CRIMINAL LAW WITHOUT PUNISHMENT?

Towards a different response to wrongdoing

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CHAPTER 1: INTRODUCTION

Nearly every Western society is equipped with a punitive legal system created as a response to criminal behavior. The practice of punishment is deeply rooted into traditional legal systems and people generally find it hard to imagine a well-functioning society without the institution of punishment. For a long time, it has been argued that punishment is an effective way of dealing with offenders. However, recent studies have shown that this assumption is doubtful, to say the least. If we examine punishment closely, the practice might prove not only be less effective than we used to think, but it is at the same time an extremely drastic way of interfering in people's lives, of which incarceration probably is the clearest example. Punishment in many forms deprives people from their freedom, their jobs and probably even of their close friends and relatives. Still, in many cases we assume this practice is fully justified. Sometimes we go even further and argue that states that fail to do so or fail to punish appropriately (i.e. high enough) are unjust. We also tend to grant victims the right to see their wrongdoer punished or argue that society as a whole has a right to see him punished.

But are these assumptions legitimate? When we take a closer look at the concept of punishment, we run into several moral objections to the practice. Punishment inflicts a great deal of harm, not only to the offender himself but also to all of those related to the one who is punished; people whom we consider to be innocents. These insights lead us to the inevitable question about the justification of punishment. On what grounds – if any - are our legal institutions, representing society, entitled to punish law-breaking individuals? The fact that punishment is generally accepted. The mere fact that this is the way society usually is organized is certainly no sufficient reason to assume it is a morally just practice.

In my view, the major difficulty for the justification lies in its central element, namely in the fact that it involves some form of coercion and harmful treatment. In other contexts – outside of the realm of legal punishment – coercing and harming others would be morally impermissible. Treating human beings in such way stands in serious tension with common basic values such as freedom from restrictions, confinement and deprivations of property and life. Another reason why punishment requires a justification is that it is not a natural fact, but a human institution. Humans have developed and organized the practice of punishment. However, having a criminal justice system in place is not indispensable to human society. We can think of a society where the penal practice is absent, even though this might seem counterintuitive if we lack a proper alternative way of dealing with crime. Furthermore, the institution of punishment incurs considerable costs and a reason must be given why society chooses to incur these costs.

Given these basic values on which most people agree, we still deem it acceptable to imprison people if they commit a crime or impose a fine on them, which seems to be inconsistent with these basic values and merits further exploration. What is the moral ground for this practice? Obviously, the practice of imposing hard treatment on individuals – even if they have committed a crime - needs some kind of justification. We need a reason to explain why we are entitled to punish. It is important to make a distinction between two types of justification for punishment. The first is an empirical one and concerns the reasons why – as a matter of social scientific explanation - we punish criminals. The second one is the moral justification of punishment and revolves around another question, namely what – if anything – renders it permissible to punish wrongdoers. For the purpose of his thesis, I will focus on the latter question. The underlying issue is why criminals, contrary to other citizens, are not entitled to be treated in accordance with aforementioned basic values. If offenders would retain these

rights, these rights would raise a barrier against punishment, because punishment cannot justifiably infringe on those rights.

Philosophers have thought long and hard about these questions. They have developed countless answers, of which consequentialism and retributivism are the most influential families of theories. Instead of discussing them in detail, my aim is to show these theories contain serious flaws and therefore cannot provide us with a satisfactory justification of punishment. Considering these shortcomings, I will consider whether or not there are other, morally appropriate, ways of responding to criminal wrongdoing that avoid the justificatory difficulties the practice of punishment faces. However, before I am able to answer these questions, it is necessary to have a clear view on what it is exactly we talk about when talking about 'punishment'. Therefore, various ways to conceptualize punishment shall be discussed in the second chapter. Chapter three will commence with a brief discussion of traditional justifications of punishment, followed by an in-depth examination on their flaws. Chapter four builds on these deficiencies. I will examine new ways of responding to wrongdoing which are not best understood as punishment.

The scope of this thesis is limited to the subject of *legal* punishment. Other instances of punishment - such as parents disciplining their children or disciplinary measures imposed by superior on an employee in the workplace - will not be discussed in this thesis and therefore not included in the definition of punishment I will utilize. The authority a parent exercises over its child is, in general, accepted as a part of the upbringing of the child, even though the legitimacy of this practice could be questioned as well. Another interesting discussion which is strongly related to punishment deals with questions about the legitimacy of the state. However, I intend to maintain a narrower focus and only target the justifiability of punishment and its alternatives will therefore not elaborate on the authority of the state in relation to legal punishment.

CHAPTER 2: WHAT IS PUNISHMENT?

The introduction has shown that the deep-rooted tradition of legal punishment is a concept open to criticism. A great deal of that criticism has been aimed at the ways in which legal punishment is often justified. Before discussing the moral legitimacy of our penal system, we must first examine another matter important to all justificatory theories of punishment, namely what punishment *is*. There is a clear distinction between the concept of punishment itself and questions about its justification. In the subsequent chapter I will turn to the concept itself. The purpose of this chapter is to get a clear understanding of what I take punishment to be, by proposing a definition of the word 'punishment'. This proposed definition will be used throughout the following chapters of this thesis. For the development of this new definition, I will draw from the wide variety of influential definitions that have been developed in philosophical penal literature. Some interesting definitions of punishment will be discussed and, if necessary, criticized.

2.1 DEFINITIONS OF PUNISHMENT

I will commence this paragraph with a famous definition of punishment which is created by H.L.A. Hart and inspired by Anthony Flew and Stanley Benn. It consists of five separate elements which an act has to meet in order to qualify as punishment. The cumulative requirements read as follows: First, the treatment imposed on the offender must involve something painful or otherwise unpleasant. Second, the act is imposed because of a violation of legal rules. The third requirement is that the act must be imposed on a (supposed) offender as a reaction to him violating the law. Fourth, it is enforced by humans, not being the offender. The last requirement entails that the act must be imposed and administered by an authority, founded by a legal system against which the offence is committed.[1]

Fierce criticism has been uttered against this definition. A crucial deficiency is found in the first element of this 'Hart-Flew-Benn-definition'. According to Hart, punishment must involve pain or consequences otherwise considered unpleasant. But Hart misses an important point here because he ignores the fact that something that is painful or has unpleasant consequences is not considered punishment unless the aim of this treatment is to impose pain or such consequences.[2] It is essential to acknowledge the difference between knowingly inflicting pain on someone and intentionally causing it. One who knowingly inflicts pain is aware that pain will be the result of his actions, but he did not have the intention to cause it. One who purposely inflicts harm causes it intentionally.[3] One might ask why something does not count as punishment unless the purpose of the treatment is to cause pain or an unpleasant consequence. Douglas Husak urges us to think of a dentist who knowingly inflicts pain on his patients. If possible, the dentist would surely try to minimize the pain. If there is no other option, however, we deem it permissible he inflicts pain on his patient, because this is the only way to prevent the patient from even more suffering in the future.[4] When punishing an offender, however, the state is not at all looking for ways to minimize the pain inflicted on him, nor does the state deem punishment only permitted if its causes less unpleasant consequences to the offender in the future. Hart's definition of punishment fails to incorporate this crucial difference between the intentional infliction of pain and doing so knowingly. As a result, his definition lacks one of the most important features that makes punishment so morally problematic.[5] Furthermore, Hart's proposed definition does not involve any condemnatory or expressive aspect. But punishment does certainly contain such an expressive or

[1] Hart, H.L.A. and Gardner J., 2008, p. 4 – 5, Wood, D., 2010, p. 457.
[2] Husak, D., 2014, p. 4.
[3] Husak, D., 2014, p. 5.
[4] Husak, D., 2014, p. 4.
[5] Husak, D., 2014, p. 6.

condemnatory element. The mere infliction of pain or other unpleasant consequences is not sufficient to speak of punishment. If this would have been the case, however, taxation would also qualify as punishment. While paying taxes is often considered as unpleasant, it is certainly not punishment since the taxpayer is not being condemned.[6]

Bedau and Kelly developed another interesting definition of punishment. Like Hart's it also consists of multiple elements. According to these theorists, punishment is the authorized imposition of deprivations – of freedom or privacy or other goods to which the person otherwise has a right, or the imposition of special burdens – because the person has been found guilty of some criminal violation, typically (though not invariably) involving harm to the innocent. The second element of this definition is supposed to remind us that crime is a violation of the rights of the victim and that the harm done is akin to the harm a punishment does. Furthermore, this definition points out that punishment is a human institution and it is imposed on individuals who have acted wrongly. Defined like this, the imposition of punishment on an innocent does not qualify as punishment. It falls outside the scope of this definition because someone who is known to be innocent will not be found guilty of some criminal violation. The last element of this account of punishment also points out that no single purpose or aim is built by definition into the practice of punishment.[7]

Scanlon sides with von Hirsh and defines punishment as consisting of two aspects. He focuses on the condemnatory aspect of legal punishment since punishment condemns certain actions as wrongful. The other aspect is that it involves a form of hard treatment which, in Scanlon's definition, includes not only incarceration but also monetary loss.[8] The condemnation-part of this definition stems from Scanlon's conviction that governments have an obligation to affirm citizens' right by condemning any violation of those rights. At the same time, condemnation serves another goal, namely the discouragement of citizens to commit such violations. Furthermore, the government owes to threaten its citizens with hard treatment if necessary.[9] What I find very interesting, for the purpose of this thesis at least, is Scanlon's remark that the two elements of legal punishment are not inseparable. In his view, it is possible to condemn certain forms of behavior without involving hard treatment on the wrongdoer. This is an important element of Scanlon's view on punishment, to which I will return below.

