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GOOD CONSEQUENCES

Justification of punishment (retributivism)

Through punishment, the state causes to a punished person certain harm, which can consist, for example, in restricting his freedom (imprisonment, house arrest,…), harm to property (pecuniary punishment, forfeiture of property,…), physical suffering (corporal punishments), harm to honour (shaming punishments), but also in loss of life (capital punishment). At the same time such harm is not only a side effect of punishing, but it is of primary intention.[1]) Then, a question remains, in what way the fact, that a punished person wilfully violated law, can morally justify that he/she is punished? Philosophers of penal law developed a whole range of competing theories, which answer this question by their own manner. Of course, each of these theories has its strengths and weaknesses. Traditionally, the most pronounced among these theories are two, i. e. retributivism and consequentialism. If put very simply, the consequentialist justifications of punishment (e.g. Bentham, Sidgwick) lie in the idea that punishment is only justifiable on the basis of its good consequences, while retributivist theories (e.g. Kant, Hegel) present within their mainstream an opinion that punishment is justified only when a punished person deserves it.

The retributivist theories presume, that conditions for justification of punishment lie in the past, these are the so called *backward-looking theories.* Retributivists insist that a mere past fact, that a crime was committed, justifies punishment of an offender, without regard to whether this punishment has beneficial effects for the future. We, as society (or the state), have not only a moral right, but also a moral duty to punish an offender, because he did something morally wrong, and so from the moral point of view he deserves an appropriate punishment.[2]) The moral desert for punishment is a necessary and at the same

[1]) It is true, that by taxation the state causes financial harm to its citizens, however, from a conceptual point of view, taxation is not a pecuniary punishment, partly as it is not a consequence of an illegal act, but partly also that even if taxation *de facto* causes financial harm to citizens, this harm is not the purpose of taxation. The state does not impose taxes on its citizens so that they suffer. Taxes, unlike punishments, do not express condemnation of behaviour by society. See BOONIN D., *The Problem of Punishment*, Cambridge 2008, pp. 15-23.

[2]) Retributivism has both general and individual character. On the one hand it is an opinion that penal institutions as such are justifiable, when they generally assure that just those, who deserve it, are punished, and on the other hand it is an opinion that a punishment of each particular offender is justifiable just by the fact, that he deserves it.

time a sufficient condition for moral justification of punishment.[3]) An appropriate punishment can deter from future criminal activity, it can render offenders incapable from committing further crimes, educate citizens, strengthen social cohesion, prevent collective self-help ("vigilance committees"), provide satisfaction to crime victims, or if need be, satisfy revengeful sentiments in society; however, according to retributivists these consequences, albeit even some of them are socially desirable, do not justify punishing.[4]) If we knew that tomorrow the whole Earth would be destroyed by a sweeping impact of an asteroid, then punishment would not have any future social benefits, yet under such circumstances, it is meaningful, according to a retributivist, to punish today all those, who deserve it.

Some authors consider the desert to be a self-evident moral principle, while they hold that it requires no other explanation, nor justification.[5]) Admittedly, the other recognize that the concept of desert is an intuitive one, however, for the purposes of justification of punishment, they require some kind of its non-trivial analysis. For critics might claim that the statement that X ought to be punished, as he deserves it, does not actually mean anything more than X ought to be punished, because he ought to be punished.[6]) For example David Dolinko writes in this connection: „The retributive theory is arguably the most influential philosophical justification for the institution of criminal punishment in present-day America. Yet it is curiously difficult to articulate this theory in a perspicuous fashion. The central claim of the rival deterrence theory can be summarized swiftly – „it's right to punish criminals because doing so minimizes the net level of suffering". But correspondingly concise efforts to characterize retributivism risk collapsing into „it's right to punish criminals because doing so is right".[7])

If we are to provide some factual analysis of the concept of desert, then the

[3]) Pure retributivism means that the desert for punishment is an absolute moral value, hence the desert is always the only justifying reason for punishment. In return, the impure retributivism admits that in some cases importance of desert is outweighed by another moral value. See KERSHNAR S., *Desert, Retribution and Torture*, Oxford 2001, p. 69.

[4]) MOORE M. S., 'Justifying Retributivism', in: *Israel Law Review*, Vol. 27, No. 1-2, 1993, p. 15.

[5]) „For example, although retributivists grant that, theology aside, it is a contingent question whether wrong doers *are actually likely to suffer* for their misdeeds, they see it as a moral necessity, independently of the consequences, that wrongdoers *ought to be made to suffer* in proportion to their offenses. What I call *deep retributivism* holds this as a fundamental principle, in need of no further justification." See HILL T. Jr., 'Kant on Wrongdoing, Desert, and Punishment', in: *Law and Philosophy*, Vol. 18, No. 4, 1999, p. 409.

[6]) LACEY N., *State Punishment: Political Principles and Community Values*, Routledge 1988, pp. 16-17.

[7]) DOLINKO D., 'Retributivism, Consequentialism, and The Intrinsic Goodness of Punishment', in: *Law and Philosophy*, Vol. 16, 1997, p. 507.

ancient principle of retribution (*lex talionis): An eye for an eye, a tooth for a tooth* surely cannot pass muster.[8])

This principle is defective partly because it is not obvious for the whole range of crimes (e.g. fraud, perjured testimony, blackmailing), what punishment should be inflicted, so that the said analogy is maintained. Moreover this principle itself is too coarse-grained. This overly simple principle does not, for example, differentiate between murder, negligent manslaughter, or unculpable killing of another, despite the fact, that from the moral perspective there are significant differences. It seems to be much more desirable to evaluate the desert of an offender to be punished on the basis of in what manner such a person was reckless towards the legal interests of other people. It is possible to consider the rate of his culpability, which can be deduced even from the fact, that the offender risked causing damage to their legitimate interests, while taking into consideration the reasons, why he took such a risk, and also with regard to what knowledge can be fairly required with respect to his circumstances and position.[9])

Herbert Hart says, that retributivism responds to three questions. What kind of behaviour can be punished? How severely? What justifies punishment? The simple model of retributivism subsequently means that a person can be punished only when he did voluntarily something morally wrong, that this punishment must be in some way equal, or equivalent to the atrocity of his crime and also that justification of punishment consists in the fact that punishment is a negative response to the offender doing something morally wrong.[10]) Hart demurs at the principle that a punishment is to be adequate with regard to the gravity of the crime.[11]) Some retributivists have a tendency to the opinion that completed crimes should be punished more severely than unsuccessful attempts, or as the case may be, negligent behaviour with fatal effects should be punished more severely than negligent behaviour with less grave effects.[12])

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[8]) A Jewish poet Abba Kovner formed shortly after the war the Nakam group (Dam Yehudi Nakam – "Jewish Blood Will Be Avenged"), who planned to poison six million Germans in revenge for Holocaust under the principle "An eye for an eye". A Jewish politician and Zionist leader David Ben-Gurion rejected this idea, arguing that six million of dead Germans could not get back lives of six million Jews. The original plan failed. Later on, in 1946, the Nakam group attempted to poison approx. 12,000 German POWs, however without success. Even today the Kovner´s comrades commiserate that the Jewish blood was not avenged: "You cannot be killing Jews and not suffer for that."

[9]) ALEXANDER L., FERZAN K. K., *Crime and Culpability: A Theory of Criminal Law*, Cambridge 2009, p. 23.

[10]) HART H. L. A., *Punishment and Responsibility*, Oxford 2008 (2nd edition), p. 231.

[11]) We should distinguish this principle from the principle of proportionality to the effect, that a system of punishments should be balanced.

[12]) A negative reaction of society is usually stricter against agents, who intentionally caused grave harmful consequences, than against those, who at the same culpability only attempted, or risked these consequences. However, the other thing is, whether these emotions are rational. See MOORE M. S., *Placing Blame: A Theory of Criminal Law*, Oxford 1997, ch. 5.

This indicates that for them a criterion of desert is not only a subjective moral wrong of an offender, his personal character, or his personal choice, but also the harm inflicted. Further Hart points out that in the context of retributivism it is not clear at all, why we should believe this odd moral alchemy that a combination of two evils, i.e. the moral wrong of a crime and the suffering caused by punishment becomes together something good.

According to retributivists, the reason to punish is not only the fact, that somebody violated the law, yet the law can be immoral. If man is punished on the basis of the law, then moral justification of such punishment depends on moral correctness of the law and not on the mere fact that it is a formally valid law.[13]) In this connection, literature sometimes distinguishes between moral and legal retributivism, while moral retributivism focuses only on *mala in se*, i.e. not on *mala prohibita*: „Moral retributivism differs from legal retributivism in that the former focuses on grounds of punishment that can be identified independently of the state's decision to criminalize certain activities. As a result, moral retributivism need not justify many of the practices that are currently part of a criminal justice system, such as parole and laws against the sale of marijuana."[14]) A thumping majority of reflections on retrubutivism as a theory, which in a certain manner justifies punishing, represents reflections on moral, not legal retributivism.[15]) However if the purpose of retributivism is justification of punishment as an institutionalized legal practice, then moral retributivism can quite easily miss this proclaimed purpose. Punishment, if understood in a legal sense, means the punishing of somebody for violating the law. But, we can quite easily imagine cases, when somebody deserves punishment from the moral point of view, although he did not violate positive law (immoral legal behaviour), or on the contrary, he does not deserve punishment from the moral point of view, in spite of violating positive law (moral, or morally neutral, illegal behaviour).[16]) And this is quite a serious problem for the retributivism based on the moral desert.[17])

Arguing in favour of retributivism can be purely notional, that is to say that the negative reaction against an offender of a crime has a nature of punishment only, when the purpose of such a reaction is to give an offender exactly what he deserves for his crime. Otherwise such a reaction is not real punishment, but merely institutionalized injustice.[18])

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[13]) HONDERICH T., *Punishment: The Supposed Justifications Revisited*, London 2006, p. 19.

