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Justice in the Liberal Tradition

In this chapter, I will look at theories of justice that have underpinned the development of the rules and institutions of justice in modern western societies. I will proceed first, by examining the general political-philosophical ideas and concepts in the area of justice in the modernist era, and then by looking at the perspectives on punishment which are linked with these philosophical theories. I will conclude the chapter by discussing liberalism's concerns with *security*, highlighting certain issues which are, I believe, posing threats to justice in the *risk society*.

By 'modernist era', I mean the period from the seventeenth century to the late twentieth century. This was the period which saw the development of modernism in most areas of western European life. In the sphere of government, it was the time of change from absolutist to constitutional government; in the sphere of the economy, it saw the ending of feudalism and the development of capitalism, with the transition from a predominantly agrarian to a predominantly industrial economy; in the sphere of religion, it saw the ending of the monopolistic influence of the Roman Catholic church and the rise of Protestantism and then of secularism; in terms of demographics it saw the shift of populations from the country to the towns and cities. The period saw the consolidation of the nation-state as the main political entity, and it saw the rise and fall of some nation-states, the movement of national boundaries, the rise and fall of dynasties; it saw changes in the form of families and changes in the roles of males and females; it saw the establishment of state-financed police services and of penal codes and systems of punishment; it saw developments in people's understandings of the extent of the world and the nature of the universe. These far-reaching developments not surprisingly stimulated much activity in political, moral and legal philosophy – the fields at whose intersection we find *justice*.

Although there are many different and competing theories and concepts in the philosophy of the era, these do have distinctiveness and coherence, such that different schools of thought can reasonably be seen as variants within a tradition, as different ways of institutionalising the same values and beliefs. The various theories are differently nuanced balances between the values and the states-of-being given importance in the tradition, and they are different interpretations or ways of securing those values and states of being. This

modernist tradition began with what came to be known as the Enlightenment, and then developed into modern liberalism. Into the twenty-first century, our most influential theories of justice are liberal formulations of Enlightenment themes and values.

This modernist tradition begins with seventeenth-century theories of natural rights exemplified in the work of John Locke; progresses through ideas on the grounding of principles of morality and justice propounded by high Enlightenment philosophers, most notably Immanuel Kant, and culminates in the social contract Utilitarian liberalism of John Stuart Mill.[1] In the second half of the twentieth century, these theories were revitalised for changed times by latter-day liberal theorists such as John Rawls (1972) and Robert Nozick (1974). In turn, the implications of liberalism in their original and revised versions for law and morality have been questioned and elaborated by Dworkin (1978, 1986a), Raz (1986) and others.

What makes it plausible to read these divergent writings as comprising one tradition is that there has been no wholesale repudiation of their most fundamental tenets – constitutionally limited government; individualism; equality of freedom and respect – through successive generations of liberal thinkers. Rather, the tradition has developed through writers on the one hand addressing philosophical problems raised by, or left unresolved by, previous formulations, and on the other hand, foregrounding different questions raised within the tradition, according to political, moral and social circumstances at different times. But whatever challenges have been made to these philosophical keystones, there has always been a response from a recognisably liberal perspective.

The earliest phase of the nascent Enlightenment-liberal tradition is concerned first and foremost with questions of the limits of political power and the extent of political obligation. Early Enlightenment, pre-liberal works were produced at a time of emergent challenges to the autocratic monarchies of Europe, and a decline in adherence to the doctrine of the divine right of kings. Hobbes's great work, *Leviathan*, for example, was first published in 1651, two years after the execution of Charles I. John Locke was born ten years before the outbreak of the English Civil War, the son of a lawyer who fought on the side of the Parliamentary party. Locke underwent periods of exile during the Restoration period, finally returning to England in 1689 after the expulsion of James II and the accession of William of Orange, whose supporters he had associated with in Holland. His best known political works, the *Two Treatises of Civil Government*, were written in defence of the 'Glorious Revolution' of 1688 which ended the Stuart era. Although Hobbes and Locke differed in their ideas on the strength of the duty of subjects to obey the sovereign (Hobbes positing absolute duty and Locke duty conditional on the sovereign governing in accordance with the rights of subjects), both locate the basis of sovereign power and the duty of obedience in the self-interest of subjects, rather than in the divine status of the ruler. This idea of *social contract*, of political

power arising from the agreement of individuals to cede some of their freedom in return for the security offered by the institution of state power, is one of the main foundations of modernism. It has been subject to many different formulations, but it has not yet been effectively or decisively displaced.

The next key theme in the development of the Enlightenment-liberal tradition was the search for the source or measure of justice. If it has been accepted that power was to be justly established, that it was to be exercised justly over subjects, and to arbitrate justly between subjects, in what did justice consist, what did it mean to act justly? Although Hobbes and Locke had broken with the doctrine of the sovereign as the earthly representative of God, they did not advance on seeing justice and virtue as reflections of the divine will and temperament; they produced no new theories on the source and nature of justice. For Kant and for Mill, who formulated what continue to be the two great streams of post-Enlightenment liberalism, God's will (or even existence) was not directly demonstrable, and the source of value must therefore be found in human beings themselves and their empirical situations. Kant located *rightness* in human capacities, whilst Mill argued that *goodness* lies in human desires. These two approaches, the deontological and the Utilitarian, are the main branches of modern liberalism, and as such they are manifested in the major theories of punishment.

In the twentieth century, the primary concerns of liberalism turned once again to political rather than moral philosophy. With constitutional government securely established, the most pressing issues of justice for liberal democracies in the past century have been to do with the distribution of material and social goods. In the west at least, challenges to liberalism have come not from religion but from socialism and communism, which have charged that liberalism's attachment to property rights and to limited government have together legitimised excessive inequalities in life-chances and in degrees of wealth. Liberalism has responded by developing ideas which would set principled limits to inequalities (Rawls) or would justify existing inequalities (Nozick). The political embodiment of these ideas is seen in the welfare-liberalism of Roosevelt's New Deal in the USA after the depression of the late 1920s and early 1930s, and the west European social democracies, vying with the minimal-state ideologies of conservative libertarianism and neo-liberalism.

The other great challenge to which liberalism has responded is pluralism. Liberalism was, of course, founded in circumstances of emerging religious pluralism and political difference, but the degrees of difference between Catholics and Protestants within the same Christian religion, and between proponents of different degrees of constitutionalism, were not of the same order as the overlapping and highly charged pluralisms of religion, race, ethnicity, sexuality and value systems that we recognise as the inevitable character of contemporary societies. Locke's denunciation of religious persecution falls far short of Mill's positive evaluation of diversity of character, and even

further short of the centrality of pluralism in the ideas of Rawls. And for many critics, even this recognition of pluralism does not go far enough. What is a common thread throughout the liberal tradition, however, is the definitional connectedness of the very concepts of pluralism and justice. Liberals are united in their advocacy of *anti-majoritarianism*: they see that it is as important to protect minorities against the tyranny of the majority, as it is to protect subjects against the tyranny of the sovereign.

What follows is by no means a comprehensive exposition of the liberal tradition. There is a large body of literature devoted to the tradition as a whole, and to each of the authors and themes located within it.[2] I will briefly sketch some of the main themes, indicating the areas of agreement and disagreement between the different strands within the liberal tradition which have bearing on the topic of justice. The principles which are particularly vulnerable to the politics of risk and safety, and to feminist, communitarian and postmodern critiques, will be drawn to the reader's attention.

The emergence of the liberal agenda

John Locke is sometimes regarded as the first Whig theorist, a pre-Enlightenment thinker whose work influenced Enlightenment philosophers; sometimes as the founding father of the Enlightenment. Wherever the boundaries of the Enlightenment are placed, however, there is no doubt that his *Letters concerning Toleration* (1689–92), *Two Treatises of Government* (1690) and *Essay Concerning Human Understanding* (1694) had a profound impact on the subsequent flowering of Enlightenment thought (Williams, 1999: 5). His writings concerned key Enlightenment-liberal themes: the sources and limitations of knowledge in human experience in the world; the wrongness of religious persecution even to eradicate a belief one firmly holds to be mistaken; and the contractarian vision of a society of citizens governed by laws founded on respect for equal freedoms.

Locke sees knowledge as springing from experience; and experience, for him, consists of two elements, sensation and reflection. Although writing at the time of declining belief in divine authority, Locke was not seeking to repudiate religious truth itself, but the idea of truth and knowledge as immediately revealed and not subject to interpretation or indeed to construction in the light of human experience. Writing at a time of the growth of the continental hermeneutic tradition of producing competing interpretations of religious texts (Palmer, 1969: 34–5), and directly affected by political movements clustered around the religious schisms of Reformation and Restoration, it would be surprising if Locke's ideas were not as they were. He saw all knowledge as formed through the twin filters of experience of external phenomena and mental introspection:

> **All those sublime thoughts which tower above the clouds, and reach as high as heaven itself, take their rise and footing here; in all that great extent wherein the mind wanders in those remote speculations it stirs not one foot beyond those ideas which sense or reflection have offered for its contemplation. (*Essay Concerning Human Understanding*, Book II, Chapter 1, Section 24)**

More than anything, however, Locke's dispute was with the theory of *innate ideas*, which had wide currency in his time (O'Connor, 1964: 207). According to this theory, some items of knowledge are not acquired through experience but exist *a priori*, that is they are present in the mind prior to experience. This theory had its antecedents in Plato and Augustine, and it surfaces in various guises from time to time. Locke examined two kinds of knowledge claimed as 'innate': self-evident logical principles, and moral rules. Logical principles, he argued, only seem self-evident through processes of rigorous mental analysis; moral rules, even if they seem to have universal assent, are nonetheless rooted in experience. If they are universal, this must be because of some commonality of human experience.

Criticisms of Locke's theory of knowledge, as with other parts of his philosophical corpus, centre mainly on his somewhat muddled and inadequate argumentation rather than on the truth or otherwise of his propositions themselves. What was important for the future development of the liberal tradition, was the way in which he directed attention to the operation of human capacities for reflection in empirical situations, as the source of knowledge and judgment. This quality of reflective experience remains the source of principles and values of justice throughout the modernist liberal tradition.

The human capacity for reflection means that members of a society are able to contrast their actual experience of life in that society with the imaginary experience of life in a hypothetical society, or in a hypothetical state of being outside all society. Locke depicted the freedoms that persons would have in a pre-social *state of nature*: freedom to act as one wishes; freedom to dispose of one's property unhindered; freedom to repel or exact vengeance upon those who impinged on one's actions or property. He claimed these primary freedoms associated with a state of nature as *natural rights*, arguing that people associate in societies in order best to protect those natural rights. The just society is therefore one which secures natural rights, and its use of coercive power and infringement of liberty is justified only to the extent that these are necessary to secure natural rights.

