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Care and Punishment:
Imagining an Integrated Response to Wrongdoing

By

Amy Rowland

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[Signatures of committee members]

George Sher, Autrey Professor of Humanities
Philosophy

Rachel Zuckert, Assistant Professor
Philosophy

Elizabeth Long, Associate Professor
Sociology

HOUSTON, TEXAS

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ABSTRACT

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Traditional theories of state-sanctioned punishment, specifically retributivism and deterrence, are critiqued from a feminist ethic of care perspective. The argument is made that the integration of care-based reasoning into punishment theory is essential to the development and practice of punishment as a fair and just institution. The argument rests on the premise that the care and justice theories are best understood as complementary, each lending critical contributions to our understanding of fair and reasonable practices. Two sub-theses are developed: the ideal, in which it is argued that care theory gives us reason to re-conceptualize our responses to wrongdoing in ways that are not dependent on punitive measures, and the non-ideal, in which it is argued that care-based reasoning can address some of the shortcomings of traditional theories and practices, particularly those relating to concerns about human dignity and respect, and can provide justifications for improvements.
For Gaye
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CHAPTER ONE

Introduction and History

Only a few have rejected punishment entirely, which is rather surprising when one considers all that can be said against it.

John Rawls

PART I: Introduction

1.1 Why Care about Punishment?

It is difficult, perhaps impossible, to isolate a philosophical issue and study that one issue thoroughly without finding connections that lead to a seemingly endless array of related concerns and considerations. So it is with the study of punishment. This particular inquiry was prompted by the intellectual equivalent of turning a corner. I suddenly saw something I had failed to notice. In this case, it wasn’t just that I saw something I felt I should have seen; although it clearly was that, what impressed me most was that I saw something I had a hard time believing. As my study has deepened and broadened, I have been led to reconsider not only what I had previously accepted about the institution of punishment, but also accompanying and variously related ideas such as the metaphysics of persons, the nature of reasons, and the intersection of morality and economics. Although I have come to understand a great deal more about punishment and its social and political underpinnings, I continue to respond with a sense of incredulity when faced with much of what exists in the contemporary policies and practices of state-sanctioned punishment. At the very least, in writing this I hope to contribute a

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constructive analysis with practical suggestions for change and improvement in our current policies and practices, particularly as they relate to incarceration.

This formal philosophical inquiry was both preceded and informed by direct involvement with prisoners. My initial response to my concerns, particularly those involving incarceration, was to get inside the system and spend time with prisoners. As it happened, a way opened for me to work as a lay chaplain at Harris County Jail, in Houston, Texas. Subsequent to that, I accepted a job developing and directing a small non-profit program that provided housing and mentoring to women releasees, where I remained for two years. And so this single concern has, over the years, come to bear the names and faces of the men and women I have worked with, some while incarcerated and others after release. These relationships, and the stories and experiences these men and women shared with me, began to alter and inform my nagging sense of a present injustice, and helped me to develop what has become this formal project. For those who have not had relationships with individuals whose lives provide a relief map of the relevant concerns, there are statistical analyses and policy inconsistencies that provide ample evidence of the need for deeper investigation into what it is we are doing, what we think we are doing, and why we believe we are justified in doing it, when we exercise current punishment policy. Some, though certainly not all, of the corresponding issues will be touched on in this thesis. As much as I would like to say that I isolate the problem areas, provide a thorough analysis and respond with a reasonable solution, in reality, I will do what philosophy as a discipline so often does: I will attempt to define the problem more clearly.
In its broadest conception, this analysis will focus on the relationship between beliefs about the nature of persons and the purpose of punishment, specifically state-sanctioned punishment and the practice of incarceration. This inquiry will break into two general concerns: the reasons we have to care about the individuals we punish, and the role that punishment serves in society. Caring about individuals and their particular needs is often seen as an activity somewhat extraneous to ethics, which as a discipline in recent times has preferred a more universalized appreciation of need and care, with discussions of such involving not individuals, but “representative persons”. 2 Carol Gilligan’s \textit{In a Different Voice}, published in 1982, launched what has been an on-going inquiry into the value of care in ethics, particularly as contrasted to the value of justice. However, the role of care with respect to those we punish remains little examined. In this thesis caring will play a central role, both in consideration of the nature of persons and in determining the purpose of punishment. This project will focus most directly on the intersection of care and punishment, specifically the practice of incarceration as operative in the United States correctional systems. One way to view the structure of this thesis is as a thought experiment examining the implications of what it is to care, and how and why we might extend that care to those we punish. I will propose that extending care reasoning to our moral deliberation on punishment issues is essential and that the decision-making practices of the care and justice perspectives are, in fact, most effective when understood as being in a relationship that is complementary rather than competitive.

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2 Harry Frankfurt refers to caring as the third enterprise of philosophy, behind the more notable concerns of epistemology and ethics. See his 1988 \textit{The Importance of What We Care About}. New York: Cambridge University Press, p. 90.
Perhaps the most persistent problem that arises in the evaluation of state-sanctioned punishment is that of maintaining the integrity of the individual being punished. It is with respect to this point I begin my argument that although the traditional approaches have recognized individual integrity as an important human good, the accounts they give do not capture some deep intuitions about why and how individuals ought to be valued. Traditional theories, for example, have a difficult time explaining the moral significance of our caring about our close relations. This becomes even more pronounced in the criminal justice system, where wrongdoers are often treated as though they belong to no one and no longer deserve the caring respect of anyone. Whatever our principles of justice and whatever our institutions, self-respect seems to be a human good for which we accept trade-offs. Our institutions, however, even those designed for the purpose of punishing, must not by design diminish the self-respect of the participants. It is this issue that opens the way for a deeper consideration of what the care perspective with its grounding in the moral particulars of our lives, might offer to a more complete understanding of punishment.

This thesis is comprised of five chapters. Chapter One is divided onto two parts, an introduction and historical background. In Part I, I discuss the concerns that motivated this project. I will also identify four desiderata that will serve as minimum standards for any theory of punishment. Part II surveys the justifications and use of incarceration in the United States. Chapter Two, ‘Care and Justice’, examines the development of care ethics. It introduces the care perspective as an alternative moral framework from which to examine punishment. I will argue that an ethic of care provides a moral perspective

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that is able to explain, better than any of the traditional approaches, some of the persistent tensions that surface regarding appropriate responses to wrongdoing, in particular, those that refer to the treatment of the individual being punished. Specifically, care theory helps motivate and explain why we should care about individuals, even when they have committed criminal wrongdoing. The purpose of chapter two is to argue for a class of moral reasons that are often overlooked or thought to be derivative. This discussion will cover the history and emergence of care ethics as a way to familiarize the reader with the motivational assumptions of that perspective. It analyzes the different metaphysical underpinnings of the care perspective as contrasted to the justice perspective, particularly differences regarding the nature of self and the nature of moral value. These differences, I argue, are the root source of the tensions that arise in their respective practices of moral deliberation. In Chapter Three, ‘Retributivism’, I discuss three traditional justifications for retributive justice. These justifications will be critiqued from the point of view of the care perspective and for how well they capture the desiderata. I will offer two sorts of criticism, the first sort will be internal to the theory and the second will be external. For the internal criticisms I will suggest ways in which care theory can mitigate the objections, in the external criticisms I will consider ways in which care theory challenges the basic premises of the theory. Chapter Four, ‘Deterrence and Reform’ examines the traditional justifications of deterrence and reform theories. As in chapter three, each of these consequentialist theories will be subject to both an internal and external critique and evaluated with respect to the desiderata. Chapter Five, ‘Applications and Summary’, will break into two separate considerations. First I will examine current practices in the criminal justice system and suggest ways in which the integration of care-based reasons
can improve the deliberative process with respect to determination of punishment. The second consideration reaches for a somewhat more idealized notion of moral deliberation with respect to appropriate responses to wrongdoing. In this ideal theory, I will explore a response to wrongdoing that reflects many of the traditional justice values but also maintains a high level of moral particulars in the deliberative process. At the very least I expect that the motivation to care about those we punish in ways reflective of the care perspective will be established. I recognize, however, that there is always the chance that one may be unmoved by the value of persons, or more pointedly, persons who have broken the law. Nonetheless, there may be utilitarian reasons to accept the role of the care perspective as providing moral reasons that contribute to the making of a better society.

1.2 Punishment and Individual Integrity

The role or purpose of punishment does not stand independently but is shaped and defined by the beliefs about the role and purpose of morality more generally. These beliefs are varied and continue to be debated some two millennia after Thrasymachus queried “Why be moral”? The relationship between self-interest, or living the good life, and altruism, or living morally, is itself a larger unresolved issue. Other views, some based on economic theory rather than traditional moral theory, add to the diversity of opinion. It is from this pluralism about what constitutes morality that our theory of punishment must arise. Although there may be a general consensus that the proper response to wrongdoing is punishment, the justification for that punishment and the form

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4 See Thomas Nagel's 1986 The View From Nowhere for a portrait of this tension.
5 Richard Posner has argued that criminal law, specifically, as opposed to punishment more generally, can be explained through market forces without resorting to moral arguments. See Posner’s “An Economic Theory of the Criminal Law”. Columbia Law Review, vol. 85, no. 6 (October 1985), pp. 1193-1231.
that punishment takes are both largely dependent on the specifics of the particular tradition in which the issues are being considered. Surveying the traditions is a useful way to draw out some of the persistent and core justification issues. The discussions in chapters three and four will make explicit the issues that have historically defined the scope of punishment theory and the tensions that arise within theories, particularly those related to the justification and practice of punishment. In spite of their shortcomings, there is a great deal of understanding of the human condition reflected in the traditional approaches to punishment, and they have persisted in large part because of the extent to which they do reflect our beliefs about who we are. Nonetheless, there seems to be a perspective unspoken here. Although individualism marks our national character, there is little in our traditions on punishment that puts the well-being of the individual being punished among the concerns in the forefront.\textsuperscript{6} Much of our theorizing about individualism manifests itself as concerns about rights and non-interference as a framework for promoting the conditions of human flourishing but little is said about the particular demands involved in valuing the integrity of lives as they are lived, that is, in their particulars and particularities.

There has been no lack of theorizing about punishment, by philosophers, legal scholars, and others, yet it remains a perplexing issue. From both sociological and philosophical standpoints we have trouble explaining even our most considered judgments about punishment. The justification of punishment requires that we balance important and competing claims, in what H.L.A. Hart has referred to as ‘a compromise of

conflicting principles. Not only do issues arise regarding the conflicts between self-interest and beneficence, as mentioned above, but there are also practical and tactical issues, such as coordination, coercion, cooperation and so-called ‘free-rider’ problems to consider. In addition, there are potentially irresolvable conflicts within the concept of punishment that led Avishai Margalit, among others, to question whether or not a just society can in fact satisfy the conflicting claims involved in the institution of punishment. Care for the individual and punishment of the wrongdoer are but two among such competing values. In our pluralistic society, adjudicating between these claims has proved to be no easy task. This is particularly true when we try to engage traditional ideas about punishment in a dialogue about the value of caring for individual members of society, even across boundaries that specifically signify conflict, such as criminal wrongdoing. In the case of criminal wrongdoing there is no simple response to both the victim, if there is one, or the wrongdoer, as members of what is, at least nominally, the same community. If we institutionalize care, we will have to ask whom we should care about, how much we should care, and what that care should look like. Similarly, if we are going to justify the institutionalization of punishment, we need to ask how this punishment relates to the way we institutionalize care in our society.

I have two goals in this project. One goal is to identify a set of moral reasons that does not demonize offenders and may be integrated with traditional justifications for

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8 Margalit (1998). See especially pages 262-270. Margalit addresses, among other things, the retributivist claim that failing to punish is a failure to respect the free agency of the individual offender and he questions whether a means of causing humiliation can also be a sign of respect.
9 Here I use the term “community” to identify persons who are bound by the same laws and legal system. Although we live in what is presumed to be a society of equals, current events, especially those regarding issues of race as they affect frequency of arrest, conviction, and length of sentencing, provide a strong case to argue that a definable separation exists between members of different races within the same “community”.
punishment. In a non-ideal world such as ours, it is my hope that these reasons will mitigate some of the most troubling and destructive aspects of the institution of state-sanctioned punishment. My second goal is to construct an ideal framework of moral reasoning in which theoretical commitments and practical implications can be evaluated and integrated. To further these ends, I will consider feminist ethics, specifically the care perspective. Given my concerns, there are some strategic benefits to turning to a feminist critique. One obvious benefit is the feminist call for reappraisal of the relationship between theory and practice as voiced in the familiar claim that 'the personal is political'.\textsuperscript{10} A second benefit, more related to the care perspective specifically, is its focus on particularity that arises from its commitment to the belief that relationships give our lives meaning.\textsuperscript{11} Feminist theory resists the reduction of individuals to 'representative persons' in the name of fairness or any other principle. The force of this argument will rest on how compelling the incentive to care becomes in the process of considering it among the alternatives. Although the moral concerns addressed by the care perspective are familiar, the moral reasoning associated with it is somewhat different from the political and philosophical reasoning that has historically framed debates about punishment, so I will spend the chapter on care theory articulating and defining the

\textsuperscript{10} The original attribution of this phrase is unclear. Carol Hanisch uses the phrase in a feminist context in her 1970 \textit{Notes from the Second Year}, but the concern that the personal and political not be severed from each other is certainly present in other social justice movements. An early and especially articulate expression of it can be found in Claudia Jones' 1949 essay "An End to the Neglect of the Problems of the Negro Woman!" (originally published in "Political Affairs", re-published in "Words of Fire: An Anthology if African American Feminist Thought," New York: The New Press, 1995). She wrote "This means ridding ourselves of the position which sometimes finds certain progressives and Communists fighting on the economic and political issues facing Negro people, but 'drawing the line' when it comes to social intercourse or inter-marriage. To place the question as a 'personal' and not a political matter, when such questions arise, is to be guilty of the worst kind of Social-Democratic, bourgeois-liberal thinking as regards the Negro question in American life; it is to be guilty of imbibing the poisonous white-chauvinist 'theories' of a Bilbo or Rankin." (1995, p: 117).

\textsuperscript{11} This is not a claim of exclusivity, as other factors, such as satisfying work give our lives meaning as well.
different motivations and models of moral reasoning behind traditional western thinking about justice and the feminist perspective of care. It is my hope that this deliberative process will introduce a lasting challenge to any justification for punishment -- that it takes seriously the good of the individual being punished so that the meaning of punishment is not derived exclusively from how it serves society, but has relevance to the individual and community in which the punishment occurs.

In order to motivate care, it is important to recognize the social climate in which this discussion takes place. Recent trends in criminal justice policy have seen both individuals and states calling for increased sentencing laws applied across the board. Resultant laws have had the effect of requiring the incarceration of more people, for longer periods of time. In addition, though perhaps in some cases only coincidentally, there have been calls to cut back on so-called 'country club' like facilities now available to inmates. The 'extravagant' amenities referred to typically include weight rooms, libraries, educational opportunities, and in some cases jobs. What is distressing about these trends in public opinion and policy is that they fail to address the social context of criminal activity, treating it instead as though it were a discreet problem that can be cut out and eliminated.\(^\text{12}\) Privatization of prisons has only served to escalate these trends, as private prisons have economic incentive to retain prisoners and no incentive to reform individuals or provide services that might reduce recidivism. It is not difficult, given these emphases on the punitive aspect of punishment, to get a portrait of a population that is considered disposable by the society sanctioning the punishment. These policies seem to express a rekindled sentiment of a form of retributivism that runs deeper than mere

\(^{12}\) In a prime example, in 1995 George Allen, then Governor of Virginia, argued for increased sentencing solely on the basis it would prevent crime because potential offenders would already be incarcerated.
concern for balancing the scales of justice. While increases in sentencing severity reflect an understandable anxiety about the amount of violence and crime in our society, they contribute to a process of stigmatization of offenders and effectively remove those who fail to conform to the law from the operative power structure.

At the root of this recent retributivism I see our Individualism, an individualism that we have perhaps taken too literally.\textsuperscript{13} We live in a culture that in many respects is increasingly isolationist, in which we isolate ourselves not only from others, but from our own selves as well.\textsuperscript{14} We value individual autonomy highly, but I argue that if we value it as an end in itself we do so at the expense of maintaining our connectedness with others. I suggest instead that the value of autonomy rests in its contribution to our sense of well-being. The aspect of autonomy most commonly articulated and valued is that which helps us define our independence from others, that which allows us to individuate from our family and peers. In fact, independence and autonomy are often seen as going hand in hand. But there is another important and less heralded aspect of autonomy that we nonetheless value deeply. An important benefit of developing into an autonomous individual is that in doing so one gains the ability to choose one's community. Here choice is the significant element. Not only does autonomy help us differentiate ourselves from others, it puts us in a position in which our commitments to others can be made consciously, with more clarity and decisiveness. In the realm of moral discourse, the significance of autonomy is the relationship it bears to responsibility. As separate autonomous individuals we bear responsibility both for our separateness and for the

\textsuperscript{13}See Franklin Strier's 1996 \textit{Reconstructing Justice} for an in-depth discussion of the relationship between individualism and our adversarial legal system.

relationships we actively maintain. As individuals, our autonomy does not literally isolate us from others, but merely separates us; our individual choices will still be social choices. When we fail to recognize that our connectedness to others persists, even in the face of our rugged individualism, we can easily value only that aspect of autonomy that supports isolationism. There is a danger, both psychologically and socially, in neglecting the role of autonomy in defining our relatedness to others in positive terms. It is not enough merely that each of us learns to individuate our self in the context of broader society, but each one of us is also responsible for our conscious rejoining with society.

Our relationships with others are responsible for a sense of well-being that runs much deeper than feelings of self-satisfaction are able to sustain.\(^\text{15}\) When relatedness to others is accepted as a basic ontological premise, justifications for the more objectively cruel punishment modalities erode\(^\text{16}\). When relatedness is accepted as an inescapable fact, those who perhaps cannot be brought into a cooperative or mutually recognized relation, the so-called criminally insane for instance, are seen not as disposable individuals, but as participants in a human tragedy. For it is a human tragedy to fail to be among your own. When we brush off our hands with a sense of relief and satisfaction at the successful separation of ‘the bad’ from ‘the good’, we fail to care about the lives that are encountering the separation from ‘the bad’ side. At that point we have made a choice to deny that our relatedness requires that we extend to them the care that we usually express to others, even if only in formally defined social customs such as granting

\(^{15}\) The notion that our well-being is closely connected to our relationships with others is common in sociological, psychological and theological writings as varied as: Herbert Morris, Nel Noddings, Robert Bellah, and Dietrich Bonhoeffer, among others.  
respect. In directing our concern away from the wrongdoer in this manner, we run the risk of failing to provide the primary basic good of self-respect.17

Our contemporary spirit of individualism masks our interdependence because it emphasizes autonomy's role in separation and individuation but is silent regarding the responsibilities that even autonomous individuals bear to each other as social beings. It is easy to reject the importance of care when the centrality of relatedness is not valued or acknowledged. Not only is there little social incentive to interact in more caring ways, but our economic culture devalues those aspects of our selves and well-being that cannot be accounted for in terms of productivity. Together, social and economic forces encourage us to separate ourselves from others, as individuals, as states, as nations, and even to separate our emotional and spiritual selves from our 'productive' selves. The language of productivity is the primary language of business, and it is recognized as the legitimate language of our culture.18 We are completely capable of expressing our interdependence and our need for others in human terms that are not reducible to economic terms, however, the language that such an expression requires deviates from the lexicon of our primary language, and insofar as it deviates, it is devalued.

Given this portrait of the current state of affairs, it is not surprising that those who have been convicted of violating our common code of behavior are not grieved over, but in effect disposed of. We do not think of prisoners in terms of lost relationships. There may be occasional concern for the loss of their productivity, but this is just as likely balanced by a certain relief that at least the incarcerated are not taking jobs away from

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17 See especially the chapter on punishment in Margalit's 1998 *The Decent Society* for a pointed discussion of the concern that humiliation has been institutionalized along with the practice of punishment.
18 See Bellah (1985).
people who really deserve them. Human frailty is hardly something we are going to overcome. It is a shared condition of our existence. The prevalent ‘throw away the key’ attitude of the ‘three strikes you’re out’ legislation denies the reality and dignity of those who have been challenged and failed. When looking at a brutal murderer, it is easy to think, ‘I would never do that’ or ‘he is an animal’. The more heinous the crime, the more easily we remove ourselves from our shared humanity with the offender. Some even claim that offenders deserve to be cut off from the rights and privileges normally extended to individuals in a community because the offenses committed breached the public trust. The justification for this type of reasoning is that one only deserves the protections of the state when one is living in accord with the state. I will look more critically at such justifications in later sections; the point here is that the practice of incarceration separates us from offenders, and this separation is more than physical.

I suggest that there are two levels at which offenders experience alienation from society. There is the formal alienation, which occurs when an individual is physically removed from free society, but there is also the psychic alienation, which occurs as the incarcerated individual is removed from the public imagination. Whatever formal obligations we acknowledge we have to our neighbors and fellow members of society, we do not feel they extend to prisoners, and much less do we extend our compassion to the individuals so removed. It is as though we think of them as no longer human, no longer

19 Jobs programs for inmates, such as California’s Joint Venture Program, are introducing a variety of economic and labor rights issues in their wake.
20 The list of rights that the incarcerated lose extends well beyond their loss of freedom to include loss of voting rights, access to information, and loss of multiple social opportunities (including employment) and privileges once released.
in need of the same basic respect that we demand for ourselves. It is almost as though certain criminal acts overload our ability to experience compassion and we justify our lack of compassion by claiming it is what offenders deserve. The physical removal from public life reinforces notions of the prisoner as ‘other’. But it is an otherness that is artificially sustained by our collective willingness to forgive and forget our own imperfections. Martha Nussbaum, in “Equity and Mercy” recounts Seneca’s insight into our shared circumstance:

In a crucial passage, Seneca says that the wise person is not surprised at the omnipresence of aggression and injustice, “since he has examined thoroughly the circumstances of human life”. Circumstances, then, and not innate propensities are at the origins of vice. And when the wise person looks at these circumstances clearly, he finds that they make it extremely difficult not to err. The world into which human beings are born is a rough place, one that confronts them with threats to their safety on every side. If they remain attached to their safety and to the resources that are necessary to protect it – as is natural and rational – that very attachment to the world will almost certainly, in time, lead to competitive or retaliatory aggression.

Our ability to forget that our own life circumstances contribute to our propensity to violate the law is a forgetfulness into which escapes the conscious acknowledgment of the enormous challenge we each face in trying to live our lives. It is this forgetfulness that allows us to dissociate ourselves from and forget about offenders, and in this respect it marks a failure of compassion. Our system of justice is in place to keep order in

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21 Such condemnation is hardly new. It was most strikingly expressed by nineteenth century judge Fitzjames Stephen when he wrote: “I think it highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred and to justify it.” Quoted in Nigel Walker’s Why Punish? New York: Oxford University Press, 1994, p. 21.


23 It is interesting to note here that Nietzsche, in discussing punishment and forgetting in The Genealogy of morals, sees our forgetfulness as a means of attaining a certain generosity of spirit that makes forgiveness possible. He is speaking of forgetting transgressions that have occurred to one’s person, and
society, but it is incapable of judging individuals in terms beyond their actions. As individuals we judge by removing our care and concern from inmates and their families. I interpret the current penchant for offenders serving 'hard time' as an unjustifiable forgetting that each person, each offender, each inmate is in fact one of us.

Shutting prisoners off from discourse with the free world is also self-defeating, as I claimed above, because it removes from public discourse the very people who by violating laws and social norms have exhibited behavior that suggests that they most need assistance if they are to be brought into society and not further removed. Because it is in relationship that we learn to experience our deepest sense of well-being, alienating prisoners seems counterproductive. I am not suggesting that we are in a position to eliminate incarceration, I am suggesting however, that the sort of social modeling and connections that occur in prisons, now with even less enhancement or guidance from books, access to media, or educational opportunities, is self-defeating if one has any wish of bringing those who have broken with free society back into its realm with any success. By bringing someone back into the realm of free society, I do not merely mean release, but at the very least an education or rehabilitation that will allow a successful behavioral integration of the individual back into society.

1.3 Applying the Desiderata

In these four desiderata I consider what we should want from a theory of punishment. I introduce these desiderata in order to lend specificity and consistency to the evaluation of punishment theory. The desiderata will provide parameters against acknowledging that this requires strength of moral character. I want to suggest that we have institutionalized our failure to forgive and forget in our criminal justice system and that this contributes to possible institutionalization of cruelty.
which to judge and compare theories. These may be viewed as minimum requirements, (arguably) necessary, rather than sufficient conditions for justifying punishment. These desiderata do not arise from any specific tradition or theory of punishment, but from intuitions about what we in fact value, as reflected in other aspects of our lives. They are intended to be applicable to any theory of punishment, and attempt to reflect our intuitions about what wrongdoers deserve. In subsequent chapters I will evaluate how the traditional approaches are likely to respond to these desiderata. This evaluation will help expose where our policies and intuitions diverge, and where we may be lacking reasons we would prefer to have. I will use these criteria as standards against which the traditional justifications of retributivism, deterrence and reform theory will be judged. They will serve as markers as the traditional theories are analyzed and also as the care perspective weighs in with a set of reasons and justifications that suggest alternative practices. The four desiderata are: the person punished should deserve the punishment; innocents should be affected only minimally by the punishment, as compatible with fulfilling the other criteria; punishment should have some social value; and the value of punishment must bear some direct relation to the wrong that was done.

**Criterion 1: Punishment must be deserved.** Here I will specify the conditions in which desert is applicable. For example, one must have actually committed the offense in question, and one must be an agent capable of bearing responsibility in order to deserve punishment. Unpacking desert involves considering issues of responsibility, autonomy and guilt. What we are said to deserve as a result of any particular action is defined by the expectations of the culture in which the action occurs. Our notions of
desert reveal our cultural expectations of what 'ought to happen'. Desert can be both backward and forward looking. One can be said to deserve present recognition for some past action, or to deserve future recognition for some present action. But one also can be said to deserve recognition now for some anticipated future event, as when a child with a terminal illness is said to deserve certain preferences over peers who anticipate longer lives.

Although communities may differ in what an individual may be said to deserve, what can be said most generally is that wrongdoing deserves punishment. However, in order to deserve punishment one should be responsible to some degree for one's actions. One who is ignorant of the law and violates it as a consequence is not seen in the same light as one who has evaluated the situation and consciously violated the law. Although it is every citizen's responsibility to know the law, the failure of responsibility here is with respect to knowledge of the law, which is a precursor to being able to act responsibly with respect to the law. Differentiating ignorance of the law from overt violations of the law is not meant here to imply that only the latter deserves punishment, but it is meant to illustrate the role that responsibility plays in our determination of what people deserve. The individual who only violated the law out of ignorance is typically not thought of as deserving the same punishment as one who consciously violated the law. The different levels of responsibility each case exhibits justify these differences in desert.

The level of responsibility the agent is determined to possess differentiates what is properly deserved in response to conscious actions. An adult determined to be fully responsible would deserve full measure of punishment. However, mitigation occurs when considering adults who are not fully responsible for themselves. In the case of
juveniles, a separate and more lenient measure of desert is used; this is justified because
the youth are determined not yet to be fully responsible for their actions. One way we
evaluate an individual’s responsibility is considering the individual’s ability to act
autonomously. The ability to ascertain one’s own well-being in broad terms and to act
effectively to serve those ends without coercion either in the formulation of those ends or
the means chosen to achieve them is a base condition for autonomy. One’s level of
autonomy is a matter of degree. People achieve autonomy incrementally and unevenly.
It is possible for an individual to achieve a high level of autonomy in one area of
expertise in one’s life and yet be fairly incompetent in another. This consideration leads
me to posit that we evaluate at some base level the skills that it takes to be autonomous,
and from that point consider the particular situations in which one’s skills are called to
use. So there is a difference between the root skills of developing autonomous agency
and the specific cases in which one applies those skills. The latter are dependent on a
plethora of contingent conditions, while the former is suggestive of a level of maturity
and conceptual mastery.

Desert, then, in the broadest sense, is derivative from the issues of responsibility
and autonomy. In the specific case of punishment and who deserves what, there is the
further consideration of guilt. There are two concepts of guilt that need to be
distinguished. One concept of guilt refers only to the actual agency involved in a
particular incident. To speak of guilt this way is to separate out the concept of guilt from
the concept of blame. One can be guilty without being blameworthy insofar as one
actually precipitated the particular act in question, but did so without bearing the requisite
responsibility for blame-worthiness. When one is not fully responsible for an action, it
makes sense to acknowledge the causal agency as guilt (‘yes, it was she who did it’),
while refraining from applying blame to the same individual (‘but she could not have
done otherwise under the circumstances’). This use of guilt recognizes only the causal
agency for which the individual is responsible, which is a notion of responsibility that is
prior to considerations of blame-worthiness. This, then, is a stripped down notion of guilt.
I mention it not because it is commonly used, but because it is important not to overlook
and conflate the distinguishable features of blame and guilt.

A second way of conceiving guilt is to include the notion of blame-worthiness in
the concept of guilt. Guilt in this understanding of the term indicates that one is
responsible both for causal agency and for blame as well. Determining blame-worthiness
involves making a judgment about the individual agent’s role in the act in question. This
judgment requires evaluating both the responsibility and the autonomy of the individual
in the circumstance in question. As I mentioned above, evaluating an individual’s
autonomous agency requires judgment at several levels. The individual must be
determined to be capable of acting autonomously and subsequently it must be judged to
what degree that individual was capable of acting autonomously in the particular
circumstances in question.

Criterion 2: Innocents should be affected only minimally by the punishment,
as compatible with fulfilling the other criteria. Here the traditions vary widely, with
consequentialist theories having a particularly difficult time protecting innocents.
Although the protection of innocents is likely a desired outcome by all theories, if we
take our concern for others seriously it is not only impractical to suggest that no
innocents will be affected by the practice of punishment, there is a sense in which that
result would be tragic. Imagine the level of social cohesion we would have if we were completely unaffected by the life events of those around us. We would not be recognizable as the sort of social beings we in fact are. As it is, the suffering of those we care about does affect us. Therefore, as long as those being punished are cared about by innocent friends and family members, there will be innocents who suffer as a result of deserved punishment. This suffering is not altogether a bad thing, however, for it only occurs through the very positive activity of caring. It would be far worse if no one cared enough to be affected by the circumstances of someone else.

**Criterion 3: Punishment should have some social value.** I leave open for any theory to determine how that value should be defined, whether as instrumental, as a consequentialist might claim, or intrinsic, as a deontologist might claim. The core intuition here is that any particular application of punishment must be valuable to some party, person, or group. Punishment is largely viewed as the practice of inflicting some harm on a person in response to some wrongdoing. Because this is a social practice, it is reasonable to claim that this harm, in order to be justified, must be able to be interpreted in terms that recognize its contribution to some social notion of good. These interpretations range from claiming that punishment increases stability because it deters future wrongdoing to the claim that punishment restores justice by correcting the imbalance of justice that results from wrongdoing. Each explanation is justified in the context of a background theory that is already in place and provides the parameters in which punishment is to be considered. Although the metaphysical, epistemological and ontological commitments of different traditional theories vary, there is in each of the predominant theories a common effort to justify punishment in terms of its value.
Criterion 4: The value of punishment must bear some direct relation to the wrong that was done. This criterion rests on the notion that punishment is a form of communication. One of the ways in which values are communicated to the society at large is through punishment and the threat of punishment. The general idea behind this claim is that punishment communicates, and in order to do so effectively it must be meaningful. In order for punishment to be meaningful it must include an explanation as to why it is the appropriate response to the wrong that was committed. There is an assumption here that the individual being punished is a rational autonomous agent, capable of understanding the moral prohibition that was violated, that is, someone with whom communication is possible. Joel Feinberg has explored the expressive nature of punishment at some length\textsuperscript{24}, but here the first aspect of the claim I am making is most general, namely, that punishment communicates. The second aspect of this claim is that part of respecting the integrity of individuals is to insist that punishment communicate in a way that respects the rational agency of the offender by making a rational connection between the offense and the punishment. This may seem redundant, but many things communicate and I believe it important to specify that the sort of communication to which I refer is respectful communication between rational parties. Strictly vengeful punishment may communicate anger and perhaps anguish, but it fails to communicate respect for the integrity of the individual being punished. If we are going to carry forward the premise that all individuals are worthy of respect, then what we communicate when we punish must reflect that respect. One of the conditions of that respect is that the

punished party is provided with some reasoned justification as to why the punishment is appropriate to the offense.

1.4 General Justificatory Concerns

The task of successfully articulating and implementing a theory of punishment is complicated by the fact that a theoretical justification of the institution of punishment may not justify any particular practice of punishment or any particular law. We claim to justify all sorts of behaviors in the name of punishment that are normally prohibited, the death penalty being a most obvious example.\(^{25}\) My concern is that violations of some of these prohibitions are not properly justified, and may in fact be unjustifiable. Our theoretical commitments are made under conditions of incomplete knowledge and so, I argue, we build into even our best theories the potential for metaphysical, psychological or some other kind of error, such as may occur in implementation. Furthermore, a practice may fail to be justified by theory because it conflicts with one or more of the basic principles of the supporting theory in ways that may not be readily apparent. That is, a theory may be consistent with itself, but the facts of the world may differ from the presumptions of the theory. When the theoretical presumptions about the world do not fit the actual world, the theory is only of limited relevance. For example, many who defend capital punishment do so based on a belief that it acts as a deterrent. Whether or not capital punishment actually deters is a fact about the world over which there has been disagreement. We may find ourselves faced with effects that were unexpected, according

\(^{25}\) In Texas, the justified use of lethal force seems to be an ever lowering standard. Recent acquittals in cases where lethal force was used against unarmed individuals suggest that another way of closing the justification gap is to further relax the prohibitions against violence and abuse we customarily maintain in daily life. This thesis will take the opposing viewpoint and argue for higher standards of conduct at all levels of interaction in an attempt to align theory and practice.
to theory, but in practice were unavoidable. Punishment theory seems particularly susceptible to this sort of oversight, given that there is so much emotional weight that attaches to the judgment of wrongdoing. This reveals though, that developing responsible theory involves more than making theoretical commitments and that theorizing should not be divorced from consideration of the practical results of its application.

At the root of concern here are both practical and theoretical aspects of punishment. The main practical concern is that our actual treatment of offenders is often immoral. The main theoretical concerns are that we lack a clear conception of what constitutes ‘successful’ punishment, as well as what constitutes a successful justification for much of the punishment we do exercise. These last issues, regarding our ambiguity about success, occur not only because we are unclear about the aims of punishment, but also because we lack a method for determining when the aims of punishment have been met. An actual case may best illustrate my concerns. Consider the single mother arrested for smuggling cocaine into the United States for her boyfriend. She served four years in prison and upon release returned to her four children. Although she had been a department store manager, she could not rent an apartment, except in what she termed ‘the slums’. In spite of her skills and experience, she could not find a job in her field. In the early years after her release, her teenage children helped support the household. Presumably the sentence of four years was justified. The stigmatization and discrimination she suffered, however, are not even recognized by theory, although for her they were unavoidable consequences.
As the above case illustrates, the reality of the experience of punishment diverges from our theoretical understanding of it. Current theory reflects an understanding of punishment as a discrete event. Experience, however, demands that punishment be viewed systemically. Punishment in the actual world is not a discrete event. Fair and effective punishment will need to respond to the reality that our private and public lives are complex and interrelated. A useful theory will explain and respond to that reality. In the following section I will discuss the development of the penitentiary and the evolution of the criminal justice system in the United States. What I find most significant about this history is that it reveals that problems with translating theory into practice seem to be an intractable challenge to the just and reasonable application of punishment. As the following section traces the past two hundred years, theory and practice have had a turbulent or at best uneasy alliance. As you will see, the failure of theory and practice to align contributed to the collapse of centuries of dedication to reform into policies of often-extreme retributivism.

**PART II: A Brief History of Prison Use in the United States**

If your only tool is a hammer, all of your problems will look like nails.
Sir Charles Pollard²⁶

1.5 **The Evolving Use of the Prison**

The social dynamics responsible for the development of incarceration as a form of punishment differ dramatically from the dynamics defining its use in the 21st century.

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The legacy of the prison is that it was introduced as a humane alternative to the humiliation of public forms of punishment such as the stockades and even execution.\textsuperscript{27} The institution of the prison has changed less dramatically in the last two centuries than have the justifications and aims of its use. This brief history of the practice of incarceration in the United States will provide an overview of the conflicting justifications that continue to be voiced in support of its use. Retributivists, deterrence theorists and reformers all have claimed the prison as a means toward their ideological ends. This recounting of the history of the criminal justice system’s reliance on incarceration in the face of changing policy motivations will serve as a useful demonstration of how use of the prison has evolved to its current status as the backbone of the criminal justice system.

Prior to the Revolutionary War the colonies followed English practices regarding criminal justice and the use of the prison.\textsuperscript{28} In England and Europe, public physical punishments ranging from whipping to execution were customary, as were forced labor in ‘workhouses’ and banishment. In the absence of local law enforcement, the public spectacle of punishment was favored by royalty, who relied on intimidation as a means of exerting authority.\textsuperscript{29} In the colonies, punishments were generally some form of (often painful) public physical humiliation, such as the pillory.\textsuperscript{30} The primary aim of these

\textsuperscript{27} For a useful history and analysis of the introduction of the penitentiary to America as a theologically and socially sound response to criminality, see Laura Magnani’s America’s First Penitentiary: A 200 Year Old Failure. San Francisco: American Friends Service Committee, 1990.
\textsuperscript{30} The practice of banishment, common in England, was less popular in the colonies, where many had suffered from persecution or banishment. Many of the physical forms of punishment, however, were copied directly.
punishments was to deter crime.\textsuperscript{31} Other than debtors, who were sentenced to spend time in prison, most offenders were held in prison only to await either trial or corporeal punishment. Prison was generally not viewed as a punishment in itself.\textsuperscript{32,33} In late 18\textsuperscript{th} century Philadelphia, however, Quaker sensibilities of faith and justice contributed to a change in social policy that resulted in the introduction of the penitentiary. The penitentiary, as its name suggests, was quite literally designed to be a place where law-breakers could come to penitence.\textsuperscript{34} In the 18\textsuperscript{th} century, the spectacle of public punishment was losing favor throughout the western world, as nations became more politicized and less dependent on sovereign authority. Reformers such as Dr. Benjamin Rush became prominent spokespersons for the penitentiary alternative. Rush argued that the humiliation of public punishment alienated offenders, taught them to be numb and destroyed their character.\textsuperscript{35} The penitentiary was viewed as a necessary and more humane alternative to the violence, degradation and humiliation of public punishments.

In 1790, with the passage of the Penology Act, the Walnut Street Jail in Philadelphia was transformed into the first penitentiary.\textsuperscript{36} Based in part on the Dutch ‘workhouses’, the penitentiary would instill wrongdoers with discipline and good work habits.\textsuperscript{37} The philosophical shift to use of the penitentiary was profound. Quite unlike the previous practice of deterrence through public humiliation, the purpose of the penitentiary was to

\textsuperscript{32} Magnani, (1990), p. 9.
\textsuperscript{34} Magnani (1990), pp. 6-14.
\textsuperscript{35} Magnani, (1990), p. 20-22.
\textsuperscript{36} Rothman (1998), p. 103.
facilitate the reform of the wrongdoer. The penitentiary experience was designed to provide the wrongdoer with an environment conducive to the restoration of right moral principles. To that end, inmates were kept in separate cells and were expected to spend much of their time in silence in prayerful reflection or engaged in a solitary task, such as spinning. In addition to the new discipline in the life of the inmate, order was introduced into the management of prisons that resulted in prisoners being divided by category of offense and the use of liquor being prohibited within the facility.