[14]) KERSHNAR S., *Desert, Retribution and Torture*, Oxford 2001, p. 69.

[15]) Notional difference between moral and legal retributivism would, of course, get complicated, if we believed, that people have moral duty to observe the law.

[16]) We may not agree on, whether matrimonial infidelity deserves a punishment, but we can certainly agree that pursuant to the (Czech) Criminal Code, infidelity is not a criminal act.

[17]) BOONIN D., *The Problem of Punishment*, Cambridge 2008, p. 99; LACEY N., *State Punishment: Political Principles and Community Values*, Routledge 1988, p. 19.

[18]) This notional argument has a character of natural law theory. The leading retributivist Michael S. Moore is at the same time a leading natural law theorist, after all.

For example, Antony Quinton insisted that retributivism in its essence was not moral, but logical doctrine. Yet, an innocent person can suffer harm by a particular "punishment", but it is notionally unsuitable (illogical) to assert that he was punished.[19]) It is also possible to argue functionally, that the best interpretation of a particular penal system is that the implicit goal (purpose, function) of this system is to give offenders exactly such a punishment, which they morally deserve.[20]) However, if retributivism is the best interpretation of a penal system, as it best matches our intuitions about what is morally right, then we can argue straight on an ethical level.[21]) We can focus on the fact that it is unjust to punish somebody, who does not deserve a punishment, typically an innocent person, or punish a person in a different manner than he deserves. We can also argue that punishment of a person is justified, provided that it met rationally controlled feelings ("virtuous emotions") of his victim on satisfaction of justice.[22]) Nonetheless, it is also possible to enter a competing camp and argue in terms of consequentionalism. We will then contend that such punishment will have the best social consequences, which gives offenders exactly what they morally deserve. And this means that punishing on the basis of desert is good not only in itself, but at the same time it is the best way to realize certain additional values. Punishment according to the desert is not only inherently good, but also instrumentally.[23])

[19]) QUINTON A. M., 'On Punishment', in: *Analysis*, Vol. 14, No. 6, 1954, pp. 133-142.

[20]) A complication lies in the fact that moral retributivism is more like a normative theory of what penal law should be (as a branch of positive law), than a descriptive theory of what it is in reality. If a certain penal system makes it possible, for example, to "punish" the innocent in the public interest (scapegoats), or it allows for exemplary and absolutely inadequate punishment (the theatre of horror), then moral retributivism will not be the best interpretation of such a system, but it will rather oppose such a system and condemns it morally as mere caricature of a penal system.

[21]) Stephen Kershnar argues, that our moral intuitions are such, that it is the desert, which determines, who is to be punished. I.e. that we have a moral duty to punish those on the one hand, who deserve it, we have a moral duty not to punish those, who are innocent on the other hand, as well as that we should derive the rate of punishment from the desert for punishment. At the same time, punishment is in proportion to criminal behaviour of a person at the very moment, when it causes such harm to an offender, which is equal partly to, what his rate of culpability is, and partly to what harm represents a typical consequence of criminal behaviour of this type. See KERSHNAR S., *Desert, Retribution and Torture*, Oxford 2001, p. 81.

[22]) Here, we actually consider certain idealization of attitudes of victims, as a victim *de facto* can have even entirely unjustified and irrational desires for revenge. See ZAIBERT L., *Punishment and Retribution*, Ashgate Pub 2006, p. 103.

[23]) MOORE M. S., 'Justifying Retributivism', in: *Israel Law Review*, Vol. 27, No. 1-2, 1993, pp. 21-22.

Desert theory is the most pronounced line of retributivism and that is why we usually connect retributivism only with this theory, but in reality there are also other lines of retributivism.[24])

Some retributivists, the so called forfeiture-based retributivists contemplate that the state has a right to punish an offender because the offender violates certain rights of other people by committing crime and thereby at the same time loses his own right not to be treated in such a manner.[25]) If somebody violates certain rights of other people, it does not mean that he loses all his rights, but he loses only those rights, which he violates himself. Therefore the starting point is an idea that there is a significant relationship between own moral rights and moral duties towards other people.[26]) Alan Goldman puts it quite understandably: „Persons normally have rights not to be severely imposed upon in order to benefit others. If we are justifiably to ignore these rights, it could only be when they have been forfeited or alienated. And the only way in which this can be done involuntarily is by violation of the rights of others. Since having rights generally entails having duties to honour the same rights of others, it is plausible that when these duties are not fulfilled, the rights cease to exist.“[27]) Punishing of the innocent in the public interest is unacceptable already because that only he, who violated rights of other people, can be justly punished by restriction of his own right.

Nevertheless, the Goldman's approach is not pure retributivism. The fact that a particular offender lost a certain right, does not itself mean, that the state has

[24]) We introduced retributivism through one particular version of retributivism, to wit retributivism of desert. It is not easy at all, to introduce retributivism generally. E.g. Matt MATRAVERS holds that retributivism (generally) does not have a clear definition. It has a character of rather essentially contested concept than a notion based upon a rigorous criterion, which could be used for clear differentiation of one non-consequentialist theory from another. See MATRAVERS M., *Justice and Punishment: The Rationale of Coercion*, Oxford 2000, p. 48.

[25]) The most prominent representatives of contemporary retributivism based on moral desert for punishment are Michael S. Moore and Stephen Kershnar. Historical representatives of retributivism based on the loss of rights include Thomas Hobbes, John Locke and David Hume, the contemporary ones include Alan H. Goldman and Vinit Haksar.

[26]) A libertarian Murray Rothbard formulated a theory of "proportionality", which means that an offender loses his rights, at most to a scope, in which he deprived another person of his rights. Therefore, e.g. a capital punishment is admissible for a criminal act of murder. At the same time, it is crucial that punishment is not understood as paying a debt to society, but as paying a debt to a victim of crime. In the Libertarian world, there are no crimes against society as a whole *in abstracto,* but merely crimes against individuals, or particular groups of individuals. Withal it is allowed that a victim of crime forgives an offender a part, or even his entire punishment: „The proportionate level of punishment sets the right of the victim, the permissible upper bound of punishment; but how much or whether the victim decides to exercise that right is up to him.“ See ROTHBARD M. N., *The Ethics of Liberty*, New York 1998 (1982), p. 89.

[27]) GOLDMAN A. H., 'The Paradox of Punishment', in: *Philosophy and Public Affairs*, Vol. 9, No. 1, 1979, p. 43.

a good reason to cause him harm, which would otherwise mean violation of that right. The loss of a right is necessary, but not sufficient condition for punishment, which must in addition bring some social benefit.

„When a person violates rights of others, he involuntarily loses certain of his own rights, and the community acquires the right to impose a punishment, if there is social benefit to be derived from doing so.“[28]) Vinit Haksar says openly that retributivism of the forfeiture of rights has common features not only with the retributivism of desert, but also with utilitarianism.[29]) It is true, that society does not have a general right to punish any person for the purpose of deterring other people from a certain fashion of behaviour, however if somebody violated rights of other persons, then he himself gave society the right, to restrict his own rights for the purposes of the public interest, namely in a similar (or equivalent) fashion.[30]) Somebody can see the problem of retributivism of the forfeiture of rights already in the fact, that its basic idea, i.e. the forfeiture of own rights as a consequence of interference with rights of another, is not as self-evident, as it may *prima facie* seem.[31]) Indeed, people have a general duty not to interfere with the rights of others, however it does not imply that a consequence of violation of this duty is to be exactly the loss of their own rights. The idea that there is a mutual conditional character to the effect that we have a duty to respect your rights, but only when you respect our rights in a similar manner, must be above all brought in harmony with our idea of what actually constitutes these rights, on which they are based.[32])

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[28]) Ibid p. 44.

[29]) Haksar distinguishes three versions of theory of loss of rights. A criminal loses his rights, if he violates rights of somebody else, (1) even if his behaviour was not intentional, (2) only, when it was a an intentional act reflecting his personal character, (3) only when his behaviour was voluntary and free.

[30]) HAKSAR V., 'Excuses and Voluntary Conduct', in: *Ethics*, Vol. 96, No. 2, 1986, p. 322.

[31]) One thing is, what proposition is valid, the other thing is, what follows from this proposition. Let us assume that the following proposition of theory of forfeiture of right is valid: *If somebody has a certain right, then he also has a duty to respect the same right for other persons.* From this, the theory of forfeiture of rights derives, that if somebody violates his duty to respect a certain right for other people, then he himself does not have (or, loses) this right. However, there is something else following logically from this: *If somebody does not have a duty to respect a certain right for other persons, then he himself does not have the same right.* It is one thing to violate a certain duty, the other thing is not to have that duty. Admittedly, a murderer violates his duty to respect another's right to life, but it does not mean that he does not have, or loses this duty. He did not lose this duty of his, therefore if he somehow loses his own right to life, we have to be looking for reasons of this loss somewhere else, than in the aforementioned proposition. See BOONIN D., *The Problem of Punishment*, Cambridge 2008, p. 108.

[32]) Provided that, it is the mutuality of their recognition within society, something like an implicit social contract, which is constitutive for the rights of individuals, then retributivism of rights is quite natural and intuitive concept, actually, it is then self-evident.

