

Chapter 2

The Possibility of a Correctional Ethic

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Imprisonment as it exists today is a worse crime than any of those committed by its victims; for no single criminal can be as powerful for evil, or as unrestrained in its exercise, as an organized nation. Therefore, if any person is addressing himself to the perusal of this dreadful subject in the spirit of a philanthropist bent on reforming a necessary and beneficent public institution, I beg him to put it down and go about some other business. It is just such reformers who have in the past made the neglect, oppression, corruption, and physical torture of the old common gaol the pretext for transforming it into that diabolical den of torment, mischief, and damnation, the modern model prison.

—G. B. Shaw, *The Crime of Imprisonment*¹

Introduction

At a seminar I recently attended, an eminent criminologist was defending the privatization of prisons. When questioned about the moral justification of privatization, one of the arguments he produced ran as follows: We accept that there is nothing morally wrong about the privatization of schools and hospitals; so why should we think any different about prisons?²

One objection to this kind of argument is that it is unethical to profit from human suffering; and—unlike schools and hospitals—one of the principal objectives of the prison is to inflict human suffering.³

The criminologist might, of course, have replied by arguing that not all human pain or suffering is inherently evil or malicious. Causing others to suffer or depriving them of various goods may be morally obligatory or even praiseworthy, namely, where it serves as a necessary means to a greater good, such as medical care, education, character development, moral rehabilitation, deterrence, public safety, or a combination of these ends. Or it may constitute a greater good in itself where it is conceived of as justly deserved punishment.⁴ According to this line of thought, the criminologist's defense of the morality of privatization would seem to depend upon the following key assumption: The prison, as a public institution, is similar to the school or hospital inasmuch as any deprivation or suffering imposed upon its principal subjects⁵—as an integral part of its central function—is designed to constitute or bring about a greater good and, as such, is morally justified.

Fortunately, the issue of privatization is not my concern here, but the truth of this assumption certainly is. The central function of the prison is, in a purely administrative sense, to provide the kind of regime or social system that is required to hold and control a collection of human beings in forced captivity for extended periods of time.⁶ But this objective cannot be carried out without depriving prisoners of some of the most highly valued of human goods: liberty, heterosexual relationships, autonomy, material goods and services, and security.⁷ Naturally, the forced removal of such goods will, in turn, give rise to considerable suffering or pain, albeit experienced in different ways and to different degrees by each prisoner.⁸ It is crucial to note that the pains of imprisonment are not an accidental or unintended by-product of the institution, but are an essential component of what the prison is designed to do, what it is for. One cannot have a prison without depriving the goods listed above, and one cannot deprive human beings of such goods without inducing significant pain and suffering. The question is this: Can the imposition of this kind of suffering by an institution be morally justified? If not, then—as I hope to show—the prison would not be the kind of institution for which an ethic is logically possible. To propose or construct a correctional ethic would be an oxymoron, rather like presenting oneself as a married bachelor or a violent pacifist; or, closer still, like constructing an ethic for slave-masters.

Setting out the criteria for logical possibility is only half the story, however. I shall also attempt to show that the prison does in fact fail to meet these criteria; and, therefore, that anything posing as a correctional ethic is a nonsense—a dangerous nonsense. An ethic for slave-masters may well be a contradiction in terms, but it is the kind of contradiction that, left unnoticed, would function as a Trojan horse—presenting itself as a gift to the oppressed,

but, in reality, serving only to legitimize and thereby entrench the institution most responsible for their oppression.

Thus, if I hope to achieve anything in this chapter, it is to persuade philanthropic readers to abandon the false hope of a correctional ethic and turn their attention instead to (a) ways of meliorating the institutional harm inflicted upon prisoners and their families, (b) restorative justice alternatives to crime prevention and response,⁹ and (c) political strategies for penal abolition.

The Argument

Put formally, the core argument of my chapter is this:

Premise 1: If there can be no moral justification for the suffering imposed by the prison upon its principal subjects as an integral element of its central function, then a correctional ethic would be logically impossible.

Premise 2: There can be no such moral justification.

Conclusion: A correctional ethic is logically impossible.

The argument is logically valid, so the strategy of this chapter will be to defend each premise in turn. My argument for *Premise 1*, put formally, will be this:

1a. It is logically possible to use a rational decision-making procedure to adjudicate between two or more options only if it can permit at least one of the options on relevant grounds (that is, if, given the grounds available to the procedure, it can only prohibit every one of the options under consideration, then it cannot, logically, function as a means of adjudication for that set of options).

1b. An “institutional ethic” is, minimally, a rational decision-making procedure by which institutional decisions¹⁰ are adjudicated on moral grounds.

It follows that:

1c. It is logically possible to use an “institutional ethic” to adjudicate between institutional decisions only if it can permit at least one of the options available on moral grounds.

Now:

1d. If an integral element of the central function of an institution is to impose the kind of suffering upon its principal subjects for which there can be no

moral grounds or justification, then, by definition, no institutional decision could be permitted on moral grounds.

It follows from *1c* and *1d* that:

1e. If an integral element of the central function of an institution is to impose the kind of suffering upon its principal subjects for which there can be no moral grounds or justification, then no ethic could be used to adjudicate between its institutional decisions—in other words, an ethic designed for that institution would be logically impossible.

We can apply the general premise *1e* straightforwardly to the specific case of the prison and so infer *Premise 1* of the core argument:

1. If there can be no moral justification for the suffering imposed by the prison upon its principal subjects as an integral element of its central function, then a correctional ethic would be logically impossible.

In Section 1 of this chapter, I will defend premises *1a* to *1e* in some detail. My argument in support of *Premise 2* of the core argument, again put formally, will be this:

2a. The suffering imposed by an institution upon its principal subjects as an integral element of its central function can be morally justified only if it constitutes or brings about a greater good to those subjects—that is, a good that (i) is for the principal subjects; that (ii) redeems the kind of suffering imposed on them; and that (iii) gives the institution its moral purpose and direction.

2b. The only kind of greater good that is available to the prison is justice.

It follows from *2a* and *2b* that:

2c. If the suffering imposed by the prison upon its principal subjects¹¹ constitutes or brings about injustice for them, then it cannot be morally justified.

2d. The suffering imposed by an institution upon its principal subjects constitutes or brings about an injustice for them if it (i) disregards their uniqueness and (ii) fails to meet their basic human needs—both of which are owed to them by virtue of their intrinsic dignity and worth as human beings.

2e. The suffering imposed by the prison upon its principal subjects is caused by the manner in which it forcibly deprives them of liberty, heterosexual relationships, autonomy, material goods and services, and security.

2f. The manner in which the prison forcibly deprives its principal subjects of liberty, heterosexual relationships, autonomy, material goods and services, and security (i) disregards their uniqueness and (ii) fails to meet their basic needs—as owed to them by virtue of their intrinsic dignity and worth as human beings.

It follows from 2d to 2f that:

2g. The suffering imposed by the prison upon its principal subjects constitutes or brings about injustice for them.

And from 2c and 2g, we can infer *Premise 2* of the core argument:

2. The suffering imposed by the prison upon its principal subjects as an integral element of its central function cannot be morally justified.

In Section 2, I will defend premises 2a – 2g in some detail. For the purposes of this chapter, this should complete my defense of the conclusion that a correctional ethic is logically impossible.

Section 1

1a. *It is logically possible to use a rational decision-making procedure to adjudicate between two or more options only if it can permit at least one of the options on relevant grounds.*

There are various ways in which we adjudicate between decisions. Some will be selected on economic grounds, others will be based on aesthetic, pragmatic, political, ethical, or other types of grounds. Let the term “rational decision-making procedure” be defined as a way of adjudicating between decisions by an appeal to relevant kinds of grounds or justifications. So, for instance, we might have an economic decision-making procedure, so called because it adjudicates by appeal to economic grounds.¹²

The interesting point here is that the possibility of using a particular decision-making procedure depends on the kind of choice at hand. For example, a decision between two colors, where the cost of the paint is the same, will not be something an economic decision-making procedure can settle. It might give us reason to refrain from choosing both colors; but if we need to find a reason for choosing one over the other, it would make no sense to use an economic procedure—put another way, it would be logically impossible.

