but also because doing justice can have important crime-prevention effects – the consequentialist, utilitarian argument. … If the criminal law has moral authority, it can stigmatize offenders and, for some, the fear of stigma will deter prohibited conduct. More importantly, moral authority gives the criminal law persuasive power to label as morally condemnable, conduct that was not previously seen as such. That is, a criminal law with moral credibility can facilitate the internalization of norms that counsel against prohibited conduct'[37].

He believes that the said internalization of norms by people has greater force to control conduct, than threats of official liability and punishment; and that a criminal law with moral authority can influence conduct by helping to shape community norms. He states, `norms relating to drunk driving and domestic violence, for example, have evolved in part because more severe criminal penalties and related reforms painted such conduct as more morally condemnable

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36 Robinson, Paul H. (2001) 'Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice' Harvard Law Review 114. 1429 –1456.

37 Robinson (n36) 1443

than previously thought'. For him, the strength of the crime-control powers of criminal law is a function of its moral credibility; and a criminal justice system that concerns itself with preventive detention, rather than administration of justice, `can expect no more moral authority than that afforded doctors who determine whether a mentally ill person is sufficiently dangerous to be civilly committed'.

Robinson argues that requiring the criminal justice system to punish, based on predictions of future dangerousness rather than blameworthiness for crimes committed will undercut the system's moral credibility. He adds that citizens who initially welcomed the added protection provided by preventive detention reforms may later perceive that the system no longer dispenses justice. The more criminal liability is disconnected from moral blameworthiness, the less moral authority to change norms or cause the internalization of norms, criminal law can exercise. So, in the long run, `using the criminal justice system as a mechanism for preventive detention may undercut the very crime prevention goal that is offered to justify such use'[38].

Robinson's explicitly stated concerns are not unfounded. It is noteworthy however, that the criminal justice system does not deter, due, only to its moral credibility. Other factors like the certainty and severity of punishment also matter. Consequently, even if the justice system loses its said moral credibility; but potential offenders believe there is certainty of being arrested, if an offence is committed, the justice system will still deter. Also, preventing crime by arresting dangerous persons may be expedient in some cases and does not have to lead to the justice system's loss of moral credibility, with proper management. It may actually be necessary to make arrests, to prevent crimes like terrorism, the effect of which can be devastating, when committed.

4.6 Norval Morris established Limiting Retributivism model of criminal punishment, which is a hybrid of Retribution and Deterrence. Morris[39] criticised the manner in which Rehabilitation was being operated, as well as the severity of punishments. He then advocated the essence of Limiting Retributivism – that a strict upper limit to be set by the retributivist element (just deserts of the offender) should control the severity of sentencing. Limiting Retributivism is 'a principle

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38 Robinson (n36) 1443 - 4

39 Morris, Norval (1974) `The Future of Imprisonment'. University of Chicago Press.

that, though it would rarely tell us the exact sanction to be imposed… would nevertheless give us the outer limits of leniency and severity which should not be excluded'[40]. Richard Frase[41] presents the following as one of the key elements of Morris's theory: 'Within the range of deserved… penalties, all other traditional sentencing purposes may be considered, subject to an overall, limiting principle of humaneness and economy that Morris called "parsimony"[42]. Frase believes that parsimony supports the view that the sentence imposed on an offender need not be more severe than necessary, to achieve the other purposes of punishment. For him, the way it works is that, when sentencing, Judges should start from the low end of the range of prescribed penalties and increase sentence severity only to the extent that it is necessary, to achieve all applicable non-desert-based sentencing purposes. According to him, Morris viewed the principle of parsimony as both utilitarian and humanitarian.

Matthew Haist[43], views Limiting Retributivism as an attempt to reconcile retributivism with utilitarians. He avers that Limiting Retributivism is not a typical retributivist concept, as it does not support the position that punishment should be predicated on a criminal getting his or her just deserts. He states that, rather, desert and blameworthiness serve as a limiting principle. Haist believes that despite the fact that Morris used retributivism as a limiting principle, his theory can still be seen as located squarely within the retributivist camp of theories of punishment[44]. For him, limiting retributivists determine the appropriate range of punishments for a crime by using the intuitive sensibilities about crime. He states for instance that people tend to agree that rape is a far more reprehensible crime than theft. He explains how limiting retributivism utilizes utilitarian concepts such as incapacitation and deterrence – 'The Judge or sentencing guidelines determine the range of punishments available for certain crimes, given the type of crime and the criminal's

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40 Morris, Norval (1981) 'Punishment, Desert and Rehabilitation', SENTENCING. Hyman, Gross & Von Hirsch, Andrew; (eds.), 257 – 259.

41 Frase, Richard S. (2013) 'Limiting Retributivism and other Hybrid Theories'. Just Sentencing, Oxford University Press.

42 Haist, Matthew (2009) 'Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?' Journal of Criminal Law and Criminology, 99, 789 – 821.

43 Haist (n42)

44 Haist (n42) 803

culpability and moral blameworthiness, and then utilitarian concerns are used to determine the adequate punishment within that range'[45].

