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## RETRIBUTIVISM: A JUST BASIS FOR CRIMINAL SENTENCES

*Robert A. Pugsley\**

While people will disagree about what justice requires, . . . the primary of justice [in determining sentence lengths] is vital because it alters the terms of the debate. One cannot . . . defend any scheme for dealing with convicted criminals solely by pointing to its usefulness in controlling crime: one is compelled to inquire whether that scheme is a just one and why.

. . . [A] wise [political and practical] accommodation requires, first, a coherent conception . . . .<sup>1</sup>

Increasing numbers of citizens are disenchanted with the unproductive bureaucracy known as "criminal corrections," whose claim to "cure" a captive population of offenders remains manifestly unfulfilled.<sup>2</sup> Many observers have reluctantly reached the conclusion that such promises were hollow from the beginning: Whatever else prisons might do, they do not—because inherently they cannot—make their inhabitants "better."<sup>3</sup>

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I would like to thank the following teachers, all of New York University School of Law, who have given generously their time and comments: John V. Delaney, Graham Hughes, Richard H. Kuh, and David A.J. Richards. I have also benefited from discussions with my colleague at Southwestern, Herbert T. Krimmel, and with Dr. Cathleen R. Cox and John Danisi.

1. A. VON HIRSCH, *DOING JUSTICE* 5-6 (1976). Professor von Hirsch takes an important first step in placing greater emphasis on desert than deterrence. The report has enormous value as a statement in support of desert-based punishment.

2. For a highly readable summary of the most comprehensive empirical data on this point, see Martinson, *What Works?—Questions and Answers About Prison Reform*, PUB. INTEREST, Spring 1974, at 22. The study which formed the basis for Martinson's distillation was published in complete form the following year. See D. LIPTON, R. MARTINSON & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT* (1975). Dr. Martinson has now retracted some of the conclusions he drew from this study. See Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979). See also A. VON HIRSCH, *supra* note 1, at 110-43.

3. See AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE* (1971) [hereinafter cited as *STRUGGLE FOR JUSTICE*]; K. MENNINGER, *THE CRIME OF PUNISHMENT* (1968); J. MITFORD, *KIND AND USUAL PUNISHMENT* (1973); N. MORRIS,

In light of these forced observations, many people within and without the criminal justice establishment are questioning the assumptions upon which our correctional process rests. Unfortunately, "[W]e have in our country virtually no legislative declarations of the [philosophical] principles justifying criminal sanctions."<sup>4</sup> An explicit sentencing policy is necessary to provide a foundation for correctional practice. This is especially important now, because punishment-based determinate sentences are being broadly considered. Several state legislatures and the United States Congress have either adopted or are contemplating adoption of determinate sentencing structures.<sup>5</sup> If the public, through its elected representatives, is to play a meaningful role in determining correctional practice and sentencing policy, then the nexus between the practice and the policy must be made manifest; it must be a matter of public knowledge and intelligent, concerned discussion. We may then get from ourselves and our lawmakers, or a special commission designated by our lawmakers,<sup>6</sup> what we have been unable to receive from courts or parole boards. In short, we must establish a coherent penal purpose, and our statutory enactment must reflect, and offer promise of achieving, that purpose. The result then might be legitimately described as a penal-law/corrections system.

This Article delineates the main differences among the major penal rationales, enunciates the distinct consequences implied by each, and argues that retributivism provides an appropriate theoretical foundation for determinate sentencing proposals. These proposals present an opportunity to turn necessity—limited resources, increasing numbers of convicted offenders, and the apparent ineffectiveness of rehabilitation-premised incarceration—into virtue: doing justice. However, to reach this result, an ordered choice must be made among basic penal purposes.

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THE FUTURE OF IMPRISONMENT (1974); G. MUELLER, SENTENCING: PROCESS AND PURPOSE 110-43 (1977); E. VAN DEN HAAG, PUNISHING CRIMINALS (1975); J.Q. WILSON, THINKING ABOUT CRIME (1975).

4. M. FRANKEL, CRIMINAL SENTENCES 106 (1973).

5. *E.g.*, S. 1437, 95th Cong., 2d Sess. (1978); CAL. PENAL CODE §§ 1170-.6 (West Cum. Supp. 1979); FLA. STAT. ANN. §§ 947.165, .172-.174 (West Cum. Supp. 1979); ILL. ANN. STAT. ch. 38, §§ 1005-3-1 to -10-2 (Smith-Hurd Pamphlet Supp. 1978); ME. REV. STAT. ANN. tit. 17-A, §§ 1251-1254 (West 1978); Act of Apr. 5, 1978, ch. 723, 1978 Minn. Sess. Law Serv. 705 (West); Act of July 20, 1978, ch. 481, §§ 21-27, 1978 N.Y. Laws 848. *See also* Parole Commission and Reorganization Act, 18 U.S.C. §§ 4201-4218 (1976).

6. *See, e.g.*, Tonry, *The Sentencing Commission in Sentencing Reform*, 7 HOFSTRA L. REV. 315 (1979).

## ISSUES: PRACTICAL AND PHILOSOPHICAL

There are four commonly accepted goals<sup>7</sup> of criminal punishment:<sup>8</sup> Retribution, deterrence, rehabilitation, and incapacitation/isolation. However, only retributivism contains a valid philosophical premise upon which a coherent, organized system of just punishment can be built: It is the sole penal rationale concerned exclusively with doing justice. A retributive punishment scheme is not inherently incompatible with other enumerated penal goals. Indeed, any incidental deterrent, rehabilitative, or preventive effects which result from just punishment are certainly welcome. However, these additional social-utilitarian goals cannot morally *justify* the imposition of criminal sanctions.<sup>9</sup>

Larger questions of political and moral philosophy are unravelled in selecting a theoretical justification to guide imposition of criminal sanctions. The primary dispute concerns which philosophical theory should govern our sentencing policy: Utility in the Benthamite sense of increasing general happiness or reducing general suffering;<sup>10</sup> or Justice in the Kantian sense of reestablishing

7. Virtually every commentator would accept this listing, though some have identified a few additional subcategories. See, e.g., Mueller, *Punishment, Corrections, and the Law*, in *THE TASKS OF PENOLOGY* 47 (H. Perlman & T. Allington eds. 1969).

8. I speak of "criminal punishment" because *any form* of legal interference with liberty upon adjudication of criminal guilt is, by nature and definition, punishment. Other writers, however, consider the various aims of "criminal sentences" to include "punishment" or, synonymously, "retribution." While my terminology focuses on what I regard as the essentially punitive nature of any "rehabilitative" program to which one is involuntarily *sentenced*, other verbal schemes retain an illusory distinction between punishment and involuntary "rehabilitation." Professor Dershowitz is among those who take this latter approach, though he would certainly not subscribe to the policy implications suggested by such terminology. Dershowitz, *Background Paper*, in *TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT* 67, 69 (1976).