All of the aforementioned definitions of punishment may appear to be plausible at first glance, but they lack an essential element. In my view, the absence of this element causes an act not to qualify as a penal measure. Hanna's account of punishment inspired me a great deal when thinking about proper definition of punishment. In order to qualify as punishment, according to Hanna, the imposed treatment must *aim* at inflicting suffering on the offender.[10] Suffering cannot merely be an ancillary element of the state's response to misbehavior but has to be the main aim of the practice that is imposed on the offender in order to label the practice as punishment.[11]

If we incorporate deliberate infliction of suffering into our definition, practices such as forced compensation or involuntary psychiatric treatment are excluded from the realm of punishment. Although these practices might cause the offender to suffer, these practices aim at something else. Psychiatric treatment, for example, focusses first and foremost on improving the wellbeing of the offender. That such a treatment sometimes causes the offender to suffer might be true, but suffering is by no means the

[6] Husak, D., 2014, p. 7
[7] Bedau, H.A. and Kelly, E., 2017.
[8] Scanlon, T.M., 2013, p. 103.
[9] Scanlon, T.M., 2013, p. 103.
[10] Hanna, N., 2008,
[11] Hanna, N., 2008, 330.

main aim of the intervention. Even if an individual treatment would be imposed on an offender with the aim of making him suffer, we cannot say this is punishment, since such treatment in general is not focused on punishment.[12] Hanna also recognizes the other important elements of punishment, for example that it is only inflicted on those thought to be offenders.[13] This means that for example, hard treatment imposed on a known innocent does not qualify as punishment.

For the most part I believe Hanna's definition of punishment to be very informative. However, there is one part in Hanna's theory on punishment, which I find difficult to swallow and that is the part where he talks about incarceration. Hanna goes as far to argue that incarceration does not necessarily qualifies as punishment, since incarcerating people does not (always) aim at making the prisoners suffer. Even though this is indeed the conclusion that follows from strictly following Hanna's concept of on punishment, I cannot agree. First, it will be hard to convince incarcerated offenders of the claim that incarcerating them does not qualify as punishment. They will most certainly *feel* punished. One might object that the criminals feeling towards the punishment is of no real concern here since it is not their opinion that matters, but the intention with which the sentence was imposed. But I believe public opinion to be very important to any proper definition of punishment. A proper and workable definition of punishment is one the public in general can agree on. And I think very little people would agree with Hanna's claim that imprisonment is not a form of punishment only because the imposition of suffering is not its primary aim. One may even dispute the claim that sentencing people to prison is not aimed at making them suffer. With this claim is to be found in the aim of incarceration. Society might deem it necessary to incarcerate people for a variety of reasons. The safety of the nations' inhabitants for instance is very much valuable and should be protected. Incarcerating an offender is a very effective means to ensure the safety of the rest of the citizens. Protecting the offender can be another reason to lock him up. But incarceration is first and foremost used to deprive the offender from his freedom. Protecting citizens or the offenders from themselves can be achieved in other ways than simply putting the offender behind bars. Making the offender participate in a certain therapy, for example, might even be a more effective means to protect the rest of society than simply putting him or her behind bars. Still, most wrongdoers are being incarcerated instead of treated for having committed a crime. Why use prisons instead of therapy if the latter has proven to be more effective? I do not intend to argue there that people are always and only incarcerated with the aim to make them suffer, but if suffering was not the general aim of incarcerating people, other means of crime handling would have a more predominant place in responding to crime.

So, incorporating deliberate suffering in the definition of punishment leads to a result that strange to say the least, but Hanna seems to endorse. Hanna concludes his discussion on the definition of punishment by arguing that, since our traditional penal measures generally do not aspire to impose suffering, they fall outside the scope of punishment. Therefore, our traditional ways of dealing with criminals can stay in place, because they simply do not qualify as punishment. But, this seems to me as an easy way out in order to avoid the difficulties justificatory penal theories face. Simply claiming that all our penal practices do not qualify as punishment is a mere change in wording and does not provide us with a satisfactory answer to the moral questions our penal practices face.

[12] Hanna, N., 2008, 327.
[13] Hanna, N., 2008, 329.

2.2 TOWARDS A NEW DEFINITION OF PUNISHMENT

After discussing several definitions of punishment, I should like to propose an alternative account of punishment. I assume a good definition meets the following elements. These desiderata have been developed by Alison Jagger in her article on the moral permissibility about punishment.

1. *Conservatism*: a proper account should as little as possible disturb existing usage.
2. *Consistency and non-arbitrariness*: Improvement of consistency might be an appropriate reason for modifying existing usage.
3. *Precision*: Improvement of precision is another proper rationale for altering a term's interpretation. However, concepts are always somewhat vague by nature, especially when they are morally laden. Therefore, disputes over borderline cases can never be fully be avoided.
4. *Impartiality*: It of great importance for a definition of punishment to be value-neutral. This means that the definition itself does not incorporate any norms that aim to justify any part of the definition itself.[14] A good account should not beg disputed moral questions and leave open the debate about merits. [15]

The definition of legal punishment I end up proposing incorporates these desiderata as much as possible. The content of the proposed definition is based on the valuable elements of the influential definitions I have identified in the first part of this chapter and it explicitly leaves out the parts I have criticized.

In my view, a proper account of legal punishment reads as follows: *Legal punishment is a condemnatory measure imposed by a state institution on an individual who is thought to have committed a crime, thereby depriving the offender from a right he would normally be entitled to, by deliberately inflicting hard treatment on this individual.*

So, what I hold to be a satisfactory account of legal punishment consists of - at least - five elements. In order to qualify as punishment, a treatment has to:

1. Be imposed on an individual who is thought to have violated a legal rule;
2. Be imposed by a state institution;
3. Aim to inflict hard treatment on the offender;
4. Have a condemnatory effect on the offender;
5. Deprive the offender from a right he would normally be entitled to.

The first criterion of the proposed definition speaks largely for itself. For an act to qualify as punishment, the person it is imposed on must (at least) thought to have committed an offense. Imposing a form of treatment on someone who is known to be innocent does therefore not qualify as punishment. The second criterion separates *legal* punishment from other disciplinary measures often referred to as 'punishment'. A disciplinary measure imposed on a child by its parent is often referred to as 'punishment' but does not fall within the scope of the type of punishment that I intend to justify, because it is not imposed by a state institution. The fourth criterion holds that the imposed treatment must have a condemnatory effect. In the beginning of this paragraph I explained why this is a crucial element of the definition punishment, namely to distinguish punishment from other state-led measures such as taxation.

[14] Bedau, H.A. and Kelly, E., 2017.
[15] Jaggar, A.M., 2005, p. 205.

The third and fifth element of my definition may be considered less self-evident and need a more extensive explanation than the first two. The third element revolves around the aim of hard treatment. This element is largely inspired by Hanna, but slightly altered. I have shown that by demanding that the imposed measure aims at *suffering* Hanna has raised the bar too high, even though other elements of his definition are certainly valuable. Furthermore, to ascertain whether or not an act aims at suffering is extremely difficult to assess, since suffering is a highly subjective notion. In my view, a more appropriate definition of punishment substitutes the aim of 'suffering' with 'hard treatment'. By changing the aim of the practice from suffering to hard treatment, the abovementioned difficulty relating to imprisonment is resolved. I assume everyone can agree with the claim that imposing jail time aims at imposing hard treatment on an offender. Therefore, jail time does fall within the scope of punishment in my definition of punishment. As I have said earlier, I think a good definition of punishment is one most individuals can adhere to. Since I think most people will not perceive measures such as therapy or education as being 'hard treatment' but rather a way of providing aid to someone in need. Therefore, a satisfactory definition of punishment must at least exclude these rehabilitative measures. Since rehabilitative measures are generally not considered to be 'hard treatment' by the general public, the proposed definition successfully excludes measures that aim at the rehabilitation of the offender.