The promise that a penitentiary stay could ‘reform the deviant’ remained the hope that guided social and criminal justice policy. By the early 19th century most states adopted the reformative notion of the penitentiary. The post-Colonial period was marked by a public concern that crime was increasing and threatening social stability. The primary contributing factor to the increase in crime was thought to be the deterioration of the social order in the new open society that was developing. The belief at the time was that the turn to crime represented a failure of social institutions to instill obedience. David Rothman describes a belief that, “Just as the defects in the social environment had led the inmate into crime, the disciplined and disciplining environment of the institution would lead him out of it.” In the first half of the century, the methodology for transforming wrongdoers was guided by the reformative ideals of isolation and discipline. However, it soon became apparent that there was a growing divergence between the rhetoric and the reality of reform. The economic realities of the single-cell penitentiary

38 Magnani (1990), p. 22.
39 Magnani (1990), p. 27.
made its continuation cost-prohibitive. Without the solitude and silence that were prescribed by the reform ideology, incarceration became increasingly custodial. After the Civil War, there was even less reliance on penitential influences and greater use of incentives and deterrents to shape the behavior of inmates. There was also a turn toward prison labor, both as a means of discipline for the inmates as well as a means to offset the cost of operating the prison.

Although the rhetoric of reform persisted throughout the 19th century, the reform 'experiment' was failing. In 1820, just thirty years after the Walnut Street Jail experiment started, the Visiting Committee of the Prison Society reported on the facility:

*It is with deep regret that the Visiting Committee feel themselves obliged to state, they have not been able to perceive any reformation among the prisoners; and they are fully convinced, the following causes have principally, if not entirely, prevented the reform that has been so anxiously expected.*

1st the unfitness of the present building for a Penitentiary.
2nd the want of classification
3rd the crowded state of the prison
4th the want of employment.

*While causes so pregnant with evil exist, it is vain to expect any reform.*

This early warning was repeated in 1867 when Enoch Wines and Theodore Dwight released their “Report on the Prisons and Reformatories of the United States and Canada” which found that none of the prisons reviewed were meeting the criteria of reform. The primary objections they reported were that the cells were too small, the staff was untrained, the facility lacked central supervision and there was unacceptable use of

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corporeal punishment. Although the justification for expanding use of the prison from a holding tank to a penitentiary was the promise of reforming character, the material needs of a successful penitentiary had still never been met. Reformers acknowledged that from the outset they lacked the staff, the physical plant and the know-how necessary to carry out their program of reform. Coming to terms with these failures, however, served to re-invigorate the commitment to reform, and in 1870, the National Congress on Penitentiary and Reformatory Discipline admitted these shortcomings and re-asserted its mission as reformatory, stating:

Our aims and our methods need to be changed. [In the first instance,] the prisoner’s self-respect should be cultivated to the utmost, and every effort made to give back to him his manhood.\(^{49}\)

And so the care and reform of the inmate remained central to the mission of incarceration in intention, if not in practice.

The twentieth century continued to embrace the reformatory promise of the penitentiary. The 1920’s and 30’s were marked by developments in the psychotherapeutic model of identifying criminal behavior as a malady. The psychotherapeutic model used medical terminology and replaced normative words, such as ‘bad’ with terms of disease such as ‘maladjusted’.\(^{50}\) Programs of ‘reform’ became programs for ‘treatment’. However, much as was the case with earlier efforts at reform, the progressive vision was rarely successfully executed.\(^{51}\) The continuing failure of the prison experience to live up to its reformatory promise was due, at least in part, to a material failure. Prison riots in the 1950’s forced prison administrators once again to

\(^{50}\) E. Rotman (1998), p. 159.
reevaluate practices. In 1953, the American Prison Association (APA) found that in spite of ample rhetoric espousing the progressive reform programs, inmates were largely idle throughout the day, forced to live in overcrowded conditions in facilities that were not suitable, and were supervised by staff that was insufficiently trained.\textsuperscript{52} In short, complaints registered almost upon inception of the penitentiary were still unresolved. For over 150 years reform had been the general justification for incarceration, and for as long, it met financial and administrative obstacles that hindered its successful implementation. Undeterred, the professional response to the institutional shortcomings was yet another re-commitment to reform. In 1954, the APA went so far as to change its name to the American Correctional Association (ACA) as a means of reaffirming that they were not merely custodians of inmates but were in the business of reform.\textsuperscript{53} This commitment was in keeping with international standards. The following year, the Geneva Congress of the United Nations adopted ‘Standard Minimum Rules for Treatment of Prisoners’ which stated explicitly in Article 58 that imprisonment is justified only when it will “ensure, so far as possible, that upon his return to society, the offender is not only willing but able to lead a law-abiding and self-supporting life.”\textsuperscript{54} From the vantage point of the 21\textsuperscript{st} century it may seem somewhat surprising that such an earnest commitment to individual well-being and reform was such recent history.

The long history of reform, however, was about to collapse, only to be supplanted by increasingly retributivist policies and practices. The failure of reform to produce statistical evidence of its effectiveness certainly contributed to its loss of favor.

However, perhaps the most devastating blow to the reform effort in the 20th century was the politicization of crime. Crime entered electoral politics in the 1964 presidential race, when Barry Goldwater made street violence an electoral issue in his bid for the presidency.\textsuperscript{55} Goldwater lost the election, but the issue of crime had become a political one. The politicization of crime has affected the tenor of national dialogue on crime to the extent that it is now necessary for political hopefuls to adopt a ‘tough on crime’ stance as a baseline from which to engage about issues of criminal justice.\textsuperscript{56} Although the escalation of emotions and rhetoric have led to dramatic increases in incarceration, it also seems to have also obscured the fact that the criminal justice system is ill-prepared to address crime at the scale that politicians infer it will. Ideally, punishment applies equally to all wrongdoers in similar situations. Statistics reveal, however, that that in the case of legal wrongdoing, only about 50 percent of crimes are reported, and of that 50 percent, only about 10 percent result in conviction.\textsuperscript{57} This means that about 95 percent of the time, criminal wrongdoing goes unpunished.\textsuperscript{58} The conception of the criminal justice system as capable of ‘cleaning up crime’ is simply naïve. However, the issue of crime has taken on political currency and this has resulted in an exaggerated sense of our reliance on the criminal justice system and an increased anxiety about public safety.

With crime in the center of partisan politics, responses to it have been driven by political

\begin{footnotes}
\item[58] L. Friedman (1993), p. 458.
\end{footnotes}
expediency more than the substantive concern for what was best for the individuals involved that marked the reform efforts.\textsuperscript{59}

Over the last thirty years opinions and practices in the criminal justice system changed enormously. In the late 1960's and early 1970's the popular conception of punishment and the use of incarceration was still that it provided individual-oriented programmatic and therapeutic responses to wrongdoing. Inmates were enrolled in programs and courses of treatment intended to address what were believed to be the underlying causes of their criminal behavior and to prepare them to live in the free world without turning to crime. Many inmates were given indeterminate sentences, a practice that allowed states to adapt punishment to the individual.\textsuperscript{60} An indeterminate sentence meant that instead of receiving a sentence of a set duration, such as ten years, an inmate would be released when he or she had demonstrated a readiness to rejoin free society.\textsuperscript{61} The 1970's marked the beginning of a dramatic shift in both legislative and public opinion about the nature and purpose of punishment, which saw individual-oriented sentencing replaced by strict adherence to principled applications of justice. In one of the starkest examples, in 1973, Nelson Rockefeller, then governor of New York State, altered the national dialogue on crime and drug use in what have come to be known simply as The Rockefeller Drug Laws. These laws exploited the growing anxiety about crime and safety and began the reversal of reform-minded policy. The Rockefeller Drug Laws ended indeterminate and individualized sentencing, and introduced mandatory sentencing, which included sentences of 15 years to life for minor drug possession

\textsuperscript{60} N. Morris (1998), pp. 216-7.
\textsuperscript{61} Indeterminate sentencing was offender-related, addressing the needs and capacities of the offender, rather than using the amount of harm done as a gauge to determine an amount of harm due to the offender.
charges and life sentences for repeat offenders. These changes effectively shifted the basis of what constituted appropriate punishment away from facts about the offender to the facts of the offense. This shifting and reordering of priorities associated with the movement from reform policy to retributivist policy marked the second such shift since the American Revolution. In a very short time, however, the statistical evidence generated since the retributivist turn indicate that there is much to be concerned about in the category of ‘unintended results’.

Part of the evidence that current practices are failing comes to light when the demographics of those individuals who are being punished are examined. Among persons convicted, there is a disproportional representation of poor and minority individuals. If the retributivist turn was in large part political rather than ideological, a corollary shift is that those most impacted by the sentencing changes were those with the least political influence rather than those who represented some particularly dangerous or heinous criminal element. In the United States, at the end of the year 2000, 6.3 million people were either incarcerated or under some sort of court supervision. That represents 3.1% of the population. In the year 2000, the incarceration rate in the United States for white non-Hispanics was 132 per 100,000; for Hispanics it was 280 per 100,000; and for black non-Hispanics it was 736 per 100,000. In California, two out of five young black men are under the supervision of the state. Black males comprise six percent of the

63 Cragg (1992), p. 139.
66 Vivien Stern. A Sin Against the Future: Imprisonment in the World. (Boston: Northeastern University
total population in the United States, but nearly fifty percent of the prison population.\textsuperscript{67} \textsuperscript{68}

It is difficult to imagine the impact of raising a child under the shadow of such chilling probabilities. Incarceration has become an accepted practice in the United States, with the last thirty years seeing an unprecedented increase in the use of incarceration in response to criminal wrongdoing. In the years between 1975 and 1996 the incarcerated population in the United States increased nearly six-fold.\textsuperscript{69} To put these numbers into a global perspective, consider the following statistics for the rate of incarceration per hundred thousand people from a sampling of countries around the world: Croatia, 50.0; France, 91.4; Brazil, 95.5; Thailand, 159.0; England and Wales, 120.0; Italy, 85.0; Singapore, 229.0; South Africa, 368.0; Kazakhstan, 560.0; Russia, 690.0; United States, 615.0.\textsuperscript{70} Two issues stand out as rather pronounced. The statistics give us an indication that our use of incarceration in the United States is radically unbalanced in its distribution across class and race, dramatically different from what might be projected from the demographics of a fair and equal distribution, all other things being equal. But perhaps even more surprising is that the rate of incarceration in the United States is approximately five times that of most of our European allies, and far out of step with most of the world.

While these statistics alone do not provide enough information to condemn the current practice of punishment, they do indicate that social and especially economic forces need to be evaluated in order to determine whether there is bias in the application of punishment policy or in the policy itself. Social and economic injustices have proved

\textsuperscript{67} Stern (1998), p. 50.
\textsuperscript{70} Stern (1998), p. 32.
to be reason enough for some to dismiss the possibility that the institution of punishment could be practiced fairly because society itself is too riddled with unfairness to support its fair functioning.\textsuperscript{71} Along these lines, Barbara Hudson warns that institutions, even those trying to reform themselves, have a tendency to perpetuate present injustices. She writes,

By modesty demurring that social injustices can be dealt with by the criminal justice system, justice model reformers are building those very injustices into the heart of the system, by privileging the factors they most strongly influence – the nature of the charge faced by a defendant, and the length of the previous criminal record – as the only factors relevant in sentencing.\textsuperscript{72}

The persistent presence of injustices within the criminal justice system has led some, like Pat Carlen, to argue for broadening the aim of punishment. She suggests that,

“The criminal justice system should be used not only to punish criminals but also to redress some social injustices, or failing that, to ensure that at least its sentencing policies do not increase social inequality”.\textsuperscript{73} Others have gone so far as to argue that there is an institutional bias in the practice of punishment that we cannot escape, and have taken to referring to the institution of state-sanctioned punishment and its supporting bodies as ‘the prison-industrial complex’. Eric Schlosser writes of the development of this concept:

Three decades after the war on crime began, the United States has developed a prison-industrial complex -- a set of bureaucratic, political, and economic interests that encourage increased spending on imprisonment, regardless of the actual need. The prison-industrial complex is not a conspiracy, guiding the nation’s criminal-justice policy behind closed doors. It is a confluence of special interests that has given prison construction in the United States a seemingly unstoppable momentum. It is composed of politicians, both liberal and conservative, who have used the fear of crime to gain votes; impoverished rural areas

\textsuperscript{71} See Murphy (1973).
\textsuperscript{73} Carlen (1994), p. 329.
where prisons have become a cornerstone of economic development; private companies that regard the roughly $35 billion spent each year on corrections not as a burden on American taxpayers but as a lucrative market; and government officials whose fiefdoms have expanded along with the inmate population.\textsuperscript{74}

However one conceives of the justifications for state-sanctioned punishment, it is clear that the realities of the social, economic and political environment in which it is practiced can and do influence the shape of the final sanctioned practice.

The prison boom that has accompanied the ‘tough on crime’ legislation of the last thirty years has changed the economic scale of incarceration. State budgets have reflected this, with corrections taking an increasingly larger percentage of state resources.\textsuperscript{75} In some ways, the recent trend in the privatization of prisons has made the economic considerations of incarceration even more apparent. Since its inception in 1983, The Corrections Corporation of America (CCA) has become the largest and most influential operator of private prisons. The operators of private prisons, such as CCA and Wackenhut Corrections, have the economic incentive (and influence) to lobby state and federal legislators for longer sentences for offenders.\textsuperscript{76} With private prisons operating on a capitalist model, the motivation behind the institution shifts from justice to profit and prisoners become a commodity for which prisons compete. Private prisons are not burdened with what may be the state’s interest in the personhood of the offender, but are able to focus merely on the numbers and the fact that an occupied bed is a paying bed.

As Eric Bates writes in “Private Prisons”:

The real danger of privatization is not some innate inhumanity on the part of its practitioners but rather the added financial incentives that reward

inhumanity. The same economic logic that motivates companies to run prisons more efficiently also encourages them to cut corners at the expense of workers, prisoners and the public. Private prisons essentially mirror the cost-cutting practices of health maintenance organizations: Companies receive a guaranteed fee for each prisoner, regardless of the actual costs. Every dime they don’t spend on food or medical care or training for guards is a dime they can pocket.\textsuperscript{77}

Typically, one might expect that in the determination of appropriate sentencing measures the social costs are weighted against the economic benefits, but in the private prison industry we have a model for consistently selecting economic value over the social value. Political, economic and social forces all come into play in the application of punishment. These often unspoken tensions about the role of the state, the needs of the individuals served by the state, along with questions about the appropriate scope of moral reasons relevant to the institution of punishment all contribute to the dynamic that is our current practice of punishment. It is no surprise that as a culture we are by turns passionate, ambivalent and deeply conflicted about how to respond to wrongdoing. One of the deepest problems with both the retributive and deterrence theoretical accounts is that they lack any internal mechanism or motivation to integrate the value of criminal justice among society’s other values. Underlying concerns about social justice, partisan politics, and increasingly, pressures to respond to economic forces, make it a practical reality that any application of a system of criminal justice will be shaped by the interplay of these competing social and economic concerns. The needs of prisons will be pitted against the needs of other social programs.\textsuperscript{78} The challenge is not simply to ‘do right’ or ‘do justice’, but to sort through these demands and discern a best response, given the disorderly nature of life and competing social forces. It is a mistake to think that the

\textsuperscript{77} Bates (1998), pp. 11-18.
criminal justice system operates independently of other social institutions. Social institutions, whether intentional, such as the criminal justice system, or unintentional, such as entrenched practices of racism, sexism or economic oppression, are woven together in one fabric. In order for the practice of punishment to be both humane and relevant, it must be able to interact in meaningful ways with the other social forces defining contemporary society.

1.6 Summary

At virtually every level of application, the justice of the criminal justice system is in question with respect to incarceration. Those most directly affected by it, offenders, victims, policy-makers and law enforcement officials, have serious complaints about the current practices. Offenders object that many aspects of the current system are excessively punitive and unjustified on any theory. Among their complaints are: that the sentencing practices are severe beyond proportionality or fairness; that the current system places extraordinary hardships on families during incarceration; that they receive inhumane treatment while under institutional confinement; and that the stigmatization continues to diminish their quality of life once the term of their punishment is over. Victims also have many objections to current practices. They object to the fact that they have almost no voice in the criminal justice process; they object to the inadequacy of the state-supported services available to them and they object to the fact that the state and the general public focus their responses on the offender, often to the neglect of the victims of crime. Those who make the laws are no more satisfied with current conditions. Policy-makers and law-enforcement professionals worry they are providing too little too late;
that their efforts are not effective at reducing or relieving crime and its aftermath; and that the politicization of crime has paralyzed the possibility of real progress or reform. In addition, lawmakers are now questioning whether current practices are sustainable from an economic standpoint, as both incarceration and recidivism rates have remained high enough to strain state budgets beyond capacity.\footnote{More and more states are addressing the economic aspects of the incarceration boom by reversing mandatory sentencing laws, early release for non-violent offenders and waiving prosecution of non-violent offenses. See latest reports in “Inmates Go Free to Reduce Deficits” by Fox Butterfield, in \textit{The New York Times}, December 19, 2002, pp. A1, A20.} It can be difficult to discern whether problems arise from poor policy decisions or from problems with execution, or some combination of the two.

In order to respond to the broad interests of all those impacted by the practice of incarceration, it is clear we need to think beyond a simple ‘law versus offender’ model of justice and think deeply and systemically about our responses to wrongdoing. My aim in this thesis is to employ care-based reasoning to develop a plausible response to criminal wrongdoing that does not demonize the offender; nor further alienate the offender from the community. In order to understand the social motivation behind this sort of response, though, one would need to reinterpret the social dynamic of criminal wrongdoing from an adversarial model to a more cooperative model. Care reasoning addresses this need. As I mentioned above, reform policies have historically dominated justifications for punishment, even while many of those practices fell short of success. There is a long tradition of compassion toward criminal offenders that in recent decades lost all voice in social policy. While care-based reasoning does not introduce such concerns to discernment about social responses to wrongdoing, I will argue that it does bring to contemporary punishment theory a model of moral reasoning that is guided by a spirit of
cooperation and grounded in acceptance of our inescapable interdependence. The significance of this contribution is that it explicitly acknowledges what was once informally incorporated into deliberations about wrongdoing, namely, recognition of our fundamental interdependence. This recognition alone is enough to deflate much of the dehumanizing rhetoric that has driven the politics of incarceration the last thirty years.

By insisting on a deeper responsiveness to the interdependency of social institutions as well as the incorporation of moral particulars in decision-making, the scope of the moral problematic around punishment can be reconfigured from one that is describable in terms of violations of principles (or laws) to one that covers a wide spectrum of concerns relevant to state authority and social order. These contributions, in theory at least, have the potential to make the criminal justice system more responsive to individual and societal needs. That seems especially relevant given that responsiveness is one of the hallmark values of adversarial justice.80

CHAPTER TWO

Care and Justice

If you were in fault ever, if you had done anything very wrong, I should be sorry for the pain it brought you; I should not want punishment to be heaped on you.¹

Maggie Tulliver in The Mill on the Floss

PART I: The Ethics of Care: Emergence of a New Perspective

2.1 Introduction

The concerns that motivate this thesis share a common base: they all focus on the treatment of offenders, whether done deliberately or incidentally. The analysis in this chapter draws out a distinction in the metaphysics of care reasoning and justice reasoning. The views of the self in these respective perspectives, I argue, reflect distinctive and important complementary insights into human interaction and, equally importantly, complementary insights into the role of morality as a guide to interpersonal conduct. Traditional justice-based reasoning has attempted to capture the breadth of human need in moral terms primarily by providing protections for individuals by placing limits on conduct and preserving, to a large extent, values such as autonomy, fairness and equality. Perhaps the justice tradition's greatest strength is precisely this dedication to the creation of a system of social justice that nurtures the conditions of human flourishing. The main objection here to the justice tradition is not that it is somehow wrong, but rather, that it is an incomplete expression of what we care about. With this in mind, a major contribution care theorists have made to the justice model, has been to

¹ Quoted in Carol Gilligan's In A Different Voice: Psychological Theory and Women's Development. (Cambridge, MA: Harvard University Press, 1982), p. 69
broaden the scope of how we understand individual needs from a moral point of view. Care theory provides motivation to incorporate concerns about moral particulars into public moral deliberation about appropriate social policy. In this chapter I will trace the development of the care perspective and discuss the significance of the care and justice perspectives as parallel and complementary models of moral reasoning.

The task of this chapter is to establish the care perspective as a sound ground for moral reasoning. The more long-term aim, addressed in subsequent chapters, is to apply the moral reasoning of the care perspective to contemporary thinking about state-sanctioned punishment. The first challenge, however, is to address how we might evaluate or deliberate about the set of moral reasons generated from the care perspective. This challenge amounts to overcoming a cultural bias regarding the constitution of moral reasons. Margaret Walker describes the situation as follows:

Philosophical ethics, as a cultural product, has been until most recently almost entirely a product of some men’s thinking. There are the usual reasons to suspect that those men will not have represented, or will not have represented truly, modes of life and forms of responsibility which aren’t theirs, or which they could recognize fully only at the cost of acknowledging their interlocking gender, race and class privileges.\(^2\)

The reason for this, Walker explains, is an epistemological difference. She characterizes the epistemological difference between the care and justice perspectives as that of a different baseline assumption about moral understanding. The justice perspective, she describes, holds that the ‘adequacy of moral understanding increases as this understanding approaches systematic generality’ and the corresponding assumption by the care perspective is that the ‘adequacy of moral understanding decreases as its form

\(^2\) Walker (1995), pp. 139-140.
approaches generality through abstraction.' The justice and care perspectives approach moral knowledge from different epistemological and metaphysical assumptions. While the two perspectives are in tension over many values, I will suggest that they are best understood as complementary to each other. Instead of treating the two perspectives as oppositional, I suggest that together they present, while not necessarily a whole, certainly a more complete picture of the moral landscape. The overriding concern of this project is to identify a class of moral reasons that may provide good reason to alleviate some of the gross injustices that currently are part of our institution of state-sanctioned punishment, and most particularly in our practice of incarceration. It is my belief that care-based reasoning can provide the moral justification for such relief.

As I briefly mentioned in chapter one, I am interested in using the ethic of care to pursue two lines of argumentation with respect to punishment and care theory, one ideal, the other non-ideal. In subsequent chapters, I will develop this analysis and consider how care impacts, or how we might want care to impact, our punishment theory and practice. These arguments will come to fruition in chapter five, but I want to set out the parallel reasoning paths in advance. In the non-ideal analysis, which is the ‘real world’ analysis, I will subject traditional punishment theories to an internal critique. These criticisms will not be limited to objections that spring from the care perspective, but will reflect an objective presentation of problems internal to the theories themselves. In general, these objections claim that the traditional justifications for punishment do not preserve some basic human rights and values, the absence of which endangers offenders in ways that are

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4 See Rosemarie Tong's Feminist Thought (Boulder: Westview Press, 1989) footnote 63. The idea that they are opposed has been a disservice and unhelpful to deeper understanding of what is required in the course of coming to moral maturity. Fluidity, rather than rigidity, seems the greater wisdom.
unjust as well as physically, socially and morally demeaning. Where possible, I will suggest ways in which the integration of care theory can reduce or eliminate the problems internal to the theory. Care theoretical values, the argument runs, provide missing moral incentives to retain the dignity, respect and well-being of those we punish. This is non-utopian, in that there are still profound reasons to reject the institutionalization of punishment as currently practiced. The ideal analysis will critique the traditional theories from the care perspective, and as such will question some of the basic premises of these theories. The argument for ideal theory applications will claim that state-sanctioned punishment, as currently practiced, misconceives the breadth of morally relevant social dynamics that come into play with the practice of punishment. Care-based reasoning, I argue, provides reasons for believing that a more responsive, socially integrated practice is both desirable and necessary. Again, I will suggest ways in which care theory can help us envision an alternative response to wrongdoing. First, however, I will turn to the analysis of the ethics of care in this chapter.

In Part I of this chapter, the development of care ethics will be explored in its early chronology. This historical perspective will be used as the foundation for our understanding of ‘care’ for this project. Part II will further distinguish care ethics from justice ethics and will focus on the moral commitments that underlie each perspective, specifically those commitments relating to the nature of the self and the concept of moral value. In both Part I and Part II, the articulation of the ethic of care will involve applying a steady contrast with what has come to be called the ethic of justice. This definition-by-contrast reflects the historical manner in which the ethic of care evolved and differentiated itself from justice ethics. The contrast also emphasizes the connectedness
of the two perspectives. In spite of the great emphasis on their differences, they each address a shared concern for appropriate moral reasoning and aspire to contribute to human flourishing; care and justice reasoning are engaged in similar work using different tools and different base assumptions. In the end, I argue, the contrasts will serve not only to differentiate the ethic of care from the ethic of justice, but also to illuminate the interdependence of care and justice. This chapter will lay the groundwork for the later chapters in which that interdependence will be explored and practical applications for punishment theory and practice will be envisioned.

2.2 The Contemporary Origins of Care

There have been numerous controversies surrounding the ethic of care as it has been discussed and differentiated from justice over the past several decades. It has been argued that it is not a full-fledged ethic in its own right, and so perhaps not worthy of serious consideration. It has been argued that it is not a new ethic at all, but one which exists within the framework of the traditional ethic of justice. It has been charged with being too woman-centered. It has been charged with being anti-feminist and anti-woman. The controversies are not even limited to those between proponents and detractors. Among care theorists a variety of interpretations have evolved so that there are now a variety of ‘care ethics’ and not simply a single theory known as ‘the ethic of care’. In this thesis I am interested in two related questions regarding care. First, what are the contributions that the reasons generated by care theorizing brings to traditional

\[5\] A recurring theme in critiques of the care perspective is the concern that although care thinking illuminates important moral consideration, it is not a stand-alone ethic, but requires supplemental reasons of the sort the justice perspective may provide. This was also a sentiment echoed throughout the Florida State University International Conference: “The Ethics of Care Revisited”, October 1999. See also Margaret Urban Walker’s “Moral Understanding: Alternative ‘Epistemology’ for a Feminist Ethics” in Justice and Care, Virginia Held, ed. (Boulder: Westview Press, 1995), p. 180.
conceptions of moral theory? Second, how does taking care seriously impact contemporary theories and practices of punishment? I will focus on differentiating the care perspective from the justice perspective in order to address these two questions.

The works of Carol Gilligan and Nel Noddings have each had a pivotal role in locating and defining the relevant issues for ethics of care. Their work provided an intellectual base from which developed a broad interest in understanding what we mean by care. In the following discussion I will present a brief review of Carol Gilligan’s initial work exploring the psychology of care. This will be followed by a synopsis of Nel Noddings’ phenomenological analysis of the ontological and ethical bases of care. Together, these ideas and ideals formed the foundation of what has emerged as care ethics.

2.2.1 Carol Gilligan and In a Different Voice

In contemporary moral theory, it was Carol Gilligan who launched the discussion about the moral perspective of care and the ensuing idea of an ethic of care in her seminal work In A Different Voice: The Psychology of Moral Development.6 In this book, Gilligan, a psychologist, distinguishes a moral orientation of care from the monolithic justice perspective that has dominated modern western social and political philosophy. Her work developed in response to her mentor, Lawrence Kohlberg’s, analysis of the stages of moral development. Gilligan was impressed by the fact that on Kohlberg’s scale of moral development women typically failed to reach moral maturity.7 She noted that in the Kohlberg studies male subjects were used exclusively. The results of the males were then generalized into a universal standard. Kohlberg’s model identified six

7 Gilligan (1982), p. 18.
stages of moral development that he believed any individual must pass through in order to reach moral maturity.\textsuperscript{8} According to his research findings, girls' moral development tended to reach an apex at the third stage, where morality is evaluated in interpersonal terms. Boys, on the other hand, were able to exhibit the mature stages of development by making moral judgments that reflected concern for universalizable principles of justice.\textsuperscript{9} Kohlberg's findings troubled Gilligan, who consequently conducted alternative research using both males and females. Her results led her to identify two moral decision procedures. She heard what she called 'a different voice' which led her to articulate a second moral decision-making procedure in addition to the one that Kohlberg had concluded was the universal standard. Gilligan came to identify these two decision-making procedures as two distinct perspectives or moral orientations.\textsuperscript{10} She called the new model the 'moral orientation of care' and the familiar Kohlberg standard the 'moral orientation of justice'.

When Gilligan conducted her research, the results from her female subjects varied in striking and consistent ways from the results of the males in the same study. Gilligan's results affirmed Kohlberg's 'universal' description of moral decision-making as a model that captures a valid representation of mature moral development, but at the same time, her results also supported the inclusion of this new moral orientation as an expression of mature moral development. This new orientation, which resisted universalization in favor of responding to moral particulars, captured the decision procedure used more

\textsuperscript{9} Gilligan (1982), p. 18.
typically by the women in her study, and provided a description of moral development
that contrasted with the one proposed by the universalized Kohlberg model. In brief, the
difference she noted is that the justice model reflects a perception of morality that
emphasizes the separateness of individuals and requires abstract thinking and a reliance
on universal principles. The care model, in contrast, reflects a perception of morality that
emphasizes the connection between individuals and requires consideration of the concrete
particulars in any situation.

The gender identification with these two perspectives has been a controversial
aspect of Gilligan’s work, but also reveals much about the intellectual climate of the
time. The care model that Gilligan described reflects many of the psychological
developmental differences between males and females that her peers and predecessors

11 The ethic of care emerged as a moral perspective in Gilligan’s work on the study of moral development
and gender. Rethinking the psychology of moral development and gender is significant to this project,
not because morality is in some way derivative of either psychology or gender, but because the moral
development of men and women differ, according to psychological theory and according to socialization,
and those differences have not shared equally in the moral voice of our culture. The study of moral
development reflects gender differences because the culture in which our socialization occurs teaches
behavior and value in gender related terms. It is the overlay of our social expectations that defines gender
in any given era.

The significance of clarifying gender and its expectations is to make explicit the understanding
that gender assignments are fluid. Increasingly fluid, if anecdotal urban experience is at all reliable. The
point here is that because gender is a social construct, one has a choice about accepting the gender
assignment one is given. However, the complexities of sex and gender do not need to enter into
considerations of what makes good moral decision-making. Even if our reasons for acknowledging one
way of thinking to the exclusion of another have, historically, had almost everything to do with gender and
social expectations, it is not necessary for this project that we rethink gender entirely before proceeding. It
is enough, at this point, to acknowledge that the social construct of gender has played and continues to play
an influential role in how we develop our beliefs about what is morally important and valuable. The
modest claim from Gilligan’s work is not that men and women differ in these particular ways, but that these
distinct moral voices exist, and both reflect mature moral reasoning. The justice/care debate captures a
tension that is not merely a gendered difference. This tension reflects our deep ambivalence in situations
when forced to choose between connection and independence. The point here is that gender is an
explanatory device, not a normative one. For more reading on gender and morality, refer to: Susan Moller
About Gender: A Historical Anthology. (New York: Harcourt Brace College Publishers, 1997); and
Claudia Card. “Gender and Moral Luck” in Justice and Care, Virginia Held, ed. (Boulder: Westview
Press, 1995).
had already identified. For example, Erik Erikson had noted that identity for males seemed to develop as an understanding of self in relation to the world, whereas for females' identity seemed to develop in relation to others.  

Similarly, Nancy Chodorow, in *The Reproduction of Mothering*, described the development of masculine identity as occurring through the process of separating from the mother, whereas feminine identity developed through the experience of attachment to the mother.  

These, in turn cohere with Jean Piaget's assessment that males are more rule-based and females are more cooperative. This new moral orientation of care did not simply appear intact one day on the moral horizon, rather, the ability to see it as a possibility evolved over time, in conjunction with developments in psychological theory. Gilligan's work mapped real developmental differences onto real moral differences, and whether these differences ultimately break down along gender lines or not is less significant than the articulation of this new 'perspective'.

In identifying the moral orientation of care, Gilligan was able to name some of the gender differences that were familiar to psychological theory and give those characteristics that applied to women (or those who thought in this 'new voice') equal moral status to those which applied to men. Her work illuminated a parallel between models of moral reasoning and the formation of identity. Although it had been familiar psychological theory that the formation of identity differs for males and females, the implication that moral reasoning might somehow reflect those differences in a parallel manner had not been developed. Because Gilligan was framing this implication in

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developmental terms, she first described her finding as an 'orientation of care' and 'care perspective' rather than attempting to classify it as an 'ethic of care'. In her work, she connected some of the issues related to the development of identity to the development of moral reasoning styles. This is not to say that moral reasoning is a somehow determined by psychological development, but that our psychology informs our moral reasoning. The care model was the 'different voice' that Gilligan heard, and she heard it particularly in the method of moral decision-making used by her female subjects.

2.2.2 Nel Noddings and the phenomenology of care

Nel Noddings, in her book *Caring: A Feminine Approach to Ethics and Moral Education*, brings to Gilligan's psychological analysis a philosophical context for understanding the import of care. Whereas the psychological analysis anchored care in the formative role that relationships play in a life, Noddings develops an analysis of the phenomenology of care. She begins with the fact of our relatedness. Relatedness, she claims, is ontologically basic; by which she means simply that it is an inescapable fact of our existence that we are born into social relationships.\(^{15}\) Further, she reasons, it is in our relationships and in our natural sentiments for each other, and not obedience to moral principles, that we find the grounding of our moral motivation. Although ontology is not typically addressed in analyses of care, or even moral reasoning, Noddings' ontological claim is the foundation on which she builds her work. She acknowledges the influence of Heidegger on her thinking, and the parallels between her description of being-in-the-world, and those of Heidegger's in *Being and Time*.\(^ {16,17} \) In the development of care,

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\(^{16}\) Noddings (1984), p. 4.
however, she parts company with Heidegger. As Heidegger developed the concept of care, it reflected a quality of attentiveness that was not directly moral in nature.

Noddings takes a decidedly moral turn in her construction of the concept of care. For Noddings, care is the morally basic response to our relatedness. ¹⁸

Noddings builds on the work of Carol Gilligan by identifying and analyzing the components of the care relationship. In her careful study she provides an analysis of the conditions of care that are more philosophical and less strictly psychological in nature than Gilligan's work. This begins with the claim that care is best understood as a dyadic relationship between two participants, the one-caring and the cared-for, and continues with the development of a comprehensive characterization of the commitments of each role. ¹⁹ The contributions I will focus on here, however, are her foundational claims that relatedness is ontologically basic and that care is the morally basic response to our relatedness. One of the benefits of her ontological analysis is that she is able to use ontological claims to argue that care is a universal value, not a relativistic one. She argues that there is a basic human experience underlying moral motivation that keeps care-based ethics from becoming completely relativistic or situational. The universal experience known as the 'human affective response', Noddings claims, is the intuitive basis of ethical behavior. Certain feelings, she argues, are natural and accessible to all individuals; these include feelings of caring and the desire to be cared-for. ²⁰ These

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¹⁸ See also Sara Ruddick's *Maternal Thinking*, (Beacon Press: Boston, 1989), especially Chapter One on this point.
¹⁹ See especially chapters 2 and 3 in Noddings' *Caring*.
feelings are understood as essential to the development of a sense of human well-being and individual flourishing.  

Noddings' turn to ontology illuminates a critical point of departure for care ethics from justice ethics. Her first claim, regarding the fact of our relatedness, is the basis for the acknowledgement that we develop moral theories out of a need to understand and mitigate the various and complex relationships we find ourselves in as a condition of the world. That these relationships are inescapable is a fact easily accepted by both care and justice theorists. Her second claim identifies the locus of the moral difference between care and justice. Noddings claims that our relatedness requires a moral response of caring. That is, we are morally obligated to tend to our relationships because the care and nurturance those relationships allow us to participate in are essential to our conception of an ethical ideal. Justice ethics also claim that our relatedness requires a moral response, but that obligation is understood as an obligation to provide for the individuals involved by establishing a social structure that defines the parameters of acceptable social behavior. The difference between the two perspectives is not whether our relatedness matters or is central to our moral reasoning, for clearly our understanding of moral reasoning is framed by our relationships; at question is what our moral response to our relatedness ought to be.

From the framework Noddings identifies, it becomes easier to see that the care and justice responses to relatedness are each responses to real human need. Although for

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21 Sara Ruddick writes of this emotional response as basic to human preservation, a response of reflective feeling, not merely reasoning. See her *Maternal Thinking*, especially p. 69. The idea that "we all need love" is a common thematic in literature as well, where are emotional vulnerabilities and flourishing are frequently explored.

centuries the justice response has been recognized as the standard appropriate moral response, a significant contribution of care theorists has been to illuminate an aspect of morality that has been under appreciated in the western tradition. In whatever way this contribution complicates our understanding of morality and moral obligation, it may also be seen, as I will argue throughout this thesis, as a clarifying insight into the nature of deeply felt moral conflicts that regularly trouble moral theorists. The crux of the conflict between justice and care ethics is that our relatedness can be seen simultaneously as morally compelling us to care for each other as well as morally compelling us to protect ourselves from each other. The moral significance of identifying the ethic of care is not, I believe, that it is morally superior to the ethic of justice, but the significant implication is that until one has considered the ethic of care perspective, one has not considered all of the morally relevant reasons available. I suggest that a plausible reading of our current circumstance is that we have been socialized to expect our values to conform to certain gender stereotypes, and that those stereotypes collectively tell more of the full story of what we care about, morally, than either story alone does. With the emergence of the ethic of care as a clearly differentiated value system, I am interested in asking a question of great moral significance. What difference does taking the ethic of care seriously make to our understanding of punishment theory and practice? To that end, I now turn to examining the theoretical differences between care and justice ethics models of moral reasoning.
PART II: Justice and Care: Dialogue Across Boundaries

No man is an island, entire of itself; every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were. Any man's death diminishes me because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee.

John Donne, “Devotions upon Emergent Occasions”

AFOOT and light-hearted I take to the open road,
Healthy, free, the world before me,
The long brown path before me leading wherever I choose.

Walt Whitman, “Song of the Open Road”

2.3 Two perspectives compared

The previous section highlighted both developmental and socio-cultural influences that both inform and align with the justice and care perspectives. The goal of this section is to take a critical look at the way each perspective constructs ideals of moral reasoning, and more generally, rationality. These distinctions will provide a context for a dialogue between the care and justice perspectives, so that we may appreciate the depth and breadth of the most considered reasoning of both perspectives. In particular, I will examine and compare three aspects of the justice and care models of moral decision-making in order to flush out their deeper implications. The aspects to be compared are: the concept of the self, and the nature of moral reasoning and the concept of moral value. I will argue that the conception of the self that one holds influences the way one conceives of moral value and that one’s moral priorities organize around the conception of the self. In addition, I will argue, moral reasoning, as a means of navigating the self in the moral world, largely reflects both the underlying concept of self and of the way in
which one constructs moral value. In sketching out the rough similarities and differences between the care and justice perspectives, they each share an appreciation for the need for structure in relationships and they both acknowledge that relationships are critical to human flourishing. Where they differ though, is in the way they prioritize these values. In short, the justice perspective views the mature self as individuated and separate and so views others as potential threats to autonomy which moral guidelines (principles) must mediate. In contrast, the care perspective views the mature self as integrated in relationships and sees others as providing safety through a web of relationships which it is the role of moral guidelines to preserve. These very different perceptions of the self in relation to others impact the sort of moral consciousness that each perspective develops, which ultimately will become manifest in behaviors. (See chart below.)

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<tr>
<th>Concept of Self</th>
<th>Care</th>
<th>Justice</th>
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<td></td>
<td>Connected, embedded</td>
<td>Independent, autonomous</td>
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<tr>
<td>Moral Value</td>
<td>Primary moral value is for</td>
<td>Primary moral value is for</td>
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<td>Moral Reasoning</td>
<td>Particular, specific, networked</td>
<td>Generalized, principled, hierarchical</td>
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In these next sections I will discuss and differentiate the justice and care perspectives with respect to these conceptions. These characterizations are accurate in a very broad sense, but as with any theory, actual proponents vary in their interpretation of
and adherence to these generalizations. The motivation for this comparison and
clarification of the care and justice perspective is to provide a clear articulation of the
grounding of moral reasons as generated from these two perspectives. In subsequent
chapters, the results of this contrast and comparison will be applied to very specific
considerations regarding justifications for punishment. The task here is to grasp the
justifications for the varying and even opposing claims of justice and care as they
interpret the moral significance of our relatedness. The following comparisons assume
that neither orientation is unreasonable, but that individual readers may be biased by their
own habits and therefore unfamiliar with, or at the very least unsympathetic to, certain
types of reasons or reasoning. As I introduce the concept of self and the intersection of
moral value and moral reasoning for the care and justice perspectives, I will do so in
anticipation that the critical ability to evaluate reasons across moral perspectives will not
only be possible, but fruitful.

