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‘Why do we try international criminals?’ a Retributivist Theory Response

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Abstract

This article examines the foundational justifications for the practice of punishing perpetrators of international crimes. It argues that creating such a foundation is important for the formation of a coherent and consistent criminal process. The article then presents two theories that justify punishment in national systems – retributivist and consequentialist. This presentation includes a critique of these theories and of models that try to combine the two. At its conclusion this presentation raises severe moral concerns with the application of the consequentialist justifications. Next, the article examines the express opinions of the various ad-hoc international tribunals and scholarly writing on international criminal law in order to examine if displacing criminal law from the domestic to the international sphere mandates adopting a different theory to justify punishment. The conclusion that is reached at the end of this examination is that at its core, international criminal law is no different from national criminal law and should focus on the personal responsibility of the perpetrators as the foundation for punishment. The article therefore subsequently argues that international criminal law should be of a retributive nature.
A. Introduction .............................................................................................................................. 3
   I. Background and significance of the article’s bearing. ....................................................4
   II. The Crux of the Argument..............................................................................................11
B. Paradigms for Justifying Punishment .............................................................................. 15
   I. Early concepts of punishment: Biblical and Classical Greek ........................................15
      1. A Biblical Allegory of the Concept of Personal Responsibility in the Story of the
         Expulsion from the Garden of Eden..............................................................................16
      2. The Difference Between Revenge and Justice in Aeschylus’s Oresteia..................18
   II. Two Arch-type Justifications for Punishment ...............................................................20
      1. Consequentialism.......................................................................................................22
      2. Deontology and Retributivism..................................................................................29
      3. Deontological Critique of Consequentialism – confusing duty and inclination,
         instrumentalizing the individual, and violating the idea of freedom..........................36
      4. Critiques of Retributivism – vengeance, impracticality, and absolutism ...............47
      5. Mixed Theories - Justifications combining both paradigms – presentation and
         critique of their inconsistency....................................................................................56
      6. Conclusion ..................................................................................................................61
C. Theories of Punishment in International Law.................................................................... 63
   I. The Decisions of International Tribunals – Minimal Guidance.....................................64
   II. Scholarly Writing ..........................................................................................................74
      1. Deterrence as the objective of International Criminal Law .......................................75
      2. National Reconstruction, Truth and Reconciliation – Attempting to draw
         emphasis from desert of the perpetrator to the rehabilitation of the community ...76
      3. Critics of International Criminal Law – Skepticism towards the enterprise as a
         whole. .........................................................................................................................81
      4. Critique of the Academic Writing on Punishment – Asking for too much ............82
D. Conclusions – the role of punishment ............................................................................. 86
A. Introduction

This article takes a step back from the common discourse regarding international criminal law, examines the foundational justifications for the practice of punishing perpetrators of international crimes, and asserts that punishing for crimes in international law should focus on the free agency and responsibility of the perpetrators and not on external societal benefits. Current theoretical writing on international criminal law examines its efficacy, the legitimacy of super-national punishment that oversteps the boundaries of sovereignty, and its role within transitional justice mechanisms. Other scholarship of a more doctrinal nature examines specific practices of the tribunals, such as the level of intent for a specific crime, or how to define joint criminal responsibility. This article takes a much needed pause from addressing specifics, and instead suggests examining the institution of punishment as a whole from a retributive vantage point.

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1 To refrain from listing War crimes, Crimes against Humanity, Genocide and the Crime of Aggression, the term “international crimes” will be used collectively. One must no confuse these international crimes with cross border crimes which also might be considered “international” but do not necessarily rise to the level of a “war crime.”
3 See, e.g., LARRY MAY, CRIMES AGAINST HUMANITY (2005), and LARRY MAY, AGGRESSION AND CRIMES AGAINST PEACE (2008).
4 See, e.g., MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS (1998).
6 See, e.g., GIDEON BOAS, JAMES L. BISCHOFF AND NATALIE L. REID, INTERNATIONAL CRIMINAL LAW PRACTITIONER LIBRARY VOL. 1, FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW (2007).
This article’s underlying assumption is that before answering questions regarding the effectiveness of the international tribunals, we⁷ should have clarified what these tribunals are supposed to do. Before determining a legal dilemma’s best solution, e.g., who to prosecute, we should be aware of why we prosecute in the first place. Answering doctrinal questions without considering why we engage in the practice of punishment from the outset is equivalent to missing the proverbial forest for the trees. By exploring a theoretical basis for these international tribunals and proposing an agent centric deontological paradigm this article lays the groundwork for continued examination of specific questions relating to particular issues that arise during criminal prosecution of international criminals.

I. Background and significance of the article’s bearing.

On July 17, 1998, following more than a month of continuous debate and deliberation, the United Nations Diplomatic Conference in Rome adopted the statute for the creation of the International Criminal Court (ICC).⁸ Four years later, in April 2002, the requisite 60th State Party acceded to the convention.⁹

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⁷ By ‘we’ I refer here to the scholars and practitioners that shape international law by drafting international treaties and statutes, advocate before international tribunals, make judgments in international tribunals, and comment on these treaties, statutes and decisions in academic and professional forums.


⁹ As stipulated in article 126 of the Rome Statute of the International Criminal Court, (Henceforth the “Rome Statute” or “the Statute”).
and on July 1, 2002, the Statute came into force. This chronology of events set in motion the next phase in the development of international criminal law. By creating a permanent institution for the adjudication of the crimes considered so heinous that they are taken to be offensive, not to a single sovereign state, but to the international community as a whole, the member states made a strong statement. The content of that statement is the subject of this article. While it is prima facie obvious that the Rome Statute created a permanent court (as opposed to ad-hoc tribunals) to try offenders suspected of committing international crimes, the court’s purpose and hence what the international community was hoping to achieve by trying these offenders is not entirely clear.

By examining the International Criminal Court and the various ad-hoc tribunals and special tribunals created in the past sixty years, this article asks a basic question – what ought to be the justifications for punishing culprits who are charged with committing international crimes? Stated otherwise, why do we choose to deliberately hurt people by denying them their freedom, and sometimes their lives, because they committed international crimes? \[11\]

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\[10\] Chronology of the International Criminal Court at the ICC web-page available at [http://www.icc-cpi.int/about/ataglance/chronology.html](http://www.icc-cpi.int/about/ataglance/chronology.html).

\[11\] There is an important caveat here. This author was born into Western society, lived most of his life within the confines of Western culture, and is therefore inextricably affected by Western conceptions of law, justice and punishment. As far as outlining the development of crime in Western culture that is not a problem. It could become a problem when applying this article’s conclusions to international criminal law, which is universal. However, the ICC statute has been signed and ratified by 108 nations, from six continents, which shows a broad consensus.
At the level of the sovereign state, the institution of criminal punishment is comprised of different practices carried on by society. These practices include, for example, establishing a method by which guilt or innocence is determined (i.e. criminal procedure and rules of evidence) and deciding what punishments are suitable for criminals. These practices have developed over time and continue to be shaped in a manner that mirrors the rationale underlying the social institution. Thus, conducting criminal trials makes sense only because the rationale for having criminal law is the determination of guilt and responsibility. As the social institution of criminal punishment continues to develop, new practices that augment it must align with the original rationale of criminal punishment to maintain a coherent regime.

International criminal law has been developing as a social institution ancillary to national criminal law. Doubtlessly, new practices are emerging to accommodate international criminal law’s differences from national criminal law, while other practices borrowed from national criminal law will be adapted to accommodate this novel criminal system. These new practices will be developed by the agents who participate in the practice of international criminal law, based on their intuitions regarding the rationales and purpose of this social institution. Because trial processes tend to follow set procedures and rules and are usually resistant to change, whichever customs are entrenched in regarding the principles of criminal law embraced by the ICC Statute, whose rationale can be shown to flow directly from Western conceptions of criminal justice.
International criminal law in this nascent stage, will likely remain in force for a long time. It is critical for the formation of these practices – such as the determination of the method by which guilt is established, the punishments that fit different crimes, and the scope and breadth of different defenses – that they be aligned with just rationales that underlie international criminal law.

This article will examine two paradigms for justifying punishment, a consequentialist\textsuperscript{12} paradigm and a deontological paradigm\textsuperscript{13}, and suggest how they could affect the decisions rendered by international criminal tribunals. The different paradigms for justifying punishment will result in distinct differences in the ultimate outcome of three different stages of the process (before the trial starts, during the guilt stage\textsuperscript{14}, and during the sentencing stage).

First, adopting either one of these paradigms affects the criminal process before the trial begins, when the prosecution’s legal and policy choices regarding potential defendants are made. One of the initial decisions prosecutorial teams have to make in a world of limited resources is whom to prosecute and when. The International Criminal Tribunal for the Former

\textsuperscript{12} Consequentialism, focusing on the consequences of a given action as a determinant of right and wrong, is most commonly traced to the writings of Beccaria and Bentham, see infra note 34 and accompanying text.

\textsuperscript{13} Deontology will be explored in much greater length infra note 52 and accompanying text, and determines the morality of an act on its intrinsic goodness rather than on the consequences it achieves.

\textsuperscript{14} The guilt stage refers to the stage in trial following the indictment during which the tribunal focuses on the guilt or innocence of the defendant. Following the guilt stage, if the defendant is found guilty, starts the sentencing stage.
Yugoslavia (ICTY)’s progression along this route is telling. At the beginning of the ICTY’s life, the tribunal did not seem averse to trying low-ranking soldiers for international crimes. This policy has changed over time, and in its later years the ICTY concentrates mostly on senior ranking officials and officers.\footnote{15 Theodor Meron, *Centennial Essay: Reflections on the Prosecution of War Crimes by International Tribunals*, 100 A.J.I.L 551, 563 (2006). This change may be quite prosaic, as evidenced by comments made by Richard Goldstone, the first chief prosecutor at the ICTY. See Richard Goldstone, *For Humanity* 105 (2000).} The International Criminal Tribunal for Rwanda (ICTR)\footnote{16 Meron supra note 15.} appears to have employed the same completion strategy as the ICTY, and the Sierra Leone tribunals have opted to try only the most senior perpetrators from the outset. At the ICC, on the other hand, the option and question whether to try both senior and low ranking defendants remains open.

The choice of whom to prosecute is heavily affected by the fundamental justifications for punishment. If the justification is deterrence, finding a symbolic number of low and high level perpetrators, and punishing them severely enough, should suffice for the deterrence of potential perpetrators at all levels.\footnote{17 The theory of deterrence is based on the assumption that if the punishment is severe enough, and the probability of being punished is great enough, then those groups of people threatened by punishment will be deterred.} If the justification is incapacitative, then where the conflict is already over, there is no need to prosecute, and the resources used by the tribunals best be allocated elsewhere. If the point of the prosecution is to create a historical account, then perhaps prosecuting a large number of low ranking defendants is necessary to collect testimony to tell ‘the whole’ story.
Conversely, if the justification is deontological, then theoretically all guilty defendants should be charged, but in a world of limited resources it might make no difference as to which defendant is prosecuted, because all of the perpetrators are the same.\(^\text{18}\)

Furthermore before the trial actually begins, the rationale underlying the decision to punish is relevant in other junctures where the allocation of meager resources has to be applied, such as in plea bargaining. It also underlies other prosecutorial decisions regarding, among others, amnesties, peace negotiations and certain extra-legal considerations. When making these decisions the prosecutors at the international tribunals are faced with the basic need to determine which of the rationales for justifying international punishment they will adopt and to make decisions according to this rationale (or rationales if and when they are compatible). Thus, a prosecutor acting under a strictly deontological paradigm, who focuses on the responsibility and free agency of the perpetrators, might consider amnesties to be irrelevant to the decision whether to prosecute. Alternatively, if a prosecutor believes the rationale guiding international criminal law is to bring some sense of closure to the participants by creating an impartial arena where they can air their mutual grievances, then honoring a local amnesty might be viewed as a necessary step.

Second, understanding what rationale informs the decision to punish international crimes is paramount to the application of the law during the guilt stage of the trial. Most aspects of the guilt stage of the trial appear to be conducted from a deontological perspective and attempt to determine if the defendant behaved in the manner deemed culpable according to the criminal prohibition. Currently, the tribunals mostly examine the defendant’s actions independent of the societal implications of this behavior – focusing on her free agency. But this is not a necessary result of this type of inquiry, and a trial in which the finding of the facts and the determination of guilt is based on a consequentialist rationale is conceivable. Moreover, different defense doctrines and the division of defenses into excuses and justifications vary depending on the punishment rationale applied by the tribunal. For example, defining the defense of duress according to a consequentialist standard might result in a different verdict than if the defense is applied according to a deontological paradigm. Accordingly, choosing one justification for criminal law over another can directly affect the choice of conviction or acquittal.19

Finally, during the sentencing stage the justifications for punishment inform the severity and content of the punishment. Punishment aimed at rehabilitation looks very different from punishment aimed at deterrence, and both will greatly differ from punishment meted out based on a retributive

19 See, e.g., when the ICTY Appeals Chamber’s decided to deny Drazen Erdemovic the defense of duress; Prosecutor v Erdemovic, IT-96-22A (7 October, 1997).
rationale. Because the sentence marks the culmination of the trial and because the punishment of the guilty perpetrator is the purpose of the entire criminal process, the differences between the consequentialist and deontological paradigm are most visible at this stage of the trial process. All told, therefore, the normative justifications for punishment are of paramount importance to the criminal process from its very start before the trial even begins, to its end when the sentence is read out.

II. The Crux of the Argument

An examination of the justifications for punishment under international law can refer to several different questions relating to sovereignty and to the inclusion of different acts as international crimes. This article focuses on examining the current practice of punishment and uncovering its rationales and asserts that these ought to be of a retributive nature. As the practice of international punishment becomes more ubiquitous and as legal doctrines grow more complex through application, it is imperative to create a firm understanding of the basic norms grounding international criminal law. This article presupposes that all decision-makers proceed from some theoretical framework, whether or not they are aware of. When making a decision, policy guided or ad-hoc, the decision-maker acts in accordance with a maxim of

20 Or at least it ought to be, as shall be argued below.
21 The reference here is not to ground-norms in the Kelsian sense of the term. Rather than looking at the formal principle that gives international criminal law its legitimacy, I am looking for the moral and ethical values that can justify the choices made according to that formal Kelsian ground-norm (whatever it may be). See HANS Kelsen, THE PURE THEORY OF LAW ((1934)
sorts. That is, the decision-maker is using some method in order to attain a certain end. Although the decision-maker likely is not theorizing the rationale of every action he takes, the rationale is still there, and can and ought to be critically examined.