The fifth criterion relates to the observation that when we punish, we deprive someone from a right he is normally entitled to. When sentencing someone to several years of imprisonment, we take away his right to freedom. Other examples of punishment, the imposition of a fine for example, is an infringement on the right to property. People generally agree that such infringements are not appropriate outside the realm of punishment.

Before delving into the discussion about the justification of punishment, it is crucial to first obtain a clear image of what is we are talking about when we discuss 'punishment'. I have elaborated on several influential definitions of punishment which have been developed in philosophical penal literature. By drawing on these definitions and eliminating the elements I disagree with, I proposed a new definition of punishment. The definition of punishment I propose reads as follows: *Legal punishment is a condemnatory measure imposed by a state institution on an individual who is thought to have committed a crime, thereby depriving the offender from a right he would normally be entitled to, by deliberately inflicting hard treatment on this individual."*

Since the proposed definition meets Jagger's desiderata, I assume it to be a – at least theoretically – a proper account of punishment. I settled on this definition because I believe it to be broadly shared, which makes it useful and beneficial to further questions relating to penal philosophy and therefore to the rest of this thesis. The proposed definition is inclusive in the sense that it includes penal practices most people intuitively identify as punishment. This account therefore aligns with general usage of the term, which makes it suited to serve as a basis for further examination of punishment. Even if people were to disagree with this proposed, at least there will be no confusion about what I assume 'punishment' to mean in the remainder of this thesis.

CHAPTER 3: CONSEQUENTIALISM AND RETRIBUTIVISM

Now that we have clarified the concept of 'punishment', it is time to move forward and discuss the central issues raised in the debate around the justification of legal punishment. First of all, it important to notice that punishment has a specific character, since is it not something done purely for its own sake. Punishment is by nature radically different from other practices which serve no other purpose besides the practice itself. One can think, for example, about listening to music. One listens to music for no additional purpose than for enjoying the music itself.[16] Punishment is very different from listing to music, because we do not punish just to punish but there are other (additional) purposes to it. Punishment purposely inflicts hard treatment on a criminal and, as a result, the criminal is being deprived from a right he would be entitled to under normal circumstances. Incarceration is one of the most common examples of such a deprivation of rights. Usually, we would insist that every individual is entitled to freedom, but we deem it fitting to deprive a person of his freedom by putting him behind bars if he has violated the law. Apparently, we assume that there is some justification which renders it appropriate to purposely inflict hard treatment and deprive a criminal from certain rights to which law-abiding individuals are entitled to. What are the moral grounds for this, if any?

To answer the question what – if anything - justifies punishment, we need to answer a prior question first. What constitutes a proper justification for punishment? Hart argues that any good justificatory theory consists of multiple elements. He proposed to distinguish three questions which all play an important part in any proper justification of punishment. The first question he deems important is: What justifies the general practice of punishment? In other words, what justifies the creation and preservation of such a system? The second question asks to whom it may be applied. The third question is: which amount of punishment should be inflicted? According to Hart, all of these principles are relevant in order to generate a morally acceptable justificatory theory of punishment.[17] What else is important for a justificatory theory of punishment? We need to keep in mind that that legal punishment is in need of a *general* justification. A justification is considered to be general if it makes use of general principles to justify punishment across all reasonable realistic social conditions. When we apply this generality-demand to punishment, it entails that the theory should be able to justify punishment as a stable and enduring practice.[18] One must also keep in mind that the practice of justifying punishment as a whole is something different than the justification of a specific act of punishment. For the purpose of this thesis, we are concerned with examining and discovering the moral grounds of a legitimate legal system which is able to, if necessary, punish law-breaking individuals. To have a legitimate penal system in place does not automatically mean, however, that any individual act imposed under this regime is also justified. A particular case can prove to be unjustified, even if the system as a whole is considered just.[19]

But how can we test whether or not a theory qualifies as a proper theory of punishment? Alan Goldman has formulated two criteria for a successful theory of punishment. First, the theory must specify a reasonable limit to punishments in particular cases. Second, it needs to allow benefits to outweigh costs in a penal institution.[20] Many legal philosophers have reflected on the subject of punishment and several justificatory theories have been developed in philosophical literature. Roughly, these theories can be divided into two families, namely in consequentialist and retributivist penal theories. The former group of theories is characterized by having a forward-looking focus. The latter group is qualified as

[16] Bedau, H.A. and Kelly, E., 2017.
[17] H.L.A. Hart, 2008, p. 3, Cragg, W., 1992, p. 48.
[18] Hannah, N., 2008, 326
[19] Bedau, H.A. and Kelly, E., 2017.
[20] Goldman, A.H., 1982, p. 58.

deontological, which means that these theories consider punishment as being good in itself or as a practice required by justice.[21]In the following paragraph, I will elaborate on these candidate justificatory theories, in which the main focus will be on their flaws, i.e. why these theories fail to provide a proper justification for punishment.

3.1 CONSEQUENTIALISM

Many penal philosophers have argued in favor of a consequentialist justification of punishment. Consequentialist penal theories rest on the claim that punishment is justified, because creates a valuable outcome.[22] Or, to put it in David Dolinko's wording: *"Punishing offenders leads yields better results than not punishing them."*[23] Consequentialists believe punishment to bring about several beneficial effects. It is argued, for example, that punishment can help to reduce crime, give citizens a feeling of safety because the state takes measures to protect them and a feeling of satisfaction to those who want to see criminals suffer.[24] It is important to bear in mind that consequentialist penal theories come in many varieties but they will not all be discussed in this thesis. Instead, the most important ones will be discussed and criticized.

Utilitarianism is presumably the most distinguished version of consequentialism. Its advocates claim that the point of practice of punishment is to create overall net welfare.[25] Utilitarianists argue that punishment is justified because it leads to the reduction of crime, which results in an overall reduction of harm. These theorists are often referred to as 'harm-reducivists'.[26] Since harm comes in different varieties, such as physical and psychological harm for instance, harm-reducivists sometimes disagree on which type of harm is most valuable. Furthermore, they do not see eye to eye on the type of relation between the harm and the wrongful act is required in order for the act to be punishable. Is it necessary that there is a causal relation?[27] Advocates of the harm-reducing theory also have different opinions on other i issues, such as the amount of harm that is required to justify the criminalization of the responsible conduct and the seriousness of this behavior.[28]

3.1.1 OBJECTIONS TO CONSEQUENTIALISM

At first glance, the consequentialist theory seems to provide us with a satisfactory justification of punishment. The claim that it is justified to impose hard treatment on a criminal if the benefits it provides us with outweigh that burden, sounds plausible. However, many objections can and have been made against the consequentialist view. An often-mentioned objection to consequentialist penal theory revolves around the issue that, in following the consequentialist line of reasoning, one could arrive at the unwelcome conclusion that an obvious unjust punishment is justified on the ground that it results in the most utility (i.e. crime reduction).[29] Consequentialists have responded to this critique in a number of ways. First of all, they claim that it is improbable that a situation will occur in in the real world. They assert that is very unlikely that a situation will arise in which imposing such punishment would really be the best outcome.[30] Nonetheless, if we put aside whether the question of how likely it is that this

[21] Bedau, H.A. and Kelly, E., 2017.
[22] Duff, A. & Hoskins. Z., 2017.
[23] Dolinko, D., 1991, p. 541 – 542.
[24] Duff, A. & Hoskins. Z., 2017.
[25] Bedau, H.A. and Kelly, E., 2017
[26] Tonry, M., in: Tonry, 2012, p. 6.
[27] Wood, D., 2010, p. 456.
[28] Wood, D., 2010, p. 459.
[29] Duff, A. & Hoskins. Z., 2017.
[30] Duff, A. & Hoskins. Z., 2017.

scenario will occur in our day-to-day lives, the fact remains that the consequentialist penal theory is not able to prevent the imposition of unjust punishment if this brings about the best outcome. But if we were However, if we suppose that the consequentialists are indeed capable to avoid this criticism, the issue remains that consequentialist theory does not treat people as an end in themselves. The problem for consequentialism is that it is not in accordance with the dignity an individual has as a person. What is often forgotten in critical articles on consequentialism is that this does not only apply to the innocent. Also, the guilty are treated as means to an end and used to some future good. So, even if a utilitarianist does not need to commit to punishment of an innocent, the issue remains that he – at least in some cases – must approve of the punishment of the guilty.[31] So, even if utilitarianism would be able to escape the charge that they are okay with punishment of the innocent, the theory can still be criticized because the theory cannot capture the notion of people having rights.[32]

And there is another side to this problem. Reversibly, a consequentialist would insist on not penalizing a criminal if this would produce the most utility.[33] David Boonin describes an example in which a very popular person gets punished, which would cause a whole community to feel upset and angry. A consequentialist would advise not to punish this offender, since this approach does not maximize the overall utility. This is surely no desirable outcome.