2.4 The concept of the self

Any moral theory must be equipped to provide substantive accounts for what
constitutes both goodness and right action. Underlying those accounts, however, rest
basic metaphysical assumptions about what it is to be human and the nature of the self.
The justice and care perspectives each reflect a view of the self that is ultimately
relational, though they provide quite different accounts of what their relatedness
implies. Their interpretations of the metaphysics of the self and its implications for
human conduct diverge along lines that correspond to developmental models familiar to
object relations theory. I will discuss this underlying psychological analysis to some

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23 Typically, the justice perspective not described is terms of being 'relational'. However, I will argue that
even the justice perspective recognizes an inescapable relatedness.
extent, but ultimately, what will be most significant from a moral point of view is that our conception of our human nature or the self as we understand it provides, either consciously or unconsciously, a ‘ground zero’ for how we understand moral goodness. The care and justice perspectives are distinctly different in their view of the self in relation to others, and these differences in conception of the self manifest in differences in how they each perceive morality. Kristen Renwick Monroe, in her book *The Heart of Altruism*, describes this connection between moral perspective and conception of the self:

> Ethical political action emanates primarily from one’s sense of self in relation to others. This perspective effectively delineates and sets the domain of options perceived as available to an actor, both in an empirical and a moral sense. Certain situations present choices that affirm or deny one’s basic perception of self in relation to others. As a general rule, ethical political behavior flows naturally from this core perspective. To pursue an action that deviates in any significant regard from this necessitates a personal shift in identity that can occur only at great psychological cost and upheaval for the actor.

This close connection between morality, the concept of the self and our moral sense of self-in-relation, reflects what we already know about morality, in short, that moral theories address how we are to manage our relationships with ourselves and with others. Moral theories establish parameters of behavior and define what is permissible and what is impermissible for persons to do with the understanding that this is the juncture at which our metaphysical concept of the self informs how we understand the moral implications of our relatedness to others.

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24 Whatever we come to think or believe about morality or moral reasons, the content of those beliefs are greatly influenced by our understanding of being an individual in the world. Even if one believes in a moral order that is enduring, and independent of our beliefs on the matter, our concepts of morality are still our own contrivances or constructs. It seems uncontroversial to me to claim that these constructs, in the form of moral theories, reflect and are limited by the depth and scope of our understanding of the sort of beings we are.

Although the care and justice perspectives rely on the foundational metaphysical claim that, as humans, we are naturally related to a community, beginning with the family of origin and extending to the local tribe, village or community in which we live, one way of understanding the differing moral motivations of justice and care is to recognize that each perspective embraces and emphasizes a different aspect of what is (at least) the dyadic nature of human development and flourishing. The implications of identifying our nature as either ‘independent’ or ‘interdependent’ reaches into every aspect of our self-understanding, including how we are to conduct our selves morally. Gilligan suggests that the question of whether one sees the self as interdependent or individuated is analogous to the familiar Gestalt image that looks like a duck or a rabbit, depending on one’s perceptual organization. It is one’s perceptual framework that leads one to a particular interpretation. Our perceptual framework does not create our biological, sociological and psychological relationships, but it affects the way we understand and interpret the content of those relationships, and in turn, our perceptual framework may be shaped and altered dramatically by the biological, sociological and psychological facts of our lives. In theoretical terms, the justice and the care perspectives both recognize our connectedness to others. But as they conceive of themselves, they seem to represent perspectives that cannot be held simultaneously, much like the duck/rabbit image. The justice perspective emphasizes the separateness of persons and care emphasizes the connectedness. In the following two sections I will discuss the developmental narrative from object relations theory as it applies to both care and justice accounts of the self. The

26 See especially Chodorow (1978).
main purpose for this is to provide a structure for exploring their fundamental differences in a way that is morally neutral and yet will provide an explanation of their motivations for creating very different perceptual frameworks from their core agreement about relatedness.

2.4.1 Justice and the self

Personal psychological development from the point of view of the moral orientation of justice emphasizes individuation. As discussed in Part I, Kohlberg’s model of the justice perspective resonates with the social expectations for the moral development of boys. Individuation describes the process by which boys come to know themselves as ‘other than’ their primary caretaker, their mother.\(^{28}\) There is an emphasis on differentiation as the means through which one comes to know one’s self. Relationships, from this perspective, potentially threaten individuation and this perceived threat provides motivation to develop a means of establishing equality that limits the intrusion of the other. As Gilligan describes this situation, ‘...development would entail coming to see the other as equal to the self and the discovery that equality provides a way of making connection safe.’\(^{29}\) The maturation process Kohlberg’s model proposes is described in terms of object relations theory by Chodorow:

Boys are more likely to have been pushed out of the preoedipal relationship, and to have had to curtail their primary love and sense of empathic tie with their mother. A boy has engaged, and been required to engage, in a more emphatic individuation and a more defensive firming of experienced ego boundaries.\(^{30}\)

\(^{28}\) Chodorow (1978), p. 166.
In this framework, relationships are regulated by the rules of equality. The developing self learns that the way to safety and well-being is through individuation and the establishment of formal rules, such as equality, which is thought of as a basic fairness. The individuated self is able to flourish in the safe realm delineated by that formal equality. Principles of justice serve as basic rules of engagement that can be navigated by employing them as the foundation of rational choice. These principles are thought to serve the basic needs and interests required for individual flourishing. The formal nature of such a system, however, is little able to negotiate the more personal and nuanced aspects of the relationships of affection that give our lives meaning. Little (in fact) is said about the impact that actually having those relationships may have on the quality of one’s life or on the moral impact of those relationships. In the unflattering extreme, one may consider that it is this notion of empathetic individuation and independence behind Hobbes’ query in The Citizen, where he suggests we ‘consider men as if but even now mushrooms, come to full maturity, without all kind of engagement with each other’.  

Although it is the care perspective that relies on the language of personal connection and relatedness in order to convey its particular conception of morality, the justice perspective is just as steeped in issues of relatedness. While the emphasis is on individuation, the concept of individuation is embedded in an assumed relatedness. This bears mentioning because its implications are most often overlooked. In order to maintain consistency with the historical discussion, however, I will still refer to the justice perspective’s concept of self as differentiated and independent, with the

31 See Chodorow (1978) and Benhabib (1987).
understanding that this is a response to relatedness, not a denial of it. The justice perspective uses the language of rights, equality, and fairness to convey its vision of morality, and although these are often invoked for their particular value to the individual, these are concepts that require relationship. Having a right is not merely a way of bolstering one’s individual strength; to claim a right is to claim a particular relationship. A rights claim may be narrowly or broadly defined, but it is, fundamentally, a claim that shapes (at least some of) one’s relationships. Although it is our concern for an individual that often makes claiming a particular right so appealing, it is our relatedness that makes rights claims both desirable and possible.

One of the most compelling and revealing moral images associated with the traditional justice perspective is that of the hero. The hero exhibits the ideals of autonomy and independence, which the justice perspective sees as marks of maturity and successful individuation. Although heroism is an expression of individuation, the hero is celebrated precisely because this achievement (of individuation) occurs against a background belief that we are fundamentally connected. The hero is one who realizes an exceptional level of independence and autonomy and manages to individuate successfully from the collective in order to reach a radical release from the pressing demands of interdependency. In Habits of the Heart, Robert Bellah tells us that:

.... [The hero] can be valuable to society only because he is a completely autonomous individual who stands outside it. To serve society, one must be able to stand alone, not needing others, not depending on their judgments, and not submitting to their wishes. Yet this individualism is not selfishness. Indeed, it is a kind of heroic selflessness. One accepts the necessity of remaining alone in order to serve the values of the group.

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33 Bellah (1985), pp. 144-147.
And this obligation to aloneness is an important key to the American moral imagination. 34

The hero does not deny the fact that we are connected; our connection to each other is what provides the stage on which the ideal of the heroic is portrayed. The hero, as a social role model, teaches us to value principles as a means of protecting and sustaining the self in a world that is filled with the possibility of dangerous connections. The hero risks separation, even the ultimate separation, death. A hero would die not merely for another, but for a principle, a point echoed in the infamous cry ‘Give me liberty or give me death’. But it is this same willingness to abandon relationships in favor of principles that can be so disconcerting. It is fairly easy to recast the hero as an emotionally ill-formed or immature person who is incapable of maintaining a safe or respectful connection with intimates. 35

The autonomous individual, according to the justice perspective, whether or not heroic, is able to separate her self and her needs from the demands that may attach to emotional connections to others. Relationships are essential to human well-being, but the demands of relationships, if not mediated by a strong sense of duty to self, are perceived as potentially threatening to the full development of the self. Psychologists have noted that one effect of this perception can be an underlying belief that relationships are in themselves threatening, in which case, they are often met with conduct that is aggressive. 36 Relationships can be viewed as dangerous in various ways; for instance,

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35 Abraham, for instance, may have been heroic for his faith, but from Isaac’s perspective, Abraham’s actions may well have provided reason to sever trust forever. In contemporary comics, Clark Kent and Bruce Wayne (Superman and Batman, informally) are perpetually single with a story subtext that suggests an intimate relationship could threaten their effectiveness at protecting justice.
they can be consuming, and so trigger the psychological fear of engulfment, or they can be physically or emotionally brutal. The ‘rules’ of the justice perspective assist navigation through each of these kinds of threats. In these instances, it is important for the self to individuate through the development of strong ego boundaries so that this threat of loss of self can be abated.\textsuperscript{37} Once this individuation occurs, relationships may be enjoyed in the structured environment provided by rules of equality. So here, in the justice model’s conception of the self, one is embedded in a community from which there is a need to differentiate oneself and to protect oneself, a process that is mediated by a public concept of rationality that acknowledges social and legal parameters in the form of rights.

2.4.2 Care and the self

The conception of the self on the care model is also as an essentially relational being. The care model recognizes and values the experience of caring as an integral component of human flourishing. Although every moral theory will be sensitive to the relational aspects of morality that mediate conduct between various parties, what distinguishes the care perspective from the traditional justice perspective is that it does not merely suggest a new format for evaluating and negotiating power, preferences, and desert, but it makes a sharp departure from the generally assumed metaphysics of contemporary western analytic moral theory with the traditional emphasis on individuation, autonomy, independence and self-sufficiency.\textsuperscript{38} Instead of emphasizing individuation, care theory developed a very different concept of self, one that embraced

\textsuperscript{37} Chodorow (1978), p. 68-70.
\textsuperscript{38} It was this perspective Kohlberg used as his universal standard. See Part I of this chapter for more detailed discussion.
the relational aspects of the self, and emphasized the ongoing significance of relatedness in a well-integrated mature individual. The claim that our sense of relatedness to others is not merely an artifact of dependency from childhood has implications that support a new and somewhat different understanding of the ideal model of a morally mature individual. It has been one of the deeper challenges of ethics of care to articulate the ideal that corresponds to the values underlying the insights of this position.

The concept of self that the care model captures is a self that develops and thrives in connection with others. In contrast to the emphatic individuation that marks the psychology of the justice perspective, the self as understood in the care framework is sustained and nurtured in the context of a web of relationships. Instead of feeling threatened that the cost of relationships is that they compromise independence or autonomy, there is recognition of a basic relatedness to others as the essential framework in which one’s life is lived. If anything, the risk is greater on the care perspective that individuation in under valued. The self is seen as developing in relationships of interdependence, and this interdependence is not seen as a compromise, but as an important component of what constitutes individual identity. There is an understanding that the self is essentially connected to others, an awareness that is particularly acute for girls, according to Chodorow, who must struggle with ambivalence about their independence.39 Again, in the language of object relations theory and its assumed gender roles, the developmental process that girls experience is a process of identification with the mother, who is like the little girl. Chodorow describes:

... a daughter acts as if she is and feels herself unconsciously one with her mother. Puberty helps here because a girl, at this time, confronts all the

social and psychological issues of being a woman (relations to men, menstruation and feminine reproductive functions, and so forth). In a society in which gender differences are central, this confrontation emphasizes her tie to and identification with her mother.⁴⁰

Unlike boys, whose development requires they recognize their difference from their primary care-taker, girls recognize their similarity to their primary care-taker. They are ‘joined-to’, rather than ‘separated-from’.

For many reasons caring has traditionally fallen under the practice of nurturing we call ‘mothering’.⁴¹ As discussed in Part I, those reasons become more obvious when we reflect on the developmental significance of care and the role that women have historically held in society with respect to care-taking. The care-taking of children in contemporary western society falls traditionally to women, either mothers or surrogate mothers (nannies, day-care workers, and relatives...). The activity of caring for the well-being of a child is often referred to as ‘mothering’ regardless of the identity of the individual doing the care-taking. This mothering, or caring, is the activity of creating a place of safety and a sense of connection in the world for a child who is developing a sense of self and of the world. Much as the hero emphasizes the positive aspects of justice, the ideal mother embodies the strengths of the care perspective.⁴² The moral ideal of the mother is the character opposite of the hero. The mother is ever-present, ever-nurturing in service to those in her care. She provides continuity and binds familial relations. There is also the additional complication in our society that the social/gender assignation of mothering has fallen to women, who have been systematically devalued

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⁴¹ See, for historical and psychological explanations, Nancy Chodorow’s The Reproduction of Mothering and Sara Ruddick’s Maternal Thinking.
and excluded from equal power sharing. Many, however, rightly point out the shortcomings of this ideal and argue that the level of self-sacrifice and servitude required in order for one to fulfill the role of ideal mother demand that the needs of the mother become secondary to the needs of the cared-for.\textsuperscript{43} Accepting the role of mothering, then, puts one in a situation where personal needs are less likely to be heard and where one is likely to remain an undervalued and unpaid provider of essential services.\textsuperscript{44} On this point, Elizabeth Cady Stanton was an earlier dissenter of the ‘woman-as-care-taker’ ideal, and warned that many women are ‘trained in the art of self-abnegation; but when women learn the higher duty of self-development, they will not so readily expend all their forces in serving others.’\textsuperscript{45} Rosemarie Tong further characterizes the feminist dissent, saying:

[The fault is not] so much for proposing that care is the highest of all moral virtues but for failing to realize just how perilous it is for women to care in a patriarchal society. Realizing how difficult it is to be a truly caring person, all too many men will be willing to confess, as they did during Mill’s time and later, the women are more virtuous than men; and therefore that it is up to women to create and maintain human community, to weave personal relationships, to do all of society’s emotional work.\textsuperscript{46}

There ideal of the self-sacrificing mother comes at a great cost to the self-development of whomever tries to fill the role. We might question here whether in the end we would consider an actual ideal mother to be a balanced and mature individual.

Moral reasoning for both care and justice theorists begins from the perspective of an individual who is connected to a community of others. For many reasons, though, it is

\textsuperscript{44} There is an interesting asymmetry between the social rewards gained by those who embody the hero role compared to those who fulfill the ideal mother role, with the hero reaping increased power and access to power and the mother losing power with her increased commitment to mothering others.
\textsuperscript{46} Tong (1998), p. 150.
the emphasis on relatedness that is perhaps the most challenging aspect of care theory for traditional justice theorists to accept. Although on the one hand relationships are recognized as providing much of what makes life worth living, on the other hand, the relational self is easily characterized as a compromised or tarnished ideal when compared to the heroism possible through individuation. However, connection, on either view, is essential in order to provide the context in which individuals develop a sense of personal identity. The care perspective values relationships for their foundational contribution to an individual’s sense of well being in the world, and relationships are seen as a necessary condition for human flourishing. The value of relatedness, grounded in a metaphysical conception of persons, contributes to a moral consciousness that, in recognition of that value, thinks in terms of responsibility.

2.5 Moral Reasoning and Moral Value

The philosophical debate between the care and justice perspectives reflects a contrast between models of moral decision-making. Each model conceives of the individual in a particular way, each has a concept of what constitutes a moral reason and good moral reasoning, and each gives an account of moral value. Characteristically, the justice perspective conceives of the individual as ideally separate from others, it values abstract and impartial principles for moral guidance, and it considers the language of rights to be appropriate for a discussion of moral reasoning. Margaret Walker calls this the theoretical-juridical model, and describes it further as:

.... individualist in its assumption that the central moral concepts and premises are to equip each moral agent with a guidance system he or she can use to decide upon a life or its parts.... At the same time, this approach is impersonal: The right equipment tells one what is right to do (or explains why something is right to do) no matter who one might happen to be and what individual life one is living.... This unilateral
individual, yet impersonal, action-guidance is believed possible because morality is seen as socially modular... \cite{Walker1998}

In contrast, the care perspective conceives of the individual as ideally connected to others, it values the concrete and particular aspects of situations as morally relevant, and considers the language of responsibility to be appropriate for a discussion of moral reasoning. Again, Walker, referring to this as the expressive-collaborative model, describes it further:

.... [It is] not a moral theory, but a template and interpretive grid for moral inquiry. Like the theoretical-juridical conception, this alternative model suggests normal forms for moral inquiry. It directs us, however, to look at more and other things than the theoretical-juridical model picks out and to ask different questions about them. [The] expressive-collaborative model.... presents its view of moral justification as a kind of equilibrium among people that can survive the transparency that reflection produces.... This view prescribes an investigation of morality as a socially embodied medium of mutual understanding and negotiation between people over their responsibility for things open to human care and response.\footnote{Walker (1998), p. 9.}

Although it may appear that these models of moral reasoning are entrenched for individuals, they are not. Early care theorizing was unclear on this point, but the discussion of moral reasoning in the following sections follows a turn of thought in Gilligan’s later work. As Lawrence Blum points out in \textit{Moral Perception and Particularity}, Gilligan initially held the view that people firmly adopt one moral perspective or the other.\footnote{Lawrence Blum. \textit{Moral Perception and Particularity}. (Cambridge University Press: Boston, 1994), pp. 239-40.} However, as Gilligan indicates, her thinking evolved over time, and was informed by a study conducted by Kay Johnston. Johnston found that adolescent subjects who clearly identified their moral decision-making process as either

justice or care based were able, upon reflection, to come up with the moral reasoning representative of the other orientation and subsequently to explain which was preferable, even sometimes preferring the new moral reasoning to their own. This ability to switch reasoning patterns, and even on reflection to prefer reasons that did not spring from one's default or preferred reasoning model, further challenged notions of there being one set or standard model of moral reasoning, and suggests that these are rational processes, not static or genetic dispositions to one way of thinking to the exclusion of another.

Theories of moral reasoning reflect the metaphysical assumptions made about the nature of the self. Not surprisingly, there is coherence between the views on the self and views on moral reasoning and the appropriate moral character of the self-in-relation. From any perspective, the moral agent must come to terms with what it is she believes she has reason to do. Self-interest, as well as altruism, as we have seen in previous sections, can be constructed from quite different assumptions. In the case of the justice perspective, where the self is seen as independent, the associated moral reasoning reflects the self-interested desire for a protective sphere in which to maintain that individuation and the freedom to pursue one’s own conception of the good. The emphasis on seeing the individual as separate encourages the perception that flourishing depends on the ability to assert ones needs or preferences in order to have them met. In this scheme, morality requires that actual needs be understood abstractly with moral reasoning providing a rational framework for deliberation that operates as a system of rules of conduct. On the justice perspective, rights are utilized for managing the tension of living independently and pursuing the good life within a community. In the case of the care

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perspective, in which the self is seen as essentially involved in a network of relationships, the associated moral reasoning reflects the self-interested desire to be in and to maintain relationships that nourish and nurture the individual. The emphasis on connection and relationship encourages the perception that flourishing depends on the ability to live interdependently with others in close relationship. Moral deliberation, on this model reflects the desire for an environment in which connection is not merely possible, but something for which one feels responsible. On this view, morality is grounded in the concrete reality of the lives involved, and responds to the particular need of individuals.

2.5.1 Justice: Moral Reasoning and Value

Moral reasoning from the justice perspective begins from the point of view of the rational, autonomous, and adult individual. (Recall Margaret Walker’s description of the theoretical-juridical model above.) The decision-making process that corresponds to this development of the self relies on the assumption that relationships are based on a shared logic of individuation. With this understanding of the self as separate and individuated, the values that become important reflect a concern for protection and non-interference as one negotiates social and personal relationships. Because other people are viewed as threatening, as well as an essential source of support, relationships are viewed as both necessary and requiring regulation. In this framework, the protective principles of justice, equality and fairness are expressions of the regulatory nature of moral reasoning that characterize moral reasoning in this perspective.

The perceived need for protection manifests itself in laws and social customs that provide individuals with the parameters of individual liberty. John Stuart Mill, in On
Liberty, gives a classical defense of the individual’s right to this non-interference from society and the shared standards of appropriate conduct:

Though society is not founded on a contract, and though no good purpose is answered by inventing a contract in order to deduce social obligations from it, every one who received the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest. This conduct consists, first, in not injuring the interests of one another...and secondly, in each person’s bearing his share.... of the labors and sacrifices incurred for defending the society or its members from injury and molestation. These conditions society is justified in enforcing, at all costs to those who endeavor to withhold fulfillment.  

Mill’s conception expresses both the recognition of threat from others and the need for social order in the forms of laws to protect and maintain individual flourishing. This position reflects how the metaphysical conception of the person as fundamentally relational, when coupled with a belief in the need for independence, supports the development of a moral consciousness that relies on laws and rights to best promote human flourishing.

The justice perspective is very concerned with preserving the integrity and the autonomy of the adult citizen. In contemporary culture, one way the individual is protected is through ‘rights’ claims. We live in a particularly litigious age that provides us with ample examples of ‘rights’ claims made by one citizen against another, or by one group against another. The collective message seems to be that ‘I (or we) would be fine if only I (or we) could be left alone’. The private individual, on this view, is everywhere threatened with compromise and coercion by the collective body.  

Our modern sensibility that emphasizes our need to individuate from a connectedness that threatens to

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52 An extreme of this view most famously articulated by Robert Nozick (1974).
overcome or dominate us has been the subject of concern, or at least interest, since
Tocqueville’s analysis in the early years of this country. Our individualism is supported
by the underlying commitment to a conception of the self as ideally autonomous, a
conception that has marked our social, political and domestic arrangements.

The perennial question ‘why be moral?’ has historically been posed as a means of
questioning the validity of the assumption that morality requires an individual to
compromise in ways that result in a calculable personal loss for the individual who acts
morally. The underlying agitation about the demands of morality seems to stem from a
conflict between personal preferences and the obligations of morality. The sometimes
veiled (and sometimes not) suggestion that we have no reason to be moral when it is
guaranteed that our immorality would never be discovered is paradigmatic of the most
narrowly construed position of justice ethics. Such a claim only becomes imaginable as
reasonable if one considers the individuals involved as radically separate from each other.

David Gauthier expresses this viewpoint succinctly in *Morals By Agreement*:

Cooperation is a second-best form of interaction, requiring concessions
and constraints that each person would prefer to avoid. Indeed, each has
the secret hope that she can be successfully unjust, and easily falls prey to
that most dangerous vanity that persuades her that she is truly superior to
her fellows, and so can safely ignore their interests in pursuing her own.
As Glaucan said, he who ‘is truly a man’ would reject moral constraints.

The reference to Plato’s Glaucan reflects a worry about opportunists, but one need not be
completely cynical to perceive the need for a system of laws to protect individuals from

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away with’ being immoral may well afflict anyone, regardless of their preferred moral framework.
However, unlike the case above, in which hyper-individuation has created an indifference to social others, a
person acting under the guidance of the care framework cannot hold such a desire and in concert with the
care values of attention to moral particulars, social ‘others’ do not get enough distance, so to speak.
each other and from the collective will. Since the emphasis in the justice perspective is on the individual, moral reasoning protects the self-interested individual first, and uses the language of rights in order to achieve that. Rights can provide a sphere of non-interference that, although violable, define a logic of social order that permits an element of safety and independence within that construct. Turning to rights as the language of moral reasoning permits the imposition of limits that are designed not merely to protect the individual, but also to provide a social structure in which connection may be safely enjoyed.

2.5.2 Care: Moral Reasoning and Value

The context of morality, from the care framework, is our embeddedness in the particulars of our lives. Morality is understood as a concern for well-being that arises from and within the relationships with which we live. There is no ‘outside’ perspective or ‘God’s eye view’ informing or directing moral reasoning in this framework. In the context of the care perspective, individual development is understood to occur within a web of relationships. These relationships are identified as having core value, for they sustain a sense of well-being in the individual. Interdependency is recognized as a fact of continued existence, in contrast to the justice perspectives’ emphasis on individuation, independence and self-sufficiency. Decision-making in this framework is informed by a form of reasoning that resists the principled approach of the justice model in favor of a deliberation that allows consideration of a greater detail of particulars. The contexts of relationships, that is, the particulars that define a situation, provide the relevant information and framework for moral decision-making. Far from being an abstract and formal process of consideration, it is concrete and as detailed as life itself.
In the care framework, the personal informs the moral, but unlike the justice perspective where self-interest is protected by rights, here self-interest requires thinking cooperatively, and often takes the form of altruism. The logic of the care perspective is closely connected to experience. Virginia Held writes:

Moral theories, I thought and still think, should give us guidance in confronting the problems of actual life in the highly imperfect societies in which we live. We need moral theories about what to do and what to accept here and now. Ideal theories of perfect justice or purely rational theories for ideal societies leave the problems of what to do here and now unsolved, even unaddressed. They usually provide no way to connect moral theory with our actual experience, except through suggestions that once we have a clear view of our goals, we can take up, separately, questions about how to reach them.... In my view, not only must moral theories be applicable to actual problems, they must in some way be ‘tested’ in actual experience. They must be made to confront lived reality; they must be found satisfactory in the actual situations people find themselves in. Otherwise they are intellectual exercises that may be intriguing and impressively coherent, but they are not adequate as moral theories.\(^{55}\)

As Held suggests, morality must be able to address the details of one’s life, and here the metaphysical assumptions about connectedness are reflected in the language of responsibility and responsiveness to others. This understanding is quite different from the language of rights in that the process of discernment involves a dialogue, what Walker refers to as negotiation.\(^{56}\) Conflict in the context of care is unlike rights conflicts. While negotiation is possible in rights conflicts, it is also possible for one right simply to trump another because of the kind of right it is, without respect for the content of the rights involved. The care perspective is essentially cooperative, and it permits negotiation at the level of concrete particulars of the parties involved; it seeks to hear and negotiate a decisive path that acknowledges the varied needs of those affected.

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Care reflects a particular mode of engagement with our environment. The care perspective acknowledges that, as social beings, our relationships with others define not only the community in which we live, but also the self we each become. The experience of care is deeply personal and transformative. The experience of care is directly nurturing and affirming to the individual, and the benefit is a sense of well-being and acceptance. One may experience care when one is treated as an equal, but the experience that is transformative for the individual is not being equal per se, but it is being acknowledged and accepted in relationship that is personally transformative.\textsuperscript{57} There is, from the care perspective, an understanding that the role of morality is to mediate between the essential concrete relations of interdependent, rather than independent, individuals. As Bernard Williams famously challenged moral theory, when it is your wife who falls out of a boat, you want to be able to say that the reason you had for jumping in to save her was that she was your wife, not that you deliberated about the situation and determined that it was moral, in this case, to save your wife.\textsuperscript{58} What the care perspective brings out is this particular weakness in justice theory, namely, that it severs our personal motivations from our moral motivations. Williams goes on to say:

Perhaps others will have other feelings about this case. But the point is that somewhere (and if not in this case, where?) one reaches the necessity that such things as deep attachments to other persons will express themselves in the world in ways which cannot at the same time embody the impartial view, and that they also run the risk of offending against it. They run that risk if they exist at all; yet unless such things exist, there will not be enough substance or conviction in a man’s life to compel his allegiance to life itself. Life has to have substance if anything is to have sense, including adherence to the impartial system; but if it has

\textsuperscript{57} Noddings (1984).
substance, then it cannot grant supreme importance to the impartial system, and that system's hold on it will be, a the limit, insecure.\textsuperscript{59}

This is the challenge that the care perspective brings to moral theory, the challenge that insists that moral deliberation represent the aspects of our lives that mean the most to us. Our motivation to be moral is not a completely severable and objective desire, but reflects a complicated negotiation that in fact does include values that are not impersonal. Care theorists have voiced a credible argument to include a broader range of reasons in moral deliberation. The remaining challenge is to achieve that end.

2.6 Summary

The care/justice debate, I have suggested, is one contemporary articulation of a sorting out process that involves the parsing of reasons that will count as moral reasons. The disagreements between the care and justice perspectives on the nature of moral reasoning and the concept of moral value are disagreements that have roots that extend beyond the scope of this particular debate. Disputes about the nature of rationality are not new to moral philosophy, nor are disputes that characterize rationality as a discrete individual capacity versus a natural function of socialization. In many ways this contemporary conflict, over whether mature moral reasoning requires a particular kind of rational abstraction on the part of the individual or rests in a deliberative process grounded in the particulars of a case, echoes some of the same concerns about the nature of rational thought that arose in the 17th and 18th centuries.\textsuperscript{60} The lines are not easily drawn. In contemporary philosophy, the care/justice debate is but one instance of this

\textsuperscript{59} Williams (1981), p. 18.
\textsuperscript{60} For example, in The Commons of the Mind, Annette Baier contrasts the Cartesian conception of rationality as complete within each individual with the Humean conception of the social nature of reason. See Annette C. Bäier's The Commons of the Mind. (Chicago: Open Court, 1997), especially Lecture I, pp. 1-20.
sorting out process, but there are other similar sorts of arguments. The nature of rationality is one issue; the source of normative or motivational force is another. As we have seen from the distinctions drawn between the care and justice perspectives, these fundamental moral issues are not settled.

Thinking about interdependence is not new to moral reasoning, though it has been an ongoing puzzle for moral theory. The prisoner's dilemma classically characterizes the problem of coordinating self-interested action with another self-interested agent. In the prisoner's dilemma, self-interested rational choice yields a worse outcome than cooperation. The notion of rational choice, in this puzzle, fails to account for the possible benefits of cooperation. Care theory, which naturally reasons systemically and collectively, can provide a rationale for choosing the best outcome in such situations. However, it did not take care theorists to identify the reality of interdependence and the potential for cooperation among vulnerable parties. One such historical example was discovered by Robert Axelrod, who writes of the 'live-and-let-live' system of trench warfare that developed during the course of World War I. He recounts stories of cooperation between German and British soldiers that evolved over time turning artillery fire into predictable rituals. In iterated prisoner's dilemma's, where the same dilemma repeatedly presents itself, Axelrod explains that the benefits of cooperation can be noticed as a pattern. In a one-off situation, cooperation may not appear rational, but over time, the soldiers were able to recognize the benefits of cooperation and developed a strategic ritual of regularly scheduled precise artillery fire at distant targets. This satisfied the commanders as signifying the expected continued aggression and built trust with their
opponents who, by cooperating, virtually ensured the safety of all of the soldiers involved.  

The context of the care/justice debate as presented here is that of a contemporary expression of the ongoing challenge to account for or describe the scope of moral reasons, motivation, and obligation as they inform moral theory. The tensions at the core of the care/justice debate, such as that between particularity and universality, are part of this larger project in moral theory. What is particularly illuminating about the tensions in the care/justice debate in moral theory is that, as one might expect, they mirror the tensions exhibited in the broader culture that have been uncovered in feminist analyses in other disciplines. In “Criminals and Moral Development: Towards a cognitive theory of moral change,” Theo van Willigenburg writes about the tension created when the care and justice perspectives are represented as competitors. He suggests they are perhaps best understood as parallel, rather than oppositional theories. He writes:

Perhaps one could say that there is not one uniform sequence of stages of moral growth, but that there are various patterns of development with possibly different endpoints.... Therefore, there may be different sequences of moral development, resulting in different moral outlooks. These different sequences, however, would have one important feature in common: they picture moral development as a process of transcending the heteronomous and egoistic stages 1 and 3 in Kohlberg’s taxonomy. Moral development would then come down to a process of acquiring a moral point of view, i.e. a point of view opposite to egoism and the general unwillingness to take the perspective of the other: This may either be a detached or highly attached viewpoint, but – both ways- it is a viewpoint characterized by a certain amount of empathy and justice.  

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Given the above analysis of care and justice theorizing, I suggest that the care and justice perspectives are best understood as representing complementary perspectives on moral decision-making. To quote Rosemary Tong:

.... the question of which is better – an ethics of care or an ethics of justice – is an apples-or-oranges question. Like apples and oranges, an ethics of care and an ethics of justice are both good. But to insist that one kind of morality is the best is to manifest a nearly pathological need for a unitary, absolute, and universal moral standard that can erase our very real moral tensions as with a magic wand. If we are to achieve moral maturity, Gilligan implied, we must be willing to vacillate between an ethics of care and an ethics of justice. 63

Rather than try to accommodate one perspective under the auspices of the other, I will argue that the care and justice perspectives each present us with a set of reasons that collectively provide us with a more complete view of the moral landscape than either is capable of expressing or fully acknowledging in its own terms. This may sound suspiciously familiar to some as the ‘separate spheres’ argument that was leveraged to keep women at home and out of the public and political discourse of the time.64 What I want to suggest though, is not that these ‘spheres’ of reasons are discrete and ought to remain that way, but that although they have express values that are distinct, they are nonetheless interdependent. A satisfactory moral practice will be one that is able to consider and respond to the sorts of reasons that are common to both justice and care theories. As I mentioned above, it is my contention that care-based reasoning has much to contribute to current thinking about punishment, which in recent decades has suffered a deterioration of support for caring responses to wrongdoing. In the following chapters I will turn to the consideration of punishment, and as I assess the traditional retributivist,

64 For a useful introduction to the twin edge of the separate spheres argument, see Thinking About Gender, Janet McCracken, ed., especially Part Three, and in particular the sections on Rousseau and Wollstonecraft.
deterrence and reform theories, I will suggest ways in which care-based reasoning can either improve on current thinking or offer alternatives.
CHAPTER THREE

Retributivism

Do I myself want it? They say the ordeal is necessary for me! Why, why all these senseless ordeals? Why, am I going to have a better understanding then, when I’m crushed by suffering and idiocy, in senile powerlessness after twenty years of hard labor, than I have now? And why, then, should I live? And why do I agree to such a life now? Rodion Romanovich Raskolnikov in Crime and Punishment

3.1 Retributivism: The Justifications

Why punish? What retributivists have in common in response to this question is a commitment to the belief that there is a necessary connection between punishment and wrongdoing. This connection is most often referred to as moral desert, and for many the nature of this connection may seem self-evident. However, it is precisely this ‘self-evident’ aspect of the retributivist position that bears the burden of justifying the practice of punishment. Whatever appeal or force there may be behind the claim to this self-evident connection, it breaks down fairly quickly when one begins to ask questions with less obvious answers, such as “what moral authority underlies this connection?” or “how much punishment is deserved?” or “how severe should the punishment be?” or “how do we know we’ve ‘got it right’?” While the answers to these questions are neither simple nor apparent, what is clear is that the retributivists do not simply mean to assert a definition or tautology. There is more to this claim of necessary connection than the mere assertion that the meaning of punishment is equivalent to what a wrongdoer deserves. The retributivist position argues that there is substantive content behind this

base claim, and it continues to be the task of proponents to articulate that substance. Hugo Bedau describes this dilemma in the following way:

Either he [the retributivist] appeals to something else - some good end - that is accomplished by the practice of punishment, in which case he is open to the criticism that he has a nonretributivist, consequentialist justification for the practice of punishment. Or his justification does not appeal to something else, in which case it is open to the criticism that it is circular and futile.²

Although this is a blunt characterization of the parameters the retributivist justification must negotiate, it serves as a useful reminder of the justificatory task for retributivists. If the retributivist defense of punishment is neither consequentialist nor viciously circular, it must explain what nonconsequentialist content it is relying on to justify the claim that there is this necessary connection between punishment and wrongdoing. There is no single response to that challenge, rather, there are general trends or main schools of thought within the retributivist camp, several of which I will take up in this chapter and use as a basis for further discussion concerning the process of justification and the intersection of care ethics and retributivist thought.

Traditional retributivist justifications have generally been expressed in terms that cohere with the justice framework discussed in the preceding chapter. This framework includes the justice perspective's metaphysical conception of the individual as an autonomous rational agent; a commitment to a form of moral reasoning based on principles, such as fairness and equality, which commonly manifests itself as concerns for laws and rights. This chapter will explore justifications for retributive justice in light of

these background commitments. Kathleen Moore describes how each of these commitments is reflected in the retributivist position:

A retributivist believes that there are genuine choices present in the world, that people can rationally choose among them, that people are capable of acting on their choices. In this way, people are free, and their freedom distinguishes them from objects in the world – from dogs and imbeciles and trees. Beyond this, the retributivist believes that persons are political equals unless they choose to make themselves unequal in a way that calls the attention of the state – that is, by committing a crime.³

Although different accounts vary in their particulars, Moore here picks up a thread of continuity among retributivists, a core belief in the value of individual autonomy and a corresponding belief that a repercussion of that autonomy is that one has both a choice and a responsibility to do what is right through the instrument of law.

The idea that individuals deserve punishment for wrongdoing is related to autonomy and the notion of the individual as an independent, rational, responsible agent, an agent capable of choosing to do wrong. Because doing wrong is seen as a choice made by a rational agent, it is seen as a violation that permits, or even requires, response and rectification in the form of punishment. This understanding of the relationship between agency and responsibility captures an aspect of justice that has enjoyed long representation in western thought. The detailed account of the conditions of responsibility that Aristotle provided in *Nicomachean Ethics*, still reads as a thoughtful consideration of the relationship between agency and responsibility, and provides analysis of mitigating circumstances, such as ignorance and coercion, which influence whether an act may be said to be voluntary or involuntary.⁴ Retributivist justifications for punishment rely on this particular understanding of agency and responsibility to

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⁴ Aristotle. *Nicomachean Ethics*. Bk III, Chs. 1, 2.
explain the connection between wrong-doing and punishment. The concept of desert, which is foundational for retributivism, is an expression of this conception of a rational agent, acting freely.

In the following sections I will consider several retributivist accounts, each of which attempts to address the challenges of justification. I will begin with a brief recounting of the Kantian position as the classic retributivist argument that the justification for punishment rests in the notion of desert. I will then take up the very substantial and sympathetic argument for retributivism proposed by Herbert Morris in “Persons and Punishment” and refined in his later “A Paternalistic Theory of Punishment”. I find his account to be among the most forceful and subtle contemporary defenses of retributivism and so will focus in some detail on the merits and shortcomings of this position. I will then consider the retributivist analysis of Robert Nozick and his claim that punishment provides a connection to correct values. Although Nozick’s position is unapologetically retributivist, in many ways it is surprisingly compatible with the care perspective. Most specifically, this will be seen in his interest in “connection” and his claim that punishment communicates. One of the most valuable contributions of his analysis is that the clarity and precision with which he recounts his theory opens the way for an even more penetrating dialogue. Each of these theories, however, offers insights that reflect in important ways some of the same concerns that all theorists of punishment must grapple with, and in this context that are particularly useful in that they provide strong defenses against the criticisms that have consistently been raised against traditional retributivism.
3.1.1 Kant and Desert

The retributivist theory espoused by Immanuel Kant is firmly committed to the principle that wrongdoers deserve punishment. Furthermore, according to this conception of desert, wrongdoing obliges the relevant authority to mete out appropriate punishment. Some have argued for a retributivism that allows, but does not require, the guilty to be punished. These positions are sometimes distinguished as strong retributivism and weak retributivism. Strong retributivism recognizes that desert has an accompanying obligation to punish. Weak retributivism is the position that desert permits one to punish, but does not require it; it is a necessary, but not sufficient condition for punishment. However, this weak position is not what I will call 'pure retributivism', and not the classical Kantian retributivism that claims an inextricable connection between desert and the duty to punish. More than merely permission to punish, the Kantian retributivist position justifies an obligation to punish.

