INTRODUCTION

A nearly total unanimity prevails with regard to the fundamental necessity of a public penal system.[1] Even among those few who advocate the abolition of all punishments, a large majority advocates instituting alternatives to the usual prison sentence, rather than calling for the abolition of punishment without anything to replace it. When seen in this light, the existence of public penal law can be regarded as being completely justified. The manner in which punishment might actually be justified, however, remains just as controversial a subject as determining the appropriate amount of punishment. This is because these issues are closely related to one another.

Every theory of punishment currently advocated shares the rejection of the system of punishment which was prevalent in the early modern age. This rejected system, illustrated by such penal provisions as the *Constitutio criminalis Carolina*, enacted in 1532, was placed in opposition to the modern system of punishment by Michel Foucault in *Discipline and punish*. The early modern system differs from the modern system in the sense that the latter prefers either prison sentences or (if any) the most painless and most decent death sentences possible.[2] It is worth noting that well into the eighteenth century more than one hundred crimes were capital offenses. Torture,

1. For an example of the few exceptions, see Herman Bianchi, "Abolition: assensus and sanctuary," in Alexander R. Duff and David Garland (eds.), *A reader on punishment* (Oxford: Oxford University Press, 1994), pp. 336–51.
2. See the beginning of Michel Foucault, *Discipline and punish: the birth of the prison*, trans. Alan Sheridan, second edition (New York: Random House, 1995); see also the *Constitutio criminalis Carolina* in Friedrich-Christian Schroeder (ed.), *Die Carolina: die Peinliche Gerichtsordnung Kaiser Karls V. von* 1532 (Darmstadt: Wissenschaftliche Buchgesellschaft, 1986).

which was already systematically employed as an interrogation method, was often a component of the punishment, as well as constituting an intensification of the death sentence. Even though torture as a means for investigation and security is currently being propagated again[3] and even though the death penalty is still supported,[4] there are no theorists to be found who would come out in support of a return to early modern practice. All contemporary theorists show themselves to be guided by the humanitarian spirit of the Eighth Amendment to the United States Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

What exactly this humanism consists of, and where the limits of this humanism might lie, are still controversial issues. However, the fundamental discrepancy is generally seen to be somewhere between the theories of retributive justice and general deterrence.

Retributivist theories justify the punishment of a criminal on the grounds that retribution is demanded by justice to compensate for the inequities created by the crime. On this basis, one may make a subsidiary distinction and ask whether what needs to be compensated for is the gravity of the offense itself or the malevolence of the criminal that was illustrated by the said offense. Theories of general deterrence, on the other hand, justify the punishment on the grounds that all of the citizens will be deterred from carrying out an offense before it occurs, either through the threat of a certain punishment or through the enforcement of the said punishment; the latter option relies on the example it displays.

On the one hand, the modern advocates of general deterrence (examples include Thomas Hobbes, Samuel von Pufendorf, Christian Wolff, Cesare Beccaria, Anselm Feuerbach and Arthur Schopenhauer) consider that the uselessness inherent in punishments that do not serve to deter others from committing crimes is inhumane. The current system of positive criminal law also requires that each punishment contains elements of general prevention as stated in the initial paragraphs of the German Penal Code:

3. See, for example, Winfried Brugger, "Darf der Staat ausnahmsweise foltern?," *Der Staat*, 35 (1996), 67–97; and "Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter?" *Juristenzeitung*, 35, no. 4 (18 February 2000), 165–73. For a detailed repudiation of torture, see, for example, Henry Shue, "Torture," *Philosophy and Public Affairs*, 7, no. 2 (1977–88), 124–43.
4. See Ernest van den Haag, "Why capital punishment?," *Albany Law Review*, 54, nos. 3–4 (1990), 501–14.