9. Neither rehabilitation, incapacitation/isolation, nor deterrence can justifiably be used to extend or exacerbate otherwise just punishments beyond the limits which simple desert allows. Justice is the self-restraining principle of a coherent retributive theory. One of the most persuasive developments of this position is contained in Silving, *A Plea for a New Philosophy of Criminal Justice*, 35 *REV. JUR. U.P.R.* 401 (1966). See also Harris, *Disquisition on the Need for a New Model for Criminal Sanctioning Systems*, 77 *W. VA. L. REV.* 263 (1975).

10. Utilitarianism is a moral theory which has as its sole ultimate standard of right, wrong, and obligation . . . the *principle of utility*, which says quite strictly that the moral end to be sought in all we do is *the greatest possible balance of good over evil* (or the least possible balance of evil over good) in the world as a whole.

W. FRANKENA, *ETHICS* 34 (2d ed. 1973) (emphasis in original). The good and evil

moral equilibrium by repaying criminal offenses with deserved punishment.<sup>11</sup> This decision rests on the relative importance we assign to the interests of the individual versus those of the collectivity.<sup>12</sup> The philosophical theory which we choose will in part govern our responses to practical questions which must be considered in developing a theory of substantive criminal law: Why and how should certain kinds of behavior be criminally proscribed; what should comprise the essence of criminal liability; should certain

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which utilitarianism balances are themselves nonmoral and hence dependent upon a theory of nonmoral valuation. Such valuation has most frequently identified the sensation of pleasure as good, and that of pain as bad. This is the hedonistic calculus which Jeremy Bentham adopted and made the centerpiece of a moral theory whose influence in the area of societal response to crime has been enormous. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1-7, 29-42 (Hafner pub. 1948). Utilitarianism is thus a teleological moral theory, which judges an action's importance only by its usefulness in attaining further consequences. W. FRANKENA, *supra*, at 14-15, 84.

11. For a full development of the concept of deserved punishment, see notes 77-107 *infra* and accompanying text. Kantian retributivism is a deontological moral theory, which denies what teleology affirms—that what is morally right, good, or obligatory can be determined by measuring what is nonmorally good. I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 99-109 (J. Ladd trans. 1965),

or . . . what promotes the greatest balance of good over evil for self, one's society, or the world as a whole. Deontologists assert that there are other considerations that may make an action or rule right or obligatory besides the goodness or badness of its consequences—certain features of the act itself other than the value it brings into existence, for example, the fact that it keeps a promise, is just, or is commanded by God or by the state . . . . For [deontologists] the principle of maximizing the balance of good over evil, no matter for whom, is either not a moral criterion or standard at all, or, at least, it is not the only basic or ultimate one.

W. FRANKENA, *supra* note 10, at 15. The core of this position resides in Kant's famous admonition to those who would act morally to avoid "the wandering path of a theory of happiness" (utility), to act on an intrinsically moral concept of duty not derived from or dependent upon some nonmoral external standard of worth. I. KANT, *supra*, at 100.

12. This tension flows logically from the opposing emphases contained in utilitarian and retributive theories. See notes 10 & 11 *supra* and accompanying text. Utility's ultimate referent is the greatest good for the greatest number, while Kantian moral theory regards the individual moral agent as having primary importance, even when his or her rights and duties might conflict with the distinct and aggregate interests of the society and state. This conflict is, of course, central to almost every societal enterprise, because the individual always has a dual identity as member of the collectivity. Constitutional law, in particular, has become the arena in which the implications for political and social theory of these antagonistically symbolic philosophical strains are unravelled: Freedom versus order, principle versus policy, individual rights versus majoritarian will, fundamental right versus compelling state interest, and due process versus social control. For an illuminating essay on a recent and major confrontation over many of these themes, see Dworkin, *The Jurisprudence of Richard Nixon*, 18 N.Y. REV. BOOKS 27 (1972).

kinds of observable behavior alone invoke legal liability, or must the wrongdoing be accompanied by a culpable mental state; must the wrongdoing actually produce harm—injury, death, or loss—to be illegal; is individual moral fault, culpability, a required or even sufficient component of criminal liability; according to which principles (*e.g.*, transitory societal values, the natural law, or rights-based contractarian moral theory) should we rank different kinds and degrees of wrongdoing and harm; how should we ascertain and assess individual moral culpability? These concerns are implicitly addressed throughout this Article; in the section on retribution some answers begin to appear.

#### REHABILITATION

Rehabilitation has been the dominant penal rationale in this Nation for the last one hundred and fifty years.<sup>13</sup> Within the present context, the basic contours of the rehabilitative model can only be outlined, emphasizing its quintessential role in legitimizing indeterminate sentencing. A useful summary of the major elements of this model is as follows:

[Rehabilitation] is part of a humanistic tradition which, in pressing for ever more individualization of justice, has demanded that we treat the criminal, not [punish] the crime. It relies upon a medical and educative model, defining the criminal as, if not sick, less than evil; somehow less “responsible” [for himself and his actions] than he had previously been regarded. As a kind of social malfunctioner, the criminal needs to be “treated” or to be reeducated, reformed, or rehabilitated. Rehabilitation is, in many [fundamental] ways, the opposite of punishment. It pleads for a non-moral approach. At the same time, incarceration, as distinguished from more historic forms of punishment [death, banishment, and various corporal punishments], allows the possibility, at least theoretically, of both punishment [the confinement itself] and education occurring simultaneously.<sup>14</sup>

Historically, this treatment model arose as a progressive reaction to the rigidly legalistic, generally harsh, and undifferentiated response to individual offenders within a given crime category that had characterized *classical* retributive theory.<sup>15</sup>

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13. See, Mueller, *supra* note 7, at 69.

14. A. VON HIRSCH, *supra* note 1, at xxix.

15. Dershowitz, *supra* note 8, at 83-100. The classical retributive theory should be distinguished from the humane version of retribution, which I support. See notes 77-107 *infra* and accompanying text.

The American adoption of rehabilitation as a goal of sentencing, and the penitentiary and indeterminate sentence as necessary adjuncts to its realization, has been widely documented.<sup>16</sup> Since rehabilitative incarceration is directed towards reshaping a human life, it would be counterproductive and unrealistic to impose a strict time limit on the process before it begins:

The idea is to remove the sentencing power from a . . . trial judge and place it in the hands of skilled experts in human behavior. These experts would look at the man rather than his crime, take into account all circumstances that may have driven him to break the law, keep close track of his progress in prison, and release him when he has demonstrated by his behavior that he is ready to return to the community.<sup>17</sup>

Thus, the individualized rehabilitative-treatment model is entirely incompatible with determinate sentencing proposals.

While rehabilitative theory and individualized sentencing is most often rationalized as the best, most humane mode of helping the individual offender, in reality it is compatible with the social-utilitarian goals of deterrence and *preventive detention*,<sup>18</sup> both of which tend to produce unjustly long sentences. Indeed, the overriding goal of rehabilitation emphasizes society's, rather than the individual's, welfare.