In his article *Are there any natural rights?* (1954),[33]) Herbert Hart says that if a group of people devotes to a certain common activities according to certain rules, then the people, who submitted to the rules, restricted their own freedom and they have a right to request the same from those, who benefit from their self-restriction.[34]) John Rawls then in his article *Legal Obligation and Duty of Fair Play* (1964) argues for the thesis that a moral duty to abide to law is always a special case of duty to fair game.[35]) In this connection, he formulated the so-called fair game principle, which elaborates on the Hart's idea. Let's say that there is a mutual beneficial and just scheme of social cooperation, which, however, works only if (almost) all involved parties cooperate. Let's further assume that this cooperation requires from everybody certain costs, or restrictions of his own freedom. And let's finally assume that the benefits resulting from such cooperation are (at least to a certain extent) freely available. Of course, in such a defined situation, there is space for free riders. Rawls purports that it is at variance with fairness to behave as a free rider, as the fair game requires everybody, who benefits from a certain scheme of cooperation, to also share its costs.[36])

Now, we can move to another line of retributivism, the so called retributivism of fairness, which perceives society primarily as mutually beneficial cooperative enterprise assured by coercion, while the violation of societal rules (e.g. non-

[33]) In this article, Hart primarily develops a thesis that, if some moral rights exist at all, then only on the assumption that, there is at least one natural right, specifically an equal right of all persons to negative freedom. This right is considered natural in a sense that it is possessed by all people, who are capable of deciding independently. They have it already on the basis that they are people, not only on the basis that they are members of some community, or that they are in some special relation to other people. When this right to negative freedom is understood as a natural right, it means that it was neither defined, nor granted (constitutively recognized) by a human volitional act. See HART H.L.A., 'Are there any natural rights?', in: *The Philosophical Review*, Vol. 64, No. 4, p. 175. Hart did not include this article in his book *Essays in jurisprudence and philosophy*, as at that time, he had already considered the main argument of his article as misleading. See HART H. L. A., 'Introduction', in: *Essays in jurisprudence and philosophy*, Oxford 1983, p. 17.

[34]) HART H. L. A., 'Are there any natural rights?', in: *The Philosophical Review*, Vol. 64, No. 4, p. 185.

[35]) However, according to Rawls, the duty to obey the law is only the so-called *prima facie* duty, as in some cases it can be outweighed by a stronger conflicting duty. In this article, Rawls devotes to the main problem of decision-making of an individual in democracy. As a man can face a dilemma, whether he should oppose an act, which he (in a minority) considers as unjust, or whether he should comply with it, as it was (by a majority) adopted in compliance with the constitution, which in itself is just. Rawls says on this subject: „This is, of course, a difficult situation, but not one introducing any deep logical paradox. Normally, it is hoped that the obligation to the constitution is clearly the decisive one." See RAWLS J., 'Legal Obligation and Duty of Fair Play' (1964), in: *John Rawls: Collected Papers*, Freeman S. (Ed.), Harvard 1999, p. 120.

[36]) RAWLS J., 'Legal Obligation and Duty of Fair Play' (1964), in: *John Rawls: Collected Papers*, Freeman S. (Ed.), Harvard 1999, p. 122.

payment of taxes, breaking speed limits, counterfeiting of money) is understood as unfair advantage against those persons, who abide to these rules.[37]) Herbert Morris developed this idea in his article *Persons and Punishment* (1968), where he claimed that an offender is a free rider of the system, as he took something, which does not belong to him. Punishment of an offender can be justified by the fact that it restores distributive balance of the system: a criminal actually pays back his debt to society. The main argument for retributivism of fairness thus comes out of distributive justice. Man, who benefits from opportunities, which are created by law as a social institution, but does not restrict himself according to requirements of law, is a free rider in the system of social cooperation, thus in a certain manner he impairs fair distribution of costs and profits of this system. The function of punishment (*lato sensu*) is to restore such an impaired *status quo ante* and hereby reintroduce fair distribution of costs and profits in society.[38]) Herbert Hart pointed out in this connection, that sanction ought not to be only motivation to abide by law, but it also ought to be a guarantee, so that those who voluntarily abide by law, cannot be sacrificed for the sake of those, who violate it.[39]) Those, who violate law, should not ride on the backs of those who abide by it.

Law as a social institution resolves a coordination problem of negative freedom. On one hand it guarantees to people certain degree of freedom, but on the other hand it is true, that in order to accomplish this purpose, it needs at the same time restrict persons in a certain manner. Primarily it lays down rules of conduct as an option of "voluntary" self restriction, secondly it lays down sanctions against those, who did not voluntarily submit to the system. From the theory of fairness perspective, an offender through his crime, as a cost of his freedom, rather chose the risk of punishment (enforced restriction), than voluntary self-restriction by observing legal rules.[40]) An offender has decided on taking a strategy not to cooperate on the system of voluntary self-restriction, while he believes that such conduct will pay off. If it were not for punishment, it would be something like gratis freedom: others restrict themselves for my freedom, but I do not restrict myself for their freedom.[41]) An offender did not return his "performance" and therefore he owes something to society. We

[37]) DAGGER R., 'Playing Fair with Punishment', in: *Ethics*, Vol. 103, No. 3, 1993, p. 475.
[38]) MATRAVERS M., *Justice and Punishment: The Rationale of Coercion*, Oxford 2000, p. 55.
[39]) HART H. L. A., *The Concept of Law,* Oxford 1994 (1961), p. 198.
[40]) STICHTER M. K., 'Rescuing Fair-Play as a Justification for Punishment', in: *Res Publica*, 2010, Vol. 16, p. 75.
[41]) „Criminals act unfairly when they take advantage of the opportunities the legal order affords them without contributing to the preservation of that order. In doing so, they upset the balance between benefits and burdens that a cooperative practice requires, and they make themselves liable to punishment." See DAGGER R., 'Punishment as Fair Play', in: *Res Publica*, Vol. 14, 2008, p. 262.

think in terms of social contract. For example, if a thief steals something in a shop, he not only impairs balance vis-à-vis the salesman, whom he robbed, but also vis-à-vis all people, who abide by law. As his benefit does not lie only in the value of a thing, which he stole, but also in the fact, that he uses freedom in a certain kind of activity (theft), which other people denied themselves to advantage of maintenance of a system, the benefits of which he uses himself.[42])

Note, that whereas retributivism of desert is primarily focused on *mala in se,* retributivism of fairness is primarily focused on *mala prohibita*.[43]) It is not particularly intuitive to insist that criminal acts of murder and rape should be punished exactly on the grounds that a murderer, or a rapist get unfair advantage against others of us, who do neither murder, or rape, as we restrict ourselves in these activities according to law, while they do not. "Normal" people do not think in terms that it is only criminal law, which restricts their possibilities to murder and rape, they feel primary restriction in this respect already in their moral feeling.[44]) A prominent representative of retributivism of fairness Richard Dagger responds to this objection by saying that unfairness is admittedly an aspect of all crimes, including murder and rape, nevertheless by this their wrong is not exhausted, which is reflected, for example, in the severity of sentence determined for these crimes. A tax offender enjoys unfair advantage against a huge number of honest tax payers. However, both murder and rape are, in a certain sense, delicts against social cooperation. A rapist behaves uncooperatively towards his victim, as rape is coerced (non-consensual) intercourse. On the one hand, the rapist took something (nastily put), which does not belong to him, and on the other he harmed his victim's future possibilities of consensual intimacy. A murderer goes even one step further, as through the killing he directly excludes his victim from the cooperative enterprise. Dagger

[42]) DAGGER R., 'Playing Fair with Punishment', in: *Ethics*, Vol. 103, No. 3, 1993, p. 478.

[43]) According to retributivism of fairness, every crime is to a certain sense, an act against fairness, but Rawls remains rather cautious on this matter: „It would be incorrect to say that our duty not to commit any of the legal offenses, specifying crimes of violence, is based on the duty of fair play, at least entirely. These crimes involve wrongs as such, and with such offenses, as with the vices of cruelty and greed, our doing them is wrong independently of there being a legal system the benefits of which we have voluntarily accepted." See RAWLS J., 'Legal Obligation and Duty of Fair Play' (1964), in: *John Rawls: Collected Papers*, Freeman S. (Ed.), Harvard 1999, p. 118.

[44]) An overwhelming majority of us neither murders, nor rapes, especially because we generally feel murder and rape to be something morally atrocious. While we presume that these moral sentiments of ours are independent of existence of a legal system. Antony Duff says in this connection: „We do not need to make rules or conventions to render murder or rape wrongful: one reason for this is that if I am to see others as fellows with whom I am involved in a cooperative endeavour I must already see them as beings whom I must not murder, rape, or in other ways attack." See DUFF A., 'The incompleteness of 'punishment as fair play'', in: *Res Publica*, Vol. 14, 2008, p. 279.

holds that in this case these are not only delicts against interests and integrity of a particular person (victim), but in addition, these are delicts against general principles of cooperation in society: behave cooperatively and do not limit others in their own possibilities to cooperate.[45])

We have to distinguish between two questions: 1) How to justify that criminal law defined a certain kind of wrongdoing (or on the contrary, did not define) as a crime? 2) How to justify that we punish acts, which were defined by criminal law as crimes? Retributivism of fairness (fair game) does not tackle the first, but the second question. It offers a unified conception of why crimes deserve punishment, despite the fact, that from the moral point of view, crimes can embody irreducible variety of miscellaneous wrongdoings.[46]) It focuses on what crimes have in common from the desert for punishment perspective. It provides a unified explanation why a criminal act, *unlike other morally wrong, but not criminal acts,* deserves punishment. In the centre of interest is a criminal act as an illegal act and not a wrong as a evildoing. One thing is that *mala in se* criminal acts are inherently wrongdoings (evildoings), the other thing then is, that we want such a theory, which would justify their punishment on the basis of their legal status, specifically that these are illegal acts. This means that justification of their punishment cannot do without a reference to legal rules, which prohibit this conduct. Violation of legal rules, be it murder, or tax evasion, represents unfair conduct from the perspective of general social purpose of law. The unfair advantage consists in the fact, that everybody enjoys advantages of a legal system (freedom, safety, ..), but somebody violates legal prohibitions (does not restrict himself), while others observe them (restrict themselves).[47]) Retributivism of fairness is an attractive theory especially because it respects legal and institutional dimension of punishment, which we, of course, expect from every theory of punishment (in a legal sense). From this point of view,

[45]) DAGGER R., 'Punishment as Fair Play', in: *Res Publica*, Vol. 14, 2008, p. 270.