In *The Metaphysical Elements of Justice*, Kant addresses both horns of the dilemma Hugo Bedau described above. First he addresses the concern that punishment never be justified in any way by its overall consequences.

Judicial punishment (*poena forensis*) is entirely distinct from natural punishment (*poena naturalis*). In natural punishment, vice punishes itself, and this fact is not taken into consideration by the legislator. Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, 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 merely as a means to the purposes of someone else and can never be confused with the objects of the Law of things (*Sachenrecht*). His innate personality [that is, his right as a person] protects him against such treatment, even though he may indeed be condemned to lose his civil personality....

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For Kant, an individual may never be used as a means to an end, a claim through which he intentionally eliminates the consideration of consequences in the justification of punishment. Furthermore, Kant’s conception of desert in concert with his conception of human rationality create a link between the duty to punish and wrong-doing that does not require any further justification. He claims:

The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it – in keeping with the Pharisaic motto: “It is better that one man should die than that the whole people should perish.” If legal justice perishes, then it is no longer worthwhile for men to remain alive on this earth.\(^6\)

Kant establishes the duty to punish on the basis of desert alone. On this analysis, a rational individual acts according to the guidance of pure practical reason, what he called the ‘categorical imperative’. The concept of duty arises from the expanded notion of rationality that relies on the categorical imperative as the a priori ground of moral action. Our duty as rational beings, he stated, is to act only on those principles that one could consistently will to be universal law. So, for example, when I steal, I subject myself to a universal law which permits stealing, and thereby, my being stolen from. By stealing, consequently, I rob myself of the security of ownership.\(^7\) In this sense the offender wills the offense on him or her self. According to Kant, one’s reason will lead one to act according to the moral law, which defines the parameters of permissible acts and so also, the parameters of punishable ones.

Kant built his critique of punishment on rationality and the categorical imperative, and he used these in a fairly straightforward argument for defending \textit{lex talionis}, the law

\(^6\) Kant (1965), p. 100
\(^7\) Kant (1965), p. 102.
of retaliation. There is a certain consistency of reason in this. If one acts according to a
maxim, and it is one’s duty, as a rational agent, to act only on those maxims that can be
universalized, then whatever one does, one wills on oneself. The *lex talionis* as the ‘law
of retaliation’ is one of the most common expressions of the retributivist position on
desert. Many share the belief with John Kleinig that, ‘The principle that wrongdoers
deserve to suffer seems to accord with our deepest intuitions concerning justice.’\(^8\) The
appeal to *lex talionis* resonates with our cultural expectations that one will get what one
deserves. Furthermore, there is a certain elegance to justifying punishment through moral
desert; it avoids the comparative challenges that mark consequentialist justifications,
which must wade through conflicting notions of the good, and ensures that the guilty will
be punished. Although the retributivist position is familiar to many in its ‘an eye for an
eye, a tooth for a tooth’ formulation, this is not an entirely accurate representation of the
intent in that usage.\(^9\) In this familiar expression, the intent was not to guarantee that
wrongdoers received punishment, but to establish a limit on the amount of punishment
that may be meted out for any wrongdoing. It introduced the idea of a proportional
response to wrongdoing as an alternative to blood revenge. Although common use has
conflated the two, the Biblical expression does not rule out the possibility of weak
retributivism, while the *lex talionis* does.

The *lex talionis* can generally be distinguished from blood revenge (or revenge
more generally) by its concerns for responsibility and for proportionality in response.\(^10\) It
is accompanied by concern for intentionality on the part of the wrongdoer and was meant

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\(^{9}\) In the Christian Bible this is found at Exodus 21:24; Leviticus 24:20; and Matthew 5:38.

\(^{10}\) For a discussion on why retributivism is not revenge, see Robert Nozick’s *Philosophical Explanations*,
especially pp. 366-370.
to control unlimited retaliation. Kant was sensitive to variations in responses and recognized some minor mitigating circumstances that could intervene in the determination of desert and the application of punishment.\textsuperscript{11} In addition, he was adamant that it is inappropriate to apply this standard of retaliation in cases when the crime perpetrated would degrade those inflicting the punishment, as would be the case in torture or sexual assault. In contrast, in the case of murder, he was unwavering in demanding that like be returned and the individual offender be put to death.\textsuperscript{12} When this formulation is taken literally, it has also been used to support the claim that one deserves to suffer the same harm, the same act type that one has committed, not just the same amount or degree of harm.\textsuperscript{13}

Setting aside deeper considerations of the concept of desert, however, there remain difficulties in the application of lex talionis. Even if one accepts the law of retaliation as what offenders deserve, and has successfully identified what is deserved, it remains to be answered how one justifies the mechanism through which that deserved harm is delivered.\textsuperscript{14} Beyond the idea of establishing a duty to punish proportionally, it is not at all clear that lex talionis provides any practical guidance as to how it may be applied. One of the first issues to arise is the question of how to define the terms. What is it that is deserved? Is it the same amount of harm? Or the same act type? How is the harm to be measured? The understanding that harm may be returned with as much harm

\textsuperscript{11} Kant (1965), pp. 100-103.
\textsuperscript{12} Kant (1965), p. 100.
as was received but no more, leaves many questions unanswered.\footnote{There are, among retributivists, differing claims about whether \textit{lex talionis} justifies inflicting \textit{the same} harm or merely an \textit{equivalent} harm. See especially Michael Davis “Harm and Retribution” in \textit{Punishment: A Philosophy and Public Affairs Reader}, (Princeton: Princeton University Press, 1995), pp. 188-218.} For instance, there are crimes for which there are no victims or where the harm done is so tangential as to ‘stretch the concept of harm pretty far’, in the words of Michael Davis\footnote{Davis (1995), p. 198.}. Davis also notes that the corresponding legislative policy under \textit{lex} would criminalize only those acts that bring actual harm, not merely conceptual or potential harm.\footnote{Davis (1995), p. 200.} The shortcoming of this is apparent when one considers the variety of crimes for which there is no calculable harm done. There are actually several problems here\footnote{Russ Shaver-Landau. “Retributivism and Desert” in \textit{Pacific Philosophical Quarterly}, vol 81, No. 2 (2000), pp. 193-4.}, the first being that victimless crimes, such as speeding on an empty street, fail to harm anyone and so give us no indication of what sort of punishment is appropriate. A second and related problem is that some crimes cannot be retaliated; for instance, thieves without property cannot have property taken from them. A third problem is the gruesome nature of some crimes. Even Kant specified that some acts ought not be repeated, even though a strict application of retaliation would provide justification for them.\footnote{Kant (1965), p. 132.} Yet this guidance does not come from the principle itself, which leaves us with no rule or suggestion as to what other sort of punishment would be appropriate. These problems are only further compounded by the difficulty of determining correctly just how to evaluate a commensurate punishment. Who gets to decide how much harm was done, or how much harm will be caused by the proposed punishment? Deeply controversial issues, such as whether the mens rea of the person inflicting the punishment can approximate the mens rea of the offender, or whether it needs to, suddenly become relevant to the question of desert. These issues
complicate what is, on its surface, a simple and intuitively appealing account of the justice of punishment. What the *lex talionis* establishes most clearly is an indication of proportionality, that justice demands punishment for wrong done and that the punishment should “fit” the crime. However, what it means for the punishment to ‘fit’ the crime remains a somewhat vague notion, as discussed above.

### 3.1.2 Morris and the Benefits and Burdens Justification

Retributivist thought fell into disfavor in the late nineteenth and early twentieth century, suffering charges of barbarism and brutality. However, it has enjoyed a revitalization that owes a significant debt to Herbert Morris’s recasting of the retributivist justification in “Persons and Punishment”. Morris’s account of the moral significance of punishment, though still retributivist, is quite different from the Kantian conception. Whereas the Kantian justification for punishment relied on the moral force of desert as a logical and necessary component of our rationality, Morris’s defense of punishment reframes the moral issues at stake in terms of benefits and burdens. The benefits and burdens account begins with the assumption that in a just ordering of society, individuals voluntarily comply with laws in order to enjoy a personal sphere of noninterference. In adhering to the law, each individual takes on the burden of self-restraint by refraining from actions that would interfere with the liberty of others. The incentive to take on this

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23 Jeffrie Murphy, in “Marxism and Retribution” also derives a benefits and burdens account of retributive desert based on the Kantian right to retribution. Both Morris and Murphy modify their positions in later works (see Morris’ “A Paternalistic Theory of Punishment” and Murphy’s “Retributivism, Moral Education and the Liberal State”), but Morris’ analysis remains the most thorough presentation of a still influential position.
burden is that it provides for everyone a mutual benefit that, as Morris describes, consists of "...noninterference by others with what each person values, such matters as continuance of life and bodily security. The laws define a sphere for each person then, which is immune from interference from others."24 The just community is that community in which there is a fair distribution of benefits and burdens enjoyed by all, a desirable state of affairs that Morris refers to as a moral equilibrium.25

The justification for punishment on this account is dependent on the conception of justice as the fair distribution of benefits and burdens. This fair distribution or equilibrium requires that each person accept the burden of voluntary compliance with the law. (This is a burden only insofar as the exercise of self-restraint is required). This burden is counterbalanced by the benefit of living in a community where other members' compliance with the law provides a sphere of noninterference for each. Mutual compliance maintains equilibrium. Problems arise when mutual compliance fails, such as in the event that one individual refuses to take on the burden of self-restraint. The injustice arises because whenever an individual forsakes the burden of restraint, this person still enjoys the benefit of noninterference from the rest of the complying community, and in doing so gains an unfair advantage over others.26 This unfair advantage is loosely measurable as the unjust distribution of benefits and burdens, with the wrongdoer having the benefits, but not the burdens associated with the collective benefit of living in a just society. In such occurrences, when the equilibrium is disturbed, justice requires that the balance of benefits and burdens be restored. According to this argument, the state is justified in intervening to restore equilibrium. This restoration is

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25 H. Morris (1976), p. 34.
26 This is the classic 'free rider' problem.
achieved when the unfair advantage gained by the noncompliant individual is removed. The intervention to accomplish this restoration of equilibrium is punishment.

Morris identifies four propositions about rights that he argues together form the justification for punishment. His attempt, in “Persons and Punishment” is not to provide a deductive proof of this, but to indicate how it might be true. These propositions are:

.....first, that we have a right to punishment; second, that this right derives from a fundamental human right to be treated as a person; third, that this fundamental right is a natural, inalienable, and absolute right; and fourth, that the denial of this right implies the denial of all moral rights and duties.

In this format, Morris’s propositions are reminiscent of the Kantian argument that punishment is both a right and a duty that springs from what it is to be a rational being in a community. Here Morris establishes the right to punish in a way that allows him to address and circumvent the retributivist dilemma described by Hugo Bedau as quoted above. Morris addresses this dilemma by claiming that the justification for the institution for punishment (his first claim) is constituted by the remaining three rights claims.

In the first proposition Morris claims the right for a society to have an institution of punishment, and in the following propositions goes on to claim that this institutional right is grounded in the right for an individual to be respected, a right which entails the right to be punished. This first proposition, “we have a right to punishment”, establishes the right of society to punish in this conception of justice as the fair distribution of benefits and burdens. As he describes:

To summarize, then: first, there is a group of rules guiding the behavior of individuals in the community which establish spheres of interest immune from interference by others; second, provision is made for what is generally regarded as a deprivation of some thing of value if the

rules are violated; third, the deprivations visited upon any person are justified by that person's having violated the rules; fourth, the deprivation, in this just system of punishment, is linked to rules that fairly distribute benefits and burdens and to procedures that strike some balance between not punishing the guilty and punishing the innocent...\textsuperscript{29}

This is the content of the argument behind the first proposition, where he defines punishment as a justified state intervention to restore a fair distribution of benefits and burdens. Here he engages the first horn of the dilemma Bedau described, which is the challenge to defend punishment without relying on consequentialist arguments. In his appeal to a just ordering of society it is easy to construe his argument as unapologetically consequentialist. But it is important to note that he is not suggesting that the laws are established to serve the greatest good, but to serve justice. This first proposition addresses the justification for the institution of punishment, but not the justification for any particular act of punishment. Once the institution is justified, though, the stage is set for the justification of particular acts of punishment as hypothetical imperatives, rather than the categorical imperative that Kant defended. Presumably, if one rejects the assumption that a just ordering of society is a reasonable base from which to consider punishment, the further points about particular acts of punishment will be moot. The assumption here is that the acceptance of the institution of punishment is uncontroversial. Justice, defined in terms of the fair distribution of benefits and burdens, is not a maximizing principle; it justifies punishment only as a response to the unfair distribution of benefits and burdens. A maximizing principle, on the other hand, would permit such things as redistribution. On Morris' account there is the restriction that redistribution of benefits and burdens is only justified in cases where the unequal distribution occurred in the right way, namely, through a proscribed wrongdoing, in which case redistribution

\textsuperscript{29} H. Morris (1976), p. 36.
would meet the conditions of desert. The deeper issues of justification, however, will be
taken up in detail later in this chapter.

In the remaining three propositions, Morris moves to the defense of the right of
the individual to be punished. The second proposition, "this right derives from a
fundamental human right to be treated as a person", defines what it is for an individual to
be respected. This proposition reflects familiar Hegelian claims about the connection
between respect and punishment.\textsuperscript{30} As Morris states it, even when a person makes the
choice to break the law, that individual deserves to have that choice respected.\textsuperscript{31} Here
Morris' framework becomes more explicit. His argument clearly narrows the focus to
differentiate between deserved punishments and alternative therapeutic models of
responding to wrongdoing.\textsuperscript{32} This differentiation is particularly of interest because of its
close parallel to arguments made both for and against the moral argumentation of the care
perspective. Here Morris argues that to respect a choice requires that the choice is not
seen as a symptom of some sort of social pathology, but is seen as a rational act deserving
of a response. Morris argues that only a punitive response (as opposed to a therapeutic
response) is capable of demonstrating respect for the wrongdoer's choice. The popular
therapeutic responses to wrongdoing, he claims, undermine the wrongdoer by failing to
acknowledge the integrity of the choice made because they assumed that the act reflected
some sort of incapacitation on the part of the wrongdoer. Punishment rather than
treatment is appropriate, he argues, because the rational individual understands the
parameters of permissible moral choices as well as the consequences of acting outside
those parameters. The rational individual knows that the state will act to remove any

\textsuperscript{30} See T. M. Knox's Hegel's Philosophy of Right, especially sections 99-104.
\textsuperscript{31} H. Morris (1976), p. 46.
unfair advantage and so in choosing to take unfair advantage, also chooses to have that advantage removed. This proposition is a re-assertion of the Kantian desert-based justification of punishment.

The third proposition claims that this right to have our choices respected and to be treated as a person is “a natural, inalienable, and absolute right.” On this right, Morris claims:

Were we fundamentally different than we are now, we would not have it. But it is more than that, for the right is linked to a feature of human beings which were that feature absent – the capacity to reason and to choose on the basis of reasons – profound conceptual changes would be involved in the thought about human beings. It is a right, then, connected with a feature of men that sets men apart from other natural phenomena.\(^{33}\)

Here Morris introduces a metaphysical basis for the right to respect. This shift to a metaphysical argument further eclipses any consequentialist claims\(^ {34}\) and further establishes that this right is nontransferable and cannot be waived. The inalienable nature of this right is emphasized in a later discussion in which Morris adds that even if a situation arose in which exercising this right might be overcome, or trumped by other circumstances, it would never be the case that the presumption of the right would ever be defeated or overcome.\(^ {35}\) Given the kind of beings we are, we cannot help but have this right to have our rationality respected. Here it is quite explicit that Morris has adopted the concept of the self that we associated with the traditional justice perspective. He uses that language of rights and argues for the adherence to the defined basic principles of fairness. The kind of beings we are, according to this construction, is primarily rational.

\(^{33}\) H. Morris (1976), p. 50.

\(^{34}\) This might not be entirely true, as one could make a different metaphysical argument, claiming that the tendency to maximize or think consequentially is a product of the kinds of beings we are. What it does rule out, in this case, is the attempt to intercede with consequentialist concerns in the establishment of a right to be punished.

He does, however, with the introduction of the benefits and burdens account, provide a window into the fact that there are morally relevant issues that arise that have to do with more concrete issues, as experienced in the various distributions of benefits and burdens.

In the fourth and final proposition, “the denial of this right implies the denial of all moral rights and duties”, Morris embeds this concept of respect in the framework of a civil society that has defined moral rights and duties. In addition, he claims that the right to be treated with respect in the way he has described stands or falls with every other moral right or duty. He argues:

Implied, then, in any conception of rights are [sic] the existence of individuals capable of choosing and capable of choosing on the basis of considerations with respect to rules. The distribution of freedom throughout such a system is determined by the free choice of individuals. Thus any denial of the right to be treated as a person would be a denial undercutting the whole system, for the system rests on the assumption that spheres of legitimate and illegitimate conduct are to be delimited with regard to the choices made by persons.\(^{36}\)

According to this argument, in a just society there is a theoretical right to punish in order to restore equilibrium. Furthermore, he claims that this is not a purely consequentialist argument. The right to punish, he argues, as well as the right to enforce any moral code in a civilized society, is derived from the rational nature of the participants, and is required in order to respond in a respectful way to the choice that an offender makes in breaking the law.

In this analysis Morris expands on the Kantian argument that punishment is desert-based. By defining the scope of desert as a civil society, Morris was able to focus not only on a new means to justify the theoretical aspects of desert but also on a means to address the practical aspects of how that desert is meted out. The benefits and burdens

\(^{36}\)Morris (1976), pp. 56-7.
account provides a framework for a desert-based account of justice that interprets the reasonableness of deserved punishment in a social context that has a depth and texture to it that the Kantian analysis lacked. In this discussion of benefits and burdens, Morris places the concerns about the justice of punishment within a context that reflects the immediate concerns of how individuals intersect with the social order and in doing so he provides a less abstracted account of justice. Fairness, as an abstract justification principle is satisfying only to a point. Morris’ greatest success in this re-characterization of the retributivist position is that he identifies what it is that is at stake with respect to punishment and wrongdoing, and he does it in terms of the benefits and burdens that individuals actually bear. In this way he acknowledges that our moral concerns are integrated into our lives. What Morris calls moral equilibrium is achieved through punishing wrong-doing, but this punishment, so conceived, is not an esoteric or completely abstract act, the benefits and burdens characterization reflects the fact that punishment is a fair response to an unfair advantage. In this account, Morris moves the retributivist position from one that was too easily caricatured as reactionary and brutish and puts it in terms that reflect a modern sensibility.

3.1.3 Nozick’s “Linkage to Correct Values”

In *Philosophical Explanations*, Robert Nozick provides an account of retributivist punishment that seeks to explain the motivation for punishing in the absence of a teleological claim. He does not seek to justify the retributivist position, but to explain what is going on in the application of retributivist punishment. Interestingly, Nozick differentiates the factors that compose the internal workings of punishment from a broader social theory that would dictate when and how punishment is to be applied. He
stops short, then, of supplying a justification for the application of retributivist punishment, although he clearly states he supports it philosophically, and instead places his focus on the components of punishment and how they function together in a cohesive and reasonable response to wrongdoing. In his discussion he is primarily interested in the conditions that underlie the retributivist justification. He divides his attention between three basic issues that complete his theory of punishment; an analysis of the claim that punishment provides a connection to correct values, the issue of proportionality and a formula for determining compensation due to victims.\textsuperscript{37} I will begin with a brief discussion of his argument for proportional punishment before getting into the more substantive aspects of his argument that punishment is a way of “connecting with correct values.” The issue of compensation I will discuss in more detail in the section in which the desiderata are reviewed, as it addresses some of the issues of systemic thinking that the care perspective values.

Nozick makes a straightforward and intuitive argument in presenting a formula designed to calculate the amount of deserved punishment. He proposes the following initial formulation:

\[ \text{The punishment deserved depends on the magnitude } H \text{ of the wrongness [or harm] of the act, and the person’s degree of responsibility } r \text{ for the act, and is equal in magnitude to their product, } r \times H. \text{\textsuperscript{38}} \]

This equation captures the intuition that the amount of punishment deserved ought to increase and decrease in correspondence with some reasonable measurement of responsibility and with the severity of the harm done. The level of responsibility an individual may bear for any act ranges from no responsibility to full responsibility, so the


\textsuperscript{38} Nozick (1981), p. 363.
value of \( r \) may range for zero to one. That the value of \( r \) cannot exceed \( r=1 \) sets an upper limit on remedies that can be called deserved punishment. (This is the formulaic equivalent of the lex talionis). If an offender is subjected to a response that exceeds the harm incurred by the offense (where \( p = (H+ \text{ extra harm}) \times r \)), this calculation provides a reference from which to claim that such behavior is not justified punishment, but may require some other description such as cruelty, abuse or revenge. That the value of \( r \) can be zero reflects the recognition that there may be instances where harm is not remediable by punishment because no individual bore responsibility for the harm. Such cases may still involve compensation, on his account, but not punishment. The compensation component is intended to supplement his retributivism and provide victims with restoration, if possible, to their life circumstances so they are no worse off than prior to the offense.\(^{39} \) As mentioned above, I will discuss compensation and further issues of proportionality in greater detail in the upcoming discussion of the desiderata.

Nozick’s driving belief is that punishment is justified because it restores or creates a connection to correct values that was either broken or never established. He provides the rationale for his version of punishment by invoking the conditions for meaning established by H.P. Grice.\(^{40} \) His application of these conditions to retributive punishment is as follows:

1. Someone believes that \( S \)'s act \( A \) has a certain degree of wrongness.
2. and visits a penalty upon \( S \)
3. which is determined by the wrongness \( H \) of act \( A \), or by \( r \times H \),
4. intending that the penalty be done because of the wrong act \( A \)
5. and in virtue of the wrongness of the act \( A \),
6. intending that \( S \) know the penalty was visited upon him because he did \( A \)
7. and in virtue of the wrongness of \( A \)

(8) by someone who intended to have the penalty fit and be done because of the wrongness of A
(9) and who intended that S would recognize (he was intended to recognize) that the penalty was visited upon him so that 1-8 are satisfied, indeed so that 1-9 are satisfied.41

The chain of intentions here result in what Nozick calls a “connecting with correct values”.42 The correct values, the ones underpinning the law, are brought to bear on the wrongdoer. Not only are they brought to bear, they are brought to bear _qua correct values_.43 There is no intermediary, no further consideration of overall consequences. What punishment achieves is the connection of value _qua_ value to the wrongdoer in such a way that the value _qua_ value (via punishment) makes a significant impact on the individual. The Gricean conditions come into play here to ensure that the connection occurs in the right way, so it is not only a meaningful communication, but also it is clearly a communication about deserved punishment and not revenge or any other emotional expression.44 The actual harm associated with punishment is necessary, he argues, because it contributes to the incentive to appreciate the message that is being conveyed. It would not be effective, he claims, simply to recite a list of grievances one may intend to communicate to the wrongdoer as a way of connecting him or her to correct values. Part of the expression of the connection involves an experiential appreciation of the severity of the wrong from the perspective of correct values.

Many retributivists are teleological retributivists, and Nozick’s proposed description of the process of punishment and the conveyance of meaning suits the

44 Nozick has a very clear discussion on why retributivism is not revenge in this same section. Although retributivism and revenge can be said to share a similar logical structure: both claim a penalty for a reason; and the recipient knows the reason; and knows he was meant to know, they differ in the criteria of application. Revenge, for instance, may apply in response to a harm where no wrong is involved, and this would fall outside the scope of retributive justification. See especially Nozick (1981), pages 366-7.
teleological retributivist position. While Nozick agrees that there is a place for thinking teleologically within punishment, the intent behind his argument is not to debate or dispute the relevance of consequentialist claims, but to demonstrate how it is possible that the retributivist motivation stands on its own merits, independent of or even contrary to consequentialist considerations.45 The teleological retributivist will claim that the process of punishment described above in Nozick’s nine stages has the desired effect of bringing about a change in the wrongdoer. This change, the teleological retributivist would argue, is what completes the justification of punishment. The wrongdoer, once confronted in a meaningful way with the import of the wrongness of the act for which punishment is being carried out, will undergo a change in character, brought on by experiencing punishment in just the right (meaningful) way. But Nozick, who is not looking for consequentialist support to shore up the retributivist desert-based justification for punishment, argues that although the process of punishing does by necessity communicate, it does not need to bring about a new awareness in the wrongdoer in order to be effective or justified. While the teleological retributivist desires to effect a change in the wrongdoer, the nonteleological retributivist claims only to justify an effect on the wrongdoer.46 Even if the wrongdoer is not changed, Nozick argues, the connection to correct values is still important, even though not as impressive as a connection that results in rehabilitation or some beneficial change in character.

Another way to parse the differences between the connection Nozick argues for and the teleological position is to reconsider the different ways of connecting to correct values. According to Nozick, there are three ways to connect to correct values: one can

act in a way as to be guided by correct values; one can act wrongly, but through repentance connect with correct values; one may have correct values imposed on oneself in the form of punishment.\textsuperscript{47} It is the role of punishment to make this connection when other means fail. Here Nozick echoes traditional retributivist theory:

In terms of the connection with value effected by punishment we can understand some of the metaphors that stud retributivist talk. Wrong puts things out of joint in that acts and persons are unlinked with correct values; this is the disharmony introduced by wrongdoing. Punishment does not wipe out the wrong, the past is not changed, but the disconnection with value is repaired (though in a second best way); nonlinkage is eradicated. Also, the penalty wipes out or attenuates the wrongdoer’s link with incorrect values, so that he now regrets having followed them or at least is less pleased that he did.\textsuperscript{48}

Punishment is justified because it maintains a connecting to ‘correct values’. In addition, he says that to fail to respond to wrongdoing with punishment would be to ignore a “significant portion of moral reality”.\textsuperscript{49} On these points Nozick echoes both Kant and Morris as to why retributivist punishment is right. The retributivist position argues only that the connection be made.

Although Nozick refrains from providing a justification for the institution of punishment, one of his key contributions here is to provide an analysis of how it is that punishment communicates.\textsuperscript{50} His interpretation of the Gricean definition of meaning is very useful, as he concedes, for describing the psychological process of belief in the retributivist position. Where I contest his analysis is in the assumption he makes about what is being communicated. He assumes that what is occurring is that correct values are

\textsuperscript{47} Nozick (1981), pp. 374-5.
\textsuperscript{49} Nozick (1981), p. 387.
\textsuperscript{50} Although he refrains from providing a justification for state-sanctioned punishment, he does go so far as to claim that because correct values have no causal power, we must act as the agents of correct values. See Nozick (1981), p. 375 and footnote 80 on page 718.
being linked to the wrongdoer by punishment that meets the Gricean conditions. While correct values are certainly among the messages that are expressed in the institution and application of punishment, they hardly exhaust the sum total of all that is expressed. The experiences of those involved in any communication contribute to the expression, as do the social contexts in which punishment exists. So, while he is clear to say that this requirement is not the claim that the offender needs to hear what is said, as it was meant, there remains the problem of differentiating between the intended aspects of communication, which are permissible, and the unintended aspects of communication that may not be permissible, but may also be unavoidable. Nozick's claim is that "Punishment links the wrongdoer with correct values, and is a vehicle whereby the nature and magnitude of his act's wrongness has a correspondingly significant effect in his life." 51 However, the key phrase 'correspondingly significant effect' is idealistic rather than practical for it assumes that the effect of the punishment on the offender will somehow be gauged, but this is true in only the most general sense. Desert is the issue that generates and determines the amount of punishment due, and although the punishment for any specific wrong may be standardized, the effect that any punishment may actually have on any one offender is unlikely to come into the equation at all. Nonetheless, the offender's sensitivity to whatever punishment is received matters a great deal with respect to how closely the punishment can be said to have a 'correspondingly significant effect'. Imagine two offenders, convicted of the same crime and both sentenced to two years incarceration. Imagine that one experiences severe emotional and financial hardship as an incapacitated head of household, separated from loved ones and the other experiences the incarceration with a sense of relief because it provides a

welcome structure and discipline and the first exposure to a drug-free life. It would be unlikely that these two offenders could be said to experience a shared correspondence of severity between the wrongdoing and the harm of the punishment.

3.2 The Retributive Justification

Punishment must be justified. This is essential in order to differentiate punishment from tirades, vengeance, conflicts or other emotional responses that may well result in justifiable emotions, but are not justifiable grounding for inflicting harm on another. All theories of punishment will face the challenge of justifying why a society would be permitted to implement punishment. This is an enormous task, involving social and political issues beyond the scope of this thesis, such as providing an explanation of how the state gains its authority. The retributive practice, as we have seen, is justified by various interpretations of the principle of desert. The institution of punishment, however, addresses the question of how the practice might be implemented in a society and requires a justification that integrates punishment with the breadth of social institutions that collectively form the social order. As I mentioned, such a justification is beyond what I will examine here. In this section I will consider the retributive justification for the practice of punishment.

John Rawls, in “Two Concepts of Rules”, starts his analysis of the justification of punishment with a definition of punishment:

.... a person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen on the ground that he has violated a rule of law, the violation having been established by trial according to the due process of law, provided that the deprivation is carried out by the recognized legal authorities of the state, that the rule of law clearly specifies both the offense and the attached penalty, that the courts construe
statutes strictly, and that the statute was on the books prior to the offense.\textsuperscript{52}

I will not differ in my use of the term ‘punishment’. Given the structure of punishment, though, one may ask what a retributivist justification for punishment would end up justifying? On this point, Rawls presents the following query:

Does a person who advocates the retributive view necessarily advocate, as an \textit{institution}, legal machinery whose essential purpose is to set up and preserve a correspondence between moral turpitude and suffering? Surely not. What retributivists have rightly insisted upon is that no man can be punished unless he is guilty, that is, unless he has broken the law.\textsuperscript{53}

In positive terms, the retributivist is interested in seeing the guilty punished. A practice based on that premise alone, however, could too easily be construed, much as Rawls indicates, as somewhat barbaric. If one wants to avoid the move that Rawls suggests at this point, namely, to admit that consequentialist arguments are needed in order to justify punishment, there must be more that can be said. The main problem, of course, is that without the consequentialist support, the retributivist position can appear overly cruel and vengeful. The retributive justification seems, on the surface, only to be interested in seeing that the guilty are punished, a position not quite distant enough from a sort of blood lust. Far from being merely a machine to align ‘moral turpitude and suffering’, the retributive justification stands on the merit of desert as an inherently fair and justifiable concept. However, this progression of thoughts merely turns the justification back to the nature of desert, and does not explain in any deep way why desert justifies the institution of punishment. This deeper justification I will now explore.

Morris addresses the problem of justification by suggesting we have two alternatives in responding to wrongdoing, punishment or therapy, and he attempts to

\textsuperscript{52} Rawls (1955), p. 10.
\textsuperscript{53} Rawls (1955), p. 7.
demonstrate that the therapy alternative is unacceptable. As we saw earlier, Morris' benefits and burdens account relies on an idea of justice that requires that individuals be able to live among others without undue interference. His arguments against the therapeutic responses are familiar, and generally argue, as Kant did, that in order to respect one 'as a person' one must respond to wrongdoing as a rational choice and not pathology.\footnote{Morris (1976), pp. 36-7} If one 'treats' a wrongdoer, then one has diminished respect for that individual's free choice. However, there are several problems with his attempt. First, his description of the therapeutic response is somewhat unbalanced, as I will discuss below. Second, even if one accepts that the therapeutic response is inappropriate for many cases of criminal wrongdoing, this does not establish that retributive desert is the correct response. My initial comments will address the structure of his argument and its flaws. I will spend most of the discussion, though, examining his claims about the therapeutic response because he reveals in that analysis both where he has made assumptions about the value of retributive desert and about the inferiority of therapy, or perhaps any, alternative. I will use the care analysis to further this line of inquiry into alternatives to retributive desert.

Morris' main objection to the treatment model is that it strips away recognition of free will, and so strips away that which differentiates persons from other creatures.\footnote{Morris (1976), p. 49-50.} It is a hallmark of the retributive desert proponents to claim that punishment is justified as a means of expressing respect for individuals. What Morris has failed to take into account, though, is that there are other ways of showing respect. If we imagine, for a moment, what other sort of values might underlie a treatment response to wrongdoing, it seems...
perfectly possible to imagine a society in which members have determined by free choice that they will allow the state to intervene with treatment in cases where citizens are symptomatic (vis-à-vis prescribed behaviors) of some (defined) pathology. This seems a perfectly rational first order choice, one that does not necessarily fail to recognize the uniqueness of human agency. From this position one may respond that free will accounts for much of our actions, even those of moral or criminal wrongdoing, but when pathology motivates behavior free will is no longer operable and treatment is appropriate. A state that chooses a treatment response would have to have fundamentally different values shaping the understanding of the role of the state and individual responsibility, a value system decidedly different from the punitive model, but not necessarily any less interested in the role of free choice in human actions. It would have to acknowledge that guilt and culpability are separable, so that wrongdoing alone did not subject an ill person to a punitive response rather than treatment. The different values underlying the treatment response do not necessarily diminish respect for individual free will, but instead recognize that free will is not always the operative force behind human action. So Morris’ charge that the therapeutic response is not sensitive to important elements of human action is not entirely correct; there is no reason to assume that a state with a treatment model in place lacks that ability to distinguish free choice and there is no reason to assume that a state that retained both punitive and therapeutic responses would be giving up that discernment in either of its responses.

In addition to Morris’ charge that the therapeutic response erases the distinction between happenings and actions, he characterizes several ways in which therapy differs from a system of punishment. These differences, he suggests, illuminate why we would
be drawn to therapy, and yet, why it is inadequate in response to wrongdoing. I will examine some of these claims and respond to them individually. In the course of this I will revisit the moral reasoning of care theory and explore the insights it provides into other realistic alternatives to punishment. The deeper issue for punishment theory, which he does not address, is not whether therapy or any other alternative response is capable of meeting the terms of retributive desert, but whether there are other relevant values that belong in the deliberation of state responses to wrongdoing. In the end, it remains to be considered what voice these other values might contribute to our understanding of punishment. From a care-theoretical point of view, the main objections to retributivism are deeply informed by underlying values. As discussed in the previous chapter, care reasoning demands that particulars can and do have moral relevance. In order to explore what justification would look like from this broader framework, I will now look at several distinctions Morris draws between punishment and therapy and attempt to reconstruct the value differences that would be appropriate from a care-theoretical point of view.

Morris claims that while it makes sense to respond proportionally on the punishment model, there is no reason to expect proportionality in the therapy model. He says, "With therapy attempts at proportionality make no sense. It is perfectly plausible to give someone who kills a pill and treating for a lifetime within an institution one who has broken a dish and manifested accident proneness." He bases this claim on his belief that proportionality does not make sense on the therapy model because (he believes) the act of wrongdoing is ‘erased’ into a happening. I believe this is incorrect on two counts. First, acts are not erased on the therapy model; they are simply not considered as the sole

basis of an appropriate response to wrongdoing. Second, Morris has conflated the punitive response with the proportional response. Just as we are mindful to use proportionality as a measure of fairness in the punitive model, there is no reason to assume that we would not value proportionality as a means of exhibiting respect on the therapy model as well. For example, imagine an offender who writes a hot check to support a drug habit. A likely response on the therapeutic model would be to sentence the offender to a drug rehab program. Morris, however, is concerned that a response focused on treatment could potentially keep the offender in treatment indefinitely. He posits that the system of rules in place in the punishment system protects individuals from interference and because the rule of law has this aim, it also has a corresponding limit, that is, the laws cannot overreach and punish individuals preemptively. 57 He argues that because we are not dealing with deprivations on the therapy model, but instead offer a positive treatment, that there would be no incentive to limit the amount of treatment. This does not follow, however. Here it is clear his characterization of the therapy model is reflective of perhaps the most idealistic reform-minded practitioners who support endless programs for the ‘reform’ of offenders. Morris is clearly right that ‘treating’ someone until she is ‘well’, when ‘wellness’ has no established standard, presents opportunities for gross abuse and neglect. However, there is no reason that we cannot incorporate treatment and therapeutic needs into deliberative responses to wrongdoing, along with other needs that meet the requirements of justice, such as respect for the individual and desert. The ‘treatment’ for the hot check writer may well be some proportional treatment (say, a year), but not a lifetime. Admitting the need for treatment and even providing some of the needed treatment does not entail an obligation to treat

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until 'cured'. The therapeutic alternative opens up deliberation about state responses to wrongdoing in a way that addresses deep issues of concern for the offender. In this way responses, punitive or otherwise, can be more appropriate and effective. I would argue that to fail to integrate these concerns leaves retributive desert open to the charge that it does not take individuals seriously enough to respond to their actual life circumstances, and to that extent, it treats offenders as means to an end.

There is a prior concern that he does not address, namely, whether a punitive response is appropriate in the first place. His commitment, as we have seen, is to a rectification of an imbalance of benefits and burdens by depriving the wrongdoer of whatever ill-gained benefit resulted from the wrongdoing. It is a given, for him, that this correction of the imbalance is the appropriate response, and that any alternative is less than ideal because it fails to satisfy this primary aim. Care theory can help us see where his commitments have prevented him from seriously considering alternatives that reprioritize and recontextualize the communal response. As we have seen, the failings that he attributes to the therapeutic response are only failings insofar as they do not correct the imbalance of benefits and burdens. However, the corollary values he claims to be concerned about, such as protection of the innocent, and treating individuals with respect, are not exclusive to the retributive response. In order to appreciate their application in the therapy model, though, one must allow a different motivation to be the driving force, such as the motivation to have a society in which the ill are treated for their illnesses. A society that is capable of addressing this root difference will be better equipped to be just or caring in response to individual cases.
Up to this point, the objective of this discussion has been to make apparent the ways that retributive theorists explain the value of the retributive response. I will now briefly consider the justification for punishment that Nozick offers in *Philosophical Explanations*. Although he concedes that he is not providing a justification for retributivism, he nonetheless does reveal the source of his conviction. He anchors the retributive justification in the value of value. Besides signifying that punishment is significant as a means of connecting to correct values qua connect values, Nozick also claims:

To leave wrongdoing unresponded to as wrong, substituting instead a beneficial transformation of the wrongdoer unrelated to the wrong in its content, is to ignore and be blind (in one’s actions) to this significant portion of moral reality.... We have offered an account, an interpretation, of retribution as effecting a linking of the wrongdoer-flouter with correct values qua correct values. Clearly, I believe that establishing such a linkage not only is involved in retribution, but also is (sometimes) appropriate, called for, right.\(^{58}\)

Much of this coheres with what has been said so far. However, where Nozick parts company with Kant and Morris, is in his reluctance to make claims about how and when punishment ought to be applied. Whether or not punishment is ever actually called for, he goes on to say, is a matter that would be determined by a theory external to the theory of punishment, one that governed the use of punishment.\(^{59}\) This caveat is significant for it admits, as Morris and Kant do not, that other values may come into play as a society deliberates over how to respond to wrongdoing. Nozick’s analysis can be read as compatible with a variety of responses to wrongdoing, which makes his understanding more appealing and reasonable from a care theoretical standpoint. As mentioned above, his presentation takes the form of an explication of what happens in the course of

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retributive punishment, rather than argument supporting its application. That said, he
does believe that punishment at times is the right response, and this he grounds in the
belief that failing to respond with punishment would be a flouting of correct values.