Among the supporters of the indeterminate model are the drafters of the Model Penal Code.<sup>19</sup> The Code permits broad indeterminacy, permitting the sentencing court to choose prison over probation if, *inter alia*, the offender is "in need of correctional treatment that can be provided most effectively by his commitment to an institution."<sup>20</sup> Although the Code offers general guidelines for the exercise of this discretion,<sup>21</sup> the very terms in which it is formulated suggest the inherent dangers of such an approach.<sup>22</sup>

16. See, e.g., STRUGGLE FOR JUSTICE, *supra* note 3, at 34-47. See generally P. CLARE & J. KRAMER, INTRODUCTION TO AMERICAN CORRECTIONS (1976); D. ROTHMAN, THE DISCOVERY OF THE ASYLUM (1971).

17. J. MITFORD, *supra* note 3, at 80.

18. See note 36 *infra*; text accompanying notes 34-36 *infra*.

19. MODEL PENAL CODE (Proposed Official Draft 1962).

20. *Id.* § 7.01(1)(b).

21. See *id.* § 7.01.

22. Inherent difficulties in the Code's approach are raised by the following questions: What constitutes "need" for prison confinement, and how and by whom is this satisfactorily determined? In light of what we now know about institutional failure—and apparent inability—to provide "correctional treatment" which impinges

Professor Herbert Wechsler, the Code's Chief Reporter, has commented on the division of opinion that existed between those drafters who favored severe sentences to secure general deterrence and to remove the offender from society, and those who supported indeterminate confinement in therapeutically oriented prisons to promote rehabilitation. He records with satisfaction that neither view prevailed, and concludes: "The course of prudence normally is to shape policy in terms that take account of the diversity of interest, ordering and harmonizing in so far as possible the conflicts that emerge. That is, we think, the course required here."<sup>23</sup>

The difficulty with this approach is that whatever "harmonizing" effect it achieves is obtained at the expense of coherence, consistency, and, ultimately, evenhanded justice. Some goals are, both theoretically and practically, not amenable to being harmonized; any peace among their conflicting premises and policy implications is illusory.<sup>24</sup> Those who believe in long sentences on punitive grounds can accept lengthy indeterminate sentences grounded on rehabilitation. However, given the lack of meaningful rehabilitation programs in most prisons, there is nothing to distinguish—in concrete terms—an overlong (and therefore unjust) sentence rationalized on deterrent or vindictive (but *not* humanely retributive) grounds from the identical sentence justified on rehabilitative grounds. It is insufficient to answer that these various, and often conflicting, goals may be coincidentally realized within the same span of time. If an offender's period of imprisonment for "rehabilitative" purposes is longer than is justified by his or her deserts, the additional time is unjust. The genuine antagonism between these goals cannot be papered over. A choice must be made between justice and presumed utility: We can approximate one or the other, but, in most hard cases, we cannot have both.

Due to these inherent conflicts, the rehabilitative model has not been employed as a limited, rights-protecting theory which cir-

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on the recidivism rates, see Martinson, *What Works?—Questions and Answers About Prison Reform*, PUB. INTEREST, Spring 1974, at 22, 41-42, what kinds of "treatment" is the Code referring to that can best be provided by imprisonment?

23. Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 468 (1961). It is interesting to note the inconsistent directions in which the Code's drafters were pulled. The language of one provision expresses an important aspect of retributive theory, *limiting* the nature and extent of punishment. The relevant language is: "to safeguard offenders against excessive, disproportionate or arbitrary punishment." MODEL PENAL CODE, *supra* note 19, § 1.02(2)(c).

24. See W. LAFAYE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 24-25 (1972) [hereinafter cited as LAFAYE & SCOTT].



cumscribes state invasion of personal liberty. Rather, it is a sweeping assertion of state power that pursues expedient goals at the expense of the individual; it claims that a large area of nonreviewable judicial and administrative discretion is necessary to secure such goals. The "experts" want a blank check, enabling them to write in the amount of time and the circumstances required to complete their experiments in personality transformation. Freedom from "irksome legal controls"<sup>25</sup> thus becomes the necessary condition, or price, of the process. This is at the heart of what Judge Frankel has termed lawless sentencing, sentencing which, "as thus far employed and justified, has produced more cruelty and injustice than the benefits its supporters envisage[d]."<sup>26</sup>

The Model Sentencing Act considers rehabilitation the primary goal of sentencing. "The policy of the [Model Sentencing] Act is that dangerous offenders shall be identified, segregated, and *correctively treated in custody for long terms as needed*. . . . Persons convicted of crime shall be dealt with in accordance with their potential for rehabilitation, considering their individual characteristics, circumstances, and needs."<sup>27</sup> The nexus between rehabilitative assumptions and goals, and indefinite long-term confinement could not be more clearly stated. Also apparent is the common blurring of the theoretically separate aims of rehabilitation and preventive detention.

Still other sentencing reports<sup>28</sup> echo a marked predisposition towards rehabilitation as the lodestone principle of modern criminal corrections. This is not surprising; on the contrary, it is the conventional wisdom. Only recently has there emerged the unembarrassed assertion of desert-based alternatives and plans for definite sentences, allowing only limited discretion to the sentencing court, and even less to correctional and parole authorities.<sup>29</sup> If these proposals at first seem harsh, anachronistic, and overly legalistic, there is a healthy antidote in remembering the unfulfilled

25. STRUGGLE FOR JUSTICE, *supra* note 3, at 39.

26. M. FRANKEL, *supra* note 4, at 88.

27. COUNCIL OF JUDGES OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT § 1 (2d ed. 1972) (emphasis added) [hereinafter cited as MODEL SENTENCING ACT].

28. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 2.5(c) (Approved Draft 1968); NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS Standard 5.2 (1973).

29. See note 5 *supra* and accompanying text.

promises of rehabilitation, and the inhuman practices which have been spawned and masked in its name.

#### INCAPACITATION/ISOLATION

Incapacitation/isolation provides another major justification for imprisonment. It does not rise to the level of a theory in the sense that the other three penal rationales do: Its purpose is the modest one of physical restraint; the offender is segregated from society and prevented from further harming its members or their property. This is what one scholar has termed "neutralization,"<sup>30</sup> and may take the form, as another has noted, of "imprisonment, banishment, exile, deportation, hospitalization, house arrest or enforced enlistment in the military."<sup>31</sup> Furthermore:

In order to operate effectively, the removal of the convicted of offender need not be accompanied by any pain or inconvenience other than that inherent in the isolation itself. . . . Suffering, inconvenience, and loss of freedom, money, and status generally accompany isolation [especially in prison]. But at least in theory, they are unintended side effects.<sup>32</sup>

This point is of utmost importance, since imprisonment is the dominant form of criminal incapacitation in this country. There is a growing realization that:

Incarceration is a severe penalty, even in the "nicest" places of confinement—with smaller size, better location, improved services, and less regimentation than is customary in American prisons today. *The loss of liberty is itself a great deprivation.* And confinement works a dramatic change in the quality of the person's existence . . . .<sup>33</sup>

The disparity between the declared objective and practical reality demonstrates that no concept of the role of prisons, however "neutral" or skeletal it might at first appear, can be free from ideological aims. There is no value-free rationale for, or plan of, imprisonment; the enterprise is inherently value-imbued. Recognizing this fact is the necessary first step towards shaping and implementing a humane, just set of values in our sentencing and correctional practices.