For Locke, legitimation of state power comes from 'tacit consent' in a (hypothetical) foundational social contract whereby members of a society agree to stop short of harming the life, liberty and property of others in the exercise of their own freedom, and to hand over to the state the role of punishing infringements of the laws enacted to uphold these rights and freedoms. They thus accept a measure of curtailment of freedom to act in pursuit of

their self-interest, including curtailment of freedom to seek retribution or to deter further encroachments on their life, liberty or possessions.

Natural rights, and the freedoms and limitations they imply, provide the standards of right and wrong, justice and injustice, and are prior to any particular regime. It is the duty of those in power as well as those over whom power is exercised to uphold these standards. Locke's ideal state of affairs was the *civil society*, the society of free men [sic], equal under the rule of law, bound together by no common purpose but sharing a respect for each other's rights (Gray, 1995: 13).

It follows from Locke's conception of natural rights and the narrow limits to legitimate power to interfere with subjects' freedom of action, that he would be opposed to any attempts to impose uniformity of belief or custom. The form of his conception of natural rights also meant that he cast his views on religious tolerance in negative rather than positive terms: diversity is an outcome of lack of interference with people's worship, rather than a good in itself. He did not propose a duty to promote diversity – for according to him it is not the state's role to promote anything – but he deplored religious persecution as unwarranted interference with freedom. In his *Letter on Toleration* he argued that coercion – the means by which state power produces its effects – cannot change belief. Religious persecution can produce conformist religious behaviour, but cannot produce that which it seeks – a change in religious faith. Religion is mainly a matter of belief, so religious persecution is irrational. Locke looked to the motives and efficacy of the persecutors, not to the effects on the persecuted (Mendus, 1989: 28).

While Locke did not advance to a full theory of pluralism, he did open an important portal towards the idea of acceptance of freedom to pursue a variety of beliefs and value systems. Similarly, while he did not develop a full theory of rights, he took important steps in that direction.

Like his theory of knowledge, Locke's ideas on rights and toleration are criticised less for their substance than for his failure to theorise them adequately. He neither generalised from religious difference to other forms of difference, nor made a clear argument for religious tolerance as a special case. Likewise, he did not offer substantial explanation of why the state of nature would engender the rights he specifies, rather than engendering more or different rights. While his right of equal freedom under the law has been more or less uncontentiously incorporated into the liberal perspective, his ideas about property rights have proved more problematic.

Again, some of the difficulty with Locke's ideas comes from deficiencies of argument, rather than from the propositions themselves. It has been objected that a Lockean approach to property legitimates what are – to someone nurtured in twentieth-century western welfare liberalism at least – unconscionable levels of inequality. This objection arises most urgently when one has in mind contemporary formulations of entitlement theories such as that put forward by Nozick (1974), according to which natural rights allow for

only *minimal state* governance. In particular, no redistributive taxation could be justified (Pettit, 1980: 85). Two Lockean ideas compromise a straightforward understanding of his theory as allowing for unlimited inequalities and giving undue emphasis to uninterrupted enjoyment and free disposal of property. These are the meaning he gives to 'property', and what Nozick refers to as his 'proviso' concerning the acquisition and deployment of property (Nozick, 1974: 175–82).

For Locke, 'property' refers to life and liberty as well as to material possessions, and it is to protect their rights in this broadly conceived 'property' that people come together in societies. Individuals relinquish the state of nature and co-operate 'for the mutual preservation of their lives, liberties and estates, which I call by the general name – property' (*Two Treatises of Government*: 180)

Free disposal of one's property is thus equivalent to inviolability of life and liberty, and the conditions under which it can be suspended would not seem unreasonable to most liberals. What is confusing is this inclusion of what we would generally take to be very different categories of things and qualities that can be possessed and enjoyed, under the common label 'property'. The 'proviso' provides some glimmer of differentiation between property rights in one's own body and in other material things. It stipulates that property rights in hitherto unowned things can be acquired through the 'mingling of one's labour, joining it to something that is one's own', 'at least where there is enough, and as good left in common for others' (*Two Treatises*, Section 27). The proviso offers a criterion of justice in property-holding when the principle of property is extended from one's own body to things external to it. Ownership of one's own body cannot be deleterious to anyone else, but for other goods (including liberty) one person's gain may be someone else's loss.

Although Locke's idea of property may seem perversely wide, one advantage it offers is that it does subject forms of property such as land, goods and wealth to the principle of equal and compatible freedom, alongside life and liberty. Although it is, of course, by no means an egalitarian, full-blown principle of distribution, it provides some limit to inequality, and suggests that external property entitlements should not be immune to challenge by standards of justice.

Locke's work introduced most of the themes of contemporary liberalism: equal freedom; the social contract; limits to governmental power; rights and the just society; tolerance and diversity; distribution of property; derivation of knowledge and values from experience. His formulation of these ideas has been contested in the centuries that have followed, but the least we can concede is that he set the agenda for the liberal tradition.

The morality of reason

Enlightenment moral philosophy is a *post-conventional* ethics. By post-conventional, what is meant is that moral values are espoused, and moral

decisions made, through individual choice and reflection. Moral rules are no longer fulfilled merely by following convention, whether these conventions are laid down by religious or secular authorities. If religious ethical codes such as the Ten Commandments are followed, this is because those who follow them choose to do so; similarly, law is not obeyed automatically – one has choice in whether or not to obey the law in general and in the particular, although knowledge of sanctions consequent upon disobedience may well become part of the decision-making process.

Important Enlightenment themes were, therefore, formulation of the essential principles of post-conventional morality, description of the procedures and sources whence those principles would be derived, and identifying the basis of the authority invested in those principles and procedures.

A consequence of this post-conventional stance was that autonomy was more highly valued than making the 'right' choice on any particular occasion: the fact that some course of action was chosen freely, upon reflection, was more important than the outcome of the reflection. Voltaire's well-known aphorism of deploring a choice but defending to the death the chooser's right to make it exemplifies the Enlightenment spirit.

Enlightenment, then, is a moral/intellectual coming of age; it is an acceptance of responsibility for knowledge and morality rather than following tradition for its own sake. As Kant, the pre-eminent Enlightenment thinker, puts it in his essay *An Answer to the Question: What is Enlightenment?*, in 1784:

> **Enlightenment is man's emergence from his self-incurred immaturity. Immaturity is the inability to use one's own understanding without the guidance of another. This immaturity is self-incurred if its cause is not lack of understanding, but lack of resolution and courage to use it without the guidance of another. The motto of the Enlightenment is therefore: *Sapere aude!* Have courage to use your own understanding! (Kant, 1784, quoted in Williams, 1999: 2)**

Kant is not advocating a radical relativism in which each person makes up their own moral code, their own idea of justice; nor is he arguing against the existence of God: what he is claiming is that moral law is law which a rational being would – and must – adopt for herself. This rational endorsement by the individual is a continuing and central idea in liberal theory, through to Rawls and beyond into the discursive philosophies of Habermas and other contemporary theorists.[3] A *sine qua non* of modernism is this reflexive individualism in which each person, if not their own moral author, is their own moral authority.

Immanuel Kant was through-and-through a German academic, schooled in the German rationalist tradition; his innovativeness lay in bringing this together with the developing British empiricist movement. Like Locke and Hume, Kant attached great weight to human experience as the source of knowledge and understanding, but he did not see these as the sole sources.

He distinguished theoretical reason, which is subject to confirmation by sense experience, from *a priori* categorical reason, which precedes experience. The categories of reason, he argues, organise the way in which we perceive the world.

The principles of justice, according to Kant, are therefore derivable from the categories of reason, rather than from any conditions of life in an actual society, or in a hypothetical natural state. Justice, he says, is a property of relations between people; it concerns the exercise of will among people; and it is concerned with the possibility and freedom of the exercise of will rather than the content or aim of that exercise of will. These conditions distinguish justice from other moral ideas such as virtue (which is something to do with the actor herself and may be exhibited in purely private conduct); they also distinguish justice from benevolence or charity (which though exercised towards other people, involve their desires or well-being rather than their free exercise of will). The conditions also establish justice as a form of moral rationality, as distinct from instrumental rationality which is deployed to bring about effects desired by the agent for herself.

Kant argues that is in the nature of reason that it is something that is actively exercised, and that the outcome of the exercise of reason is the formation of will. Only will formed by free exercise of reason can be described as moral: will formed in response to any form of coercion will be prudential or conventional, and since justice is a moral category, justice must be predicated on the free exercise of will. Since justice is concerned with free exercise of will in relationship with other people, it follows that the freedom involved must be of a relational quality. Justice is thus a state of relationships which brings about equilibrium in the free exercise of wills of all participants in the relational environment:

> **Justice is therefore the aggregate of those conditions under which the will of one person can be conjoined with the will of another in accordance with a universal idea of freedom... Every action is just [right] that in itself or its maxim is such that the freedom of the will of each can consist with the freedom of everyone in accordance with a universal law. (Kant, 1996: 151)**

Freedom of the will is thus a – perhaps the – crucial concept in Kant's theory of justice, and is posited in the *Critique of Pure Reason*, first published in 1781. Developing the idea further in the *Critique of Practical Reason* (1788), he argues that freedom of will is not something that can be proved theoretically, but that it is presupposed by our conception of morality, and that it is implicated in our acceptance of any moral law (Acton, 1970: 44–52).

The universal law to which Kant refers is that of equal freedom for all human beings – which is the fundamental maxim of classical liberalism, and which marks a clear departure from pre-Enlightenment philosophies. This law is fundamental to Kant's system of moral philosophy because it is essential

for the realisation of his two elements of a universal law: treat all persons as ends and never as means, and act only in such a way that you could will your acts to be universalised. The first element comes from our recognition of human freedom as consisting in the capacity to determine ends for oneself; the second element is linked to the demand for equality, and also to the logical conditions of possibility of moral rules. So, to take the example which Kant uses, as do other moral philosophers, it would be irrational to break a promise because if everyone broke promises, the practice of promising would collapse, so that there would no longer be the opportunity to break promises. A promise and its acceptance marks a relationship of trust between promiser and promisee; in a society where no promises were kept, a promise would cease to be interpreted as a statement of intent of future action and therefore promises would no longer be sought or offered.

Kant's rule of universalizability – the categorical imperative as it is known – and the rule of treating people as end and never as means, imply two essential characteristics of morality. First, morality is unconditional, the logic of universalizability means that there can be no exceptions; secondly, its content is based on an ethic of equal respect, all people are to be treated as ends, as I am an end to myself. *All* persons are to be respected in their self-determination, on *all* occasions.

