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Punishment and Reform

Steven Sverdlik
Department of Philosophy SMU, sverdlik@mail.smu.edu

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It is an ancient set of ideas that the punishment of criminals can lead to their moral reform and, therefore, that legal institutions should be designed, at least in part, to achieve this aim. Plato is often cited as the founding father of this tradition, and his claims about punishment are remarkable: whoever acts unjustly, he tells us, should voluntarily go to a magistrate to be punished, regarding her as like a doctor who can prevent "the disease of injustice from being chronic and making his soul festering and incurable".[1] Another founding father is said to be G. W. F. Hegel, who famously asserted that criminals have a right to be punished, and are honored as rational beings when the authorities inflict it on them.[2] There are contemporary writers such as R. A. Duff who seem to belong to this reform tradition, as we might call it, although they often reject the more extravagant claims of the founding fathers.

In the present essay I examine the idea that punishment should reform offenders. I clarify the sense in which some important theorists including Duff can appropriately be described as accepting the reform of offenders as at least one legitimate goal of punishment. I then formulate the conception of reform that we can draw out of their work. This is a moralized conception, which emphasizes repentance for wrongdoing and a commitment to obey the law for moral reasons. In the last section I argue that

[1] Plato, Gorgias, trans. Terence Irwin (Oxford: Oxford University Press, 1979), pp. 46-54 (= 475b-481b), at 53 (= 480b).

[2] G. W. F. Hegel, Elements of the Philosophy of Right, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), pp. 124-7, at 126.

consequentialism gives a better account of the role that moral motivation should have in the legal of reform of offenders. This fact argues in favor of a consequentialist approach to punishment.

I

'The Reform Theory' and Its Relatives

The history of reformist thinking about state punishment is confusing, in part because of terminological issues. Neither Plato nor Hegel describes his own position by using the word 'reform' (or its equivalent). Forty years before Hegel's work Jeremy Bentham does assert that punishment might, among other things, 'reform' a criminal who undergoes it.[3] But it is only in the late 19th century that English-language philosophers start to speak of a 'reform theory' of punishment.[4] A. C. Ewing's important work, The Morality of Punishment (1929), is the first book-length defense of the position that he calls "reformatory".[5] And by Ewing's day it was conventional to say that there are three

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[3] Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, ed. J. H. Burns and H. L. A. Hart (London: Methuen, 1982), pp. 180-1. (Published 1789)

[4] J. M. E. McTaggart attributes a 'reformatory' theory to Hegel in his "Punishment." Studies in Hegelian Cosmology, 2nd ed. (Cambridge: Cambridge University Press, 1918), p. 132f. This essay was first published in 1896. Before McTaggart, O. W. Holmes had spoken generically of a reform view. See note 6 below.

[5] A. C. Ewing, The Morality of Punishment (London: Kegan, Paul, Trench, Trubner,

general 'theories of punishment', namely, reform, deterrence and retribution.[6] It must be said that this division could easily have been seen to be unsatisfactory since, as I just noted, utilitarians like Bentham had recognized that punishment may be able to increase the amount of happiness in society by reforming convicted criminals. Utilitarianism need not yield a purely 'deterrence' theory of punishment.

Curiously, the more recent proponents of positions that would seem to be variants of the reform theory tend to avoid that label. I will mention three important figures, and say something about why they prefer different terminology.

Herbert Morris describes his second theory of punishment as a 'paternalistic', the idea being that punishment should be imposed on criminals for the same reason that good parents punish their children, to wit, to benefit them. The specific benefit that punishment can impart is a moral one, namely, making the criminal "an autonomous individual freely attached to that which is good".[7] This outcome sounds like a sort of moral reform, but

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1929). Hereafter, abbreviated as MP. See also Walter Moberly, The Ethics of Punishment (Hamden, Conn.: Archon Books, 1968), esp. chs. 5, 8.

[6] The tripartite division can be found by 1881. See O. W. Holmes Jr., The Common Law, ed. M. Howe. (Cambridge, Mass.: Harvard University Press, 1963), p. 36. It structures H. L. A. Hart's influential paper "Prolegomenon to the Principles of Punishment". Punishment and Responsibility (Oxford: Oxford University Press, 1968), pp. 1-27.

[7] Herbert Morris, "A Paternalistic Theory of Punishment." American Philosophical Quarterly 18 (1981), pp. 263-71, at 265. (Hereafter PTP.) For his earlier theory see Herbert Morris, "Persons and Punishment". On Guilt and Innocence (Berkeley, CA: University of California Press, 1976), pp. 31-58.

Morris explicitly rejects that label.[8] One of his reasons for doing so is that taking reform as a goal might authorize authorities to transform an offender "in a manner that bypassed the human capacity for reflection, understanding and revision of attitude."[9] It is clear, though, that Morris believes that punishment should produce moral improvements in people who undergo it. If we can call these improvements 'reform' we see that Morris endorses what I will call the First Platonic Claim.

FPC: to elicit reform in a person is necessarily to benefit her.

Jean Hampton holds that "punishment is a way of teaching ethical knowledge."[10] Somewhat like Ewing, she holds that its purpose is to teach the wrongdoer and others that her action was morally wrong.[11] Hampton also endorses the First Platonic Claim.[12] We would expect her, too, to speak of her view as a sort of reform theory. Instead, she calls it

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[8] PTP 264.

[9] PTP 265. Morris seems to have in mind his earlier "Persons," op. cit. There he criticizes the claim that criminal behavior is a sort of illness that calls for therapy, not punishment. The therapeutic interventions that could be taken with regard to those who break the law might completely and forcibly transform their personalities. Ibid., pp. 42-3.