[46]) Matt Stichter is right, when he argues, that the followers of retributivism of fairness can consistently provide one answer to a question, what justifies that crimes generally deserve punishment and at the same instant remain pluralists in an answer to a question, what justifies criminalization of miscellaneous kinds of behaviour. The reasons, why to criminalize some kind of behaviour are manifold, they are usually available before an appropriate punishment for a specific crime is being searched. The praxis of punishment of crimes is generally justified by the fact that crimes as illegal behaviour represent unfair behaviour, nevertheless, when determining a kind and severity of punishment, we take into account the reasons, why certain behaviour is criminalized, in what and to what degree it is harmful, or dangerous. See STICHTER M. K., 'Rescuing Fair-Play as a Justification for Punishment', in: *Res Publica*, 2010, Vol. 16, p. 80.

[47]) Consistently speaking, retributivism of fairness is not only a theory, which justifies punishment of crimes, but it generally justifies sanctions (*lato sensu* punishments) for illegal behaviour (including, for example administrative delicts). However, the role of culpability is not clear here, as unfair advantage can be provided by violation of law without culpability.

retributivism of fairness rather clearly outclasses classical retributivism of desert, which is an institutionally blind theory, as it justifies punishment of morally wrong acts (evildoings), without regard to whether these represent illegal conduct. Provided that retributivism really aspires to be a theory of criminal law, then it must focus on justification of punishment as a sanction laid down by law for culpable violation of law, not as an informal sanction for any moral wrongdoing.

Justification of punishment (consequentialism)

While retributivism justifies punishment on the basis of past facts (backward-looking theory), consequentialism is trying to justify punishment on the basis of anticipated future facts (forward-looking theory). A consequentialist holds that a conduct (or a rule) is morally right at the very moment, when its anticipated consequences are better than all its available alternatives, including "doing nothing".[48]) Applying this consequentialist ethics to criminal practice means to judge moral rightness of punishment not on the basis of moral assessment of behaviour, which occurred in the past and is currently subjected to punishment, but on the basis of future effects of punishment.[49]) Classical utilitarianism, which is the most familiar version of consequentialism, belongs among traditional ("textbook") ethical theories.[50]) Utilitarians claim that rightness of an action depends of the value of its consequences and that such a value lies in their utility, which means maximum of earthly happiness and the same time minimum of suffering for all people. The important thing is that utilitarianism considered as an ethical theory and not as psychology of human decision-making, focuses on overall social utility. We should not confuse this with the so-called ethical egoism, which is a kind of consequentialism according to

[48]) Of course, consequentialist ethics is not only the ethics of punishment. See, e.g. SCHEFFLER S.,*The Rejection of Consequentialism*, Oxford 1982; MULGAN T., *The Demands of Consequentialism*, Oxford 2001; Mendola J., *Goodness and Justice: A Consequentialist Moral Theory*, Cambridge 2006.

[49]) As far as punishment is concerned, a consequentialist can generally accept consequentialist ethics and therefore he would accept consequentialism of punishment too; however, there can also be such a consequentialist, who considers consequentialist justification of punishment as the best justification of punishment, however he does not generally profess consequentialism.

[50]) Leading representatives of law & economics Louis Kaplow and Steven Shavell formulate their normative jurisprudence in terms of welfare economics. In its nature, this jurisprudence is consequentialist, as legal rules (or institutes) are assessed only based upon what anticipated effects they have on social welfare, which is aggregated from utilities of individuals. Kaplow a Shavell understand utilitarianism as one of possible variants of welfare economics. Utilitarianism requiring maximization of expected total welfare is a variant, in which social welfare is calculated as a simple sum of utilities of all individuals. However, we can modify such calculation in a way, that social welfare will be calculated only according to utility of those, who are worst off. See KAPLOW L., SHAVELL S., *Fairness Versus Welfare*, Harvard 2006, pp. 5, 27.

which an action by one particular agent is morally right, if it maximizes own utility of this agent: "Ethical egoism claims that it is an agent's moral obligation to do what promotes his own good or welfare. Such a view makes the agent's own good primary, defining other moral notions in terms of it. It represents an agent-relative form of consequentialism."[51]) Thus, while ethical egoism is *agent-relative* consequentialism, ethical utilitarianism is *agent-neutral* consequentialism.

Please, note that classical utilitarianism is interested only in a total sum of utilities in society. It leaves open the question of how these utilities ("happiness") should be distributed in society, so that it was socially just. If maximization of total social utility was achieved, for example, in such a manner that the rich people would be even far richer and at the same time the poor would be a little poorer, it would be in accordance with classical utilitarianism. A utilitarian considered utilities of all people as equal, but this is why it will be ("without social prejudice") invest means to where it is the most effective, therefore where it will have the best effect for overall social welfare. A classical competitor of utilitarianism in the issue of distributive justice is egalitarianism. While utilitarianism requires us to help those, who can have the biggest benefit out of that (effectiveness), as through this the total welfare of society increases, egalitarianism requires us to help those, who are in the worst situation (solidarity), even if this was a suboptimal strategy of distribution of resources.[52])

Utilitarianism is very attractive, at least superficially, as it rather well corresponds to our intuitions that good life matters and human conduct should be evaluated with regard to what consequences it has for good life.[53]) If this reminds a reader of hedonism, it is not far from truth, because classical utilitarians (Jeremy Bentham, John S. Mill, Henry Sidgwick) indeed reflected things in a hedonist manner. Utilitarianism interpreted through hedonism means that we understand good life as satisfaction in a psychological sense (state of mind), hence as the maximum of total happiness, that we calculate as difference between a sum of gratifying feelings and a sum of unpleasant feelings.[54]) Hedonist

[51]) BRINK D. O., 'Some Forms and Limits of Consequentialism', in: *The Oxford Handbook of Ethical Theory*, Copp D. (Ed.), Oxford 2006, pp. 407-408.

[52]) MENDOLA J., *Goodness and Justice: A Consequentialist Moral Theory*, Cambridge 2006, str. 2-3; STEIN M. S., *Distributive Justice and Disability: Utilitarianism against Egalitarianism*, Yale 2006, p. 1.

[53]) It is also advantage of utilitarianism that it avoids the concept of moral desert, which is apparently unsustainable from the perspective of the so called free will problem. See SOBEK T., *Nemorální právo* (*Immoral Law),* Aleš Čeněk, p. 53; SMILANSKY S., *Free Will and Ilusion*, Oxford 2000, p. 31.

[54]) On the other hand, non-hedonist interpretation means that we understand gratification as realization of preferences, without regard to what these preferences are and how their realization is felt psychologically. See SCHEFFLER S., *The Rejection of Consequentialism*, Oxford 1982, p. 28.

motivation of action means that people are in their decision-making urged by desire for pleasure and fear of suffering. The important thing is that ethical utilitarianism includes the so-called principle of impartiality.[55]) It is true that theory of rational decision-making recommends to an individual agent to maximize his own expected benefit, but utilitarianism as an ethical theory asseses action according to whether it maximizes overall utility of all people.[56]) A moral aspect of utilitarianism consists in equality, to wit, that happiness (preference) of all people is considered as equally important, as equal.[57])

Mother Therese is admirable, however, among people, she is more like an exception. It would be naïve to hope that all people start acting as pure altruists by themselves, i.e. that they will perceive pleasure of another as their own pleasure and suffering of others as their own suffering. That is why a task of public policy is to give people such incentives, so that individual and general interests can be aligned, or as the case may be, make sure that people will not pursue maximization of their own happiness against general welfare of their community. The objective to be achieved is that anticipated balance of pleasure and suffering, when an individual thinks rationally about what he should do, is such, that he will be not only motivated to what is best for him personally, but along with that also what is the best for entire society.[58]) The function of punishment can be to deter from such conduct, which is indeed in the interest of an individual, but at the same instant it harms society. Jeremy Bentham put it as follows: „The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore,

[55]) A problematic consequence of the principle of impartiality is that the utilitarian ethics, if we take it consistently, requires from an individual to pursue his individual interests only if they contribute to the public interest. Utilitarianism is incompatible with liberalism. „This requirement of impartiality arguably conflicts with human nature and with the conception of people as separate entities. It also conflicts with one's obligations toward family, friends, and community." See ZAMIR E., MEDINA B., *Law, Economics, and Morality*, Oxford 2010, p. 20. Thinking in terms of utilitarian ethics is potentially dangerous. Indeed, the main motto of the Nazi and the Stalinist regimes was, that the public interest was everything, the individual interest was nothing. Liberal economists come from an idea that the best manner of how to maximize total welfare in society is not to sacrifice interests of an individual in favour of the public interest, but conversely that each person freely pursues his own interests.