The structure of this derivation of morality and thence of principles of justice demonstrate, among other things, Kant's distinctive innovation in philosophical reasoning. His argument moves from the nature of moral life – the kinds of moral rules humans make between themselves, and the processes involved in making moral decisions – to the presuppositions involved in moral ideas and processes. Equal freedom, then, is not a prescription produced by morality, or a description of a just society, but a *condition of possibility* of justice. What he is saying here is that if we do not recognise other people as equal to ourselves and deserving of both respect and freedom, then our treatment of them will be motivated by instrumentalism and domination – the desire to make them act in our interests, rather than the recognition of our responsibility to enable them to advance their own interests. Justice is a way of remedying inequalities in freedom – of securing freedom from domination – therefore it necessarily rests upon the presumption that equal freedom is the fundamental precept of justice. Kant's focus on 'conditions of possibility' of concepts, processes and principles is his innovatory mode of 'critical' philosophy, and it begins a tradition of critical philosophy which is continued by Habermas in the present time.

Kant also introduced into theories of justice an important separation between the *right* and the *good*, the distinction between acting justly and acting from desire. Again, Kant reasons back from general human thought processes to first principles, rather than the other way round. He argues that we commonly experience the tension between duty and desire – we often

have a sense that we ought to do something we don't really want to do, or ought not to do something that we do want to do. Morality, therefore, cannot be a matter of fulfilling desire, and justice must therefore be something other than promoting what is generally desired, or desired by a majority of people. Acting justly is therefore a matter of doing right, rather than bringing about good.

Clearly, Kant's importance in the liberal tradition can hardly be overestimated. He set forward the main principles and ideas of one of the two major streams of liberal thought, and his ideas have been seminally influential on current theories of distributive and punitive justice directly, and also as reformulated by more recent liberal philosophers such as Rawls (Murphy, 1987). Later chapters will raise questions about the appropriateness of his ideas of justice in the present day, and will also engage with contemporary theorists who wish to retain much that they believe continues to be of value in the Kantian branch of the liberal tradition, while addressing some aspects which are perceived to be inadequate in present social, political and intellectual contexts.

The greatest good

For Kant, the root of morality is in the reasoning *subject*; for Bentham, Mill and the Utilitarian philosophy they established, it is in the *object* of reason. For Utilitarians, morality is to be found not in how reason proceeds, but in what the reasoning subject desires. This return to the object of desire rather than the desiring subject was not a return to the pre-Enlightenment tradition of seeing the good as some supra-natural quality external to persons, which humans should strive to incorporate into their mode of being. The good, for Utilitarians, is what people themselves value; what is worthy, is that which people seek to promote. Rather than finding the right and the good in *a priori* principles, Utilitarians find the good and the right in empirical generalisations. What people desire, and seek to promote for themselves and those they care about, is their happiness. Right action, therefore, is action which promotes happiness; a just society is a society which produces happiness for its members. If happiness is desirable, then it should be maximised: the best society is that which produces the greatest happiness for the greatest number of people.

This single-criterion standard of the right, the good and the just gives Utilitarianism what Pettit describes as its 'attractive simplicity':

> **The just social charter is required, not to meet obscure metaphysical constraints such as natural rights represent, but merely to ensure that more happiness is brought about by the charter than would be realised by any alternative. (Pettit, 1980: 111)**

Bentham laid the foundations of Utilitarianism in his *Introduction to the Principles of Morals and Legislation*, first published in 1789, building his theory on the human impulses to pursue pleasure and avoid pain as the basis of rules of conduct. He defines the good for each individual as the securing of a maximum of pleasurable experiences and a minimum of painful experiences, a balance which he calls 'happiness'.

This hedonistic generalisation serves Bentham as an account of *motivation; morality* is action which promotes the happiness of others. But without some sort of theory of moral reasoning such as that offered by Kant, there is no bridge between the motivation of pursuing one's own happiness and the morality of promoting the happiness of others, and of the generality of people. For Utilitarians this bridge is provided by the laws and institutions of state: laws provide a prudential reason (avoiding the pain of sanctions) for stopping short of causing misery to others through pursuit of one's own happiness; social institutions should be arranged so as to produce a maximum of happiness optimally distributed between the generality of people.

The simplicity of this early Benthamite Utilitarianism may indeed be attractive, but it oversimplifies some important issues. One is how to prioritise pleasures; another is how to balance the pleasures of some against the pains of others. The first question of which pleasures, which forms of happiness, the just society should promote, has led to various formulations, which generally fall under the heading of justice as welfare, the satisfaction of needs; or justice as self-actualisation, the freedom and ability to follow one's own ends. The second question, balancing the pleasures of some against the pains of others, is the crucial issue for justice in the risk society. It raises the problem of the relationship of social utility to individual rights.

Bentham's down-to-earth empiricism had no difficulty with rights, famously dismissing the idea of natural rights as 'nonsense on stilts'. For John Stuart Mill, however, rights could not so easily be dismissed, and one of the important threads in his works *On Liberty* (1859) and *Utilitarianism* (1861) is that of trying to show that rights can be derived from the principle of utility, and thence that justice can be reconciled with Utilitarianism.

In *On Liberty* Mill makes a powerful case that liberty is essential for human flourishing. He argues for freedom of thought and freedom of action as the basic conditions of well-being and happiness. Mill moves from Locke's narrow defence of religious tolerance to proposing diversity of ideas and character as necessary for individual and social advance. Suppression of false ideas, he says, is as injurious to society as is suppression of true ideas: only through the interplay of ideas can truth be established and embraced with confidence. Diversity of character is necessary to provide a range of choices (his argument here is similar to contemporary ideas about the desirability of a range of role models), and also to demonstrate the consequences of bad character (he gives the example of the way people shun the company of drunks, an idea familiar in everyday discourse now in the notion of the 'pub bore').

The high value Mill places on liberty leads to his principle of harm: that the only reason for which liberty in any person may justly be curtailed is to prevent harm to others. Neither the advancement of the general good nor the prospect of self-harm is, according to Mill, sufficient grounds for restriction of liberty. The proper response to an agent doing or contemplating behaviour which might result in self-harm is, he would suggest, advice rather than coerced restraint; except in the case of harm to others, his arguments for the importance of freedom to society in general as well as to individuals imply that any restriction of liberty is likely to be inimical rather than beneficial to general welfare.

Mill's views on liberty and his harm principle represent a considerable advance on Bentham's 'felicific calculus', the simple aggregating of benefits and harms which gives no sense of individuals as separate, and entitled to Kantian respect as ends rather than as means to the general good. Nonetheless, Mill's attempts to bring together individual rights to freedom and the principle of utility as maximisation of general welfare are generally thought unsuccessful (Gray, 1995: 51). The problem is that freedom can only be guaranteed if liberty and general welfare do indeed, as he suggests, coincide. Protection of liberty is therefore contingent on liberty being what individuals value most, on it being the highest good to the majority of people. If this is not the case – and there is strong empirical evidence that people do not always maintain a strong conscious commitment to freedom – then liberty is precarious. Liberty can only be guaranteed if it has value of an *a priori* nature, which is precisely what Utilitarians want to deny.

This is a profound difficulty for Mill, because it is not in the qualities or states which are accorded value that he differs from Kant and other non-Utilitarian liberals, or in the priority which he believes the principles of justice derived from these values should be accorded, but in the grounding of those values and principles. He returns to this problem of the relationship between justice and utility in *Utilitarianism*:

> **While I dispute the pretensions of any theory which sets up an imaginary standard of justice not grounded on utility, I account the justice which is grounded on utility to be the chief part, and incomparably the most sacred and binding part, of all morality. Justice is a name for certain classes of moral rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life... (Mill, 1861, quoted in Westphal, 1996: 173)**

Mill brings these rules of justice grounded on utility together with the concept of rights by arguing that we recognise the primacy of rules of justice because they imply rights residing in the individual. The further step he takes is to derive rights from *security*. Security is, he says, the most basic, general utility. Without security in ownership of one's life and property, one cannot be said to possess liberty, and one cannot pursue one's own version of happiness.

Security is, therefore, the one non-substitutable good and thus a society which seeks to promote happiness is bound to afford to everyone the universal elements of security as basic rights. Security is, Mill explains,

> **to everyone's feelings, the most vital of all interests. All other earthly benefits are needed by one person, not needed by another; and many of them can, if necessary, be cheerfully forgone, or replaced by something else; but security no human being can possibly do without; on it we depend for all our immunity from evil, and for the whole value of all and every good, beyond the passing moment, since nothing but the gratification of the instant could be of any worth to us, if we could be deprived of everything the next instant by whoever was momentarily stronger than ourselves. (ibid.: 168)**

Without doubt, Mill was concerned to guarantee individual liberty against the wishes of other citizens as well as against oppressive governments. In *On Liberty*, he says that social convention is as significant a source of coercion as governmental tyranny; with the coming of democracy, he might well have expected it to become the most significant form of oppression. He inveighs against the Chinese practice of foot-binding, which to him epitomised everything that was to be feared in the suppression of individuality by the 'despotism of custom' (Mendus, 1989: 49). It incorporated the stunting of natural growth, both physical and moral, and the dreariness of a society where the imposition of uniformity stifled the emergence of variety or excitement.

Because of this strong abhorrence of the tyranny of imposed uniformity, Mill would, no doubt, have expected his work to be deployed on the side of liberal opponents of the tyranny of 'grand plan' political theories such as communism. He would surely have endorsed Isaiah Berlin's championing of value pluralism against any 'final solution' of the resolution of conflict between competing ideals and values. Mill's own writing is very close to Berlin's warning that it is the idea that there is one best set of values, one best form of social organisation, one best way of ordering human affairs, that 'more than any other, is responsible for the slaughter of individuals on the altars of the greatest historical ideals' (Berlin, 1969: 167). Mill would surely be horrified if he could have known that in the twentieth century Utilitarianism was cited as an anti-libertarian tendency alongside communism, that it is a philosophy which contemporary liberals such as Rawls are ranged against.

This staunch liberal thrust of Mill's writing on the tyranny of public opinion, echoing Montesquieu's (1989) concern with democracy as the 'tyranny of the averages' prompts some commentators to make a distinction between *rule-Utilitarianism* and *act-Utilitarianism*. With act-Utilitarianism, the losses and benefits to happiness/welfare are calculated for each action, and such an approach clearly could not yield any authoritative charter of stabilised individual rights. Rule-Utilitarianism, on the other hand, generates a set of rule-governed institutions and practices designed to promote general well-being.