Nozick’s basis for retributive punishment is found in his analysis of the role of
value in moral theory. He explains:

Ethical theory must show and explain why and how the value of a person
gives rise to determinate conditions to moral constraints upon the behavior
of others; ethical theory must also show and explain why and how a
person whose life befits his own value will (thereby) be led to behave
toward others in specified ways, why and how a person is better off
behaving morally toward others – in accordance with their moral value.\footnote{Nozick (1981), p. 401.}

At the foundation of moral thinking, Nozick writes, is the intrinsic value of persons.\footnote{Nozick (1981), p. 414.}
The retributive account he provides is an attempt to explain how the value of persons is
respected through the connecting to correct values via punishment. Respecting value qua
value is in itself valuable and this value grounds the moral push and pull toward certain
behaviors. When a society fails to respond to wrongdoing, Nozick argues, that society is
flouting correct values. By allowing the violation of value to go unaddressed, a society
flouts value through its complicity with the degradation of value.\footnote{Nozick (1981), p. 390.}
The role of
retributive punishment is to (re)connect the person who has ‘lost contact’ with correct
values to correct values. Failing to care about values, Nozick claims, has a value cost,
even if the person does not realize it.\footnote{Nozick (1981), p. 410.}

If retributive punishment is ever justified, it will be so, according to Nozick,
because of its ability to (re)connect wrongdoers to correct values. This leads us to
consider whether the account of connecting to correct values that Nozick presents
actually achieves the desired end. The nine steps he outlines are intended to capture the process of punishment in a way that fulfills the Gricean criteria for meaning. His argument is that the connection to correct values is made because the event (punishment) fulfills the criteria for meaning. In accordance with the meaning Nozick ascribes to punishment, the wrongdoer will know that it is intended that she know that she is being punished for an act in virtue of its wrongness, and is being punished in proportion to its wrongness. Although he claims not to be a teleological retributivist, he has stipulated a very specific outcome in justification of punishment. He assumes the chain of intentionality behind the act of punishment will be recognized by the wrongdoer and that this will confront the offender’s flouting of correct values with the valuing of correct values. It is not clear, however, why this chain of intentionality would be preserved instead of compartmentalized in such a way that the offender simply prefaces the value statements in the following way:

\[ Y \text{ believes that what I did was wrong. I know that } Y \text{ is punishing me in virtue of the fact that I did the act that } Y \text{ held to be wrong, and that } Y \text{ believes I am being punished in proportion to the wrong of my act. I also know that } Y \text{ intends me to understand that I am being punished for the act in virtue of its wrongness, and to understand I am being punished in proportion to its wrongness. } Y' \text{ 's values are impacting me much like a blunt instrument, but I do not share } Y' \text{'s values or beliefs.} \]

This seems as realistic a response to state-sanctioned punishment as any, and it is not clear why this should be considered valuable.

Nozick claims that this process of punishment allows us to send a message to the offender about value qua value. He claims that the fact that correct values have a significant impact on the individual’s life (even if experienced like a blunt object) has
value in itself.\textsuperscript{64} But this accounting requires further examination. Since he claims to be giving a non-teleological account, the success of the connection to correct values cannot rest on whether the person being punished has the right understanding of the prior intentions. If the apprehension of meaning is not significant to the connecting, then apparently, the meaning is in the act, coupled with the intentions. But if this is the case, it becomes difficult to understand why the connecting is thought to occur between the offender and correct values, when the apparent connection, with respect to the Gricean criteria for meaning, is between the society that sanctions punishment and correct values. The offender is significant only as the object toward which the meaningful act (punishment) is directed. In this sense it appears that the offender, by receiving punishment, is being used as a means to the public end of expressing correct values. The non-teleological account must explain why punishment is able to make a connection between the offender and correct values when both the message and the receptivity of the offender are irrelevant. It becomes apparent on this analysis that there is a real indifference toward the individual being punished, with the force of the justification resting on the state’s authority to express its foundational values.

3.3 The Desiderata

\textbf{Criterion 1: Punishment must be deserved.} What makes desert an appealing criterion for punishment is that it restricts punishment to only the guilty. Retributivists recognize in desert a core element of justice. For those who believe, as Kant did, that justice is an obligation which requires the meting out of punishment to all guilty individuals, desert is an expression of that notion of justice. The desert criterion is easily met by retributivists, who see it as expressive of the natural relationship between

\textsuperscript{64} Nozick (1981), p. 377.
responsibility and action. People can be said to deserve things either because of acts or omissions, or because of qualities or character traits. Desert can be a moral or non-moral claim.\textsuperscript{65} In the case of state-sanctioned punishment, desert is a legal claim, and the person said to deserve punishment must be responsible for committing a legally wrong act.\textsuperscript{66} This “act requirement” has enormous intuitive appeal, as it is the requirement that ensures that punishment is only administered to those who are guilty.\textsuperscript{67} It also provides a relatively clear-cut answer to questions regarding why punishment is deserved. An individual deserves punishment when he or she has committed a legal wrongdoing. The intuitive advantage of the act requirement, however, quickly leads to a new set of complications. Even if we assume in the case of state-sanctioned punishment that all acts deserving of punishment have been previously defined through legislation, issues of agency and intentionality may not always be transparent. There are two aspects of desert that merit special consideration in the punishment process because they pose technical challenges to the just application of punishment. The first aspect is that of culpability, where the inquiry focuses on whether the individual meets (or fails to meet) the criteria of guilt, responsibility and blameworthiness and can be said to deserve punishment. The second aspect is that of proportionality and the determination of the amount of punishment that one’s deeds have merited. These aspects of desert are closely related and both require we examine our understanding of action theory. First I will examine the conditions and discernment of culpability, and second, the measurability of actions and harms as they relate to proportional punishment will be examined.

\textsuperscript{65} Sher (1987), p. 6-8. 
\textsuperscript{66} Because the focus here is state-sanctioned punishment, and laws and morality may diverge, ‘wrongness’ here indicates a legal rather than moral violation. 
In discussing culpability, it will be useful to recall Nozick's formulation of deserved punishment, \( r \times H \). The determination of culpability falls under the value of "\( r \)" which is the measure of responsibility. In order to determine "\( r \)", it must first be determined whether the individual in question did in fact commit the wrong act. If yes, the act requirement has been satisfied, and it must then be determined to what degree that individual can be said to be responsible for having done the act.\(^{68}\) Being responsible for an act includes both having done the act, and having had some choice in the matter. Coercion, negligence, intentionality and ignorance may all affect the degree to which an individual may be held responsible for an act of wrongdoing.\(^{69}\) Here, however, it becomes evident that the discernment process as realized in the justice system is less than ideal. These mitigating factors rely heavily on self-reporting; power relationships are not always transparent; and people are not always accurate, informed or truthful. We have no standardized scale for measuring the presence or the effects of coercion, nor for determining what someone's intention may have been.\(^{70}\) These technical deficiencies are not easily remedied. Recent developments in DNA testing have promised to provide a significant improvement in the collection of empirical evidence, but at the same time the credibility of fingerprinting has been undermined.\(^{71}\) The criminal justice system deals with this indeterminacy by subjecting alleged wrongdoers to an adversarial process that is designed, ideally, to bring to light all of the facts relevant to the culpability of the individual charged with the wrongdoing. It remains an imperfect process. In spite of the

\(^{68}\) See Nozick (1981) pages 380ff for a discussion of the act requirement.

\(^{69}\) A very thorough accounting of the affects of volition, ignorance, intention and coercion on responsibility can be found in Aristotle’s Nicomachean Ethics 3.1 10-15.

\(^{70}\) See Torny (1994) on this point. Even if one accepts the basic premise of Kant’s Right of Retaliation, it is not without practical limits.

fact the process is often thought to be the procedural safeguard of justice, real disputes can persist about the facts of any case as well as about the culpability of the individuals charged with wrongdoing. The troubling nature of determining guilt or innocence has played out dramatically in recent years. The year 2000 saw an unprecedented recognition of the fallibility of the current system, with Governor George Ryan of Illinois imposing a moratorium on state executions. His justification for intervening with the moratorium was the fact that the state had exonerated more inmates than it had executed since it reinstated the death penalty in 1977. The problem with this indeterminacy is particularly acute with death penalty cases, because the final expression of justice is irreversible. After two years, Governor Ryan's death penalty commission has come to the consensus that the system is imperfect and therefore the death penalty should be abolished. At issue here is not whether retributive desert is ever right or whether people ever deserve state execution, rather, the question is whether we are equipped to make the proper determination of desert. Unless this latter question can be answered in the affirmative, our proclamations of justice will continue to be undermined.

Even in cases where the facts are agreed upon, a subsequent problem with desert remains. Opinions may differ widely as to what a wrongdoer deserves in response to the wrong done, and this leads us to consider how we gauge proportionality. We have already seen the difficulty in ascertaining culpability. Now we must ask, do we measure the punishment against the value of the benefit gained, or against the harm done, or

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against the level of culpability of the wrongdoer? Once culpability is determined, the question arises as to what exactly, if anything, is deserved in response. There are two avenues I will pursue here, the first being the question that if we believe a punitive response is deserved, how do we know the type and the amount of punishment that is deserved, and the second being why we believe a punitive response is deserved. The first question, regarding how to determine the amount and type of punishment deserved runs into deep problems on incommensurability. If we want to preserve proportionality, we need to determine what it is that the amount of punishment should in proportion to. There are three alternatives I will consider: punishment ought to be proportional to the extra benefit gained by committing the crime; punishment ought to be proportional to the harm done by the crime; and punishment ought to be proportional to the strength of the prohibition violated.

If we first consider that punishment is proportional to the extra benefit gained by the wrongdoing, Richard Burgh suggests there are four natural contenders for what that extra benefit might be comprised of:

1. the ill gotten gain, e.g., money in the case of robbery;
2. not bearing the burden of self-restraint, hence having a bit more freedom than others;
3. the satisfaction from committing the crime;
4. the sphere of noninterference which results from general obedience to the particular law violated

In cases of property theft, the ill-gotten gain is generally calculable in dollars. However, as Morris argues, more than just property loss is at issue. Restoring the victim to the same level of financial or property well-being would be restitution, but it would not satisfy retributive desert. The benefit gained from forgoing the burden of self-restraint

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75 Sher (1987), p. 81.
will vary widely from person to person and crime to crime. Likewise, the satisfaction from committing the crime is also a subjective value and will vary across persons. These are far too subjective; wrongdoers, even those perpetrating the same or similar acts, are likely to receive differing benefits from their actions.\textsuperscript{77} Desert may give us reason to remove those benefits, but because they are subjective, they cannot provide us with a proportional response that reflects the gravity of the crime. This leaves us to consider the extra benefit the wrongdoer received for violating the sphere of noninterference. Many, however, question the usefulness of this response. Andrew von Hirsch argues that the zone of noninterference is too esoteric a concept to support retributive desert.\textsuperscript{78} Burgh worries that here also about the fact that not all wrongdoers benefit equally from their act of transgression. He dismisses the sphere of noninterference option because not all wrongdoers benefit equally from the zone of noninterference for any particular offense. Some wrongdoers receive the benefit of the self-restraint of others, other wrongdoers, he argues, cannot have the same crime perpetrated against them, for example, someone without possessions cannot be robbed, and so they do not receive the benefit of others’ restraint. The concern here is that there may be no reason to punish someone, on the benefits and burdens account, who has not benefited from the sphere of noninterference provided by other’s restraint.\textsuperscript{79} However, this is only true if the relevant benefit is the benefit of an unreciprocated sphere of noninterference. Sher suggests the zone of noninterference should be understood as a generalized benefit instead of a benefit specified by the nature of the violation.\textsuperscript{80} There is precedence for thinking of the

\textsuperscript{77} Sher (1987), p. 80.  
\textsuperscript{79} Burgh (1982), p. 205  
\textsuperscript{80} Sher (1987), pp. 79-80.
noninterference zone as a generalized principle. Jeffrie Murphy presented his benefits and burdens account with this understanding.\textsuperscript{81} However, this generalized account is troubling because it needs to be supplemented by an account of the extra benefit. Furthermore, although the extra benefit from the actual offense is theoretically measurable, it is not clear how or if different offenses benefit differently from the generalized cooperation of others. Proportionality is lost if all offenses are equally an offense against the generalized noninterference zone provided by a communal adherence to the law, so an independent standard would be needed to provide a ranking of severity against which proportional punishment could be measured. So the violation of the zone of noninterference, whether narrowly or generally defined, is not going to preserve proportionality.

The second possibility is that the punishment ought to be in proportion to the harm done. The lex talionis, and more generally, arguments for proportional punishment, appeals to the base reasonableness of the expectation that one will get back exactly what one dished out, so to speak. There are two points to make here. First, although for many cases it may seem that a proportional punishment response is appropriate, there will remain the challenge of whether we are capable of measuring what constitutes an ‘equivalent’ harm across persons, circumstances and events. Second, when dealing with the parsing out of harm, it will be even more evident that some cases will test the limits set for proportionality. Some cases will beg for a more severe punishment while other will beg for mercy. In measuring harm, we again face deep challenges of subjectivity and incommensurability.

\textsuperscript{81} Murphy (1973).
First I want to discuss briefly cases that test that reasonableness of the proportional response assumption. Michael Tonry writes of his concern succinctly, saying that,

...in the abstract, I have some sympathy for a retributive scheme with strong proportionality conditions; in practice, observing that the vast preponderance of common law offenders are poor, ill educated, often mentally subnormal, and often from minority groups, I believe that punishment strongly committed to proportionality will exacerbate social injustice and further disadvantage the already disadvantaged. 82

This is the worry that we cannot do justice in an unjust world. In an unjust world, how do measure harm, and how do we judge which harms 'count'. One doesn't have to take the extreme 'whole life' view of suffering to appreciate that arbitrary circumstances of one's life can impact the scope of one's perceived or real options, effectively foreshortening one's autonomy, sometimes to ill effect. 83 The disincentives of punishment may be inverted for people who find themselves disenfranchised from what many take to be the standard benefits of society. As Clarence Darrow recounts in 'The Holdup Man', incarceration, in order to get out of inclement weather or to get a meal, can actually be an incentive to commit minor infractions for those who are homeless. 84

Although consequences are not part of the retributivist justification, a retributivist would no doubt recognize this as an undesirable and unfortunate side effect. For it is one thing to say that consequences have no weight in the justification of punishment, and quite another to say they make no difference at all. Consequences may in fact make a great deal of difference, even moral difference, as they do in cases that provide incentive to commit a felony. But the retributivist argument still holds that the consequences do not

83 See Ezorsky (1972) for a discussion of the whole life view of suffering.
make the right kind of difference to affect whether punishment is deserved. These are the same concerns that led Jeffrie Murphy to argue that although retributive desert was justified, our current social circumstances are such that we may not be in a position to implement it. He writes:

If we think that institutions of punishment are necessary and desirable, and if we are morally sensitive enough to want to be sure that we have the moral right to punish before we inflict it, then we had better first make sure that we have restructured society in such a way that criminals genuinely do correspond to the only model that will render punishment permissible – i.e., make sure that they are autonomous and that they do benefit in the requisite sense.  

If we are going to measure harm, there is this background concern that social injustices may have disadvantaged some citizens more than others, and it may not be clear whether we are doing justice or perpetuating injustice.

Given a society that has decided to punish offenders, however, if this punishment is going to be in proportion to the harm done, there are some profound issues of incommensurability that need to be addressed. Not all crimes will have the same impact on all people. Attempts to standardize punitive responses, so that similar offenses receive similar sentences, will be met with objections that not all “equal” crimes impact their victims equally. If we are measuring harm, there will be pressure to take the victim’s circumstances into account. But there is no clear answer as to what circumstances ought to be morally relevant to the deserved sentence. For a crime perpetrated on a stranger, the relative well-being or stability of the victim is, to some degree, a matter of moral luck. To what extent should an offender be penalized for violating someone who was ill equipped to cope with the event? One victim may be emotionally devastated by a loss that another person may rebound from fairly quickly. The harm done to the victim is not

85 Murphy (1973), p. 29.
irrelevant to the wrongdoing, yet is another area where subjective responses call our attention to the inadequacy of our ability to define a harm-based proportional response. The same issue exists with attempts to measure how offenders will experience their punishment. Punishments are standardized within offense classifications, but offenders will be differently affected by the impact of their punishment. Although an elaborate objective scale of offenses exists, the measurement of harm it reflects does not take the offender’s point of view into consideration. Again, to some degree it will be a matter of moral luck how much an offender suffers from deserved punishment.

One might attempt to measure the unfair advantage with respect to the strength of the prohibition violated, as George Sher suggests. This, however, is not a transparent process, and one that runs the risk of circularity. If the strength of a prohibition is determined by the degree of wrongness of an act, and the degree of wrongness is reflected in the severity of the laws attached to it, then we are simply saying that whatever the law states is what an individual deserves. In some respects this is clearly right, but it also illuminates that there is no independent standard of desert, one that would have a grip without the benefit of a legal system. This seems wrong. It would seem, rather, that the retributivist would want to claim that desert informs our concepts of appropriate legal sanctions, not vice versa. But then we return to the question of how we measure desert. If the process of discerning retributive desert is similar to the discernment that informs sound legislation, then this is clearly a process that relies on public judgment and is susceptible to cultural changes and the mood of public opinion. But if that is the case, then we are left with a concept of desert that is functionally an expression of public opinion and we are left with no handle on any absolute standard by

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which to gauge our response. This has practical implications because the tendency of retributive desert theorists, particularly those who adhere to a strict application of proportionality, has been to keep the scope of relevant information narrowly focused on the incident of wrongdoing. If we understand retributive desert as an expression of censure that is defined, in some degree, by changing standards, there is good reason to think that this gives us reason to incorporate more information, not less, into our discernment process about what justice demands. If we understand justice as an enduring value, one that is susceptible, however, to the biases of time and circumstances, a broad rather than narrow view of circumstances may help us avoid erring in favor of present biases.

These questions get to the heart of our intuitions about punishment and wrongdoing. As discussed above, the retributivist justification for punishment rests on the understanding that the punitive response is appropriate because it best responds to the individual as an autonomous moral agent. In the prior section I discussed situations in which a treatment response may in fact be a more appropriate way of respecting an individual, given the circumstances. In addition to considering cases in which treatment might be appropriate, or even preferable to punishment, we need also to what other responses are available to us. Why, for instance, do we feel we are justified with the punitive response instead of an intervention that addresses more directly the actual rift that occurred as a result of the wrong? When we review the justifications for retributive desert, we recall that they require some harm or deprivation to be visited on the wrongdoer. This harm may occur in order to balance the distribution of benefits and burdens or to connect to wrongdoer to correct values. These harms are justified because
anything less would either fail to take the autonomy of the wrongdoer seriously or would be a flouting of correct values. The nature of these responses, however, is troubling. They both claim to respond to a wrong, in kind or in some equivalent kind, in order to make things right. Morris seeks to reestablish a balance, not merely through compensation, but by weighing the harm done in terms of unfair advantage as well. His objective is to restore what was lost. This response is not measured solely in property terms, though, but also in social terms, terms that attempt to measure the valuable aspect of cooperation that was lost by the violation. What is troubling about Morris' account is that he does not look at ways of restoring cooperation, which one might consider a high priority. Rather, he focuses on measuring the unfair advantage gained in order to extract the same from the wrongdoer. It is not clear why this attempt to abstract the value of the harm done and translate that into a punishment is more respectful or more effective at restoring what was lost than a response that addressed the particular loss and specific circumstances more directly.87 For instance, if we incarcerate someone who has committed property theft, the victim and the wrongdoer are effectively alienated from each other and the justice system is the only effective link between them. This means that for both the victim and the wrongdoer, the restoration of benefits and burdens will only be satisfied at a broad theoretical level. Justice will have been served, but the circumstances of their relationship and the specific transgression will have been generalized into an offense classification with a range of sentencing options. It is certainly more efficient and practical to have a generalized response to wrongdoing, as opposed to responding on a case-by-case basis, yet it is also important to recognize how much is lost in the translation. Such generalized responses to wrongdoing may well serve

to mend what was broken, from a legal perspective, yet they fail to address the disruption that was experienced by both the victims and wrongdoer. It is this failure that seems to reflect a lack of respect for the individuals involved. Again, it may be that justice requires a level of generalization that cannot admit of such close particulars, but that does not mean that nothing is lost. In the case of retributive desert, I would argue that what is lost is the opportunity for individuals to navigate their way through the more personal aspects of the experience of the wrongdoing. This would hold for both offenders and wrongdoers.

**Criterion 2: Innocents should be affected only minimally by the punishment, as compatible with fulfilling the other criteria.** This is a corollary to the desideratum that punishment must be deserved. In the claim about desert, innocents are spared the direct application of punishment, in this claim, there is a lexical ordering. All other things being equal, this claim stipulates that whenever there is a choice between two or more punishment options, the punishment applied should be the one that affects innocent people as minimally as possible. Retributivists recognize that those who suffer punishment need to be able to answer for themselves a question most commonly associated with suffering of any kind: why me? Desert may well be the answer supplied to an individual who has broken the law, but desert drops out of the picture when considering the impact of punishment on innocents. There may well be ties of responsibility between an innocent individual and a wrongdoer, but in order to deserve punishment or its effects one must also be guilty. The innocents affected by punishment lack the requisite guilt for desert and so although they suffer as an effect of punishment, they do not suffer as a deserved effect of punishment. Because that suffering is
undeserved, it is not defended by retributivism. So retributivists can embrace this desideratum as being at least consistent with respecting individuals.

Here again we can see the disadvantage of not having a more sophisticated theory of agency with respect to criminality and punishment. It is implausible on any account to assume that punishment has an immediate or direct impact only on wrongdoers. Wrongdoers are not a class of individuals who are somehow isolated from the ties of human relations. Adults who break the law, one may assume, have social ties to family, friends, or organizations, which form a network of relationships that help define the life of import for the wrongdoer. The fact that we characteristically respond to wrongdoing as though we were responding only to the wrongdoing allows us to continue making policy and following practices that neglect the broader implications of these practices. The justification for retributive desert rests on the premise that implementing it is an expression of justice. As we have seen, however, our attempts to define and apply the concept of desert narrowly may in fact undermine justice more broadly construed. Care theory, once again, can provide moral justification for expanding our horizon of relevant moral concerns in particular cases, making desert one of a plurality of concerns. In fact, it would require this broadening of relevant moral reasons.

**Criterion 3: Punishment should have some social value.** The wording of this desideratum follows from the expectation that punishment plays a role that in some constructive way contributes to the social good. Note that this desideratum does not specify that the benefit must be part of the justification, but merely that the institution of punishment must provide some benefit. Deontologists may attempt to resist this desideratum, preferring to give priority to doing what is right over what is good.
Although they may argue that punishment is justified in virtue of it being right as opposed to being good in terms of consequences, they may still recognize that there is value in doing what is right.\textsuperscript{88} For the deontologist this good is not a justificatory good, yet it is not merely coincidental either. For Kant, doing what is right has value because it expresses one’s highest nature as a rational being and exhibits the maximum respect for individuals. The benefit may be as benign as “right has been done”, or in Nozick’s terms, “correct linkage has been restored”, an end valuable in itself, even if no character change occurs. Some may accept that insofar as doing the right thing is valued, it is good, and this recognition of value is enough to meet this desideratum. In recent years, however, many have simply come to accept that retributive desert must be understood as a practice embedded in a larger social framework that provides instrumental reason for a society to apply it.\textsuperscript{89}

Although retributive accounts place great value on respecting the individual, there is a sense in which the notion of individual relied upon is not rich enough. If I am to be punished for a wrongdoing I committed, and there is no foreseeable good to come from my punishment, I would tend to believe that it is not me but the general rule to punish wrongdoers that is being respected. In such a case, a rule is being followed and that rule specifies that wrongdoing must be punished. An argument is made that following this rule is a means of respecting the individual who committed the wrong because it acknowledges the independent agency of the wrongdoer, and responds directly to that autonomous choice. This portrait characterizes the rule following as a means of communicating with the wrongdoer (particularly as described by Nozick), and so claims

\textsuperscript{89} See Rawls (1955), Nozick (1981), and Morris (1994).
to be an expression of respect. What the retributivist account fails to address is the parallel interpretation that acknowledges the retributivist rule to punish wrongdoers, acknowledges the wrongdoing, and the agency, and yet sees that in order to respect the individuals involved, more information will be required in order to discern an appropriate response. The retributivist needs to explain why that individual, whose circumstances are not examined beyond the blunt fact of a wrongdoing, is not being used as a means to an end, namely, as a pawn to fulfill a rule. Here the retributivist may well argue that she recognizes mitigating circumstances, and claim that the full particulars are taken into consideration, and so the case is without merit. However, if the retributivist is willing to allow that mitigating circumstances lessen the desert claim with respect to punishment, so that it is no longer a duty to punish the wrongdoer, simpliciter, but a duty to punish when enough criteria are met, there is no reason that circumstances could not completely erase the claim to punish, at least in some cases. This is not immediately troubling to the retributivist, if we look back at Nozick's formulation of deserved punishment as expressed in $r \times H$, we see that the responsibility could drop to zero, in which case no punishment is deserved. A new problem arises, though. How do we determine what constitutes a mitigating circumstance? It is at this point where the commitment to punish crystallizes. If we approach a situation in which an individual has committed a crime and seek to diagram the impact that the both the wrongdoing and the punishment have, much as one would diagram a sentence, we would see the systemic nature of the relationships between the events and persons involved.

Again we are faced with the question of how to determine which effects "count" as morally relevant? If I am incarcerated and thereby unable to care for my child, why
would that fail to count as morally relevant in the consideration as to whether I "deserve" incarceration? Clearly it would be a good thing if I were to meet my moral obligation to care for my child, but the retributivist is only equipped to weigh mitigating circumstances that relate to individual responsibility for the wrong done, and is not able to weigh other moral claims against the claim of desert. Because of this, the individual who is subject to a course of punishment that has not taken full measure of the lives involved that will be significantly impacted, has a fair complaint against the underlying retributivist justification that it has used her a means, rather than an end. While it is commendable that retributivist accounts are able to limit the extent of punishment based on arguments for proportionality and individual respect, it seems quite unsatisfactory that those limits are generalized across persons and not responsive to any particular individual and situation in question. Formal respect may well entail respecting one’s rationality, but there is also a notion of respect that responds to more than one’s rational nature and is responsive to one’s particular capacities and life situation. It is this contextualized respect, a respect for the integrity of the fullness of one’s life which retributivism fails to reflect. Care theory can provide a justification for taking a broader notion of morally relevant concerns into account. Where the retributive notion of desert has typically provided justification on a case by case basis, with the scope of the desert defined by the wrong done and only the wrong done, considerations based on a broader understanding of morally relevant circumstances would merit taking the whole person, not just the one wrong act, into consideration. In the applications section of chapter four I will follow particular cases to illuminate this point further.
Criterion 4: The value of punishment must bear some direct relation to the wrong that was done. This desideratum reflects the general concern that capricious violence or exploitive vengeance not be done in the name of justice. Earlier, I stipulated that punishment must be justified. This desideratum specifies that the punishment be related to the wrongdoing that is being punished. Ideally, this would be to protect inmates from abuses such as slave labor as well as older practices such as blood lust. One can argue that an individual deserves to be punished for a crime, but that does not mean that simply “anything goes” in terms of the form that punishment takes. Retributivists acknowledge the importance of there being a connection between the wrong done and the punishment. They argue for it in several fashions. The most basic argument is that the punishment is related to the crime through desert. But as we have seen, this claim is more specific than the desert desideratum, which is defined through complex analyses of responsibility, guilt and blame. The logic behind this connection on the retributivist account is the claim of desert, coupled with some form of proportionality. This “relationship” is based on the lex talionis and is a prescription for tailoring the punishment to “fit the crime”. The lex talionis, as discussed above, claims that what a wrongdoer deserves is to suffer a harm that is similar in degree and type to the harm inflicted through the wrongdoing. Another way this relation is made, as we saw in Nozick’s presentation of “connecting to correct values”, is through a meaningful communication.\textsuperscript{90} The thought behind applying the Gricean conditions of meaning to the application of punishment is to demonstrate that a connection has been made, via punishment, to establish a relation between the wrong that was done and the punishment that was applied.

\textsuperscript{90} Nozick (1981), pp. 363-97.
Although the retributivist position argues that it achieves a relationship between punishment and wrongdoing that respects the integrity of the wrongdoer, we have seen in the preceding sections that there are serious practical shortcomings in the just application of retributive desert. Furthermore, we have seen that desert, as a narrowly construed standard of justice, fails to take into account a spectrum of relevant moral concerns. There are issues of social justice that have moral relevance to individual cases of wrongdoing. The concern remains that justice demands that we think systemically about punishment, and learn to integrate our punitive and non-punitive responses to social needs. Retributive desert provides us with a valuable but limited insight into state-sanctioned punishment, and the limitations, as we have seen, call our attention to the need to consider retributive desert as one moral concern among others as we evaluate our responses to criminal wrongdoing.
CHAPTER FOUR

Deterrence and Reform

I believe very few men are capable of estimating the immense amount of torture and agony that this dreadful punishment, prolonged for years, inflicts upon the sufferers... I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body.¹

Charles Dickens

People in systems do not do what the system says they are doing.²

H.C. Westerman

4.1 Introduction

One of the persistent challenges for punishment theory is to provide a justification for doing harm to another person. As we saw in chapter three, retributive justifications for punishment rely on desert-based claims to establish the right to inflict normally prohibited harm on individuals who have committed criminal wrongdoing. The retributive justifications address the application of punishment on a case-by-case basis. Of primary concern to the retributivist is whether those deserving punishment, and only those deserving punishment, in fact get the punishment they deserve. Unlike the retributive theories, which ground the justification of punishment in desert, the consequentialist justifications for punishment rest on punishment’s positive contribution to the well-being of society and/or the offender. Consequentialist theories aim to justify the institution of punishment as a social good and typically are not concerned with justifying specific acts of punishment. Some have even suggested that the retributivist and consequentialist justifications are complementary, and together provide full

¹ Quoted here from David Rothman’s “Perfecting the Prison” in The Oxford History of the Prison.
² Quote from H.C. Westerman’s “Untitled” (The Hands) 1978.
justification for punishment. In this chapter, however, I will not attempt to integrate retributive and consequentialist concerns but will focus solely on developing the consequentialist justifications.

Consequentialist theories of punishment offer a significantly different alternative to retributive theories. This is particularly noticeable in the form of argumentation adopted by their respective justifications. Whereas the retributivist looks to a past action (a wrong that has been done) to determine the appropriate punishment, the consequentialist looks to the future for guidance regarding appropriate punishment. Forward-looking justifications, such as deterrence and reform theories of punishment, along with other consequentialist theories, justify state-sanctioned punishment through an appeal to the overall benefit that the institution of punishment provides for a community. There are several common consequentialist justifications for punishment besides deterrence and reform, including rehabilitation and incapacitation; however, the most prevalent justifications, and the ones that will be the subject of greatest focus here, are the theories of deterrence and reform. In section 4.2 I will discuss deterrence theory and its justifications as introduced by Cesare Beccaria and Jeremy Bentham, two 18th-century philosophers whose careful analyses of punishment and the state’s role as a public enforcer of the good continue to influence contemporary policy. In section 4.3 I will discuss reform theory. Here I will discuss early notions of reform as presented by Plato and the more comprehensive contemporary conceptions of reform introduced by Herbert Morris’ defense of paternalism and Jean Hampton’s moral education theory of punishment.

3 Rawls (1955), pp. 3-32.
4.2 The Deterrence Justifications

Deterrence theory assumes that offenders are rational actors. Rational actors, presumably, evaluate the costs and benefits of their actions, including criminal actions. The driving hypothesis of deterrence theory is that the threat of punishment in the proper measure will deter a rational actor from committing a crime. Based on this assumption, deterrence theorists claim that the institution of punishment promotes social well-being by reducing crime. In order for the state to punish, there must be some justification that provides the state with the legitimate authority to intervene in the lives of citizens for the purpose of doing harm in the name of punishment. Deterrence theorists argue that state-sanctioned punishment is legitimate only insofar as it contributes to the overall reduction of harm in society. To that end, deterrence theory justifies punishments that reduce crime in one or more ways, and the social good that a deterrence system of punishment provides is the justification for the practice or institution.

There are two customary approaches to deterrence and they may be present either jointly or individually in any particular punishment policy. The intent of some policies is to deter an offender from committing another crime; these are instances of special or individual deterrence, because they aim to deter a specific individual, the offender. Other policies aim to deter the general public by making public examples of offenders and using the public nature of the law as teaching tools; these are examples of general deterrence, so called because their purpose is to deter the general public from committing criminal acts. Both sorts of deterrence rest on the critical assumptions that informed rational actors will make self-interested choices and that punishment will provide the necessary incentive to ensure that criminal wrongdoing is not worth the cost.

4.2.1 **Cesare Beccaria**

Cesare Beccaria offered a classical Enlightenment approach to punishment theory in the eighteenth century. In his seminal work *Of Crimes and Punishment*, Beccaria presents a comprehensive explanation of the role of law and the justification for punishment as a deterrent. According to Beccaria:

> It is better to prevent crimes than to punish them. That is the chief purpose of all good legislation, which is the art of leading men – if one may apply the language of mathematics to the blessings and evils of life towards the maximum of possible happiness and the minimum of possible misery.⁵

Beccaria understands the law as providing the ‘conditions of fellowship which unites men… once they have tired of living in a perpetual state of war….’⁶ Left to our own devices, he claims, each of us ‘…acts as if he were the center of all permutations of the globe.’⁷ Beccaria’s assessment of the rational choice to obey the law includes a cost-benefit analysis that weighs the benefits of social cooperation against the cost of the individual privileges or freedoms lost. A rational individual, as such, can come to see the benefits of the rule of law and as a free individual can choose to live within the law. Rational actors, he argues, accept the rule of law only out of necessity and they will abandon it if it if they perceive that their personal benefit will not be advanced by it. The rational basis of the law and an individual’s awareness of its benefit are essential to good social order. Beccaria recognizes that an acceptance of the law, and an awareness of the protection it affords, together form what he terms a ‘fatal liberty’, and provide the necessary incentive to comply with and uphold the law.

In a departure from religious moralists, Beccaria claims that the basis of human justice is public utility, not God. While he recognizes the power of religious revelation to motivate actions, he also recognizes that humans are imperfect interpreters of the will of God. As he succinctly states, the problem of relying on religious authority is: if we can act in opposition to God in wrongdoing, then we can act in opposition to God in punishing.\(^8\) Instead of appealing to religious or moral authority, he appeals to human self-interest and human reason. Beccaria believes that laws and political morality are most effective when they reflect the true nature of human sentiments.\(^9\) The aim of punishment, according to Beccaria, is to prevent crime; and the best prevention, he believes, is education.\(^10\) He theorizes that the more people there are who understand the law, the fewer crimes there would be.\(^11\) The deterrence justification of punishment, Beccaria argues, appeals to the rationality of would-be offenders and is dependant on individual free choice. The need for punishment, he continues, arises as a necessary mode of enforcement, in order that the cooperation of others is not taken advantage of by those who would not voluntarily accept the restraints required by law.\(^12\) So, although the political end of punishment is clearly to intimidate individuals, the civil point of punishment is to remove any encouragement that unpunished wrongdoing might provide to would-be wrongdoers.\(^13\)

In contrast to earlier Draconian punishments that celebrated the effectiveness of their severity, Beccaria believes that,

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\(^8\) Beccaria (1996), pp. 77-78.
\(^9\) Beccaria (1996), p. 10
\(^12\) Beccaria (1996), pp. 11-12.
\(^13\) Beccaria (1996), p. 35.
One of the greatest checks on crime is not the cruelty of punishment but its inevitability. Consequently, the vigilance of magistrates, and the inexorable severity of a judge, if it is to be a useful virtue, must go hand in hand with a mild system of laws.\textsuperscript{14}

The deterrence justification of punishment, he argues, implies a natural limit to the amount of punishment or threat that may be meted out for any wrongdoing. According to his estimate, legal punishments must not exceed the smallest amount necessary in order to prevent crime. Any punishment that exceeds what is required for deterrence he classifies as 'abusive' and claims that such a punishment would deteriorate the respect for the law, which is a requisite for obedience.\textsuperscript{15} The institution of punishment, according to Beccaria, is a social good that deserves the affirmation and support of the citizenry for its positive contribution to their individual and collective well-being.

### 4.2.2 Jeremy Bentham

Jeremy Bentham, writing later in the 18\textsuperscript{th} century, published *The Principles of Morals and Legislation*, which expanded on many of the ideas introduced by Beccaria. Bentham grounds the justification for punishment squarely in the principle of utility, the principle that he believes ought to guide all moral conduct, public or private. He provides the following definition at the outset:

> By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness.\textsuperscript{16}

The proposed effectiveness of the principle of utility as a guide for moral action and social coordination rests on the belief that, as Bentham states, 'Nature has placed

\textsuperscript{14} Beccaria (1996), p. 68.
mankind under the governance of two sovereign masters, *pain* and *pleasure*. The utility of an act, he therefore reasons, is judged by its ability ‘to produce benefit, advantage, pleasure, good, or happiness’, or ‘to prevent the happening of mischief pain, evil, or unhappiness to the party whose interest is considered’, whether that party is an individual or the community in general. This justification depends on understanding the causes and experiences of human pain and pleasure. Therefore, in order to assess comparative levels of pleasure and harm, Bentham’s analysis of punishment includes a critique of the four sources of pain and pleasure that he believes are the basis of motivation for all human behavior. The four sources he describes are: the physical, the political, the moral and the religious. Insofar as these sources produce pleasure, they may be viewed as sources of motivation. Insofar as they produce pain, they may serve as sanctions on behavior.

In keeping with this understanding of pain and pleasure as social drivers, Bentham argues that the purpose of law, as well as government, is to serve society in ways that decrease pain and maximize pleasure. He describes the primary nature of the rule of law in the following way:

The general object which all laws have, in common, is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, every thing that tends to subtract from that happiness: in other words, to exclude mischief.

The general role of the government, he adds, is to support the law, with the underlying purpose of the government being ‘to promote the happiness of the society, by punishing

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20 These sources of motivation are reflective of Beccaria’s sources of obedience, which he named as: religious, natural and political. See Beccaria (1996), especially pages 11-13.
and rewarding’. It is these twin roles of law and government in service to the principle of utility that provide the foundation of Bentham’s justification for a deterrence theory of punishment. Punishment in the form of deterrence is justified insofar as the deterents prevent more harm than they cause. Here it can be seen most clearly that he addresses his reasoned approach to punishment theory to the rational actor. He claims all men [sic] calculate the risks of their actions in this manner:

When matters of such importance as pain and pleasure are at stake, and these in the highest degree (the only matters, in short, that can be of importance) who is there that does not calculate? Men calculate, some with less exactness, indeed, some with more: but all men calculate.

If the law is designed to deliver a punishment that, on balance, will make the offender lose more than he gains, or in Bentham’ terms, suffer more pain than pleasure, the rational actor will be effectively deterred by this prospect. It is the balance of these pains and pleasures that Bentham believes ought to be regulated by the institution of punishment.