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30. Mueller, *supra* note 7, at 62.

31. Dershowitz, *supra* note 8, at 70.

32. *Id.*

33. A. VON HIRSCH, *supra* note 1, at 109 (emphasis added).

The incapacitative objective, labeled "preventive imprisonment"<sup>34</sup> or "predictive restraint,"<sup>35</sup> was historically linked to rehabilitative theory, which was considered treatment in secure isolation from the community. It is now regarded as a social protection measure in its own right,<sup>36</sup> and is thought by some to be capable of reducing the overall crime rate.

Several basic difficulties attend this approach: (1) While in theory it is designed for repeat or dangerous offenders as a measure of last resort, in practice it has been applied to all types of offenders convicted of a wide variety of criminal acts;<sup>37</sup> (2) since the great majority of prisoners eventually return to society, keeping them caged for long periods with little opportunity to participate in voluntary vocational/educational programs is a self-defeating proposition for both the offender and society;<sup>38</sup> and (3) there are inherent empirical difficulties in accurately predicting who is dangerous, and when the danger ceases<sup>39</sup>—difficulties which may be erroneously and unjustly resolved against an inmate's liberty for long periods of time.

The Model Sentencing Act maintains that the length of the term of confinement should be determined by predicting the likelihood of future criminal activity, asserting that the estimated dangerousness of an offender is the *prime* reason for his or her con-

34. STRUGGLE FOR JUSTICE, *supra* note 3, at 51.

35. A. VON HIRSCH, *supra* note 1, at 19.

36. I treat predictive restraint or preventive imprisonment/detention as a subcategory of incapacitation/isolation, because the two are often joined in practice. However, they are conceptually distinct. Anyone imprisoned for a definite term is isolated from society during that period. Someone who is predictively restrained is incapacitated indefinitely (*beyond* the limits of a justly punitive sentence), *not* because of what he or she actually did, but rather on the unknown basis of what he or she might possibly do. Thus, predictive restraint is a particular way of selecting some individuals for (indeterminate) incapacitation. *See id.*

37. M. FRANKEL, *supra* note 4, at 100.

38. This is why determinate sentencing proposals include considerably shorter periods of incarceration.

J.Q. Wilson elaborates, from a deterrence perspective, how incapacitation theory is counterproductive. J.Q. WILSON, *supra* note 3, at 178-79. Other writers have analyzed patterns developed during lengthy periods of incarceration that are maladaptive to life after release. P. CLARE & J. KRAMER, *supra* note 16, at 99-145; G. MUELLER, *supra* note 3, at 110-43; A. VON HIRSCH, *supra* note 1, at 107-10.

39. N. MORRIS, *supra* note 3, at 58-84; A. VON HIRSCH, *supra* note 1, at 19-26; Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions*, 23 J. LEGAL EDUC. 24 (1977); Von Hirsch, *Prediction of Criminal Conduct and Preventative Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717 (1972).

finement.<sup>40</sup> This approach places enormous discretionary power in those entrusted with classifying, evaluating, and controlling the freedom of an individual—based not on what the individual has done but on what he or she *might* do. Such power is susceptible to abuse in the best of circumstances; the politically charged atmosphere that permeates correctional bureaucracies virtually assures abuse of this power.

Some utilitarians find little difficulty in depriving offenders of their liberty, on the basis of guesswork, beyond the time justice requires.<sup>41</sup> One writer, ignoring the well-documented empirical difficulties of accurate prediction,<sup>42</sup> suggests that “post-punishment incapacitation” should be mandatory for violent criminals “with no less than a 60 per cent chance of recidivism.”<sup>43</sup> If such mathematical accuracy were possible, the proponents of desert might face a different debate, although they would not necessarily reach a different conclusion.

Even moderately conservative observers find the idea of basing length of confinement on predictive factors difficult to accept:

[W]hatever additional safety benefits might be gained by post-punishment confinement on the basis of statistical factors like age or sex are simply not worth the price of bringing into the criminal justice system an element of blatant injustice to individuals. The crime problem is a serious one, but the situation is surely not desperate enough to justify such an expedient.<sup>44</sup>

This is not to deny completely the need for such restraint in exceptional situations and for periods of time limited by explicit criteria. Judge Frankel, for example, believes that treatment programs dealing with drug abuse are effective for voluntary subjects in a prison or other confinement setting. These programs are likely

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40. Compare MODEL PENAL CODE, *supra* note 19, §§ 7.01(1)(a), 7.03 with MODEL SENTENCING ACT, *supra* note 27, §§ 1, 5, 9. The Model Sentencing Act also states that its “definition of ‘dangerous offenders’ together with the procedure for referral for clinical diagnosis makes it possible for the first time to achieve reasonable accuracy in identifying [those with a predilection towards criminal acts],” *Preface to MODEL SENTENCING ACT*, *supra* note 27, at v. Such “accuracy” is questionable in light of the distinctly mixed results derived from similar predictive models. See note 39 *supra* and accompanying text.

41. See, e.g., E. VAN DEN HAAG, *supra* note 3.

42. See note 39 *supra* and accompanying text.

43. E. VAN DEN HAAG, *supra* note 3, at 241-51.

44. Plattner, *The Rehabilitation of Punishment*, PUB. INTEREST, Summer 1976, at 104, 114.

to be few in number, since they must be "describable in terms that have meaning and tolerable limits, including, importantly, limits upon the time required for achieving success or admitting failure."<sup>45</sup> Similarly, Judge Frankel's plan for tightening judicial sentencing discretion would allow a *narrowly defined* class of "dangerous people" to be confined for indeterminate terms to isolate them. But again, this is an exception; the risks should be in favor of freedom, with the presumption being towards a definite sentence.

The Committee for the Study of Incarceration<sup>46</sup> would limit predictive restraint measures even more than would Frankel. The committee's report emphasizes that "the fundamental moral objection to predictive restraint is that it is not deserved. This objection stands even where the prediction of future criminality is accurate."<sup>47</sup> However, "while . . . commensurate deserts [based on *past* conduct] should be the *prima facie* basis for allocating penalties,"<sup>48</sup> the committee concludes, this principle might be departed from in

a small class of especially fearsome cases: namely, defendants who stand convicted of serious assault crimes and who have extensive records of violence. . . . Were predictive restraint authorized for these special situations, however, that authority should be narrowly defined in the sentencing rules. Without explicit and tightly drawn limits, this "exception" could come to be invoked so indiscriminately as to overwhelm the rule.<sup>49</sup>

The committee uses dual reasoning in reaching this conclusion: Offenders with serious criminal records *deserve* to be incarcerated for some time; and additional time served beyond that which desert permits is the price that must be paid to a skeptical public to retain the considerably lower sentencing scale that the report recommends.<sup>50</sup>

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45. M. FRANKEL, *supra* note 4, at 99.