Once these are in existence, right action consists of following these rules, rather than calculating utility afresh for each action.

An example that is often used to illustrate the difference between these two forms of Utilitarianism is that act-Utilitarianism could not forbid punishment of the innocent, inflicted for reasons of deterrence. If it is desired to send very powerful messages condemning a certain form of behaviour, then what matters is that broadcast media publicise the sentences being given; the deterrent effect will still be realised if the person sentenced in the case was actually innocent. The important message is that this sort of behaviour attracts this sort of punishment. The answer suggested by Rawls (1972) and others is to appeal to rule-Utilitarianism. A society would institute a criminal justice system in which punishing the innocent would be against the rules, because a system would have no deterrent effect if it did not convey the message that the sure way in which people could avoid punishment was by refraining from crime. Punishing those known to be innocent would therefore be against the rules of criminal proceedings, since knowledge that the rules were sometimes circumvented would lead to loss of confidence in the system.

To punish someone without conviction might be against the rules of the criminal justice system, but as Duff suggests, a judge might pronounce guilt whilst actually believing the person to be innocent (Duff, 1986: 163; Matravers, 2000: 17–21). Another example which comes to mind is that of police 'planting' evidence where they think that a person is guilty but cannot find enough properly obtained evidence to secure a conviction, or where they think the suspect is innocent this time, but has got away with crimes on previous occasions, 'noble cause corruption', as it is often called. The distinction between act- and rule-Utilitarianism, in other words, might be difficult to sustain in individual cases of rule application.

This argument could, of course, be made against any rule-generating philosophy: there is never any guarantee that each individual action will live up to the principles incorporated in the rules. It can plausibly be argued that rule-Utilitarianism would yield institutions designed to maximise liberty, a system of rights to guarantee basic security, and a distribution system that ensures a reasonable supply of goods to all. Since rule-Utilitarianism is concerned with institutions and rules for a whole society with the objective of promoting the desires of members of society as defined by themselves, it has a strong egalitarian and democratic thrust.

The real difficulty with Utilitarianism that remains even with rule-Utilitarianism, is the *contingency* of liberty, and of individual rights. Protection of these values is contingent upon the self-interest of happiness-seeking persons being enlightened. These values will only be inscribed into the rules and institutions of a society if people really do desire freedom and security rather than more immediate or ephemeral goods, and protection of freedom and rights is also contingent upon people being sufficiently enlightened to recognise that their self-interest is bound up with the interests of

others. If these conditions are not met, then the formula that a just society protects the happiness of the 'aggregate' of persons – a formula endorsed by Mill as well as Bentham – would mean that the interests of (some) individuals may be sacrificed for those of the majority population or the society as a whole. Mill certainly believed in a general capacity for enlightened self-interest, but he offers no proof of its generality or of its dependability, so that in his theory individual rights and liberties have a degree of contingency that is unacceptable to most contemporary liberals.

Even if enlightened self-interest, rather than the narrow interests of those with power and influence, is the basis on which people establish social institutions, Utilitarianism has important pragmatic deficiencies from the point of view of justice. These arise because of the inadequacy of the specification of the concept of harm, and the minimalism of the rights defined. Taken together, these defects produce the effect that a very small degree of probable harm could justify a large restriction on freedom. They also mean that there is nothing to mitigate very large degrees of inequality in distribution; if very unequal distribution, either of goods or of freedoms, would produce the greatest aggregate happiness, then Utilitarianism would recommend very unequal distribution.

Fairness and impartiality

As the twentieth century progressed, deontological liberalism seemed to yield to state activism (Gray, 1995: 36). The liberal ideal of limited government based on individual rights gave way to various forms of enhanced state power, harnessed to different visions of human good. Counterposed to socialism and Fascism, with their ideas of the perfect society, was western European welfare statism, and in the USA the interventionist economics of the New Deal. The response to the economic depression of the 1930s and the Second World War in the 1940s was the promise of state-delivered power, prosperity and welfare. Utilitarianism, in one form or another, seemed to have triumphed. Although not without powerful defenders such as Popper (1945) and Berlin (1969), deontological liberalism seemed to be in defeat, to have run its intellectual and political course.

In the 1970s, Kantian liberalism revived. Theoretically, the standard-bearer of this revival has been John Rawls, whose formulation of *justice as fairness* has become perhaps the key reference point of contemporary liberalism. Rawls's A *Theory of Justice* (1972) aims to provide a critique of Utilitarianism and to develop a persuasive alternative to it. He sets his sights against all forms of Utilitarianism, but sees the essential doctrine most clearly and accessibly delineated by Sidgwick (1907):

> **The main idea is that society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest**

> **net balance of satisfaction summed over all the individuals belonging to it. (Rawls, 1972: 22)**

In Rawls's much-quoted phrase, this summative approach does not take seriously the 'distinction between persons' (ibid.: 27). The available mechanisms for distribution of goods and rights for Utilitarianism are the 'big brother' method, where a single legislator presumes to know what will generate happiness for most, or the democratic majoritarian method, where those preferences with the most votes will be supported and minority preferences will be rejected. For Rawls, this means that the objection raised against Mill, that only if all people desire the same thing – equal liberty of all over all other things – can everyone be sure that their interests will be respected, makes Utilitarianism in general unacceptable.

Rawls starts from the assumption that in post-conventional society people will *not* have the same preferences. Where there is a plurality of ideas of the good, the task for justice is not to maximise the good, but to regulate relationships between different versions of the good. Instead of the Utilitarians' arithmetical answer to the problem of the choice between preferences – each person to count for one and only one – Rawls's solution is *impartialism*: the rules of a just society are impartial between competing ideas of the good. Justice as impartiality does not tell us what goods we should pursue (self-development, self-determinism, righteousness, freedom from pain or want), nor what the good society should provide (welfare, security, religious tolerance or strict conformity, diversity, racial purity, adherence to tradition are some 'goods' that different societies have espoused from time to time), but sets the 'ground rules' for pursuit of any vision of the good:

> **justice as impartiality is not designed to tell us how to live. It addresses itself to a different but equally important question: how are we to live *together*, given that we have different ideas about how to live? (Barry, 1995: 77, emphasis in the original)**

Rawls returns to Kant's location of the sources of morality in the reasoning subject rather than in what is desired by the subject. He brings Kant's ideas of the *a priori* authority of reason together with the political philosophy of social contract theory, to develop his political theory of justice. Thus Kantian essentialism as regards reason is joined with the political question of how to limit pursuit of self-interest in favour of social co-operation. In brief, Rawls turns to Kantian transcendent reason to solve the Utilitarian problem of the loss of individual rights in the name of a general good, and the democratic problem of majoritarian disregard or suppression of minority views and interests. He returns to Kant's emphasis on the *process* of deriving moral principles over the *outcomes* of procedures to determine the good. The right is again prioritised over the good, and the key question in setting up the basic structures of a just society is, 'What processes could ensure that choices made would be those of reason rather than of self-interest?' Kant's abstract moral

criterion of universalizability – his categorical imperative – is transposed into a formula for establishing principles of justice for actual political societies.

Rawls is not concerned with all possible societies, but with those characterised by what he calls 'circumstances of justice'. These circumstances of justice are those familiar from social contract theory: social co-operation is feasible and desirable; social co-operation is not inevitable because divergence of self-interests arising from plurality of ideas of the good means that co-operation will involve some sacrifice of individual self-interest.[4]

In order to arrive at truly impartial decisions, decisions to which all members of a society could agree, which are the product of reason rather than self-regard, which deal fairly with all preferences, Rawls prescribes that people should contemplate foundational decisions by mentally placing themselves behind a *veil of ignorance* about their actual present and probable future position in society. This obviously has family resemblances with older contractarian concepts of the state of nature; the difference is that Rawls does not ask people to imagine themselves prior to society, but to be in a society and potentially occupying any possible position within it. Although Rawls of course realises that everyone is cognisant of their present social position and has ideas about their likely future position, he suggests that it is possible to put on the veil of ignorance and make choices as if in this pre-cognisant *original position*.

Choosing from this original position, Rawls argues, is the only way to achieve fairness to all, and to protect the position of the worst-off. For example, in considering whether to have a system of redistributive taxation, if we know ourselves to be wealthy we would be against such a system; if we are aware of ourselves as poor we would favour it, with high rates of taxation on the rich: only if we did not know our economic status would we think about a system being fair to all. Furthermore, if we have no idea of our actual position, we will have to envisage the possibility that we might be in the worst-off position: institutions which protect the worst-off are therefore the rational choice.

Rawls allows his decision-makers elementary knowledge of the circumstances and basic values of their society. They will have understanding that their society is restricted by some degree of scarcity; that human beings value freedom and that they desire to pursue their own self-determined interests. This elementary knowledge means that there is held in common what Rawls describes as a 'thin theory' of the good. People share concern for what he calls primary goods – liberty, opportunity, self-respect, food and shelter. Justice is concerned with the distribution of these goods.

It is important to the theory that the choosers have no knowledge which would enable them to calculate the probability of being in one social position rather than another. Lack of probability data dictates that the distribution that will be chosen is the *maximin*, the best of the worst outcomes: Rawls believes that his choosers will guarantee against the possibility of being in the worst-off position rather than gambling on being in one of the better-off positions.

Rawls believes two principles of justice would emerge from reflective deliberations under these conditions, one governing the distribution of rights and liberties, and the second governing the distribution of income and wealth, status and power. The first set of goods would be distributed according to an equal liberty principle:

> **each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.**

The second set is to be governed by the rule that social inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all (1972: 60).

The equal liberties principle is incorporated, in some way, in all formulations of liberalism; what distinguishes Rawls's version from the Utilitarians' is that it is not contingent on liberty being a good desired by an aggregate or majority of persons, and that it is accorded inviolable priority over the second principle. Rawls's second principle of justice, the principle for the distribution of social and material inequalities, is distinctive in that since it specifies that the benefits of inequalities are to be for all, those in the worst-off position are to be protected. He therefore proposes his *difference principle*, that social and economic inequalities are only justifiable to the extent that they are to the benefit of the least advantaged (1972: 14–15).

As well as positing this principle as being the rational choice from the maximin position, Rawls defends the difference principle on two other grounds. The first is prudential: no-one could be expected to agree to co-operate unless such co-operation would be to their advantage, so the distribution must be favourable to the least well-off, those who are gaining least from co-operation. Secondly, he argues that inheritance of talent, wealth, educational opportunity or ambition is fortunate rather than earned, so it can yield no deserved advantage and should therefore be used for the benefit of all.