[56]) The theory of rational decision-making does not have to be normatively equivalent with ethical egoism. As ethical egoism in its stronger version requires from us to get rid off altruistic sentiments (affections) like: I feel other people happiness as my own happiness. The theory of rational decision-making does not have such ambitions. Rationality does not require that altruism has to be only self-referential. Mother Therese is not irrational by feeling (empathizing with) other people happiness as her own happiness, she will be irrational, when she realizes her altruistic preferences inefficiently. For example, if she helps 10 people, although she could help with same costs and in the same manner to 100 people. See BINMORE K., *Rational Decisions*, Princeton 2009, p. 21.

[57]) MULGAN T., *The Demands of Consequentialism*, Oxford 2001, p. 14.

[58]) MATRAVERS M., *Justice and Punishment: The Rationale of Coercion*, Oxford 2000, p. 14.

in the first place, to exclude, as far as may be, every thing that tends to subtract from that happiness: in other words, to exclude mischief.“ However, from the perspective of hedonism, even punishment is something bad, as it causes suffering and that is why Bentham ties punishment to the principle of utility: „But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.“[59])

The most straightforward concept of utilitarian ethics is act utilitarianism, which assesses specific actions of individuals according to how they contribute to social welfare. If we apply utilitarianism of action to criminal practice, then particular punishment of a person for violation of law is right, when it is socially useful (meaningful) and effective at the same time. This is rather intuitive, as hardly anybody would defend meaningless, or ineffective punishment. Utilitarians endorse (*inter alia*) the following causal mechanisms of punishment: correction, incapacitation, individual deterrence, general deterrence and public condemnation.[60]) Correction of an offender (e.g by rehabilitation) means a change of his character, values, attitudes and opinions in such a direction, so that it eliminates, or at least weakens his propensity to crime. Incapacitation (e.g. imprisonment) means that an offender virtually looses an opportunity, or means to repeat his crime. Individual deterrence is based on that a specific offender is deterred from further criminal activity by threat of other, or as the case may be, even more severe punishment. The purpose of general deterrence is to deter all potential offenders from certain conduct by threat that they will be given a similar punishment as the convicted offender. Public condemnation is value and information effect of punishment, which strengthens legal awareness of society that such conduct is not being tolerated, as it is socially harmful.[61]) The purposes of punishment are manifold, however there is a general rule, that punishment ought to be effective, therefore social costs of punishment should not be higher than its social benefits. This is a good answer to a question, why to punish specifically those, who intentionally violated law. If we did not punish only those, about whom we have good reasons to think that they intentionally violated law, but we would arbitrarily “punish” anybody for anything, then punishment would not satisfy its purposes, i.e. the social costs of punishment would exceed its social benefits. Whom and especially from what would we deter in the future by punishment, which would be randomly imposed on

[59]) BENTHAM J., *An Introduction To The Principles Of Morals And Legislation* (1789), in: *The Works of Jeremy Bentham*, Vol. 1, Bowring J. (Ed.), Edinburgh 1843 (The Online Library of Liberty), p. 248.

[60]) FRASE R. S., ‘Punishment Purposes’, in: *Stanford Law Review*, 2005, Vol. 58, p. 70.

[61]) One thing is public condemnation as value information from governmental bodies addressed to the public, as to such behaviour is not tolerated, as it is socially harmful, the other thing is public condemnation as a spontaneous critical answer of the public regarding harmfulness of such a behaviour, i.e. the public exacerbation.

somebody, without regard to how he behaved? What information value would such a "punishment" have?

Act utilitarianism focuses on justification of particular punishment of a specific person. Therefore a decision on punishment is understood here as an individual action. A particular punishment is morally justified, when total utility, as a consequence of this punishment is higher than any available alternative, i.e. another punishment, or an absence of punishment. However, here we come upon quite serious and widely discussed issue. Since theoretically it is possible that particular "punishment" of a certain **innocent** man will have better consequences from the perspective of social utility than any available alternative.[62]) For example, the punishment of families of offenders can have greater deterrent effect than punishing actual offenders. From the Kantian point of view, it is, of course, absolutely unacceptable, however from the utilitarian point of view, it is in principle possible to justify even "punishment" of an innocent man, merely for the sake of reducing circumspection of real offenders, so that we can apprehend them more easily.[63]) Or let's suppose that we know with a certainty that there are dangerous terrorists in a certain group of people, however, we cannot determine, who they are out of them. In this case it can be socially useful to arrest the whole group, ergo including innocent persons.[64])

From the perspective of utilitarianism, we can even justify preventive "punishment". If we have utilitarian grounds to punish subsequently somebody, who already committed a crime, we have the same grounds (deterrence, incapacitation, rehabilitation) to "punish" preventively even a person, in whom it is highly likely that he will commit a crime in the future.[65]) It may be socially useful to arrest preventively (crime incapacitation effect) all adult men of a certain unadaptable national minority, but is this morally acceptable? Of course, it is not. Individual rights are aces that within our liberal political thinking tri-

[62]) „Guilt will be necessary for punishment only if punishing the guilty produces more social good than punishing the innocent. Although there are reasons for thinking that this will often be the case—because deterrent and incapacitative effects to some degree depend on guilt—there is no guarantee that it will always be so. Because utilitarianism aggregates goods and ills across persons, it necessarily admits the possibility that severe harm to a small group may be justified by a widespread, if minor, benefit to a large number of others." See GOLASH D., *The Case against Punishment*, New York 2005, p. 44.

[63]) From the Kantian perspective (the Categorical imperative) we ought to treat a man as an end in himself and not only as means to achieve some other end (e.g. social utility).

[64]) The main objections against utilitarianism is that it can justify even "punishment" of an innocent man, but utilitarianism can as well justify non-punishment of a man, whose guilt was proved, in the case that his punishment would not be socially useful. The other problem is that social usefulness of punishment can be independent of whether its severity is appropriate to the gravity of a crime. Under certain prerequisites it is, for example, utilitaristically possible to justify that the most suitable punishment for breaking a speed limit is capital punishment. See BOONIN D., *The Problem of Punishment*, Cambridge 2008, p. 56.

[65]) BRAITHWAITE J., PETTIT P., *Not Just Deserts*, Oxford 1990, p. 46.

umph over social utility.[66]) As a classical example illustrating that utilitarianism can justify even "punishment" of an innocent, the literature states the following story: In a small town there are two communities at war living in a permanent tension, one next to the other. Some woman gets raped and members of her community (assuming that the rapist is someone out of the other group) are making a threat with blood revenge. In order to calm down the crowd and prevent heavy bloodshed, the sheriff presses false charges and condemns an innocent member of the other community, who at that time appeared by coincidence near the scene of a rape. Utilitarianism can morally justify such conduct, as through small evil (condemnation of an innocent person) much bigger evil is averted (bloodshed of many innocent people).[67]) Our intuitions about what is just, resist such an approach.[68]) From an intuitive point of view, it is perhaps acceptable that under extreme situation of general menace we would sacrifice an innocent person in the interest of society as a whole, however act utilitarianism does not limit itself to such extreme situations. Act utilitarianism means, that it is morally right to "punish" an innocent man, whenever social benefit following from this "punishment" is at least slightly higher then if such an innocent man is not "punished".

A liberal considers people as separate persons: each individual has a certain autonomy, one person cannot be burdened with costs only because other have benefits from it. However, from the liberal standpoint, it is extremely difficult to explain to a utilitarian, that his way of thinking is twisted, if only because an individual should not be sacrificed in the public interest. A utilitarian can argue, that if we consider all consequences of "punishment" of the innocent, then from a utilitarian point of view we can acknowledge that "punishment" of the innocent is bad conduct. For suffering of the innocent is not the only cost of such practice. If, for example, the public learns that an innocent person was "punished", it undermines its confidence in law and respect for it. Nobody wants to live in a system, in which anybody (and therefore he himself) is under a threat that he will be "punished" without guilt, this merely because there is a public interest in it.[69]) Nobody wants to be a scapegoat. Nevertheless, a utilitarian

[66]) DWORKIN R., 'Rights as Trumps', in: *Theories of Rights*, Waldron J. (Ed.), Oxford 1984, pp. 153–67.

[67]) MATRAVERS M., *Justice and Punishment: The Rationale of Coercion*, Oxford 2000, p. 17.

[68]) Let's notice that this statement requires moral realism. Something is moral truth objectively, i. e. independently of our intuitions. Moral intuitions have only epistemic significance and in unusual cases they are unreliable. See SOBEK T., *Nemorální právo* (*Immoral Law),* Aleš Čeněk 2010, Ch. 1.5., 7.2.

[69]) A utilitarian may argue that in our calculation we always have to include all long term consequences of conduct. For example, the killing of hospitalized patients for the purpose of donating their organs to several other patients (we kill one patient, but we save lives of three other patients) is even from the utilitarian perspective only seemingly desirable. For there is a whole number of other negative side effects, e.g. that ill people will fear that they would be sacrificed in such a manner and would avoid their own hospitalization. See ZAMIR E., MEDINA B., *Law, Economics, and Morality*, Oxford 2010, p. 22.

thereby insists on a morally dubious idea that if it pays off from the social point of view (e.g. due to good concealment of the fact, that an innocent person was "punished", or because society is ignorant to "punishment" of innocent people), the "punishment" of an innocent person is actually a right thing to do.