Because Bentham recognizes that punishment itself is a ‘mischief’ or an undesirable source of pain, he argues that it is only legitimate to punish when the harm of the punishment prevents more harm than it caused. To this end, he identifies four aims of punishment: to prevent crime; to induce a lesser crime instead; to do as little harm as possible and to prevent crime as cheaply as possible. Unlike the retributive commitment to punish all wrongdoing, this balance-of-pleasures-and-pain approach allows Bentham to acknowledge instances in which punishing is not justified because, on balance, it is found not to be ‘worth it’. Bentham identifies two types of cases in which

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punishment may be found not to be worth it. One type of case relates to the offender's ability (or lack of ability) to respond to a deterrent. The other type of case relates to the cost of applying punishment. In the first sort of case, punishment would be excluded when it would not be preventive, such as in instances where the sanction is not public, and thereby precludes the offender from responding to the deterrent as a rational agent. Similarly, cases would also be excluded in which the offender is not capable of responding to a deterrent for organic reasons, which provides us with both a moral and a logical explanation for why we feel we ought not punish infants or the insane. The second type of case involves weighing the overall social costs and benefits of applying punishment. These exclusions include instances when the harm of the punishment would exceed the harm of the offence and cases where no actual harm occurred, even if the potential for harm in similar circumstances exists.26

Bentham goes to great lengths to provide a detailed analysis of the relevant pains and pleasures that must be taken into account in the evaluation and justification of punishment. In determining when to punish and how much punishment is appropriate, the principle of utility requires that the consequences of both the harm done and the harm of the punishment itself be evaluated. Bentham identifies two sorts of consequences that exist for any harm, primary and secondary, both of which must be weighed in the justification of punishment.27 The primary consequences are those suffered as a direct consequence of an act. For example, property loss is a direct consequence of theft. Secondary consequences are those that are suffered indirectly, either because of some

shared interest or perhaps out of sympathy for the victim.\textsuperscript{28} The breadth and depth of these considerations help protect wrongdoers from emotional responses to wrongdoing that might lead to unjustifiably severe punishment. The calculation of appropriate punishment is guided by two limiting factors: the punishment must be severe enough to deter (which requires that the punishment must outweigh whatever gain may be made by the offense); and must create less harm than the offense, were it to occur. This may seem like a conundrum – a requirement that punishments are both more and less severe than the wrongdoings with which they are associated – but the critical value of deterrence is that if it prevents crime generally, then on balance, the harm associated with one punished offense is outweighed by the harm associated with number of offenses that were deterred by that punishment. If deterrence works, then, it is this reduction in harm that justifies its use.

4.2.3 **Deterrence Critique**

The enormous appeal of deterrence theory, particularly in contrast to retributive justifications, is that punishment, theoretically at least, never amounts to adding harm to harm. On the deterrence account, the institution of punishment directly contributes to the betterment of society by reducing the overall amount of harm experienced. There are, however, deep problems with deterrence theory, both in its justification and in its application. In the first part of this section I will consider the problems that stem from justification issues, such as the punishing of innocents, preventive punishment and difficulties with proportionality. In the second part of this section I will discuss the problems that arise in the application of deterrence theory, particularly those problems that arise from the technical challenges of measuring both mental states and crime rates.

The classic objection to deterrence theory, and to any consequentialist theory of punishment, is that it permits the punishment of innocents. In general, the objection states that if good consequences are what matter most, then any individual, whether guilty or innocent, could be punished if that would satisfy the greater good of the community. If punishing an innocent person would prevent more harm than punishing a guilty person, or not punishing at all, then deterrence theory calls for the punishment of the innocent person. Innocence, as a meaningful claim to justice, is insufficient almost to the point of irrelevance where strict deterrence prevails. However, deterrence theorists generally agree that punishing innocents is morally objectionable and counter that the above objection rests on a narrow understanding of deterrence. One of the strongest arguments deterrence theorists employ for the protection of innocents is the now familiar ‘definitional stop’ defense that claims punishment, by definition, is a response to wrongdoing. An innocent individual who is subjected to harm for the good of the community cannot be said to have suffered punishment, but some other sort of harm, perhaps better called ‘telishment’, in recognition of its teleological basis. A second popular explanation as to why deterrence theory does not condone the punishment of innocents is the rule-utilitarian defense that claims the long-term consequences of punishing innocents, as a rule, are worse than would be the case if innocence were recognized as a just reason not to be punished. Regardless of whether these defenses can provide protection to innocents, it seems that something significant is lost in the fact that innocence alone is not sufficient reason not to punish. I will take up the issue of

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29 Ten (1987), pp. 13-14
30 Hudson (19996), p. 25.
innocence again, including the adequacy of these defenses, in the desiderata discussion in section 4.4.2.

A second justificatory problem is a concern that is somewhat derivative of the problem with punishing innocents, namely, the problem of preventive punishment. If the aim of punishment is to deter crime, then deterrence theory, it would seem, justifies the punishment of those who are most likely to commit crimes.\textsuperscript{33} In the case of preventive punishment, the individual being punished is innocent of wrongdoing, and this returns us to the initial objections to punishing innocents. A similar practice, `selective incapacitation' raises similar concerns.\textsuperscript{34} Besides the moral objections to punishing innocents, both of these practices require that we have the capability to discern with reasonable accuracy which individuals are likely to offend in what circumstances. To be clear, there are two levels of objection to these practices; on one level they are objectionable because they punish individuals who are innocent, and on another level, they are objectionable because they rely on predictions of behavior, rather than behavior. The science of prediction adds a layer of complexity to an already fallible justice system. There is the chance that a prediction will result in either a `false positive' or a `false negative.' A false positive occurs when an innocent individual is incorrectly identified as dangerous and a false negative occurs when a dangerous individual is permitted free. In the former case, the state offends the liberty of an innocent individual, in the latter, public safety is compromised.\textsuperscript{35} Even if we accept that preventive punishment is justifiable in principle, because the practice of predicting behavior is still only unreliable at best, for

\begin{itemize}
\item \textsuperscript{33} Ross (1988), p. 56.
\item \textsuperscript{34} `Selective incapacitation' is the practice of rating offenders for dangerousness and punishing them according to their risk profile.
\item \textsuperscript{35} See both Hudson (1996), pp. 32-35 and Tonry (1992), pp. 173-4.
\end{itemize}
we lack certainty as to whether any individual identified would actually offend, absent the punishment. I will discuss the difficulties of application in greater detail shortly, but the justificatory problem here is that deterrence theory justifies punishment too liberally, and so perhaps, immorally.

A third justificatory problem is the problem of proportional punishment. The emphasis on prevention may well be laudable for its ends, but recalls both the severe sanctions employed by Dracos in the name of prevention, as well as the frequent use of capital punishment prior to the 18th century.\textsuperscript{36} The development of social policy with the aim of prevention leads quite naturally to the question: ‘prevention at what cost?’ When sentences are severe enough they are clearly effective at deterring wrongdoing, but the social cost of such threats are enormous. Deterrence theory aims to reduce the occurrence of criminal behavior, but because it does not tie punishment to the actual crimes committed, it lacks the internal argument for proportionality familiar from retributivism. So where retributivists rely on the lex talionis as a general guide to ensure fair proportional punishment, only the deterrent effects and overall future social benefits of punishment guide deterrence theorists. There are several objections here. First, the lack of proportionality means that there is permissible variation in punishments for the same offence. Second, there is no limit to the severity of punishment, so long as it prevents more harm than it causes. Furthermore, because deterrence can be tied to either the offender or the general public, there can be wild discrepancies with respect to the assessment of the harm prevented by the punishment.

In the face of these objections one response open to the deterrence theorist is that proportionality is not a necessary condition of fair and just punishment. If what we care

\textsuperscript{36} Hudson (1996), p. 20.
about is less harm overall, any inconsistency in sentencing could be accepted as a reasonable cost of social cooperation. Since the overall result is a better society, one can argue that variations within reason are not only fair but also, in fact, happen on a regular basis under our current sentencing practices. However, if one is committed to some form of proportional punishment, such dismissals will hardly be persuasive. The real question remains: is there any internal mechanism in deterrence theory that will serve to limit levels of punishment? Here Beccaria offers an answer in his strong advice that government heeds its power and beware that ‘atrocities breed impunity’.

He argues that in order to meet the aim of prevention, punishment must be in proportion to the crime. Proportionality is required because deterrence as prevention only works if it engages the potential offender qua rational actor; punishment that exceeds what would be required to deter would be recognized as ‘superfluous, and therefore tyrannical.’ The state, therefore, would undermine its own essential credibility were it to punish excessively. Bentham also argued that any punishment that exceeds the minimum amount of harm required to deter is unjustified. According to these arguments, the internal mechanism that limits punishment on the deterrence model is a standard of reasonableness; it is not measurable against an actual historical harm, such as a past wrongdoing, but is measured against the harm prevented and the price we are willing to pay for that reduction in harm. Even if these arguments are considered reasonable, there remains the potential for extreme variations in sentencing because the aim of the deterrence may vary. There is nothing within deterrence theory that identifies the appropriate use of special or general deterrence and although at times the aims of both

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may be met in the same punishment, they are just as likely to conflict in ways that pit the interests of the offender against the interests of the general public. One sentence may seem reasonable if the intention is merely to prevent the offender from reoffending and quite another sentence may seem appropriate if the punishment is meant to educate and deter the general public.

The problems with the justification of deterrence theory, as apparent from the discussion above, blend into the problems that arise with application of the theory. There are many variables and many unknowns in applied deterrence theory. The aim of deterrence is to prevent or reduce crime by creating conditions in which individuals choose non-criminal behavior over criminal behavior, or at least choose lesser offenses than they may have otherwise. In order to deter, prevent or reduce crime, however, it is necessary to understand the conditions of crime. This is a challenge that confounds simple execution of deterrence ideals. While it seems quite likely that Bentham is accurate in his claim that most of us calculate the costs of our actions, at least to some degree, an effective deterrence program would need not only to catalog the full complement of factors that impact decision-making with respect to crime but also be equipped to measure the impact of these variables on decision-making. Socioeconomic factors such as unemployment and poverty can influence how one considers the cost of wrongdoing and whether it is ultimately ‘worth it’. Race can also play an indirect role, particularly as evidenced by statistics that report higher crime rates for the unemployed and higher unemployment rates for non-whites.\(^{39}\) Facts about the way the criminal justice system discharges crimes can also impact decision-making. For instance, as the

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certainty of being caught and prosecuted increases, crime rates decrease.\textsuperscript{40} But, in order for the certainty of being caught to have any weight, it must be public knowledge. What makes this additionally complicated is that it is the perceived rate of criminal apprehension, not necessarily the actual rate, that will make a difference in decision-making, and this perception can vary from individual to individual within the same community. A final complication for any attempt to standardize deterrence factors, is what Barbara Hudson calls the reciprocity presumption. As she explains:

The key notion here is \textit{reciprocity}: we can, to some extent, presume that people who think much as we do will be put off by the prospects of punishments that would deter ourselves. This ‘reciprocity of perspectives’ is fundamental to social theory and social policy (Schutz and Luckman, 1974).\textellipsis Even with ‘normal offences, however, reciprocity of perspectives can only be a working hypothesis; it is impossible to know with any certainty that what would deter me, would deter anyone else.\textellipsis If true, this is obviously a considerable problem for deterrence strategies, with their reliance on similarity of reasoning among offenders and non-offenders.\textsuperscript{41}

All of these factors, socioeconomic, criminal statistics and psychological make-up, play a role in the cost-benefit analysis that is required of any potential offender in order for deterrence to work. It is unclear how all of these factors could be accounted for in adequate fashion given that all of them are dynamic and subject to change as they interact with each other.

Given all of these variables, it is difficult to know if deterrence ‘works’. In defense of deterrence, J.Q. Wilson argues that there is some indication that deterrence works because comparative statistics show similar results from different data sets with different biases.\textsuperscript{42} He puts the modest findings in the following context:

\textsuperscript{40} Wilson (1995), p. 179.
\textsuperscript{41} Hudson (1996), pp. 21-22.
Given what we are trying to measure—changes in the behaviour of a small number of hard-to-observe persons who are responding to delayed and uncertain penalties—we will never be entirely sure that our statistical manipulations have proved that deterrence works. What is impressive is that so many (but not all) studies using such different methods come to similar conclusions.\footnote{Wilson (1995), p. 183.}

In spite of some evidence that punishment may have a deterrent effect, studies of one of the most ambitious deterrent sentencing initiatives in the United States, The Rockefeller Drug Laws, did not show evidence of deterrence. As Wilson further reports,

A group was formed to evaluate the effect of this law. Its report, issued in 1977, concluded that there was no evidence the law had reduced either the availability of heroin on the streets of New York City or the kind of property crime often committed by drug users. Of course, it is almost impossible to measure directly the amount of an illegal drug in circulation or to observe the illicit transactions between dealers and users, but a good deal of circumstantial evidence, gathered by the study group, suggests that no large changes occurred. There were no marked shifts in deaths from narcotics overdoses, in admissions to drug treatment programmes, in the incidence of serum hepatitis (a disease frequently contracted by junkies who use dirty needles), or in the price and purity of heroin available for sale on the street (as inferred from undercover buys of heroin made by narcotics agents).\footnote{Wilson (1995), pp. 194-5.}

There is, at best, inconclusive evidence that deterrence is an effective criminal justice strategy.

If we grant that, even with these complications, deterrence shows promise, preventing and reducing crime is still only half of the equation. Deterrence is justified only when it results in making the community better off. Here we run into similar evaluative challenges as just discussed when we consider the cost of the various methods of enforcement and punishment typically used as deterrents. There are social costs associated with law enforcement, policing and the institution of incarceration. Although imprisonment, for example, can assure short-term deterrence, insofar as the individual
incarcerated will not be able to harm those outside the prison, it may well contribute to ongoing recidivism. Again, Barbara Hudson explains this dynamic:

.... Labeling theory, which has been extremely influential in the development of work with (particularly young) offenders, holds that rather than reducing the likelihood of reoffending, the intervention of the criminal justice system tends to increase it, and the more severe the punishment, the greater the impact on the offender in the direction of reoffending (Blagg and Smith, 1989). This is because being labeled a criminal by the courts places handicaps in pursuing a non-criminal lifestyle (it is more difficult to get a job with a criminal record, and non-criminals may not wish to associate with the criminal), and because the offender comes to think of him/herself as a criminal, with crime the only available 'career'.

Extensive investments in recent law enforcement trends, such as the development of drug task forces and the implementation of zero tolerance policies, can serve to bring more individuals into the criminal justice system, not always to good effect. In addition to the difficulties assessing what punishments are likely to deter, there is the additional problem of evaluating whether such deterrents will actually make things better. The deterrence theorist is in the unfortunate position of arguing about differences in value by comparing an existing situation to a hypothetical situation; it is an argument that is not likely to end in certainty.

Deterrence theory, as a stand-alone justification for punishment, lacks many of the characteristics we might rightly expect from the institution of punishment. Although its basis in rationality makes it enormously appealing and gives it an intuitive advantage, the complex mechanics involved in what may be called the 'deterrence calculus' make it all too apparent that deterrence is not easily standardized. The lack of limits, or rather, the too-easily-redefined limits of punishment are unsettling when one expects both fairness and consistency in sentencing. In ideal theory, the minimization of pain and

maximization of pleasure are worthy aims. In reality, we are ill equipped to discern whether one person’s extreme suffering is better or worse than the minor sufferings of thousands or millions. These simply aren’t equations we can quantify. And yet, an unfortunate aspect of deterrence is that individuals are pitted against their communities and against each other, as must be the case when the interests of the offender, the community and the victim are all taken into account, and comparisons are required that cannot possibly be calculated or conveyed.\footnote{Nozick (1974), p. 61.}

4.3 

**Punishment and Reform**

Like deterrence theory, reform theory aims to prevent crime. Unlike deterrence, which does not specify the means by which to achieve crime reduction, reform efforts aim to reduce crime specifically through educational interventions geared toward changing not merely the behavior of would-be offenders, but changing their minds. Both deterrence and prevention aim to change behavior, and although the behavioral changes they achieve appeal to rational processes, they changes they seek to effect are essentially situational changes rather than deep motivational changes. Reform theory also relies on engaging rational processes, but at a much more subtle level. Whereas deterrence effects change through providing incentives, often in the form of punishment, reform effects change by engaging the offender in a process of moral reflection and character development. Reform, as I discussed in chapter one, was designed to take away the desire to offend and to facilitate successful reintegration into the community after incarceration.\footnote{See chapter one of this thesis for the historical context of the practice of reform in the United States.} In the 18\textsuperscript{th} and 19\textsuperscript{th} centuries the components of reform included building
a solid work ethic and enforcing time for solitude and repentance; together these were thought to be the building blocks for character reform.\footnote{Hudson (1996), pp. 26-28.}

One of the key differences between reform and deterrence is the way in which they each engage the imagination of the offender or would-be offender. The deterrence theorist is interested in making known the costs of offending; it is in essence a ‘big stick’ approach. The aims of deterrence can be met by the strategic implementation of threats and punishments that will serve ultimately to condition individuals to make non-criminal choices. An objection to deterrence theory that I did not mention above becomes immediately evident in contrast to reform practices. Because deterrence is only aimed at changing behavior, some object that it disregards or disrespects the individuals to whom it applies because it is too much like conditioning and does not engage the offenders as moral agents. Whereas the deterrence calculus appeals directly to an individual’s self-interested avoidance of pain, reform efforts attempt to help the offender discover moral reasons, rather than self-interested reasons, for refraining from wrongdoing. These efforts, quite naturally, often involve some form of educational outreach or training. In the following sections I will explore the development of reform-minded punishment ideology with a brief introduction to Platonic thought about character and reform and a more in-depth analysis of recent moral education theories of reform.

4.3.1 Plato

In several of his dialogues, Plato discusses the justification for punishment and its contribution to social order. His views are clearly consequentialist and he recognizes both deterrent and reform benefits from the institution of punishment. I have placed him in the reform discussion because of his persistence in equating the aim of punishment
with education and character reform. In the dialogue *Protagoras*, Plato establishes himself as a consequentialist:

> Just consider the function of punishment, Socrates, in relation to the wrongdoer. That will be enough to show you that men believe it possible to impart goodness. In punishing wrongdoers, no one concentrates on the fact that a man has done wrong in the past, or punishes him on that account, unless taking blind vengeance like a beast. No, punishment is not inflicted by a rational man for the sake of the crime that has been committed — after all, one cannot undo what is past — but for the sake of the future, to prevent either the same man or, by the spectacle of his punishment, someone else, from doing wrong again.\(^\text{49}\)

Plato differentiates himself from deterrence theorists in his assertion that punishment is justified because it reforms wrongdoers. His argument for the justification of punishment begins with the claim that all individuals ought to have the virtues of justice and respect and those that do not should be subject to punishment.\(^\text{50}\) He rationalizes that punishment is justified because such virtues are social necessities, and since they can be taught, they ought to be taught to those who lack them. Furthermore, Plato argues, punishment is the appropriate means to teach them. He explains:

> You know how, when children are not yet good at writing, the writing master traces outlines with the pencil before giving them the slate, and makes them follow the lines as a guide in their own writing; well, similarly the state sets up the laws, which are inventions of good lawmakers of ancient times, and compels the citizens to rule and be ruled in accordance with them. Whoever strays outside the lines, it punishes, and the name given to this punishment both among yourselves and in many other places is correction, intimating that the penalty corrects or guides.\(^\text{51}\)

It is this corrective nature of punishment that distinguishes Plato’s reform ideology.

Although he recognizes that punishment also deters behavior, its essential value is in its

\(^\text{49}\) Plato (1961), *Protagoras*, [324a-324b].

\(^\text{50}\) Plato (1961), *Protagoras*, [322c-322d].

\(^\text{51}\) Plato (1961), *Protagoras* [326c-326e].
ability to teach moral lessons to those who exhibit a lack of moral understanding through wrongdoing.

In the dialogue *Gorgias*, Plato explores the relationship of punishment to the development of the soul. Wrongdoing, he claims, is both evil and shameful for the wrongdoer, and even the wrongdoer who escapes apprehension or punishment does not escape these afflictions. The wrongdoer, on Plato's account, suffers ailments of character and is 'the most unhappy who is afflicted with evil and does not get rid of it'.\(^{52}\) Furthermore, he claims that the burden of evil and shame that accompanies wrongdoing outweighs the benefits of wrongdoing and that the evils of 'injustice and intemperance' are the greatest of all evils.\(^{53}\) A wrongdoer may find relief from these afflictions through punishment, however. Here Plato describes punishment as a just chastisement of the guilty. Wrongdoing is the mark of injustice that brings evil to the soul; and justice, in the form of punishment, is able to rid the soul of the injustice.\(^{54}\) Punishment has this effect, Plato argues, because every soul has an order and the discipline of punishment can redirect a soul that has fallen out of disorder or injustice and restore it to justice.\(^{55}\) Here, as in the *Protagoras*, the emphasis is on the reformational and educational aspects of punishment. Punishment is justified because it engages the wrongdoer in a process that in both intention and actuality makes the offender a better person.

4.3.2 Jean Hampton and the Moral Education Theory

\(^{52}\) Plato (1961), *Gorgias* [478e].
\(^{53}\) Plato (1961), *Gorgias* [474c-477e].
\(^{54}\) Plato (1961), *Gorgias* [477a-477c].
\(^{55}\) Plato (1961), *Gorgias* [505b-508c].
As I discussed in chapter one, reform was a dominant influence on punishment theory and practice in the United States up until the mid-twentieth century. In recent years, reform has enjoyed resurgence of interest. The most promising new interpretations are those that insist, as Plato did, that punishment is only justified when it is both educational and for the betterment of the offender. Jean Hampton, in her benchmark article “The Moral Education Theory of Punishment”, outlines the characteristics of such a modern reform theory. Hampton acknowledges that many forms of punishment are successful at changing behavior, but often, she says, this change is accomplished by establishing moral boundaries much the way one would establish boundaries by erecting a fence. Deterrence, for instance, justifies threats of punishment with the intention to create such boundaries. Hampton, however, has different aspirations for state-sanctioned punishment:

This deterrent effect of punishment is certainly welcome by the state whose role it is to protect its citizens, and which has erected a ‘punishment barrier’ to certain kinds of actions precisely because those actions will seriously harm its citizens. But on the moral education view, it is incorrect to regard simple deterrence as the aim of punishment; rather, to state it succinctly, the view maintains that punishment is justified as a way to prevent wrongdoing insofar as it can teach both wrongdoers and the public at large the moral reasons for choosing not to perform an offense.\(^{56}\)

It is important here to note the dual aim of educating both the offender and the public. One of the ongoing difficulties with deterrence theory, as I discussed above, is the challenge of weighting the value of special deterrence against general deterrence. Here Hampton affirms that both ends are to be met in all cases. More important, though, is the distinction that the aim of punishment is not to cause certain choices to be made, but to equip people to make informed moral choices. This shift in priorities permits a radical

\(^{56}\text{Hampton (1995), p. 117.}\)
departure from one of the basic premises of punishment theory historically, namely, that punishment is an infliction of harm on the offender.

Like deterrence, the moral education theory assumes offenders are rational agents. Unlike deterrence, however, the moral education theory also assumes that offenders are autonomous and able to choose and learn and be accountable for their actions.

Additionally, as mentioned above, the moral education theory insists that punishment, as a practice and as an institution, has as its aim the moral improvement of the offender and society. The goal of such punishment is not merely the sort of behavioral change that can be conditioned by threats, but the goal is to teach offenders the moral reasons behind legal prohibitions. For this reason, punishment must be more than simply a deterrent. Deterrence, Hampton claims, may be the only option in situations with offenders who are incapable of making autonomous choices, but such punishment would be justified as deterrence and not as exemplifying the moral education theory. Hampton contrasts the educational nature of punishment with the conditioning that is characteristic of deterrence. All that is required of a rational agent in response to deterrence is the ability to evaluate the means of pain avoidance, but the moral education theory attempts to reach the offender at a deeper level of critical engagement by addressing the underlying moral reasoning that the offender violated. In this way, Hampton argues, punishment is not merely something that is done to an offender, but it is something done for him. This educative character of punishment so understood by the moral education theory, she claims, can provide a full and complete justification for punishment.

4.3.3 Reform Critique

In this section I will critique reform in general and the moral education theory in particular. The moral education theory, with its emphasis on contributing to the well-being of the offender and the community, seems to embody the values of care theory. It will be of special interest in this critique to explore the extent to which the moral education theory is able to meet care-theoretical concerns. I will also examine the justificatory problems with reform and, as with deterrence, I will take an in-depth look at the challenges that arise in the application of reform policies. In addition, I will focus on a series of objections that arise out of concern for the apparent indeterminate nature of punishment under the reform ideologies, including moral education theory.

As is the case with any consequentialist theory, reform theory must address the issue of protecting innocents from punishment. Whereas deterrent theorists are forced to create an expanded narrative explanation as to why it turns out that innocents will not suffer under deterrent theory, reform theory, and the moral education theory expressly, has a more direct explanation as to why the punishment of innocents is prohibited. On the moral education theory, one aim of punishment is to teach the offender about the moral wrongness of whatever criminal act was committed. If no wrong act was committed, there is no offender, and so there is no lesson to be taught and no punishment is justified. But the moral education theory also has as an aim the moral education of the public, and this aim is more susceptible to the wrongful use of innocents. Hampton argues, however, that the education of the offender and the education of the community are linked. The linkage between the two is not arbitrary; rather the linkage is that the moral lesson is the same for each.\textsuperscript{60} The aggregation problem which subjects innocents to potential misuse on most consequentialist accounts does not occur here because both

\textsuperscript{60} Hampton (1995), pp. 133-4.
the good of the offender and the good of the community are required by the moral education theory, with the result that neither can be sacrificed for the good of the other.\textsuperscript{61} Hampton also responds to concerns about the related problem of preventive punishment. Here she recognizes that being immoral and potentially likely to commit a crime is reason to subject a person to moral education, but it is not sufficient reason for the state to intervene for that purpose. Laws define the role of the state and without an incident of law breaking there is no justification for the application of state-sanctioned punishment.\textsuperscript{62} For both of these concerns, the moral education theory can explain why, according to the requirements of the theory, an actual offense must be committed and the offender alone may be subjected to punishment.

There are a number of criticisms and concerns that arise because the nature of reform is such that its conditions of success are not easily standardized. Many of the objections that plagued the treatment model of reform movement in the 1960’s and 1970’s seem at least superficially applicable to the moral education theory, especially worries that offenders would only ‘act’ reformed and concerns about the fairness of indeterminate sentencing. Before addressing these issues, however, it is important to note that although both treatment theory and the moral education theory are reform theories, their interpretations of the social problems related to crime and punishment are quite different. On the treatment model wrongdoing is seen as a symptom of a disease and an offender is considered successfully treated when she shows signs of accepting moral norms and integrating into society. On the moral education theory, wrongdoing is

\textsuperscript{61} Although Hampton does not make this connection explicitly, her analysis recognizes that the moral good relative to an individual may have specific characteristics that differentiate it from the moral good of the collective, a recognition that permits giving moral weight to what care theory calls ‘moral particulars’.

seen as a sign of moral ignorance and the sign of successful punishment is for the offender to experience moral growth rather than exhibit particular behaviors.\(^{63}\)

Perhaps the most persistent problem with treatment theories of reform is that they seem to lead to indeterminate sentencing, and that in turn leads to problems with fairness and inconsistency. The innovation of indeterminate sentencing, which developed under the treatment model of punishment, was that it matched the treatment (punishment) to the apparent moral behavior of the offender. It had well-meaning intentions, but it led to two undesirable consequences. First, indeterminate sentencing tended to turn prisoners into actors, because if an inmate 'acted' reformed, release was more likely. One of the advantages of the moral education theory is that because it does not link success to behavior it does not encourage offenders to adopt dishonest moral positions simply to appease the legal system and earn release. In fact, the moral education theory rejects many of the forms of incarceration used today because they reward inmates for being actors rather than their best moral selves; an experience that can contribute to making the offenders 'morally worse'.\(^{64}\) Second, indeterminate sentencing, as a practice, can be inconsistent and result in potentially cruel sentences.\(^{65}\) For example, someone who is slow to respond to treatment spends a longer time in prison than someone who responds quickly. An offender could end up incarcerated for a minor offense for a much longer period than another offender who committed a more heinous crime. The injustice of this was not lost on inmates. The moral education theory, however, unlike the treatment model and unlike both deterrence and retributivism, does have a justification for a cap on punishment. Hampton offers this contrast:

\(^{65}\) Hudson (1996), p. 28.
The moral education theory, however, does seem to have the resources to generate a reasonable upper limit on how much punishment the state can legitimately administer. Because part of the goal of punishment is to educate the criminal, this theory insists that as he is educated, his autonomy must be respected. The moral education theorist does not want ‘education’ confused with ‘conditioning.’.... On this view the goal of punishment is not to destroy the criminal’s freedom of choice, but to persuade him to use his freedom in a way consistent with the freedom of others.66

The ongoing problem with reform, particularly when conceived of as treatment, is that there is a temptation, sometimes even a commitment, to punish (or ‘treat’) an offender until she shows signs of moral improvement. Hampton again thinks otherwise:

First, this theorist would strongly disagree with the idea that a criminal should continue to receive ‘treatment’ until his reform has been effected. Recall that it is an important tenet of the view that the criminals we punish are free beings, responsible for their actions. And you can’t make a free human being believe something. In particular, you can’t coerce people to be just for justice’s sake. Punishment is the state’s attempt to teach a moral lesson, but whether or not the criminal will listen and accept it is up to the criminal himself.

The moral education theorist takes this stand not simply because she believes one ought to respect the criminal’s autonomy, but also because she believes one has no choice but to respect it.67

In sharp contrast to most historical punishment theorists, Hampton is willing to concede not only that there are practical limitations to the effectiveness of the moral education approach, but she also seems quite aware that these limitations fall short of what contemporary western audiences have come to expect from their punishment theories. Neither of these points speaks against the theory, but rather, each reflects her conviction that no one deserves to be harmed, not even in exchange for wrongdoing. She cites in her defense the historical and moral guidance of both Jesus and Plato, the latter of whom she quotes from Crito, ‘We ought not to repay injustice with injustice or to do harm to any

man, no matter what we may have suffered from him.\textsuperscript{68} This is clearly the converse intuition of retributivists.

An additional worry with reform theories is that they may be too paternalistic. Herbert Morris defends some element of paternalism in punishment theory, but also acknowledges there is a risk involved when paternalism ignores the experience of the person being punished.\textsuperscript{69} Certainly an aim of the state is to protect the citizenry, but when this protection overrides the autonomy of the individuals it is designed to protect, it may be objectionably paternalistic. Morris argues that punishment may well be a paternalistic choice we make willingly:

In considering, for example, why we might wish to have a society of laws, of laws associated with sanctions for their violation, of laws that are in fact enforced against others and ourselves, it would be rational, indeed it would be, I think, among the most persuasive of considerations for establishing such a social practice, that it would promote our own good as moral persons. Thinking of ourselves as potential, and thinking of ourselves as actual wrongdoers, and appreciating the connection of punishment with one’s attachment to the good, to one’s status as a moral person, and to the possibility it provides of closure and resumption of relationships, would we not select such a system, if for no other reason, than that it would promote our own good?\textsuperscript{70}

Hampton agrees that punishment, particularly reform-minded punishment, is often paternalistic and she even acknowledges that the moral education theory is paternalistic to some extent. Insofar as punishment intrudes on an offender’s life with the unsolicited advice to consider a set of moral reasons one may otherwise overlook, the moral education theory of punishment is paternalistic. But Hampton, like Morris, is sympathetic to some degree of paternalism and she differentiates the paternalism in the moral education theory from the objectionable paternalism. Paternalism is objectionable

\textsuperscript{68} Hampton (1995), p. 112. Passage is quoted from Plato’s Crito, X, 49.
\textsuperscript{70} H. Morris (19995), p. 163.
when it intrudes on one's personal liberty, such as in the form of laws which limit conduct toward one's self.\textsuperscript{71} The moral education theory is not paternalistic in this way, it does not define the content of the law; it merely provides justification for educating and encouraging moral growth in those who have shown ignorance of the law.\textsuperscript{72} The moral education theory does not prescribe moral standards, but is a social tool for organizing civic responses to criminal wrongdoing, however the state chooses to define it.

A dilemma remains, however, for reform and rehabilitation, even if the issues of innocents, paternalism and indeterminate sentencing are adequately resolved. Barbara Hudson explains this reform/rehabilitation dilemma:

\textit{...if it strives for guaranteed effectiveness, rehabilitation [or reform] must resort to fear of further intrusion (deterrence) or physical restraint through chemistry, psychotherapy or technology such as electronic surveillance – in other words, it ceases to be rehabilitation and becomes prevention.}\textsuperscript{73}

Deterrence is said to be successful when behavior changes, but reform is only successful when the offender not only changes behavior, but also can say she does so out of understanding and respect for the moral reasons not to offend. Much as deterrence faces the dilemma of punishing enough to make a difference, but not enough to create an increased burden, reform faces the dilemma of demonstrating its effectiveness when failure is an indication that free will has not been removed from the decision-making process. Hampton admits that her presentation is merely a first draft of a proposal, and here it is most evident that there are no standards of application, no universal benchmarks of reasonable educational interventions and no guidance as to the amount or type of intervention that would be appropriate for any given offense.

\textsuperscript{71} Hampton (19995), p. 122-123.
\textsuperscript{72} Hampton (1995), pp. 123.
\textsuperscript{73} Hudson (1996), p. 31.
The practical challenges faced by the moral education theory are quite daunting. Two significant questions remain unaddressed: what should moral education look like, and why should a moral education response to wrongdoing be a sufficient state response. I will first address what moral education might look like and why. The justification for punishment, on reform theories, rests on an understanding of the offense as a signal that there is a lack of moral knowledge. The response of the moral education theory, as with most reform theories, is to offer both an intervention and information. Hampton is fairly specific about the particular reform that is to occur on moral education theory. She argues that the educational reform process must be informative and must aim to teach the offender about the moral reasons that were violated, which is to say, they should not merely be able to recite the reasons, but they should learn about the values behind the reasons. The process also acts as an intervention; punishment stops the offender in her normal course of life events and imposes obligations that would not otherwise be present. She describes it as a ‘disruption of freedom’ that may include confinement, monetary loss and community service.\(^{74}\) The intervention aspect is important because it impinges on freedom, not with the retributivist aim ‘to balance justice’, but in order to get the attention of the offender.\(^{75}\) Much as Plato argued that punishment is justified, in part, because the state needs its citizens to be aware of the law and obedient to it, Hampton suggests that punishment is justified when it attempts to educate the offender. So although we are very clear about the intended purpose of punishment on the moral education theory, it is not clear from Hampton’s proposal just what justified moral education punishment would look like beyond our best theories of moral education.


The separate question of whether a reform response to wrongdoing, or more specifically a moral education response, should be ‘enough’ of a response persists for several reasons. The primary objection to moral education will come from those who believe that the infliction of pain is a necessary component of punishment and they will object to the fact that moral education does not require pain. It may well be the case, as Hampton concedes, that pain will be involved, but the theory does not fail to meet its objectives is no pain is inflicted. Although the moral education theory shares many aspects of Nozick’s ‘linkage to correct values’ theory discussed in chapter three, the pain criterion is a crucial point of differentiation.\textsuperscript{76} Nozick assumes the commensurability of pain and uses it in order to communicate the parallel nature of the harm of the offense and the harm of the punishment. This reliance on commensurable pains allows him to claim that punishment communicates; to claim that it says, in essence ‘this is what you did to me’.\textsuperscript{77} The lack of the intentional infliction of pain on the moral education theory, however, does not mean that communication of moral value is sacrificed. Rather, the lack of a pain \textit{requirement} does not mean that no pain is suffered by the offender subjected to moral education instead of some form of explicit pain. The loss of freedom associated with the forced intervention may not be painful in the usual sense of punishment, but it does impose itself on the offender in way that requires sacrifice on the part of the offender. A second point made in chapter three is relevant here as well. An offender by definition has broken with community. If the moral education theory is effective, the offender will come to understand the cost of his offense, not just in official legal terms, but also in terms of the impact it has on personal relationships. If the moral


\textsuperscript{77} Please refer to chapter three of this thesis for a complete discussion of Nozick’s position.
education theory is effective, the offender will experience the human cost of her action, and such a personal accounting does not come without pain. As I mentioned briefly above, however, the intuition that an offender deserves harm is unlikely to be altered by the altruism and beneficence of the moral education theory.

As ideal theory, the moral education theory provides useful insights into how we may envision a response to wrongdoing that not only refrains from demonizing wrongdoers, but also actually enhances their lives. From a care-theoretical standpoint, the emphasis on maintaining the integrity of the individual being punished is essential. Neither deterrence nor retributivism places such a premium on the integrity of the individual. In addition, the linkage of the offender to the community through the shared learning of moral reasons reflects an awareness that individuals belong in community, and this awareness, too, reflects care-based values. It is easy to construe punishment as an institution set on dividing communities by separating out the wrongdoers from the rest. This sort of separation is short sighted in that it ultimately alienates the individuals who most need reconnection. Reform efforts have consistently recognized that successful reintegration is a vital component of an effective punishment theory and the moral education theory improves on that directive by forgoing, when possible, the aspects of punishment that are the most alienating and socially disruptive. All of these characteristics recommend the moral education theory quite highly as an example of care-based reasoning. One is forced, unfortunately, to imagine the educational interventions and to assume that our best practices for learning would be put in place for the purpose of this new form of punishment. It is somewhat difficult to imagine, however, just how different the moral education theory is from any other, from the point of view of the
offender. The moral education theory proposes to use a state institution in order to motivate deep personal change and this impersonal process seems parallel enough to Nozick's 'linkage to correct values' to apply the same turn of intention that challenged Nozick. I am unconvinced that subjecting an offender to state-sanctioned moral education will not result in the offender learning merely that the state would prefer that she not behave in that way again. This is not the moral education Hampton aspires to, and much more would need to be said about how moral education, the actual reshaping of values not merely behaviors, would be achieved when the agent of change is the state. While I find the aims of the moral education theory most appealing, the application remains undeveloped.

4.4 Desiderata

Criterion 1: Punishment must be deserved. As I discussed in the critique above, consequentialist theories have a difficult time acknowledging desert because desert typically refers to past actions while consequentialist theories, such as deterrence and reform, are generally forward looking. The concepts of responsibility, guilt and blameworthiness, however, are not meaningless to deterrence theorists, and as I described in section 4.2.3, they offer explanations as to why it can be argued that the punishing of innocents is either unlikely to deter or simply not a case of punishment. The reform theorists similarly do not have a direct appeal to desert, but the moral education theory is structured as an educational response to wrongdoing and as such, does not come into play in the absence of wrongdoing. Again, this is not a full embrace of desert as a sufficient condition for punishment, but it meets a minimum standard that at least those who are
subjected to punishment are in fact guilty of a crime. Desert is appealing to retributivists as a fundamental expression of justice, but the consequentialist is more likely to claim its merit because of its role in prohibiting punishing innocents, scapegoat laws, and ex post facto laws. Consequentialists can argue that desert has instrumental value in promoting the good for society, and they can claim derivatively that desert is a good for individuals. What these positions have in common is that they acknowledge the moral significance of the requirement that punishment must be deserved, however, the consequentialist can only indirectly become aligned with the notion of desert.

**Criterion 2: Innocents should be affected only minimally by the punishment, as compatible with fulfilling the other criteria.**

Consequentialists have a particularly difficult time directing the distribution of harm that comes in the form of punishment. As already discussed, the provision for protecting the innocent is only made indirectly. When deterrence is the prevalent justification for punishment the manipulation of innocents can be an extremely useful and effective tactic for pressuring individuals into compliance with the law. This is true, though, only because we do in fact value those with whom we are in relationship. The deterrence theorist recognizes that there are several means of achieving deterrence. An individual may be deterred in order to avoid personal pain but also a potential offender may be deterred by the harm that either wrongdoing or punishment would bring to close relations. Punishment is an effective deterrent not only because it impacts the wrongdoer directly, but also because it impacts those closest to the offender. Yet there is a point, even for deterrence theory, where the scope of its negative effects can begin to be
perceived as too broad. If a theory forced innocents to witness the public torture of offenders, it might deter crime, but deteriorate respect for the authority enforcing such a rule. In order for deterrence to be effective as social policy, it must be respected in its operation. So even deterrence theorists who rely on punishment having some impact on innocents can recognize that there is pressure to limit the extent of that impact in order for it to be effective social policy.