[10] Jean Hampton, "The Moral Education Theory of Punishment." Philosophy and Public Affairs 13 (1984), pp. 208-38, at 213. (Hereafter MET.)

[11] MET 221. Hampton nowhere mentions Ewing.

[12] MET 214, 237.

the 'moral education' theory, and she implies that it is not a reform theory.[13] I believe that Hampton is following earlier work of Morris here. She is thinking of the reform and 'rehabilitation' of criminals as identical goals.[14] But 'rehabilitation' approaches are based on the assumption that criminals are mentally ill, so that the appropriate social responses to them are conceived of as forms of therapy.[15] Such approaches seem to conflict with the claim that many criminals are legitimately punished for their behavior. Hampton herself believes that many criminals are legitimately punished for their behavior.

The most distinguished contemporary philosopher whose views seem to fall within the reform tradition is Antony Duff.[16] Here is one summary that he gives of his position:

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[13] MET 209. She seems to be accepting the tripartite division.

[14] R. A. Duff distinguishes them. Punishment, Communication, and Community (Oxford: Oxford University Press,2001), p. 5. (Hereafter PCC.)

[15] MET 214-5; 222.

[16] R. A. Duff, Trials and Punishment (Cambridge: Cambridge University Press, 1986), esp. ch 9. (Hereafter TP.) PCC, esp. ch. 3. See now Rowan Cruft, Matthew Kramer, and Mark Reiff, eds., Crime, Punishment and Responsibility: The Jurisprudence of Antony Duff (Oxford: Oxford University Press, 2011). Writers close to Duff's position include Steven Tudor, "Accepting One's Punishment as Meaningful Suffering." Law and Philosophy 20 (2001), pp. 581-604; John Tasioulas, "Punishment and Repentance." Philosophy 81 (2006), pp. 279-322; Christopher Bennett, The Apology Ritual (Cambridge: Cambridge University Press, 2008).

> Punishment should be understood as a species of secular penance that aims not just to communicate censure but thereby to persuade offenders to repentance, self-reform, and reconciliation.[17]

It can be seen that Duff is not averse to speaking of the 'reform' of criminals—although, as here, he prefers to speak of punishment encouraging criminals to reform themselves. Duff does not agree with Morris and Hampton on every point;[18] but they all believe that punishment must respect the autonomy or moral agency of criminals. This insistence also leads Duff to be wary of speaking of the most defensible position as being a reform theory, since that term (like 'rehabilitation') might be used to include modes of treatment that simply mold criminals into law-abiding citizens, and undermine their moral agency.[19] Duff prefers to speak of his position as a "communicative theory"—his point being that punishment conveys to offenders the appropriate social censure of their actions.[20]

Despite the terminological issues that have just been noted, I will speak of the process we will be investigating as 'reform'. I do this in part to bring out the fact that there are important connections running from Plato to Bentham and Ewing and on to writers like Morris and Duff. And the term seems accurate as a matter of English usage.

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[17] PCC xviii-xix. Cp. xvii; 106; 129.

[18] For criticism of Hampton, see PCC 91-2. Duff also abandons his earlier endorsement of the First Platonic Claim at PCC 89-90, which might also be seen as a criticism of Morris and Hampton.

[19] PCC 90-1.

[20] PCC xviii.

On the other hand, since the more recent writers I mentioned all reject the term 'reform' as a label for their own positions, I will call their theories 'quasi-reform'. No substantive issue that I am interested in will be decided by that label. The two substantive issues I am interested in are these: (i) what is reform? (ii) what role will it have in a theory of punishment?

Before I address those questions I will make four points about theories of punishment that focus on reform. The first three are familiar.

First, it is one thing to assert that reform can occur while a person is being punished; it is another to say that her punishment itself ought to produce reform. Only the latter idea should be thought of as accepting reform as a goal of punishment.[21]

Second, we must distinguish the assertion that punishment itself can and should bring about reform from the assertion that some non-punitive treatment can and should bring about the reform (or 'rehabilitation') of a criminal.[22] The latter position is not a reform approach to punishment. We will be investigating the claim that reform is a morally legitimate goal of punishment itself.

Third, some writers in effect assert that the reform of criminals is the only legitimate goal of state punishment. Other writers make it one goal among others. For example, utilitarians traditionally emphasize deterrence as the main way that a system of

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[21] Hastings Rashdall, The Theory of Good and Evil, 2nd ed. London: Geoffrey Cumberledge, 1924), Vol. I, p. 292; MP 73.

[22] Derk Pereboom is a prominent contemporary proponent of the idea of replacing punishment. See his Living Without Free Will (New York: Cambridge University Press, 2001), pp. 158-86, esp. 174-86.

criminal law can produce happiness for a society, but, as I noted, they have acknowledged that reform is, in principle, another way.[23] For a utilitarian reform is in principle, we might say, a sub-goal of punishment. Ewing, who is not a utilitarian, asserts that deterrence and incapacitation are morally legitimate aims of punishment.[24] I will call theorists who believe that reform is the only legitimate goal of punishment 'exclusivists' and theorists who believe that reform is one legitimate goal among others of punishment 'inclusivists'.

Finally, some philosophers accept the First Platonic Claim—that reform is necessarily good for the criminal who is punished.[25] Other philosophers claim only that reform is a morally worthy aim of punishment, but do not assert that being reformed necessarily is a benefit to the offender. Still, given that a reformed criminal will treat other people in morally better ways, it is plausible to claim that an important goal of a system of punishment is to produce such reformation.[26] Duff has now expressed doubts about its suitability for use in justifying punishment in the sort of political community he

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[23] Bentham, Introduction, op. cit., pp. 180-1; Henry Sidgwick, The Elements of Politics, 3rd ed., (London: Macmillan, 1908), p. 122.