In general terms, this is the point of premise *1a*.

1b. An institutional ethic is, minimally, a rational decision-making procedure by which institutional decisions are adjudicated on moral grounds.

There are any number of decisions taken within an institution, some of which are sanctioned or required by formal policy procedures and others of which, within set parameters, are left to the discretion of the individual. Let the term “institutional decision” be defined as (a) any formal or discretionary decision taken by an employee or employer of the institution and (b) any decision that is consistent with or contributes to the central function or ultimate goal of that institution. Now, whatever else an institutional ethic is supposed to do, it must at least provide a rational way of sifting out the ethical wheat from the chaff when it comes to institutional decision making. In other words, it is a kind of decision-making procedure that is distinguished by its appeal to moral grounds—which typically will include principles or values such as fairness, honesty, impartiality, the dignity and worth of human beings, and so on.¹³

For example, suppose a shop manager needs to pay off his debts and realizes he can do so either by making it store policy to overcharge his customers or by opening on weekends. There are a number of considerations that might justify the decision to overcharge—a deeper attachment to his weekends than to his customers, for instance. But none of these reasons for overcharging could possibly involve a rational appeal to moral grounds.¹⁴ Thus we have premise *1b*.

1c. It is logically possible to use an institutional ethic to adjudicate between institutional decisions only if it can permit at least one of the options available on moral grounds. (From 1a, 1b)

Suppose the shop manager’s decision was between two evils, for instance, between overcharging customers or underpaying his employees. There might be a rational basis for choosing one rather than the other—one might be more likely to succeed, for instance. But he could not decide between the two on moral grounds. If he could, it would not be a decision between two evils.

The situation is very like using economic grounds to choose between two colors. What the shop manager wants is to find some rational way of determining which of the two decisions to make. But an ethical decision-making procedure could tell him only to refrain from making either decision: for both options involve an evil, and evil cannot be justified on any moral grounds. If the manager is truly bent on finding a rational justification for stealing, it would make no sense for him to turn to this kind of decision-

making procedure. Put another way, it would not be logically possible for an ethical decision-making procedure to adjudicate between these two choices. So, from *1a* and *1b*, we arrive at the conclusion *1c*.

1d. If an integral element of the central function of an institution is to impose the kind of suffering upon its principal subjects for which there can be no moral grounds or justification, then, by definition, no institutional decision could be permitted on moral grounds.

The examples we have used up to now have been straightforward institutional decisions for good or evil. But our concept of an institutional decision allows—as it should—for a good deal more complexity. Suppose that we have a group of people intent on stealing a large sum of money from the city bank. They are very organized, having set up an administrative framework and a hierarchy of roles and functions. In other words, they create a kind of institution. Not all of these roles will be directly involved in the act of stealing, but the tasks of each role are consistent with and contribute to the ultimate goal of stealing from the bank. Again, not every decision made in the context of this organization will appear to be unethical; there might be evidence of honesty, loyalty, and even compassion in the day-to-day preparations of the organization. However, if any of these decisions is consistent with or contributes to the ultimate goal of theft, then it cannot be justified on moral grounds. For any such decision will be a decision between various ways in which to realize an evil end. Thus we have premise *1d*.

1e. If an integral element of the central function of an institution is to impose the kind of suffering upon its principal subjects for which there can be no moral grounds or justification, then no "ethic" could be used to adjudicate between its institutional decisions—in other words, an ethic designed for that institution would be logically impossible. (From 1c, 1d)

It follows that this organization cannot, logically, make use of a decision-making procedure that provides rational justification for distinguishing between ethical and unethical decisions. For such a procedure would rule out—on rational grounds—every decision that might be consistent with or contribute to the organization's ultimate goal of theft. An ethic for this kind of organization would, in other words, make no sense: it would be logically impossible.

Take another example: suppose an employee of a government that has the ultimate goal of ethnic cleansing decides to do what he can to thwart this evil, for instance, by destroying communication systems to which he has access. In so doing, the employee is clearly making a decision that can be justified on moral grounds. The problem is that the decision is patently in-

consistent with the goals of the institution he serves: it is not, as such, an institutional decision. We do not have here grounds for an ethic of genocide.

Suppose this same employee decides to transfer to a position that does not involve any direct act of ethnic cleansing, for instance, a secretarial post. The employee, in this case, has not decided to act against the institutional goals, and yet we might want to say that the decision to transfer could be justified on moral grounds. Nevertheless, even a secretarial post must, in some small way, contribute to the ultimate goal of such a regime. The machinery of any government would soon grind to a halt were it not oiled by the "clean hands" of a thousand grey-suited bureaucrats.

We can also learn from this example that institutional decision making cannot be morally evaluated merely by reference to the goals of a specific department or substructure of that institution. Devising an efficient reference system may, in itself, be of no moral significance. But if the system is to be used for an exhaustive registration of a racial group so as to ensure its extermination, we would not hesitate in issuing the strongest form of condemnation. Institutional decision making must also be evaluated by reference to the central function or the ultimate goal of the institution that it serves.

This completes my defense of the premises supporting *Premise 1* of the core argument, namely:

1. *If there can be no moral justification for the suffering imposed by the prison upon its principal subjects as a integral element of its central function, then a correctional ethic would be logically impossible.*

The Interim-Ethic Objection

There are many institutionally imposed forms of suffering that (most of us feel) cannot be morally justified—for example, those imposed by slavery, ethnic cleansing, child pornography, and the like. The point of the discussion thus far has been to show that, if imposing such unjustified suffering upon others is an integral element of the central function of an institution, then an ethic for that institution would be logically impossible.

There is an important objection to this claim, however, a discussion of which will do much to clarify my argument.

It is not clear why an interim ethic [for the prison] cannot be developed. A pacifist may argue for certain rules of combat (*jus in bello*), even if not thinking there can be a just war (*jus ad bellum*); animal rights activists might argue for improvements in research protocols

even if they want ultimately to eliminate animals from scientific experiments; I can even think that Paul was recommending some rules of slavery to Philemon in his dealings with Onesimus (the issue may not be one of redeeming slavery, but of meliorating it: in a nonideal world, may not that be a valuable project?).¹⁵

Few would doubt that the melioration of the suffering caused by an institution, such as slavery, would be a valuable project. But how we conceive of such a project is crucial. In arguing for certain rules of combat, pacifists would utterly betray their commitment if they did so on the grounds that a war in which both sides strictly adhered to such rules would produce a morally acceptable outcome. Likewise, it makes perfect sense for us to think that working toward more humane conditions for slaves is morally praiseworthy, even obligatory. But it makes no sense to suppose that, at some point, our efforts will render the situation morally acceptable—that is, unless and until we have managed to set the slaves free.

The reason for this, of course, is that the central function of slavery—the forced captivity of and trade in human beings—is fundamentally immoral. More precisely, the forced deprivation of human goods that this central function entails gives rise to the kinds of suffering for which no moral justification is possible. There are various moral considerations to which we can appeal in our decision to improve the plight of slaves. But we cannot sensibly construe this decision as being consistent with or contributing to the central function of slavery. Put another way, in our efforts to meliorate the harm done to slaves, we would certainly use an ethical decision-making procedure; but no such procedure could, logically, be enlisted to adjudicate between any of the institutional decisions that might be made by slave-masters, drivers, or overseers. For these decisions are simply a matter of selecting between various ways of realizing an evil end.

The issue, then, appears to turn on what is meant by the term “interim ethic” in this context. On the one hand, it could mean the following:

A. A rational decision-making procedure for adjudicating, on moral grounds, between decisions that are consistent with or contribute to the goal of preventing an evil institution—in lieu of its abolition—from realizing its central function of imposing unjustified suffering upon others.