In his famous article *Two Concepts of Rules* (1955) John Rawls dealt with a difference between justification of certain practice as a system of general rules, that are to be applied and coerced, and justification of particular conduct, which consists in implementation of these rules.[70]) Being aware of this difference, we can combine utilitarianism with retributivism, so that general justification of institution of punishment is utilitarian (social utility), but individual punishments are justified retributively (desert for punishment). A penal system is good, if it maximizes social utility, but a particular person can be punished only because he culpably violated law.[71]) From the practical point of view this means that a legislator, when he lays down rules of a penal system, should be a utilitarian, while a judge, when deciding a particular case, should respect requirements of retributivism, including adequacy of punishment with regard to individual nature of a crime. This moves us one level of abstraction higher in utilitarian thinking, therefore we move from act utilitarianism, which takes into account utilities following from individual punishments, to rule utilitarianism, which devotes to overall utilities following from the functioning of a certain penal system.[72]) However, what it actually means, that a certain rule (as an element of a penal system) is justifiable on the basis of its social utility?[73]) If this meant that each individual application of this rule is an optimal decision from the perspective of maximization of social utility, then rule utilitarianism would collapse back into act utilitarianism. Rather this means that (repeated) application of this criminal rule will produce, from a long-term standpoint, greater social utility than which would be produced by using any of the alter-

[70]) RAWLS J., 'Two Concepts of Rules.', in: *The Philosophical Review*, 1955, Vol. 64, No. 1, str. 5.

[71]) LACEY N., *State Punishment: Political Principles and Community Values*, Routledge 1988, str. 50.

[72]) Also the rule utilitarianism is in its principle predisposed to tolerating "punishment" of the innocent. For the rule utilitarian, it will be, for example, right, if we reduced a general requirement on the strength of evidence (probability, "degree of certainty", permissible degree of doubts) in proving guilt, provided that social benefits from the fact that less guilty persons escape punishment, overweighs social costs from convicting more innocent persons. A moral problem is that the convicted innocent persons are scapegoats of social utility. See SMILANSKY S., *Free Will and Ilusion*, Oxford 2000, p. 29. An answer of a utilitarian will be that it is not possible to ensure with 100% certainty, that the convicted person is truly guilty. Moreover, evidence proceedings cannot be a never ending process. Therefore, we need to decide somehow, what the acceptable risk of the conviction of an innocent person is, with regards to efficiency of the means invested in the evidence proceedings.

[73]) Of course, we can utilitaristically assess a specific criminal rule, a penal institute, or a penal system as a whole.

native rules. From the perspective of social costs and benefits, this is simply the most effective rule, which we have at our disposal.[74])

Maybe, from the long-term point of view, social utility is best supported by criminal rules with retributive content. It is not obvious, but let's suppose, it is the case. Therefore, let's suppose, that rules of punishment on the basis of desert for punishment are also the best from the utilitarian perspective. However, there is a complication that, we can move utilitarian thinking even one level higher to the methodological level. Maximization of social utility may not be ensured by formalistic rule utilitarianism, which requires strict ("blind") application of utilitarian rules, but modified rule utilitarianism, which presumes, that a judge, in principle, respects utilitarian rules, however can deviate from them in a specific case, provided that this is in the interest of social utility.[75]) Therefore, even if utilitarian rules generally required retributive punishment, the utilitarian methodology of their application could in special cases (as exceptions) allow "punishment" of the innocent. Therefore, let's assume that formalistic rule utilitarianism would be more effective from the perspective of social utility than modified rule utilitarianism. It is not obvious, but let's assume, it is the case. This means that utilitarian rules have retributive content (*assumption 1),* while utilitarianism requires, that judge will apply them strictly, i.e. without exceptions (*assumption 2)*. It seems that if these assumptions are accepted, utilitarianism does not now face an objection that it tolerates, or even requires "punishment" of the innocent. However, the argumentation that utilitarianism under certain assumptions does not allow "punishment" of innocent persons, absolutely misses the substance of that objection, even if those assumptions were realistic. For utilitarianism is criticized from the position of retributivism, first and foremost because it does not refuse "punishing" of the innocent directly as something, which is evil in itself. Since "punishing" of innocent persons is bad independently of whether or not it pays off from the perspective of social utility. An objection against utilitarianism, which, **in principle**, allows conscious "punishing" of the innocent, is as follows: „The allegation is that any

[74]) The rule utilitarianism can be also reformulated as the so called collective utilitarianism. We will ask then, in what way an individual should act on assumption that all other people would act similarly as he does. In this concept, we understand maximization of public welfare as a collective undertaking. Each of us has a moral duty to support general good, but only through such means, which would be optimal, if implemented by everybody. From this point of view, for example, it is not right to invest all of one's means in the charity, as if everybody did it, it would finally harm entire economy and basically reduce total welfare of society. Please notice the similarity with the categorical imperative: Act in such a way, so that the maxim of your act can become a general principle.

[75]) „It seems unlikely that the occasional deviation from the rule when arguments from utility dictate it would really undermine the long-term utilitarian benefits of having the rule at all. If, on the other hand, we stick to our rule even in a case where its application clearly does not maximise utility, we are no longer really utilitarians: we have become concerned with something other than, or additional to, the maximization of utility." See LACEY N., *State Punishment: Political Principles and Community Values*, Routledge 1988, p. 51.

moral theory that can consider the rightness or wrongness of punishing the innocent as a moot question contingent on circumstance is mistaken (irrespective of whether, as a fact about the world, utilitarianism would demand such a thing).“[76])

Consequentialism means that we should consider moral rightness of something according to what consequences this has in society, if and to what extent it supports the good.[77]). However, the issue comes back. For we can imagine such specific situations, under which conscious “punishment” of an innocent person (or on the contrary conscious non-punishment of a guilty person) contributes best to the maximum of people getting a punishment, which they indeed deserve.[78]) Since **one** person will get, what he does not deserve, (or on the contrary will not get, what he deserves), but with a consequence that **more** persons will get, what they deserve. One retributive step back will make possible more retributive steps forwards. It is true that this kind of consequentialism pursues exclusively the retributive value (desert for punishment), however, similarly as utilitarianism it can justify “punishment” of innocent persons.[79])

Consequentialism and economic analysis of law

Economics is not only a science on economy, *lato sensu,* we can understand it as being led by efforts to explain in principle any human behaviour on the basis of a prerequisite that people as individuals behave rationally.[80]) People can make rational decisions among available alternatives on quite various matters, e.g. when carrying on business, judicial decision-making, in politics, sports activities, but also within partner relationships and when upbringing children. In this sense economics represents general theory of behaviour and economy is only one of many subjects of interests of economics. This universal approach can also be felt as a danger, as imperialism of economics, but also as an opportunity for methodological unity of social sciences.[81]) People live in an

[76]) MATRAVERS M., *Justice and Punishment: The Rationale of Coercion*, Oxford 2000, p. 22.

[77]) Let’s notice quite a significant difference that something has some consequences in society and that something has some consequences for society as a whole. The main problem of utilitarianism is that it does not consider persons as separate individuals, but it recklessly sums up their individual utilities into one social utility. Willingness to sacrifice an individual in the public interest is then only an undesirable consequence of this grossly anti-liberal approach.

[78]) For example, the aforementioned example of willing “punishment” of one innocent person (or conversely, willing non-punishment of one guilty person), only in order to reduce vigilance of a big group of real offenders, so that we can apprehend them more easily. The consequence is retributively good in a sense that eventually a bigger part of society gets, what it deserves.

[79]) BOONIN D., *The Problem of Punishment*, Cambridge 2008, p. 81.

[80]) KIRCHGÄSSNER G., *Homo Oeconomicus*, Springer 2008, p. 2.

[81]) Of course, we can ask, whether different fields of social sciences use the same notion of rationality, or whether they use different ones: „If a psychologist identifies what she takes to be omnipresent irrationality when people reason about probabilities, is she denying what an economist would maintain by saying that economic agents are rational agents?“ See BERMÚDEZ J. L., *Decision Theory and Rationality*, Oxford 2009, p. 1.

environment of limited resources, they cannot fully satisfy all their desires, therefore they are forced to behave effectively. As being effective means to be able to achieve maximum from minimum.[82]) In economics, rationality is understood in terms of instrumental concepts. A rational person is he, who chooses optimal means to achieve given goals with respect to given circumstances.[83]) Economics is modelling a man as an economically rational agent (*homo economicus*) in a sense that he directs his decision-making, be it consciously, or unconsciously, on maximizing his expected utility.[84])

Of course, this cannot be everything. For an agent strives to maximize utility always within the framework of how he defines his decision-making possibilities (decision problem). Besides, the actual definition, of what the possibilities of choices are, or what expectations are rational, is a problem, to which various economic theories respond in a different manner. An economist can presume that agents act in compliance with his economic theory, thus if he knows preferences of agents, he can specify, with respect to circumstances, the decision problem, which agents are currently trying to resolve, and predicate their behaviour accordingly.[85]) When, following that, an economist moves to another economic theory, as he considers it as a better economic model, he will expect that agents act and have always acted already in accordance with this new theory. Of course, an economist needs not think this way, but if he does, it means, that he expects, that practical (implicit) *know how* of agents is always potentially better than his own theoretical (explicit) *know that*. This imaginary economist does not know, or at least not with a certainty, which of the economic models is the right one ("true"), however his assumption is that this ignorance is primarily on his side and not on the side of agents, whose behaviour he analyzes. Thus, consequently, he is paradoxically the only one, who with regard to his model is not a priori *homo economicus,* being the one, who works with it.[86]) Such thought, no matter how amusing it may be, is scarcely anything more than a caricature of current economics. The problem dramatically changes in its very basis, if we realize that a man is limited not only by the lack of external

[82]) MANKIW G., *Principles of Microeconomics*, South-Western College Pub 2006, 4th. ed., p. 2.

[83]) GERRARD B., 'Introduction', in: *The Economics of Rationality*, London 1993, p. 1.