Using broad brush strokes, justifications for punishment can be divided into two main schools of thought or paradigms. One paradigm is based on consequentialist justifications for punishment. The defining character of consequentialist analysis is that the values of actions, punishment among them, is measured not by the intrinsic value of the actions themselves, but rather the results (consequences) they achieve. For instance, utilitarian analysis, focuses on the maximization of happiness, and is one type of consequentialist justification for punishment. According to this system of thought, punishment is justified only if it increases rather than decreases the happiness of the general population.\textsuperscript{22} The most commonly mentioned positive consequences of punishment according to this analysis are deterrence, rehabilitation, and incapacitation.\textsuperscript{23} According to utilitarian analysis, the aggregate happiness of society as a result of the benefits of punishment (e.g., the future decrease in crime) will be offset by the costs of maintaining a penal system. The costs include the economic expenses of the legal process and the maintenance of the penitentiary system, as well as the actual pain and suffering caused to the


criminals themselves as a result of the punishment. Other types of consequentialist theories of a non-utilitarian kind do not necessarily seek to increase happiness, but nonetheless determine the morality of action based on its consequences.

A second paradigm justifying punishment is deontological. The defining character of deontological analysis is that the value of an action ought to be grounded in the action itself rather than in an external ends. In other words, if when punishing, we intend to put a criminal in jail in order that he suffer, the imprisonment should be justified in and of itself, and not in order to satisfy some other end external to the action itself. The penal theory associated with deontological analysis is retributive punishment, which claims punishment ought to be borne by the criminal because she deserves to be punished.

The conclusions of this analysis will argue that punishing criminals in general should be founded on deontological justifications. This analysis is not meant to be exhaustive, but only set the stage for further discussion of the application of these paradigms by international tribunals. Following this analysis it will be shown that there is no normative difference between criminal adjudication in national courts and international courts that can justify adopting a consequentialist approach to international criminal punishment. This

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will be done by critiquing the various consequentialist justifications for punishment in international fora found in current academic writing (national rehabilitation, historic record, peace building etc.). This article will argue that inflicting punishment in international law should be guided by deontological retributive justifications and that increases in the severity associated with mass crimes and the internationalization of the tribunals do not change the basic notion of national criminal law, according to which the central aspect of punishment is the autonomous agency of the criminal.

The next section of this article, section B, examines the development of the practice of punishment and its justifications. First, this section presents certain early classical concepts of punishment. Next, this section analyzes the two paradigms of punishment – consequentialist and retributivist – and outlines some of the critiques aimed at them. Following this, section C explores whether the differences between the two paradigms retain the same meaning in international law. The analysis in section C is accomplished by examining first the opinions of international criminal tribunals, and then scholarly writing. The article concludes with a statement on the validity of consequentialist and retributivist justifications for punishment as they apply to international criminal law.
B. Paradigms for Justifying Punishment

In order to correctly frame the question of ‘why ought we to punish in International Law?’, we ought to examine the different justifications for punishment as they have developed over time. Thus, a discussion of the differences between consequentialist and deontological concepts of punishment, as summarized above, follows in greater detail. This distinction is indispensable for critical examination of the practice of the tribunals and of academic writing on the underlying rationales of international criminal adjudication. In other words, this section will craft the lenses through which the later examination of the materials dealt with in this article will be seen.

I. Classical concepts of punishment

Literary archeology is sufficient to understand that punishment has been an important institution of Western culture from its earliest stages. The constituting documents of Western cultures such as the Bible and Greek and Latin dramas are rife with myths involving the judgment of the main characters, either by God (e.g. in the story of Adam and Eve, or Cain and Able), by cooperation between men and gods (e.g. in the Oresteia, Antigone or Phaedra), or by men alone, such as in the trial of Jesus before Pontius Pilatus and the multitude in the Christian Gospels. These constituting myths of Western morality tell us varying stories (not always consistent) about human behavior, deviation from norms, and criminal responsibility.
This section will use two of these myths to map a few basic understandings about criminal justice in early Western society. These will be followed by an account of how, with the advent of the Age of Reason, concepts of the justifications for criminal law began to change and the consequentialist school of thought developed rationales for punishment that compete with the traditional retributive concepts of punishment. The next section will outline the development of deontological justifications for criminal law. When these two paradigmatic ways of justifying crime and punishment have been explained, it will be possible to show how international criminal tribunals and scholars adopt one paradigm or another (or both, or neither).

A word is needed regarding the use of biblical and mythical stories in order to explain an issue. These myths are not used here as anecdotal evidence that if we behave in a certain way, certain results will follow (i.e. they are not presented to provide a moral ‘lesson’). Nor are they intended to provide legitimacy to one view or another based on their supposed sanctity. For our purposes, these myths provide an opportunity to understand how punishment has been perceived in the past. These allegories or moral parables were used originally to teach a moral lesson, and it is possible to glean from that lesson how the tellers of these myths understood the institution of punishment.

1. A Biblical Allegory of the Concept of Personal Responsibility in the Story of the Expulsion from the Garden of Eden
In the book of Genesis (chapter 3) the first sin of mankind is described. Eve and Adam eat from the tree of knowledge despite God’s explicit prohibition and learn to distinguish between good and bad. God finds out what they have done (interestingly, despite God’s omniscience, he asks Adam and Eve whether they have eaten from the forbidden fruit – essentially giving them a ‘hearing’ of sorts). There is, at first blush however, a paradox in the story of the original sin. If Adam and Eve had really lacked the ability to distinguish between good and bad, they could not have understood the nature of their sin or rather the nature of the prohibition which they disobeyed. There is a way to solve this paradox, however. The solution relates to a very early understanding about crime and punishment and who can be punished.

Before eating the forbidden fruit, Adam and Eve had not been given the wisdom to know right from wrong in a substantive manner. The example given in the very same biblical story is that they did not know that walking naked in God’s presence was wrong. The content of ‘what constitutes a wrong’ and ‘what constitutes a right’ was not yet given to them. But the knowledge that such a categorization existed and that some things are wrong and some are right had been instilled in them from their very creation. To use a simple simile, Adam and Eve had moral ‘containers’ of ‘right’ and ‘wrong’. These ‘containers’ were almost, but not entirely, empty because the ‘wrong’ container already had two prohibitions in it – eating from the tree of knowledge

25 Genesis 3:6
and the tree of life.\textsuperscript{26} More basically, the ‘wrong’ container also had in it the very act of behaving ‘wrongly.’ Once they ate from the tree of knowledge, these ‘containers’ were filled with other prohibitions, and Adam and Eve learned good from bad in a substantive way.

What can be taken away from this story is the idea that all men and women are instilled with the ability to tell right from wrong, \textit{apriori} and independent of all knowledge. The story posits that Adam and Eve, the forebears of all humanity, were created with an innate ability to understand what a prohibition is, and as such were deemed guilty for violating this prohibition. Even as clean slates, without any substantive knowledge, before they were even aware of their own naked bodies, Adam and Eve were endowed with the free will to abide by a prohibition, or to violate it. That is the reason that when they chose to violate the prohibition they were punished.

\textbf{2. The Difference Between Revenge and Justice in Aeschylus’s Oresteia}

The second ancient text is the third part of the Aeschylus’s Oresteia, the Eumenides. Following Agamemnon’s return from the Trojan War a series of murders tore apart his household.\textsuperscript{27} The last person standing after vengeance wreaked havoc on the household was Orestes, Agamemnon’s son. After he murdered his mother in revenge for the slaying of his father, Orestes escapes to

\textsuperscript{26} See Genesis 2:17 (prohibition on eating from the Tree of Knowledge) and Genesis 3:22 (prohibition regarding the Tree of Life).
\textsuperscript{27} Aeschylus, \textit{Oresteia} (Richmond Lattimore, Trans.) (1953), \textit{Agamemnon}, lines 1340-1350.
the safety of Apollo’s oracle in Delphi, seeking sanctuary from the Erinyes (the Furies) who sought to avenge his mother’s death. The Erinyes, born out of Uranus’s blood, represent vengeance. They seek to avenge the deaths of those who have no one left to avenge them. Their thirst for blood would not be sated until their justice had been done, and when Apollo whisked Orestes to appear before Athena, they demanded his death. Athena, however, decided that this complex matter demanded a trial.²⁸ What followed is a rather skewed legal process, but a process nonetheless, at the end of which Orestes was found innocent. And most importantly – the Erinyes were satisfied. The furious creatures of the underworld, who but a few strophes earlier screamed for Orestes’s blood, were transformed to the Eumenides – those who grant grace – who sleep beneath Athena’s temple, their blood lust quenched, as long as justice prevailed.²⁹

The fundamental principle the Eumenides represent is the victory of the judicial process over the endless cycle of revenge. Something in the legal process, in the way in which we determine criminal responsibility, grants it legitimacy, which in turn differentiates it from revenge. Thus, while revenge is a visceral, almost reflexive action intended to right a wrong by wronging the offender, the trial process does not create another wrong but rather the righteousness of justice. Revenge is cyclical with one party exacting revenge

²⁸ Id. The Eumenides, lines 483-490.
²⁹ Id. line 900.
over the other in a never ending feud; but the judicial process brings with it finality, stemming from the legitimacy of the process. Orestes’s drama serves to distinguish retributivist justice from revenge.

I have lingered on these two myths because they canonize two key components in the understanding of the practice of punishment. That is, whatever the justifications for punishment, these justifications should relate to the idea of personal responsibility and to some sort of legitimizing process that transfers visceral revenge into retributive justice.

II. Two Arch-type Justifications for Punishment

The aforementioned allegories provide a basis for examining the development of how societies described punishment of crime during the pre-modern period. This next section will discuss how we justify these practices in the modern era.

Emile Durkheim describes punishment as a foundational part of society, in the way it is both the reaction to behavior that deviates from the social norms as well as the agent for this definition. Durkheim looked for the most common features of penal law and came to the conclusion that in all societies, penal law serves to censure behaviors that seem to each society to be harmful to it. Durkheim continued and described how in early societies the roles of all the individuals were quite similar and created a very cohesive and close knit

group. Thus, the range of behaviors considered harmful to the group was quite expansive and all deviations from the collective conscience were brutally sanctioned. The repressive force of criminal law was used both to define behaviors beyond what society will acquiesce – that which we punish; and to punish those who deviate from what is considered conscionable. Punishment thus had the extremely repressive role of reining in departures from the shared ethos.

According to Durkheim, when societies evolved and individuals started taking on different roles (for Durkheim the main theme here is actually not criminal law, but the evolution of societies from ‘simple’ to ‘complex’ communities), the cohesiveness of society started to unravel. The collective conscience covered a much smaller set of principles and the role of criminal law shrank. But criminal law did not disappear. Its role as an oppressive mechanism by which society forcibly and violently compels individuals to refrain from certain behaviors remained. Although much criticism has been mounted in later years on the veracity of Durkheim’s historical assertions, his contentions regarding the role of criminal law in society remain valid—criminal law is still employed to sanction only those actions that societies consider so offensive that they matter to it as a whole and not to the limited number of individuals directly affected by these

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31 Id. 91. Durkheim designates this as “mechanical solidarity”, in the sense that the solidarity between members of society is not only due to a sense of communal belonging, but because they are mechanically equal and interchangeable in society.

32 DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY, 49 (1990)
actions. The reason for punishing those who commit criminal offenses, however, requires additional justification.

Today, two paradigms for justifying punishment developed over the centuries. One, consequentialist, is based on an attempt to apply scientific criteria to human social behavior. The other, retributivist, is based on desert and free choice as the determining factors upon which punishment should be meted out.

1. Consequentialism

Although the sociological analysis of the pre-modern era allows us to understand the development of modern criminal law, the works of the enlightenment philosophers led to the development of a new paradigm – consequentialism. Among these philosophers, René Descartes’ thinking was revolutionary in that he attempted to explain physical phenomenon by breaking down the objects of his scientific study into their basic components. The application of this phenomenon to social studies meant that to understand how society functions, one must understand how the smallest unit that comprises society operates and deduce from that the workings of society as a whole. Not surprisingly, the smallest unit in society was deemed by social scientists to be the individual (literally Latin for ‘indivisible’), and by studying the

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individual and what motivated him, the new penologists thought they could engineer society as a whole.

One of the earliest examples of these attempts to examine the individual and deduce from his behavior how society operates is the work of the Italian scholar Cesare Beccaria. Beccaria understood human beings as creatures who wish to maximize their happiness. When applied to society as a whole, rules that maximize happiness or common utility form the foundation of justice. Viewed in this light, oppressive criminal punishment, meant to cause physical pain in order to enforce a legal order is the anathema of justice because it very often inflicts much more pain than necessary to limit the evil of the crime itself.

Beccaria was appalled by the criminal proceedings of his time and by what he considered the barbarity of corporal punishment. Applying the utilitarian formula, Beccaria sought to balance pain and gain (cost and benefit), and found that the punishment of his day far outweighed the gain of minimizing crime. He hypothesized that all humans want to maximize their pleasure; hence they give up only so much of their liberty as is necessary to enable them to live in a functioning society. From this Beccaria deemed that the social contract between the selfish individuals and the sovereign only gave

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35 Id.
36 Id. at 42.
37 Id.
38 Id. at 14.
the sovereign the power to limit individuals’ liberty by the minimal amount necessary for society to exist. This limitation also extends to the minimal punishment required to dissuade the selfish, pleasure-maximizing individuals from committing crime.

Beccaria continued and postulated in this manner about many different aspects of punishment. Because he saw punishment as a scientific exercise in the management of behavior, strict certainty regarding the punishment of the guilty was important to Beccaria. For deterrence to work, Beccaria argued, there should be a high probability of capture, a high likelihood of conviction, and a certainty about the sternness of the punishment. He thought that the severity of the penalties of his day dissuaded judges from convicting even the guilty, thus creating inefficiencies and uncertainties in the law. This uncertainty made, in Beccaria’s eyes, punishment less deterrent and therefore ineffective.