Limiting Retributivism, apart from being a fusion of Deterrence and Retribution itself, also proposes that, when sentencing, Judges should consider all the aims of punishment. These perspectives are also comparable to those of Hart[46]. Like Haist, the researcher believes that in spite of the added elements, Limiting Retributivism remains essentially retributivist. The said utilization of utilitarian principles is commonplace, for it is expected that Judges would so utilize the utilitarian principles, even when they apply orthodox retributivism.

With the utilization of utilitarian principles, Limiting Retributivism could be viewed as an attempt to improve Deterrence, by combining it with features of other objectives of sentencing. In line with Morris's explanation above, when applied, this objective can assist Judges to hand down relatively lenient sentences that still have some measurable deterrent impact.

4.7 Nagin[47], whose view is similar to Morris's - that sentences need not be more severe than necessary, believes that the deterrent effect of the Certainty component of Deterrence is greater than that of the Severity component. He explicates the relationship between certainty and the apprehension probability thus, `certainty of apprehension and not the severity of the legal consequence ensuing from apprehension is the more effective deterrent'[48]. He posits that if a case would be made out for crime prevention benefits of measures requiring lengthy prison sentences such as California's Three Strikes Law, that case should be based on Incapacitation, rather than Deterrence. For him, `crime prevention would be enhanced by shifting resources from imprisonment to policing…'[49].

According to Nagin, what deters more is, certainty of apprehension (knowing that apprehension could lead to sanction – whether severe or not, if some given probabilities come true) and not certainty that punishment, upon apprehension will be severe. He refers to California's Three Strikes Sentencing Law (CTSSL) as an

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45 Haist (n42) 804 – 6
46 Haist (n42)
47 Nagin (n2)
48 Nagin (n2) 201 – 2
49 Nagin (n2) 202

example of measures that require lengthy prison sentences, which he believes have little deterrent effect. CTSSL was enacted in 1994. Per the Law, a Defendant convicted of a felony, having been previously convicted of a serious felony (one strike), will be sentenced to State prison, for twice the term prescribed for the offence. A Defendant convicted of any felony, having suffered two or more prior strikes will be sentenced to between twenty-five years and life imprisonment in a State prison[50]. CTSSL appears to be aimed at deterring the commission of serious crimes. From the above, Nagin believes that a severe sentence is of low deterrent value; and that effective policing will deter people from committing crime.

4.8 Valerie Wright's comments on a perceived shortcoming of Deterrence are also relevant here. For her, an examination of the dynamics of criminal justice reveals why Deterrence is limited – no certainty of apprehension. She states: 'If there was 100% certainty of being apprehended for committing a crime, few people would do so. But since most crimes, including serious ones, do not result in an arrest and conviction, the overall deterrent effect of the certainty of punishment is substantially reduced. Clearly, enhancing the severity of punishment will have little impact on people who do not believe they will be apprehended for their actions'[51].

Wright's opinion is that severe punishment, which is meant to be a general deterrent, is not effective. Like Nagin[52], she also suggests that Courts should not sentence offenders to life or long jail terms. While Wright's comments underscore the importance of the Certainty component of Deterrence, they also underline its weakness. It should be remarked that it may not be necessary for many people to be 100% certain of being apprehended for committing a crime, for them to be deterred. As a matter of fact, 100% certainty appears far-fetched and unrealistic. It is arguable that if people are substantially (not 100%) certain of being apprehended, not a few would be deterred.

4.9 Asaf Wiener states that `Deterrence-based sentencing makes false promises, since as long as we believe that crime can be

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50 California Courts – The Judicial Branch of California (TJBC) (n.d.) `California's Three Strikes Sentencing Law'. [Online]. Available from: <https://www.courts.ca.gov/20142.htm> [Accessed 14 August, 2019].

51 Wright, Valerie (2010) 'Deterrence in Criminal Justice: Evaluating Certainty vs Severity of Punishment'. The Sentencing Project Report (November).

52 Nagin (n2)

deterred through harsh sentences, there is no need to consider other approaches'[53]. Wiener alludes to the low deterrent effect of severe sentences and states that the continued false belief in the efficacy of Deterrence keeps preventing the consideration of other aims of punishment. Wiener seems to thereby be proposing, in line with Morris's view that, fusing the other objects of punishment with Deterrence as appropriate, may aid crime prevention more.

5. Conclusion

From the era of Hobbes, through that of Bentham, to the present-day, Deterrence has generated numerous views. The preponderance of contemporary views of Deterrence considered do not recommend harsh sentences. Rather, they propose, *inter alia*, effective policing (Certainty, as opposed to Severity) and consideration of other objects of punishment, besides Deterrence, in sentencing. The object is to get Courts to shift focus from stern sentences, which are the hallmark of traditional Deterrence, to sentences that draw on other goals of punishment, including Rehabilitation. So, if the Court imposes a reasonably stern sentence, even after considering Rehabilitation, it will mean that it was the least stern sentence possible in the circumstances. This appears more practicable than Duff's communicative theory which emphasises Rehabilitation, without giving due regard to other goals of punishment.

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[53] Wiener, Asaf (2015) `Virtual Crimes, Actual Threats: Deterring National Security Offenses Committed Through Cyberspace'. Journal of Law and Cyber Warfare, (4), (2), 109–148 [Online]. Available from: <https:// heinonline.org/HOL/P?h=hein. journals/jlacybrwa4&i=249> [Accessed 5 July, 2019].