If this is what is meant, then I have no complaints whatsoever with the notion of an interim ethic—and, so far as I can tell, this is precisely the kind of decision-making procedure used by pacifists, animal rights activists, and St. Paul in the examples given above. But as the foregoing discussion should make clear, this kind of ethic is a long way from what I mean by an institutional ethic. And it is certainly not what would ordinarily be understood by

correctional ethics: that is, the kind of thing that is likely to be studied by prison officers, administrators, and support staff, written up into official codes of ethics for correctional departments, promoted by correctional officials as another important step toward professionalization, and touted by government ministers on the defensive as one of the mechanisms available for protecting the rights of prisoners. Given the official commitment of these individuals to the prison as an institution, it is highly implausible to suppose that a correctional ethic might be conceived of by its chief users as a means of preventing an evil institution from realizing its goals.¹⁶

One alternative sense of an interim ethic might be this:

B. An ethic designed for a specific institution that, by virtue of its prohibition of unethical decisions, would ultimately serve to contribute to the eventual reform of an evil institution.

The basic idea here is that, far from serving the goals of an evil institution, the application of a specific ethic for that institution would have an extremely important role in undermining its operations. For example, suppose the evil goals of an institution were consistently thwarted or ameliorated by individuals and groups opposed to those goals. Some of them work within the institution, surreptitiously undermining its activities. Some manage to prevent the institution from inflicting certain kinds and degrees of suffering by legal reform, public protest, or even armed intervention. The arduous task of keeping the institution in check may even spawn a host of caregivers, social workers, and humanitarian agencies, along with opportunities for altruism, courage, compassion, and so forth. Why could we not develop an interim ethic for this institution that aims to work alongside these forces for good and promote its reform? Cannot evil institutions be transformed? Would an ethic even be necessary if an institution did not require such reform?

There is some plausibility to this line of thought. However, it fails to come to terms with the structural boundaries of an institution. There is only so much reform that an institution can take before it collapses into a quite different institution, with altogether different goals. What kind of reforms, for instance, would so transform the institution of slavery that it still managed to achieve its ultimate goal, but in such a way as to be morally acceptable? Can we even imagine a code of ethics for slave-masters? Would slavery be morally permissible were it strictly regulated by a United Nations Minimum Standards for the Treatment of Slaves? What moral values could possibly be at work here?

In short, an ethic that is specifically designed for an institution must seek to regulate those decisions that are consistent with or contribute to its central function or ultimate goal. If the ultimate goal is evil, then such an

ethic will collapse into incoherence. For there can be no moral grounds for distinguishing between decisions that, in one way or another, all lead to an evil end. The role of an “institutional ethic” is not to regulate evil institutions so that they are rendered harmless in practice. Such an ethic would not merely be incoherent, but would also constitute, indeed encourage, straightforward moral compromise and hypocrisy. The function of an “institutional ethic” is to enable a good institution to realize its worthy goals, not to ensure that an evil institution’s goals are thwarted.

To put the point slightly differently: There is nothing incoherent or morally untoward about devising an ethical decision-making procedure that will have a broad applicability to various public service professions. But important questions must be raised if this procedure is to be tailored to suit the various roles in a particular institution with particular goals. There is all the difference in the world between a broadly-based “public service ethic” and an “ethic” that is designed for specific institutions, such as “police ethics,” “nursing ethics,” or “correctional ethics.” A general “public service ethic” can be adapted to serve institutions with perfectly respectable goals. But it can just as easily be co-opted to legitimize an institution with evil goals.¹⁷

Herein lies the practical importance of our investigation. If it turns out that the suffering imposed by the prison as part of its central function *can* be morally justified, there would be every reason to try to bring it back into accord with its foundational values, for instance, by eradicating any excessive, nonessential (and hence) unjustified suffering. And if a “correctional ethic” can contribute to this reform, then, given the state of prisons today, such an “ethic” could not be more urgently needed. But if the suffering imposed by the prison as an integral part of what it does cannot be morally justified, then a “correctional ethic” will not only be incoherent, it will also—as Shaw might say—transform the prison into even more of a “diabolical den of torment, mischief, and damnation” than it already is. This brings us to my defense of *Premise 2* of the core argument.

Section 2

2a. The suffering imposed by an institution upon its principal subjects as an integral element of its central function can be morally justified only if it constitutes or brings about a greater good—that is, a good that (i) is for the principal subjects; that (ii) redeems the kind of suffering imposed on them; and that (iii) gives the institution its moral purpose and direction.

(i) A greater good for the principal subjects

History reveals to us that some institutions—such as slavery—were, during certain periods, thought to be perfectly respectable. But, at some later stage, these same institutions came to be regarded as morally abhorrent. The point here is that evil institutions are not always obviously evil.

There is an important reason for this lack of clarity. The survival of an evil institution depends, to a considerable extent, upon its ability to redirect our attention from what an institution does with its principal subjects to the benefits that will thereby accrue to the rest of us. Put another way, an evil institution is typically perpetuated by ensuring that only its benefits are examined, deftly ignoring any barbarity that has been imposed upon the principal subjects to produce those benefits. For example, slavery might be regarded as a useful, even beneficent public institution were it evaluated solely by reference to the following list of outcomes:

1. the provision of cheap and efficient labor;
2. a relatively effortless means to financial success; and
3. the attendant goods of social status, power, authority, and so on.

The problem with this list, of course, is that it gives us only the benefits of the institution, which, as it happens, accrue entirely to the slave-owner and his or her class. The list does not divulge what it is about the institution of slavery that brings about these so-called benefits, namely, the forced captivity of and trade in human beings. And it is surely this reality—not merely the supposed benefits—that we must evaluate if we are to determine whether the institution's treatment of its principal subjects might constitute or bring about a greater good. Put another way, the suffering that slaves undergo can be morally justified only if it constitutes or brings about a greater good for the slaves themselves—not (or not merely) for those who might benefit from their suffering.

Likewise, if we are to evaluate the suffering imposed by the prison, we must ensure that our attention does not focus merely on the so-called benefits it might bring. For example, the prison might be defended as constituting or bringing about a greater good on the grounds that it will:

1. enable the immediate victims and the wider community to experience the moral satisfaction of retribution;
2. protect the public, first, by equipping the offender better for civil life, and, second, by deterring potential offenders;
3. affirm and legitimize the power and authority of the judiciary, the police force, the current political regime, and, more generally, the norms and values of our civil life;

4. ground the considerable economy of the correctional system, its employees, and the private firms who supply and purchase goods; and
5. serve as a politically expedient substitute for providing adequate social welfare, education, and public health to marginalized groups, such as the homeless, the mentally ill, drug-users, the illiterate, immigrants, racial minorities, and the like.

The problem with this list is that it gives us only the so-called external benefits of the prison—which, as it happens, accrue in the main to all but its principal subjects, the prisoners. Such a list serves only to hide from the public conscience the reality and the seriousness of the human suffering that imprisonment entails.

Of course, it might be argued that—in our present political climate—imprisonment is necessary to produce the alleged benefits listed above and, moreover, that these benefits are, in themselves, morally permissible or even obligatory. Our task here is not to dispute these views, as contentious as they are. For, as I have argued, we cannot determine whether the suffering imposed by an institution upon its principal subjects constitutes or brings about a greater good solely by examining the benefits that it might produce for the rest of us. Such a procedure has legitimized the most barbaric institutions in our history. We must also determine whether such suffering might constitute or bring about a greater good to those upon whom it is imposed.

(ii) A greater good that redeems the suffering imposed on the principal subjects

A government bent on ethnic cleansing might have rational grounds for deciding between various means of realizing its goal: a gas chamber may be less expensive than bullets, for instance. My argument thus far has claimed that it would make no sense to employ an ethic to adjudicate between the bullets or the gas chamber. For there are no moral grounds to which one could possibly appeal in deciding between these two evils.

But there is an important objection to this. We might think that, were we forced to make such a decision, we would choose the bullet on compassionate grounds. Compassion is a moral virtue; hence, it looks as though it is possible, after all, to choose between two evils on moral grounds.