[84]) The hypothesis of rationality is defended on the most general level by stating that in the long run evolutionary forces in the competitive and scarce resources environment eliminate irrational acts. To be rational is simply our adaptive strategy. We distinguish cognitive and motivational elements of rationality. Cognitive rationality means that an agent arranges his system of preferences, so that it is consistent, transitive and complete, furthermore that he respects laws of probability and includes in his decision-making all available, but only relevant information. Motivational rationality then consists in the fact that the agent aims without prejudice maximization of his welfare.

[85]) SALEHNEJAD R., *Rationality, Bounded Rationality and Microfoundations*, New York 2007, p. 37.

[86]) Of course, if we economically analyze an economist's work (the economy of economics), then we will view and economist as an agent, with an assumption that he is *homo economicus*.

resources, but also by limits of his own mental powers. Eric Posner says on this matter: „Standard economic models assume that agents maximize their gains within budget constraints. These models put an unrealistic burden on the memory and analytic powers of the agent: nobody does or can take account of everything when deciding how to act. And once decision costs are taken into account, the models fall into an infinite regress. Although the assumption that people optimize may allow for reasonable approximations of human behaviour in some contexts, it does not in other contexts.“[87])

There are no doubts that in the last half of the century theory of law was significantly influenced by economic analysis.[88]) Especially by the fact that it provided tools for systematic and methodologically (relatively) rigorous research of relations among purposes (goals), means, incentives and preferences, which lawyers considered only intuitively and often under influence of various prejudices. Economic analysis of law includes two aspects, a positive and a normative one.[89]) The positive aspect descriptively focuses on cognition of factual operation of legal rules in society, i.e. on cognition of how law *de facto* contributes to social welfare. The normative aspect considers a question on what legal rules are socially desirable, i.e. what the law should be like from the perspective of what is socially good. The positive model monitors in what way law currently influences behaviour of people (e.g. does capital punishment reduce a number of murders?), the normative model focuses on formulating recommendations for legal policy.[90]) If we accept that efficiency is an important quality of legal rules and institutions, we can ask ourselves a descriptive question on what the current legal regulation is from the perspective of efficiency and we can also normatively ask, how it should improve from this point of view. The normative question logically includes a positive question, as if we want to know, in what way something should change, we have to know first, what it currently is and how it could change, i.e. what possibilities of change are realistically available. The positive analysis does not restrict only to description of a legal system, it can also serve for explanation of why the current system of rules is what it is. If legal practice (including informal practicing of legal

[87]) POSNER E., *Law and Social Norms*, Harvard 2002, p. 44.

[88]) For example, the economic analysis of criminal law blooms since 1968, when Gary Becker published his influential article *Crime and Punishment: An Economic Approach*. See BECKER, G.S. (1968) “Crime and Punishment: An Economic Approach,” *Journal of Political Economy*, Vol. 76, pp. 169–217.

[89]) We can talk about four tasks of the economic analysis of law: partly to explore to what degree current law supports economically efficient outputs (the *descriptive* task), partly explain reasons for why the current law is efficient, or inefficient in such a way (the *explanatory* task), further to this estimate what efficient outputs of certain new, or hypothetical legal regulation, there will be (the *predictive* task), and last but not least, also to formulate recommendations in what way law should change, so that it is more efficient in pursuing its goals (the *normative* task). Perhaps, it is not necessary to emphasize that these four tasks are closely related. See VELJANOVSKI C., *The Economics of Law*, 2. ed., 2006, p. 11.

[90]) SHAVELL S., *Foundations of Economic Analysis of Law*, Harvard 2004, p. 1.

institutes in society) has general tendency to develop in the direction towards economic efficiency, then efficiency can be a useful category for better understanding of law in action.[91]) We can also by intentional legislation try to constructively give support to this, in principle, unconscious evolution process, which is primarily based on accumulation of rational decisions of agents, who practise legal institutes ("the invisible hand of the law in action").

The economic analysis of law is intrinsically consequentialist. It tries to understand legal system according to what effects it will probably produce in the society, whose members as rational agents adapt their behaviour to its rules. For the legal rules should not be designed purposelessly, but for regulation of future behaviour of their addressees in the direction, which is preferred by a legislator as socially desirable. For example speed limits are designed, so that drivers drive more slowly, and consequently, more safely. Or, for example, an interpretation rule *contra proferentem*, that an ambiguous word in the contract ought to be understood against the party that included it in the contract, serves as motivation for the offerer to formulate contractual provisions more precisely.[92]) Apart from this, the advantage of general legal rules, compared to discretion of public agencies, is that they are foreseeable in their application, therefore make it possible for agents to plan their actions with regard to their probable legal effects.[93])

An economic approach to law follows from a requirement for efficiency of legal regulation. Among various concepts of efficiency , there are two most frequently mentioned ones: Pareto-efficiency and Kaldor-Hicks efficiency. These are tests of whether the change of distribution of values (or, allocation of resources) in society can be assessed from an economic point of view as a change for better. While Pareto-efficiency means that at least one person is made better off by the change and at the same time nobody is made worse off, Kaldor-Hicks efficiency means that those, who are made better off by the change, are made better off by so much, that they can compensate those, who are made worse off. If we put it more technically: distribution of values *A* is in society *S* socially preferred (*Pareto superior)* with regard to distribution of values *B,* when at least one of the members of *S* prefers distribution *A* to distribution *B* and at the same instant all other members of *S* are either indifferent to these two distributions, or they also prefer *A* to *B.* The distribution *A* is Pareto-efficient (*Pareto optimum),* when there is no such possible distribution, which would be socially preferred with respect to it.[94]) Pareto-optimal system is at the verge of its possibilities in a sense that no body can be made better off in other way than to the detriment of another. Pareto-efficient change of law is

[91]) MICELI T. J., *Economics of the Law*, Oxford 1997, p. 3.
[92]) FRIEDMAN D., *Law's Order: what economics has to do with law and why it matters*, Princeton 2000, p. 4.
[93]) MICELI T. J., *The Economic Approach to Law*, Stanford 2004, p. 9.
[94]) The idea was introduced in 1896 by an Italian sociologist Vilfredo Pareto (1848-1923).

a consensual change in a sense that nobody can be made worse off by this change, therefore nobody has a reason to block it. It seems that the Pareto concept of efficiency does not work with comparing utility among individual persons, which is among economists generally felt as its advantage. Nevertheless, absolute intolerance to losses (no matter how small) of individuals (even a single one), provide that these are not compensated, and without regard to (no matter how big) benefits of those, who were made better off, actually means that the Pareto concept attributes to losses of those, who were made worse off by the change, "infinite" importance in comparison with benefits of those, who were made off better.[95])

Kaldor-Hicks efficiency follows from the fact that distribution of values *A* in society *S* is socially preferred with respect to distribution of values *B*, when those members of *S,* who prefer *A* to *B,* have in total bigger benefit from the change from *A* to *B* than is the total loss from this change of those member of *S,* who on the contrary prefer *B* to *A.* Therefore (if we disregard transaction costs) this means that those, who were made better off by the change, were made better off by so much, that they could, in principle, compensate those, who were made worse off by the change. If this compensation was indeed implemented, it would be actually a change, which is Pareto good, that is why Kaldor-Hicks efficiency is sometimes called *Potential Pareto.* Kaldor-Hicks efficiency is based on a cost-benefit analysis: the change of law has in total bigger benefits than costs, therefore total social welfare increases.[96])

Kaldor-Hicks efficiency indeed potentially allows compensation of those, who were made worse off by the change, but in principle it focuses only on total welfare, not on issues of just redistribution of resources.[97]) The economists Nicholas Kaldor (1908-1986) and John R. Hicks (1904-1989) pursued through this concept separation of two independent questions, specifically economic efficiency and just distribution of resources, which was supposed to partly allow more solid analytical basis for the notion of efficiency, partly get finally rid of "sentimentally coloured" issue of distributive justice, which goes beyond the scope of economics.[98]) Legal positivists distinguish questions of validity (normative existence) and justice of law. They hold that this is not blind ignoring of the question of justice, as some critics are trying to foist on them, but rational division of work, where different methods are needed. However, the thing is far more complicated. For example, Walter Schultz argues, that market economy does not stand only on rational egoism, but it can function economically effi-

[95]) ZERBE R., *Economic Efficiency in Law and Economics*, Edward Elgar Publishing 2001, p. 3.

[96]) Regarding detailed. as well as critical analysis of concepts of economical efficiency, see MARKOVITS R. S., *Truth or Economics: On the Definition, Prediction, and Relevance of Economic Efficiency*, Yale 2008.

[97]) A reason for redistribution of resources can, indeed, be a law of diminishing marginal utility, however, only as means for maximization of total social welfare.

[98]) ZERBE R., *Economic Efficiency in Law and Economics*, Edward Elgar Publishing 2001, p. 6.

ciently only when its agents respect certain moral constraints, which intrinsically motivate them to internalize externalities of their behaviour.[99])

Now, we will make a digression to the so-called deontological ethics, i.e. to the ethics of duty.[100]) According to consequentialism, such conduct is right, which produces the best consequences. This is challenged by deontologists.[101]) They claim that there are certain moral prohibitions and commands (e.g. not to lie, punish the innocent, torture, betray, to live up to one's promises). At least in some cases, deontological ethics requires us not to maximize the good.[102]) Deontological theories prefer certain values (e.g. autonomy of an individual, human dignity, fundamental rights and freedoms, truthfulness, gratitude, fidelity, fairness, equal treatment, personal desert, honesty, living up to one's promises) to achieving good results.[103]) Utilitarians morally assess behaviour according to what consequences it has, deontologists assess moral quality of behaviour as such, as well as moral quality of interpersonal relationships. The fact, that (particular) parents maltreat their own child, is for deontological ethics something, which is wrong in itself, even if it was through some coincidence good for anything else, for example that the media coverage given to this case would provide incentive to the government to take general preventive measures against maltreatment of children. Utilitarianism is consequently of instrumental nature, as moral value of conduct consists in endorsement of some other values, which are independent of morality, or as the case may be, stand "before morality" (e.g. pleasure, absence of suffering, utility, satisfaction of preferences). Utilitarians believe that we have a good reason for maximizing human pleasure and minimizing an amount of human suffering in the world.