Consequentialism fails to acknowledge the first criterion of Alan Goldman's criteria for a proper theory of punishment. I have shown that consequentialist penal theory cannot prevent an obviously unjust punishment from being imposed in the situation that this would leads to a net benefit that outweighs this burden. To the consequentialist punishment of an innocent individual is, at the very least, not obviously wrong if it brings about desirable consequences. For the same reason, consequentialist penal theorists would in some cases argue it is best to refrain from punishing a guilty person if not punishing this criminal results in the best outcome. Even though consequentialists would recognize that punishment of the innocent brings about negative effects, they cannot ensure proper limitation to punishment. Furthermore, consequentialist penal theories cannot ensure that the offender will be punished in proportion to the crime he has committed. The individual will not be treated as deserved, but as a means to benefit others.[34]

3.2 RETRIBUTIVISM

Until the 1970's, consequentialist theories predominated the philosophical thought on punishment. Around that time, a shift occurred and penal theory moved away from consequentialist theories on punishment to retributivism.[35] Contrary to consequentialism, retributivism is purely backward looking. Retributivists do not focus on the desired effect when justifying punishment, but on the notion of deterrence. Retributivist penal theorists claim that legal punishment is a just response to criminal behavior, and their theory rest on the notion that the wrongdoer deserves to be punished.[36] Punishment certainly has some desirable side effects, such as crime control, but these benefits are not the principle aim of punishment.[37]For retributivists, there is something about the nature of law, lawbreaking and

[31] Murphy, J.G., 1973, 219.
[32] Murphy, J.G., 1973, 220.
[33] Boonin, D., 2008, p. 53.
[34] Goldman, A.H., 1982, 58.
[35] Matravers, M., in: Tonry, T., 2012, p. 30.
[36] Dolinko, D., 1991, p. 542.
[37] Murphy, G.J., in: White, M.D., 2011, p. 96.

punishment that makes punishment the fitting response to wrongdoing. The fittingness of this response exists independently from the abovementioned side-effects.[38]

Two variations of retributivism exist: positive and negative retributivism. According to positive retributivism a criminal should be punished by the state because he or she deserves it. Negative retributivism does not provide us with a ground for punishment but tells us instead that only the deserving should be punished and the punishment should be in proportion to his desert.[39] According to Duff and Hoskins, all positive retributivist theories aim to provide an answer to two questions. First: why do the guilty deserve to suffer? And why is it the state that should inflict this burden on it?[40] Intuition tells us that suffering is what the criminal deserves, but this does not answer the question *why?* This question becomes especially difficult to answer when we acknowledge that the retributive intent is to make the person suffer. It would certainly have been easier if suffering was merely a beneficial side-effect.[41] Some have suggested it is simply a case of 'tit for tat': you get what you deserve. But while this sounds logical, it certainly does not provide a justification for retributivist principle of vengeance. This is what Finagrette calls the 'chief problem of retributive penal theory': it fails to explain the supposed relationship between moral wrong and the imposition of suffering.[42]

Retributive penal theory imposes a strict limit on the amount of punishment to be imposed. Punishment must be equal to the crime in degree of harm. This idea is derived from the Kantian idea that rational agents universalize their principles of actions. Since a rational agent recognizes the moral equality of other individuals, he will act only in ways he would approve for these other agents. By treating criminals as moral agents, they would have to consent to equal treatment as their victims, because there are no morally relevant differences between the two. Punishing beyond these limits would be nothing else but a multiplication of wrongs.[43]

Some retributivists have sided with Kant and developed the 'theory of moral balance', which is an influential variation of retributivism.[44] They hold that punishment is justified because it removes the unfair advantage a criminal has gained over the law-abiding citizen. Moral balance theorists focus on the fact that someone who breaks the law only enjoys the benefits of the legal system but does not accept the burdens that come with it. In their view, punishment is justified because it eliminates the advantage the criminal has gained.[45] Retributive punishment re-establishes a fair distribution of burdens and benefits.[46]

3.2.1 OBJECTIONS TO RETRIBUTIVISM

Like consequentialism, retributivist penal theories have been met with a great deal of criticism. The subsequent paragraph will revolve around frequently heard objections which have been uttered against retributivism. In general, critics have argued that the retributivist rationale for punishment seems to insist that individuals have two legitimate options: paying their debt earlier in cash or later in punishment. But this latter 'option' seems to conflict with the law's objective to prevent certain behavior. The law that prohibits stealing, for example, specifically denies us another option besides paying for the things we

[38] Fingarette, H., 1977, p. 503.
[39] Duff, A. & Hoskins. Z., 2017.
[40] Duff, A. & Hoskins. Z., 2017.
[41] Fingarette, H., 1977, p. 500.
[42] Fingarette, H., 1977, p. 512.
[43] Goldman, A.H., 1982, 59.
[44] Murphy, J.G., 2012, p. 78.
[45] Dolinko, D., 1991, p. 545
[46] Fingarette, H., 1977, p. 502.

take. This example makes it clear that retributive penal theories fails to take the role of law as prohibition into account.[47]

More specific criticism has been uttered against the moral balance theory. Some theorists have expressed their concern about the object of the desert. They ask: what is it that deserves punishment? These critics claim that the reason why someone deserves punishment is not because he gained an unfair advantage, but that that he has inflicted harm on another person.[48] A related criticism points out that it is difficult – maybe even impossible – to determine the extent of the advantage the wrongdoer obtained by breaking the law. John Finnis proposed a solution for this difficulty. He describes the advantage the criminal obtains as: *"acting according to one's taste without exercising any self-restraint".* Thus, he continues, it is the principle of fairness between citizens that justifies punishment. David Dolinko fiercely criticizes Finnis' view by showing that it can result in unpleasant outcomes. Pursuant to Finnis' justificatory theory, the criminal's advantage ought to be proportional to the burden of self-constraint law-abiding citizens carry. Therefore, the extent of this burden depends on the inclination people in general feel to break a certain law. But since very few people feel tempted to commit severe crimes, and more individuals are inclined to commit less serious crimes the state would be required to punish severe offences less hard than less serious ones.[49] Obviously, this result is very much counterintuitive to the basic instinct that tells us that a murderer deserves a more serious penalty than a shoplifter does.

Others have claimed that both society and the offender react in an emotional way criminal wrongdoing. Society might feel anger towards the offender and might desire that he gets punished. The victim, on the other hand, might feel ashamed or guilty because of his actions and therefore feel he or she ought to be punished. Some retributivists argue that crime deserves punishment because it acts on our emotions.[50] Advocates of this theory argue that there is no goal behind the desired suffering, but it is simply a fitting response to the crime. The reason why it is fitting, they argue, is that the making the criminal suffer aligns with our 'bedrock intuition'.[51] In sum, their case rests only on the assumption that we are supposed to 'see' that punishment is in order if you commit an offence.[52] Critics who argue against this hypothesis claim that not everyone may find such a deeply rooted intuition within himself.

We have seen that a general conviction of retributivists is that the hurt that is inflicted to the offender should somehow correspond to the repulsiveness of the crime. Determining if this proportionality-criterion is satisfied is extremely difficult, since a unit to measure suffering or repulsiveness does not exist.[53] To escape this difficulty, retributivists have suggested that crimes should be assessed based on a scale that provides us with an order to measure the degree of repulsiveness of one crime in comparison to another. While this system might be able to successfully evade the lack of a unit to measure both the repulsiveness and the hurt, it leaves us with other difficulties. H.L.A. Hart points out that, in order to compose such a scale, we need a crime which is related to a fixed punishment to serve as a base from which we can start comparing other offences.[54] Another important problem that occurs in developing such a scale revolves around the repulsiveness of the crime. Comparing repulsiveness necessarily

[47] Fingarette, H., 1977, p. 502.
[48] Duff, A. & Hoskins. Z., 2017.
[49] Dolinko, D., 1991, p. 545 and Finnis, J., 1972, p.162.
[50] Duff, A. & Hoskins. Z., 2017.
[51] Hampton, J., 1988, in: Murphy, J. and Hampton, J., 1988, p. 113.
[52] Fingarette, H., 1977, p. 503.
[53] H.L.A. Hart, 2008, in: Hart, H.L.A. and Gardner J., 2008, p. 161.
[54] H.L.A. Hart, 2008, in: Hart, H.L.A. and Gardner J., 2008, p. 162.

involves that judges are able to make a comparison between peoples' motivations and considerations when they commit an offence.[55] This is obviously an arduous and possibly even unachievable task.

Abovementioned critical notes are all linked to particular versions of retributivism, which might make them easy to rebut by simply adhering to another version of retributivism. Literature has also shown ways in which retributivism in general is subject to criticism. All retributivists agree that punishing people who are guilty of committing wrongs – and making them suffer because of it – is a morally good thing.[56] However, they seem not to be able to provide any moral reason for this and therefore it remains unclear why it is intrinsically valuable to see wrongdoers suffer.