We can best respond to this by looking at an example of decision making in the hospital. Suppose we have to decide between spending scarce funds on the vaccination of a large number of children for measles, or on providing a lung transplant that may rescue the life of one premature infant. Whatever our decision, an evil will result: either the infant will die or the children will not be protected against measles. It will be the right decision, we think, only if it results in the lesser of these two evils. In this sense, our decision will be

based on compassionate grounds. But there is more to the story here. Whatever our decision, a good will result: either the infant will live or the children will be protected. And we tend to think that it will be the right decision only if it results in the greater of these two goods.

Now this kind of story is not available for a decision between methods of genocide: a bullet is, perhaps, a lesser evil than the gas chamber, but this hardly implies that the bullet would be the morally right option. Why? Because neither option will result in a good. A lesser evil is morally permissible only if it is redeemed, that is, only if it is, at the same time, a greater good. To cause less suffering than you could have caused is still to cause suffering. You might be less evil than others, but you are still evil. To murder someone with a bullet simply because of that person's racial difference, and then to justify your action as compassionate because you could have herded him or her into a gas chamber, is beneath contempt. This is so, because—for any such decision—there is always the option (typically requiring the sacrifice of one's own interests) of deciding against either option.¹⁸

Likewise, the modern prison may well be an improvement on the beatings, hangings, guttings, decapitations, and so forth of penal history.¹⁹ But this, in itself, can hardly provide moral justification for the suffering experienced by modern prisoners. No imposition of suffering can be justified merely because it is a lesser evil; it must also be a greater good: it must be, in this sense, a redeemed evil.

(iii) A greater good that gives the institution its moral purpose and direction

Thus far, I have argued that a greater good must accrue to the principal subjects and must also redeem their suffering. But one further criterion is necessary. Suppose we are trying to determine a greater good that might result from the sufferings imposed by medical staff upon their patients in carrying out their official duties in a hospital. One greater good might be the financial interests of shareholders. Suppose it is a private hospital in which only shareholders are admitted as patients. Thus we have a greater good that accrues to the principal subjects and that (the patients might think) redeems their sufferings. But is this the kind of good that might provide a moral justification for their suffering? Surely, it could offer only some kind of prudential or pecuniary justification. Moreover, it is hardly a good for which one would need to undergo the kind of suffering experienced within a medical context. There must be a far stronger connection between the suffering and the goals of the institution. For the hospital, the most natural candidate for this kind of greater good would appear to be healing or adequate medical care, in other words, the kind of good that gives the hospital its specific moral direction and purpose. And so we have our third criterion for what might count as a greater good.

2b. The only kind of greater good that is available to the prison is justice.

There are various goods that imprisonment might bring about, such as food, shelter, and education. But these goods are not specific to the prison and could well be delivered without the kind of suffering entailed by forced captivity; hence, they cannot provide the prison, as a unique institution, with its moral purpose or direction. Nor can we adduce the kind of goods we have identified as external benefits of the institution, since they do not accrue to the prisoners themselves. Punishment is, of course, one possibility, but it is not at all easy to conceptualize punishment as a good, perhaps because the term typically refers to the actual deprivations or suffering imposed, rather than the good they supposedly constitute or bring about. A far more likely candidate is justice. If the pain of imprisonment constituted or brought about this good, then it would, indeed, satisfy all three criteria. First, it would be a greater good for the prisoners insofar as they understood and experienced their suffering as justice (or just deserts), and this would be so whatever the benefits for others might be. Second, it would be more than sufficient to redeem their suffering, for it would not merely be a lesser evil; it would also instantiate one of the supreme human goods. Finally, it would give the prison—as an instrument of the criminal justice system—its specific moral purpose and direction.

2c. If the suffering imposed by the prison upon its principal subjects constitutes or brings about injustice for them, then it cannot be morally justified. (By 2a, 2b)

We thus have the following consequence. The kind of suffering imposed by the prison as an integral element of its central function must be such as to bring about the greater good of justice for its principal subjects. So, if we can show that the kind of sufferings thereby imposed exclude the possibility of justice—if, in doing what it was designed to do, the prison turned out to inflict injustice upon its prisoners—then we must conclude that the prison does not constitute or bring about the greater good that would otherwise accrue to its principal subjects, redeem the suffering it causes, or give it moral purpose or direction. In that case, the kind of suffering it imposes cannot be morally justified—and so we would have our conclusion as regards the logical impossibility of a correctional ethic. But we have much work to do yet.

2d. The suffering imposed by an institution upon its principal subjects constitutes or brings about an injustice for them if it (i) disregards their uniqueness and (ii) fails to meet their basic human needs—both of which are owed to them by virtue of their intrinsic dignity and worth as human beings.

To get a handle on the nature of injustice, we need to be clear about what is meant by intrinsic dignity and worth.²⁰ First, intrinsic dignity and worth are essential to what it is to be human: there are a myriad of qualities that make each person distinct and unique. There are some qualities that many of us have in common, such as intelligence, wealth, or social status. But no such quality can constitute the borderline between a person and a nonperson. Second, these attributes are not quantifiable: no one has more intrinsic dignity or worth than another. Nor do they come in a variety of grades or standards: no one has a higher-quality or a more-refined share of intrinsic dignity or worth. Third, these qualities are inviolable: just as no one can create intrinsic dignity and worth so also no one can destroy them.²¹ Finally, while we can have cognitive and emotional access to the intrinsic dignity and worth of ourselves and of others, this access is typically not as clear-sighted or as responsive as it ought to be.

Herein lies the connection between our nature and our morality. Intrinsic dignity and worth are not metaphysical abstractions, having no point of contact with our day-to-day lives. They lie at the core of our social relations. Were our cognitive and emotional facilities perfectly attuned to the intrinsic dignity and worth in ourselves and in others, and were this reflected in our behavior and attitudes, then ethics or morality would be superfluous. It is only our failure to see and to respond to these qualities as we ought that gives our talk about morality and ethics a purpose and a point of reference.

So how should we respond? How do we see as we ought? These are not easy questions, but we can perhaps make some headway by an imaginative focus on the two qualities in question, that is, in isolation from the ordinary, complex array of human attributes.

To begin, dignity and worth do not seem to be the kind of qualities before which we can comfortably remain neutral or indifferent. Ushered into their presence—uncluttered and uncloaked—we should probably feel a kind of awe or reverence. Their possessor, we feel, might be aptly described as magnificent, noble, most excellent, worthy of honor, exquisite, even sacred. To ascribe these attributes to human nature is to have the highest view of humankind imaginable. Whatever variables we might use to rank ourselves as better or worse, superior or inferior—all are overridden by this default perspective on the supreme value of a human person. We might be utterly useless, powerless, friendless, and even morally hideous. But there is a core to each human being that remains untouched, a core that demands nothing less than our most profound respect and highest esteem.²²

What is interesting is that we spend most of our lives trying to earn respect and to be valued for what we have achieved. On one view, this might be seen as a bewildering and tragic miscalculation: we are owed respect and esteem just by virtue of being human. These are not attitudes we can sensibly

earn. A more plausible view, I think, is this: the human sciences frequently point out that we are, in essence, social creatures. We would wilt or self-destruct in isolation. One reason for this, I suggest, is that we are dependent on others for maintaining an adequate cognitive and emotional grasp of our own intrinsic dignity and worth. How others treat us—the respect we are afforded and the degree to which we are valued—affects our sense of humanity. We feel more human, more at home with our nature, when we receive that basic respect and esteem from others that is, somehow, our birthright. Our attempts to earn respect and esteem are not misguided or superfluous. Given our social nature, they are the only means we have to shore up a subjective grasp of our own dignity and worth.²³

In a perfect world, of course, there would be none of the competition or frenzied grasping for respect and value that we find in our society. Not because we would be self-sufficient, but because there would be no failure on the part of others to bestow the respect and value we are, by nature, owed. In such a world, there would be no market value in the reciprocation of respect and value—"I will respect or value you if you are or do X, Y, or Z." And since there would be no failure to bestow the respect and value owed, there would be no talk of duties, obligations, rights, or justice.²⁴ In this world, however, such language makes perfect sense. We are perfectly familiar with what it is to engage in immoral behavior, to violate a person's rights, to abstain from our duty, or to commit an injustice. For we are all perfectly familiar with what it is to withhold the value and respect that is owed to fellow human beings by virtue of their intrinsic dignity and worth.²⁵

There are two basic kinds of withholding that can occur in an institutional context. One involves disregarding the uniqueness of principal subjects, that is, their particular character, abilities, actions, or whatever makes them the individuals they are; the other involves failing to meet their basic human needs. Both, I will argue, are ways in which an institution might inflict an injustice upon its principal subjects. But we need first to examine the nature of these two forms of injustice in more detail.