> By serving a prison term, a prisoner should eventually become able to lead a life in which he or she commits no crimes (which is the goal of the execution of punishment). The completion of a term of imprisonment also serves to protect the general public from further crimes.[5]

On the other hand, theories of general deterrence often draw the criticism that they treat criminals inhumanely, because the intended aim of punishment is conceived of solely to serve the interests of the other citizens without taking into consideration the dignity of the criminal. This criticism is leveled in its most intense form when it is postulated that general deterrence allows the punishment of an innocent person.[6]

This objection can be understood in at least two different ways. General deterrence can be objected to on the one hand, for the reason that the aim of punishment ignores the interests of the convicted, or on the other hand, in accordance with retributivism, for the reason that any kind of interest – whether of the criminal or of the fellow citizens – should be disregarded by the penal sentence, because a punishment justified in a retributivist way is merely about inflicting on the criminal what he or she intrinsically deserves because of the deed. A punishment situated in the retributive model should be concerned with inflicting a punishment that is in line with what the prisoner merited because a certain crime was perpetrated. The latter objection is raised by retributivism. The former objection is raised by positions that hold that the rehabilitation of the perpetrator should be the punishment's goal. Admittedly, the latter position recognizes that for the purpose of reaching rehabilitation a certain period of time of specific deterrence may become necessary, in which society is protected from further crimes through incapacitation of the criminal.

5. From the German National Code of Enforcement of Sentences, the "Strafvollzugsgesetz" (StVollzG), published by the German Federal Ministry of Justice, § 2. The above passage is the precept to the later statutes in the codex. Compare as well with the judgment of the German Federal Court of Justice (*Bundesgerichtshof*) on December 8, 1970, 1 StR 353/70. (Translation mine.)
6. Cf. Peter Koller, "Probleme der utilitaristischen Strafrechtfertigung," *Zeitschrift für die Gesamte Strafrechtswissenschaft*, 91 (1979), 45–95; Kristian Kühl, *Die Bedeutung der Rechtsphilosophie für das Strafrecht* (Baden-Baden: Nomos, 2001), p. 29; Peter Landau, "Karl Christian Friedrich Krauses Rechtsphilosophie," in Klaus-Michael Kodalle (ed.), *Karl Christian Friedrich Krause (1781–1832): Studien zu seiner Philosophie und zum Krausismo* (Hamburg: F. Meiner, 1985), pp. 80–92 (p. 29). For a refutation of this objection, compare Fred Rosen, "Utilitarianism and the punishment of the innocent: the origins of a false doctrine," *Utilitas*, 9, no. 1 (March 1997), 23–37.

Retributivism criticizes theories of general deterrence as well as theories of rehabilitation considered as the aim of punishment for much the same reason, that is, because these theories treat punishment as a mere means to an end. Retributivists themselves hold that punishment ought to be justified without any reference to further goals, invoking the rationale that the criminal deserves it because he or she knowingly violated the law. It is for this reason that legal theorists term retributivism an *absolute theory*, because, according to retributivism, punishment represents a good that does not depend on any goal. On the contrary, in the "relative" theories the justification of punishment always depends on its relation to a goal. According to the proponents of retributivism,[7] it derives its superiority from the fact that it alone – as the only theory of criminal justice that views the punishment solely as a goal in itself – treats the malefactor not as a simple means to an end, but as a subject possessing human dignity. In this work, I will attempt to refute these theses. I hope to show that it is not retributivism but rather rehabilitation that meets this requirement.

Proponents of rehabilitation obviously consider the aim of punishment to be to grant the criminal the best "possible" status, by which it is understood that this is the way of treating the criminal that is both the most benevolent and still compatible with the protection of society against further crimes. Thus, with rehabilitation as an aim in punishment, clear limits are set for specific deterrence. Without specific deterrence, rehabilitation would be unthinkable, for if there were no public enforcement of the law, there could in turn be no reintegration back into society, for there would be no rule of law into which a criminal could be reintegrated after the rehabilitation has been completed.

Unlike rehabilitative and specific deterrent punishments, retributivism does not concern itself with the future of the malefactor beyond the duration of the punishment. In this respect, the theory of rehabilitation is the only one that can categorically exclude those sorts of punishment that – as mentioned at the beginning of this introduction – the proponents of all the theories of punishment reject resolutely: the "cruel and unusual punishments." The vice president of the Federal Constitutional Court of Germany Winfried Hassemer rightly

7. See, for example, Otfried Höffe, *Gerechtigkeit: eine philosophische Einführung* (Munich: C. H. Beck, 2004), p. 83.

observes: "The goal of rehabilitation is necessarily contained in opting for prison sentences. Corporal and capital punishments do not need any further justification than retribution."[8]