Beccaria’s hypothesis regarding the severity and consistency of punishment might have been true, in the sense that, naturally, punishment in his day did not completely deter or eliminate crime. But no less interesting is that his critique of punishment asks a set of questions about the institution of punishment completely different from the ones asked by retributivists.

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39 Some of Beccaria’s postulations form the very basic concepts of modern legal systems. He opposed torture as a means by which to extract information, criticized severely the idea of partial guilt, which allowed magistrates to imprison men not yet found guilty during the trial for their partial guilt (thereby insisting on the clear binary distinction between guilt and innocence), called for the abolishment of secret laws and accusations, etc. Id. at 32.
40 Beccaria, supra note 34, at . 58.
According to Durkheim and Foucault’s analysis, punishment before Beccaria was not aimed at deterring criminals from committing crimes, but at defining taboos, reinforcing the legitimacy of a social order, and placing blame.\footnote{This might be an opportune place to recall that deontology does not mean acting without maxim. Consequentialism is about achieving something beyond the maxim. In Durkheim’s early societies, punishment was a direct manifestation of the criminal prohibition. It was not meant to achieve anything other than to punish for the violation of the taboo. In Beccaria’s analysis, the punishment is incidental to its deterrent effect.} Beccaria comes to his conclusions about the ineffectiveness of punishment because of these divergent set of questions. To him, punishment is not a good in itself, but rather an evil necessary to achieve an external good; an act justified only by its consequence.

Foucault’s description of this turnabout is worth quoting:

\begin{quote}
Punishment, then, will be the art of effects; rather than opposing the enormity of the penalty to the enormity of the crime, one must adjust to one another the two series that follow from the crime: its own effects and those of the penalty. A crime without a dynasty does not call for punishment; any more than, according to another version of the same fable, a society on the verge of dissolution and disappearance would have the right to erect scaffolds... One must punish exactly enough to prevent repetition.\footnote{FOUCAULT, supra note Error! Bookmark not defined., at 93. See also GARLAND, supra note Error! Bookmark not defined., at 186.}
\end{quote}

If the spectacle of the criminal punishment, the public hanging and the pillory, was meant to be a raw manifestation of the power of the king – a repressive justice inflicted on the very body of the culprit – then the new form of government had no need for it. Corporal punishment was conceived as the
dark repression of the monarchial despotism of the dark ages.\textsuperscript{43} Causing pain, for the sake of causing pain, \textit{i.e.} retributive punishment, was considered an excess which had absolutely no use in the eradication of crime.\textsuperscript{44} Beccaria believed that punishment can be made to create fear in society - a fear which will inspire compliance with the law. Punishment became tool for the making of a better society.

Beccaria and other consequentialist theorists who followed justified punishment not on the indignation towards the criminal act, but on the criminal act’s disutility. Criminal justice’s role became the amelioration of wrongs of society. Punishment was intended to correct, educate, and deter the miscreants who thieved and murdered in order for society to progress without the disruption that came from unruly behavior.\textsuperscript{45} Writings of early American criminologists such as Benjamin Rush’s ‘\textit{An Enquiry into the Effects of Public Punishments upon Criminals and upon Society}’ from 1787 mirror Beccaria and clearly demonstrate this point.\textsuperscript{46}

Consequentialism manifests itself in punishment, therefore, by attempting to minimize the damage caused by the suffering of the criminal, and maximizing the good that comes from this pain. An array of justifications for

\textsuperscript{44} Beccaria, \textit{supra} note 34, at 43.
\textsuperscript{45}MICHAEL MERANZE, \textit{LABORATORIES OF VIRTUE, PUNISHMENT, REVOLUTION AND AUTHORITY IN PHILADELPHIA 1760-1835}, 131 (1996).
\textsuperscript{46} See BENJAMIN RUSH, \textit{AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS AND UPON SOCIETY} (1787).
punishment rise from consequentialism: deterrence, moral education, rehabilitation, and incapacitation are among the most commonly noted. A brief few words on each is warranted. Deterrence can be divided into specific deterrence and general deterrence. Specific deterrence is intended to affect the individual criminal being punished, while general deterrence is meant to affect the community at large. If it is possible to measure (empirically) exactly how much punishment is required to deter individuals from committing each offense, it is possible to calculate exactly how much pain is necessary in order to prevent each crime, and maximize social utility.\textsuperscript{47}

Communicative or moral education justifications utilize punishment to educate. According to the communicative justifications for punishment, causing pain to the perpetrator is meant to reinforce the strength of the public norm by pointing out its taboo. Communicative justifications for punishment are similar to general deterrence, because they see punishment as a means by which to send a public message – though unlike deterrence justifications, the content of the message is not to frighten the public by the severity of the punishment, but rather to communicate society’s disapproval of the criminal behavior.\textsuperscript{48} Communicative theories of punishment, therefore, are similar to deterrence theories in that they punish not to assert the responsibility of the perpetrator, but rather to teach the relevant community a lesson.

\textsuperscript{47} JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, 189 (1907) (1789).

\textsuperscript{48} J.L. Mackie, Morality and the Retributive Emotions, 1 CRIM. JUST. ETHICS 3, 4 (1982).
Rehabilitation too is very much a consequentialist justification for punishment. The main premise of rehabilitative punishment is that the prisoner is seen as an individual who committed a crime because of her condition. This condition could have stemmed from the criminal’s individual psyche, or as later social determinists thought, from the social conditions in which she grew up.\textsuperscript{49} But in common to both approaches is that the punishment ought to reform the criminal so that it is safe to return her to society. The approach is consequentialist in that it sees punishment not as an end, but rather as a means by which the deviant criminal can be rehabilitated. The prisons are not meant only to deter, but rather to “correct” the prisoners (e.g. in correctional facilities), and attempt to create better men and women out of them for the sake of society.\textsuperscript{50}

Of incapacitative justifications there is not much to elaborate. Criminals are considered dangerous and as a consequence of their incarceration they are taken off the streets making our surroundings safe. Punishment here is consequentialist in that it serves to keep the danger away from society.

Consequentialist justifications for punishment are alleged to be part of a progressive agenda seeking to minimize pain and focus on improvement of society. Substantive criticisms to this paradigm, however, come from an expressly liberal point of view no less concerned with the welfare of

\textsuperscript{50} MERANZE, supra note 45, at 132.
individuals.\footnote{As will be further demonstrated below, some aspects of this allegedly progressive movement to mitigate the harms of punishment end up threatening human liberties much more than retributive justifications for punishment.} In order to understand this criticism and the justifications for punishment it offers, a very brief word on Immanuel Kant’s ethics are required. Following this short explanation will be an elaboration of how these ethical mores justify punishment. Finally, an explanation of how Kantian ethics critique some aspects of consequentialist justifications for punishment shall be presented.

2. Deontology and Retributivism

Much like the utilitarians, Kant formulated a grounding principle on which he built his ethics. But while the ethics of utilitarians such as Jeremy Bentham and Beccaria are based on maximization of happiness in society, reached by assuming that man’s selfishness is the most basic positive force in civilization, Kant looked to a different maxim. For Kant the starting point was that the only thing that could possibly always be positive was the will to do good – the good will.\footnote{\textit{Kant}, supra note 24, at 49 (Kant 4:393).} While all other acts could be, at least theoretically, driven by a corrupt reason, the good will could theoretically be pure. Although an altruistic act can be driven by selfish reasons, the good will, has to be, by definition, good.\footnote{\textit{Id.} at 53 (Kant 4:397).} Kant postulates that the capability to wish to do good, the ownership of good will, is a basic characteristic of all human beings.\footnote{\textit{Id.} at 58 (Kant 4:404) and 79 (Kant 4:428).}
Because the good will is good, independent of what it aims to achieve, it follows that actions according to the good will also must be independent of inclinations. In opposition, actions made in accordance with other interests external to the good will are not independent of these interests, and are therefore based on what we ‘want’ (inclinations - what we are inclined to do) as opposed to what we ‘ought’ (duties) to do. This, in Kant’s ethics is the difference between duties and self-seeking purposes. Acting upon our good will, therefore, can only happen when we act according to duties; it is then that we are indeed independent of our wants and desires and are really truly free. Thus, acting according to the good will, that is, acting morally, is when human beings, according to Kant, are free.

This formulation is extremely theoretical, however. It states that when we act according to a duty that obliges us, we are free. But one may ask what creates such a duty? Moving from theory to practice, Kant succeeds in stipulating one duty, which is categorical and always applicable to all human beings completely independent of all interests and consequences, but also completely independent of any context. This is Kant’s categorical imperative. Kant formulates this imperative in slightly different ways in his Groundworks.
The first formulation of the categorical imperative is that one should act only according to that maxim whereby she can at the same time will that it should become a universal law. This imperative iterates a universal duty on members of a society to think of their actions in a generalized way. This formulation also shapes the basis of the right to punishment in Kantian ethics. Living in a society entails following the rules that govern that society. If we recall the earlier discussion of Durkheim, we see that these rules essentially define our society, that is, the existence of the society manifests itself by its acceptance of certain rules. Obeying these rules is a matter of duty, in the strictest Kantian sense – that is – when we obey the rules out of duty and not out of inclination we are truly free. Because, when we act, we should do so only according to that rationale by which we will that the rationale become a universal law, when we act counter to our duty, we essentially will that the duty to obey the laws be void. Moreover, if we generalize our action, we acquiesce that the same action, even when it is criminal, be also acted upon us. In other words, when we commit a criminal act, we acquiesce that criminal act be acted upon against us as well.

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58 Kant, supra note 24, at 47 (Kant 4:403).
59 Not all rules made by all societies are, of course, justified. Rules which violate the ability of the members of society to act according to their good will, for example, are rules which might not warrant obedience. A more specific discussion regarding which rules create a reason for disobedience and what that disobedience ought to entail is beyond the scope of this paper.
60 Durkheim, supra note Error! Bookmark not defined..
61 Kant, supra note 24, at 55 (Kant: 4:400).
Two justifications of punishment stem from this reasoning. First, we committed a crime by violating the criminal law as a duty in general. We willed that our private will overpower the will of the society of which we are part. But the force of criminal law cripples our will. The force with which the criminal law punishes us is the reinforcement of the societal duty over our own private deviation from it. By punishing us, the law reinforces the duty, and overpowers our aberrant will. This is done by the pain of punishment. Second, when we attack somebody, if we take the categorical imperative seriously, we justify being attacked. In this sense, when we commit a crime, we commit it upon ourselves as well – this is the idea of retributivism. We deserve the punishment in the sense that we have, by ourselves, committed the attack. The criminal law, in this sense, is the manifestation of our very will, as it reinforces this will (to attack somebody else) upon ourselves.\footnote{Id. at 473 (Kant 6:332)} The punishment is not only just because we have broken the law, but because we have perpetrated an attack against our fellow human being.

Because we are all endowed with free will, because we are all able, as human beings, to make decisions and to inherently obey our duty and follow the categorical imperative, punishment is not optional, but mandated. To deny punishment would be to deny responsibility, to deny that as perpetrators we have a responsibility for our actions and the ability to make choices. Because we are obligated to act in a way that respects the universally free will of all
members of society, when a member of society exercises his will and chooses to violate his duty, it is our duty to punish her, thus respecting her choice.\textsuperscript{64} Not to do so would be arrogant, it would place us in a superior position – as the proprietors of free will who think others’ will is not free, but rather constricted and therefore undeserving of punishment. This point will be revisited shortly when some of the rehabilitative aspects of the consequentialist justifications for punishment are critiqued.

Michael Moore has been one of the most prolific formulators of retributive justifications for punishment in the last few decades. Moore distills two basic notions of retributive justifications. The first notion is that criminals deserve to be punished for their wrongdoing, and that this is a sufficient reason for punishing them.\textsuperscript{65} The second is that punishment is not only sufficient, but that it is also necessary as a consequence of criminal action.\textsuperscript{66} According to this notion, punishment of the criminal is an intrinsic good; i.e. it requires no other justification, but is morally required.

Moore suggests, however, that retribution does not necessarily have to be deontological, that this last aspect is not a necessary requirement of retributivism, and that one may be consequentialist about retributivism.\textsuperscript{67} He comes to this conclusion by separating instrumentalism from consequentialism.

\textsuperscript{64} MARK TUNICK, HEGEL’S POLITICAL PHILOSOPHY 36 (1992).
\textsuperscript{65} Michael S. Moore, Justifying Retributivism, 27 ISR. L. REV. 15, 15-16 (1993)
\textsuperscript{66} Michael S. Moore, The Moral Worth of Retribution, PRINCIPLED SENTENCING (Andrew von Hirsch and Andrew Ashworth eds.) 110, 110 (2009).
\textsuperscript{67} Moore, supra note 66 at 19.
Instrumentalism when applied to punishment, according to Moore, manifests itself when punishment is aimed at achieving ends that are external to the punishment itself (ends such as rehabilitation, deterrence, etc.). This instrumentalism, according to Moore, is different from consequentialism, because consequentialism can still view retribution as the just reason for punishment (as opposed to a means to another end), but can view the punishment, or omission to punish a guilty party, as a means by which to increase the overall retribution.\(^68\)

There is a problem with this distinction, however, because consequentializing retribution means that a specific punishment is ‘used’, i.e. instrumentalized, to increase the aggregate retribution. Retribution, as Moore himself described it, is punishment meted out because it is good in and of itself, and because the perpetrator deserves punishment. If punishment is meted out for another reason, e.g. to increase the possibility general retribution (as in the case of state’s witnesses), it becomes instrumental rather than an end. This is in essence an aggregation of retribution that severs the link between desert and punishment.

Lingering on this difference is important, despite Moore’s eventual decision to choose a deontological approach to retributivism, because it highlights the potential misunderstanding of the argument that retribution is a

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\(^{68}\) Id.; and with greater detail Id. at 22-23.
good in itself. If retribution is, as Moore explains, a good that can be aggregated, then it can be instrumentalized and weighed against other goods in a consequentialist manner.\(^6\) However, if retribution is understood to be necessarily intrinsic and deontological, then it cannot be aggregated and consequentialized and it remains a coherent justification. This mistake flows from the term “good in itself”. One way to understand this phrase is by conceiving retribution as creating some sort of good, another is that retribution is itself good, not because of what it creates, but because it has intrinsic value. A deontological non-instrumentalist comprehension of retribution must follow the second of these two definitions.