[99]) SCHULTZ W. J., *Moral Conditions of Economic Efficiency*, Oxford 2001.

[100]) The three most significant concepts of normative ethics are deontological ethics, consequentialism and the virtue ethics.

[101]) Among the most prominent representatives of deontological ethics belong Immanuel Kant, William David Ross, Thomas Nagel, Thomas Scanlon and Frances Kamm.

[102]) We cannot generally claim that moral intuitions are always on the side of deontological ethics. Some deontological constraints are quite intuitive: *It is impermissible to sacrifice a life of one person to save lives of four people, provided that the life of such a sacrificed man was not in danger.* However, other deontological constraints are much less intuitive: *It is impermissible to sacrifice a life of one person to save lives of four people, even if otherwise all of five persons would die, i.e. including the one, who was sacrificed.* In the first case we sacrifice a life of a man, whose life is not in danger, in order to save four people, whose life is in danger, so the sacrificed person, if he was not sacrificed, would stay alive. For example, if we kill one healthy person, so that we can save four people by transplanting his organs, who would die without this transplantation. In the second case, lives of all five people are in danger and if we did not sacrifice one of them, all of them would die. This means that the sacrificed person would die anyway, even if he would not be sacrificed. For example a group of five shipwreck survivors is dying of hunger, they can be saved, but only if they kill and eat one of them.

[103]) ZAMIR E., MEDINA B., *Law, Economics, and Morality*, Oxford 2010, p. 41.

A moral value of a conduct consists not in its intrinsic nature, but in total benefits we can expect from it.[104])

Unlike utilitarianism, followers of deontological ethics are not neutral towards an agent. The fact that this is my child, gives me a special moral reason to support his personal interests. I have an obligation to take care of my family, you have an obligation to take care of yours. For the followers of deontological ethics, we are separate persons, as individuals we have differently focused moral obligations.[105]) A utilitarian, for example, believes that an individual has a moral duty to give up care of his family, provided that this contributes to total public good, for example, if this increases a total level of parental care in society. On the contrary, a deontologist will claim that each of us has a moral duty to take care of his family without regard to what consequences it has for public welfare. While a utilitarian will approve of terrorist torture in the interest of obtaining publicly important information, a deontologist will refuse that. A utilitarian will agree to killing one innocent person in order to protect more innocent people, a follower of deontological ethics will not approve of this, out of principle. Utilitarianism (as a kind of consequentialism) focuses on results of conduct, not on the moral quality of conduct as such, he is interested in good results, but is blind to how these results were achieved: the end justifies the means.

Deontological ethics is sensitive both to the nature of conduct (commissive, ommissive), as well as to the subjective side of conduct (culpability, motivation), especially, what respect for justified interests of other persons an agent expressed through his behaviour. As morally important it considers, for example, differences between harming and mere allowing harm, between intending and mere risking harm (intention versus negligence), but also between whether somebody caused harm to avoid harm to other people, or to increase welfare for other people. For a utilitarian, battery and failure to help to another, provided that both lead to equally serious consequences (for example death), are morally equivalent.[106]) It is true, that a deontologist generally accepts, that it is always morally wrong, if innocent people die at war, nevertheless he considers it much worse, when civilians are wilfully bombed, than if the civilians are bombed (with the same number of victims/casualties) as an inevitable side effect of an attack on military targets, even if this in both cases equally contributes to the victory over aggressive, totalitarian regime.[107]) Utilitarians differ from deonto-

[104]) DARWALL S. L., 'Introduction', in: *Deontology*, Darwall S. L. (Ed.), Blackwell Pub 2003, p. 1.

[105]) Utilitarianism is not established on moral grounds, that are relative to agents, therefore does not create special space for specific moral relationships among concrete individuals (*inter partes),* e.g for the relationship of friendship. See McNAUGHTON D., RAWLING P., 'Deontology', in: *The Oxford Handbook of Ethical Theory*, Copp D. (Ed.), Oxford 2006, p. 443.

[106]) KAMM F., *Intricate ethics: Rights, responsibilities, and permissible harm*, Oxford 2007, pp. 17, 423.

[107]) DARWALL S. L., 'Introduction', in: *Deontology*, Darwall S. L. (Ed.), Blackwell Pub 2003, p. 3.

logists in how they think about the agent's attitudes. For example, if a promisor feels bad (feelings of guilt) because of failure to meet his promise, then such a violation of promise is less efficient from the utilitarian perspective, therefore it is less justifiable, than if he had a good feeling from it, as the violator's good feelings are included in the total utility (welfare) resulting from that violation. However, from the perspective of deontological ethics, the violation of promise is less justifiable, if the violator derives pleasure in it, than if he has harrowing feelings of guilt. As the promisor´s satisfactory feeling of pleasure indicates from his side a lack of respect and sensitivity to legitimate interests of the promisee.[108])

Theories of deontological ethics can be divided into absolute and threshold ones. While an absolute deontologist holds that moral constraints cannot be overridden at any cost, a threshold deontologist asserts that moral limitations have their own limits. This means that a moral constraint can be overridden in favour of good results, but only when an anticipated benefit from violation of a constraint is high enough, or when an anticipated loss from keeping the constraint is too high. For example, to kill an innocent man, in order to save lives of more innocent people is unacceptable, save that quite a big number (let's say thousands) of human lives would be saved. Therefore, sacrificing one life in order to save more lives is in principle unacceptable, but there is a certain threshold in the number of saved lives, beyond which this is acceptable (justified). We have a moral duty to other people to respect their rights, but under some special circumstances it is permissible to override these moral constraints (*permissible overriding).* However, different kinds of moral constraints have a different threshold of permissible overriding. It is not morally permissible to kill one man in order to save life of another man, but it is permissible to lie to somebody, so that I can save a life of one man.[109]) For example, if I use a vehicle of another person without the owner's consent, because at this moment it is the only way of how I can get to work on time, then it is morally unacceptable, even if the harm caused to the owner of the vehicle, that he did not have his car available, was smaller then my benefit from getting to work on time. Nevertheless, it can be perhaps morally justified, if I use a vehicle of another person without his permission, in order to save a life of the third person, provided that I had no other option at that time, of how to save his life.[110]) Admittedly, I have a moral duty to apologize to the owner of the vehicle, or

[108]) ZAMIR E., MEDINA B., *Law, Economics, and Morality*, Oxford 2010, p. 30.

[109]) Immanuel Kant held that we should never lie, even to a murderer about the location of his pray.

[110]) I think that this consideration can be defended on the level of rule utilitarianism. The rule *Use (even without the owner's consent) a property of another, whenever you have a bigger benefit from it than is the loss of its owner*, will perhaps not maximize social welfare from the long run perspective. More likely it will lead to disruption of the institute of ownership.

compensate him for the harm incurred, nonetheless my behaviour had moral justification.[111]) An absolute deontologist *a priori* rejects every torture as morally impermissible, without any exceptions. While a threshold deontologist also in principle rejects torture, however he will make an exception, if we could, for example through torturing (typically a terrorist), likely obtain a piece of information, which is necessary for saving thousands of human lives (the so called ticking bomb problem).[112]) He will assess such torture, or "torture", as morally permissible.

Moral intuitions have indispensable importance among motivational reasons for observance of law. In the event that rules of the positive law were in gross contradiction to moral intuitions, then people would not feel observance of law as their moral duty. Eyal Zamir and Barak Medina are not, admittedly, legal moralists, they do not assert that law ought to be a tool for enforcing majority morality, however they hold, that neither in the liberal democracy a deep gap should exist between positive law and common sense morality. Normative jurisprudence should not be satisfied with simple utilitarianism (maximization of social utility), but it should tie it to deontological constraints, specifically to the requirement to respect an autonomy of an individual and his personal dignity. The two, Zamir-Medina, do not contest that maximization of total welfare in society is a good goal, they acknowledge that results do matter and that costs and benefits of a legal change should be taken into account. However, in one breath, they add that this is not the only thing that finally matters. Similarly as an economic analysis considers results of cognitive psychology (the so called behavioural law and economics), it should also include intuitive moral constraints, which we will, however, comprehend in the sense of threshold, not absolute deontological ethics. The economic analysis of law will be believed to be in better coherence with existing legal doctrines, if it is not just cost-benefit analysis, but it will show consideration to elemental requirements of common sense morality too.[113])

Efficiency is not everything. If law pursues grossly immoral goals, so much the worse, if it pursues them efficiently. The Nazis were murdering Jews quite efficiently, if we only consider efficiency of their killing technique (gas chambers). Maybe, in total, the mass murdering of Jews was inefficient for the Nazi regime, that suffered from desperate lack of labour force during the war. However, this genocide would be, of course, unjustifiable even if it would be in total economically efficient for the Nazi regime.

[111]) KAMM F., *Intricate ethics: Rights, responsibilities, and permissible harm*, Oxford 2007, p. 231.
[112]) BRECHER B., *Torture and the ticking bomb*, Blackwell Pub. 2007.
[113]) ZAMIR E., MEDINA B., *Law, Economics, and Morality*, Oxford 2010, p. 350.