(i) Injustice as disregarding a person's uniqueness

The fact that human beings are equal—by virtue of sharing an intrinsic dignity and worth—does not imply that we should treat everyone in the same way. Suppose an illiterate person applied for a job as an English teacher. There is an array of social graces that would enable us to turn down the applicant in such a way as to demonstrate our continued respect and esteem for that person as a human being. But would it be possible to show a genuine respect for the applicant were we to award the position to him or her? Would we not instead demonstrate a blatant disregard, and thus contempt, for the applicant and his or her capabilities?

In other words, it is by virtue of what we have in common—our intrinsic dignity and worth—that we owe each other the highest respect and esteem. But we do not show this respect and esteem by ignoring what makes us distinct and unique. Our character, our abilities, our achievements, our relationships, all of these make up what we are. They do not make us fundamentally better or superior human beings: we do not, on account of them, have more or less worth or dignity as human beings. Nevertheless, were someone to treat us in a way that showed an utter disregard for our unique qualities—for who we are and what we have made of ourselves—we would interpret and feel this as a sign of disrespect and contempt: it would be an insult to our sense of dignity and worth.

Suppose that our character, our abilities, and our achievements are less than spectacular. In such a case, we might not want to be treated in a way that accurately reflects who we are. We might want others to disregard our failures and transgressions. But this is not a counterexample. It is simply a matter of our wanting to avoid the pain of shame and rejection. For were it certain that we should be exposed and called to account, we would still want to be treated fairly; that is, we would want to be held accountable only for who we are or what we have done, and not for the faults or wrongs of others. To do otherwise would, again, show an utter disregard and contempt for who we are: it would be an insult to the dignity and worth that we are owed as human beings. This desire, I suggest, is nothing more than a desire for justice. But we need a little more background here.

In some contexts, we might say that an injustice occurs in just those cases in which we are discriminated against on grounds that have nothing to do with the matter in question: being denied employment on the grounds of race, being passed over for promotion on account of a family connection, and so on. These cases are unjust because they are unfair. To strive for justice is to insist that all persons be treated in the same way in cases in which there are no relevant grounds for treating them otherwise. This principle is founded on the bedrock assumption that all persons—stripped of their unique character, abilities, actions, and so forth—share in common an intrinsic dignity and worth.

Suppose two persons are being evaluated for their possession of some specific collection of attributes, for instance, their physical strength, intellectual achievements, or whatever. Now if these two are identical insofar as they each have these traits to the same degree, then there could be no grounds for special treatment. For, if their character and abilities do not distinguish them, and so must be taken out of the equation, there is nothing left but their basic equality as human beings. To treat them differently would be to deny this equality. Put another way, it would be to acknowledge the intrinsic dignity and worth of one, but not the other. Put yet another way, it would be to deny them justice.

(ii) Injustice as failing to meet basic human needs

There is a range of basic human needs: physical, emotional, and social. Each of these is basic in the sense that, if it goes unsatisfied, we feel that our very humanity is at stake. This is not because its absence threatens our existence—which it may well do—but because it threatens our status as human beings. When we see an ethnic group being forcibly deprived of food, water, and shelter, for instance, we are outraged because we feel that its human dignity has been violated and its fundamental worth called into question. We use the term “injustice” because we feel that there could be no possible grounds for such treatment. No matter what its members might have done to provoke their oppressors, no one deserves to be treated in a such a way. To deprive people of such basic needs is to treat them as less than human beings. It is to deny our fundamental equality with them. It is to deny them justice.

One important qualification must be raised here. A number of institutions deny basic human needs, but not all of these warrant condemnation. A religious order, for instance, might deprive its initiates of personal property, sexual intercourse, freedom of association, and so on. How does this kind of institutional deprivation differ from that involved in, say, slavery?

My suggestion is this: the deprivations of a religious order would be designed to deliver a certain kind of good to its primary subjects, such as a heightened experience of God. But there is no such design to the deprivations in slavery: there is no good that will thereby accrue to the primary subjects. This distinction makes all the difference in the world. In either case, the deprivations may be much the same. But the mere fact that the principal subjects are not forced, but voluntarily submit themselves to such deprivations in order to obtain a certain kind of good so transforms the manner in which these deprivations are imposed and how they are experienced, that the principal subjects are unlikely to feel that their humanity has been in any way violated or called into question.

First, even in cases in which the deprivations are regarded as a matter of duty or obedience, there would be no point at which the principal subject’s basic autonomy was undermined. They would freely choose to undergo the deprivations, without coercion, manipulation, or duress. And they would possess the ultimate freedom of opting out of the exercise at any point. None of this would be true of an institution such as slavery.

Second, those who would be involved in depriving the principal subjects of their basic needs would be doing so not merely for their own benefit, but for the good of the principal subjects. For this reason, they would continue to show the respect and esteem the subjects would be owed as human beings, as exhibited in a variety of social graces, such as politeness, listening, empathy, concern, honesty, admiration, helpfulness, and so on. It is no

coincidence that those who impose or enforce deprivations upon principal subjects merely for the benefit of themselves or others inevitably do so in a manner that strips the subjects of their human dignity and denies their intrinsic worth.

2e. The suffering imposed by the prison upon its principal subjects is caused by the manner in which it forcibly deprives them of liberty, heterosexual relationships, autonomy, material goods and services, and security.

The pains of imprisonment have been well documented by psychologists and sociologists. The particular list that premise 2e proposes is drawn from Gresham Sykes's *The Society of Captives*, and—since I lack the space here—it is to this work I would refer readers for a detailed elaboration of each kind of deprivation.²⁶ My task, here, is to show how the manner in which the prison imposes these deprivations might constitute an injustice to the prisoners, and this brings us to premise 2f.

2f. The manner in which the prison forcibly deprives its principal subjects of liberty, heterosexual relationships, autonomy, material goods and services, and security (i) disregards their uniqueness and (ii) fails to meet their basic needs—as owed to them by virtue of their intrinsic dignity and worth as human beings.

(i) The prison disregards the uniqueness of its principal subjects

The source of the problem with imprisonment is twofold: first, people are imprisoned for different kinds of crimes, some being more serious than others; second, each prisoner is culpable for his or her crime to a different degree. This, of course, presents severe difficulties for legal sentencing. Seriousness and culpability come in degrees that are typically so subtle or complex that it is extraordinarily difficult for the legal system to take this variability into account—that is, without making the kind of rough assessment that may be satisfactory (because workable) to all but those who must suffer under its blinkered judgments.²⁷

But this problem is not (primarily) my concern here. For even if we allow that legal judgments of seriousness and culpability are as fair as can be expected, the likelihood of a prison sentence amounting to no more and no less than what is justly deserved (in view of the degree of seriousness and culpability as determined by the court) is surely minuscule. Imprisonment is simply too blunt and too sweeping an instrument for responding appropriately to the uniqueness of each individual case—even where much of this uniqueness has already been eroded by the roughness of sentencing guidelines.

Suppose we could fine-tune the experience of imprisonment so as to provide various benefits or goods and services for prisoners who are less deserving of justice, and these could be graded according to their value to the prisoners or by the degree to which they alleviated certain kinds of suffering, and so on. The problem with this proposal is not merely that the kind of calculations here are no more likely to find precision. It is rather that it fails to recognize the distinction between what is essential to the experience of imprisonment and what is not.