A synthesis of the above comments on retributive justice would provide the following justification for punishment: A society is a group of people whose interactions are guided by a basic set of rules. For these rules to have manifest (as opposed to abstract) meaning they cannot be broken, or rather, breaking them must have a real physical corollary, otherwise they would remain abstract principles rather than rules. This corollary is punishment, i.e. pain induced for the express purpose of overpowering the perpetrator’s will and demonstrating that he is subject to the rules – which we shall call criminal law. This pain is not caused for any other reason, not to express what the law is to others, nor to deter, nor to rehabilitate the perpetrator, but solely to give manifestation to the

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\(^6\) Martin Peterson, *A Royal Road to Consequentialism*, Ethical Theory and Moral Practice, [http://www.springerlink.com/content/w024x37667362660/fulltext.pdf](http://www.springerlink.com/content/w024x37667362660/fulltext.pdf).
existence of the law, without which there is no society. The perpetrator, however, is not an instrument for the expression of the law, but is rather inflicted with pain because he chose to break the law. Therefore, by virtue of his actions, the perpetrator deserves to be punished for the choice that he made. Lacking the perpetrator’s choice to break the law, there would be no cause for the law to manifest itself, or in other words, it is solely the choice of the perpetrator to break the law that creates and justifies the punishment.

Because this section is meant only to introduce retributivist justifications for punishment, this quick exposition will have to suffice as an explanation of the underlying principles of non-consequentialist punishment. Having laid down this groundwork, we can now proceed to critique consequentialist justifications for punishment.  

3. Deontological Critique of Consequentialism – confusing duty and inclination, instrumentalizing the individual, and violating the idea of freedom.

Deontological theory of punishment is convincing not only because it justifies punishment, but also because the theory provides a strong critique of consequentialist justifications. Whereas the first Kantian formulation is useful in justifying deontology, the second formulation of the categorical imperative is useful for critiquing consequentialism. The second formulation states: “act in such a way that you treat humanity, whether in your own person or in the

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70 Some of these themes will be once again revisited when critiques of deontological theories will be presented infra.
person of any other, always at the same time as an end and never merely as a means to an end.”\textsuperscript{71} Three critiques stem from Kant’s second formulation. The first critique relates to the way in which the concept of punishment is conceived in consequentialist thought. The second and third critiques relate to the role of the defendant in consequentialist punishment.

The first critique relates to the manner by which the decision to punish is justified generally. Central to Kant’s ethics is the idea of deontology. According to this principle, because a moral action derives from a duty, its justification ought to be rooted in the duty itself, and not in its result.\textsuperscript{72} Simply put, if there is a duty to punish, then that duty can only exist because the act of punishing is justified in and of itself, and not because some other external benefit is created because of the punishment.\textsuperscript{73} According to this rationale, when we decide to punish, we should do so not because of the inclination we have towards the positive outcome of the punishment, but because we believe we have a duty to punish in the first place. The maxim of our action should be that punishment is a good in and of itself, and not because it may lead to some positive ulterior consequence. Consequentialists who justify punishment conceive it as an evil rather than a good, which is only acceptable because it leads to positive consequences. From a deontological perspective, if consequentialists are to be taken at their word, we should actually have a duty not to punish rather than to

\textsuperscript{71} \textsc{kant}, \textit{supra} note 24, at 80 (Kant 4:429).
\textsuperscript{72} \textit{Id.} at 55 (Kant 4:400).
\textsuperscript{73} \textsc{kant}, \textit{supra} note 62, at 473 (Kant 6:332).
punish (because if we believe that punishment is inherently bad then it should not be practiced), even though we might have an inclination towards the positive external consequences that punishment produces.\(^{74}\)

It may be helpful to show how, unlike the consequentialist justification for punishment, the deontological justification for punishment survives this critique. The deontological retributive justification for punishment (articulated above according to the first formulation of the categorical imperative) justifies punishment for its own sake, not for an external end. Retributive punishment is not a means to some external end such as the improvement of society, or the greater good of the community. The criminal is punished because he deserves his punishment, for the reason that, as a moral agent with a free will, he has decided to commit a crime.\(^{75}\) Georg Hegel develops on this theme when he states: "The injury . . . which is inflicted on the criminal is not only just in itself (and since it is just, it is at the same time his will as it in itself, an existence . . . of his freedom, his right); it is also a right for the criminal himself, that is, a right posited in his existent will, in his action".\(^{76}\) Hegel tells us that the free will of the culprit is not only the object of the punishment (inasmuch as by punishing we subjugate

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\(^{74}\) This of course highlights the difference between the two paradigms – consequentialists do not think in this manner, which is why they are consequentialists and not deontologists.

\(^{75}\) Tunick, *supra* note 64, at 35.

\(^{76}\) *Hegel, Philosophy of Right* § 100 (H.B. Nisbet trans., 2003) (German language in Brackets omitted) (1820).
the free will of the accused), but is also the forerunner of the crime itself. This creates what Allan Brudner calls “the thematic unity” of criminal law.\(^7\)

The second critique, focusing on the role of the criminal in punishment, highlights the notion that a person ought to be treated as an end rather than as a means. Like Kant’s first derivation of the categorical imperative, which is quite close to the golden rule,\(^8\) the second derivation too is quite intuitive, and the opposition to the treatment of fellow human beings as chattel fairly stems from this principle. Unfortunately, in complex moral situations, such as in the case of punishment, that intuition sometimes gets lost.

People who espouse consequentialist justifications for punishment lose sense of the convicted felon as a human being, insofar as being a human being means being an end rather than a means to an end – and to view him as an instrument to be used to improve society.\(^9\) As Kant explains it, punishment “must always be inflicted upon him (the criminal) only because he has committed a crime. For a human being can never be treated merely as a means to the purposes of another or be put among the objects of rights to things: his innate personality protects him from this. . .”\(^10\) Because consequentialist justifications view punishment as a good to society, external to

\(^8\) See, e.g., the rule in the Mishna in Seder Nezikin, Pirkei Avot 2:13 “That your friend’s honor be likeable to you as your own.” A similar idea is also found in the New Testament. _Matthew_ 7:12.
\(^9\) A rehabilitationist whose interests are purely therapeutical and specific in the sense that they aim to solely ‘heal’ the criminal would make an exception to this criticism, though, of course, not to the critique that this justification for punishment does not respect the criminal’s free will.
\(^10\) _KANT_, _supra_ note 62, at 473 (Kant 6:332).
the punishment itself, the theory necessarily views the person bearing the punishment as a means to achieve a societal end. Examining the different consequentialist justifications shows how problematic this is.

General deterrence is the most palpable example of the use of the individual, as a means, for the improvement of society. The culprit is punished not for his actions, not because of what he did, but in order to accomplish a means external to his self. General deterrence reasons that denying human beings their freedom, and sometimes their life, against their will, is justifiable for the sake of society. The individual is essentially turned into a tool. Her subjective self is turned into an object whose innate free will is subjugated to the general good. It is interesting to note, how once the reasoning for the punishment itself stops being deontological and becomes consequentialist (punishment is no longer for the sake of punishment), so does the criminal himself stop being treated as an end in and of himself and become a part of a social project. This kind of justification raises the question whether determination of guilt is necessary in the first place. Of course, if we want to credibly deter the public from committing a certain act, it is necessary to show that this act will entail punishment. But at least theoretically, if the lack of guilt can be hidden from the public view, then punishing complete innocents, for the achievement of general deterrence, could be just as moral according to this reasoning. The same critique applies to communicative theories of punishment. TEN, supra note 23, at 36.
Vyshinskyism becomes not a ‘slippery slope’ danger, but rather a justifiable exercise.\textsuperscript{83}

Incapacitative and rehabilitative justifications for punishment can be critiqued in the same manner, though because the punishment in the case of incapacitative or rehabilitative punishment is not meant as a demonstration, the risk of misuse for the formation of a public agenda is much smaller. Yet in both cases, the victim is still not the focal point of the punishment. The denial of the prisoner’s liberty or life is not justified by him being an end, but rather as a means to make society ‘safer.’ We would have to be quite naïve to think that rehabilitation is aimed at bettering the life of the criminal as opposed to ‘making him safe for society;’ incapacitation is certainly not aimed at protecting the rights of prisoners either.

The third critique, stemming from the importance of the free will to the second derivation of the categorical imperative focuses on the detachment of the principle of guilt from punishment under the consequentialist justifications.

One instance where this detachment becomes evident is in the existence of the temporal paradox. The paradox exists when forward-looking punishment is based on past behavior. Utilitarians generally concede that only guilty people ought to be punished. But if the punishment is forward looking

\textsuperscript{83} Vyshinsky was Stalin’s Chief Prosecutor during the various purges and show trials in the nineteen thirties and forties. \textit{See Aleksandr Solzhenitsyn, Gulag Archipelago}, 282 (Vol. 1, Thomas P. Whitney, trans. 2007) (1973).
rather than retrospective, it is not entirely clear how guilt fits into the scheme. If one chooses to punish because somebody is guilty of having committed an act in the past, and that punisher focuses on that act, then the punishment is based on the responsibility for that past act. But if one chooses to punish because of something that will happen in the future, is that person not essentially punishing because of the possibility of future wrongdoing? In other words, forward looking punishment severs the tie between the requirement of past guilt and punishment, creating a temporal paradox.  

Because forward-looking punishment cannot be meted out for a crime that has not been committed, the alternative is that the punishment is for an anticipatory wrongdoing. This alternative implicates the severe conundrum of assuming away free will. If the idea of guilt and responsibility, as the fundamental principles for punishment, is based on the notion that the criminal acted of free will, then assuming that the same criminal will commit a crime in the future is tantamount to assuming her free will away. In other words, if we assume that people are innately able to determine right from wrong, and act right by following their own free will, forward looking punishment is tainted by

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84 There are mechanisms used by sovereign states at times to incarcerate people and prevent them from posing a danger even though they are not guilty of committing a crime. The two most common mechanisms are administrative detention and forced institutionalization. Both raise serious human rights concerns because of the potential of unchecked abuse they contain. For in depth analysis see GEORGI오 AGAMBEN, HOMO SACER, SOVEREIGN POWER AND BARE LIFE (Daniel Heller Roazen, Trans.) (1998) (1998).

85 H.L.A. Hart and other proponents of mixed theories try to solve this conundrum by combining the theories. See below XXX

the assumption that the criminal will not follow her free will and necessarily commit a crime in the future. Assuming that a person will commit a wrongdoing in the future is a deterministic assumption that, basically, assumes away the person’s free will. This assumption is problematic even if we don’t adopt Kant’s assertions that a person who is free will choose to do good. Even if we adopt a more neutral stance according to which persons exercising their free will might choose to do good or evil the temporal paradox is problematic because it assumes the opposite – that a person will choose to do evil – i.e. that there is no choice at all. Coming full circle, assuming away the free will is basically assuming away the idea that responsibility – and guilt flowing from responsibility – is requisite for punishment.

It is not surprising, therefore, that consequentialist social determinists who were most active at the end of the 19th and beginning of the 20th century suggested that the idea of guilt be abandoned altogether. The determinists argued that if the odds are so highly stacked against the accused, then she could not possibly be held responsible for her crimes. This is one of the great paradoxes of progressive thinking – for in attempting to act humanely towards the poor and the destitute, progressive thinkers deny these destitute exactly that which is common to all humans. When asking to forgo punishment in light

88 Rothman, supra note 43, at 69.
of environmental determinism, and arguing lack of culpability due to lack of choice, the progressive thinkers put the very people whom they sought to save outside of humanity.\textsuperscript{89} According to social determinists, criminals should no more be responsible for their criminal actions than insane people should be held responsible for their infirmity. According to this outlook, trying to hurt the criminal by exacting retribution is similar to trying to hold a sick person to blame for his illness and hurting him further because of it.\textsuperscript{90} Hoping to have a criminal’s situation improve by penitence is as vain as hoping for a sickness to heal out of its own volition.\textsuperscript{91} The medical determinists, full of compassion and the enthusiasm of a new found wisdom promised to heal the criminal of his criminality.\textsuperscript{92} Happily this brand of consequentialism is largely is rarely argued explicitly, though, as we shall see, during sentence determination, some of its aspects are still very persuasive to modern day judges.

This temporal determinist problem is most visible in incapacitative and rehabilitative justifications to punishment. The incapacitative justification for punishment is that a dangerous criminal should be incarcerated so that she cannot physically commit crimes anymore. In punishing someone for the sake of incapacitation, we are stating that on account of her actions in the past, we are judging her incapable of making correct choices in the future and

\textsuperscript{89} C.S. Lewis, \textit{The Humanitarian Theory of Punishment}, 6 RES JUDICATAE 224, 225 (1953).
\textsuperscript{91} Id. at 122.
\textsuperscript{92} It is quite telling that at the same time, another progressive project based on medical determinism made its first steps – the eugenics project. See \textit{id} at, 58.
therefore denying her the physical ability to make choices at all. If human beings are *apriori* able to make moral decision based on their innate faculty for reasoning, denying a culprit’s ability to make a future moral decision is tantamount to claiming she is incapable of human reasoning, no longer a person capable of controlling her life, but rather an object to be controlled. Were we to accept this very disturbing notion, we might have found ourselves wondering why limit punishment to those who have already sinned. Would it not be more prudent, to find who is going to commit a crime in the future and prevent him or her from committing a crime by punishing them ahead of time and save us the trouble of the crime? Recidivism is common place, and often a good chance that someone who has broken the law once will do so again, but surely there are others signs which could point out future criminals. Incapacitative punishment is problematic because it assumes that we are not free to make choices; it assumes that on the basis of who we are, we will strike out at society. Incapacitative justifications do manifest themselves fully elsewhere in sovereign practice – in administrative detention. And indeed, preventive administrative detention is based on dangerousness not on guilt. Doubtlessly this is the reason preventive detention is not administered after a full trial (how can one prove the future beyond reasonable doubt?) and considered an extreme and contested measure that does not align with a humanist conception of modern democracies.
The most logical justification stemming from social determinism is rehabilitative. Rehabilitation assumes that the criminal is incapable of making moral choices on his own. Punishment and incarceration is required so that he can be reeducated in a manner that will prevent him from committing crimes in the future. In other words, the punishment is only incidental to providing the prisoner with the capability of learning right from wrong. But rehabilitation is problematic as a justification for punishment because, like incapacitation, it assumes away the very element that justifies punishment – free will to tell right from wrong.\textsuperscript{93} If a person needs rehabilitation because she does not have the capacity to tell right from wrong, she should not be punished in the first place, because lacking that capacity she cannot be guilty. There are people in society who are considered to be lacking in the capacity to make moral choices. We do not punish them, however. Rather, we commit them to mental institutions. This practice is highly contested, and critiques of the serious ramifications on the inmate’s liberties have found their way to both academic literature and popular culture.\textsuperscript{94} This critique should not be construed to mean that providing inmates with the choice to educate themselves is wrong. It does, however, state that justifying the incarceration \emph{apriori} because it presents an opportunity for criminals to be reeducated, or consequently, determining

\textsuperscript{93} Herbert Morris compares the rehabilitative rationale for punishment to the treatment of animals. See \textsc{Herbert Morris, On Guilt and Innocence,} 43 (1976)

\textsuperscript{94} See, \textit{e.g.}, \textsc{Michel Foucault, Madness and Civilization} (Richard Howard trans.) (1988) (1973) (1961) and Milos Forman, One Flew over the Cuckoo’s Nest, 1975.
release date based solely on participation in “rehabilitative” programs, is contrary to the idea of punishment meted out because of guilt.