These two principles address the main problems of earlier theories. Natural rights theory offers no guarantee against very unequal distributions and no promise of redressing the injustice of earlier distributions; Utilitarian theory fails to offer adequate guarantees of individual rights. Rawls's *Theory of Justice* combines the essential wisdom of Kantian approaches, that justice is a set of principles for enabling impartial resolution of conflicts between the ends of self-determining persons, and the insight of Utilitarianism, that the satisfaction of human wants, rather than the implementation of abstract, mystical principles, is what the just society should promote.

An aspect of his theory that has been emphasised by subsequent writers is its capacity to deal with the problem of *external preferences* (that is, preferences which are external to the exercise of reason in the original position). In spite of Mill's attention to the question of diversity, Utilitarianism generally fails to deal adequately with the possibility that some people's preferences will not be supported, because not enough people vote for them. But the

problem of external preferences is, in our times, perhaps even more significant: some people's pleasure might consist in visiting hardship on others. Persecution or restriction of rights of sexual or racial minorities, for example, are prime examples of external preferences:

> **Assume that racial prejudice is so widespread in a community that laws enacted specifically for the purpose of putting the despised race at a disadvantage would satisfy the preferences of most people overall ... Pure utilitarianism (and pure majoritarianism) would then endorse these laws because they are laws that a legislature weighing the preferences of all citizens equally, with no regard to the character or source of these preferences, would enact. If a judge accepts the pure utilitarian account of treating people as equals, then he must conclude that in these circumstances laws deliberately designed to put blacks at an economic disadvantage... treat blacks as equals. He cannot rely on equality or on any egalitarian theory of democracy to condemn such laws.**
>
> **We know, however, that such laws do not treat blacks as equals. On what theory of equality must we then be relying? (Dworkin, 1986a: 65)**

Dworkin is pointing out here that the Utilitarian dilemma of the sacrifice of individual liberties to the general good, the problem of the contingency of equal maximum liberty being promoted only if it is a majority preference, calls into question not only the issue of the priority of good over right, but also what is meant by 'equality'. As Dworkin demonstrates, equality of preferences, with equality defined as each one to count as one and one only, does not offer the safeguards against discriminatory laws that our sense of equal justice seems to demand: only an understanding of equality as equal rights will suffice.

Dworkin regards Rawls's Kantian theory as advancing a long way towards providing a necessarily robust grounding for the inviolability of individual liberty. He has concerned himself with the application of the principle of equal liberty and the priority of rights over expediency or general welfare concerns in actual legal-political issues such as minority rights. Dworkin commends a rights-based rather than a rule-based approach to law, saying that rights are 'trump cards' held by individuals, which allow resistance to decisions even when made by legitimate authorities, following properly constituted rules (ibid.: 198). He is thereby extending the Rawlsian approach from the establishment of basic principles and structures to actual functioning institutions and their decision-making.

Another advantage that Rawls's theory offers is that his 'difference principle' provides a rational approach to the limitation of inequalities. Without this or a similar principle, we are forced to choose between Lockean entitlement theory, which legitimates all inequalities so long as they arise from lawful disposal of lawfully held assets; or a rigid egalitarianism such as that all must have the same, or all must have only what they need. The Lockean

approach offends our sense of solidarity by allowing some to starve while others have unlimited wealth; both versions of the second approach offend our sense of the rightness of people being at liberty to enjoy that which they have legitimately earned. Even Nozick, who advocates a Lockean minimal state and is against intervention to achieve any particular pattern of distribution, supports Rawls's difference principle as a rough guide to measuring and remedying past injustices in bestowing new property entitlements (Nozick, 1974: 230–1).

Contemporary liberals have suggested modifications or developments of Rawls's theory, and have pointed out some deficiencies. Dworkin argues that Rawls does not take seriously enough the possibility of conflict between the ideals of liberty and equality; it has been held that he does not provide sufficient evidence for his list of primary goods, and that he fails to demonstrate convincingly that decision-makers would be pessimistic maximin-ers rather than optimists or gamblers (Matravers, 2000). These deficiencies notwithstanding, his theory has been acknowledged as the most successful and authoritative recent formulation of liberalism. As Gray summarises, in spite of 'some empirical difficulties', 'It is in the development of this contractarian method that the most promising solution of liberalism's foundational questions is to be found' (Gray, 1995: 55).

Liberalism and punishment

All forms of liberalism mandate the punishment of offenders. Because of the value liberalism ascribes to free pursuit of one's chosen ends, however, it follows that for liberals, punishment should be subject to principled limits, and that it should be for legitimate purposes. The two streams of liberalism – Kantian deontologism and Utilitarianism – are associated with two approaches to punishment: retributivism and consequentialism. There is an extensive literature on punishment theory; for my present purposes I will concentrate only on those features of the two approaches which are important for the main issues dealt with in this book.[5]

Both deontological and consequentialist approaches to punishment share the same fundamental aim, which is to deter harmful or undesirable behaviour (Hart, 1968; von Hirsch, 1993). This is almost a truth-by-definition, since punishment is always, whatever else it may or may not be, a negative sanction invoked by proscribed behaviour (Hudson, 1996). The essential question is not what punishment is for, but by what justification is the deliberate infliction of pain or hardship a proper means to pursue this aim of deterring harmful behaviour. It is on this version of the 'why punish?' question that the two approaches diverge: consequentialism looks forward to future preventable harms; retributivism looks backwards to harms already enacted. Consequentialism argues that offenders *need* punishment to reduce the likelihood that

they will offend again; retributivists argue that they *deserve* punishment because of crimes they have already committed. Consequentialists argue that communities need the imposition of punishment on offenders to deter potential offenders and prevent future crime; retributivists argue that communities need punishment to be inflicted on offenders to restore the balance of benefits and harms in the society and to remedy the damage that has been done to its moral boundaries. Both perspectives agree that the existence of a system of punishments is necessary to dissuade potential offenders (all of us) from transgressive acts and to assure potential victims (any of us) that any encroachment on their well-being is taken seriously. Both agree that to ensure the limitation of self-interest in favour of respect for each other's liberty and property, positive sanctions in the form of benefits from such social co-operation need to be complemented by negative sanctions in the form of 'hard treatment' for transgression. This general argument for the necessity of a system of punishment is what Rawls describes as the *assurance* justification for coercion: it provides an assurance that rules will be enforced (Rawls, 1972: 315).

Consequentialist theories of punishment

Consequentialism faces up to the fact that once a crime has been committed, punishment is an additional pain. It is therefore only justified if the good consequences it brings about outweigh this extra, intentional pain. The good achieved by punishment is prevention of future crime; for consequentialists, punishment is only justified if the total amount of crime reduction it brings about through individual and general deterrence is greater than the extra burden of punitive hard treatment. Although this might warrant draconian punishments to maximise deterrence, the fact that the pain of punishment is immediate and certain but the alleviation of potential pain through deterrence is uncertain, leads most consequentialists to call for moderate punishments. Braithwaite and Pettit (1990), who have led a contemporary revival of principled consequentialism, advocate *decrementalism*, systematic lowering of penalties until crime rates begin to show rises which can be demonstrably linked to penal deflation.

A system of penalties commensurate with the harm done by the offence would satisfy most consequentialists. Jeremy Bentham advocated a penal system that was moderate by the standards of his times, as did the other 'founding father' of modern penal science, Cesare Beccaria. Both insisted that punishment was tyrannous if imposed for any purpose other than promoting general happiness; it was in fact the penologist Beccaria who first used the phrase which is often taken to sum up Utilitarian philosophy by arguing that laws should be evaluated by whether or not they conduce to 'the greatest happiness shared among the greater number' (1999: 441), rather than Bentham as is usually supposed.

Beccaria, in his great work *On Crimes and Punishments*, first published in 1764, uses the harm principle to determine which acts should be classified as crimes and insists that no punishments should be inflicted before a conviction beyond doubt has been obtained through a fair trial, based on evidence rather than on (forced) confession. He argues forcefully against torture and the death penalty, and equally forcefully in favour of proportionality in punishments.

The section of his work which emphasises the due process rights of fair trial and proof beyond doubt, together with emphasising certainty and proportionality, often leads to Beccaria being considered a 'classicist' rather than a consequentialist in penal philosophy.[6] His writing, however, exemplifies the distinction between Utilitarians and deontological liberals, which lies not in the principles that they espouse but in the derivation of those principles.

Beccaria advocated proportionate penalties not as a matter of moral principle, but as a matter of deterrent utility, arguing that severe and inhuman penalties reduce crimes less effectively than more moderate sanctions:

> **The harsher the punishment and the worse the evil he faces, the more anxious the criminal is to avoid it, and it makes him commit other crimes to escape the punishment of the first... As punishments become harsher, human souls which, like fluids, find their level from their surroundings, become hardened and the ever lively power of the emotions brings it about that, after a hundred years of cruel tortures, the wheel only causes as much fear as prison previously did. If a punishment is to serve its purpose, it is enough that the harm of punishment should outweigh the good which the criminal can derive from the crime, and into the calculation of this balance, we must add the unerringness of the punishment and the loss of the good produced by the crime. Anything more than this is superfluous and, therefore, tyrannous. (ibid.: 455)**

If it could be shown that harsh, disproportionate penalties do reduce crime effectively, then Beccaria and other consequentialists would have no reason to oppose them. Indeed Bentham, in a posthumously published article, questioned Beccaria's argument against torture. Saying that utility should not be overridden by sentiment, he suggests that if torture could make someone do something which it was overwhelmingly in the public interest to have done, then there is no harm. Bentham even suggests that the justification for torture in such a case would be greater than the justification for punishment, because with the purpose of deterrence or reformation in punishment there is the possibility either that this may not be brought about or that more punishment may be used than is necessary. But with torture, as soon as the result is achieved the torment stops (Morgan, 2000: 186–7).

In our own times, we see penalties becoming harsher on just this basis: that it is believed that they are effective in reducing crime. Arguments about the connection between enhanced punishments and crime rates are conducted in mathematical terms, with rival calculations of the number of crimes 'saved'

by increases in levels of imprisonment the main point of contention (Zimring and Hawkins, 1995).[7]

As well as crime reduction, there is another contribution to the general happiness claimed for punishment. People gain satisfaction from offenders being punished. This expressive aspect of punishment has been somewhat neglected in most accounts of the justification of punishment, but penal practice cannot be understood without it (Garland, 1990). Punishment is a cultural phenomenon, expressing society's commitment to its moral standards in ways that are consistent with the wider culture of the society, but it is also a source of individual gratification. Popular support for the death penalty and for long prison sentences and austere, inhumane prison regimes persists in spite of dissemination of information on their ineffectiveness in crime reduction; these 'life-trashing' punishments are *enjoyed* by their supporters quite apart from any belief in their instrumental efficacy (Simon, 2001).