For example, whether or not a prisoner has a TV set will, no doubt, make a considerable difference to his or her experience while a prisoner; but it is not, in itself, relevant to his or her experience as a prisoner. Nonprisoners have TV sets, and many prisoners do not. Having a TV set is accidental to captivity. But what all prisoners experience is, to take one example, the loss of liberty. No amount of fine-tuning or supplementary goods and services can compensate for this deprivation. Each prisoner may feel this loss in different ways and to different degrees, but—at some level—it is a deprivation that causes a kind of suffering that does not discriminate between prisoners. It is imposed in utter disregard for the uniqueness of each individual; it takes no account of whether a fine defaulter is more or less deserving of this kind of deprivation than child molestation. Sykes states that “what makes this pain of imprisonment bite most deeply is the fact that the confinement of the criminal represents a deliberate, moral rejection of the criminal by the free community.”²⁸ But can it really be the case that a fine defaulter is equally deserving of such rejection as the child molester? We can modify the conditions of imprisonment as much as we like (minimum, maximum, single cell, shared, dorm, TVs, computers, whatever),²⁹ but it is the simple fact of confinement that inflicts the pain of this kind of rejection.³⁰ In sum, prisoners guilty of widely differing offenses and degrees of responsibility will experience the blanket pains of captivity in the same way, and thereby will experience a kind of suffering that disregards what they uniquely deserve.

Again, suppose we managed to limit a prison to holding only those offenders who had committed one type of crime and who shared exactly the same degree of responsibility for their respective crimes. And in case anyone supposes that we can determine proportionality with fairness by the measure of time spent in prison, let us suppose that each prisoner is given the same length of sentence. The key problem with this proposal is that there would be “as many prisons as there are prisoners.”³¹ As I have argued, there are certainly common elements to the pains of imprisonment. But each prisoner will experience this pain in different ways and to different degrees. Even the length of time is experienced in different ways by different individuals: a one-year sentence would, for one person, feel like an eternity; for another, it would be a blip on his or her life-screen. It is also experienced in different ways by the same person in different contexts: one month in an

isolation cell, in one context, would be unbearably painful for a person; in another context, removal of visitation rights for the same length of time would be equally painful for the same person. As Mathiesen points out:

The severity of punishment is bound up with and relative to the vantage-point, especially proximity. The meaning of prison time, the meaning of two months, two years, twenty years of imprisonment, is therefore morally relative and relative in terms of perspective. This fact is reflected in the great international differences which exist concerning the evaluation of the importance of prison time. If prison time were objective, various nations should converge towards the same punishment times. We know that they certainly do not converge, but show dramatic differences.³²

In sum, even though every prisoner in our hypothetical prison would—according to the demands of justice—deserve the same kind and degree of suffering, the nature of imprisonment is such that it could never deliver, again, because it cannot take account of the unique deserts of each prisoner.

(ii) The prison fails to meet the basic human needs of the principal subjects

I have argued that the prison forcibly deprives its principal subjects of five types of human goods. It would not be difficult to make a case for the view that either possessing or having access to each of these goods constitutes a basic human need, and so—due to lack of space—I shall simply assume this here. The point I do want to make, however, is that the prison's failure to meet these needs is not the issue. As I suggested earlier, a religious order might also deprive each of the five goods (to varying degrees), and yet the initiates of that order would not regard this as an injustice. The problem is the manner in which the prison deprives its principal subjects of these basic needs. The chief difference between the religious order and the prison is that the principal subjects of the former voluntarily submit themselves to such deprivations in order to obtain a certain kind of good—a heightened experience of God, for instance. Prisoners, on the other hand, are forcibly deprived; and this, I suggest, so transforms the manner in which these deprivations are imposed and how they are experienced, that prisoners are likely to feel that their humanity has thereby been violated or called into question. And this is, indeed, the consensus of empirical research on the psychology of imprisonment.³³ As Sykes puts it, "the deprivations and frustrations pose profound threats to the inmate's personality or sense of personal worth."³⁴

Now this should be a source of deep perplexity and discomfort for prison advocates. For retributive punishment is typically defended as a humanitarian response to crime. Unlike the medical or utilitarian responses, it takes

seriously the freedom and responsibility of the individual, and, thereby, is intended to uphold his or her dignity and worth as a human being.³⁵ As C. S. Lewis argues:

To be "cured" against one's will and cured of states which we may not regard as disease is to be put on a level with those who have not yet reached the age of reason or those who never will: to be classed with infants, imbeciles, and domestic animals. But to be punished, however severely, because we have deserved it, because we "ought to have known better," is to be treated as a human person made in God's image.³⁶

But if the pains of imprisonment are conceived of and morally justified as punishment (or just deserts), why do prisoners feel their deprivations as such a bitter attack on their sense of dignity and self-worth? Why do they feel that their punishment is designed to bring about precisely the opposite of C. S. Lewis' noble intentions, namely, to treat them as little more than "infants, imbeciles, and domestic animals"?

Let me put the point slightly differently: Suppose we have wronged another person. What would we expect the experience of justice being done, in this context, to feel like?³⁷ It might, of course, involve substantial pain, but would we not also expect to feel a kind of dignity or pride in having done what it took to ensure that justice was done, that the harm had been repaired, the wrong righted? Perhaps we might feel a sense of moral relief or the burden of guilt lifted? And would not those around us respect and value our achievement, welcoming us back as a moral equal?³⁸ But does it not then follow that, were we to experience the pain of being a prisoner (and then of being an ex-prisoner), it would be highly unlikely that we would sense justice was being done to us in these circumstances?

It might be argued that many prisoners feel no sense of guilt or shame over their crime; many fail to recognize or care about the harm they might have caused their victim; they have no desire to right the wrong or repair the harm; and so, with no sense of what they might deserve or owe, their experience of imprisonment—even were it justice being done—would, naturally, be felt as an injustice to them. I have no doubt that this is frequently the case, but it is not at all clear how this fact might be used to show that the pains of imprisonment are morally justified.

As I have argued, the suffering imposed by an institution upon its principal subjects must constitute a greater good for those subjects. One sense in which this might occur, in the context of the prison, is that the prisoners understand and experience their suffering as justice (or just deserts). We have already seen the obstacles for this approach. But another possibility is that the suffering induces in them the kind of moral transformation that

enables them to appreciate the seriousness of their wrongdoing and so come to understand and experience their suffering as justice. The problem here, however, is that the lessons learned within a prison are highly unlikely to effect a change of heart.³⁹ As Feinberg puts it:

[Many] criminals are not predisposed to repentance, being either dedicated zealots or revolutionaries, calculating amoral risk-takers paying the price, without regret, for their losing gamble, sullen prisoners of the class war (in their own eyes), or sociopathic personalities. Inflicting pain on these individuals by depriving them of their liberty may be socially necessary to protect others, but its most likely effects on the prisoners themselves will be to confirm their cynicism and hatred, or convince them to take greater precautions against discovery next time around—hardly “moral messages.”⁴⁰

In sum, those prisoners who would embrace justice, if given the chance, will, it seems, experience quite the opposite of what one should expect justice to involve. It would also appear that those prisoners for whom the experience of justice is irrelevant will be even further removed from the recognition of what justice demands of them. In either case, whether or not others might think that the prison is where justice is done, the pains of imprisonment do not constitute or bring about justice so far as the prisoners are concerned.

Finally, what of those prisoners who appear to submit to the pains of imprisonment, in the sense of accepting that they deserve their suffering—that having done the crime, they must do the time? In one view, this may be nothing more than a coping mechanism: “The phenomenon of men identifying themselves with their oppressors—of publicly proclaiming the virtues of rulers, expressing their values, or, still worse in the eyes of the inmates, obeying them all too gladly—may represent a deliberate Machiavellian attempt to flatter those who have power in order to gain favors.”⁴¹

Another explanation might be that they actually do believe that their suffering is justly deserved—not because it really is, but because, as Freire puts it, “[t]he very structure of their thought has been conditioned by the contradictions of the concrete existential situation by which they were shaped.”⁴² With no other options for what counts as justice, individuals who long for redemption will tend to embrace the only form of justice offered to them.