4. Critiques of Retributivism – vengeance, impracticality, and absolutism

Retributivism too has not gone without its share of criticisms. The root of most of these is the ambiguous meaning of the notion of desert and what is considered by many to be a tenuous connection between the commission of the crime and the pain inflicted as punishment. The most intuitive of these reactions to retributive deontological punishment argues that punishment solely for the causation of pain is no different from revenge. This reaction, however, misses the point of the trial process in criminal law. The story of Orestes’s escape from the Furies and his subsequent trial was recalled in the beginning of this section. It is exactly the process of the trial that transforms the retributive punishment from blood vengeance to just punishment. The trial process, when conducted with the aim of determining the responsibility of the culprit, looks at the very limited set of legal questions that determine guilt or innocence and removes the allegedly criminal action from its social context (e.g. a family feud). By conducting a trial that examines solely the actions of the defendant, by scrutinizing whether she acted of her own free will, society determines the justice or injustice of the act, irrespective of the consequences it aimed to achieve and without regard to the reason with which it had been acted
Thus, if we determine that murder is a crime, the existence of a previous blood-feud should not be relevant. With the exception of a very limited number of defenses that relate directly to the freedom of the individual to act, the deontologically driven trial cuts the chord of revenge by determining responsibility over an act, rather than allowing for the context to rehash the violence again and again.

A second type of critique aims at the idea of desert. J.L. Mackie points to what he considers a paradox in punishment stemming from the wide acceptance of deserved punishment on the one hand, but the inability to explain it “within a reasonable system of moral thought”. Mackie separates the justifications for punishment into negative retributivism (the innocent ought not to be punished), positive retributivism (the guilty ought to be punished), and permissive retributivism (the guilty may be punished). The difficulty facing retributivists, according to Mackie, is justifying positive retributivism. After surveying what he considers the inadequate justifications for the use of desert, Mackie proceeds to describe three interconnected elements that make up positive punishment: harm, prohibition, and sanction. This interconnectedness between harm and the prohibition on the commission of the act, however, do not justify the sanction according to his analysis. Lacking an analytically

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95 Thus crimes of conscience are still considered crimes.
96 J.L. Mackie, Morality and the Retributive Emotions, 1 CRIM. JUST. ETHICS 3, 3 (1982)
97 Id., at 4
98 Id. at 6-7.
persuasive answer, Mackey provides an alternative biological evolutionary response for human retributive inclinations.99 Mackie’s critique, however, does not require a return to primal emotions. What Mackie’s analysis misses is that without the sanction, stating that something is forbidden would be meaningless. Because we want to forbid harm (or more precisely we want to define boundaries for behavior) we must have rules to that affect. As has already been shown above, the physical manifestation of rules are the sanctions applied to the breaking of the rules. One may argue that reprobation is enough and that punishment is not necessary. This is, however, a question of ordinal, not cardinal importance. Reprobation is a type of a censure. Whether we believe an oral censure is enough, or whether sever acts require a stronger censure is a question of degrees, not of the justification of the practice of punishment itself.

A third, and very substantive criticism, can be found mostly among modern sympathizers of retributive justifications for punishment. This critique argues that theoretically retribution might be a good justification for punishment, but practice in the real world renders it impractical.100 This criticism attacks retribution from two angles. First, because retribution is absolute, goes the argument, and the duties it produces are absolute, in a world of limited resources, the theory provides no way to allocate these limited resources, and

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99 Id., at 8.
100 See, e.g., Cahill, supra note 18.
therefore becomes irrelevant. The second claim is that because of its absoluteness, deontology leads to results too extreme to be practicable. The answer to both of these questions is complex and will be explored further in the proceeding chapters with greater depth. An outline of the answer to each of these criticisms, however, is as follows.

The critique that the inability of deontologically based punishment to distinguish between various cases and therefore to provide guidance as to the allocation of these resources assumes that such a material difference between cases exists. But stating that a certain theory of punishment does not distinguish between equals is not a valid criticism to that theory, unless it succeeds in justifying, from the outset, that there is good reason to distinguish between the equals. More specifically, deontological analysis might see no difference between different perpetrators because according to the basic tenets of the theory, all perpetrators ought to be punished. To undermine the theory, stating that these perpetrators are actually different and therefore ought to be treated differently is insufficient. Rather, to undermine the theory, one would need to explain how their difference matters. This observation is true of any consequentialist theory as well. Supposing the punishment of two perpetrators would produce the exact same result, e.g. a given level of deterrence. The inability to distinguish between the two perpetrators, and thereby the inability

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101 Id. at 828-29.
to decide who should be prosecuted, would not undermine the consequentialist theory. This would only mean that the two are equal under the given theory of punishment and that therefore there is no moral reason to choose one over the other. In other words, to claim that retributive theory is unable to create coherent policy is to state that the distinctions made according to the theory are no good. Making this claim has nothing to do with the practicality of impracticality of the theory, but with the manner by which it allocates responsibility. The subtext of this criticism is that a theory that creates prosecutorial policy based on consequentialist determinations is a better one because it would allow making prosecutorial decisions based beneficial outcomes an idea that deontological retributivism disavows.\textsuperscript{103}

The second branch of the criticism against retributivism’s practicality argues that deontological theories of punishment create duties that lead to potentially catastrophic and impossible outcomes. This critique aims at the heart of the categorical imperative exactly because of its “categorical” nature. When writing about the torture of terrorists in a ticking bomb scenario, Michael Moore solves this problem by adopting a ‘threshold’ deontologist position.\textsuperscript{104} This position, notwithstanding how much emphasis is placed on the deontologist aspects of punishment, is too permissive in adopting a consequentialist approach exactly at situations where the difference between

\textsuperscript{103} This line of reasoning will be further explored in the chapter dealing with prosecutorial discretion. \textit{Infra xxxx}
\textsuperscript{104} \textsc{Michael Moore}, \textit{Placing Blame}, 706 (1997).
consequentialism and deontology matter most. A different possible response to this criticism, however, is that while the duty to punish is indeed a weighty one, and to some degree forms the underlying norm to all the other rights and obligations created by people in a society, it is not the sole or absolute duty that critics make it out to be. Other grounds to act according to duties that are not the duty to punish do exist, and at given situations these duties will conflict in a manner that makes acting according to more than one duty impossible. The solution to this problem is to understand that ground to act according to a duty cannot create a duty if it is impossible to fulfill that duty, and that there will be times when a ground to act according to a duty exists, but that the duty itself does not arise because it is impossible to comply with.

Another criticism aimed at retributivist punishment assumes that adoption of an absolute duty of retributivism is impossible, because of its incredibly high social costs, and that the only way to justify punishment is to bring bear another, consequentialist justification for punishment. Along these lines, Doug Husak’s criticizes the institution of punishment rather than the actual desert of the perpetrator. Husak claims that even if the commission of the crime is sufficient for punishment to be deserved, this desert does not mean that punishment should be inflicted. Husak claims that retributive justifications are

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105 Morris, supra note 93, at 57.
106 This matter will be further explored in the chapter dealing with the defense of duress. Infra XXX.
108 Id., at 447.
insufficient to justify the costs associated with desert due to the drawbacks of punishment (costs of incarceration, possibilities of mistake).\textsuperscript{109} Husak’s conclusion is, therefore, that while the guilty might deserve to be punished, we ought to require something more for the actual punishment to be justified, and suggests such a consequential goal could be the reduction of crime.\textsuperscript{110}

Mitchell Berman suggests there is a similar gap in the deontological justifications for punishment. Berman divides punishment cases into two main categories: core punishment which is meted out to deserving individuals, and peripheral cases, in which, due to error, punishment is meted out to undeserving individuals.\textsuperscript{111} Berman argues that deontological retributivism can be used to justify the former but not the latter. Peripheral cases can only be justified by the good consequences of the general scheme of punishment.\textsuperscript{112} The crux of Berman’s argument, therefore, is quite similar to Husak’s in that it points to the costs of having a system of criminal punishment; it is different, however, in that it focuses on the certainty of error and suggests that the only manner to justify punishment despite this certainty is to justify parts of punishment consequentially.

The reply to Berman’s criticism is based on the meaning of agent relativity and deontology, and can be partly found in Michael Moore’s response to the

\textsuperscript{109} Id., at 451
\textsuperscript{110} Id., at 459.
\textsuperscript{111} Mitchell N. Berman, Punishment and Justification, 118 ETHICS 258, 261 (2008).
\textsuperscript{112} Id., at 283.
challenge of the supposed inadequacy of deontological theories to deal with false convictions.\footnote{Michael Moore, *Justifying Retributivism*, 27 ISRAEL LAW REVIEW 15, (1993).} The very meaning of a deontological theory of punishment is that the theory focuses on intent (or knowledge) of specific circumstances and not on general consequences. In a system where punishment is meted out following due process of law, we intentionally raise procedural safeguards so as not too recklessly punish the undeserving.\footnote{Id., at 22.} As deontologists we can demand no more of ourselves than to act so as not to knowingly cause harm to any given individual because of our action (or omission). David Dolinko finds this reasoning unconvincing because he claims that Moore is essentially adopting a doctrine of double effect, according to which the intended benefit of one action can justify the unintended damage of another – this, Dolinko correctly argues, is a consequentialist rather than a deontological justification for action.\footnote{David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment*, 16 LAW AND PHILOSOPHY 507, 512 (1997).} As an example, Dolinko posits the responsibility of manufacturers who knowingly produce and market, through good faith intermediaries, a fatally faulty product that will only kill a few of the consumers.\footnote{Id. 513.} Dolinko argues that because the manufacturers don’t intend to cause the harm (they only intend to make profit), and because they aren’t causing the harm to any specific individual, they cannot be held responsible under Moore’s explanation.\footnote{Id.} Dolinko misses the mark, however, because his definition of intent is too narrow.
Intent, in deontological reasoning (and in criminal law, at least in common law systems), refers to the intended action and a foreseeable result,\textsuperscript{118} not to the intended result (with the exception of specific intent crime like murder). The producers of the faulty product in Dolinko’s example would be criminally responsible actions because they intended to create the fatal product, not because they intended for the result to be fatal. In other words, the doctrine of double effect is never justifiable according to deontological standards if it is applied as a mere balancing test between competing interests. When crafting a system of criminal law and due process, however, what is created is not a faulty product, but rather a product (a system) in which a great amount of due care is given to preventing false positives.\textsuperscript{119}

Common to Husak’s, Berman’s and Dolinko’s critiques is their attempt to solve perceived inconsistencies in retribution by adopting a mixed theory of punishment incorporating both intrinsic and instrumental justifications for punishment. Perhaps highlighting these theories and the problems they raise will further assist in explaining why they do not provide a good solution to the problems that plague what are considered “purely” instrumental or intrinsic theories of punishment.

\textsuperscript{118} GLANVILLE WILLIAMS, supra note 102, at 35
\textsuperscript{119} One might argue that this amount is not sufficient because we have false positives. The reply to this argument is to point out once more that while punishment is an important duty, it is not the only one. See supra note Error! Bookmark not defined., and accompanying text.
5. Mixed Theories - Justifications combining both paradigms – presentation and critique of their inconsistency.

Many theorists suggest that just punishment is achievable only as a combination of the two justifications. For example, C. L. Ten argues that retributive theories, while requiring that some action be taken in the face of crime, provide inadequate justifications of punishment. In “Doing Justice, The Report of the Committee for the Study of Incarceration”, von Hirsch makes a similar claim, arguing that utilitarian considerations, provide the additional justifications required to make punishment not only deserved, but also worthwhile executing.\(^{120}\) H.L.A. Hart provides a slightly different mixed theory, arguing that utilitarian reasons are sufficient for punishment but that they ought to be “side-constrained” \(^{121}\) by considerations of guilt – thereby creating a mixed theory.

Von Hirsch starts by examining punishment from the perspective of general deterrence\(^{122}\) and very quickly confronts the problem of punishing an innocent individual for the benefit of society. His solution to this dilemma is to require that the perpetrator also deserve to be punished so as not to abuse his basic rights. This solution is problematic, however, because adopting a moral theory does not only entail adopting the reasons for action it justifies, but also the reason for action it negates. In the case of consequentialist instrumentalist

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\(^{122}\) Von Hirsch, supra note 120, at 38.
theories, the negation is of any actions that do not increase the overall good. If the philosophical tenet guiding von Hirsch is consequentialist, it is unclear what is the justification for refraining from punishing somebody who is not guilty. Von Hirsch declares that though he considers the utilitarian justification to be a just one for punishment, he cannot adopt the core utilitarian principle according to which punishing an innocent would be justified if it increased the greater good, and is therefore tempering this theory with a desert requirement that recognizes “inviolable” human rights founded on justice. But where does this justice come from, if a just action is determined by its good consequence is not explained.