46. A. VON HIRSCH, *supra* note 1.

47. *Id.* at 125.

48. *Id.*

49. *Id.* at 126.

50. *Id.* at 127-29. The report draws a useful distinction between rehabilitation, defined as a penal measure that is a utilitarian tool of crime control, and a variety of self-help programs, which the offender could use on a purely voluntary basis. It is the former, coercive scheme that the committee advocates eliminating as a justification for confinement; the latter, being noncoercive, would not be advanced for such justificatory purposes.

Unlike Frankel, the committee would not allow the offender to be held in confinement for purposes of rehabilitation any longer than his or her just punishment requires. The report asserts that to do otherwise is to impose a sentence disproportionately severe in relation to the crime: Such a sentence would exceed the legislative limit—which reflects a presumably adequate punishment for the offense, because it is established with respect to the seriousness of the crime.<sup>51</sup> Thus, whether the treatment might “work” in a given case is a consideration secondary to the justness of the particular sentence. The only departure from this principle would occur if the state could justify holding a particular offender for additional time under the strictly delimited rubric of predictive restraint quoted above. If this violent offender is also a *treatable* violent offender, the state could institute rehabilitative treatment during the indeterminate period of confinement. But the baseline reference point for eventual release remains the offender’s dangerousness—not his or her capacity for rehabilitation. This is a distinction which will be difficult to enforce in practice; it is also one which is required to preserve the coherence of a sentencing plan that is based on desert and not on “treatability.” Finally, the report stresses the exceptional nature of this departure from desert; it countenances such a variation “only for the purposes of safeguarding the general rule that the sentence should be deserved.”<sup>52</sup>

#### DETERRENCE

Deterrence can perhaps be defined most simply as the proposition that “threats can reduce crime by causing a change of heart [in the potential criminal] induced by the unpleasantness of the specific consequences threatened.”<sup>53</sup> Many proclaim deterrence<sup>54</sup>

51. *Id.* at 125.

52. *Id.* at 131.

53. F. Zimring, *Perspectives On Deterrence* 3 (1971) (paper prepared for Center for Studies of Crime and Delinquency, National Institute of Mental Health, monograph series on crime and delinquency issues).

54. Rather than “deterrence,” several European codes use the term “prevention,” which includes not only the former’s social and psychological threat of punishment under the criminal law, but also the law’s moral-pedagogic and habituating effects. It is this added dimension of socialization (internalization of norms) that “deterrence” does not convey. See J. ANDENAES, *PUNISHMENT AND DETERRENCE* 173-74 (1974); Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966). At least one American study has explicitly adopted this framework, incorporating deterrence, rehabilitation, and incapacitation within an overall theory of prevention. See *STRUGGLE FOR JUSTICE*, *supra* note 3, at 50-51. The broad notion of “prevention” is a concept quite compatible with morally educative goals of

as the central aim of the criminal law.<sup>55</sup> Since the criminal law proscribes that which a given society regards as seriously unacceptable, the credible enforcement of law through imposition of sanctions is supposed to suppress both future criminal conduct by punishing the individual offender (special deterrence) and criminal conduct by potential offenders (general deterrence). This was the view of the English utilitarian Jeremy Bentham,<sup>56</sup> whose rationalistic calculus of pleasure and pain became the prototype for lawmakers concerned with setting the penalty for a particular offense just high enough to make it sufficiently unattractive. Deterrence has often been criticized on this point, its opponents arguing that, for many types of crimes and criminals, such considerations are, at best, irrelevant, and, at worst, a dangerous myth.<sup>57</sup> These objections have been well answered, even by those who are not active proponents of the deterrent theory.<sup>58</sup> They essentially reply that nothing like Bentham's assumptions regarding human psychology are required to observe the causal link between threat and avoidance in criminal matters. No one carries a criminal code and tariff-card in his or her head; but one *is* imbued with the societal norms internalized over the course of one's life.<sup>59</sup>

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retribution. See notes 77-107 *infra* and accompanying text. For excellent discussions regarding the various empirical questions posed by deterrence theory, see F. ZIMRING & G. HAWKINS, *DETERRENCE* (1973); Tullock, *Does Punishment Deter Crime?*, PUB. INTEREST, Summer 1974, at 103.

55. See, e.g., O.W. HOLMES, *THE COMMON LAW* 40 (M. Howe ed. 1963); Morris, *Impediments to Penal Reform*, 33 U. CHI. L. REV. 627, 631 (1966) (citing Goodhart, Book Review, 74 LISTENER 1006 (1965)); Van den Haag, *Punitive Sentences*, 7 HOFSTRA L. REV. 123 (1978). This asserted reliance on deterrence as the underlying justification for the criminal law and its set of sanctions stems from the desire (a utilitarian moral duty) not to add to world suffering. As in many fundamental applications of the moral theory of utility to the problems of crime and punishment, Jeremy Bentham has provided the analytical framework. See note 10 *supra* and accompanying text.

56. J. BENTHAM, *supra* note 10, at 178-203.

57. "The claim for deterrence is belied by both history and logic." H. BARNES & N. TEETHERS, *NEW HORIZONS IN CRIMINOLOGY* 286 (3d ed. 1959).

58. See, e.g., A. VON HIRSCH, *supra* note 1, at 43-44; Mueller, *supra* note 7, at 63-69.

59. Although this generalization contains some truth, serious empirical questions exist regarding the ability of deterrence to achieve its purpose. Is severity, or certainty, of punishment the more relevant consideration in fashioning either an individual sentence or an entire scheme of punishment? The answer to this question, first offered two hundred years ago by the criminologist Cesare Beccaria, and supported by recent findings, appears to be certainty. See C. BECCARIA, *ON CRIMES AND PUNISHMENT* 58 (H. Paolucci trans. 1963); Dershowitz, *supra* note 8, at 72; A. VON HIRSCH, *supra* note 1, at 62-63. If the actual imposition of punishment is what gives force and meaning to a deterrent theory's threat, then what credibility can an over-

A more important and troubling concern involves whether deterrence theory can provide a morally acceptable basis for imposing criminal sanctions. The essence of deterrence is publicity: making known the infliction of pain on one person to inhibit others from committing similar acts. The desired effect could be achieved by punishing either an innocent or a guilty person. The critical factor is what the *public* believes the person did, and is being punished for, not what the person actually did. This is a point hardly ignored in regimes of terror—from that of Robespierre to those of Hitler and Stalin.