[24] MP 80; 92; 103; 120; 122.

[25] Plato, Gorgias, 475b-481b; PTP; MET; TP 256-60.

[26] I take it that the utilitarian writers cited above in note 23 do not claim that moral reform is necessarily better for the person who is changed in this fashion. However, if a consequentialist accepted certain 'Objective List' conceptions of well-being she could include virtue as a component of a person's well-being, so that bringing about her moral improvement would be good for her.

endorses.[27] Given that it is controversial, and that it is possible to take reform as an aim of punishment even if it is false, I will not be assuming it in what follows.[28]

II

Quasi-Reform Theories and Exclusivism

The theories of Morris, Hampton and Duff certainly seem to be claiming that a psychological change that I am calling 'reform' is at least one of the legitimate goals of a system of punishment. In this section we look at some of the structural features of quasi-reform theories. I argue that they are not exclusivist, even though their proponents might be understood to be claiming that they are. That is, there are other aims besides reform in their theories. In fact, reform plays a relatively small role.

We can begin with the self-descriptions of quasi-reform theorists. Morris explicitly says that reform is only one of the legitimate goals of a system of punishment.[29] Hampton, in contrast, says that reform (and the moral education of the citizenry) is the only legitimate goal.[30] She later changed her mind about this.[31]

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[27] PCC 89-90.

[28] Skepticism about the First Platonic Claim is expressed by Joel Feinberg, Harm to Others (New York: Oxford University Press, 1984), pp. 65-70; Russ Shafer-Landau, "Can Punishment Morally Educate?" Law and Philosophy 10 (1991), pp. 189-219, at 209-11.

[29] PTP 271.

[30] MET 209.

Duff is the most difficult of the three to characterize. He has asserted that he is offering a "unitary" theory of the justification of punishment.[32] One way to explore whether this is true is to look at how he responds to two objections. These are actually old objections to reform theories.[33] Morris and Hampton also responded to them.[34]

> Criticism 1: If reform is the only legitimate goal of punishment, then someone who has repented and reformed before being punished, no matter how serious her crime, ought not to be punished. But that is false.
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> Duff's responses: [35] A truly repentant offender would desire to be punished. This is related to the crucial fact that the offender's undergoing the 'hard treatment' component of punishment serves as a "secular penance". That is, it is a kind of apology to the victim and to the community that serves to reconcile them. Repentance does not even call for a reduction in sentence, since a full apology is owed in any case to victim and community.[36] Furthermore, not punishing the

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[31] Jean Hampton "Righting Wrongs" in Jean Hampton, The Intrinsic Worth of Persons, ed. Daniel Farnham (New York: Cambridge University Press, 2007), p. 108, n. 2.

[32] PCC xvii.

[33] They were both briefly mentioned by Holmes, Common, op. cit., p. 36. Objections to indeterminate sentencing were first raised by writers discussing its practice in the US. American Friends Service Committee, Struggle for Justice (New York: Hill and Wang,1971), chs. 3, 5, 6 and 8.

[34] PTP 268-70; MET 230-5.

[35] PCC 118-21.

[36] PCC 120-1; R. A. Duff, "The Intrusion of Mercy." Ohio State Journal of Criminal Law

offender fully would communicate a false message to all concerned about how wrong the offender's behavior was.

Criticism 2: If reform is the only legitimate goal of punishment, then someone who is incorrigible, or a fanatic, ought not to be punished at all, because her punishment cannot reform her. But that is false. On the other hand, and more realistically, reform might instead be thought to favor indeterminate prison sentences for unreformed offenders. However, this means that if someone who commits a minor offense is unreformed by her initial punishment it should in principle be lengthened until she does reform. This sort of practice results in objectionably disproportionate punishments and has been shown in practice to lead to terrible abuses.

Duff's responses:[37] Offenders are autonomous agents and the state must try to persuade them that their acts were wrong, not coerce their obedience. Furthermore, unduly harsh punishments—like unduly lenient—communicate a false sense of how wrong the offender's act was. Finally, the state owes it to victims to compel offenders to perform a full penance, that is, apology, even if the offender is certain never to repent.

One of Duff's responses to the first objection is striking. I will call it the Second Platonic Claim.

SPC: a truly repentant offender who had not yet been punished for a crime would desire to undergo it.

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4 (2007), pp. 361-87, at 384-6. Contrast TP 289.

[37] PCC 121-4.

(Morris also asserts this.[38]) This is distinct from, though related to, the First Platonic Claim: that reform is necessarily good for the criminal who is punished.

The Second Platonic Claim is puzzling. If we consult the quotations from the three quasi-reform theorists above, it seems that the psychological changes in offenders that they are interested in promoting are, roughly, these: becoming convinced that one's action was wrong; feeling guilty for performing it; resolving not to do it again. So, if a rational offender underwent these three changes, why would she still want to be punished?

The answer that Duff gives to this question brings out the distinctive claims in his theory. Punishment communicates society's censure of the offender's criminal conduct and also constitutes "a species of secular penance" by the offender.[39] This latter claim means that punishment is a sort of ritualized apology made by the offender to the victim and the community, after which she is regarded as reconciled with them.[40] Such an apology must be distinguished from compensation. I do not want to examine the cogency of these two ideas of censure and penance. The important point for my purposes is this: there seem to be at least three aims of punishment in Duff's theory, not one.[41]

All three quasi-reform theorists reject the two objections. They thus accept that convicted offenders will be punished even if they have already reformed, in some sense,

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[38] PTP 269.