When von Hirsch tries to justify his mixed theory by ‘moving’ from a deontological to a utilitarian perspective, he encounters a similar problem. When approaching punishment from this direction, von Hirsch and Ten essentially adopt the critique posed by Mackie that desert alone cannot justify punishment. Their solution, like Husak’s, is to augment the retributive justification for punishment with consequentialist ‘buttresses’ thereby validating the pain, and the costs, associated with punishment. There is reason to believe they adopt this solution because they understand the Kantian account

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123 VON HIRSCH, supra note 120, at 50.
124 Id., at 51.
125 Id., at 53.
126 Mackie, supra note 96.
127 Husak, supra note 107.
128 TEN, supra note 82, at 76; VON HIRSCH, supra note 120.
of punishment, to be absolutists and untenable.\textsuperscript{129} If this absolutist positive retributivism\textsuperscript{130} is abandoned, however, then guilt becomes a necessary, but insufficient reason to punish (negative retributivism). What is missing, therefore, is a sufficient reason to punish: a consequentialist one.

Similarly to the problem faced when attempting to incorporate a deontological restraint to consequentialist justifications, Ten and von Hirsch’s arguments encounter a problem in the way they attempt to merge retributive and consequentialist justifications. Deontological morals distinguish between different types of behaviors in terms of their moral worth. The easiest two distinctions are between (a) actions taken out of pure inclination and against a duty. These are actions that we take though we know they are wrong because we enjoy them. And (b) actions taken against our inclination but according to a duty; i.e. actions that we do not enjoy, but we do because it is our duty. Action (a) is a patently immoral act, and action (b) a purely moral act. But there are two other variations, which apply to a mixture of deontological and consequentialist justifications for punishment. One is an action that we take out of inclination, but that is also our duty(c); the other is an action that we take out of duty but that we are also inclined to do (d). A weakened version of the first of these is the “middle of the way” type of justification that Ten and von Hirsch’s theory offers, i.e. we punish to create a good consequence (inclination) but

\textsuperscript{129} Ten, Id., at 75.
\textsuperscript{130} Mackie, supra note 97.
only in cases we have a duty to do so. An action of this sort is problematic in terms of deontology because it leaves unanswered the question whether we act out of duty or out of inclination. Differently put, if one acts according to inclination, then the duty to act is no longer the driving force and the action is therefore not the result of free will, but rather of inclination. If for an act to be morally meritorious, it ought to be solely out of duty and not out of inclination as well, then this middle of the way justification fails the test. This does not mean that one should suffer every time one acts according to duty (option (d) above). What this does mean is that the lodestar ought to be the necessity to act according to duty only, and not according to duty and inclination. If a court places both retribution and deterrence as justifications for punishment, it is literally stating that it punishes both because of duty (retribution) and because of inclination (deterrence). These mixed theory, therefore, are incoherent both from a consequentialist, and from a deontological perspective.

Hart’s version of this theory proceeds from a different angle, though he faces similar difficulties. According to Hart, the ‘General Justifying Aim’ of punishment is utilitarian.\(^{131}\) But Hart is aware that utilitarian justifications for punishment create a serious problem with the notion of guilt and that believes that punishment of the innocent is inherently unjust.\(^{132}\) He therefore suggests


\(^{132}\) *Id.*, at 12.
that the General Justifying Aim can be divorced from the manner in which desert is distributed and suggests that punishment has a separate retributive ‘Distributive’ aspect. Accordingly, punishing without actual benefit causes useless pain and suffering, but maintaining retribution as a distributive aspect of punishment assures that the Principle of Justice is not violated. Hart’s explanation is, however, is flawed.

If according to utilitarian reasoning morality is achieved by maximizing utility, it is unclear why the decision who to punish is exempt from this reasoning and the determination who is guilty can be made according to non-utilitarian grounds. Hart’s side-constraining ‘Principle of Justice’ remains unjustified according to his own theory. In ‘The Concept of Law’, Hart presents a theory of justice and injustice, according to which the difference between the two is couched in the Aristotelian distinction between equal and unequal. Essentially, a just rule is one that treats alike cases alike, but distinguishes and treats cases that are not alike differently. This explanation, however, does not provide a basis for determining why punishing the innocent is not like punishing the guilty, when the purpose of punishment is utilitarian rather than retributive and therefore focuses on consequences rather than on desert.

133 Id. at 11-12.
134 Id., at 21-22.
136 Id.
In other words, Hart suggests that punishment is supposed to create deterrence, that we only punish those who are guilty because punishing the innocent would be unjust, and finally that when we determine how severely to punish in guilty, we return again to deterrence calculations when choosing the sentence. Hart cannot, however, explain this qualifier from a utilitarian perspective. Thus, when Hart says that only the deserving ought to be punished, he falls back to a retributive justification for desert that is incompatible with his general moral (utilitarian) theory.

At the end of the day, mixed theories are logically internally contradictory and therefore cannot be morally justified either by consequentialists or by retributivists.

6. Conclusion

I have examined at some length the consequentialist and the deontological justifications for punishment in municipal law because this analysis is crucial to understanding the following analysis of international criminal law. Thus far, I have shown the distinctions between these two paradigms of criminal law and have further demonstrated that these two paradigms stem from a very different understanding of the role of criminal law in society. This section began by recalling two constituting myths about criminal justice. Based on the analysis conducted so far, this article claim is that
deontological justifications for punishment live up to the values these two myths allegorized. As was seen in the allegories, deontological justifications as opposed to consequentialist justifications, focus solely on the guilt of the defendant, concentrating on the defendant’s action and starting from a point of respect to the defendant’s innate ability to tell right from wrong. Moreover, a trial conducted in order to discover the measure of the defendant’s responsibility is the means by which the justice in punishment is achieved and the neutral punishment legitimized. Furthermore, the deontological critiques of consequentialist justifications listed above make consequentialism an unviable paradigm for justifying punishment, insofar as the basic notion that human beings are independent beings with a free will is accepted as a basis for criminal law. This will conclude the examination of the two paradigms for understanding criminal law for this article. The analysis was not meant to develop a complete picture of a theory of punishment because it would far exceed the scope of this article. It was meant, however, to portray the basic principles that underlie each paradigm and the inconsistencies related to adopting a theory that strays from a strong retributive core as a justification for punishment. The next section will examine whether international criminal law is different from municipal criminal law in a manner that requires adopting a different assumption about the reasons justifying punishment.
C. Theories of Punishment in International Law

The previous section presented an analysis of the core concepts of justifications for punishment as understood in the Western tradition. This analysis formed the basis on which to investigate whether international criminal law is different from national criminal law in a manner that validates disassociating retributivism as a central core for the justification of punishment. This section will conduct this investigation in three stages. First this section will review the statements made by international tribunals regarding the justifications for punishment and see if these tribunals make an explicit statement that could suggest that international criminal law is different from national criminal law in a manner that would support adopting a different justification for punishment. Second, the section will review academic writing to see if the analysis provided by experts in international law provides a novel understanding of this issue. Finally, based on the above sources the section will adopt the hypothesis formulated earlier, that international criminal law, like national criminal law, ought to be based on agent centric retributivism.

Before proceeding, a word might be warranted on the viability of transplanting core national criminal law concepts unto international criminal law. As detailed above,\textsuperscript{137} national criminal law is a system of prohibitions – of duties owed by members of a society (a sovereign nation). As with all duties,\textsuperscript{137} See supra note 30, and accompanying text on the role of criminal law in society.

\textsuperscript{137} See supra note 30, and accompanying text on the role of criminal law in society.
there are correlative right holders. In criminal law, the right-holder is society itself (as opposed to civil law in which the right-holders are individuals). In other words, being part of a society subjects the members of that society to certain duties. Lack of compliance with these duties is met with a sanction. This explanation can also be transferred so that international community, rather a single national community, is the right-holder. In the international arena, the duties owed prohibit behaviors that we find so repugnant that they injure humanity as a whole, not just a specific national community. These behaviors constitute international crimes. This group of duties is naturally smaller than the duties owed in national criminal law because they are duties common to a large variety of different cultures (hence the Rome Statute is much smaller than national penal codes). The following pages will examine if perpetrators who violate these duties owed to humanity as a whole ought to be punished on retributive or consequentialist grounds.

I. The Decisions of International Tribunals – Minimal Guidance

One might think the most obvious places to find the rationales that ought to be used to justify punishment are the statutes and conventions that established the different tribunals. The constituting legal documents establishing the various international tribunals, however are ambiguous regarding the justifications for punishing individuals charged with committing international

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138 I refer here to the idea of correlative rights and duties in the Hohfeldian sense; see Wesley N. Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 YALE L.J. 16, 28 (1913-1914).
crimes. The tribunals’ constituting documents speak of ending impunity,\textsuperscript{139} of contributing to the restoration and maintenance of peace,\textsuperscript{140} and of halting future violations,\textsuperscript{141} but do not clearly answer the question “why we ought to punish?”

When analyzing the opinions rendered by the international tribunals, this section will look only at the express statements they have made regarding the reasons for punishment. Although much can be gleaned about the way the tribunals view the justification for punishment from the way the tribunals rule on different issues, this article will search for explicit statements in which the tribunals point to the justifications for punishment in order to lend legitimacy to their actions.\textsuperscript{142} Because the ICTY and ICTR are presided over by the same appellate body, and because the basic justification for punishment ought to be the same for both tribunals, and indeed their rhetoric is quite similar, the two tribunals will be examined together.

\textsuperscript{139} Preamble to the Rome Statute of the International Criminal Court.
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} This is not the only means by which to determine how the tribunals justify punishment. Examination of the decisions of the tribunals on specific issues (for example, under what circumstances the defense of duress applies) will reveal how the tribunals actually apply the theory, but is beyond the scope of this article.
Scarce discussion of the justifications for punishment exists in the opinions of the international criminal tribunals.\textsuperscript{143} This paucity is both understandable and disappointing. On the one hand, that the tribunals do not go into long academic and analytical discussion regarding philosophical questions of criminal theory is understandable. The mandate of these tribunals is to try criminals, not to engage in complex and potentially divisive analysis. On the other hand, because of the international tribunals’ relative novelty, one could expect, and indeed one may find, very rich discussions of different theoretical aspects in the legal material.\textsuperscript{144}

One of the early decisions by the Trial Chamber of the ICTY attempts a detailed discussion of the justifications for punishment. I quote at length from the Delalic decision:

\textit{The theory of retribution, which is an inheritance of the primitive theory of revenge, urges the trial chamber to retaliate to appease the victim. The policy of the Security Council of the United Nations is directed towards reconciliation of the parties. This is the basis of the Dayton Peace Agreement by which all the parties to the conflict in Bosnia and Herzegovina have agreed to live together. A consideration of retribution as the only factor in sentencing is likely to be counter-productive and disruptive of the entire purpose of the Security Council, which is the restoration and maintenance of peace in the territory of the former Yugoslavia.}\textsuperscript{145}

\textsuperscript{143} Robert D. Sloane, \textit{The Evolving 'Common Law' of Sentencing of the International Criminal Tribunal for Rwanda}, 53 ICJ 713 (2007), has reached the same conclusion.

\textsuperscript{144} Probably the most cited and contested of these analyses is the one regarding determination of responsibility for state action in the Tadic appeals decision. Prosecutor v. Tadic IT-94-1-A 35-75.

\textsuperscript{145} Prosecutor v. Delalic et al. IT-96-21 ¶ 1231.
The Trial Chamber proceeds to elaborate, one after the other, on the other justifications for punishment such as “Protection of Society”\textsuperscript{146}, “Rehabilitation”\textsuperscript{147}, and “Deterrence”\textsuperscript{148} explaining why they are viable justifications for punishment.

It is somewhat disappointing that this is one of the most extensive discussions of the justifications of punishment in the early sentencing decisions of the ICTY or ICTR. One would think that the judges collected every mistaken assumption regarding retributivism and put it down in the above paragraph. Alas, beyond pointing out that punishment may sometimes risk peaceful settlements of dispute (though this is also true for deterrence and for incapacitation), this opinion tells us nothing useful about what rationale can justify punishment in international law.\textsuperscript{149}

Other early opinions by the ICTR and ICTY discuss justifications for punishment in an even more perfunctory manner. One telling aspect of the token nature of the analysis is the lack of discussion of article 7 of the International Covenant on Civil and Political Rights, which states clearly that “punishment should essentially seek the reformation and social rehabilitation of

\textsuperscript{146} Id. at ¶ 1232.
\textsuperscript{147} Id. at ¶ 2133.
\textsuperscript{148} Id. at ¶ 1234.
\textsuperscript{149} Some aspects of the decision were appealed, but the Appeals Chamber’s opinion does not discuss justifications for punishment at all. See IT-92-21-Abís.
the prisoner.” 150 Opinions rendered by the ICTR appear to repeat a few formulas in most of the decisions that refer to the question of the justifications for punishment. These are usually found at the beginning of the sentencing decision. 151 The formulations seem to act as a sort of a prelude to the decision itself that does not require application to the specific case. The recital found in these cases states first the severity of the crimes in question by claiming that they “shock the conscience.” 152 The tribunal then proceeds to list the following justifications for punishment:

i. The need of international cooperation to liberate humanity from such an odious scourge 153

ii. ...ending impunity, promoting national reconciliation and restoring peace 154

iii. Penalties imposed on accused persons found guilty by the Tribunal must be directed, on the one hand, at retribution for the said accused, who must see their crimes punished, and over and above that, on the other hand, at deterrence, namely to dissuade for good others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights. 155

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150 As explained above, this article completely disagrees with this assertion, and neither international practice at the Nürnberg and Tokyo tribunals (which executed the senior perpetrators), nor the practice of various States (insofar as most states still permit life sentences, and many still maintain the death penalty in their books) mirrors this assertion.
153 See, e.g., Rutaganda, supra note 151, at ¶ 451, and Musema, supra note 151, at ¶ 981.
155 See, e.g., Prosecutor v. Akayesu ICTR-96-4, and Serushago Id. at ¶ 20.
In many other opinions, it is possible to find similar ideas, if not worded in the exact same manner.\textsuperscript{156} When the ICTR and ICTY use this wording, they are borrowing directly from the UN Security Council resolutions that instituted the ad-hoc tribunals. When the Security Council stated that the tribunal is established in order to “end impunity”\textsuperscript{157} it acted in a politically astute manner, because the statement it so vague that it provides the tribunals with the discretion to develop their own theory without having to settle the matter in the politically divided United Nations. It is disappointing that the tribunals failed to do so. Had the tribunals wanted to, they could have developed and interpreted the words of the UN mandate providing a meaningful justification for punishment.