It might, of course, be said that these two explanations beg the question against suffering as a form of justice. There will be individuals who are consumed with guilt for causing others to suffer, and such persons may feel that their own suffering in prison would at least achieve some kind of justice insofar as it serves to counterbalance the suffering experienced by the victim(s) of their crime.⁴³ The problem is that the prison, as we have seen, is too blunt

and indiscriminate an instrument to address the imbalance of suffering in a way that might be remotely proportionate. The pains of imprisonment would either be too much or too little or of the wrong kind. As Mathiesen puts it:

[T]he pains [of the victim and the prisoner] are so *different* that they cannot be compared, at least not in so precise a way as to provide a basis for punishment values, punishment scales, and proportionality or balance of punishment. How much deprivation of liberty, medical services, self-esteem and personal autonomy is necessary to balance the breaking and entering of a home or the vandalism of a summer house? The two "versions" of pain, in this hypothetical example, contain so many complex factors, and such a strong element of subjective experience, that proportionate justice, the balancing-of-scales justice breaks down.⁴⁴

Conclusion

I have argued, in Section 2, that the suffering imposed by prison upon its principal subjects both disregards their uniqueness and fails to meet their basic needs in a manner that violates their dignity and worth as human beings. For this reason, it follows that:

2g. The suffering imposed by the prison upon its principal subjects constitutes or brings about injustice for them. (From 2d, 2e, 2f)

And since the suffering of prisoners fails to constitute or bring about for them the greater good of justice, we must therefore infer *Premise 2* of the core argument:

2. The suffering imposed by the prison upon its principal subjects as an integral element of its central function cannot be morally justified. (From 2c, 2g)

It remains only to conclude that, if the foregoing defense of *Premises 1* and *2* is sound, then it must follow that a correctional ethic is, indeed, logically impossible.

Notes

1. George Bernard Shaw, *The Crime of Imprisonment* (New York: Philosophical Library, 1946), 13.

2. An invitation brochure for a conference on privatizing prisons held in Dallas, Texas, in 1996 began: "Dear Executive, Can you afford to bypass a tremendous opportunity to invest in stock showing great performance and high returns? Privatization of correctional facilities is the newest trend in the area of privatizing previously government run programs that can offer such optimal rewards. . . . While arrests and convictions are steadily on the rise, profits are to be made—profits from crime. Get in on the ground floor of this booming industry now!" Quoted in Vivien Stern, *A Sin against the Future: Imprisonment in the World* (Boston: Northeastern University Press, 1998), 290.

3. "[I]mposing punishment within the institution of law means the inflicting of pain, intended as pain." Nils Christie, *Limits to Pain* (Oxford, U.K.: Martin Robertson, 1981), 5.

4. "The offender may justly be subjected to certain deprivations because he deserves it; and he deserves it because he has engaged in wrongful conduct—conduct that does or threatens injury and that is prohibited by law." Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (New York: Hill and Wang, 1976), 51.

5. That is, where a principal subject stands to an institution as a student stands to a school, a patient to a hospital, a slave to slavery, or a prisoner to a prison.

6. As Sykes suggests, the kind of social system required to carry out this function is "what we would usually call a totalitarian regime: . . . The detailed regulations extending into every area of the individual's life, the constant surveillance, the concentration of power into the hands of the ruling few, the wide gulf between the rulers and the ruled . . . [t]he threat of force [lying] close beneath the surface." Gresham Sykes, *The Society of Captives* (Princeton, N.J.: Princeton University Press, 1958), xiv.

7. This list is drawn from Sykes, *The Society of Captives*, chapter 4: "The Pains of Imprisonment."

8. "[E]ach man brings to the custodial institution his own needs and his own background and each man takes away from the prison his own interpretation of life within the walls. . . . Yet when we examine the way the inmates of the New Jersey State Prison perceive the social environment created by the custodians, the dominant fact is the hard core of consensus expressed by the members of the captive population with regard to the nature of their confinement. The inmates are agreed that life in the maximum security prison is depriving or frustrating in the extreme." Sykes, *The Society of Captives*, 63.

9. For a good introduction to restorative justice, see J. Braithwaite and H. Strang (eds.), *Restorative Justice and Civil Society* (Cambridge, U.K.: Cambridge University Press, 2001).

10. That is, formal or discretionary decisions that are consistent with or contribute to the central function of the institution in question. See pp. 60–62 *infra* for more detail.

11. In this and the remaining premises, please qualify this suffering as only that which forms an integral element of the institution's central function.

12. One decision may, of course, be made on the basis of a variety of different kinds of grounds, but for our purposes, it will be useful nevertheless to distinguish decision-making procedures according to the kinds of grounds that may be adduced.

13. See, for example: "The *Code of Conduct and Ethics* sets a framework for

ethical decision making and defines the standards of behaviour expected of all of us who work in the Department of Corrective Services." And again, "The *Code of Conduct and Ethics* covers all employees of the Department. It provides an ethical framework to guide your decisions, actions and behaviour, so that they will, at all times, be rational and fair. It advocates values that require integrity, efficiency, economy, honesty and impartiality." *Code of Conduct and Ethics* (New South Wales [NSW] Department of Corrections, April 1998), Commissioner Leo Keliher's "Foreword" and 1.

14. The use of overcharging (or stealing) as an example of a moral evil is, of course, not as straightforward as I imply here, particularly since "property . . . is not an unproblematic moral idea" (John Kleinig, personal communication, October 16, 2000). To simplify matters, I would ask the reader who doubts the wrongfulness of the acts of stealing portrayed in the following examples—or even more generally—nevertheless to regard them, for the sake of argument, as actions that, in certain circumstances, would be morally wrong for the agent in question to perform.

15. John Kleinig, personal communication, October 16, 2000.

16. See, for example: "The vast majority of you act responsibly and have nothing to fear. It is, therefore, in your interests to report suspected corrupt conduct or unethical practices, so that public confidence in the Department and your standing in the community is enhanced. Each of us is entitled to be proud to be an employee of this Department and to feel valued, respected and supported by the Department." Keliher, "Foreword," in *Code of Conduct and Ethics*.

17. The "Code of Conduct and Ethics" used by the NSW Department of Corrections in Australia was "developed from the *Model Code of Conduct for NSW Public Agencies* [among other sources]." Keliher, "Foreword," in *Code of Conduct and Ethics*.

18. For an alternative view, see Gertrude Schneider, *Muted Voices: Jewish Survivors of Latvia Remember* (New York: Philosophical Library, 1987), 137.

19. That things have thus improved is not uncontroversial: "the modern pains of imprisonment are often defined by society as a humane alternative to the physical brutality and the neglect which constituted the major meaning of imprisonment in the past. . . . [But the] deprivations or frustrations of the modern prison . . . can be just as painful as the physical maltreatment which they have replaced." Sykes, *The Society of Captives*, 64.

20. This view is known as the (Kantian) egalitarian theory of human worth. See Jean Hampton, "The Wisdom of the Egoist: The Moral and Political Implications of Valuing the Self," *Social Philosophy & Policy* 14, no. 1 (Winter 1997): 21–51, 27 et seq.

21. "[Egalitarian] theories of worth (e.g., of the sort held by Kant) . . . insist that [human worth] does not and cannot diminish no matter what we do (so that even a wrongdoer is held to be valuable, and deserving of our respect)." Hampton, "The Wisdom of the Egoist," 28.

22. This point—that human worth is independent of moral status—should be clearly distinguished from the view that human worth is determined by moral status: "on a moral-inegalitarian view, moral evaluation actually determines where a person falls on the scale of human worth: the higher the moral evaluation, the higher the worth, and vice versa." Hampton, "The Wisdom of the Egoist," 29–30.

23. "Most of us tend to care about what others (at least *some* others, some

significant group whose good opinion we value) think about us—how much they think we matter. Our self-respect is *social* in at least this sense, and it is simply part of the human condition that we are weak and vulnerable in these ways. And thus when we are treated with contempt by others it attacks us in profound and deeply threatening ways." Jeffrie Murphy, "Forgiveness and Resentment," in Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge, U.K.: Cambridge University Press, 1988), 25. Compare the following report of burglary victims: "'It's like we were raped. The stuff they took was all given to us for our wedding presents . . . they went through our clothes.' . . . It wasn't just a house they invaded, it was people's property and real live human beings that they offended." Mark Umbreit, "The Meaning of Fairness to Burglary Victims," in *Criminal Justice, Restitution, and Reconciliation*, ed. Burt Galaway and Joe Hudson (Monsey, N.Y.: Criminal Justice Press, 1990), 49.