Vengeance in punishment is a vent for individual feelings, as can be seen when relatives of a murder victim want to witness the killer's execution, or when they oppose a murderer's release even after he or she has served a long sentence. At times these individual sentiments are widely shared, there is a popular outpouring or shared moment of national consciousness, often after some widely publicized, horrific acts.[8] Vengeance is also a strong cultural theme, the subject of countless western and crime films and novels, and so it would be surprising not to find it present in punishment (Murphy, 2000: 132–3). The cultural presence of vengeance and its apparent near-universality in the human psyche mean that it is easily roused. Vengeance seems to be providing a populist underpinning of increasing severity of punishments in the 1990s and into the present century (Sarat, 1997). Consequentialism would have no basis for calling for limits to vengeance, other than lack of public support.

Consequentialist punishment theories, scarcely surprisingly, incorporate the strengths and weaknesses of the Utilitarianism from which they are derived (Matravers, 2000). Any limitations on the distribution and nature of punishment are entirely contingent on the preferences of the majority. Even the requirement that those to be punished should be properly convicted is subject to people's regard for due process conventions. Walker poses the question mentioned earlier of whether, for purposes of deterrence of potential offenders, it matters whether someone on whom sentence is passed is actually guilty: what is important is that potential criminals can see a certain level of punishment attaching to the crime (Walker, 1991: Chapter 11). He quotes the usual consequentialist answer to this objection in terms of rule-Utilitarianism, that punishing the innocent, or punishing without demonstrably sound conviction, would weaken confidence in the criminal justice system. This would mean, among other things, that threat of punishment would cease to deter, since deterrence rests not just on fear of punishment but on confidence in being able to avoid punishment by refraining from crime.

As Walker says, this may well be true in an open, democratic society, but it is not true in a closed one. Even in an open society, protection of the innocent depends on an effective appeals system and is, as we see in our own time, subject to balance in the rules of evidence that protect the innocent as well as convict the guilty.

Again, in our own times we see little public resistance to weakening of conventions such as the right to silence, double jeopardy (people cannot be tried twice for the same offence) and the right to jury trial; and we see the connection between high-profile cases where there is public demand for someone to be caught and punished, and conviction of the innocent.

Proportionate penalties; punishment only of the guilty; fair trials; high standards of proof, cannot be guaranteed by consequentialism. It may be supposed that rule-Utilitarians, such as Bentham is sometimes held to have been, may well have thought such standards important (Kelly, 1990). The Utilitarian problem of contingency arises in this context: the importance of due process is not secured as a basic principle; under consequentialist penalties it is contingent on particular policy-makers believing in its importance.

The strength of consequentialism is its placing at the heart of matters of criminal justice the demand that punishment, like other social institutions, should be justified by its contribution to human welfare. Even if the existence of a system of punishments generally contributes to welfare, there is nothing sacrosanct about it which prescribes its application in every individual case including those where it serves no useful purpose. Consequentialism recognises punishment for what it is: the deliberate infliction of pain, which as such is inevitably morally problematic, at best a 'necessary evil'.

Liberal retributivist approaches

Utilitarian, consequentialist theories look to the effects of punishment on future potential crime for both general justification and principles of distribution. Modern retributivist theorists separate general justification from distribution of punishment. Like consequentialists, they see that the reason for having a system of punishments is to make people obey the law – whether they express this in penological terms as deterring crime or in more contractarian terms as the limitations on pursuit of self-interest inherent in social co-operation. A system of punishment supplies a prudential reason for complying with laws. Retributivists, like Utilitarians, see that the moral claims associated with membership of a co-operative, contract-based society will not be sufficient to bind all people, all the time, to legality, and that there will be times when the self-interested temptation to unco-operative activity will be hard to resist. When they consider distribution of punishment, however, retributivists take the Kantian turn, basing distributive principles on the moral status of offenders themselves, not on the community of potential victims.

The key principle of retributive theories, then, is that offenders should be punished for crimes they have (actually, already) committed and to the extent that they deserve to be punished. This principle offers a guarantee against punishment of the innocent, and it decrees that punishments should be commensurate with the crimes for which they are imposed. It does not, however, as retributivists themselves point out, define what is to count as commensurate punishment: commensurate retributivism might be interpreted as exact equivalence of punishment to crime (an eye for an eye, a life for a life), but in contemporary versions commensurability is most often interpreted as proportionality, the most severe penalties for the most serious crimes (von Hirsch, 1976, 1993). The scale and nature of penalties (whether death or life imprisonment, for example, is the most severe penalty available) will depend on the culture and sensibilities of the society in which the penal system exists (Garland, 1990; Spierenburg, 1984).

These distributive principles, modern retributivists claim, are necessary for systems of punishment to conform to the principles of justice specified by deontological liberals. Retributivism in distribution fulfils the Kantian 'golden rule' of treating people only as ends and never as means, and of incorporating rules that rational people would choose to be universalised. Rational free-choosers would choose to have some system of enforcement of the rules they establish: willing the existence of rules implies willing that they be upheld. Punishment of an offender as an example to others, or to protect society against something she might do, uses the offender as means; punishment without sound conviction of guilt is something people would not rationally endorse because it would mean that for any individual, avoidance of punishment would not be within their own power. Only if punishment follows conviction for a crime already committed can there be any certainty of avoiding punishment through restraint from crime.

Modern retributivists seek to incorporate the values of liberalism – equal liberty, fairness, impartiality – into penal systems. They insist that the rights which are central to all forms of liberalism, whether described as natural rights, prerequisites of equal liberty, the essential conditions of happiness, or a particular set of primary goods, should be central to criminal justice as they are to all basic institutions of the just society. Due process rights should not be compromised or suspended for reasons of utility; behaviour should not be the subject of criminal law unless it is harmful to others.

Contemporary liberal philosophical writing, however, with its emphasis on distributive justice, offers little guidance on punishment. Rawls assumes that penal justice is retributive justice, but offers only a few paragraphs on the matter. He puts forward what might, in his own terms, be called a 'thin theory' of deterrence, explaining that

> **the purpose of the criminal law is to uphold basic natural duties, those which forbid us to injure other persons in their life and limb, or to**

> **deprive them of their liberty and property, and punishments are designed to serve this end. (Rawls, 1972: 314)**

Rawls points out that punishments are not 'a scheme of taxes and burdens' (ibid.: 314–5), and yet one of the most prevalent interpretations of contractarian retributivism is that it sees punishment primarily as a device to restore a proper balance of social benefits and burdens. The criminal, on this account, has claimed a benefit unfairly, and has refused to accept a legitimately imposed burden or restraint. Benefits in this context are not just benefits of income or property not legally owned or earned, but include benefits in terms of some sort of emotional gratification or removal of inconvenience gained by committing violent crime; the burden or restraint is that of acting within the limits imposed on self-interest by law. Punishment removes the benefit, and/or imposes a burden to counterbalance a benefit already unfairly enjoyed. At the same time, punishment assures the law-abiding that unfair advantages will not be allowed to stand, that 'free-loaders' on the social contract will not prosper (Matravers, 2000: 52–72).

As Duff (1986, 1996) has objected, this account does not capture the full moral essence of crime and punishment. Not only is the moral meaning of crime not exhausted by a refusal of the restraints of law, but the moral meaning of punishment is not exhausted by redressing the balance of advantage and constraint. Most of us do not kill, rape or steal because our consciences are repelled by the nature of the behaviour; we do not refrain merely because of boundaries imposed by law. Similarly, there is a difference between punishment according to criminal law, and reparation paid by offenders to victims or to the community generally. Crimes are *bad* as well as unfair actions, and the key difference between punishment and taxes or compensation is that punishment conveys a message of blame, or *censure*.

Just as criminal laws are statements of societies' moral bounds (the expressive element of law), so punishments are pronouncements of the wrongness of criminal acts (the communicative aspect of punishment). A form of retributivism which either stresses the aspect of punishment which is the communication of censure (von Hirsch, 1993) or which sees the whole of punishment as an act of communication (Duff, 1986, 1996) has emerged and enjoys considerable influence. Whereas, however, distribution-of-benefits and burdens explanations have difficulty in accommodating the censure element of punishment, communicative theories have plausibly to account for the hard treatment aspect. With benefits-and-burdens theories the question is, 'Why punishment and not reparation?' With communicative theories the question is, 'Why is a stern lecture from a judge not sufficient?'

Von Hirsch sees the harsh treatment as a prudential supplement to the censure, not as censure itself. An attraction of his formulation is that, he claims, it has an inbuilt thrust towards moderate punishments because otherwise the prudential element would be so strong that the censuring message would be

lost: people would refrain from crime because they were afraid of the hard treatment rather than because they were persuaded by the moral message. Duff's formulation is more thoroughly communicative in that although he also endorses the idea of hard treatment as a prudential reason for obeying the law, he proposes the hard treatment itself as a moral expression; the harsh treatment of punishment has penitential character and status.

Both Duff's and von Hirsch's penal communications are different in a significant way to the 'expressive element' in punishment as described in the section on consequentialism, above. The expressive vengeance there is an expression of sentiment by or on behalf of victims with no sense of responsibility towards the offender; the communication in these contemporary retributive theories is addressed to the offender, as rational moral agent. Von Hirsch's censure addresses the offender as a member of society operating on the same sort of motivational system as the non-offender, reminding her of the costs of criminal behaviour as well as the moral rules of the society. Duff's communication seeks to reintegrate the offender as a member of the moral community, affording her the opportunity to re-adopt and affirm its moral rules and principles by accepting the wrongness of the crime.

Rawls's brief remarks on retributive justice seem to me to pose a difficulty which I do not as yet see adequately dealt with by subsequent desert theorists (a term frequently applied to contemporary retributivists). This is that although in connection with the distribution of goods Rawls argues that talents, characteristics and opportunities are acquired through fortune and therefore the results of their employment cannot be associated with the idea of desert, he does not offer the same possibility for the distribution of legitimate and illegitimate opportunities, personal and social characteristics implicated in criminality. Referring to 'acts proscribed by penal statutes', he states simplistically that 'propensity to commit such acts is a mark of bad character' (1972: 315). The question then is, to what extent are we responsible for our characters? If our characters are formed by factors (genetic predisposition) and events (our upbringing and life-chances) which are not the result of our own choices, then can character be used as the basis for culpability and therefore for punishment?