Later decisions handed down by the ICTY have adopted a somewhat different, and perhaps more nuanced formula. The decisions repeat, verbatim, a commitment to “retribution as an expression of society’s condemnation of the criminal act and of the person who committed it,”\textsuperscript{158} or a similar formula regarding retribution’s role in “express(ing) the outrage of the international community at these crimes.”\textsuperscript{159} Invariably, though retribution is mentioned as a requirement that the punishment fit the crime, the requirement that the

\textsuperscript{156} See, e.g., Prosecutor v. Nahimana et al., ICTR 99-52-T, at ¶ 1095; and Prosecutor v. Kajelijeli ICTR-09-44A, ¶ 94 the Kakelijeli. decision mentions reconciliation and restoration of peace as other roles of the tribunal.

\textsuperscript{157} See Security Council Resolutions for the creation of the tribunals, \textit{supra} note 140.

\textsuperscript{158} See, e.g., Prosecutor v. Babic IT-03-72-S ¶44; Prosecutor v. Jokic IT-01-42/1-S ¶31; Prosecutor v. Karisnik IT-00-39-T ¶1135.

\textsuperscript{159} See, e.g., Prosecutor v. Banovic IT-02-65/1-S ¶34; Prosecutor v. Stakic IT-97-24-T ¶900; Prosecutor V. Deronjic IT-02-61-S ¶143.
punishment need also deter future wrongdoers is noted as a fundamental consideration for sentencing.\textsuperscript{160}

Other decisions handed down by the ICTY formulate similar ideas, though the text is somewhat more varied.\textsuperscript{161} The formulations, with minor divergence, typically read thus:

\begin{quote}
The Trial Chamber is cognizant of the jurisprudence of the tribunal, which supports deterrence and retribution as the main general sentencing factors. The Trial Chamber understands this to mean that first, the penalty imposed must be proportionate to the gravity of the crime and the degree of responsibility of the offender, and second, such penalty must have sufficient deterrent value to ensure that those who would consider committing like crimes will be dissuaded from so doing.\ldots\textsuperscript{162}
\end{quote}

As discussed above, myriad theoretical difficulties relating to a justification combining retributive and consequentialist justifications exist.\textsuperscript{163} Looking back to the decisions of the ICTY at the application of this heteronymous logic, the problematic aspect is manifested in the words of the 2009 decision in the Lukic case: “the primary objectives of sentencing, as

\textsuperscript{160}Decisions made by the Special Panel for Serious Crimes in East Timor seem to follow the same line of reasoning. In the \textit{da Silva Case}, the tribunal justified the punishment it meted out stating retribution requires that crimes be punished, that deterrence should also be served, and that impunity be avoided to promote national reconciliation. This same formulation appears in other cases handed down by the East Timor panels. See Prosecutor v. Joao Franca da Silva Alias Jhoni Franca, Dili District Court, Special Panel for Serious Crimes, Case No. 04a/2001, Judgment (5/12/2002) ¶154; See also Prosecutor v. Carlos Soares, Dili District Court, Special Panel for Serious Crimes, Case No. 12/2000, Judgment (31/5/2001) p. 11; Prosecutor v. Joseph Leki, Dili District Court, Special Panel for Serious Crimes, Case No. 05/2000, Judgment (11/6/2001) p. 11; Prosecutor v. Benjamin Sarmento et al., Dili District Court, Special Panel for Serious Crimes, Case No. 18/2001, Judgment (16/7/2003) ¶153.


\textsuperscript{162}Simic, supra note 161, at ¶ 33.

\textsuperscript{163}See Chapter 1 section 2.d.
defined by the Appeals Chamber: (are) punishment and deterrence.\textsuperscript{164} By distinguishing between what it calls "punishment" and what it calls "deterrence", the tribunal states that in addition to the punishment the accused deserves, he will also serve a "deterrent" sentence, in essence, a sentence beyond the punishment he deserves.

Beyond the conceptual problem, however, a practical problem appears whenever the two justifications collide (for example, when political expediency\textsuperscript{165} would justify a light sentence for a serious offense). Deterrence is so difficult to measure that it is virtually impossible to determine whether increasing the severity of the punishment causes over-deterrence. As can be expected, the tribunals constantly refer to deterrence, but never actually attempt to compute explicitly the right amount of punishment.\textsuperscript{166} But other consequentialist justifications are more binary and can be examined against retribution. In the Plavsic case,\textsuperscript{167} Biljana Plavsic, who was a senior official in, and later the head of, the Serbian government in Bosnia-Herzegovina, was initially accused of genocide, crimes against humanity, violations of the laws and customs of war, and grave breaches of the Geneva Conventions.\textsuperscript{168} Among the war crimes and crimes against humanity with which Plavsic was

\footnotesize{\textsuperscript{164} Prosecutor v. Lukic et al. IT-98-32/1-T ¶1049

\textsuperscript{165} By political expediency I do not mean political corruption, but rather true expediency, such as the brokering of a peace agreement.

\textsuperscript{166} See, e.g., the decision of the ICTY in the Kupreskic case. The tribunal explicitly states that it will not calculate the necessary sentence for each offense. Kupreskic, supra note 161, ¶ 867.

\textsuperscript{167} Prosecutor v. Plavsic IT-00-39&40/1-S.

\textsuperscript{168} Indictment in case IT-00-40-I, Prosecutor v. Biljana Plavsic; available at http://www.icty.org/x/cases/plavsic/ind/en/pla-ii000407e.pdf.}
charged were willful killing, extermination, murder, and persecution.\textsuperscript{169} The Trial Chamber (no appeal was filed), however, approved a plea bargain according to which the defendant was found guilty solely of persecution, and was sentenced to eleven years in prison, less time served.\textsuperscript{170}

Plavsic’s sentence was very light. Even compared to the rather light sentences meted out by the ICTY, a former head of state accused of genocide should be incarcerated for a significantly longer period of time. The light sentence was justified by the tribunal because of Plavsic’s plea agreement, part of which included her allocution and statement of remorse. The tribunal discussed the value of her statements to the goal of reconciliation in some length\textsuperscript{171} and comes to the conclusion that they present serious mitigating factors in the determination of the sentence. This is a clear example of a clash between retributive justice and consequentialist justice. When such a clash occurs, if we are to adhere to retribution, it is not possible to ‘balance it out’ with other factors, and claiming that retribution along with consequentialist rationales justify punishment is an empty phrase. Judging by the Plavsic case, when the heteronymous nature of the ‘retributive and consequentialist’ punishment manifests itself, it is not possible to reconcile the two and the

\textsuperscript{169} Id.
\textsuperscript{170} Plavsic, supra note 167, at ¶ 134.
\textsuperscript{171} Id. at ¶¶ 70-81.
inclination, which is always easier to follow (be it for leniency or for severity), will overcome duty.\textsuperscript{172}

Moreover, based on the paragraph cited above from the Simic decision,\textsuperscript{173} and on similar passages from other sentencing decisions\textsuperscript{174} it appears that the tribunals allot to retribution a role not entirely compatible with its meaning – at least not as it has been defined above. Reading the passage carefully, one comes to the conclusion that the tribunal sees retribution as a sort of mitigating factor intended to reign in deterrence.\textsuperscript{175} Punishment according to this line of reasoning is a balance between the need to punish harshly in order to deter, and retribution, which requires that the punishment not be overtly serious in relation to the offense. This is actually a mistaken analysis both as to what retribution is supposed to achieve, and as to what (justifiable) deterrence is supposed to achieve. Retribution indeed demands that the punishment fit the crime, but it does not create some maximum bar to limit the level of deterrence. Rather, it is intended to set the level of punishment as a justified principle in itself. The tribunal also misunderstands the theory of deterrence in that, even if one accepts deterrence as a justifiable reason for punishment, deterrence ought not to punish any more than is absolutely

\textbf{Footnotes:}
\textsuperscript{172} See Michael Moore, Placing Blame, 97-102 (1997) for more examples and further critique of mixed justifications.
\textsuperscript{173} Supra note 162 and accompanying text.
\textsuperscript{174} See e.g. Prosecutor v. Todorovic IT-95-9/1-S (2001) ¶¶ 28-30.
\textsuperscript{175} This is somewhat akin to the distinction H.L.A Hart makes between “General Justifying Aim” and “Distribution” in punishment. See Hart, supra note 131.
necessary in order to deter future culprits from committing the crime. In other words, deterrence is not some unchecked rationale for punishment that is only reined in by the requirement of proportionality in retribution.

The decisions of the international tribunals offer only minimal direction for choosing one justification for international criminal punishment over the other. The discussion of the basic rationales for punishment by the tribunals is token and conclusory. It both misunderstands retribution, and views deterrence as a justifiable rationale for punishment, without considering its problematic aspects. Finally, it does not provide reason to believe that there is a normative difference between municipal criminal law and international criminal law that would justify abandoning a deontological retributive paradigm for justification of punishment. Supposing the opinions of the tribunals had dealt seriously with the implications of consequentialist justifications for punishment for international crimes, would have they come to a different conclusion? To seek the answer to this question, we now turn to academic writing on the subject.

II. Scholarly Writing

Academic writing on the justifications for punishment in international criminal law is much more varied than court opinions and branches in various directions. In fact, writers express a diverse range of opinions. This section will collect these differing opinions into a few groups and assess the contribution of

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176 See note 38 above and accompanying text.
each group of theorists. Following the presentation of the three groups of theorists, I will comment on their analysis.

1. Deterrence as the objective of International Criminal Law

The opinions of the former presidents of the ICTY as they are expressed in academic writing provide an interesting prism through which the justifications of the international tribunals' punishment may be observed. Theodore Meron writes in the centennial issue of the American Journal of International Law about the progress of the international tribunals and international law based on more than ten years of adjudication. He states that “(a)s the risk of being caught in the web of criminal tribunals grows, so will the prospects for deterrence.” Meron follows in the steps of Hersch Lauterpacht. Lauterpacht specified that the factors that should effect the decision whether to prosecute international crimes are “the relative merits and disadvantages of providing a deterrent against criminal violations of the law of war; the prospective effectiveness of such deterrent; the taking into account of a widespread and not inherently reprehensible desire for retribution.”

When speaking about the measure of success the International Criminal Court has had in achieving its goals, the former President of the ICC, Philippe Kirsch stated that even the pre-trials at the ICC have deterred possible

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perpetrators from committing international crimes, and that the ICC’s most important function will be to end impunity by deterring future crimes.\footnote{Interview with ICC President by ‘Citizens for Global Solutions’, February 12-13, 2009. Available at \url{http://www.globalsolutions.org/node/1175}.}

Somewhat surprisingly considering the repeated reference to deterrence in the sentences of the international tribunals, there is scant other academic writing that investigates this aspect of the punishment. Perhaps this is due to the empirical difficulty of assessing the success of deterrence, already notoriously difficult within sovereign nations,\footnote{\textsc{Von Hirsch}, supra note 120, at 41.} across widely varied societies and nations. Perhaps it is because scholars do not take general deterrence very seriously as a justification for punishment in international criminal law.

2. National Reconstruction, Truth and Reconciliation – Attempting to draw emphasis from desert of the perpetrator to the rehabilitation of the community

Another former president of the ICTY also published an article in the American Journal of International Law’s centennial issue. Antonio Cassese writes about the importance of the trial process drawing our attention to two other justifications: setting the record straight,\footnote{Antonio Cassese, \textit{On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian law}, 9 A.J.I.L 2, 6, 9 (1998).} and easing of tensions through a discursive process.\footnote{\textit{Id.} at 9.} These two justifications, while not identical, appear quite ubiquitously together in the international criminal law literature and merit a
close examination. These justifications are at the core of the second group of academic opinions addressed in this section.

The common component found in both of these justifications is the view that in international criminal law the trial process is supposed to do more than just determine the responsibility of the offenders for the commission of a crime. Scholars who share this view believe that international tribunals were created in order to do more than national criminal tribunals. When examining a national criminal trial, we never actually expect the trial to bring closure, such as between a rapist and his victim, or a murderer and the family of the victim. Traditionally, national criminal law was expressly not about the relations between the victim and the culprit, but between society as a whole and the culprit. In the last century, as part of the many changes criminal law has undergone, different national systems have introduced victim participation at various levels in the trial procedure. But this participation does not bind the prosecution’s discretion as the representative of the State as the party exacting retribution from the offender.

International tribunals, however, according to this strain of scholarship, deal with a fundamentally different set of crimes, and their role is therefore to contribute to the establishment of accountability, reconciliation, and truth.

184 Closure here refers to a shared common understanding between parties of a dispute as to the reasons that created the dispute, and a sense that some sort of misunderstanding between them has been set right because of the process they underwent.
When examining court procedures and the determination of sentence, reconciliation scholars look for parts of the criminal process that should be altered to accommodate this new role for the criminal trial. Because of the different role the tribunal plays in the healing process, these scholars believe the attempt to transpose the rationales for national criminal law to international criminal law concerned with mass atrocity is doomed to fail.\textsuperscript{186}

Mark Henham suggests a new way to look at international criminal tribunals when he criticizes the way the ICTR failed to capitalize on the admission of guilt of Jean Kambanda in his plea bargain\textsuperscript{187} by not using it to promote further reconciliation (though it is not clear how a tribunal is supposed to capitalize on an admission of guilt). Henham sees the ICTR as being strict and isolationist in that it refuses to adopt a broader consequentialist agenda that will assist in the rebuilding of the war-rendered Rwanda by rebuilding and healing the torn society.\textsuperscript{188}

Adherents to this justification approach for international criminal law actually see the criminal sanction as a byproduct of the trial procedure.\textsuperscript{189}

\textsuperscript{187} Ralph Henham, \textit{The Philosophical Foundations of International Sentencing}, 1 ICJ 64.
\textsuperscript{188} \textit{Id}.
sometimes more harmful than helpful in the promotion of restorative justice.\(^{190}\)
The criticism and suggested alterations to the system thus refer to the very heart of the criminal system. Drumbl tells us that “mass atrocity is something greater than the sum of its parts”.\(^{191}\) Regular criminal law that focuses on separate criminals at a given trial cannot therefore do justice to the massive crimes it is supposed to address.\(^{192}\) Some actually view such a criminal trial as counterproductive not only because it does not aid reconciliation, but also because it allows the mass participants, or at minimum, those who acquiesced to the atrocity, to evade responsibility. Their response for this case is the differentiation between criminal guilt and collective guilt\(^{193}\) and the relinquishment of the former in order to enable reconciliation and a forward movement.