Even when one assumes that the punishment is merited and therefore justified as being compensation either for the crime or for the criminal's own wickedness, and asserts the claim that one should treat the criminal humanely, this allegedly humane view of the criminal should also concern itself with the situation in which the criminal will be after the complete term of imprisonment has been served. The absence of appropriate rehabilitative measures leads not only directly to the creation of a durable criminal environment with an ensuing reduction in public safety,[9] but also to a state in which the criminal is punished twice for a crime, by being continually stigmatized, instead of enabling him or her to express remorse and to reach a reconciliation with society.[10] Therefore, concern for the convict's future after the sentence necessitates appropriate treatment while the sentence is being served. Retributivism may attempt to fulfill this requirement of humaneness, along the lines of what Paul Ricœur attempted.[11] In doing so, retributivism stumbles upon what Hassemer terms the "antinomy of punitive goals," which refers to the fact that in many cases the various existing theories of punishment do not allow for the same amount of punishment.[12] Hassemer observes that

> A period of punishment limited by the proportionality principle and as required by the goal of retribution normally does not suffice for a treatment, so that the goal of rehabilitation itself will fail. A *period of punishment* can also be *too long* for a reasonable treatment of the prisoner.[13]

In view of this antinomy of the punitive goals, a priority rule must be set. Either retributivism should be deemed to be the primary aim and rehabilitation the secondary aim – meaning that the rehabilitation will be carried out only as far as it does not interfere with the retribution – or the rehabilitation should be given priority over the retribution.

8. Winfried Hassemer, *Einführung in die Grundlagen des Strafrechts*, second edition (Munich: C. H. Beck, 1990), p. 286.
9. Cf. John Braithwaite, *Crime, shame and reintegration* (Cambridge: Cambridge University Press, 1989), p. 102.
10. Cf. Braithwaite, *Crime, shame and reintegration*, p. 101; Hassemer, *Grundlagen des Strafrechts*, p. 289.
11. Paul Ricœur, *Le Juste* (Paris: Editions Esprit, 1995), p. 203.
12. Hassemer, *Grundlagen des Strafrechts*, p. 291.
13. Hassemer, *Grundlagen des Strafrechts*, p. 291.

The form of retributivism that is given priority regards its moral superiority as stemming from its being the only genuinely humane justification for punishment. It sees itself as better than rehabilitation for the reason that it bases itself not upon concern for the criminal, but instead solely upon his or her merit – or for that matter, upon his or her guilt, responsibility or malevolence. However, in doing so, retributivism ignores the following points.

First, the following differentiation is necessary. *Retribution* can be understood, on one hand, in its minimalist sense, as meaning that the guilt of the punished, without any exception, should be the prerequisite for any given punishment.[14] According to this understanding, all theories of punishment, that is, theories both of general deterrence and of rehabilitation, are retributivist theories.[15] On the other hand, retribution can also be understood to mean (1) a response to the offense that strives to provide equal compensation for the criminal's merit or guilt and (2) that this equal compensation is the sole just punishment. Thus, it excludes any goal in punishment (for instance, general deterrence, rehabilitation and specific deterrence). This is what one usually understands under the term retributivism. Retributivism consists in the acceptance of the latter (disputable) thesis. When I speak of retribution in this book, I will be making reference to the latter understanding of retribution.

Secondly, in the justification of the punishment as retaliation, *it is not the criminal's future, but rather his or her past* that is taken exclusively into account. As we have seen, this occurs with appeal either to the criminal's merit or to his or her guilt. The concept that lies at the root of this *guilt* can be from a modern, humane perspective only the concept of *responsibility*. In fact, in every contemporary retributive theory – as opposed to the cases of the deterrent and rehabilitative theories – there is the imperative to respect the responsibility of the criminal as constituting his or her own dignity and to respond to this dignity with equal compensation.