I have discussed earlier that a theory should meet two criteria in order to be successful: First, the theory must specify a reasonable limit to punishments in particular cases. Second, it needs to allow benefits to outweigh costs in a penal institution.[57] The second part of this chapter has shown that retributivist penal theory faces serious shortcomings. In sum, retributivist penal theory does not only lead to unwelcome results but appears to be founded on incorrect principles. Even though retributivism comes in many varieties, all its varieties rest on the notion of moral desert. Retributivists seem unable to clarify why the guilty deserves to suffer. Other critics have focused on the object of desert. Retributivists often claim that the unfair advantage the criminal gained over the law-abiding citizen to be the object of desert, while moral desert focusses on the harm that is done to the victim instead. Furthermore, even if it would be true that the object of desert is found in the unfairly obtained advantage, it remains impossible to measure the extent of the benefit.

Unlike consequentialism, retributivism is able to account for the first principle because it puts a limit to punishment, since it only aims to punish the ones that deserve it. It remains unable, however, to provide a sound theory if punishment because it fails to acknowledge the second criterion.[58] The reason for this is that this theory seriously struggles to come up with a satisfactory answer to Goldman's second criterion for a theory of punishment, to provide a balance between the costs and benefits. Retributivism might allow the costs of punishment to far exceed its benefits. In general, individuals exhibit various kinds of immoral behavior which is not punishable by law, because the enforcement-costs would be too high. An example of such conduct is insult. Even though insulting someone is a clear example of immoral behavior, responding to every insult with punishment is practically impossible. The costs of such a policy would far exceed its benefits. Furthermore, if the state's task would be to impose suffering according to moral merit, it would be logical to do so over the span of entire lifetimes instead of only in reaction to an offense. Also, punishment is often imposed on those already having little benefits and lots of burdens. Representing them as having gained an unfair advantage is simply not right.[59]

3.4 SUB-CONCLUSION

The question whether or not legal punishment is or can be justified cannot be argued to a conclusion here. Yet, this has not been the objective of this chapter. I have explored the core values of consequentialist and retributive penal theories and shown ways in which they can be criticized. It is important to note that the description of consequentialist and retributive theories I have provided in this chapter is by no means exhaustive. Surely, several variations to both theories have remained undiscussed and even many hybrid theories exist, combining aspects of both consequentialist and retributive theories.

[55] H.L.A. Hart, 2008, in: Hart, H.L.A. and Gardner J., 2008, p. 162.
[56] Scanlon, p. 220.
[57] Goldman, A.H., 1982, p. 58.
[58] Goldman, A.H., 1982, 60.
[59] Goldman, A.H., 1982, 61.

For the purpose of my thesis, however, it is not necessary to discuss every conceivable variety. The same goes for the difficulties that both theories face. Several issues of concern have been considered, but it is true that both theories face many other difficulties which have purposely been left out of this chapter on. Providing an exhaustive scheme of justificatory penal theories and points of criticism was unnecessary for the purpose of this thesis, because I intend to do nothing more than demonstrate that both major penal theories face serious difficulties, and that this makes justifying legal punishment problematic. I have done so by showing that a proper theory of punishment should 1) be able to specify a reasonable limit to punishment and 2) need to allow benefits to outweigh costs. Consequentialists appear unable to satisfy the first condition, and retributivists struggle to satisfy the second condition. Besides being unable to meet Goldman's criteria, I have demonstrated that specific variations on both consequentialism and retributivism face further difficulties.

As a result of these findings, we should recognize that the widely accepted assumption that punishment is a justified practice, might be unfounded. At the same time, the possibility remains that a satisfactory justification of punishment exists but remains to be discovered. Whatever of this may be true, I am merely saying that we should take a critical stance towards traditional penal practices. I hope the previous chapter has provided a foundation for such a critical attitude and has, at the very least, opened our minds to the possibility that the act of punishment might not be justifiable.

CHAPTER 4: A LEGAL SYSTEM WITHOUT PUNISHMENT

4.1 ELIMINATING PUNISHMENT

I described punishment – in short - as a measure aiming to impose hard treatment on citizens by a state institution. The fact that state institutions deliberately aim at inflicting such harmful treatment on its citizens seems to be a rather dubious practice that certainly needs justification. The previous chapter has shown that traditional justificatory theories struggle to provide us with proper moral grounds for legal punishment. Therefore, we have reasons to take seriously the ideal that punishment is not justified and does it make sense to look at alternative ways to respond to wrongdoing. Intuitively, people feel hesitant about this idea of abolishing punishment. Angela Davis observes that: *"We think of the current system, with its exaggerated dependence on imprisonment, as an unconditional standard and thus have great difficulty envisioning any other way of dealing with the more than two million people who are currently being held in the country's jails, prisons, youth facilities and immigration detention centers".*[60] This chapter four examines the somewhat frightening idea of removing punishment from our justice systems and replacing it with an alternative mechanism for conflict resolution system. I will address two possible alternatives to punishment and assess whether they are morally justifiable. I will assess the suitability of these theories on the basis of two criteria for a morally justifiable alternative to punishment.

4.2 ABOLITIONISM

In general terms, abolitionism is a perspective directed towards the abolition of punitive responses to criminalized problems and their replacement by dispute settlement, redress and social justice.[61] The word 'abolitionism' was formerly used by anti-prison movements, which viewed prisons as institutions fulfilling the same social functions as slavery did.[62] The anti-prison focus was followed by a wider interest in non-punitive responses to social problems.[63]Abolitionists claim that the state should no longer administer penal justice, and that decentralized forms of conflict regulation should replace the traditional system.[64] They do not only believe that our penal system is unjustified, but they see it as radically inconsistent with the values that should be underlying to a penal practice system. Abolitionism comes in two varieties. In one version of the abolitionist view, punishment can never be justified.[65] The second school of thought has a somewhat less ambitious goal and focuses on getting rid of the current penal practices. Since I doubt the justifiability of punishment as a whole, I will focus on the former interpretation of abolitionism.

What are the abolitionism's core values? As I said earlier, abolitionist theories focus on the parties directly involved in the crime. Nils Christie, for example, is motivated by the observation that state threatening and punishment takes the conflict away from the people it rightfully belongs to.[66] In other words, the state steals the conflict from the people who are actually involved because nor the victim nor the offender are allowed an active part in traditional dispute settlement. What happens instead is the involvement of professionals, leaving no room for the involved parties. Christie insists on a more supporting role for the state, in which it allows all parties involved in the conflict to resolve the problem themselves.[67] The position of the victim should be radically reformed. In traditional legal systems is

[60] Davis, A.Y., 2003, p. 106.
[61] Van Swaaningen, R., 1997, p. 116.
[62] Van Swaaningen, R., 1997, p. 116.
[63] Van Swaaningen, R., 1997, p. 118.
[64] Ruggiero, V., 2011, p. 100.
[65] Duff, A. & Hoskins. Z., 2017.
[66] Christie, N., 1977.
[67] Duff, A. & Hoskins. Z., 2017.

hardly any place for victim participation because most common justice systems regard the victims as unable to defend himself and expects them to delegate their inviolability to legal institutions and professionals which are so strongly criticized by the abolitionists.[68] It is important to keep in mind that abolitionists do not argue against social control. Peaceful social coexistence always needs some form of social control, but, in the abolitionist perspective, in another way than the top-down approach of traditional penal control.[69]Another abolitionist concern revolves around the general assumption that extremely diverse (all) criminal situations have something in common. Advocates of abolitionism claim that all acts that are labelled as 'crimes' relate to a wide variety of problems which all should be dealt with in their own way.[70] Crime should be treated in the same contexts as it emerged in and reactions should be aimed at inclusion in society, rather than at social exclusion.[71] They often focus on the social harms punishment generates, such as homelessness and the loss of family relations. Moreover, it is argued that punishment has no deterrent effect, it does not rehabilitate and does not offer true compensation for harm. They all conclude that the criminal justice system cannot, or at least does not, live up to its own objectives.[72]

Importantly, abolitionists do not believe in involving professionals or organizations in the procedures.[73] They place a strong emphasis on an individualized approach for each case. Both the professional and the organization hinder this flexibility that is of significant importance to achieve this individualized response to criminal behavior that is mentioned in the above. Most of our traditional criminal justice systems respond in a highly formalized manner to crime, which leaves little room for such flexibility. Professionals are believed to be strongly influenced by the bureaucracy they operate in and as having no experience with the impact of their decisions. The professional will have a great impact on the lives of the victims, offenders, their friends and families, but the professional himself, however, will never bear the consequences of his work. It is suggested that professionals should retain an assisting role.[74] The involved parties should be granted the opportunity to discuss their understanding of what happened and how amends will be made.[75]