[39] PCC xviii-xix.

[40] Cp. Bennett, Apology, op. cit., pp. 144-9; 188-94.

[41] On the multiplicity of aims in Duff's theory, see Matt Matravers, "Duff on Hard Treatment" in Cruft, Kramer, Crime, op. cit., pp. 68-83, at 70.

and obviously incorrigible offenders will be punished in similar ways. Furthermore, the amounts of punishment meted out to these two groups of offenders, and to other convicted offenders, will be scaled in a certain way even if considerably more or less than the prescribed amount would definitely be what is needed to bring about the reform of an offender. These facts strongly suggest that even someone who claimed to be an exclusivist— Jean Hampton, in her "Moral Education Theory"—actually was using standards for designing systems of legal punishments that were not focused only on the reforming of convicted offenders. So she was not in fact an exclusivist, and Morris and Duff are not exclusivists either. The quasi-reform theorists vary in the additional aims that they advert to in the design of legal punishments. All emphasize the communication of certain messages, as it were, to the offender and to others. Duff has his distinctive notions of penance and apology. But they all accept that reform is one aim of punishment.

III

What is (Legal) Reform?

Reform is not the only aim of punishment for quasi-reform theorists. But it is one aim. We now investigate more carefully what reform is. In this section I will formulate a conception of reform that is based on the claims of the quasi-reform theorists. My eventual formulation can be seen as a rational reconstruction of their thinking.

As a point of departure and contrast I will quote what H. L. A. Hart wrote about reform in 1960. We will see that quasi-reform theorists utilize a significantly different conception.

> 'Reform' as an objective is no doubt very vague; it now embraces any strengthening of the offender's disposition and capacity to keep within the law, which is intentionally brought about by human effort otherwise than through fear of punishment. Reforming methods include the inducement of states of repentance, or recognition of moral guilt, or greater awareness of the character and demands of society, the provision of education in a broad sense, vocational training and psychological treatment.[42]

First, note that Hart does not count as 'reform' any strengthening of an offender's disposition to obey the law that arises simply because she has been punished and is afraid of undergoing it again. (This sort of process is sometimes called 'special deterrence'.) I believe that the quasi-reform theorists would accept this exclusion.

However, Hart's inclusion of activities like vocational training and therapy would be rejected by quasi-reform theorists, I think, for being too inclusive. That is because they understand reform to be focused on the agent's prior wrongdoing and her rejection of it. As the quotation from Duff above shows, some of the central ideas in his theory are that punishment conveys to the offender that she acted wrongly, and if it operates properly she will come to understand and accept that this is so, and then commit herself to refraining from such wrongdoing in the future. Clearly training in a trade would not usually be designed to achieve these goals, nor would it usually do so.[43] It is open to a

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[42] Hart, "Prolegomenon", op. cit., p. 26. Cp. two similar definitions of 'rehabilitation': Francis Allen, The Decline of the Rehabilitative Ideal (New Haven: Yale University Press, 1981), p. 2; Lee Sechrest, Susan White, and Elizabeth Brown, eds., The Rehabilitation of Criminal Offenders: Problems and Prospects (Washington: National Academy of Sciences,1979), pp. 20-1.

[43] Cp. PTP p. 264, n. 3.

reform theorist to grant that society may be permitted or required to offer vocational training or psychotherapy to offenders while it is punishing them. But we are trying to understand one of the aims of punishment itself, and that means that we need to understand what reform is.

Third, quasi-reform theorists seem to claim that a reformed offender will have a certain motive or reason for conforming to the law. We saw how Morris describes reform as changing an offender's character so that she is "a morally autonomous person attached to the good".[44] Hampton writes

> The state…wants to use the pain of punishment to get the human wrongdoer to reflect on the moral reasons [for the existence of the specific criminal law he violated], so that he will make the decision to reject the prohibited action for moral reasons, rather than for the self-interested reason of avoiding pain.[45]

Duff's position on this question is not clear, but I think the preponderance of evidence on this question leads us to the conclusion that he agrees with Morris and Hampton.[46] These

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[44] PTP 265.

[45] MET 212.

[46] In his brief explicit discussion of reform at PCC 108-9 Duff does not say anything about the offender's motive or reason for conforming to the law. But there are clear suggestions that he believes her motive will be moral, in some sense. First, he always stresses the continuity of aims in the various phases of the criminal process. And when discussing the aims of the trial and conviction phases, he explicitly says that they seek to have offenders "recognize the wrongfulness of their past crimes and refrain from future

theorists all insist that a reformed offender will refrain from breaking the law because it is morally right to obey it; she will obey the law for moral reasons. To be morally reformed, we might say, is to become disposed to 'do the right thing for the right reason' and, in the case of the criminal law, the right reason to obey it is moral.

A fourth point needs to be made about the scope of reform. Here quasi-reform theorists seem to disagree among themselves. Morris' notion of bringing about "a morally autonomous person attached to the good" suggests that reform constitutes a global transformation of the offender's character.[47] Duff seems to have reservations

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crimes for that reason." PCC 81. This suggests that punishments will have the same aim. Second, the institutional processes that Duff discusses as, initially, alternatives to punishments but, in his view, conceivably instances of it—'criminal mediation', probation, specialized programs for abusive men, and community service orders—are all described as ways of confronting offenders with the moral wrongfulness of their own behavior. (PCC 93-4; 98; 101; 103; 105) It is a natural inference to read Duff as adding that the desired result of such processes is a commitment by the offender to refrain from the relevant behavior because it is wrong. Finally, scattered remarks suggest exactly this conclusion: the goal in punishing is to have offenders refrain from crime because it is morally wrong or obey the law because it is morally right (TP 263; Cp. 272; 273; 278; PCC 98 ("her recognition of the wrong she has committed"); 118 ("the thought that such conduct would be wrong"); 122 ("to see and accept that it was wrong").