Modern retributivists and consequentialists have some difficulties with this question of character and responsibility (Norrie, 2000: 127–41). For desert theory, the question of character is problematic because to admit it as a causal factor in crime denies the Kantian link of crime (and therefore desert) to pure-and-simple freely willed choice. If we don't choose our characters, how can we be held to blame for crimes resulting from acting 'in character'? Consequentialism has less difficulty: if crime is in character, this has to be taken into account in assessing dangerousness and likelihood of reoffending. Lacey concedes the Kantian objection to considering character in deciding penalties, but argues that because of the social functions of law (public protection and deterrence of anti-social behaviour) it is impossible to discount character and rely entirely on freedom of choice. She asks us to think about the 'irascible,

thoughtless or stupid person' who runs a 'systematically higher chance' of committing crimes than someone with a better-ordered disposition. While acknowledging that 'however dispositions are constructed, most of us would agree that many of their features are either totally or practically impossible to change and moreover not voluntarily acquired', criminal justice must 'deal with us as we are' (Lacey, 1988: 67). The paradox in Rawlsian liberalism remains unsolved, however. If we are not to be praised for possession of those characteristics which facilitate our doing well in society, why should we be held to blame for those characteristics which predispose us to do badly?

The usual solution for criminal justice is to hold to a theory of free choice in establishing the offender as blameworthy, and to consider character only in the context of assessing the likelihood of reoffending, not as a mitigation or excuse. For me, this is a central weakness of modern retributivism in relation to responsibility: it relies upon too narrow and untheorised a concept of desert (Hudson, 1999, 2000). It assumes too readily that crime is a matter of freely willed choice, and it pays insufficient attention to the differences in circumstances under which choices are made. Offences being committed in situations of drastic limitations on choice, whether arising through severe economic disadvantage; perception of powerlessness such as abused women may experience in relation to their abusers; or denial of membership of the co-operative group such as is endured by refugees and asylum seekers, raise difficult questions for retributive theories of justice. Ignoring them, or allowing them insufficient scope and influence in calculations of culpability, means that contemporary retributivism does not amount to a desert theory proper, but simplifies to a 'harm done' theory. This means, of course, that the calculus of punishment is not actually the desert of the offender to be punished, but only that of the wrong done to the victim and community. Such an approach thus fails in its Kantian aspiration to derive the distribution of punishment from the moral desert of the criminal.

Whether circumstances of severely restricted choice to achieve generally desired primary goods (food, shelter, status, pleasure) make for reduced or zero culpability depending on the degree of choice restriction, as on my own analyses of the question (1999, 2000); whether they destabilise the legitimacy of the power to punish (Duff, 1998a; Murphy, 1973); or whether the proper description of 'coercive protection' by states against people committing illegal acts in such circumstances is not properly called 'punishment' (Matravers, 2000: 266–7), the situation of extreme inequalities in the distribution of choices and opportunities poses strong challenges to liberal regimes of punishment as well as to theories of justice.[9]

Modern retributivism, like consequentialism, faces up to the fact that punishment is deliberate infliction of suffering on an individual by the state, something which in most circumstances we would think of as wrong. Retributivism's answer to this 'evil necessity' is to see that it must be subject to principled limitation. Whilst retributivists can say that a punishment system is necessary

to enforce the terms of the social contract, they are on less solid ground with the question of whether in individual cases punishment is justifiable if it has no crime reduction utility. Consequentialism seems to be on stronger ground on questions of justification, and retributivism on questions of limitations against punishment of the innocent, and punishment for possible rather than actual crimes.

Actual penal systems in liberal societies combine both consequentialist and retributivist features. Penal theorists have made various suggestions for combining features, one of the most well known being Norval Morris's 'limited retributivism', which suggests that punishment should normally be proportionate to the seriousness of the offence committed, unless there are particularly strong indications of future dangerousness of the criminal (Morris, 1982: Chapter 5). Whatever compromises and hybrids are proposed (Hudson, 1996: Chapter 3), the question of the tension between retributive and consequentialist, due process and crime control concerns is perpetual, and the balance to be struck between them changes from time to time and place to place (Packer, 1969). Some consequentialists have tried to secure proper concern for deontological principles of justice by making the 'good' to be promoted entail a relational concept of liberty: Braithwaite and Pettit's 'dominion' is an important contemporary example (Braithwaite and Pettit, 1990). They claim that because this concept relates to capacities held by each individual, it escapes the subsuming of individual freedom in general welfare that other consequentialist approaches entail. Coming from the opposite pole, most contemporary retributivists accept that there is a place for the *content* of penal sanctions to be designed to reduce the likelihood of reoffending, as long as the *amount* of punishment is determined by desert constraints.[10]

Threats to security

At the core of liberalism, security is located as the 'most fundamental good', the one 'unsubstitutable' good, on which freedom depends. Security in one's person and possessions is the precondition of freedom. At this point, then, it is helpful to recapitulate some specifically liberal interests in security, and to summarise the kinds of threats which are envisaged in liberal writings.

Liberal commitment to equal liberty means that if security is the precondition of freedom, then security is due equally to all. For social contract liberalism, the promise of security is the reason each person gives up a measure of freedom, so security is owed equally to each citizen; for other liberalisms, security is the good which all persons value equally, so again it is owed equally to all. The nature of security is that it is a public good; security must, then, be organised as a public good. That is to say, its provision and distribution must be organised in such a way that no one person's security reduces the security of others.

Michael Walzer (1983) who, as we shall see in Chapter 3, shares many of the communitarian critiques of liberalism, nonetheless holds to the liberal values of freedom and equality, and to liberals' concern for these values to be reflected in societies' patterns of distributions. He contests Rawls's attempt to formulate one principle of distribution for all types of goods, but proposes his own principle of distribution that in many respects tries to secure the same aims as Rawls, which is that distribution should be governed by principles of fairness and not by the power and advantages of individuals in the society.

Walzer advocates an idea of *complex equality* which, against Rawls, rests on the belief that there cannot be one sole principle of distribution for every kind of good. The key is to guard against *domination* of the distribution of any good by mechanisms that do not properly reflect the nature of that good. In capitalist democracies, the danger is of domination of distributions by money; in communist or one-party states domination may be through membership of a political elite. Distribution of a public good should not be dominated by money, but by a principle intrinsic to the nature of the good: so the distribution of education should be determined by desire and ability to benefit, with each person receiving as much education as they are able to absorb; distribution of healthcare should be according to each person's state of health/ill-health. While we may take issue with some of the details of Walzer's theory, the general principle is clear, that public goods should be distributed according to the nature of the good, not the power of demand.

Recognition of the public nature of security as a good has led to the shaping of modern democracies as they have developed in nation-states in the nineteenth and twentieth centuries. Security of borders was to be achieved through national armed forces; security of person and property within the territory was to be achieved through a national police force and national system of criminal justice; security against plague and infectious diseases was achieved through the creation of public health systems; and the welfare state principle of securing freedom of all from poverty, illness and ignorance led to the creation of the national health service, social security and universal free education.

Liberalism recognises two principal threats to provision of security as a public good. One is that security will change from being a public good to a *club good*; the second is the problem of *free riders* (Hope, 2000). A club good is one that is only available to members, and it is therefore a distribution that tends towards domination by money (or political patronage or whatever the domination factor is in the society in question). Only those who join the club (by paying the fee, by being a member of the party, etc.) will receive the good. We can see the public goods/club goods tension in trends towards greater use of private health and education, and in affluent housing estates and apartment blocks where residents pay together for security measures, whereas defenders of the public provision tradition argue for universal provision and try to stem the tide of privatisation.

Proponents of privatisation and neighbourhood/community provision are generally more preoccupied with the free-rider problem. They fear that people will take advantage of the goods provided without making any contribution, whether through working and paying taxes and insurance contributions, or through keeping to the rules of society. Free-rider arguments are often invoked in disputes about membership, for example about immigrant workers or refugees receiving benefits and enjoying the advantages of living in advanced western countries. In criminal justice terms, offenders are free riders in the sense that they benefit from the majority law-abiding population keeping to the rules of the society and not impinging on the security of the offenders' person and property, but they do not accept their responsibility for showing similar respect for the security of others.

The idea of free riders provides something of a bridge between the twin liberal concepts of public goods and individual responsibility. Basic goods are to be provided on the public distributive principle that no-one's possession of the good should deprive anyone else of their proper share of the good. At the same, time, liberalism rests on the idea of individual responsibility, and in terms of provision of security everyone is expected to take care not to fall prey to the risks identified (O'Malley, 2000). People are expected to avoid poverty and ignorance by working hard in education and employment; to avoid illness by maintaining standards of hygiene, having vaccinations, eating healthily and avoiding excess alcohol – we see campaigns to persuade us to stop smoking, watch our cholesterol intake, monitor our weight and blood pressure, and avoid unsafe neighbourhoods.

Liberal governance is also preoccupied by the threat posed by *dangerous persons*. With the rise of modern constitutional states, the threat mostly feared was that of dangerous classes: classes of people who threatened political and social rebellion, and who threatened the inculcation of modern virtues of thrift, hard work and the settled life. The eighteenth and nineteenth centuries saw regular eruptions of protest and violence, in some cases local and minor, but in other cases more cataclysmic. The French Revolution at the end of the eighteenth century was followed by further regime-changing revolts in 1830, 1848 and 1870. A wave of revolutions spread across many European countries in 1848; in England there were movements such as Chartistm and the Anti-Corn Law League, with events including the 'Peterloo' massacres in Manchester making the ruling elite fearful of political upheaval. As well as this political fervour, the 'dangerous classes' represented a threat to the values of modern industrialism. Vagrancy, thievery, excessive drinking and general lawlessness and thuggery challenged the ideal of the responsible, hard-working citizen of the modern state.

As the new political, industrial and social forms of modernity became embedded, attention turned from dangerous 'classes' to dangerous sub-groups and individuals. Foucault (1977) shows how the modernist penal system provided a political economy of illegality, constituting and differentiating

deviant identities into those that could be tolerated or reformed, and those that must be repressed and incapacitated. The working classes were induced to lose sympathy with those among them who defied the laws and the work ethic, and thereby legitimated government powers to discipline and punish those who did not obey the rules of the modern industrial state. The poor were divided into the 'rough and respectable', the 'deserving and undeserving', and the old solidarities of the powerless 'us' against the powerful 'them' were dissolved.