Modern advocates of deterrence condemn such abuse of their theory,<sup>60</sup> claiming that this objection is answerable within the parameters of utilitarian theory: Open countenance of a system that punishes innocent people would soon result in diminishing returns and therefore would be inutile.<sup>61</sup> Thus, the logic upon which deterrence is based would likely militate against punishing innocent people.

This defense is deficient for two reasons. It only applies to *illegal* undeserved sanctions, thereby providing no protection from *legal* undeserved sanctions, such as excessive penalties or retroactive and vicarious punishment. Furthermore, in extreme cases (*e.g.*, ones involving national security) where the utilitarian cost-benefit calculus tips heavily in favor of sacrificing the innocent, the utilitarian could consistently opt for sacrificial, illegal, and undeserved punishment.<sup>62</sup>

Thus, the fundamental injustice inherent in deterrence theory is that it permits a particular offender to be more severely punished, for purposes of example, than his or her deserts merit. Indeed, the logic of deterrence suggests that this is the inevitable result: The price of crime must be set sufficiently high to put it

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loaded, inefficient criminal justice system that fails to capture and convict most offenders actually provide? What types of crime are simply not deterrable? Is it valid to accept statements couched in terms of how different a particular offense rate would have been if there had, or had not, been X penalty statutorily available or actually imposed during N span of time in Y jurisdiction? How can one identify and empirically measure the deterrent effect of a particular kind of penalty from among the complex, interrelated set of individual and environmental influences on behavior likely to be at work in any real-life situation?

60. See, *e.g.*, Andenaes, *The Morality of Deterrence*, 37 U. CHI. L. REV. 649 (1970).

61. See, *e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 11-13 (1968).

62. Ezorsky, *Ethics of Punishment*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT at xv-xvii (G. Ezorsky ed. 1972).



beyond the reach of those who might otherwise be in the marketplace. When crime rates spiral—or are so portrayed by the media—so do the cries for stiffer sentences. The difficulty is that the legislatively provided penalty ranges often reach inflationary levels. These ranges are then unevenly applied to that minority of criminal offenders who, against large odds, manage to get caught, convicted, and sentenced. These offenders, in short, become what one writer has flatly termed “scapegoats”—hostages to the overreaching purposes of the criminal law.<sup>63</sup> There is every danger that the offender ensnared in the web of deterrence theory will be made an object lesson for his or her peers.

The belief that deterrence is at the heart of the criminal law essentially explains the position of the Twentieth Century Fund Task Force Report on Criminal Sentencing<sup>64</sup> in recommending determinate sentencing. In his background paper to the report, Professor Alan Dershowitz states:

The primary objective of the criminal sentence, especially the sentence of imprisonment, is to reduce the frequency and/or severity of the harms caused by criminal acts and omissions. The pursuit of this objective may emphasize any or all of three considerations: *isolating . . . ; punishing . . . ; rehabilitating . . .*

. . . .

The purpose of punishment is to produce a “hurt.” The purpose of this hurt is to discourage future crimes.<sup>65</sup>

Professor Dershowitz acknowledges the significance of nonutilitarian purposes of a criminal sentence, referring to the role justice, equity, and proportionality play in determining the severity of punishment.<sup>66</sup> He cites for this caveat the Report of the Committee for the Study of Incarceration, authored by Professor Andrew von Hirsch.<sup>67</sup> This Committee Report is initially congruent with the Task Force Report: “It seems almost a truism that criminals should be punished so there will be less crime.”<sup>68</sup> However, the Committee Report continues: “Assuming that punishment has some deterrent effect, it should be apparent why deterrence helps

63. Delaney, *Towards a Human Rights Theory of Criminal Law: A Humanistic Perspective*, 6 HOFSTRA L. REV. 831, 835 (1978).

64. See TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, *supra* note 8.

65. Dershowitz, *supra* note 8, at 69, 71 (emphasis in original) (footnote omitted).

66. See *id.* at 131 n.1.

67. A. VON HIRSCH, *supra* note 1.

68. *Id.* at 37.

justify the existence of the criminal sanction. . . . Does that mean that deterrence is a *sufficient* justification for the existence of punishment? We think not.”<sup>69</sup> Drawing a distinction between the rationale for punishing, and the rationale for a system of criminal punishment, Professor von Hirsch asks, “Why is it not sufficient to rely on the simple argument of deterrence, as the justification for punishing—and get on with deciding how punishment should be rationally allocated?”<sup>70</sup> He then offers a significant and persuasive answer to his own question:

On utilitarian assumptions, deterrence would indeed suffice. . . . [P]unishment would be justified if it deterred sufficiently—because, in sum, more suffering would be prevented through the resulting reduction in crime than is caused by making those punished suffer. *Our difficulty is, however, that we doubt the utilitarian premise: that the suffering of a few persons is made good by the benefits accruing to the many.* A free society, we believe, should recognize that an individual’s rights—or at least his most important rights—are . . . entitled to priority over collective interests. . . .

Given this assumption of the primacy of the individual’s fundamental rights, no utilitarian account of punishment, deterrence included, can stand alone. While deterrence explains why most people benefit from the existence of punishment, the benefit to the many is not by itself a just basis for depriving the offender of his liberty and reputation. Some other reason, then, is needed to explain the suffering inflicted on the offender: that reason is desert. . . . The penalty is thus just not a means of crime prevention but a *merited* response to the actor’s deed . . . . [W]hile deterrence accounts for why punishment is socially useful, desert is necessary to explain why that utility may justly be [and only justly, *i.e.*, within, and not beyond, the limits of the offender’s deserts] pursued at the offender’s expense.<sup>71</sup>

In much the same way that Professor Dershowitz nods approvingly at nonutilitarian aims of punishment, Professor von Hirsch notes that desert and deterrence have interrelated functions. Offenders *deserve* punishment because they violate the criminal law; the argument for actually inflicting the suffering thus earned is sealed, because the punishment may inflict less harm on the guilty

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69. *Id.* at 44 (emphasis in original).

70. *Id.* at 50.

71. *Id.* at 50-51 (footnotes omitted) (emphasis added).

individual than it prevents by reducing the crime rate through its deterrent effect.<sup>72</sup> Professor von Hirsch concludes that “[t]he interdependence of these two concepts suggests that the criminal sanction rests, ultimately, on *both*.”<sup>73</sup>

This conclusion appears faulty. If an offender has violated individual and community rights, and therefore deserves punishment, this alone provides sufficient grounds for imposing just punishment. There is enough in what Professor von Hirsch says, and certainly in the general theory of retributivism, to support such an approach. This is augmented by, but not dependent on, the quite uneven state of empirical knowledge concerning the deterrent effect of punishment.<sup>74</sup> Suppose that in relation to a particular offense or class of offenses (*e.g.*, crimes of passion) the value of deterrence is at best highly problematic and, at worst, negligible. Should society find the offender’s deserts by themselves insufficient to justify inflicting the pain that any punishment, however “light,” necessarily carries? By the same logic that insists that an individual’s basic rights—including the right to just punishment<sup>75</sup>—may not be abrogated in the interests of expedient social policy, we can insist that the desert principle operate to impose criminal sanctions even when other social policy interests would not thereby be promoted. Simply, if an individual *deserves* a particular punishment, he or she should receive it, regardless of whether a harsher punishment could achieve more deterrence, or whether deterrence could be achieved by any kind or amount of punishment. Although the logic of Professor von Hirsch’s argument seems to lead to this conclusion,<sup>76</sup> he specifically shys away from it. He does take an important first step by placing greater emphasis on desert than deterrence. This approach is more congruous with the general goals of determinate sentencing; unfortunately it does not go far enough.