In sum, abolitionists question the penal justice system in both a moral and a practical sense. They question the ethical validity of a state that intentionally inflicts burdensome treatment on its people. At the same time, the practical credibility is at stake, since empirical data has proven that the penal system is dysfunctional according to its own objectives.[76]

4.3 REQUIREMENTS FOR AN ALTERNATIVE RESPONSE TO CRIME

We have seen that the abolitionists urge us to let go of our traditional thoughts concerning the relation between crime and punishment and, as a result, transform many aspects of our contemporary societies. This remainder of this chapter will examine possible alternatives to punishment as a response to criminal behavior. The sections below aspire to develop a method to respond to wrongdoing which does not involve punishment as defined in chapter two and is be able to escape the difficulties consequentialist and retributivist theories face. But not every response to criminality which does not qualify as punishment is immediately justified. Therefore, it is important to assess which criteria an alternative

[68] Ruggiero, V., 2011, p. 104.
[69] Van Swaaningen, R., 1997, p. 117.
[70] Ruggiero, V., 2011, p. 101.
[71] Van Swaaningen, R., 1997, p. 117.
[72] Alvesalo-Kuusi, A. and Lähteenmäki, L., 2017, p. 29.
[73] Ruggiero, V., 2011, p. 102.
[74] Alvesalo-Kuusi, A. and Lähteenmäki, L., 2017, p. 30.
[75] Alvesalo-Kuusi, A. and Lähteenmäki, L., 2017, p. 29, Christie, 1977, p. 8.
[76] Van Swaaningen, R., 1997, p. 117.

should meet in order to qualify as a proper response to wrongdoing. The most important element of any morally justifiable way to handle wrongful behavior is that it should not aim at inflicting hard treatment on offenders, which I have identified as the core element of the proposed definition of punishment. In order to escape the difficulties punishment faces – i.e. to qualify as punishment - this objective should be avoided. But this first criterion is a negative one, it does not bring us closer to what a legitimate response should entail, rather than what it should not entail. Therefore, I propose a second, positive, criterion. A proper alternative to punishment should be able to affirm the victim's sense of being wronged. What I assume to be of the utmost importance, and here I side with Scanlon, is affirming the victim's sense of being wronged. Like myself, Scanlon has uttered some serious criticism against traditional justificatory theories. But, while he disagrees with those theories, he concludes that it would be unjust to let those guilty of terrible wrongs participate in society as any other citizen.[77] However, contrary to what is often assumed in literature, this intuition does not support the retributivist justification for punishment. Instead, it shows that what matters is that we respond to crime in a way that does justice to the victim. Proponents of traditional criminality will argue that punishment perfectly complies with the peoples' urge to want to see the victim suffer. But, since deliberate imposition of suffering cannot be included in the proposed response to wrongdoing, we should look for an alternative way to satisfy the victim (and perhaps even other members of society who have been affected by the crime), without deliberately making the offender suffer. What we need is a form of recognition of the past crime that will make the victim feel encouraged and supported by society. The absence of such recognition will give him or her the feeling that society is indifferent about the harm that has been done.[78] Scanlon points out that the affirmative aim of crime response will also bring about a desirable side effect, namely deterrence. People who have been victimized earlier in their life will be more inclined to obey the law if society responded to their harm in an appropriate and respectful manner.[79] This approach provides a more positive incentive to deter individuals from committing crimes than threatening to make them suffer.[80]It is essential to keep affirmation strictly distinct from any right to see the wrongdoer suffer. According to the affirmation-theory, victims are entitled to affirmation, but they lack any right, which involves the suffering of the wrongdoer.[81]

In sum: what our societies need is a different response to wrongdoing that meets the following two requirements. A morally justifiable alternative to punishment should at least:

1. Refrain from deliberate imposition of hard treatment on wrongdoers;
2. Affirm the victim's sense of being wronged.

I am looking to replace our current penal system, which has a strong focus on punishment, with affirmation-based legal system.

[77] Scanlon, T.M., 1999, p. 222.
[78] Scanlon, T.M., 1999, p. 223.
[79] Scanlon, T.M., 1999, p. 223.
[80] Scanlon, T.M., 1999, p. 223.
[81] Scanlon, T.M., 1999, p. 224.

4.4 PENAL REFORM THEORIES

This paragraph addresses influential theories which denounce punishment and propose an alternative response to wrongdoing instead. Since the penal system is so deeply entrenched in Western societies, radical alternatives are often depicted as being illusory.[82] Margaret Malloch explains that very little theorists risk developing alternatives because they fear they will be dismissed as being 'utopian'.[83] And indeed, getting rid of punishment may seem a counterintuitive move. Many of us assume is to threat of punishment that prevents people from breaking the law and think that a legal system without punishment would cause a state of anarchy to arise. The following paragraph will prove this intuition to be wrong and show that punishment is not the only fitting response to wrongful behavior. I will examine two alternatives to punishment that have been developed either in penal literature or through practice. To assess if they are credible alternatives, I will check the proposals against the criteria as indicated previous paragraph.

4.4.1 RESTORATIVE JUSTICE

A popular alternative to punishment as a response to crime is found in the concept of restorative justice. The interest in restorative justice has arisen over the years because traditional forms of punishment did not comply with our sense of fairness, satisfaction and security, as we have seen in the second and third chapter. To get a clearer understanding why restorative justice might be an appropriate alternative to wrongdoing, we should take a closer look at the concept and values of restorative justice. First, the restorative justice process has developed through practice, which makes it difficult to pinpoint it in a single definition.[84] Tony Marshall has attempted to define restorative justice not by discussing central elements but tried to capture it in a single definition, which reads as follows: *"... a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implication for the future."*[85] Others, Andrew Ashworth is one of them, have tried to define restorative justice by referring to its underlying principles. The first of these 'central elements', as Ashworth calls them, is the importance of the process, which implies there is little room for legal professionals in a restorative process. The second central principle is that restorative justice has a strong focus on the stakeholders. The restorative approach deviates from most contemporary legal systems since they do not necessarily believe the state should play the lead role in handling crime. Our traditional legal systems leave very little or even no room for victim participation in legal proceedings. Restorativists, however, focus strongly on the position and satisfaction of the stakeholders in the process, rather than on the legitimization of the state in the administration of crime.[86] They argue that because the stakeholders are more affected by the crime than the state, the state should not have such an important role to play in the dispute settlement.[87] Therefore, not only the government, but the victims, offenders and the community should also be involved in the administration of crime.[88] Some restorativists argue that the community also plays has an important role to play in the restorative justice process whereas, earlier on, most restorative processes revolved solely around the victim and the offender. The third general aspect of restorative justice is its focus on and wide-ranging aspirations for outcomes.[89] Repairing the harm that is done by the offender is the ultimate goal of the restorative

[82] Malloch, M., & Munro, B., 2013, p. 21.
[83] Malloch, M., & Munro, B., 2013, p. 22.
[84] Ashworth, A., 2002, p. 578.
[85] Cunneen, C. and Hoyle, C. 2010, p. 1.
[86] Ashworth, A., 2002, p. 581.
[87] Kenny, P. and Leonard, L., 2014, p. 26
[88] Kenny, P. and Leonard, L., 2014, p. 29.
[89] Ashworth, A., 2002, p. 578.

process.[90] Here we clearly see a difference in the outlook between a restorative and penal process. The restorative process does not aim at imposing hard treatment on the offender, but at making amends. Satisfaction of the stakeholders is of the utmost importance in a restorative process.[91] Since restorative justice has a strong focus on outcome and results, one could argue it is a form of consequentialism – although are the desired consequences radically different from those of consequentialist penal theory. At the same time, restorative justice is often contrasted to retributive justice, which – as I have explained in chapter two - has a backward-looking focus. Retributivism insists on punishing an offender because this is what he or she deserves. Also, retributive justice pays little attention to the victim and the community or to preventing further wrongdoing. Instead, it solely focusses on the particular offender and is driven by retribution.[92] Restorative justice has an entirely different outlook on crime. Advocates of restorative justice think of crime first and foremost as a disturbed relation between individuals. Of course, criminal behavior also qualifies as a violation of the law, but this is not the main drive of the restorative process.[93] George Karagiannidis has been able to grasp the contrast between the two crime resolving mechanism – punishment and restorative justice - in the following quote: *"Compensation as devised by restorative models of justice, for example, is not based on abstract variables such as judicial truth, guilt or dangerousness, but on the responsibilities of the offenders, the victims, the communities as a whole and on their respective needs."*[94]

The rationale behind restorative justice is that the harm caused by the offenders should not be matched by an equivalent harm inflicted on them but be counterbalanced by 'putting it right or making up for it'.[95] This clearly demonstrates that restorative justice is able to satisfy the two demands which a proper alternative to punishment has to meet. First, a restorative process does not qualify as punishment, because it does not meet the criteria for punishment as set out in chapter two. The main reason is that the restorative process does not aim at inflicting harm on the offender. Rather, it rather aims at balancing the scales; at making things right with again. This way of handling crime affirms the victim's sense of being wronged, but in a radically different way than punishment does. Punishment believes to do justice to the victim by harming the individual that hurt him. Restorative justice, on the other hand, affirms the victims' rights by facilitating a joint process between victim and offender which is focused on a satisfactory outcome for the victim. The restorative approach is less formalized because during a restorative process, face-to-face meetings between the victim and the offender take place, for which there is no room during regular court proceedings. This less formalized approach has an empowering effect on the victim to take an active role in the handling of his case.[96] Restorative justice seems to go even further than to affirm the victims' sense of being wronged, because it also identifies the community as a stakeholder which is to be involved in the restorative process. From the 'making right what has been wronged'-perspective, we can only applaud this. Relatives, close friends and other community-members might be affected by the crime as well.