[47] PTP 265. Moberly's central example of a successful punishment conveys the sense of the offender's global reform. Ethics, op. cit., pp. 131-3. Tasioulas speaks of "a thoroughgoing change of heart". "Punishment", op. cit., p. 308.

about such a wide-ranging scope. He asserts that legal punishment "can properly insist on addressing only those aspects of [an offender's] conduct or attitudes that constituted her crime."[48] This seems to allow for efforts to transform an offender's general attitudes towards property rights, even if he was only convicted of burglary. But it would seem to disallow efforts at transforming this offender's attitudes towards, say, spousal abuse if he was only convicted of burglary. Notice that this limitation does not pertain to reform as a psychological process. It pertains to the reform that can legitimately be a goal of a political or legal system that has a specified set of prohibited actions. For this reason I will speak of the conception that I formulate as capturing a notion of 'legal reform'.

A fifth point concerns the degree to which reform is a purely cognitive transformation. Here again there is disagreement. I quoted Hampton's assertion that "punishment is a way of teaching ethical knowledge."[49] The knowledge it aims to teach an offender, Hampton claims, is that her criminal act was morally wrong. Duff has objected to her position on the grounds that often criminals already know that their actions were wrong.

> The problem is not that they do not realize what they are doing is wrong, but that they do not care enough about it, or fail to attend to that aspect of their conduct, or give in to temptation.[50]

Duff's point is plausible, and will be reflected in our definition.

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[48] PCC 126.

[49] MET 213.

[50] PCC 91. Cp. MP 84

Finally, as we have seen, Morris, Hampton and Duff all insist that reform must be the result of autonomous activity by the offender, and not something that bypasses "the human capacity for reflection, understanding, and revision of attitude".[51] In their view the offender must freely resolve to do various things, and must change psychologically as a result of her free reflection.

I will now take all of these assertions into account and formulate the conception of reform that seems to capture the most plausible claims of the quasi-reform theorists. I will call it the Moral Conception of Legal Reform.

> MCLR: An offender S who has committed a criminal offense of type T will be reformed with respect to that instance of her performing this type of action if and only if
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> 1. she comes to believe that her action was morally wrong, if she didn't already believe this;
> 2. she repents having performed that action (i.e., she feels guilty for having done it);
> 3. (a) she freely resolves to refrain from performing actions of type T, and actions of a similar moral type (b) because it is morally right to so refrain;
> 4. her ability to freely refrain from performing actions of type T, and actions of a similar moral type because it is morally right to perform these actions has been augmented, if necessary, only by methods she has freely agreed to.

I will make two further comments on this definition. The phrase "actions of a similar moral type" is meant to capture Duff's point about the limited scope of reform. If S has committed a burglary she may have morally objectionable attitudes about property in general, so that her reform could involve changing her beliefs or desires about performing other types of property crime. But even if S also has morally objectionable

[51] PTP 265. Cp. 269. MET 222; PCC 122.

attitudes about, say, drug use, a change in these attitudes would not count as reform stemming from her response to the burglary she committed.

The fourth clause captures Duff's point about reform not being limited to cognitive changes. If S came to believe that it is wrong to perform actions of type T and freely resolved not to perform them for moral reasons she might still be unlikely to obey the relevant laws because, for example, she has deficits in impulse control, or is addicted to drugs. Some efforts to enhance her ability to refrain from performing actions of type T for moral reasons will count as being reforming.

IV

Consequentialism, Moral Motivation and Legal Reform

In this section I address once central aspect of legal reform from a consequentialist perspective. I argue that consequentialism gives a better account it than do quasi-reform theorists like Duff. The aspect is the reformed offender's motive for obeying the law. There are convincing reasons for rejecting the requirement in MCLR that reformed offenders resolve to obey the law for moral reasons. These reasons fit most neatly into a consequentialist framework, but the basic criticisms I offer are likely to strike non-consequentialists as plausible.

There is a sense in which consequentialism is inclusivist in its approach to the justification of punishment. The maximization of social well-being is the overarching aim of the theory, but ever since Bentham it has been recognized that a system of legal punishment might further that aim in a number of distinct ways. The most commonly

stated such sub-goals of punishment are deterrence (special and general), reform and incapacitation. But certainly other sub-goals can plausibly be seen as falling under the maximization of social well-being: the moral education of the citizenry (including the communication that various acts are wrong), the displacement of revenge and vigilantism[52], and solving political instances of 'the assurance problem'[53], to name only three. Retribution is, of course, the one traditionally-recognized aim of punishment that consequentialists are reluctant to treat as a sub-goal, but even here there are well-known proposals about how to do this.[54]

I will not consider here the many issues about punishment that separate consequentialists and writers like Hampton and Duff. The most important of these is the moral acceptability of deterrence. Hampton and Duff follow Hegel in rejecting it root and branch.[55] I will focus only on the goal or sub-goal of reform, and indeed on one aspect of it. Even within this limited area in the theory of punishment, I believe, we can make some progress.