24. "I come more and more to think that morality, while a fact, is a twisted and distorted fact. Or perhaps better, that it is a barely recognizable version of another fact, a version adapted to a twisted and distorted world. . . . I think it may be that the related notions of sacrifice and gift represent (or come close to representing) [this] fact. . . . Imagine a situation, an 'economy' if you will, in which no one ever buys or trades for or seizes any good thing. But whatever good he enjoys it is either one that he himself has created or else one that he receives as a free and unconditional gift. And as soon as he has tasted it and seen that it is good he stands ready to give it away in his turn as soon as the opportunity arises. In such a place, if one were to speak either of his rights or his duties, his remark might be met with puzzled laughter as his hearers struggled to recall an ancient world in which those terms referred to something important." George Mavrodes, "The Queerness of Morality," in *Rationality, Religious Belief, and Moral Commitment: New Essays in the Philosophy of Religion*, ed. Robert Audi and William J. Wainwright (Ithaca, N.Y.: Cornell University Press, 1986), 225–26.

25. "In many societies, some kind of egalitarian theory of human worth is standardly advocated. . . . However, such official endorsement often betrays the reality of a variety of views of worth in those societies that are inegalitarian, and that place people of certain sorts (e.g., those in a certain racial, gender, or ethnic group) higher than people of other sorts (e.g., those belonging to other racial, gender, or ethnic groups)." Hampton, "The Wisdom of the Egoist," 29.

26. See Sykes, *The Society of Captives*, chapter 4.

27. "I think a rulemaking body can take a number of practical steps that will enable it to formulate a workable, if not perfect, seriousness scale for use in its guidelines. At least so far as typical crimes of theft, force, and fraud are concerned, one can develop a rough assessment of their consequences using the legal definition of the crime and available common knowledge of its probable effects. One can also make commonsense moral judgments about the relative importance of the rights and interests that different crimes invade. One can grade culpability at least according to whether intentional, reckless, or negligent conduct is involved." Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Manchester, U.K.: Manchester University Press, 1986), 74; quoted in Thomas Mathiesen, *Prison on Trial: A Critical Assessment* (London: Sage Publications, 1990), 120.

28. Sykes, *The Society of Captives*, 65. Compare also: "Formal criminal punish-

ment is . . . a degradation ceremony with maximum prospects for stigmatization"; "Prisons are warehouses for outcasts; they put problem people at a distance . . . from those who might help reintegrate them." John Braithwaite, *Crime, Shame and Reintegration* (Cambridge, U.K.: Cambridge University Press, 1989), 14, 179.

29. I am not intending here to minimize the significance and value that various goods and services will have to prisoners. "From the outside one might think that the benefits and burdens controlled by the prison are not so important. From the outside, the difference between an isolation cell and a regular cell may appear small. So may the difference between six and eight crowns per day as allowance. In any case, the cell is cramped and the allowance small. Seen from within, however, much of this appears differently. Seen from the inside, differences which appear small from the outside are often magnified or enlarged and in part receive vital significance." Mathiesen, *Prison on Trial*, 130.

30. Sykes does acknowledge that a "small number of prisoners" will not be touched by this moral stigma (being psychopathic or immersed in the criminal subculture). *The Society of Captives*, 66. Consider as well: "[W]hen we become outcasts we can reject our rejectors and the shame no longer matters to us." Braithwaite, *Crime, Shame and Reintegration*, 55.

31. Sykes, *The Society of Captives*, 63.

32. Mathiesen, *Prison on Trial*, 134.

33. See Stern, *A Sin against the Future*, chapter 6: "People and Imprisonment," and Hans Toch, *Living in Prison: The Ecology of Survival*, rev. ed. (Washington, D.C.: American Psychological Association, 1993).

34. Sykes, *The Society of Captives*, 64.

35. "Retributivism is the only theory of punishment which takes the notion of human responsibility seriously because it justifies punishment solely on the basis of acts and situations which were under the control of the perpetrator concerned. Only those facts which are believed to be free human acts are relevant in assessing guilt and deciding about punishment; all circumstances independent of the offender are considered as irrelevant." Wojciech Sadurski, *Giving Desert Its Due* (Dordrecht, Neth.: Reidel, 1985), 241.

36. C. S. Lewis, "The Humanitarian Theory of Punishment," *Res Judicatae: The Journal of the Law Students' Society, Victoria* (Australia) 6 (1953): 2.

37. "Although Kantian beings who could know morality without relying upon their emotions are perhaps conceivable—just barely—that surely is not us. We need our emotions to know about the injustice of racial discrimination, the unfairness of depriving another of a favorite possession, the immorality of punishing the innocent. Our emotions are our main heuristic guide to finding out what is morally right." Michael Moore, "The Moral Worth of Retribution," in *Responsibility, Character and the Emotions*, ed. F. Schoeman (Cambridge, U.K.: Cambridge University Press, 1987), 189.

38. It is worth noting that this experience of justice has been frequently documented in the context of victim-offender mediation or family group conferencing schemes, that is, where the processes of victim-offender reconciliation and reparation are initiated: "[T]he forgiver is able to respond to the wrongdoer as someone other than 'the one who hurt me,' and the wrongdoer himself is able, thanks to this new perspective, to regard himself as liberated from his burden of moral debt.

Such liberation puts the two parties on an equal footing once more, and makes possible renewed relationships." Jean Hampton, "Forgiveness, Resentment and Hatred," in Murphy and Hampton, *Forgiveness and Mercy*, 49. "The major parties attend the [family group] conference in the roles of victim or offender. The labels of 'victim' and 'offender' may gradually be removed, and the conference process may begin that longer process of restoring the moral equality between them." David B. Moore, "Transforming Juvenile Justice, Transforming Policing: The Introduction of Family Conferencing in Australia," in *Comparative Criminal Justice: Traditional and Nontraditional Systems of Law and Control*, ed. Charles B. Fields and Richter H. Moore (Prospect Heights, Ill.: Waveland Press, 1996), 595.

39. Victim-offender mediation is one of the few ways in which this kind of inner transformation might be facilitated: "The experience of being caught for an offense and being charged will be sufficient to incite a degree of regret in most offenders (if only out of self-pity). The task of the mediation scheme is then to build on this spark of remorse to encourage even more insightful realization of the harm caused and thereby to make that remorse deeper, more genuine, and less self-centered." Tony F. Marshall and Sally Merry, *Crime and Accountability—Victim/Offender Mediation in Practice* (London: HMSO, 1990), 97.

40. Joel Feinberg, *Harmless Wrongdoing: The Moral Limits of the Criminal Law* (New York: Oxford University Press, 1988), vol. 4: 304–05.

41. Sykes, *The Society of Captives*, 90.

42. Paulo Freire, *Pedagogy of the Oppressed*, rev. ed., trans. Myra B. Ramos (New York: Continuum Publishing Company, 1994), 27.

43. "When someone infringes another's rights, he gains an unfair advantage over all others in the society—since he has failed to constrain his own behavior while benefiting from other persons' forbearance from interfering with his rights. The punishment—by imposing a counterbalancing disadvantage on the violator—restores the equilibrium: after having undergone the punishment, the violator ceases to be at an advantage over his non-violating fellows." von Hirsch, *Doing Justice*, 47. Compare Herbert Morris, "Persons and Punishment," *The Monist* 52 (1968): 475, 478.

44. Mathiesen, *Prison on Trial*, 132. Victim-offender mediation is, perhaps, the most promising way available for addressing the psychological needs of the victim. "Meeting the offender and being able to express one's feelings to the culpable party, to witness them as human beings rather than vague impersonal threats, to receive their apologies and exercise the privilege of forgiveness may help victims restore their social and personal equilibrium in a more direct and immediate way than would otherwise be possible." Marshall and Merry, *Crime and Accountability*, 182.