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72. *Id.* at 54-55.

73. *Id.* at 55 (emphasis in original). The primacy of social-protection objectives inherent in the deterrence approach has a built-in tendency to counter and subordinate two important principles of justice: (1) Only the guilty should suffer conviction and punishment (*Nullum crimen, nulla poena sine lege*); and (2) the kind and degree of punishment should be proportionate to the crime (the objective wrongdoing, measured by harm and dangerousness, and the individual subjective culpability of the offender) committed—and to that only. G. FLETCHER, *RETHINKING CRIMINAL LAW* 415-16 (1978). See notes 77-107 *infra* and accompanying text.

74. C.E. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 188-98 & nn. 32-40 (1978); A. VON HIRSCH, *supra* note 1, at 37-44 & 61-65.

75. See Morris, *Persons and Punishment*, 52 *MONIST* 475 (1968).

76. See A. VON HIRSCH, *supra* note 1, at 126-27.

In every sense in which certainty in punishment is just, the version of retributivism developed in this Article can compatibly encompass it. If a potential offender understands—from common observation—that, as a standard practice, a just and definite sentence will follow conviction, the deterrent objective would be subsumed by the retributive one. However, under a penal practice grounded on retributivism, a deserved sentence would not be raised or lowered beyond the limits of justice to effect more or less deterrence; nor would a sentence be waived merely because its anticipated deterrent value is negligible. And, of course, there is no room within retributivism for punishment of innocent persons, regardless of how deterrent such a measure might be. Deterrence speculates in the futures market, using the hard currency of known suffering. Retributivism does not lend itself to such market exchange.

### RETRIBUTION

Criminal punishment is characteristically distinguished from other forms of suffering, deprivation, and penalty by the moral condemnation it carries with it.<sup>77</sup> Utilitarian theory, whose overriding goal concerns only social protection, is an insufficient moral basis upon which to extend criminal punishment, because it never confronts the fundamental issue. The primary question, which examination of penal theory unavoidably raises and which must be faced, belongs to moral philosophy and political theory: What is there about society worth protecting by criminal punishment? Certainly, at base, it is the dignity and worth of each individual person—the touchstone of Immanuel Kant's retributive concept of just punishment.<sup>78</sup>

Retribution is often equated with revenge,<sup>79</sup> a blind, unprincipled retaliation for harm suffered. It is generally described in

77. J. FEINBERG, *DOING AND DESERVING* 95-118 (1970).

78. See generally I. KANT, *supra* note 11.

79. See, e.g., M. FRANKEL, *supra* note 4, at 109; MODEL SENTENCING ACT, *supra* note 27, § 1 ("Sentences should not be based upon revenge and retribution"); LAFAYE & SCOTT, *supra* note 24, at 24.

*Retribution* (also called *revenge* or *retaliation*) . . . is the oldest theory of punishment, and the one which is least accepted today by theorists (although it still commands considerable respect from the general public). By this theory, punishment (the infliction of suffering) is imposed by society on criminals in order to obtain revenge. . . . Typical of the criticism is that this theory "is a form of retaliation, and as such, is morally indefensible."

*Id.* (emphasis in original) (quoting Wood, *Responsibility and Punishment*, 28 J. CRIM. L.C. & P.S. 630, 636 (1938)) (footnote omitted).

embarrassed fashion as an atavistic remnant of the customs of the cavemen, a perhaps insuppressible, but certainly inglorious, vestige of our baser human nature. In fact, however, retribution is that theory of punishment that most consciously seeks to fashion a just societal response to adjudicated criminal wrongdoing.

Retributivism is properly understood to include promotion of the communal well-being of society's individual members, bound by mutually and voluntarily assumed (by acceptance of social benefits) obedience to a just legal system. It is the only justification that in itself is morally necessary and sufficient to support both a general system of criminal punishment and the imposition of individual criminal punishments. Retributivism affirmatively supports determinate sentencing schemes because articulable, narrowly drawn sentencing ranges can be derived from ascertaining what an offender deserves for committing a particular type of offense. It also suggests that specified aggravating or mitigating circumstances be taken into account as criteria in support of sentences which are set above or below the desert-based presumptive punishment for a particular offense. This guided discretion distinguishes retributively proportionate determinacy from a heavy-handed system of inflexible terms preset for each crime. Retributivism is concerned with the assessment of moral culpability as the basis for legally imposing condign punishment,<sup>80</sup> which the offender deserves due to *past* criminal conduct.

Retribution may be briefly defined as follows: It is a moral theory of criminal culpability that seeks, through the assessment and imposition of deserved punishment, to rectify the injustice caused by the unjustified or unexcused commission of a proscribed act, or omission of a required act. The principle of retribution "stems from a view that because man is responsible for his actions and for the behavior he chooses, he should receive punishment for his wrongdoing proportionate to that which he has inflicted upon society."<sup>81</sup> Thus, under retribution theory, the offender is assumed to possess the capacity and freedom to make a meaningful choice.

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80. C.S. Lewis has written that only within the framework of the retributive theory does it make sense to inquire about the *justice* of a particular punishment. He concludes: "[T]he concept of Desert is the only connecting link between punishment and justice. It is only as deserved or undeserved that a sentence can be just or unjust." Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 225 (1953).

81. COUNCIL OF STATE GOVERNMENTS, DEFINITE SENTENCING: AN EXAMINATION OF PROPOSALS IN FOUR STATES 11 (1976).

He or she is *not* depicted as either psychologically or socially pre-determined to engage in criminal conduct. Such conduct alone forms the predicate on which a punishment, in proportion to the harm of the offense and culpability of the offender, may be imposed. Retributive punishment may only be inflicted on the basis of what the offender has done in violation of a promulgated criminal law.

The punishment may only be prescribed according to the offense's seriousness (harm caused and offender's fault), not with reference to the virtually limitless claims of deterrence or individual rehabilitation.<sup>82</sup> In the familiar words of Kant, the offender must be treated as a subject, not an object:

Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else . . . .<sup>83</sup>

Thus, rather than blurring the limits on punishment which are consonant with "the evolving standards of decency that mark the progress of a maturing society,"<sup>84</sup> Kantian retributivism provides a principled framework within which to articulate these standards and suggest their content at any given point in time. Its criterion of achievement is not, will *X* punishment "work"? Rather, it is, is *X* punishment just in light of the requirements of desert and proportionality?<sup>85</sup>

Proportionality must be considered by the legislature in setting suitably graded penalties for specific categories and levels of

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82. See note 9 *supra*.