As many theories do, restorative justice comes in many varieties and there is an important distinction to be made. By incorporating restorative justice into traditional legal systems, a restorative process can take place alongside other penal measures. Another option is to fully replace traditional legal systems

[90] Kenny, P. and Leonard, L., 2014, p. 26.
[91] Ashworth, A., 2002, p. 578.
[92] Duff, A. & Hoskins. Z., 2017.
[93] Kenny, P. and Leonard, L., 2014, p. 26.
[94] Karagiannidis, C.M., 2001.
[95] Ruggiero, V., 2010, p. 190.
[96] Strang, H., 2002, p. 52.

with the abolitionist perspective on restorative justice. This means that we abolish of the concept of punishment in its entirety and solely make use of the restorative process in responding to crime.

4.4.1.1 RESTORATIVE JUSTICE: UNABLE TO STAND ON ITS OWN TWO FEET?

It is important to note that the idea of restorative justice as a mechanism for conflict resolution is not entirely unfamiliar to traditional legal systems. In some societies, the restorative process is implemented into the legal practice and often takes place alongside traditional penal measures. Abolitionists argue against such 'conventional' use of restorative justice in which the restorative process takes place in addition to a penal measure.[97]They strongly reject this dual approach because it might enhance and extend the traditional penal practice. They believe that in such a dual process, legal institutions will remain to occupy a dominant position and victim participation to often be involuntarily.[98] Whether or not this abolitionist concern is true, the fact remains that restorativists could face serious problems if the restorative process were to replace the penal system in its entirety. Since the restorative process is built on voluntarily participation, it seems unable to account for those who are unwilling to take part in the new ways of conflict resolution. Furthermore, it could be argued that it remains necessary to keep legal institutions in place for those criminals who have not pled guilty or refuse to accept the outcome of the restorative process.[99] So, a critic would conclude that for this reason restorative justice is unable to replace the penal institutions as our primary mechanism for conflict resolution. If it were to function as the sole crime resolving mechanism, wrongdoers who refuse to take part in or accept the outcome of a restorative process cannot be held accountable for their actions. For this reason, some advocates of restorative justice argue in favor of a legal system in which the victim is involved and restorative justice is the primary response to wrongdoing, but punishment is not entirely abolished and still used in severe cases.[100] Obviously, this solution will not satisfy the hard-core abolitionists.

Another issue for restorative justice is the so-called 'widening the net-problem'. Critics claim that restorative justice based legal system will lead to state interference in problems the state does not prosecute formally but can get involved because of the possibility to refer the case to a restorative proceeding. More often than not, the cases referred to a restorative program would not have been prosecuted formally but have come under the influence of the state because of this referral. [101] However, this critique does not affect the abolitionist advocates of restorative justice, because they promote another type of mediation in which the community, instead of legal institutions, play the lead role. In such instances, participation is voluntarily.[102] To escape this criticism, the proposed alternative needs to really be a replacement of punishment as we know it and not coexist alongside traditional justice systems.[103]

Andrew Ashworth has also fiercely criticized restorative justice theories. I will address his critique by elaborating on (what he refers to as) the 'three principles of compensation for wrongdoing'. The first of the three principle revolves around the question what it is exactly that the victim is entitled to. Ashworth explains the first principle by using the following example: when the judge imposes a fine on an offender for careless driving with death as a result, the fine relates to the criminal's culpability and it is not in any

[97] Ruggiero, V., 2011, p. 105.
[98] Ruggiero, V., 2011, p. 106.
[99] Kenny, P. and Leonard, L., 2014, p. 32.
[100] Ashworth, A., 2002, p. 585.
[101] Ruggiero, V., 2011, p. 106.
[102] Ruggiero, V., 2011, p. 106.
[103] Malloch, M., & Munro, B., 2013, p. 99.

way a valuation of the loss of the deceased.[104] Ashworth makes use of this example to support his claim that the victim's interest goes no further than the interest of any other citizen. He substantiates this claim by referring to the social contract theory. He argues that it is because citizens receive protection from the state, they have waived their right to self-help.[105] The second principle of compensation for wrongdoing looks at proportionality. This principle holds that there should be a fair balance between the imposed sentence and the criminal act that has been committed. What Ashworth argues is that there should be a relation between the severity of the crime and the punishment for it. This demand for proportionate sentencing is problematic for advocates of restorative justice since they strongly value involvement of the victim. Since there is a wide variety of victims who may have different attitudes towards their wrongdoers, the principle of proportionate sentencing might be impaired or even impossible to ensure because the imposed sentence is depending on the satisfaction of the victim.[106] As discussed in the previous chapter, retributivists also strongly adhere to the notion of proportionality and use this notion of proportionality to attack restorative justice. The retributivists fear that restorative justice processes – because of the strong focus on victim involvement - can and probably will not be able to ensure that the restorative process will lead to a proportionate outcome for the offender.[107] Therefore, the retributivists will argue against victim involvement in any sort of legal proceeding in response to a committed crime. The third principle of compensation for wrongdoing concerns the right to be heard by an independent and impartial tribunal. Again, this right might conflict with the restorative justice's, more specifically with its aim to involve the victim in the process. The victim cannot be considered to be impartial because the proceedings revolve around the wrong that has been done to himself. Restorative justice advocates have rebutted this criticism by saying that the ideas of impartiality and independency are wrong things to aim at, since they make for a very impersonal tribunal.

I can see why Ashworth uses these principles to attack restorative theories but I do not think these principles count as strong objection against abolitionist alternatives to wrongful behavior. In our traditional criminal justice systems, the principles Ashworth mentions are certainly of great value. What he tends to overlook is the fact that the principles he adheres to so strongly are embedded in and firmly related to traditional legal systems. If contemporary societies should shift from a justice system in which criminality is responded to with punishment to a system which incorporates to restorative processes as the primary response, we no longer need to adhere to Ashworth's principles to ensure a morally acceptable justice system. Especially the right to be heard by an impartial tribunal is not essential to the new justice system because it has the character of a conversation between stakeholders and lacks the top-down approach of traditional court proceedings.

4.4.2 REINTEGATVE SHAMING

In most contemporary Western societies, punishment and shaming have been uncoupled. In the past, however, it was common practice to apply corporal punishment in public places. These practices were supposed to have a deterrent effect on bystanders. Today, reintegrative shaming is suggested as an alternative to wrongdoing. John Braithwaite is a proponent reintegrative shaming and even claims it to be even more successful than punishment. As in the restorative process, the reintegrative shaming process involves whole community and leaves out most traditional institutions involved in punishment.[108] Braithwaite argues that shaming has a conscience-building effect which needs the

[104] Ashworth, A., 2002, p. 584.
[105] Ashworth, A., 2002, p. 585.
[106] Ashworth, A., 2002, p. 586.
[107] Kenny, P. and Leonard, L., 2014, p. 31.
[108] Ruggiero, V., 2011, p. 107.

mobilization of the entire community. *Reintegrative* shaming is to be kept distinct from *disintegrative* shaming because the process of shaming is followed by something valuable, namely the reacceptance into the community.[109] State punishment stigmatizes the offender, whereas the public shaming process focusses on the disapproval of the act instead of the person.[110] Disintegrative shaming, on the contrary, creates an outcaste of and divides the community, leaving the outcasts with receiving no respect except from fellow-deviants.[111]

Even though reintegrative shaming does not qualify – according to my definition – as punishment, it is not a morally acceptable alternative to punishment. It is true that a reintegrative shaming process aims at shaming the offender, rather than deliberately inflicting har on this individual. Therefore, the reintegrative shaming theory is able to meet the first and necessary condition of my requirements for a morally acceptable alternative. The second criterion, however, is a lot harder to satisfy from the perspective of reintegrative shaming. The reason for this is that I do not take process of shaming the offender to be enough to provide the victim with the feeling that the hurt that has been inflicted on him is properly recognizes. The theory of reintegrative shaming seems to focus on improving the position of the offender rather than on the victim because it aims at reintegration of the offender into society. But besides shaming the offender, little attention is being paid to the victim. For some victims the reintegrative shaming process might provide them with the impression that the harm that they incurred has been sufficiently responded to. For most of the more severe crimes, however, this will not be the case. Think for example of more severe crimes. The underlying problem is that the reintegrative shaming-process is hard to tailor for specific crimes. The restorative process is far better at this.