**Criterion 3: Punishment should have some social value.**

Consequentialist theories accept this criterion with little hesitation. The traditional deterrence response to the issue of punishment is to tolerate it as a necessary evil. In general, consequentialists justify punishment based on the benefit that it brings to society as a whole as long as the harm it brings is outweighed by its benefits. For example, the public infliction of punishment or the public threat of punishment may have a negative impact on particular individuals, yet at the same time may serve to deter crime and promote social order. So long as the loss of liberty, or the experience of fear or harm that accompany punishment is seen as the price of achieving an even greater good, the punishment may be justified. Even though historically viewed as an evil, punishment in the form of deterrence and reform are thought to be instrumentally valuable to society and so are tolerated because of their apparent benefits. Deterrence typically is thought to benefit the community more broadly and the practice of reform (particularly as presented by the moral education theory) benefits the individual offender as well as the community. Punishment is a social convention, and like most social conventions, it survives based on
a public perception of its effectiveness, and in the case of both deterrence and reform, their justification rests on the social value of their practice.

Criterion 4: The value of punishment must bear some direct relation to the wrong that was done.

Consequentialists adhere to some version of this fourth criterion, although it takes a different form than the proportionality constraints of retributivism. Although we typically think of punishment in terms of the harm or limitations that it puts on one's life, consequentialists generally value punishment for the good that it does, not the harm. The harm which punishment inflicts, however, is viewed as instrumental to obtaining the desired good. This instrumental view of doing a harm to create the conditions for the good succeeds, according to deterrence and reform theory, because punishment and the threat of punishment communicate to society the limits of behaviors that will be tolerated. The degree to which consequentialism supports an explicit connection between the punishment and the offense is in large part determined by the demands of society for a punishment to be a rational response to wrongdoing. If society demands merely that punishment deter, the spectrum is broad as to what counts as appropriate punishment. However, if the desired end includes that of respecting individuals, the spectrum narrows and the connection between wrongdoing and punishment will reflect that respect. It is integral to both deterrence and reform theories that they effectively communicate about the wrong that was committed, for the sake of communication the punishment needs to be connected to the wrong done. The more attention that is focused on reform, the more
essential this communication becomes and the more closely the punishment must reflect the actual wrong done and the moral values behind that were violated.
CHAPTER FIVE
Applications and Summary

Increasingly, the public understands that the object of the criminal justice system should be fewer victims, not more inmates.

Vincent Schiraldi, Justice Policy Institute

5.1 An Alternate View: Introduction

In the introduction to this thesis I mentioned that I was moved to explore state-sanctioned punishment, and incarceration in particular, because I was concerned that traditional justice-based theories of punishment turned to incarceration too quickly and without proper justification. Furthermore, I was concerned that incarceration, as practiced, not only failed to meet many of the objectives that ostensibly justified its use, but also failed to meet some basic standards of decency. It appeared that the values closest to those advanced by care theory, namely a recognition of our interdependency and the acknowledgement of the moral relevance of particulars, were not getting proper expression in current punishment theory and practice. Early on I developed the working thesis that amending the traditional justifications for punishment to incorporate the values of care theory at a foundational level would significantly improve the overall fairness of the criminal justice system and would begin to address many of the most pressing objections facing contemporary punishment theory and practice, particularly as related to incarceration practices. For this reason, it has been my interest in looking at the traditional justifications for punishment to identify opportunities to integrate care-based

values into the deliberative process. In section 5.2 I identify one such set of opportunities. In that section I will focus on various levels of discretion within the criminal justice system. These are the points in the criminal justice process that rely on human judgment, and as such, are most open to the sort of amendment and integration that I have proposed. Here I will describe the discretionary power at six different levels of authority in the criminal justice system and analyze how the integration of care-based reasons at each level might affect both policy and practices. In section 5.3 I will examine sentencing policy, and will discuss the complex of concerns that define the dynamic at the sentencing phase of punishment and the impact that care-based reasoning can have on sentencing outcomes. In section 5.4 I will explore the integration of care-based reasoning at a foundational level and will challenge the traditional justice-based conception of punishment. In the previous section I will have discussed the impact of care reasons within the context of traditional theories of punishment. Here I will introduce an alternative conception that treats criminal wrongdoing systemically, not merely as an event, but as an ongoing negotiation of social relationships. In the course of this discussion I will introduce restorative justice practices and present sentencing alternatives that are aligned with this systemic view of punishment, many of which do not rely on incarceration. Section 5.5 will summarize the argument and evaluate the theoretical and practical contributions that care reasoning brings to the deliberations about state responses to wrongdoing and the institutionalization of punishment.

Although I would like very much to claim that I have found an alternative to incarceration that would render it obsolete, I have not. The problem of what to do with the persistently disruptive individual seems to be inextricably woven into human
experience. There will always be, it seems, some individual or individuals in every community who make it dangerous for others. I am not hopeful that there is any theory or practice that could so alter this social dynamic that life without crime would be possible. Throughout the centuries, banishment, hanging and incarceration have been among the more extreme practices employed to help manage and minimize this persistent risk. What I propose, in the absence of a crime-free ideal, is a response to criminal behavior that is decidedly less punitive than current practices and which attempts to (re)engage wrongdoers in community. While the ideal aim remains the elimination of all degrading and demoralizing practices, of which incarceration is exemplary, the reality of our current culture makes that a practical impossibility, and so in the non-ideal application of care ideals, I do reserve incarceration for those extreme cases of socio-paths and violent offenders who are likely to re-offend. What I strive for is philosophically aligned with a primary aim of the abolitionist movement. While I do not propose the abolition of imprisonment, I agree with many abolitionists that the most important social policy change we could make would be to eliminate the presumption of incarceration as the norm.\(^2\) Given that contemporary practices reflect a tendency toward punitive measures, a significant part of my task in this chapter will simply be to challenge the prevalent skepticism that less strictly punitive responses are capable of fulfilling the requirements of justice. What I will argue is that care-based reasoning can help us envision alternative responses to criminal wrongdoing that are better positioned to meet many of the objectives of traditional state-sanctioned punishment without such high social costs. In many respects, the alternative I support is not so much a radical departure

from current practices as it is a renegotiation of many of the familiar values underlying current theory and practice, a renegotiation that results in radical reduction in the use of incarceration.

In the chapter on care theory I discussed the care-based argument establishing the moral relevance of particulars at some length. When we apply that reasoning to punishment theory, we can see the importance of incorporating particular facts about both the victim(s) and the offender into the deliberation about appropriate response options. Ideally, these details would remain relevant throughout the criminal justice proceedings. Historically, however, particular facts have been intentionally limited. The adversarial legal process has many procedural strengths, but it is potentially quite harsh to actual individuals in the way it utilizes particular facts. Robert Kagan characterizes it as follows:

Procedurally, American criminal justice is structured and pervaded by adversarial legalism – lawyer-driven legal contestation in a relatively nonhierarchical, organizationally decentralized system. Adversarial legalism provides powerful tools for challenging bias, abuse of power, and error by law enforcement authorities. But adversarial legalism’s procedural tools do not significantly temper the distinctive harshness of the American system of criminal justice, and they exacerbate its potential to inconsistency and unequal treatment.³

In our current adversarial system, review of particular circumstances is optional at best. For nonstandard cases this can mean that justice will be met only in a procedural sense. Once the relationship between the offender and the state is cast in adversarial terms, the relationship between the offender and the victim(s) as well as the relationship between the offender and the broader community are formalized; they are no longer expressed in personal terms. With the relationships formalized in this way, the driving motivation to

do justice slides easily into a charge to see that the offender “doesn’t get away with anything”. In this process, the criminal justice system redefines the principal relationship of wrongdoing as one between the state and the offender, and in doing so minimizes the moral relevancy of the particular circumstances of the offender, the victim, and the broader community in which the offense occurred. In an effort to temper the adversarial dynamic, I will present an alternative perspective on punishment that integrates the basic values of care theory with the traditional justice values of retribution, deterrence and reform.

5.2 Justice and Discretion: Giving Voice to Particulars

The criminal justice system that developed in the United States has had, as one of its primary design features, a commitment to be responsive to the changing needs of citizens and communities. This has been credited as an influence of our early Individualism and a desire to resist hierarchical legal structures.\(^4\) One of the first challenges raised by this effort to remain broadly responsive is the looming question of how to coordinate the operations and functions of the criminal justice system with the operations of other social institutions. This challenge is endemic to the implementation of social policy and it is often cited, though not resolved. Our notion of justice risks becoming obsolete and ineffective to the degree that it ignores the other social factors that comprise a just society.\(^5\) John Rawls in “Two Concepts of Rules” acknowledges that any justification for the institution of punishment is inextricably dependant on the other social practices that comprise the legal system.\(^6\) Similarly, Nozick in his chapter on punishment

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\(^6\) Rawls (1955), p. 31. “It is impossible to say what punishment is, or to describe a particular instance of it,
in *Philosophical Explanations* recognizes that such coordination is essential in practice, but outside the theoretical scope of his exploration.⁷ Like Rawls and Nozick, I will be able to say more about the problem than the solution. Unlike them, however, I believe that coordination problems are not strictly meta-theoretical; opportunities to integrate social values don't come only at big procedural policy moments but arise in each step of the criminal justice process, in the way each step is carried out. Traditional justice-based theories of punishment might expect the coordination of state responsibilities regarding provisions of social, economic and criminal justice to be resolved by a meta-level theory, a theory that defined the relationships between the relevant social systems. In practical terms, however, we have no such "meta-theory". What we have is a body of laws created by a legislative process; that is, a highly politicized and imperfect process that prescribes how well, if at all, the many and varied agencies it creates are able to coordinate with each other. The fact that the institution of punishment relies on a political process means that it is a potentially dynamic and variable practice, depending on the political climate. Those with interests in prisons, education, or healthcare compete with each other for dollars as well as political capital. Care-based reasoning won't simplify or resolve the difficult problems of coordination, but it provides insights into how even small and localized decisions can contribute to a more balanced model of institutional integration and interdependence.⁸

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⁸ Daryl Koehn's analysis of the "dialogical" nature of care ethics is instructive here. See *her Rethinking Feminist Ethics: Care, Trust and Empathy*, Routledge Press, 1998.
Once an offender is engaged with the criminal justice system there are many opportunities for authorities to take particular circumstances into account and use discretion in selecting the appropriate level of punitive authority to exercise. What is significant to understand at this point is that these levels of discretion exist, and that theoretically they afford the opportunity for any case to be tailored to the individuals and circumstances. Unfortunately, the decision-making procedure employed at any one step does not necessarily give appropriate weight to the morally relevant particulars as understood by care theory. What I am seeking in this analysis is an internal motivation for criminal justice practices to reflect to the greatest extent possible the morally relevant particular facts of any case considered and to resist the justice framework’s tendency toward abstraction. These opportunities for discretion serve that end. Michael Tonry describes the general face of discretionary authority in 1975 as follows:

Legislatures passed laws that defined crimes and set maximum and sometimes minimum sentences for each type of crime. Prosecutors had nearly unlimited discretion to decide what if any charge to file and whether to offer defendants the opportunity to plead guilty in exchange for dismissal of some charges or for a reduced sentence.

Judges, corrections officials, and parole boards had broad, unreviewable discretion to determine the nature and severity of punishments. . . . Prison authorities could affect prison terms by awarding or withdrawing “good” and “gain time” . . . . Depending on the jurisdiction, prisoners became eligible for parole release after serving at least one year. . . . and a parole board decided when the prisoner would be released. Except in rare circumstances, none of these decisions could be appealed to a court.⁹

There have been some modifications, some increased limits on discretion in recent years, but Tonry’s description is a succinct view of discretion as it has been exercised in modern times.

Discretion allows for greater responsiveness, greater autonomy, and less regulation.\textsuperscript{10} In an era dominated by reform-minded individualized sentencing, discretion was believed essential to success. However, the more discretion allowed also meant that there was less oversight and a greater likelihood of inconsistency in sentencing.\textsuperscript{11} One of the great disadvantages of maintaining these various discretionary privileges, historically, has been that our justice system has the capability to generate wildly disparate outcomes for cases that in many relevant ways appear similar. To some extent, this unpredictability was thought to be the cost of retaining an adequate responsiveness within the system.\textsuperscript{12} In the 1960’s and 1970’s, however, tolerance for sentencing disparities diminished along with support for reform and individualized sentencing. As a result, changes were made to sentencing laws in the 1970’s that limited some of those discretions. The discretions that remain represent the areas in the criminal justice system that are most responsive to individuals and potentially, to the integration of care-based reasoning in the deliberative process. It will be an ongoing challenge to defend these remaining discretions against charges that they permit disparity and bias. Nonetheless, in the following pages I will try to show how the use of discretionary authority can be an important contributor to a just outcome.

In this section I will look specifically at the discretion exercised by the legislature, the district attorney, police, judges, prison wardens, and parole boards. At each of these levels of discretion an individual or body of individuals is charged with evaluating the specific details of a case and making a considered judgment as to the best

\textsuperscript{10} Cragg (1992), p. 4.
way to proceed. Given the complex interests that fall under the general concern of
criminal justice, the use of discretion in these cases is no small matter in the course of
justice, and any one decision may profoundly influence the course of any one case. I will
look at what is at stake at each point of discretion, not only for the offender, but also for
the specific authority with the power of discretion and for the community as a whole. I
will also evaluate the risk of using discretion in contrast to the benefits to the relevant
moral deliberation. I am particularly interested in examining how the introduction of
care-based reasoning at each of these levels impacts the array of outcomes possible as
well as the chance that one outcome (or set of outcomes) is more likely than another
when care-based reasons are considered.

5.2.1. Legislative Authority

The legislative branch, which has responsibility for making the laws, is the logical
first level of discretionary authority in the criminal justice system. The swing in criminal
justice policy over the last thirty years, from reform-centered to retributive, is evidence of
the scope of the discretionary judgment in the hands of law-makers. The advantage of
maintaining a high level of legislative discretion is that legislators are then able to
respond to the best thinking of the day with policy initiatives. The disadvantage is that
any legislation is also vulnerable to whatever emotion or trend may sweep a generation
up with enthusiasm but prove to be unsustainable as policy. Lawmakers are in the
position of balancing what they understand to be the will of the people with their charge
as providers of the procedural tools for social order. They are also in the position to
perpetuate social injustices to which their policies are blind. Such injustices include the practice of criminalizing behavior disproportionately across economic lines.\textsuperscript{13}

Prior to the 1960’s, crime and public safety were considered complex issues best handled by “experts” in the field.\textsuperscript{14} At that time the public left criminal justice policy decisions to legislators. As crime became increasingly politicized, however, the substantive analyses that once guided policy decisions were overwhelmed by calls for “tough on crime” legislation.\textsuperscript{15} This shift toward the political and away from expert analysis resulted in some dramatic changes in the sorts of laws that were created, with more laws reflecting political expediency at the expense of politically unpopular fairness. One of the more problematic examples, which Michael Tonry points out in his \textit{Handbook of Crime and Punishment}, is the disparity in laws for crack cocaine and powder cocaine. Although the two forms of cocaine are pharmacologically equivalent and comparatively addictive, the association of crack cocaine with inner-city crime and violence, politically hot topics, led to a law that punishes selling crack as if it were 100 times the amount of the powder form.\textsuperscript{16} Similarly, mandatory minimum sentences and “three strikes you’re out” legislation have targeted politically popular concerns about drug use and crime. These laws represent some of the most reactive legislation of the “tough on crime” wave, but have proven ineffective and even detrimental in the long run. In many states now legislators are working to reverse “three strikes, you’re out” laws not only because they are ideologically opposed to them, but because they have proved too hard an economic

\textsuperscript{13} The recent focus on increasing sentences for minor drug violations has not seen a proportional concern to intensify regulation against “white collar” crimes, for example, the latter of which have the potential to impact a greater number of people negatively.

\textsuperscript{14} Tonry (1998), p. 6.

\textsuperscript{15} Tonry (1998), pp. 4-6.

burden on state budgets. These laws serve as some of the more obvious examples of law making that served political ends rather than community needs.

It is particularly difficult to consider revising or limiting legislative discretion. Our elected officials are expected to exercise judgment in the public interest, that is their job, almost by definition. With that job, however, comes an intense array of influences and pressures that also affect decision-making. Politicians cannot escape the reality that to be re-elected, they need to remain politically ‘popular’, they also need sufficient financial support to sustain a re-election campaign, and they need to maintain a good relationship within party leadership in order to be effective. Lawmakers have complete discretion as to how they manage these competing political and prudent concerns.

The politicization of crime has perhaps been the major contributor to the dramatic pendulum shift in criminal justice policy. With respect to criminal justice, political expediency has won the day, and serious deliberation about effective policy has been hard to find. This was not always the case, however, and it likely will not remain so. Lawmakers have an enormous amount of power to shape policy and they have the resources available to study and analyze the best and most effective policy alternatives for our communities. What they lack is the initiative and the public support to introduce programs that are politically “unpopular”. It will remain exceedingly difficult to pass legislation that addresses the deeper systemic issues with respect to criminal justice as long as “tough on crime” rhetoric remains the standard. Nonetheless, there is still this broad discretion available to lawmakers and there are independent thinkers, even today. Because it is remarkably easy to make well-intentioned bad law and it is far too easy to overrun one vulnerable group’s liberty with a law intended to protect another vulnerable
group, it is therefore all the more important that lawmakers think systemically and cooperatively as they formulate the laws by which we live. The intentional integration of care-based values can help prevent the adoption of laws that unfairly target a disenfranchised population and inhibit the development of strong communities.\(^\text{17}\)

Care theorists value wide legislative discretion insofar as it permits the interests of individuals to have weight. At present there is no formal mechanism to ensure that legislators respond only or primarily to the public interest. However, the intentional integration of care-based reasons can provide insights into how we might implement useful procedural standards.\(^\text{18}\) For example, it would be useful to require legislation to include stipulated goals, a reasonable timetable over which those goals might be met and projected budgets that coordinate with other relevant agencies and funding sources. In the case of mandatory minimum sentences, for example, certain objectives would have had to accompany passage of these laws, whether crime reduction or desert-based. A programmatic review of these laws over time would have shown that crime reduction was insignificant, if a causative link could even be made, and that the unintended consequences were so harsh as to exceed any reasonable standard of desert.\(^\text{19}\) The failing

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\(^{17}\) I share a long-term goal with many restorative justice proponents -- namely, that we build stronger, more capable communities by teaching at a local level the skills needed to respond to wrongdoing without resorting to “top-down” hierarchical legal structures. See also “Restorative Justice and the Need for Restorative Environments in Bureaucracies and Corporations” in *Restorative Justice and Civil Society*, (2001) Braithwaite and Strang, eds.

\(^{18}\) Debates over the public funding of campaigns also address this issue by striving to eliminate at least one source of influence that often competes with the public interest, broadly construed.

\(^{19}\) In New York State, a campaign called “Drop the Rock” is lobbying to repeal the Rockefeller Drug laws. Their mission reflects a humanistic approach to criminal justice, relying on familiar care-based reasoning: “Enacted in 1973 when Nelson Rockefeller was governor, the Rockefeller Drug Laws require harsh prison terms for the possession or sale of relatively small amounts of drugs. The harshest provision of this statute mandates that a judge impose a prison term of no less than 15 years to life for anyone convicted of selling 2 ounces or possessing 4 ounces of a narcotic substance. The penalties apply without regard to the circumstances of the offense or the individual’s character or background, making it irrelevant whether the person is a first-time or repeat offender.” Posted on the Drop the Rock website:
of these laws might have been seen, but there was no formal review mechanism in place that could assess them systemically; as a result, they remained ‘popular’. Such a formal statement of objectives and review would add a bureaucratic layer to public policy, but it would also protect us from laws that do not meet their objectives.  

5.2.2 The Police

The police are typically the first witnesses, or the first arm of legal authority to encounter a crime. What is at stake with police discretion typically is whether the police will give a warning to an offender, or respond with an arrest. Police training specifically prepares officers to know and use the law as their primary tool on the job. Unfortunately, such formal training can amount to over-preparedness with respect to knowledge of the law and under-preparedness with respect to effective community policing. Police are regularly in situations in which they are required to balance discretionary privilege with strict legal interpretation. When officers are trained to use laws as their primary tool, they are more likely to rely on laws in their daily practice and less likely to rely on discretion.  

The paradox of police training is that most training emphasizes the formal aspects of law enforcement, while most of the actual encounters police have in the course of a day require the use of their judgment and discretion.

When we look at police work as though it entailed an obligation to arrest offenders, we fail to consider responses that may be more local and more appropriate. When officers are trained to use their discretion, they recognize that they are in a

http://www.droptherock.org/

20 This schema would not prevent legislators from passing and successfully implementing “bad laws”, but it would provide some relief to citizens in that it would eliminate laws that are rife with ‘unintended consequences’.


situation of choice when dealing with an offender. Further training in community policing can help officers become aware that they are in a position to engage citizens with their responsibility to obey and uphold the law, not merely wield legal authority over them. This unique ability to engage citizens is especially useful when an officer confronts a crime. In the case of non-violent offenders in particular, issuing a warning or facilitating dialogue can actually strengthen the individuals involved and the community as a result.

The intentional integration of care-based reasons would support dialogue and restorative practices. Such responses include warnings, along with informal conferencing, which are common practices of restorative justice. A warning communicates to the offender a number of values. First, that the offender is not viewed as expendable, something that a quick arrest is likely to communicate. Second, that the offender is expected to shoulder certain responsibilities as a member of a community, including respecting others and obeying the law. Third, warnings give offenders an opportunity to reflect on what their offense may have meant to others, which is a lesson that can be lost once criminal proceedings begin. Informal conferencing can have all of these benefits for the offender along with additional benefits to the victim. In an informal conference the victim is able to express to the offender the spectrum of losses experienced as a result of the offense. Often, victims experience a criminal offense as a loss of empowerment. For this reason, John Braithwaite describes, the critical benefits of the process include restoring to the victim some of the sense of empowerment that was lost as a result of crime.\textsuperscript{23} When maintaining and strengthening community are

emphasized as “police work”, constructive community-building alternatives, such as informal conferencing, can fulfill the need for a different vision of “law enforcement”.

5.2.3 The District Attorney

The prosecutor has the widest discretion in the criminal justice system and has a number of opportunities to exercise discretion in the course of encountering someone charged with the commission of a crime. First and foremost, once an arrest has been made, it is the prosecutor’s job to determine what charges are to be pressed, if any. This includes exercising discretion as to whether to charge the offender with a felony or a misdemeanor, as well as deciding whether to negotiate a plea bargain, and the subsequent terms of the plea bargain (whether it will be for reduced or no jail time, for instance). There are enormous pressures on a prosecutor -- some political, some economic. Most prosecutors are either elected or appointed to their positions. They may, as a result, have some political party affiliations or felt obligations with respect to party platforms that may find expression in their decisions. Certainly they are not immune to the intense political demands that have driven the “tough on crime” debate. In exercising discretion prosecutors must balance their professional charge to serve the public interest with political pressure to deliver increasingly harsh sentences for offenders.24 The prosecutor’s job is also a position that someone with political aspirations could use to build a political career, and decisions may well reflect those aspirations.

In addition to the political pressures of the job, prosecutors are faced with several different sorts of economic pressure. Prosecutors wield an enormous amount of power and as a corollary they experience public pressure not to let offenders “get away with

anything”, but they are expected to accomplish this on a very small percentage of the criminal justice budget. There is, built into the job, a demand to cultivate some degree of administrative expediency. The ability of the prosecutor to manage workload is essential not only to the prosecutor’s office, which runs on a tight budget, but also to the court system that is already straining from case overload. The prosecutor’s discretion to dismiss cases and plea bargain is an economic necessity in our current criminal justice system. A different sort of economic pressure comes from the fact that the prosecutor’s decisions have financial repercussions for state and county budgets. When a felony is charged, a convicted offender goes to prison and the state bears the expense. When a misdemeanor is charged, a convicted offender goes to jail and the county is responsible for the costs. There is no straightforward administration of justice from the point of view of the prosecutor’s office.

The most effective tools the prosecutor has to negotiate workload and administer justice are the discretion to determine whether or not to pursue a case and the ability to plea bargain. These tools also represent the primary opportunity that prosecutors have to integrate care-based reasoning into their deliberations. The prosecutor is in a unique position with respect to exposure to the needs and circumstances of individual offenders and those of the community. Our current legal system ensures that particular circumstances can be considered in the deliberation about what wrongdoers deserve, but these facts are usually presented in an adversarial context that is not conducive to cooperation, reconciliation or restoration. The prosecutor, however, is not constrained by

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the trial process and is at liberty to evaluate cases on their individual merits. This means that in a case such as Tonry's example of the individual "overcoming odds"\textsuperscript{28}, where the particular circumstances of the offender are unlikely to generate much empathy in a contentious courtroom battle, those same particular facts may be judged by the prosecutor to merit a dismissal, a lesser charge or some alternative to incarceration. There are many reasons a prosecutor may make such a judgment, most of which reflect awareness of the significance of community and our interdependency. In the case of the offender "overcoming odds", there are many risks that follow from incarceration and many benefits that follow from permitting the offender to remain in community. The offender, if incarcerated, would leave his family in financial and emotional chaos and would be less likely to find a job upon release from prison, thereby perpetuating a difficult financial cycle. If the offender were to participate in an alternate sentence, such as community service, he would be able to remain employed and continue to provide for his family. His years of working against the odds to create a stable life for himself will not be completely lost by his single offense. The prosecutor is in a position uniquely capable of responding to offenders constructively instead of merely punitively or administratively. Unlike the police, who have few resources, either procedural or programmatic, a prosecutor can offer an offender the positive options to offenders, such as the choice of completing an anger management program or a drug treatment program as a condition for dropping charges. The discretion exists, but the prosecutor needs to put the aim of conviction aside in order to choose alternatives.

\textsuperscript{28} See Tonry (1994), p. 149.
5.2.4 The Judge

Historically, the judge has had wide discretion at the time of sentencing. It was the judge's special charge to balance the interests of the community, the victims and the offender in a sentence that was reasonable and appropriate for the circumstances. Sentencing reforms since the 1970's have changed the scope of the judge's discretion enormously. Prior to the 1970's individualized sentencing was deemed an essential part of an effective reformatory sentence. At that time wide discretion gave judges virtually unfettered creativity with which to respond to particular cases; they could hand down sentences ranging from community service to hard time with no parole, based on their interpretation of their cases. With the politicization of crime there was greater call for the use of incarceration as the most appropriate response to criminal wrongdoing. That, coupled with concerns that there be some regularity in sentencing, influenced states to change sentencing policy and establish limits on the discretionary authority of judges. When faced with a defendant charged with a specific offense, the guidelines provide the judge with sentencing parameters – a typical sentence, and sentences appropriate if mitigating or aggravating circumstances existed. The judge is free to determine which sentence, within the parameters, applies. This decision is not reviewable. Now all states have at least some mandatory minimum sentencing guidelines and judges face the additional challenge of choosing a sentence that meets their best judgment and falls within the sentencing guidelines. To help balance those interests, a judge may work with a prosecutor in order to work around mandatory minimums, in which case the prosecutor
will charge the offender with a lesser crime in order to avoid potentially excessive mandatory minimums.\textsuperscript{29}

The sentencing guidelines did not completely eliminate judicial discretion; however, the restrictions on sentencing did not leave judges much opportunity to weigh the details of a case and make a judgment reflective of that close consideration. Judges still have reviewable discretion to sentence outside the parameters, given good cause. In addition, they have the discretion to sentence on what is called “relevant conduct” as opposed to the “real offense” charged and this may include facts of the case that were either outside what was stipulated by the prosecutor or revealed in the trial.\textsuperscript{30} But what was once the full purview of judges, the determination of a just, proportional sentence, is now largely prescribed by sentencing guidelines and specified facts of the case. While these guidelines may reduce judicial bias in sentencing, they also reduce the beneficial contribution of fair judicial judgment based on the broad facts of a case. As Barbara Hudson points out, “Ignoring the ‘non-legal’ factors in sentencing means ignoring the fact that in all its stages, criminal justice is a complex process of negotiation.”\textsuperscript{31} Initially, the guidelines were to give ‘disadvantaged’ offenders an unbiased sentence.\textsuperscript{32} What is at stake for the offender includes type of sentence, length of sentence, type of facility (minimum or maximum security) and whether or not parole will be an option, so there are obvious reasons to support the incorporation of as much detail as possible in the judgment.\textsuperscript{33} In the long run, however, the guidelines limit discretion to an extent that

\textsuperscript{29} Zimring (1995), pp. 165-6.
\textsuperscript{30} Tonry (1996), pp. 93-5.
\textsuperscript{33} Parole is no longer offered in every state.
offenders are less likely to have their cases viewed at a level of detail that weighs the full breadth of mitigating factors.

The severity of the sentencing limitations was due in some part to the fact that judges resisted participating in the guideline development process. This resistance came from resentment on the part of some judges who saw the guidelines as threatening their relevance, and on the part of others who believed it unethical for judges to participate in policy decisions. Without the full cooperation of judges, the sentencing commissions and legislators developing guidelines lacked insights into the subtleties of judicial discretion. The resultant guidelines focused almost exclusively on issues of consistency in sentencing. But, without the input of judges, Michael Tonry points out: “The quality of justice is impoverished when sentencing laws or guidelines, in the interest of treating like cases alike, make it difficult or impossible for judges to treat different cases differently.” Judges see the integration of particular facts into judicial deliberation as integral to their mission. Care theory supports this intentional integration of care-based reasons and can provide moral motivation for cooperation between judges and sentencing commissions. Judges, who are able to articulate the value of weighing particulars, could work with sentencing commissions to develop more subtle guidelines without sacrificing the concern for sentencing consistency. Such guidelines might provide greater latitude for judges in interpreting both the weight and relevance of ‘extra-legal’ moral particulars. Current guidelines provide very little leeway for judges, but many of the sorts of constraints that judges have experienced with the guidelines can inform the sorts of parameters that would improve on judgment. For instance, an offender’s social stability,

including relationships, employment, and number of dependents, can be rated along with other factors, such as remorse, the likelihood to reoffend, and the impact that imprisonment would have on the possibility of restitution. Together these factors can create an offender profile that permits a greater level of consideration of personal details within a standardized evaluation format.

5.2.5 The Warden

Prison oversight typically falls under the general responsibilities of each state governor. For each facility, however, it is the warden who manages the on-site operations. The warden’s oversight includes supervision of the custodial, administrative and program staff as well as general operations.\textsuperscript{36} The management style and program decisions made by the warden have tremendous impact on the quality of life for the offender on a day-to-day basis as well as on how well the offender will manage post-release. Playing on the warden’s discretion, however, are the financial realities of a limited state budget or of a private corporation with earnings expectations. The budget of a state corrections department must be sorted out in the legislature, and is thereby determined through a highly political process. To some extent, then, the warden’s discretion is limited by the predisposition of the legislature to fund (or not to fund) various aspects of what might otherwise be thought of as a full operating budget. In the case where a private corporation operates the prison the dynamic is slightly different, although also financially limiting to the warden. Private corporations operate on an earning incentive and this alone challenges wardens to provide less in the way of goods

and services to the inmates, while still maintaining a facility that meets the minimum requirements in order to contract with the state to house prisoners. The unfortunate, but somewhat apt term for the impact of this form of financial incentive on prison operations is ‘the race to the bottom’.

Within the funding restrictions of a facility, the warden has discretion as to how that money will be spent, so long as minimum state requirements and staffing needs are met. The sorts of areas where the warden’s discretion makes an impact on the inmate’s day-to-day quality of life include: the ease with which visitation may be conducted; the quality and accessibility of health care; the general safety of the inmates within the lockup (this includes safety from abuse by other inmates as well as by staff); and hours of recreation time in a day. A typical discretionary use of authority is the ‘good time’ policy. So-called ‘good time’ laws permit the forgiveness of one month of a sentence for every month served without any infractions. Such laws give prison officials something to use to control inmates, leverage.\footnote{L. Friedman (1993), p. 159.} Perhaps the discretion with greatest impact on the offender’s ability to reintegrate into society after release has to do with the educational and vocational programs offered to offenders. Such programs include: high school equivalency programs; college degrees and graduate degrees; job training; and ‘life skills’ courses ranging from personal money management to anger management. The discretion within these choices is wide as well. A warden may choose to offer only those programs that address the criminal behavior relevant to incarceration or may choose instead to offer programs that address a full spectrum of needs inmates may have.\footnote{Gaes (1998), p. 714.}

Here, again, whether the warden is operating a state facility or a private facility makes a
difference in the way these discretions are evaluated. A warden in a private prison has financial incentive to keep the prison at full occupancy because a full bed is a paying bed. This provides incentive for wardens of private facilities not to offer ‘good time’ release and not to offer programs that reduce recidivism, whereas wardens of state facilities are not charged with ensuring that incarceration is profitable.

When reform was the guiding aim of incarceration the quality and range of inmate programming received a lot of support, both from prison professionals and the general public. The justification for these programs was largely understood as a systemic concern for successful reintegration of the offender back into a community.\textsuperscript{39} An offender who participates in any program is at an advantage over one who has no program intervention. However, studies have shown that the type of program offered has less of an impact on reintegration success than the capabilities of the staff conducting the program.\textsuperscript{40} Clearly, how we treat inmates impacts their ability to conduct themselves in the future. With reform out of favor, the incentives to provide constructive interventions may be varied. Even a retributivist may argue that incarceration is quite enough harm and so support programming that reduces recidivism. From an operational standpoint, one of the benefits of offering such programs is that inmates who participate in them are typically more cooperative and easier to manage. From the perspective of a care theorist, the justifications for educational interventions are closely aligned with those of reform. Reintegration is a leading concern, recognizing, as care theory does, that relationships are ongoing and that the offender is still a member of the broader community and will bring whatever positive or negative learning back to the community. Since the 1960’s, it has

\textsuperscript{40} Gaes (1998), p. 714.
been understood that the social dynamics of incarceration included the fact that the prison itself has a culture that re-socializes inmates.\textsuperscript{41} This systemic understanding of prison culture and the general practice of incarceration highlight the warden’s potential to provide constructive programmatic interventions that contribute to the well-being of inmates as well as to the stability of society. In addition, a warden’s intentional integration of care-based reasons into deliberation about operational decisions could motivate extensive programming opportunities, not only for the positive impact on offenders and reduced recidivism, but also for the reduction of stress within the facility that may be experienced by all staff, who are, in the words of Norval Morris, ‘the other prisoners’.

5.2.6 The Parole Board

Parole has fallen in and out of favor over the last thirty years. Initially parole was instated as a means of assisting inmates through the difficult first stages of reintegration after release and was considered an integral component of ‘individualized sentencing’.\textsuperscript{42} Parole, for this reason, shares many of the values of reform and care-based reasoning.

For inmates being considered for parole, the Parole Board has the discretion to determine whether a release date should be set and what the conditions of release are to be.\textsuperscript{43} From the offender’s perspective, parole review means the difference between release and continued lock-up. The justifications for parole are some of the same used in support of indeterminate sentencing. In theory, parole would provide an opportunity for professional review of a prisoner’s readiness for release. Also, like indeterminate

\textsuperscript{41} E. Rotman (1998), pp. 166-170.
\textsuperscript{42} Friedman (1993), P. 304.
\textsuperscript{43} Petersilia (1998), p. 563.
sentencing, the predominant belief of proponents was that the use of parole review would minimize the amount of time an offender spent incarcerated. For a number of reasons, parole as initially conceived and implemented failed to match those expectations. Among the more unexpected results was the fact that parole actually increased the average amount of time an offender spent under state supervision. Judges all but stopped granting pardons and commuting sentences in favor of sentencing an offender with the option of parole because of the constructive guidance promised by the parole experience.

The Parole Board is a state agency that is responsible for statewide parole review. The vision for the board included the belief that it would mitigate some of the disparities between judges in different localities statewide as well as provide a check and balance to legislative and judicial discretion more generally. However, the reality of parole is that the process was never standardized and practices have been inconsistent since its inception. Parole boards never established standards either for the basic requirements of release, nor for the conditions that must be fulfilled by an offender while under parole supervised release. These disparities of release conditions, in addition to a chronic lack of funding, put parole in a similar situation as basic reform politics in the 1970’s and many states abolished the practice. In the last decade, however, all but a few states have either reinstated parole or widened parole discretion. The reasons for this are primarily a systemic understanding of the contribution parole makes to public safety. As

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45 Friedman (1993), pp. 162, 305.
Joan Petersilia recounts, the beliefs that led to the abolishment of parole were somewhat misguided: "When states abolish parole or reduce the amount of discretion parole authorities have, they in essence replace a rational, controlled system of 'earned' release for selected inmates with 'automatic' release for nearly all inmates." Properly funded parole programs, particularly those involving substance abuse treatment, are among the most effective rehabilitation opportunities available. The tension to balance the public interest for safety against beliefs about what an offender might deserve, both in terms of rights and in terms of punishment, can to some extent be minimized by the implementation of a fully funded parole program. Parole provides the opportunity for an offender to have the sort of individualized support during reintegration that care-based reasoning recognizes as an essential acknowledgement of the continuity of community between prison and the free world. The enforcement of parole and the preparation of a guided release plan for each offender for whom release is an option would help standardize the practice and overcome the objection that parole turns prisons into 'acting schools'. Additional standardization would include release criteria and post-release objectives, all of which would be framed to meet the care-based objectives of reintegrating the offender as well as public safety concerns.

5.2.7 Summary of Discretion

Use of discretion and positive community-building interventions at early stages in the criminal justice system can reduce the number of cases that reach the sentencing stage. Even when the guilt of the offender is acknowledged by all parties, this does not

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mandate a formal sentence. Presumably there will always be offenders for whom the best and most just recourse is to proceed with formal charges and sentencing. However, for many offenses, an informal intervention may meet the needs of the state, the victims and the offender. As these various levels of discretion demonstrate, there is an enormous amount of human judgment involved in the criminal justice process. These judgments, insofar as they are reflective of concerns about public safety and the threat that an offender poses to the community, will be impoverished if do not take into consideration the extra-legal considerations that are morally relevant to a case. Once the presumption of incarceration is dropped, each of these various levels of discretion represents an opportunity to explore alternative responses to criminal wrongdoing that engage the offender in community whether or not the ultimate response is incarceration. In the following section I will look at cases that do proceed to formal sentencing.

5.3 **Sentencing Policy**

All the various levels of discretion in the criminal justice system present opportunities for authorities to evaluate the particular circumstances of an offense. Nowhere is the outcome of that discretion burdened with more expectations than at the sentencing phase. Sentencing reflects the point in the criminal justice system where, after guilt has been established, the interests of the state, the victim, and the offender are all taken into account. Ideally, this means that whatever sentence is meted out, it will represent a balanced consideration of the public interest in safety, (an interest that is borne especially by the victims), the state's interest in law enforcement, and the offender's interest in fair treatment.\(^5\) These are the interests that have historically shaped

\(^5\) Tonry (1996), p. 3.
debates about appropriate sentencing. Interpreting the relevance and priority of each of these interests has been the aim of traditional justifications for punishment. Retributive, deterrence and reform theories each provide a theoretical context in which to understand the wrong that has occurred and a justification for responding to wrongdoing in a particular way. Typically, these theories compete to inform sentencing policy in the U.S. In this section I will review sentencing history and the dynamics that define the relevant issues that arise in the discernment of good sentencing policy.

5.3.1 Sentencing History

For most of the last two hundred years, up until the 1970’s, criminal justice policy and incarceration use in the United States have reflected an overarching aim to reform offenders. The influences of deterrence and retributivism have been present, but the guiding principle has been reform. There is much in reform theory and practice that is in alliance with care-based reasoning, and for that reason our history of the use and justification of incarceration reflects an understanding of our interdependency and what we may today call ‘care values’, such as compassion for offenders and concern about the post-incarceration challenge of reintegration. Perhaps most significantly, from a sentencing point of view, many of these reform concerns were actually translated into programs that aimed to address and remedy the problems as understood. A prison sentence, to the early reformers, was not viewed as a strictly punitive measure, but as an opportunity for the offender to ‘heal’, with the expectation that the healed offender would rejoin the community when ready. The length of a sentence reflected the amount of time that an offender would require in a penitential environment in order to be ‘re-formed’.54

Initially these reform sentences were set by a judge and alterable only by a pardon. In the 1870's, however, there was concern that the prison experience was failing to reform and in an effort to promote the reformative qualities of incarceration it was deemed important to give inmates more control of their destiny. The introduction of indeterminate sentencing was the result. A typical indeterminate sentence would fix a minimum but no maximum penalty for an offense. The offender would spend the minimum sentence in prison at during which time it was expected that he or she would prepare for reintegration by participating in programs and self-improvement geared toward rehabilitation. The inmate's behavior would be reviewed periodically, and if passable, a release date would be set. For the incorrigible, a release date might never be set. For those with the incentive to reform, the indeterminate sentence was seen as much-needed change.