The reconciliationists’ solution, according to which the trial is better suited to address the broad underlying issues that brought about the crimes in the first place, also attempts to sidestep the difficult question of ex-post-facto law. Reconciliationists are concerned with the situations in which the crimes committed were ‘legal’ according to local law and legitimate according to the society where they occurred. Seeking to reconcile rather than determine guilt, they wish to address societies as a whole rather than individuals. In

\(^{190}\) Henham, supra note 187.

\(^{191}\) Drumbl, supra note 186, at 540.

\(^{192}\) Paul Roberts, For Criminology in International Criminal Justice, 1 ICJ 315, 2003.

consequence, and contrary to the solution to this problem offered by Hanna Arendt, some reconciliationists suggest that the social complexities involved in mass atrocities make the finding of mens rea impossible.

These very reflective consequentialists are deeply opposed to retributivism as a justification for punishment. Unlike the tribunals, which try to adopt a heteronymous approach, these theorists understand there to be an inherent contrast between consequentialism and retributivism. They choose consequentialism because they view retributivism as "a desire for communal vengeance," which will end up being "partial, relativistic and profoundly undemocratic." Retribution will hamper rehabilitation and reconciliation because it will increase, rather than defuse, conflicts. It will be abortive because it will place blame on a minority of the leaders, creating de-facto absolution for the complicit majority. It is also impracticable because the magnitude of the crimes cannot possibly be addressed by simple punishment. Lex talionis, or its replacement by corresponding prison sentences, can never equate the magnitude of the crimes committed.

195 Drumbl, supra note 186, at 570-571.
196 Henham, supra note 187.
197 Id.
198 Drumbl, supra note 186, at 524.
199 Id. at 580-581; This is an overly strict view of retribution and would create serious faults in national courts as well, because it would make the punishment of anybody accused of more than one murder impossible. The reply to this criticism is that pain felt by a prisoner is relative only to the prisoner’s pain himself. In the modern era, when we punish by inflicting pain (mostly by denying freedom), we try to match the pain we inflict to the severity of the crime, and not to the pain felt by the victims. In that sense, the Hegelian concept of retribution, that of an
3. Critics of International Criminal Law – Skepticism towards the enterprise as a whole.

A third group of scholars review all of the rationales above, and find them unconvincing. Their conclusions are therefore to either give up on the project of international criminal law altogether or to continue conducting international criminal trials, as David Koller suggests, even without a clear understanding of what justifies punishment, and rather lean on faith in its justice.

Daniel Zolo comes to the conclusion that “Rebus sic stantibus, international criminal justice does not seem to perform that function of ‘transitional justice’ for which it has been formally established”. He lists, like Koller, the various justifications for criminal law and proceeds to show their irrelevance. Koller states that “arguments from retribution are fundamentally inconsistent with the basic dictates of international human rights law that underlie international criminal law. Human rights law demands that the violation or limitation of one individual’s human rights be justified by the need to protect

‘evening’ of a scale, is no longer applied in national criminal law, and perhaps cannot be applied in international criminal law.

200 Marti Koskenniemi, Between Impunity and Show Trials, MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, 1-35 Volume 6 (2002).


203 Id.
the rights of others from deprivations." The efficacy of the consequentialist rationales, say both, is questionable at best.

Koskenniemi also examines each of the consequentialist justifications and criticizes them. Of the possibility of reconciliation he is skeptical based on the questionable effects of the Nuremberg tribunals on Germans (though to be fair, he examines this effect in the forties and fifties, not today). He justifiably concludes that criminal trials are poor forums for the creation of a balanced historical narrative. As he correctly argues, criminal trials, especially those of the adversarial model found in the current tribunals, bring to light only that which the sides want to bring forth; and the decisions themselves are even more limited in their historical comprehensiveness, because the judges only reiterate the facts that support their legal conclusions. Koskenniemi objects to deterrence as a rationale because of the danger of the show trial. He finally determines that international criminal procedures are simply unable to deal with the complex history that brings about the massive crimes committed by the defendants.

4. Critique of the Academic Writing on Punishment – Asking for too much

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204 Koller, supra note 201, at 1026.
205 Zolo attacks impunity saying it is not reached because of the limited prosecutions and that deterrence is ineffective on a global scale. See Zolo supra note 202; Koller, supra note 152 at 1027.
206 Koskenniemi, supra note 200, at 5.
207 Id. at 9.
208 Id. at 11-12.
209 Id. at 13.
The deterrence theorists noted above, and others who write along the same lines, take deterrence as an objective of criminal punishment for granted. They do this without feeling the need to justify deterrence or question the problematic aspects related to incarceration of individuals as a means by which to influence society. The deterrent effect (hence the utility derived from deterrence) could potentially be of greater ‘value’ when applied to international crimes than to national crimes. This value increase is caused by the great ‘disutility’ associated with the mass atrocity related to international crimes. But this potential increase in ‘utility’ does not allay the difficulties associated with the treatment of the defendant as a means rather than as an end. Actually, international tribunals ought to be even more finely tuned to the problem of instrumentalizing and thereby dehumanizing parties to a conflict than national courts. Considering the role that dehumanization of victims by the authorities has in mass crime, maintaining the dignity of participants in the process, including defendants, ought to be a first priority. Thus, the deterrence justification for criminal punishment, as it is described by academic writing is similar to the deterrence justification provided by the international tribunals.

Both judicial opinions and academic writing have failed to provide reason to


211 When looking into cases of genocide, the dehumanizing that proceeds the actual massacres are all too evident. See AGAMBEN, supra note 84, at part three, chapter 1 “The Politicization of Life.”
think deterrence would better justify punishment in the international arena than in national courts.

The discursive and reconciliatory justifications, however, are novel to international law and deserve more in depth attention. Unfortunately, beyond the doubts raised by Koskenniemi regarding the efficacy of these models, the proponents of reconciliatory justifications for the criminal process miss their mark in three ways.

First and foremost, the reconciliationists’ version of the criminal process is tainted in the same way as all other consequentialist justifications. The defendant does not just “happen” to be at the trial, and his punishment is not an “afterthought.” Or, at the very least, denying forty years of freedom or the defendant’s life ought not to be an afterthought. For example, as distasteful as we might find the existence of somebody like Adolf Eichmann, the very reason he is responsible for his actions and can therefore be punished is that he is a human being. Often, in cases of mass atrocities, the very core of the crimes committed relate directly to the mistreatment of the victims by the culprit in a way that directly denied their humanity. If the trial is to be justified, if it is to be anything other than vengeance, it must be different from the original crime by treating the culprit as a human being rather than a thing. The victory of justice

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212 See id., and supra note 207.
213 See Osiel, supra note 183, at 60 and Drumbl, supra note 189.
over the crime, the manifestation of the law, is the treatment of the defendant by society as a human being where she failed to do so before.

The second problem with the reconciliationists’ rationale is that hidden in the statement regarding the redundancy of the accused in the trial is the notion that the defendant is not really guilty. This statement is more overt when some reconciliationists talk about the lack of mens rea due to the complexity of the situation.\textsuperscript{214} Beyond the apparent paradox of claiming the defendant cannot really be guilty and yet agreeing to charge her anyway, the risk of adopting the reconciliationist agenda is that clearly guilty individuals will not be prosecuted, because their prosecution will not advance the cause of reconciliation.

Finally, and maybe less fatal to the advocacy of reconciliation as a justification than to the reconciliationists criticism of retribution, is the obliviousness of at least some as to what retributivism is.\textsuperscript{215} Those who seemed to have despaired of the project of international criminal law or gave up on an attempt to find a justifiable rationale for punishment are led by this fundamental misunderstanding.\textsuperscript{216} There is substance in many of Zolo and Koller’s criticisms and to a great degree in most of Koskenniemi’s criticisms as well. But the negative conclusions regarding the project of international

\textsuperscript{214} See supra note 195 and accompanying text.
\textsuperscript{215} See supra note 197 and accompanying text.
\textsuperscript{216} See Koller, supra note 201, at 1026.
criminal law are erroneous because these critics mistakenly consider retribution to be a barbaric vestige of medieval or biblical justice, thereby discounting the one justification for punishment that does not have the negative aspects of the other justifications they have criticized.

As argued above, there is a distinct difference between retribution and revenge. Retribution, unlike revenge, is borne out of judicial process that garners legitimacy from its substantive impartiality and its stringent and nonbiased procedural rules. Retribution is also not a visceral reaction to a wrong. Rather, it is attribution of guilt based on the criminal’s responsibility as a human being.

D. Conclusions – the role of punishment

At least part of the disaffection from international criminal law, or of finding a rationale that will justify it, stems from a misunderstanding of criminal law. In order to, on the one hand focus this criticism, and at the same time dispel it, this article returns to the basic assumptions about the role of criminal law. The criminal trial is employed in order to determine guilt or innocence of a defendant, and criminal punishment is based on the determination of the individual guilt of the defendant in relation to a specific act or omission (or set of acts in a ‘continuing offense’). This is criminal law’s great strength and great weakness.
Because the trial procedure exists to determine individual responsibility, and because the result is so binary and focuses on the objective components of the offense (*actus reus*) and the subjective elements of the offense in the perpetrator (*mens rea*), findings relating to the social context in which the offense was committed are essentially alien to the criminal process. This is criminal law’s great strength because it enables the judges to determine responsibility qua responsibility, no more and no less. If the international community decided that executing civilians during an armed conflict is a crime of war (absent a very limited set of defenses), then context does not matter when a massacre of civilians has occurred. This is the meaning of the criminal prohibition and punishment: international crimes are absolutely prohibited. It does not matter in what context, or for what reason you choose to commit genocide. Genocide is a crime – that is where the argument ends.

This is also criminal law’s great weakness. Because criminal law is meant to determine individual responsibility, the questions we ask when we determine guilt are completely unfit for social reconstruction and reconciliation. Because criminal law does not relate to context, but only to whether the acts were criminal, it is a poor tool for narrative-building and reconciliation. Comparisons between criminal trials and truth and reconciliation committees, or any other forms of post-conflict nation-building are therefore moot. Criminal law will always lose when compared to other transitional justice mechanisms, because
it is not a transitional justice mechanism at all.\textsuperscript{217} Criticisms that claim criminal justice does not achieve this goal are therefore both correct and wrong. They are correct because criminal procedures are destined to fail in the creation of a narrative of reconciliation. These criticisms are wrong because that is not the role of criminal law. One might as well criticize the use of shoes as inadequate because they fail to keep your hands warm.

The potential tension between transitional justice mechanisms and prosecution is very real and poses a serious problem to any deontological account of international criminal law. But this tension remains not only between criminal justice and transitional justice mechanisms but between criminal justice and any other post conflict peace agreements that grant amnesties as well. These political solutions to national conflicts do not replace criminal prosecution, but stand side by side with it, as means by which society deals with atrocity.\textsuperscript{218} Thus, for example, the decision of the people of South Africa to resort to Truth and Reconciliation Committees should stand on its own merits. These committees assisted in the reconstruction of a racially torn society by creating a joint narrative and allocating social responsibility. The decision whether this mechanism should be applied side by side with criminal trials, or

\begin{quote}
\textsuperscript{217} Richard Goldstone all but makes this assertion when he lauds the Truth and Reconciliation committees and claims that criminal trials could have never produced the same result. See \textit{Goldstone}, supra note 15, at 71.
\end{quote}

\begin{quote}
\textsuperscript{218} Karl Jaspers tried to differentiate between criminal guilt, political guilt, moral guilt, and metaphysical guilt. See \textit{Karl Jaspers, The Question of German Guilt} 31 (E. V. Ashton trans. 1947). Jaspers claimed only criminal guilt could be dealt with by courts, and proposed different social mechanisms for the determination of other types of guilt through civic discourse.
\end{quote}
whether criminal trials would obfuscate this mechanism and therefore should be foregone is, as Lauterpacht justifiably said, a decision made outside the tribunals and based on policy, not legal, reasons. But if one process (criminal trials) might make (and I am not advocating this opinion at this stage) another process (Truth and Reconciliation committees) impossible to conduct, that does not mean that they are meant to achieve one and the same result. This is why many commentators stress that criminal justice is just one tool among many that is necessary for the rebuilding of societies recovering from past atrocity. Understanding that these mechanisms are very different, and that they achieve different ends, enables a discussion that focuses on the different competing values that each system achieves.

The conclusion of this article is that international criminal procedures are not materially different from national procedures at their core. The guiding principle in both international and municipal trials is the determination of guilt and responsibility. Of course, international trials raise issues that are vastly different from the issues raised in national trials. The magnitude of the crimes, the official capacity in which they are often made (administrative massacres as Osiel calls them); the sheer number of offenders, the difficulties due to inadequate enforcement mechanisms, and many other aspects mean that new solutions to new and old problems must be addressed.

219 See Lauterpacht, supra note 178.
220 See e.g. RAMA MANI, BEYOND RETRIBUTION 88 (2002).
221 OSIEL, supra note 183, at 9.
But at the heart of the international criminal process, and that which justifies it, is the understanding that mass atrocities are committed by individuals. These individuals, high or low ranking, have a responsibility not to commit atrocities and crimes against humanity. When they do so, they should be held accountable. They deserve to be treated as accountable because they had the ability to decide whether to commit the crime (and when they do not have that ability, criminal defenses should apply). These people are accountable because they are human beings capable of making decisions, and as such, they should be treated as human beings should – as ends rather than means. That is the triumph of law over the banality of evil and the administrative massacre.