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[52] John Gardner, "Crime: In Proportion and in Perspective." Offences and Defences (Oxford: Oxford University Press, 2007), pp. 213-38. Cp. 280-3.

[53] See Mark Reiff, Punishment, Compensation, and Law (Cambridge, Eng.: Cambridge University Press, 2005), pp. 53-61.

[54] John Rawls, "Two Concepts of Rules." Philosophical Review 64 (1955), pp. 3-32, at 4-13. Hart, "Prolegomenon", op. cit., might also be seen as consequentialist.

[55] Duff and Hampton quote approvingly Hegel's assertion that inducing obedience to the law by means of threats is "treating a human being like a dog". Hegel, Elements, op. cit., p. 125. TP 180; PCC 14; cp. 78-9; MET 211.

A Preliminary Problem. Reform actually plays a very small role in quasi-reform theory. Hampton and Duff do not allow reform to have any influence in the determination of punishment in the two places in contemporary criminal justice systems where it sometimes does so, namely, in sentencing and parole. As we saw, Duff does not grant that the fact that an offender has been reformed speaks in favor of reducing the sentence to be imposed on her.[56] Hampton advocates the abolition of parole, where traditionally the main issue in determining whether an offender will be released from prison is whether she has reformed.[57] The main way that Duff allows reform to play a role in the design of the criminal justice system is in the form or modality of punishment for certain offenders. For example, he thinks that programs that challenge men who committed acts of domestic violence via group activities that reenact their behavior may be the best form of punishment for them.[58]

Consequentialism, in contrast, has no objection in principle to allowing considerations of reform to play a role in sentencing and parole. That is, there is nothing about the other sub-goals of consequentialism that requires sentences to be fixed at trial or afterward without regard to whether an offender has been reformed. Of course, other sub-goals like general deterrence might argue in some cases for ignoring this consideration, but in other cases they might not. Duff is striking for his insistence, in effect, that his other goals of penance and censure rule out any such modification.

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[56] PCC 120-1; R. A. Duff, "The Intrusion of Mercy." Ohio State Journal of Criminal Law 4 (2007), pp. 361-87, at 384-6. Contrast TP 289.

[57] MET 232-3. She follows American Friends Struggle, op. cit., ch. 6.

[58] PCC 102-3. More generally, PCC 92-106. Cp. Bennett, Apology, op. cit., pp. 5-7.

I will assume that a charitably revised version of a theory such as Duff's or Hampton's would assert that it is sometimes legitimate for legal authorities to consider whether an offender has reformed in determining her sentence or eligibility for parole. Writers who are sympathetic to Duff have argued that he should make just such a revision.[59]

Should Legal Authorities use MCLR? Assuming that authorities would sometimes make decisions about the severity of an offender's punishment based on whether or not she had reformed, let us now consider whether it would be morally defensible for them to use MCLR in making these decisions. There are good reasons for concluding that this is too narrow a conception of reform. We can see these reasons by coming at the problem in a more intuitive and then in a more theoretical way.

Let us begin with the more intuitive. Consider vocational training. Suppose that S undertakes vocational training in prison and as a result comes to desire to make a legal income by practicing her trade. She might thus become strongly disposed to obey the relevant law, but only out of a self-interested desire to make money. According to MCLR she has not been reformed. This verdict stems from the requirement in MCLR that the offender be motivated by the desire to do what is right. I submit that we find it morally legitimate in some cases for legal authorities to provide such training and to link the terms of an offender's punishment to the completion of them. And it is not clear that we

[59] Jeffrie Murphy, "Repentance, Mercy, and Communicative Punishment" in Cruft, Kramer, Crime, op. cit., pp. 27- 36; Tasioulas,"Punishment", op. cit., pp. 310-21; John Tasioulas, "Where is the Love?" in Cruft, Kramer, Crime, op. cit., pp. 37-53. Duff replies Ibid., pp. 375-7.

would insist on knowing whether offenders who completed such training would be committed to obeying the law for moral reasons. Note that Hart's remarks imply that S has been reformed.

Let us now look at legal reform from a more theoretical perspective. It is a widely-endorsed observation by criminal law theorists that an agent's motive in performing an action is not, in general, treated in familiar legal systems as relevant to the issue of whether it breaches a criminal prohibition.[60] Adherents of many different moral

[60] Kant made an a priori philosophical argument to the effect that legal obligations in general "can be only external". Immanuel Kant, The Metaphysics of Morals, trans. M. Gregor (Cambridge, Eng.: Cambridge University Press, 1991), p. 46. T. H. Green, apparently thinking of Kant's claim, takes it to mean that legal obligations "are not duties of acting from certain motives". T. H. Green, Lectures on the Principles of Political Obligation, ed. P. Harris and J. Morrow (Cambridge, Eng.: Cambridge University Press, 1986), p. 19. On the 'externality' of legal obligation in general, see also H. L. A. Hart, The Concept of Law (Oxford: Oxford University Press, 1961), pp. 168-76. Writers focused on Anglo-American criminal law tend to accept as established doctrine that motives are generally irrelevant in the formulation of offenses and justifications, although they might be relevant for other issues like mitigation. Holmes, Common, op. cit., p. 42; Jerome Hall, General Principles of Criminal Law, 2nd ed. (Indianapolis: Bobbs-Merrill, 1960), pp. 83-93; Hyman Gross, A Theory of Criminal Law (New York: Oxford University Press, 1979), pp.103-13. Cp. PCC 67-8, which appeals to Duff's 'liberal communitarianism'.