'Dangerousness' became a label that attached to individuals as well as to classes and sub-groups. The dangerous offender became identified as the persistent offender who is not legally insane, but because of his (usually male) proclivities posed greater risk than the person who committed occasional crimes. Criminological science developed primarily as a way to separate the 'corrigible' from the 'incorrigible', with early criminologists such as Lombroso and Ferri devising typographies to identify the 'born', the 'insane' and the 'force of circumstances' criminal. This form of criminology is, of course, very active and influential today, and has been the mainstay of the discipline throughout its existence. 'Habitual criminals' (they are usually known as 'persistent' criminals today) offended liberal society in two ways: they were 'beyond law' in that they constantly flouted legality, and they were 'beyond governance' in that they evaded the structures of identification and classification, surveillance and discipline by changing names, changing addresses, and evading public records and systems of control (Pratt, 2000a).

Since the inception of modern penal systems there have been special penal laws to protect society from dangerous and habitual (persistent) offenders (Pratt, 1998). What has changed is the scope of these laws – mainly whether they covered only offences against the person or whether they included offences against property – and the levels of support for such laws. As we have noted in earlier sections, liberal lawyers and philosophers have always had a 'bad conscience' about penalising people because of things they might do in the future or because of their characters and proclivities, and the passage of such laws is usually accompanied by attempts to clarify the definitions. A common worry is that the risk posed by people classified as dangerous is future and speculative, but the deprivation they face is real and immediate. The criteria of 'clear and present danger' are often proposed in liberal democracies, but operation of the criteria is difficult and the assessment can never be certain. Because of such anxieties, protection from danger legislation has tended to be at the margins of penal systems (Pratt, 2000a).

Similar worries affect measures to protect liberal societies from threats posed by people who are thought dangerous because of political as well as criminal potential behaviour. Internment of suspected enemies and suspected terrorists is usually controversial, and although regularly used in liberal societies, it is generally instigated as a temporary measure (though 'temporary' can last for many years). Internment usually takes place in times of war or other

unrest, and merges the categories of internal and external threats. One of the problems with internment (as with other forms of protective detention) is that evidence can be difficult to obtain and assess, and so standards of proof required for criminal convictions are often dispensed with (such as with the 'Diplock courts' in Northern Ireland). Like 'dangerous offender' legislation, internment and other forms of protection against suspected 'enemies' are at the margins of law, often on a murky border between criminal law and national security regulations where they lack transparency and accountability and barely respect the liberal ideals of due process protections, and separation of governing powers.

External threats are recognised as reasons for interference with the freedoms of others, and most liberal societies have armed forces to protect against these threats, as well as allowing powers of internment and arrest of suspected agents, terrorists and others who might represent danger. Modern liberalism has seen the rise of international law and conventions such as respect for the sovereignty of other states, non-aggression pacts, and the establishment of international bodies to try to resolve international conflicts without recourse to war. The League of Nations formed after the First World War, the United Nations formed after the Second World War, and regional bodies such as NATO (the North Atlantic Treaty Organisation) and the Organisation of African Unity have tried to secure the rule of law between nations. When war does take place, there are agreements such as the Geneva Convention which govern treatment of enemy prisoners. These bodies and conventions have not been as effective in preventing and regulating conflict as their founders hoped, and there are difficulties about conflicts between principles of national sovereignty and the right to intervene to protect citizens' human rights; nonetheless these developments do show that liberal ideals have gained hold in thinking about threats posed by outsiders as well as those posed by insiders. It is with threats posed by insiders and those wishing to be insiders, however, that this book is mostly concerned.

Conclusion

We have seen that all versions of liberalism value liberty and equality, and that most versions incorporate as fundamental the principle of equal liberty: the maximum possible amount of freedom compatible with the equal freedom of all. Should liberty and equality conflict, the conservative strand of the liberal tradition values liberty more highly than equality, whereas the welfare or egalitarian strand values equality more highly than liberty. Among contemporary liberals, Hayek (1960) and Nozick (1974) represent the conservative strand and Rawls (1972) and Dworkin (1978) represent the egalitarian strand. Modern liberalism continues to be divided into two strands: Utilitarianism with its derivation of morality from the things people value, and deontologism

which derives moral principles from the quality of human rationality that makes the choices. Liberalism values impartiality. Utilitarianism is impartial between persons, with each to count as one and only one; deonotological theories are impartial between different ideas of the good.

Liberalism as a political-philosophical tradition has established the idea of rights as the practical enactment of equal liberty, and of the concomitant idea of limited government power. As the liberal tradition has developed, successive writers have examined how securely rights and freedom are established in earlier formulations. Contemporary liberalism has tried to strengthen the defence of freedom offered by Utilitarians – although there are some critics of contemporary contractarianism who argue that Mill's defence of freedom is every bit as robust as Rawls's (Gray, 1983; Riley, 1998). The liberal ideals of equality, freedom and security are important values for humans living in societies, and there is little doubt that liberal societies – though they may be far from perfect – have seen significant advances towards freedom from tyranny and freedom to determine one's own life and goals. These are considerable gains for people, and to most citizens of liberal societies, seem to be worth defending.

This brief review of theories of justice in the liberal tradition shows that there are some inherent tensions in liberalism, tensions which cannot be resolved without the surrender of important values and insights. The main tension, we have seen, is between utility and rights. Another is between generality and particularity. For example, there may be occasions when rules made for the general run of situations, such as freedom of expression, may seem better suspended; in criminal cases, there is inevitably some loss to justice to an individual in applying rules made for the generality of instances, to which a particular case will only approximate, rather than correspond exactly. These questions have, of course, been addressed within contemporary liberalism, most rigorously by Dworkin (1978; 1986a).

Liberals have considered these questions and have made progress, but there are newer challenges. Many arise from the depth of difference in contemporary societies, with population movements making for cultural and religious differences of a degree unimagined by earlier writers on tolerance and diversity, and also new consciousness of differences, for example, between the standpoints of males and females. The perennial problems of liberalism must, therefore, be reviewed in the light of a radical, fissured pluralism that calls into question even the 'thin theory' of the good, and of understandings held in common, on which Rawls's theory rests.

Reflexive awareness of difference has made liberalism sensitive to attack from feminists, postmodernists and communitarians: these perspectives question the universalism of the process of reason as posited by deontological liberals, and the elements of the good posited by Utilitarians. Reasoning processes and ideas about fundamental goods and liberty may be derived from modern western experience, and, moreover, from white, male western

experience, and from the sorts of communities in which liberals live, rather than from any sort of universal fundamentals of human nature.

These issues of rights and utility, difference and identity, universalism and community-derived particularity, together pose what I suggest is the key question for liberal theories of justice: that of membership and exclusion. Who is to be included in the community of justice, and whom is the just community to defend itself against? The following chapters will examine some of these contemporary challenges to liberal theories of justice, and will then turn to the possibilities of stronger and more adequate conceptions of the necessary elements of justice which could stand against them.

The principal categories of threats with which liberalism is concerned – conversion of public goods into private or club goods, free riders and dangerous persons – will be reconsidered at various points during the book, and questions will be raised about how they are perceived and responded to at different times and in different theories.

Notes

[1]The editions of classic Enlightenment and liberal texts on which I have drawn for this chapter are: Bentham, (1970) *An Introduction to the Principles of Morals and Legislation*, Hobbes (1991) *Leviathan*, Hume, David (1957) *An Enquiry Concerning the Principles of Morals*, ed. CW Hendel, Oxford University Press and (1978) *A Treatise of Human Nature*; I. Kant (1965a, 1965b) *The Metaphysical Elements of Justice*, and *Critique of Practical Reason*; Locke (1967) *Two Treatises of Government*, Lazlett; Mill, John Stuart (1969) *Utilitarianism* and (1977) *On Liberty*, in *Collected Works of John Stuart Mill*, 163–71. At some points in the text, dates of original publication of the works are given; where quotations are made from works in reproduction, the citation is to the reproduction.

[2]See for example Barry (1973); Damico (1986); Gray (1995); Gutman (1980); Hobhouse (1964); Pettit (1980); Sen and Williams (1982); Shapiro (1986).

[3]Habermas's work is discussed in Chapter 5, below.

[4]In seeing that co-operation may well require some sacrifice of self-interest, Rawls is setting himself against the philosophical tradition of *intuitionism*. This tradition is associated first of all with Hume's *Treatises of Human Nature* (first published 1739 and 1740) Although Hume sees all knowledge and judgment as emanating from experience he says that experience is interpreted intuitively, rather than through exercise of reason, arguing that children, animals and others without or with as yet undeveloped capacities for formal reasoning, can nevertheless learn from experience. In his subsequent *Enquiry Concerning Human Understanding* (1955, first published 1758) and *Enquiry Concerning the Principles of Morals* (1957), he extends his intuitionism into moral reasoning, and says that one of the things that informs moral decision-making is an innate sentiment of moral benevolence, an intuitive sympathy for human misery. On this account, our instinctive benevolence would mean that acting justly towards another would be what we wanted to do, so there would be no sacrifice involved. In insisting on the use of reason to establish principles of justice and just institutions, Rawls is concerned with twentieth century developments of intuitionism in relation to justice as described by Barry (1965). The intuitionist approach to justice is characterised as suggesting that in any situation of conflict between principles or choice of principles, the right choice will be that which intuitively fits best with the chooser's sense of justice. Rawls mentions Moore (1903), Pritchard (1949) and Ross (1930) as important contributors to this approach (1972: 34–40).

[5]See, for example, Hart (1968); Hudson (1987, 1996); Matravers (2000); von Hirsch (1976, 1985, 1993); Walker (1991).

[6]See, for example, Cavadino and Dignan (1997): 45–6.

[7]There is a mathematical construct, the *lamda*, a measure of the crime rate of an individual offender, which is used as the basis of estimates of the crimes saved by long, incapacitative prison sentences for those identified as persistent offenders. Use of such a measure is subject to mathematical, criminological and moral objections (Zimring and Hawkins, 1995: Chapters 2 and 3).

[8]Examples in the USA include the Megan Kanka and Polly Klaas cases, which led to the introduction of 'Megan's Law', on community notification of the whereabouts of sexual offenders and the California 'three-strikes' legislation respectively; in England the Sarah Payne case led to calls for the introduction of an equivalent to 'Megan's Law', while hostility to the release of Myra Hindley persisted despite her having served a long prison term and being judged no longer a danger to the public. Following her death in 2002, newspaper headlines and public demonstrations showed how strong the vengeful mood remained despite her being beyond any possibility of causing further harm. (These issues are discussed more fully in the following chapter.)

[9]This issue is discussed further in Chapter 7, below.

[10]Rotman (1990) offers a good account of rehabilitation in desert-determined determinate sentences.