4.5 A NEW TERMINOLOGY

An alternative attitude to misbehavior does not only require a new way of handling crime but is also in need of new linguistic terms to avoid reasoning in old terms. Bianchi introduces the term *'eumonic'* as opposite of *'anomic'* which relates to the nature of the traditional criminal justice system, which is characterized for excluding the stakeholders.[112] Scholars such as Bianchi propose to replace the terms of the current criminal justice systems and redefine them in terms of tort, since civil law is more suitable to achieve the eumonic goals than criminal law. In other words, he suggests we move from criminal law to reparative law, thereby shifting the lawbreaker from being a criminal to being a debtor who is liable and has to take responsibility for his or her own acts.[113] Wrongdoing should be handled by a system that focuses on enabling, empowering and restoring and less with controlling and punishing.[114] Labelling an individual as a 'criminal' removes him from the realm of the normal into the realm of the exceptional, thereby placing him in a special category of people and excluding him from 'us'.[115] Nils Christie is a fierce critic of the concept 'crime' and as being a social construction that has no fixed meaning or reality. Louk Hulsman claims there is no such thing as 'crime' since it has become an umbrella term for a wide variety of behaviors that are only united because of the criminal process itself.

[109] Braithwaite, 1989, p. 55.
[110] Van Swaaningen, R., 1997, p. 207.
[111] Ruggiero, V., 2010, p. 194.
[112] Ruggiero, V., 2010, p. 180.
[113] Bianchi, H., 1986, p. 152.
[114] Alvesalo-Kuusi, A. & Lähteenmäki, L., 2017, p. 29.
[115] Hulsman, 1986, p. 25, Alvesalo-Kuusi, A. & Lähteenmäki, L., 2017, p. 28.

4.6 SUB-CONCLUSION

Importantly, the two alternatives I have gestured in this chapter are not and are also not meant as an exhaustive account of alternatives mechanism for conflict resolution. Providing such a comprehensive overview of all abolitionist ideas goes far beyond the scope of this thesis. This chapter was written with the intent to inspire a more nuanced view on relation of crime and punishment and propose criteria which a morally acceptable alternative should be able to meet. What the proposed alternatives show, at the very least, is that that crime and punishment are not inextricably linked to one another. To put it in Angela Davis' words: *"These new systems make us recognize that 'punishment' does not follow from 'crime' in the logical sequence."*[116]

In the beginning of this chapter, I identified two criteria a theory has to meet, in order to qualify as a morally acceptable response to crime. Both theories are able to meet the first criterion because they do not aim at making wrongdoers suffer. It is not implied, however, that since the proposed alternatives do not qualify as punishment, they will never bring about suffering. If one would ask whether this is problematic to the goal of finding another mechanism to handle wrongful behavior, the answer would be 'no'. In chapter two I have shown that acts only qualify as punishment if and only if they *aim* at imposing hard treatment on the offender. All of the abovementioned alternatives have no such aim. The fact that a restorative process might be burdensome for an offender and therefore makes him suffer, does not threaten the viability of the new insights. To eliminate every form of suffering, even if it is unintended, would not even be possible because suffering is an objective notion. Where one person feels he suffers a great deal, another might feel little affected. Whether the offender feels like he is suffering is of no importance to the abolitionist case. If we move onto the second criterion, we see that restorative justice is able to meet this demand as well. Reintegrative shaming, however is unable to meet the second criterion, because it shall – in general – not provide the victim with a sense of being heard.

[116] Davis, A.Y., 2003, p. 112.

CHAPTER 5: CONCLUSION

The purpose of this thesis is to take a second look at the legitimacy of a practice we often take for granted: punishment. The fact that punishment has become the standard response to crime and is deeply entrenched into Western societies, says nothing about its legitimacy. Therefore, I decided it was vital to carefully examine the legitimacy of punishment. Before doing so, it was important to define what punishment actually is. In the first chapter I proposed the following definition of punishment: *Legal punishment is a condemnatory measure imposed by a state institution on an individual who is thought to have committed a crime, thereby depriving the offender from a right he would normally be entitled to, by deliberately inflicting hard treatment on this individual.* Thereafter I addressed consequentialism and retributivism, and identified several flaws in these traditional penal theories. This led me to the same conclusion as Tim Meijers and Marlies Glasius[117], namely that both theories are unable to provide us with a rationale for punishment. Moving on to chapter four, I addressed penal abolitionism as a theory that, for that reason, rejects punishment.[118] Two theories have been explored and considered as possible alternatives to punishment. I developed two criteria an alternative has to meet, in order to qualify as a proper response to crime. Restorative justice seems capable of affirming the victims' sense of being wronged, without qualifying as punishment. Reintegrative shaming, on the contrary, has proven unable to meet the second demand – the affirmation of the past wrong to the victim.

Is restorative justice the perfect crime resolution mechanism, immune to criticism? No. As already pointed out during the discussion of restorative justice in chapter four, restorative justice raises several concerns as well. One could argue, however, that during the discussion of the flaws of restorative justice, this thesis has overlooked the most significant objection. It goes as follows: even though the replacement of punishment with an alternative crime resolving mechanism to be a morally desirable aim of philosophical legal theory, implementing such a system in the real world will raise enormous practical tensions. Critics have even argued that abolitionism is a postmodern and anarchist perspective of criminology. But I dispute this claim and believe that anarchy and abolitionism do not necessarily coincide. Anarchists, for one, do not focus on criminal law, but on state power in general. Abolitionists, by contrast, focus specifically on the state's power to punish and on the development of other mechanisms of social control.[119] Vincent Ruggiero points out that public opinion is a big obstacle for alternative justice practices. In general, people still want to see a criminal suffer. Most alternatives to punishment cannot meet these demands since they explicitly denounce hard treatment to be a legitimate aim of the justice system. This objection is a reflection of the Durkheimian idea that punishment is a vengeful and passionate reaction, motivated by passionate sentiments.[120] Ruggiero explains this public opinion-objection in the slightly narrower frame of dismantling the prison system. I think, however, that his point remains the same if it is applied to the wider context of punishment as a whole. Ruggiero argues that the practice of imprisonment is an expression of a nations cultural values and elucidates how society thinks and feels about its inhabitants and their actions.[121] He furthermore claims that any workable alternative to punishment needs to fit into the framework of what the public deems acceptable and reasonable.[122]Almost the same point is made by Finagrette, who argues that some hold that the law is an embodiment of moral attitudes of the members of the community. Therefore, punishment – as required by the law – is an expression of those moral attitudes.[123]

[117] Meijers, T., & Glasius, M., 2016, p. 432.
[118] Van Swaaningen, R., 1997, p. 202.
[119] Van Swaaningen, R., 1997, p. 132.
[120] Van Swaaningen, R., 1997, p. 183.
[121] Ruggiero, V., 2010, p. 182.
[122] Ruggiero, V., 2010, p. 182.
[123] Fingarette, H., 1977, p. 514.

These objections to alternative justice practices might be expressed with good reasons. But they are all related to the implementation of abolitionist alternatives in the real world, which is not my concern here. In order to express clearly what I try to make clear, I point to Jameson's' distinction between the *'utopian program'* and the *'utopian impulse'*. The utopian program is concerned with realizing the demands for a new society. The utopian impulse relates to dreams and desires for the future.[124] While the first is definitely interesting, my thesis is concerned with the latter. The mere fact that it might be difficult to make an alternative system function properly in the real world, is a problem of feasibility. But in my opinion, feasibility and morality are two entirely different things, of which I am – at this moment - only concerned with the latter. The fact that the implementation of an alternative system will run into practical difficulties does not mean it is not *morally desirable*. My aim for this thesis was to think of morally justifiable ways to respond to wrongful behavior which do not qualify as punishment. By proposing restorative justice a morally defensible alternative to punishment, I believe I have done exactly that. Taking further steps in order to apply these systems in the real world might certainly prove a challenging objective, of which the biggest task probably is to change people's attitudes towards crime.[125] But those practical difficulties are not my concern here. This thesis has shown that our traditional penal practices might be built on morally unjust foundations, but that a morally legitimate alternatives is conceivable. This seems to me a good place to start.

[124] Malloch, M., & Munro, B., 2013, p. 22.
[125] Van Swaaningen, R., 1997, p. 205.

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