theories might endorse this sort of limitation.[61] But it is clear, I think, that consequentialism would favor formulating criminal laws in this way. The kinds of actions it would want to prohibit legally are generally such that they either cause serious setbacks to well-being, or pose a great risk of doing so. If so, the motive of an action is very unlikely to make a significant difference in its effects or risks. So the definitions of the offenses in the substantive criminal law should not include any reference to the motives from which the actions are performed. Likewise, citizens should be regarded as conforming to the law if they do so from any motive whatsoever.[62] The theory leaves room for exceptions to this generalization, but they will be rare.[63]

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[61] The deontology of W. D. Ross is 'objectivist' about moral right and wrong, in the sense that it asserts that motives never make a difference in the rightness or wrongness of an action. W. D. Ross, The Right and the Good (Oxford: Oxford University Press, 1930), p. 7. Ross seems sympathetic to the claim that the substantive criminal law should be objectivist in an analogous way. Ibid., p. 60. The moral theory of Kant may be objectivist about moral rightness and wrong too. See Steven Sverdlik, Motive and Rightness (Oxford: Oxford University Press, 2011), chs. 5 and 6. For some discussion of Ross, see Ibid., pp. 9-11; 177-84.

[62] Cp. Green, Lectures, op. cit., p. 20.

[63] For possible exceptions, see Holmes, Common, op. cit., pp. 52-3; Hall, General, op. cit., p. 89 n. 76; Gross, Theory, op. cit., pp. 105-6; Gardner, Offences, op. cit., pp. 91-120, esp. 107-8; pp. 141-53, esp. 146-9; Douglas Husak, "Motive and Criminal Liability." The Philosophy of Criminal Law (Oxford: Oxford University Press, 2010), pp.

Let us return to the issue of whether consequentialism would include in its conception of legal reform condition 3(b) of MCLR. The remarks I just made about the substantive criminal law create a strong presumption against including such a condition. If, in general, criminal laws should be formulated so that agents acting from any motive can conform to them, why should legal authorities pay any attention to whether convicted offenders will obey certain laws from moral motives? If, for example, a parole board is to determine whether a convicted embezzler is sufficiently reformed so as to be released from prison, why would she need to prove that she will obey the relevant law for moral reasons, when other citizens can obey that law from self-interest?[64]

There is one answer that a consequentialist could give in theory. Although the theory will rarely, if ever, favor formulating criminal laws so as to make certain motives inculpating or exculpating, it also will have something to say about the value of acting from some motives rather than others. In the context of the criminal law we can take this issue to concern whether people who act from one motive tend to obey the law more often than people who obey it from some other motive. And, when legal reform is under discussion we have the issue of whether convicted offenders who will henceforward act

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53-68. Even writers who believe that on some occasions some motives legitimately matter in the substantive criminal law do not assert that the sense of duty is ever such a motive.

[64] The point thus applies to the actions described as morally worthy in Julia Markovits, "Acting for the Right Reasons". Philosophical Review 119 (2010), pp. 201-42. Markovits defends a theory that holds that an action motivated by the correct moral reasons has moral worth, even if the agent does not think of her action as morally obligatory.

from one motive tend to obey the relevant law (and laws of a similar moral type) more often than convicted offenders who will henceforward obey it (and laws of a similar moral type) from some other motive. In other words, consequentialism would take the motives that convicted offenders have for obeying the relevant laws to be important for sentencing and parole decisions only insofar as they have a bearing on how reliably the offenders will obey those laws. More succinctly: the motives that convicted offenders act from are important only insofar as they affect the rate of their recidivism with respect to the relevant laws.[65]

While the latter question is an empirical one that is answerable in principle, I believe that we have a limited amount of evidence about its answer. Empirical research on the success of specific programs of rehabilitation or reform generally takes the behavioral concept of recidivism to be the outcome measure it uses.[66] It tries to determine if a program reduces the incidence of criminal behavior in the offenders who participate in it. It generally does not try to determine what motives they have for obeying the law, when they do.

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[65] It is true that there are forms of consequentialism that assert, in effect, that acting from certain motives has intrinsic value. And, as I noted, it is possible for a consequentialist to hold that virtue is a component of a person's well-being. I will return to these possibilities below.

[66] Sechrest, Rehabilitation, op. cit., pp. 71-4. Doris MacKenzie uses this measure in her comprehensive, What Works in Corrections (Cambridge: Cambridge University Press, 2006). See p. 1.

Contrary to popular opinion, some programs for offenders have been found to be effective in reducing recidivism.[67] In certain cases the effective programs might well be thought to have elicited new moral motivation in the offenders**.**[68] But even these programs are generally evaluated by their effects on recidivism, so it seems that we cannot be sure exactly what changes occurred in the offenders' motivational structures. Moreover, I think that a number of programs that reduce recidivism are likely to have involved offenders who had, or came to have, various motives for obeying the law. These include some kinds of drug treatment, vocational training, and impulse control programs.[69]

But the crucial philosophical point here is this: it is conceivable that there are non-moral forms of motivation (besides fear) which programs might elicit from offenders and which will lead them to obey the relevant laws to the same extent that moral forms of motivation will, or even more so. Thus, while a consequentialist will sometimes endorse aiming to elicit forms of moral motivation in offenders, she ought not to conceive of reform only in those terms. This means that when its sub-goal of reform is properly formulated consequentialism will direct legal officials to respect the presumption that I mentioned above. They should consider carefully whether offenders will henceforward obey the relevant laws, but they should only pay attention to the offenders' reasons for

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[67] MacKenzie, What, op. cit.; David Farrington and Brandon Webb, "A Half Century of Randomized Experiments on Crime and Justice." Crime and Justice 34 (2006), pp. 55-132, at 73-86; 96-110.