Throughout this book, I will proceed as would a retributivist, assuming that a human being's responsibility for his or her actions, as opposed to other living beings, is actually what constitutes the special status of human beings (their *dignitas*). But then, the following

14. Cf. Otfried Höffe, *Gibt es ein interkulturelles Strafrecht? Ein philosophischer Versuch* (Frankfurt a.M.: Suhrkamp, 1999), p. 72.
15. Cf. Ulfried Neumann and Ulrich Schroth, *Neuere Theorien von Kriminalität und Strafe* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1980), p. 6.

differentiation must be taken into account. There are always two dimensions to the assertion that a human being bears responsibility for his or her actions. On the one hand, this responsibility means that different actions will lead to different consequences, and especially that all actions, which from the perspective of morality are valued differently, will also lead in some cases to different consequences. Among other things, it means that actions violating the law necessarily could or should lead to a worse situation. On the other hand, the human's status as a being capable both of reason and of assuming responsibility is an inalienable status that cannot be taken away from that human or any other human. The assertion that the human being's past illegal actions should carry consequences should not lead us to stop treating this human being as a being capable of reason, except when this prevents his or her fellow human beings from exercising that same status. Otherwise, the perpetrator would be treated as a person capable of assuming responsibility only *up to the crime*; *after the conviction*, however, the criminal would lose this status, that is, his or her worth. In this way, retributivism would lack exactly the sort of behavior toward the criminal which it regards as its moral superiority over the other theories of punishment. In short, retributivism does not sufficiently differentiate between the actor and the action. In this respect, the viewpoint that would trace a retributivist influence back to Christianity proves not to be truly convincing.[16] Rehabilitation is equally rooted in the Christian tradition, as the rehabilitation theorist John Braithwaite suggests in his plea for "reintegrative shaming":

> It is shaming which labels the act as evil while striving to preserve the identity of the offender as essentially good. It is directed at signifying evil deeds rather than evil persons in the Christian tradition of "hate the sin and love the sinner."[17]

Thirdly, retributivism relies on the assumption that the consequences of the crime, for which the criminal should take responsibility, should consist of providing equal compensation, because that is what justice demands. While retributivism focuses in this manner on demanding an equivalent punishment, *it misses an indisputable consequence of the crime*: at least temporarily, the existence of a commonwealth between the criminal and other citizens is made impossible by the crime.

16. For this viewpoint, cf. Claus Roxin, *Strafrechtliche Grundlagenprobleme* (Berlin: De Gruyter, 1973), p. 3; and Neumann and Schroth, *Neuere Theorien*, p. 13.
17. Braithwaite, *Crime, shame and reintegration*, p. 101.

A short thought experiment may illuminate this point. Let us assume the retributivist position as the starting point for this experiment, which is a position that holds that the severity of punishment should be equivalent to the gravity of the crime and that this alone should represent – without any specific *aim of punishment* – the only justified solution. Then, let us assume that in this fashion we reach the conclusion that a criminal has merited a twenty-year prison sentence. It is usually the case that serving the prison term begins, at the very latest, after the judgment has taken effect and after all recourse has been exhausted (in reality, however, the criminal – still considered officially innocent – has already been in custody either since the investigation commenced or since the issue of the arrest warrant). In this case, retributivism should raise no objections if the enforcement of the sentence were to be postponed. If the criminal were, for example, twenty years old, this would allow him or her to be in prison from age thirty to age fifty, but to remain a free person from twenty to thirty.[18] It is not only for pragmatic reasons (for instance, because of administrative concerns regarding prison capacity) that our society would reject such a reform of the prison system; our society would find this fundamentally and wholly unacceptable because it would severely endanger public safety. Above all, such a reform would be rejected because of a specific deterrent rationale. Now, the danger to society is clearly consequent to the crime. Following the specific deterrence model, the criminal is therefore liable for this consequence caused by his or her criminal offense. Whereas it is controversial whether the moral demand of retribution for the guilt that is addressed by retribution can be seen as a consequence of the crime, the danger to society is an unquestionable consequence arising from the actions of the criminal. Retributivism, however, does not actually take into account the degree to which society is endangered by these crimes, which is at odds with retributivism's own self-portrayal of itself as being the only theory of criminal justice that requires the criminal to shoulder the burden of the consequences of his or her actions.