The reform model persisted up until the 1970's, when it began losing favor. The politicization of crime contributed to this, as did an academic debate about whether or not 'prison works'. The political pressure to abandon reform policies came as crime rates were rising and political leaders were looking for change. At the same time, concern was rising about the fairness of indeterminate sentencing. Many thought that there was too much disparity in sentencing, with like offenses receiving different sentences. Others thought judges had too much discretion and the potential for judicial bias to corrupt a sentence was too great. Inmates were also displeased with the indeterminate sentence and found that an open-ended release left them feeling despairing and hopeless.

Furthermore, there was concern that there was no real standard to judge reform and that

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the practice of observing an inmate’s behavior in prison was not a reasonable predictor of the inmate’s behavior in the broader community.\textsuperscript{59}

As reform became less popular, no other theory took the place of reform as the overriding aim of punishment or sentencing policy. However, this did not stop the most dramatic policy change of the era, the change from indeterminate to determinate sentencing. Driven by concerns about the fairness of indeterminate sentencing and by the public perception that reform policies had been “too lenient” or “soft” on criminals, legislatures, and increasingly sentencing commissions, adopted determinate sentencing with mandatory minimum sentences.\textsuperscript{60} These mandatory minimums were an attempt to minimize or eliminate prosecutorial and judicial discretion. These laws limit or prohibit plea bargaining and require a minimum sentence for specified felonies. The risk of these laws is that they are too rigid. Prosecutorial and judicial discretion has been built into our criminal justice system in order to permit individualized responses to individual cases, in part out of recognition that our legal system is a rather blunt instrument and capable of error. Mandatory sentencing laws attempt to circumvent this discretion. In response to these limitations, some prosecutors avoid charging offenders with the felony offenses that would bring mandatory sentencing laws into effect.\textsuperscript{61} In other cases, where plea bargaining is still available to prosecutors, it can provide an effective “workaround” to a potential mandatory sentence that seems too severe. An offender can plea a lesser charge or a prosecutor can stipulate facts of the case that omit evidence that would bring a greater sentence.

\textsuperscript{60} N. Morris (1998), p. 217.
\textsuperscript{61} McCoy (1998), p. 466.
The move to determinate sentencing, which continues today, did not resolve sentencing tensions. The change from indeterminate sentencing to determinate sentencing brought with it demands for specificity and consistency that had not been essential to the reform-based individualized sentencing. Current sentencing practices must not only balance the plurality of interests at stake, but also navigate political and ideological pressures. In recognition of the complexity of issues involved in developing fair sentencing practices, most states have shifted the responsibility for creating sentencing guidelines from state legislatures to specialized Sentencing Commissions.\(^{62}\)

Nonetheless, the increased standardization did not settle a variety of tensions that present at sentencing. Among the deepest and most persistent disputes are those that surround the issues of desert and proportionality. The difficulty calculating a determinate agreed-upon sentence is a challenge for both retributivists and deterrence theorists that I will discuss in more detail in the next section. Other potentially volatile issues that continue to make sentencing a somewhat unstable practice include areas where discretion remains, such as in the cases of plea bargaining; the judgment as to whether an offender is likely to re-offend; and judgments of mental states and causality, such as mens rea and actus reus requirements which gauge intentionality and conduct with respect to the offense.\(^{63}\)

A benefit of the new sentencing guidelines is that they have been successful at reducing racial and gender bias.\(^{64}\) And to some extent the guidelines, which are primarily voluntary, have contributed to increased consistency in sentencing.\(^{65}\) The adoption of

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\(^{64}\) Tonry (1996), p. 33.

these guidelines, however, effectively ended individualized sentencing. The reliance on sentencing guidelines removed consideration of the offender’s life circumstances from this critical moment of judgment. This shift in sentencing philosophy away from individualized indeterminate sentencing reflected a shift in the way policy makers viewed offenders, too. Once viewed as “reformable”, offenders are now what Michael Tonry cynically refers to as “two-dimensional crime-and-criminal-history constructs”. In the policy vacuum after the fall of reform, the political influence of the “tough on crime” movement made its impact. As a result, many reform-based policies and practices that reflected care values, such as treatment programs and educational opportunities, were abandoned over the last thirty years in favor of increasingly punitive and custodial practices of incarceration.

5.3.2 Sentencing Practices and the Limits of the Traditions

As I mentioned above, sentencing policy and practice must reflect the interests of the public, the offender, the state, and community. Retributive, deterrence and reform justifications for punishment have each contributed interpretations of the dynamics and priorities of sentencing that have shaped the development of sentencing practices in the United States. In this section I will critique the theoretical, practical and technical implications of these traditions on sentencing policy and practice. It is my charge that each of the traditions is too narrowly construed to generate a sustainable sentencing practice. In this analysis I will pay particular attention to how each tradition attempts to translate its theoretical justification into a substantive policy.

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The retributive justification for punishment calls for delivering proportional harm in response to criminal wrongdoing. This harm is usually meant to balance the scales of justice or restore the balance of benefits and burdens that was upset by the wrongdoing. Even those who agree philosophically on retributive desert as the justification for punishment may disagree about the correct or ‘proportional’ amount of punishment due. Retributivists, for instance, may be motivated by what Norval Morris calls a “principle of parsimony”, which yields the smallest amount of punishment necessary to achieve a fair proportion; or they may be motivated by the concern that offenders not receive any less punishment than would be proportionally fair.\textsuperscript{68} Ideally, these views converge at the exact point of proper proportionality, and theoretically they agree on the right amount of punishment. However, the means we have to measure proportionality are very vague and rife with emotional and political bias. What we have instead of objective measures are two views within a single justification that push sentencing limits in different directions.

As I discussed in chapter three, there are two practical problems with the retributive justification for punishment as it translates into practice. The first problem is a technical problem regarding the incommensurability of harm. Briefly put, harm, being largely subjective, is not readily measured, compared across persons and “balanced”. The second problem relates to the first in that the traditional practices typically underestimate the scope of harm done by the wrongdoing and by the punishment. By this underestimation I refer to the fact that these measurements of harm are narrow in scope and do not include more enduring harms, such as issues of trust on the part of victims and

future employability on the part of offenders.\textsuperscript{69} Either of these problems could, in theory, be overcome by improvements in our ability to measure and compare harms with greater accuracy. The incorporation of a greater level of detail, such as that provided by the integration of care-based reasons, would provide a base measurement of harms that included issues related to present well-being, well-being over time and the impact on relevant systems affected, such as family units and financial dependents. Although collecting and calibrating these harms would be a daunting task, in theory, at least, we can appreciate that such a move would bring the retributivist closer to meeting the desired aim of matching the harm of the wrong with the harm of the punishment.

This difficulty calculating an appropriate sentence is true for deterrence and reform theorists as well. Both deterrence and reform justifications depend on the ability to calculate the amount of punishment that will bring about the desired change in the offender -- a change in behavior, in the case of deterrence, and a change in motivation, in the case of reform. In order to deter the offender from repeating the wrong, deterrence theory must be able to calculate the amount of harm that would dissuade the rational offender from offending in a like manner again. This measure would be highly dependent on the emotional and psychological composition of the offender, with a sensitive person more likely to respond to only a minimum of punishment. Whatever the state of the offender, there is tension at sentencing between the desire to punish enough to be effective and the desire for the punishment to be perceived as fair so the institution

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\textsuperscript{69} For victims there have been measures to address the narrow scope of relevant harm. In Texas, for instance, there are provisions for victims to submit a Victim Impact Statement that may be considered by the judge at the time of sentencing. At this time, there is no provision for offenders to argue that for greater consideration of the harmful impact of incarceration.
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remains reputable and does not appear brutal. If the deterrent effect is meant for the general public, this same balance of concerns is present, but the determination of what constitutes ‘enough’ punishment will be generalized over the relevant community of potential offenders, not merely derived from the one offender. Just what that amount of punishment may be, in either case, is open to broad interpretation. The same is true for reform theory. The justification for reform permits punishment to act on the individual in a way that facilitates a change in internal motivation so that the desire to repeat the offense does not occur. Reform interventions are typically educational, as they involve the re-shaping of one’s understanding of acceptable behavior. The measurement of what will be required for such a change to occur, as years of indeterminate sentencing demonstrated, is an open question for any individual. It is true with deterrence and reform as it was with retributivism; the greater the knowledge base in attempting to make these difficult calculations, the more accurate they may be. The final disposition in any of these cases is that they are technically incapable of rendering in practice the level of accuracy that would satisfy what is promised in theory. Nonetheless, if these are our best efforts at attaining justice, we may do well to improve them by incorporating all relevant moral details in those difficult deliberations such as may be provided by integrating justice and care-based reasons.

5.4 A Re-visioning of Punishment

In my ongoing critique of the justice tradition I have continually contrasted it with the care tradition and suggested that the two are in fact complementary aspects of justice.

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Chapter Five

The so-called justice tradition represents an incomplete conception of justice in part because its analysis remains at a high level of abstraction. The care tradition, I have argued, provides a necessary balance to this abstraction by requiring moral deliberation to incorporate details relevant to the interdependency of all parties involved. In the preceding discussions on discretion within the criminal justice system I have repeatedly tried to demonstrate that the integration of care-based reasons with the justice-based traditional theories results in moral decision-making that is more fair, more comprehensive and less subject to the harshness of more abstracted theories. In short, I argued that care-based reasons improve moral judgment. Even by itself, this would vindicate the care approach. However, there is more to be said. In my opinion, the care approach not only supplements the traditional justice-based theories of punishment, but also it gives us reason to aspire to a response to wrongdoing that does not leave its own wake of harm for offenders, victims and the community to contend with. In these final sections I will sketch an alternative account of punishment that the care approach suggests.

On any of the strictly justice-based punishment traditions, the offender is identified as the target or locus of the punishment. One can think of such theories of punishment as providing a sort of calculus or function that is to be applied to the offender. I will refer to this type of theory as a providing a 'transactional' account of punishment: in exchange for a wrongdoing, the offender receives punishment. Whether one relies on a retributive, deterrence or reform theory, this general application pattern is the same. Imagine a retributive response to an offender who has committed a minor property theft and stolen a radio. The quantifiable loss of property (the cost of the radio)
and the fact of the theft together may be said to amount to the 'harm done'. If we imagine that the next-to-impossible task of measuring the harm that came from the fact of the theft, what Herbert Morris has called 'the unfair advantage', has been accomplished, we are able to calculate a measure of total harm done. The response would reflect and balance this total harm with the proposed sentence. According to the retributive view, the successful delivery of a deserved punishment to an offender will restore justice. It is this conception of restoring justice that I believe to be the most problematic aspect of the traditional theories. In the case of the radio thief, the traditional theories respond to the incident by inflicting a response on the offender. The retributivist would apply proportional harm, the deterrence theorist would apply the necessary harm to deter future wrongdoings, and the reform theorist would apply whatever measures were required to alter the motivation of the offender. My objection to this shared conception of punishment is that it represents punishment as a terminal event that operates in a comparatively closed system. Furthermore, it conceives of the exercise of state authority as though it were possible to carry out punishment with little or no interaction with broader society.71 On this conception, criminal justice proceeds like a transaction in which the only relevant relationship is the relationship between the offender and the state. In exchange for breaking the law, the offender receives punishment.

The depiction of criminal justice as a "closed system" and punishment as a terminal event is prevalent in both theory and practice. Robert Nozick's 'rxH' formula presented in *Philosophical Explanations* is an excellent example of a detailed yet closed

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71 The isolation of criminal justice policy has been exacerbated by the politicization of punishment over the last several decades. See Lawrence Friedman's *Crime and Punishment in America*, especially chapter 12.
theoretical system. Nozick presents an independent algorithm for punishment with no internal motivation to subject the process to broader constraints of justice. The radio thief would receive a prescribed (rxH) punishment and justice would thereby be satisfied. This insular conception of punishment, which is shared by deterrence and reform theorists as well, is perpetuated by a model of justice closely identified with the emphatic individualism of the justice framework, as initially discussed in chapter one. In that earlier discussion I also identified how different conceptions of the self could affect moral motivations and one’s sense of moral obligation. I suggested that the concept of the morally mature self, as characterized by Laurence Kohlberg, lacked an ability to synthesize moral obligation with a high degree of uncertainty. Moral reasoning, on that view, was motivated by concerns for autonomy and non-interference. I argued that this sense of the self as essentially independent and in need of protection from others meant that the justice tradition, when thinking systemically about moral concerns, framed them in a narrow defensive context. The moral motivation was to protect, which was believed best achieved through independent fortification, not through interdependent or cooperative measures. What I have identified as the ‘transactional’ account of punishment of the justice traditions reflects these same values, with an emphatic reliance on isolating individuals from a problem in order to protect them.

What I propose is an alternative to the familiar concept of punishment as a calculation. What I propose is an approach to criminal wrongdoing that shifts from blaming to problem solving, from a transactional account to a process account. There is

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73 See discussion of Nozick’s formula in chapter two of this thesis.
74 See Frank Stier’s *Reconstructing Justice*, especially Chapter One, for a discussion of the impact of the ideal of Lockean Individualism on American conceptions of justice.
much of the early reform theory that will be reflected here, but there are two major points of differentiation between reform as practiced in the last two centuries and what I propose today. First, I will abandon the incarceration presumption that has dominated the transactional account of punishment as practiced by the justice traditions and will replace it with a presumption of community. Second, along with the shift to a presumption of community, I will prescribe a deliberative process that will rely heavily on the intentional integration of morally relevant particulars in order to problem solve about the needs of community in the face of wrongdoing. What I propose is a response to criminal wrongdoing that opens a dialogue between those with particular interests in the wrong done. The purpose of this dialogue is to provide a forum to negotiate the interests of the offender, the state, the victims and the community. Such a dialogue would include the principled concerns typically represented by retributive, deterrence and reform interests as well as the particular interests of each party relative to the wrong done.

As I have tried to demonstrate in earlier sections, the traditional justifications for punishment are amenable to incorporating care-based reasons into their deliberative processes. I have argued repeatedly that this integration is an improvement over applications of the theories without benefit of care-based reasons. However, I am now arguing that the justice-based traditions can never adequately represent the dilemma that we face in the case of criminal wrongdoing because they lack the internal motivation required to animate the full range of relevant moral concerns. In contrast, care theory’s recognition of the interdependence of persons and institutions calls for a response to criminal wrongdoing that is fundamentally cooperative and constructive. It calls for a response, but it does not stipulate in advance what form an appropriate response will take.
What care theory stipulates is a process of consideration that must be satisfied before justice can be achieved. Just as the traditional justifications for punishment reflected the moral reasoning of the self as identified in the justice tradition, this process-oriented conception of wrongdoing reflects the moral reasoning of the self as identified in the care tradition. On the care tradition, moral reasoning is motivated by concerns for maintaining safety through relationships and interdependency. A process-oriented response to criminal wrongdoing reflects these values in its awareness that systemic thinking about wrongdoing includes consideration of the victims, the offender and the community.

The issues that arise from an incident of criminal wrongdoing are complex and do not easily conform to standardized resolutions. There will be a dynamic tension in every act of criminal wrongdoing – concerns for consistency, fairness and desert will vie against concerns to assess the breadth of mitigating circumstances that serve to make every case ‘unique’. It is this dynamic aspect of wrongdoing and punishment that is not captured by the traditional theories of punishment. Retributive, deterrence and reform theories all conceive of punishment as a calculation, albeit a complex calculation. In contrast, care-based reasoning conceives of the appropriate response to wrongdoing as a negotiation. The care-based conception of wrongdoing sees a criminal act as an event that happens to the victim and to the community. There are relationships affected by the wrongdoing that will not be addressed by a formal legal proceeding. Instead of viewing wrongdoing as a discrete event for which punishment is due, I am proposing a response to wrongdoing that calls together all the parties affected by the wrong, all the parties that have a vested interest in the loss that occurred and in the future that awaits them all in the
aftermath. When wrongdoing is viewed as a breach of relationship, it is natural to see that the needed response is a healing one, for all parties.

In the following sections I will look at responses to criminal wrongdoing that reflect a process-oriented response to wrongdoing. They will share a common respect for individuals and a recognition of our interdependency. Because community is understood as a driving motivation for all individuals, these responses will typically strive to reintegrate wrongdoers back into community. First, I will introduce the theory of restorative justice as a theory that exemplifies a process-oriented approach to wrongdoing. Restorative justice values are closely aligned with care values insofar as relatedness and interdependency are understood as foundational. After introducing restorative justice, I will turn to examples of applied programmatic responses. There are three levels of applied practices I will examine: preventive programs; alternatives to incarceration; and improvements to incarceration practices. In each of these sections I will discuss what is at stake at that point in the criminal justice process and compare and contrast the alternatives with traditional responses to wrongdoing.

5.4.1 Restorative Justice: A Systemic Response to Moral Particulars

In recent years, restorative justice practitioners have developed a fairly sophisticated application of community-based responses to wrongdoing that share many of the care-based values I have identified as critical to a just response to criminal wrongdoing. In particular, restorative justice utilizes dialogue and conferencing as integral components of the criminal justice process. In this section I will introduce the principles of restorative justice and discuss the basis for this alternative conception of the
relationship between wrongdoing and punishment. Restorative justice makes the following assumptions:

1) what we presently call a crime is a complex event, which will have different meaning according to the circumstances of the offender, the victim and the community, and the relationship between them; 2) that all parties to the event deserve a hearing, and that they all have claims on the justice process.75

These assumptions, which reflect care-based concerns, begin to illuminate the dynamic aspects of wrongdoing that resist resolution on a strictly transactional approach to wrongdoing. Rather than reduce the event to a legal relationship between the offender and the state, the wrongdoing is identified as a multi-faceted event that has direct implications for the offender, the victim(s) and the community, including the law enforcement community. Given this description of the social rupture that wrongdoing creates, it becomes evident that a formal legal response fails to address many aspects of the event. Restorative justice practitioners have suggested that formal legal proceedings would benefit by adopting a response that engages those most closely affected.

Restorative alternatives have developed in various parts of the world, but there is yet to be a consensus on what constitutes the restorative justice process. Leena Kurki presents the following principles as representing the core beliefs and objectives of restorative justice:

- Crime consists of more than violation of the criminal law and defiance of government authority.
- Crime involves disruptions in a three-dimensional relationship of victim, community, and offender.
- Because crime harms the victim and the community, the primary goals should be to repair the harm and heal the victim and the community.

75 Hudson (1996), pp. 144-5.
• The victim, the community, and the offender should all participate in determining the response to crime; government should surrender its monopoly over that process.
• Case disposition should be based primarily on the victim’s and the community’s needs—not solely on the offender’s needs or culpability, the dangers he presents; or his criminal history.\textsuperscript{76}

As these principles outline, what is distinctive about restorative justice compared to traditional, more adversarial practices, is that the response to the wrongdoing is a creative response, determined by the victim, the offender and the community. The emphasis in the restorative justice process is on the maintenance and restoration of relationships, not on following specified legal procedures. The values of restorative justice include healing, moral learning, community participation and community caring, forgiveness, responsibility and making amends.\textsuperscript{77} Restorative practices date back hundreds of years, but they reflect some of the most contemporary concerns of moral theory and share with care theory a foundational respect for community and interdependence. At a time when the majority of those incarcerated report a history of drug abuse, and the economic and racial demographics of our prison populations reflect a bias toward minorities and the poor, incarceration itself must be re-evaluated for the effect it has on the deterioration of communities and relationships. The negative effects of incarceration include the personal degradation experienced in institutional living, the forced separation from community and the life-long stigma as an ex-convict. What we do when we incarcerate individuals creates a set of problems for the inmate and the inmate’s close community that have no expression in the legal process that determines when incarceration is the most just response. The transactional conception of punishment finds its justification in broad

\textsuperscript{76} Kurki (1991), p. 2.
\textsuperscript{77} Braithwaite (2002), p. 11.
social principles that provide protection and allow wide-ranging self-determination.

What the transactional conception fails to address is the communal aspect of wrongdoing. The many levels of discretion within the criminal justice system help mitigate what could otherwise be an even more harsh system of justice. However, the presumption, at each of those discretionary junctures, is a model of justice that permits but does not demand a holistic response to wrongdoing. On the restorative justice model, a holistic response is part of what constitutes a just response.

In order to respond to criminal wrongdoing in a manner that engages those whose interests were affected by the wrongdoing, a re-visioning of the conditions of justice are in order. By introducing a process-oriented response to criminal wrongdoing I realize that many of the advantages of the current legal system are at risk. One of the most obvious issues is that of time-management and efficiency. It seems virtually impossible to respond individually to every case with a comprehensive plan that addresses the relevant needs of the victim, offender and community. It seems unlikely, given our established legal processes for responding to criminal acts, that we are at any risk of making a sudden transition from one justice process to another. Nonetheless, I can suggest the following as a template of some of the challenges I imagine a full transition would entail. Initial efforts would require community-building and educational outreach efforts to inform citizens about community-based responses to criminal wrongdoing. These efforts would in effect attempt to change the public understanding of incarceration as a 'corrective' response and instill in its place a web of community-based responses that emphasize and enforce accountability and responsibility. Such responses might include community service, required educational interventions, and restitution. In places where
such programs exist, recidivism decreases dramatically, suggesting that the initial concern about having the resources to respond properly to all cases may in fact resolve itself in the course of the program.

In these next sections I will draw on a number of restorative justice practices as examples of applied care-based responses in the field of criminal justice specifically aimed at issues of sentencing policy and practice. In presenting these programs and alternatives I will be able to discuss further both the advantages and disadvantages of adopting such programs, and compare these alternatives to their more traditional counterparts in a critical dialogue.

5.4.2 Preventive Interventions

Perhaps not appropriately called “responses” to criminal wrongdoing, preventive programs respond to the potential for criminal wrongdoing within a community. These programs reflect an understanding that crime is systemic and that a community can take positive steps to intervene in a constructive manner to prevent crimes from occurring. Because these programs do not aim at any particular wrong that has been done, they have unusual liberty. However, they also bear responsibility to respect other social values, such as rights of noninterference.

Community Justice is a relatively new development in the field of criminal justice. The aim of community justice programs, such as Community Policing, is to problem solve about public safety and crime issues and to empower communities. Community policing entails working with community members to assist police in maintaining an adult presence in places where adults are usually absent. Police train the

78 Kurki (1999), p. 3.
community to identify needed patrol locations and patterns and in engaging citizens in this way, help to reinforce a sense of mutual obligation among neighbors in a neighborhood.\textsuperscript{79} As the Director of a Community Justice program in Oregon describes:

> In a community justice framework, the goal is to engage as many citizens as possible in building a better community . . . . People who share a strong sense of community are far less likely to violate the trust of others. Their stake in and bond with the community is the strongest force of guardianship to prevent crime from flourishing.\textsuperscript{80}

Community justice reflects the understanding that justice is a community responsibility and that formal legal interventions cannot provide a safe environment; they are designed to respond once a violation occurs.

Mentoring programs are also significant preventive interventions. Programs that draw ‘at risk’ youth into community, such as Youth Advocates in Houston, provide adult and peer counseling as well as an outlet for positive social interactions.\textsuperscript{81} What mentoring programs have in common is the shared understanding that providing the experience of a caring connection can strengthen individual ties to community, as well as build self-esteem in individuals who had felt estranged. Whereas traditional theories of punishment can recognize the value of preventive programs, they do not give guidance as to what forms of intervention would be most useful, effective or just because they lack an analysis of the social dynamic of wrongdoing. The care-based conception of wrongdoing sees it as a community event, and this provides a social context for prevention that relates directly to the positive benefits of building responsibility and accountability through

\textsuperscript{79} Smith (1999), p. 3.

\textsuperscript{80} Kurki (1999), p. 3.

\textsuperscript{81} Intervention programs that focus on at-risk youth are noted by the Criminal Justice Consortium in Oakland as effective tools for preventing violence and strengthening community. See their resources and research data at http://www.idiom.com/~cjc/.
programs that enrich and enhance social interdependencies. To that end, the Office of Juvenile Justice and Delinquency Prevention recommends programs such as Big Brothers and Sisters, Family Counseling and Life Skills Training that can provide a young person with the skills and support to help prevent violent and otherwise criminal behavior. What all of these programs share with care-based reasoning is a sense that individual identity and well-being are inextricably linked to community, and that through community ties an alienated individual can find shared values where once was seen only isolation and opportunism.

5.4.3 Alternatives to Incarceration

National attitudes toward incarceration may well be changing, moving away from the presumption of incarceration toward more restorative practices. An ACLU poll found that over 60 percent of people surveyed believed that incarceration was used too often. This move may be coming from several directions. On the one hand, proponents of the traditional model of criminal justice are looking for alternatives to incarceration because of economic realities that make the status quo impossible to maintain. California Department of Corrections estimates that the cost of housing an offender ranges from $1,000 to $3,000 per month, depending on the level of services needed. Mental health counseling could add up to another $8,000 per month, per offender. With these costs burdening state budgets, one has to question the value of what it is one is buying with that money. In the case of incarceration, particularly of non-violent offenders, it becomes less clear that what we are buying is security or justice. Although for some, these economic

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84 Friends Committee on Legislation: “Alternatives to Imprisonment”. 
realities have motivated consideration of alternatives, for others, motivation to seek community-based alternatives comes from a systemic understanding of criminal wrongdoing. The systemic response is motivated at least in part by the awareness that offenders when incarcerated leave the community for a period of time, during which they are exposed to a prison community that ranges from severely dysfunctional to cruel, and when they return, they are typically less well prepared to cope with free society than prior to their incarceration. Community-based process-oriented alternatives to incarceration attempt to address wrongdoing without creating a new set of obstacles for the offender to overcome. The same ACLU poll found that approval ratings for alternatives such as education, community service, probation and victim reconciliation now range from sixty to over eighty percent. These statistics indicate that although policy has not yet reflected this trend, public opinion is shifting back from the reactionary ‘three strikes you’re out’ response to criminal wrongdoing and showing awareness that offenders are part of our broader community.

Programmatically, there are a wide variety of non-custodial options for offenders. Restorative justice responses include informal and family conferencing. These conferences allow the victim, offender, members of the community and law enforcement officials to meet and share perspectives on the impact of the wrongdoing and to develop a restoration plan for the offender. In a similar vein, the Department of Justice now promotes a community dispute resolution (CDR) process that unites community

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organizations and law enforcement agencies in order to respond to disputes and criminal wrongdoing. The Department of Justice reports:

As the nation’s top law enforcement agency, the Department of Justice is uniquely responsible for the safety of all communities. The Department can best meet this mission in partnership with communities to ensure that public safety is achieved through greater civic engagement in laws and institutions grounded in solving the problems that are grist for everyday conflict. One key to that success is the use of community dispute resolution (CDR) as a vital part of community violence prevention, mediation, and problem solving.\textsuperscript{87}

The key to these alternatives is that they engage the offender with the community. Unlike prison, which isolates and alienates the offender from the community and from the wrong that was done, conferencing and dispute resolution ensure that the offender faces the repercussions of the wrongdoing and also give the relationships that were ruptured an opportunity to mend. In a typical restorative justice conference, for instance, all of the parties with an interest in the offense would be invited to attend the conference and each would have the chance to air their grievances. Not only would the offender and the victim be present, but individuals who care about both parties would be invited, as would other community members who may have been affected by the wrongdoing. The dialogue would permit the offender to hear what the offense meant to the victim, how others saw it affect the victim, and how those who care about the offender were affected. The parties can sort through the event and circumstances and attempt, cooperatively, to develop a plan for the offender to make amends.

Non-custodial alternatives have been a part of the reform tradition since the late 19\textsuperscript{th} century when probation was formally accepted as a legitimate sentence.

\textsuperscript{87} Department of Justice website: www.usdoj.gov.
Probation still exists today, and depending on the region, a probation plan may provide many of the same values as restorative justice, including making amends and rebuilding broken trust. Other alternatives to incarceration include ‘intermediate sanctions’, which covers a range of responses between probation and incarceration, such as boot camp, house arrest and electronic surveillance. Intermediate sanctions allow an offender to remain out of prison, but because they involve some sort of intense supervision, they have been widely accepted, even by those who support ‘just desert’ sentencing.\textsuperscript{88}

Other types of alternative sentences aim at serving populations with special needs. One such type of program that is gaining support is the state-ordered rehabilitation program. In Wisconsin, for example, a recent methamphetamine epidemic resulted in the creation of a state-supported rehabilitation program.\textsuperscript{89} The Center for Alternative Sentencing and Employment Services (CASES) oversees several programs that are geared toward offenders with either substance abuse problems or mental illness. The Nathaniel Project, for instance, is specifically designed to meet the needs of mentally ill offenders and permits judges to sentence an offender to intensive case management and community service.\textsuperscript{90} In addition, the Vera Institute has been monitoring and researching sentencing alternatives for several decades and in 1979 launched the Community Service Sentencing Project.

Copying the British model, the project organized offenders into closely supervised work crews. Anyone who refused to work or left a job early was sent back to court and usually sentenced to jail as a consequence. As a result of strict enforcement, seven out of ten offenders completed the required seventy hours of labor, and with help from project staff many of them found permanent employment, housing, and services needed to

\textsuperscript{88} Tonry (1996), p. 100.
\textsuperscript{89} Singh (2001).
\textsuperscript{90} See CASES website online at http://www.cases.org.
stabilize their lives. According to a 1998 study by Vera, the project continues to have high completion rates and to be valued by the communities where offenders work.\textsuperscript{91}

Many of these programs are similar to the sorts of reform-minded programs that were popular in the 1960's and 1970's. What restorative justice and community-based corrections add to these programs is a community dialogue that was not part of the earlier reform ideal. The reform ideal was aimed at changing the behavior of the offender. Restorative justice and process-oriented community responses, however, are aimed at the community. As such, they require dialogue between the offender and the victim and local representatives as part of the justice process. The dialogue creates the awareness for all parties that the wrongdoing had many facets, some of which may amount to mitigating circumstances, some of which may serve only to highlight the selfishness or lack of foresight of the offender. Whatever the outcome of the dialogue, the point of community response is that it allows those impacted by the wrongdoing to address the specifics of the offense in a way that all parties can come to an agreement about what went wrong and what can make it right again.

5.4.4 Improvements to Incarceration

The state responds to a number of offenses by requiring incarceration. The practice of incarceration raises many concerns about human rights violations, issues related to loss of liberty, disrespect for persons and inhumane treatment that spring from the basic elements of the practice. In addition, there are concerns around issues of diminished health, diminished well-being, erosion of individual productivity (present and future) of the offender, and the deterioration of families that arise from the practice.

\textsuperscript{91} Vera Institute Website: http://www.vera.org.
Perhaps the most pressing problem that arises in the evaluation of traditional practices of punishment and incarceration is that of maintaining the integrity of the individual being punished. Although the traditional justifications for punishment recognize individual integrity as an important human good, the accounts they give do not cohere well with some deep intuitions about why and how individuals ought to be valued. There exists a discontinuity between our punishment practices and our intuitions about how individuals, even criminal wrongdoers, ought to be treated by the state. But changes are not likely to come if we persist in directing punishment at the offender, as though no other element of the community were relevant. The need for programs that provide constructive opportunities for inmates to improve themselves has been well documented by criminal justice institutes and studies. The California Little Hoover Commission report on Correctional Reform specifies the need for just such changes:

More than 80 percent of inmates are addicted to drugs or alcohol. Half of them cannot read at the sixth-grade level. Moreover, the vast majority of inmates do not receive education, work training or drug treatment - even though those services have proven repeatedly to help inmates successfully reintegrate into society and are far cheaper than re-incarcerating inmates.92

The success of educational interventions at reducing recidivism has been documented, but with the justifications for punishment coming from a plurality of sources, lowering recidivism does not always carry favor over the demand that offenders get what they ‘deserve’. In spite of the mixed efforts by state corrections departments, there are a number of programs that do exist that strive to prepare inmates for a smooth transition into free society. One such program is the Windham School District, the school district

of the Texas Department of Criminal Justice (TDCJ). The philosophy statement of the Windham School District reflects these precise concerns:

Adults in the United States face the challenges of life in an ever-changing technological age. Successfully coping with these challenges requires adults to employ educational processes that are the basic tools of human growth and development. Incarcerated adults, as a group, lack the basic educational tools needed to adjust successfully to the economic, sociological and cultural dimensions of today's society. Confined persons need to develop the academic skills that will allow them to process knowledge and information. They need vocational competencies that will enable them to contribute to a productive society. They need the social skills that will provide them with self-confidence and the ability to interact successfully with their fellow man.\(^{93}\)

Currently, over sixty-five percent of offenders are arrested within three years of their release.\(^{94}\) According to Norval Morris, "In many state prison systems, the prisoner is set free at the prison gate in clothes ill-suited to the likely pattern of his life and with funds insufficient to support himself during the difficult period of readaptation but sufficient to buy a handgun."\(^{95}\) Clearly, efforts to support successful reintegration have not reached the level of success.

The services that one believes appropriate for a state-supported prison to provide will be directly affected by one's understanding of the aim of punishment. This is precisely why I suggested that no systemic changes are likely to occur unless we reconceive of wrongdoing and punishment as community events, not merely as an elaborate transaction of justice. Currently, there are a number of programs available to inmates while incarcerated that are geared toward improving the chances of successful reintegration upon release. Substance abuse programs, vocational training, and work-release are all

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\(^{93}\) Statement of Philosophy posted on the Windham School District website: http://windhamschooldistrict.org/general_info.php

\(^{94}\) Bureau of Justice Statistics webpage.

available in varying degrees at different facilities. When we view punishment systemically, the motivation to assist offenders with reintegration no longer conflicts with concerns to ‘do justice’. Correctional departments have been especially responsive on two fronts that are a step toward restorative justice -- providing substance abuse programs and victim offender mediation programs. TDCJ currently supports Substance Abuse Felony Punishment (SAFP) as one of its State Jail initiatives. This program permits offenders with substance abuse history to be sentenced to a Therapeutic Community (TC) for residential treatment for addiction. The Substance Abuse Felony Punishment initiative is aimed at supporting reintegration by helping inmates overcome addiction and by providing support services for the reintegration process. TDCJ also participates in a Victim Offender Mediation/Dialogue program (VOMD). Victim Offender Mediation/Dialogue programs are open to victims of violent crimes who may request the dialogue, which is typically used to help determine restitution. In 2001, Victim Offender Mediation/Dialogue programs were used 22 times, with 6 of those dialogues resulting in a creative resolution.\footnote{See TDCJ website online at: http://www.tdcj.state.tx.us} The practice of victim offender mediation shares the restorative justice values of conferencing and allows communication and connection to occur where traditional forms of justice impede them.

For all of these programs there are two outstanding questions that need to be answered. I have tried to address the question of whether these are the sorts of responses we ought to be making. If I have been successful in motivating support for this conception of wrongdoing and punishment and the community-based response, there remains the additional question as to whether these programs as configured achieve the
ends toward which they aspire. To a limited extent the answer to this latter question is affirmative, but clearly the issue is one that deserves in-depth analysis. My effort here has been to highlight special programs that have shown modest success in terms of lowering recidivism and meeting community needs. My greater effort has been to motivate a way of thinking about punishment that shifts the way we think about responding to wrongdoing. When we view punishment on a problem-solving model rather than a punitive model, we shift our priorities. To some extent, the questions that lie ahead are for social scientists and public policy analysts. The unanswered program questions will have more to do with the cost-effectiveness of various interventions, the importance of addressing different learning styles, and the impact of various interventions on recidivism. I would argue that concerns for desert, deterrence and reform are most appropriately voiced in the context of a community-based response.

5.5 Summary

The importance of thinking systemically about social concerns, such as punishment, is familiar to care theory, which as a regular practice notes the moral significance of relatedness. The introduction of care-based reasoning to deliberations about punishment theory is significant, not only because it forces the traditional justifications of punishment to expand their notions of what counts as a morally relevant reason, but also because it presents a novel interpretation of how to respond to criminal wrongdoing. Care reasoning reminds us that we have moral reasons to respond to others that are grounded not in principles alone, but in the reality of our shared community and unavoidable interconnectedness. Recognition of this interconnectedness forces us to think about the particulars that join us in common community. However, the values of
care-based reasoning are not new to criminal justice concerns. The need for community and to belong to others in order to feel whole, are not insights that originated with feminist philosophy. In one of the most eloquent passages on the need for connection, and the need for restoration after wrongdoing, Herbert Morris writes in “On Guilt and Suffering”:

When we possess the concept of wrongdoing, I want to suggest that it is connected for us with the concept of ‘being joined together’ with another or others, the idea of union, the idea, too, that in this union one is complete, one is whole, in a way that one would not be without it. Being a member of a community, being friends, being lovers – all imply union as I employ this concept. This union and completeness are valued. When they exist there is, among other things, sharing of and commitment to the same values and because of this one is the recipient of approval, benefits, warmth and favors associated with the relationship.... When one is guilty of wrongdoing, one separates oneself from another or others with whom one was joined.... Wrongdoing then arises in a world in which asking for and receiving forgiveness, making sacrifices, reparation, and punishment exist; and where they, as well as other responses, have the significance of a rite of passage back to union. And so it is characteristic of individuals who possess the concepts of wrongdoing and righting the wrong that they remember injuries and that they connect certain present feelings and conduct with restoration of relationships damaged by past conduct. A wrong, then, is not understood as righted when matters are simply where they were before the wrong because forgetting may account for this, and forgetting is not a restorative response. For restoration there must be a bringing back by certain appropriate responses which carry significance to the parties.97

The values that Morris expresses seem universal. The need for connection that persists, even in the aftermath of wrongdoing, is especially poignant, for it is in the aftermath of wrongdoing that traditional justice responses, particularly as they turn to incarceration, serve to sever rather than restore relationships. It has been my aim in this thesis to acknowledge the validity of the various philosophical motivations we have to respond to wrongdoing with retributive, deterrence and reform responses. They each reflect

concerns that belong in the deliberative processes in response to wrongdoing. Where I have differed from these traditions is over the manner in which they are incorporated into responses to wrongdoing. I have argued that tactically, each of the major traditions faces serious limitations in translating theory into practice. I have additionally argued that were we to rely on punishment practices informed by these traditions, we have compelling reason to incorporate care-based reasons into those moral deliberations in order to reach better, more informed decision. Finally, I have argued that in order to overcome the severe limitations of the justice traditions we need to transform our understanding of wrongdoing and the reason we feel compelled to respond when it occurs. I have argued that such a transformation calls for replacing the notion that punishment is a response that is due to the offender, as though to complete a transaction. I have suggested that a more appropriate understanding would reflect the values and worries that Morris describes above. The traditional justifications, while sharing these same values of connection and restoration, have been limited by responses that failed to respond to wrongdoing systemically. A more appropriate understanding of wrongdoing and punishment would be a responsive, process-oriented model that provided a forum in which aggrieved parties were able to come together, air their needs, and cooperatively attempt to rejoin what had been ruptured by the wrongdoing. I recognize that replacing our transactional conception of punishment with such a systemic process would require a radical re-thinking of both social relations and the role of the state. I believe such a re-thinking is justified, although for practical reasons and reasons of inertia I admit it is unlikely to occur in the near future. It is my hope, however, that as we explore the limits of our current policies and practices, we have a vision such as what I’ve suggested in
mind, and perhaps we will evolve from our decidedly punitive stance, much as we have already evolved from our more patently brutal responses to wrongdoing from earlier centuries.
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