[68] MacKenzie, What, op. cit., pp. 115-24.

[69] MacKenzie, What, op. cit., pp. 69-89; 90-111; 221-40; 241-73; 137-67.

doing so when they have good evidence that this affects the likelihood that the offenders will indeed obey those laws. Consequentialism would thus reject including any condition like 3(b) of MCLR in a defensible conception of legal reform.

The intrinsic value of acting for moral reasons. It might be objected at this point that I have ignored an important issue in value theory. The consequentialist view of the value of moral motivation just sketched in effect took that value to be instrumental or extrinsic. That is, the value of an offender's moral motivation was assessed by considering its effects on the likelihood that she will obey the relevant laws. A critic might note that obeying the law for moral reasons could well have intrinsic value. Duff makes some claims that suggest that he believes this, although he does not argue for it.[70] And there are certainly moral theories that assert that this is so, or seem to. Kant famously insisted on the moral worth of acting from a sense of duty, and this might be taken to mean that so acting is intrinsically valuable.[71] There could be and are consequentialist theories, such as that of Thomas Hurka, that accept somewhat similar claims.[72] But if these claims are true then it might be appropriate for legal authorities to

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[70] PCC 118; 129 describe certain responses to wrongdoing as "intrinsically" appropriate. Cp. 88-9.

[71] Immanuel Kant, Groundwork of the Metaphysic of Morals, trans. H. J. Paton. (New York: Harper and Row, 1964), pp. 65-7. Cp. Markovits, op. cit.

[72] Thomas Hurka's "recursive theory of value" asserts that certain psychological attitudes towards intrinsically good states of affairs are themselves intrinsically good. But these claims are incorporated into consequentialism. Thomas Hurka, Virtue, Vice, and Value (Oxford: Oxford University Press, 2001), esp. chap. 1.

consider an offender's motivation for obeying the law independently of its influence on recidivism.

There are two important difficulties with this suggestion.

First, a consequentialist, anyway, need not grant that the value of moral—or any other form of—motivation is intrinsic. As I have argued elsewhere, the most plausible form of consequentialism asserts that whenever motives have any value, it is in virtue of their effects.[73] If this is correct then the consequentialist arguments already given for rejecting MCLR still stand. Non-consequentialists like Duff would need to present an argument in favor of the intrinsic value of obeying the law for moral reasons.

But, second, even if obeying the law for moral reasons has some intrinsic value, it seems to be quite small. Hurka presented an important set of abstract arguments for the claim that virtue is a lesser intrinsic good when compared to the 'base-level' intrinsic goods it is positively oriented towards. For example, he says, a love of knowledge has less intrinsic value than the knowledge it is a love of.[74] In the context of the criminal law we can take this to imply the plausible assertion that, for example, refraining from killing someone for moral reasons has less intrinsic value than the life of that person does, or than refraining from killing her for some reason or other does. Ewing made a similar point about punishment. He held that "a right mental attitude" to good and evil acts "is of value intrinsically", and that the production of such attitudes in the offender and others is the goal of punishment qua punishment. But, he added:

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[73] [Identifying description removed.]

[74] Hurka, op. cit., pp. 129-41.

> It would clearly be wrong to conclude that, because a certain effect was produced by virtue of the essential nature of punishment, it was therefore of more importance than any other effect in practice. That would be like saying that, because sugar qua sugar is sweet, it is good to eat it and enjoy the sweetness even if it be poisoned.[75]

Let us make these points concrete. We are now supposing that legal authorities will make certain decisions about the length or severity of punishment based not only on whether offenders will obey the law but also on whether they will do so for moral reasons, since that has intrinsic value. This means that an offender who would otherwise be released from prison could be required to serve, say, another year. That could be true because if she were released now, although she would certainly obey the relevant laws she would only do so from, say, self-interest. It is hard to believe that the putative intrinsic value of moral motivation could be so great as to require this much extra hardship for the offender—not to mention the added administrative effort that will require taxpayer support. I myself find it hard to believe that the intrinsic value would be so great as even to require an extra day in prison.[76]

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[75] MP 107; 103.

[76] The same point would seem to hold with respect to any theorist, consequentialist or otherwise, who claims that virtue is intrinsically valuable or, like Plato, claims that virtue is necessarily good for a person.

V

Conclusion

Consequentialism accepts that reform is an important sub-goal of legal punishment, and some of its ideas can be usefully employed to highlight the defects in the quasi-reform conception, MCLR. We have seen that this conception of legal reform is too narrow to be defensible. I have not presented or defended an alternative, consequentialist conception of reform, but I think it is fairly clear that it is going to look something like what Hart had in mind.[77] The consequentialist is likely to agree that "the provision of education in a broad sense, vocational training and psychological treatment" should now play an important role in the institution of legal punishment.

Without presenting that conception here I will note one last point. Recall what we found when examining the structure of Duff's theory. He is actually claiming that punishment is justified insofar as it furthers three goals: penance, censure and reform. None of the three goals that Duff advocates speaks in favor of providing educational or vocational training opportunities for offenders, even if linking such training to the severity of their punishment reduces recidivism. This seems to be a serious difficulty for his overall theory, in addition to being a difficulty for his conception of reform. We have seen that there is, in contrast, a sort of moral capaciousness to the consequentialist approach to punishment that is a point in the theory's favor.

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[77] A careful re-formulation of Hart's remarks would need to assess the validity of the criticism that quasi-reformists make that Hartian ideas allow one to say that interventions like involuntary neurosurgery count as reform.