Fourthly, the disregard shown for the consequences of the action attests to *a disregard for the legal dimension of crime* as well as for the punishment of a crime. Retributivism focuses on the guilt of the perpetrator. Admittedly, it also emphasizes that the punishment of

18. Such a postponement is actually possible under German law, though admittedly only in a limited number of cases with short sentences.

the criminal represents justice for the victim.[19] Apart from that, concern for the commonwealth does not play a role in retributive theory's justification of punishment. Consequently, if in the retributivist justification of punishment only the criminal is taken into account, this begs the question of why the punishment falls under the jurisdiction of the judicial powers, that is, why it belongs to the commonwealth – which, in other cases, maintains distance from the private sphere of the individual. If, in the retributivist justification of punishment, only the criminal and the victim are taken into account, then it is inevitable to ask why the punishment could not just be decided in a civil trial. Under these circumstances, we should not be surprised to observe that retributivism is hardly ever supported by legal theorists, even though it enjoys a wide esteem among philosophers for its supposed morality, as well as majority support.[20] This discrepancy between the view of philosophers and the view of legal theorists does not, unfortunately, receive much attention from philosophers.

Unlike the theories of deterrence and rehabilitation, the justified implementation of retributivism is not accountable to performance criteria, or to its "output" (put differently: "According to retributivism . . . the significance of punishment lies outside the realm of social reality").[21] If especially high recidivism figures were noticed in relation to one sort of crime that was being handled with measures involving rehabilitation of the criminal, there would then be questions as to the legitimacy of this sort of penal mechanism. However, the implementation of retributivism is, by its very essence, not dependent on its effectiveness. The justification for a system of retributive justice is not empirically verifiable through criminological studies, for example. Rather, the criticism directed toward retributivism must be at the conceptual level. For this

19. This perspective is very questionable, because, in a modern constitutional state, the criminal proceedings are differentiated from civil proceedings, among other things, by the former being carried out by the state's attorney as the representative of the interests of the commonwealth, while the latter transpires between two private parties. At the most, the victims appear alongside as joint plaintiffs and the punishment is in no way seen to be compensation for the infringement on their rights. Since the notion that punishing the malefactor represents justice for the victim seems not to be central to the core of retributivism I will disregard this aspect of it, at least in this work, and concentrate only on the main argument of retributivism. Were this main argument omitted, the (alleged) justice on the part of the victim for a proponent of retributivism would also not be enough justification for the ills that the criminal would be forced to undergo as a component of his or her punishment.
20. Cf. Roxin, *Strafrechtliche Grundlagenprobleme*, p. 182.
21. Neumann and Schroth, *Neuere Theorien*, p. 11.

reason, the criticism of retributivism that will be made in this book will present hardly any empirical and interdisciplinary aspects. Instead, it will concentrate on the conceptual arguments, that is, on arguments dealing with legal ethics and moral philosophy. In this respect, this book will proceed no differently than do the depictions of those legal theorists who still treat "absolute theory" in relation to Kant's and Hegel's argumentation – or more exactly, to its theoretical foundation. But my conceptual critique will aim to facilitate the convergence of the philosophical with the legal debate over the justification of punishment.

Last but not least, the importance of empirical studies for the justification of punishment should not be overestimated. Hassemer calls to our attention

> that reliable knowledge about the *successes* of rehabilitation can hardly be obtained. The favorite argument based on the recidivism figures, which because they fluctuate between 30 and 40 percent are said to discredit the concept of rehabilitation, is untenable upon closer examination. First, from such statistics one knows only the manifest, determined and judged criminality . . . Secondly, experiments and empirical lines of argument face a fundamental problem in penal law: one cannot isolate the intervening variables; one cannot try out how it would be if one were to seek to achieve the reform of the offender with another form of penal consequence.[22]

Even if an especially high recidivism rate were to be observed in regard to rehabilitative punishments of certain crimes, it would still be impossible to draw a reliable conclusion from that observation. Is the limited efficiency of the punishment still better than nothing? Or, on the contrary, should the punishment of these crimes be completely abolished? Should a retributivist degree of punishment be substituted in place of a rehabilitative punishment? Or should an effective general deterrence punishment be introduced, such as the death penalty? The decision remains to be made, and it requires overall legal and moral guidance regarding the justification of punishment. The consequences for the commonwealth should also be brought into consideration. I differ in this point somewhat from the following view of Kristian Kühl, for example: "All the theories of punishment that are geared to certain future goals must assert the suitability of the

22. Hassemer, *Einführung*, p. 288. Also, cf. George P. Fletcher, *Basic concepts of criminal law* (Oxford: Oxford University Press, 1998), p. 31.