83. I. KANT, *supra* note 11, at 100. Kant's use of the qualifier "merely" has not gone unnoticed by those theorists and policymakers who are attempting to formulate a morally justifiable, multi-purpose penal approach. Two essentially different groups have incorporated its meaning within their theories of punishment: the more ethically sensitive proponents of the deterrence theory; and those modern retributivists concerned with showing that their approach is not inflexibly maladaptive to the needs of general prevention. See note 54 *supra*. For the most enlightening examples of the former, see generally J. ANDENAES, *supra* note 54; F. ZIMRING & G. HAWKINS, *supra* note 54. For good examples of the latter, see A. VON HIRSCH, *supra* note 1, at 45-58; *United States v. Bergman*, 416 F. Supp. 496, 499 (S.D.N.Y. 1976) (sentencing memorandum of Frankel, J.).

84. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

85. See generally I. KANT, *supra* note 11.

offenses. *Lex talionis*<sup>86</sup> has often been read as retributivism's counsel to exact literal and harsh payment for any harm suffered, however barbaric such punishment might be. Kant's approach is to make the kind and degree of punishment approximate as closely as possible the offender's culpability and the harm resulting from the offense, since the object is to restore, as carefully and completely as possible, the moral equilibrium which the offender's action has disturbed.<sup>87</sup> Thus, Kant articulated a complex set of considerations to ensure that the punishment "fits" the crime. But even he acknowledged that a literal working of his "principle of equality" could lead to morally unacceptable results, "because [the literal punishments for rape and pederasty, for example] would themselves be punishable crimes against humanity in general."<sup>88</sup> The retributive obligation to treat the offender as an end precludes mutilation as a form of punishment. The same consideration precludes subjecting even a convicted murderer to any (gratuitous) maltreatment that would degrade his or her character as a human being.<sup>89</sup> Modern retributivists have expanded Kant's approach, some arguing that the overriding aims of retribution prohibit certain types of punishment—for example, the death penalty<sup>90</sup>—that might otherwise be justly deserved.

In addition to the theoretical objection to a literal-minded grading of punishments, there are other, more practical reasons for abandoning such an effort. To truly determine the moral desert of the offender, one would have to reconstruct the offender's biography and be privy to the complex set of motives that induced the offense. One would further have to be prepared to accept light penalties for serious crimes, in specific cases, as a result of any attempt to totally individualize moral culpability and desert. One author concludes:

Certainly, there is no rational way of demonstrating that one criminal deserves exactly twice or three-eighths or twelve-ninths as much suffering as another; yet according to at least some form

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86. *Exodus* 21:22-25.

87. See generally I. KANT, *supra* note 11.

88. *Id.* at 133.

89. *Id.* at 104.

90. C.L. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 92-96 (1974); *Matthew* 5:38-39; Gerstein, *Capital Punishment—"Cruel and Unusual"?: A Retributivist Response*, 85 ETHICS 75 (1974); Pugsley, *Capital Punishment—Bringing Back Death*, 103 COMMONWEAL 518 (1976).

of this theory [retributivism], the amounts of suffering inflicted for two crimes should stand in exact proportion to the "amounts of wickedness" in the criminals.<sup>91</sup>

But our inability to attain such finely calibrated, metaphysical congruence hardly constitutes grounds for abandoning either desert as the basis of punishment or the goal of obtaining roughly equal punishments for roughly equal offenses. Energy must simply be channeled in those directions most likely to produce a result which, though it may fall short of Kant's sensitive balancing scales, is still essentially just—and certainly more just than the unprincipled chaos that passes for sentencing practice in many jurisdictions today.

One strength of the retributive approach lies in what Professor Feinberg has termed "the expressive function of punishment."<sup>92</sup> Professor Feinberg usefully separates a particular punishment into two components: Its condemnatory aspect, and its hard treatment part. He argues that the former is the more important of the two; the denunciatory function of punishment most distinguishes it from other forms of penalty and deprivation with which society is familiar:

What justice demands is that the *condemnatory aspect* of the punishment suit the crime, that the crime be of a kind that is truly worthy of reprobation. Further, the degree of disapproval expressed by the punishment should "fit" the crime only in the unproblematic sense that the more serious crimes should receive stronger disapproval than the less serious ones, the seriousness of the crime being determined by the amount of harm it generally causes and the degree to which people are disposed to commit it. That is quite another thing than requiring that the "hard treatment" component, considered apart from its symbolic function, should "fit" the moral quality of a specific criminal act, assessed quite independently of its relation to social harm. Given our conventions, of course, condemnation is expressed by hard treatment, and the degree of harshness of the latter expresses the degree of reprobation of the former. Still, this should not blind us to the fact that it is social disapproval and its appropriate expression that should fit the crime, and not hard treatment (pain) as such. Pain should match guilt only insofar as its infliction is the symbolic vehicle of public condemnation.<sup>93</sup>

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91. J. FEINBERG, *supra* note 77, at 117.

92. *Id.* at 98.

93. *Id.* at 118 (emphasis in original). Professor von Hirsch draws a similar dis-



Belief in the morally reprobative function of criminal punishment singularly distinguishes the retributive penal rationale from the three previously discussed. By punishing the criminal for his or her misdeed, society not only vindicates the abstract law, but also publicly and ritualistically reaffirms for all its members their shared values.<sup>94</sup> It reiterates the generally understood consensus concerning right and wrong upon which the community depends and the law rests. As the French sociologist Emile Durkheim taught, a society *needs* its criminals precisely for this purpose.<sup>95</sup> This feature of retributive punishment prevents it from being mistaken for a simple, "value-free" economic exchange of punishment to pay for the crime. One of the recent determinate sentencing documents has put the point this way:

When punishment is expressed in . . . terms of just deserts, it abandons its primary reliance upon a utilitarian rationale. As such, it is justified not as an effective crime-prevention measure but because it is right—because it ought to be. There is the feeling of a Kantian imperative behind the word "deserts." Certain things are simply wrong and ought to be punished. And this we do believe.<sup>96</sup>

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tion, embracing the larger implications of the retributivist theory, while rejecting a literalist understanding of its *lex talionis*: "Since the focus is on the offender's [unjustly gained] position [of advantage] vis-à-vis all other citizens, rather than on the victim alone, the quantum of punishment [hard-treatment component] would not necessarily have to equal the victim's suffering." A. VON HIRSCH, *supra* note 1, at 160 n.4 (emphasis added). Thus, retributive measurement becomes the foundation for *shorter* determinate sentences. Retribution theory allows sufficient latitude for warranted clemency or mitigation of deserved sentence in a particular case. While these occasions must be the exception, such a provision strives for an element of grace in the working of justice. A deserts-based punishment scheme is also quite compatible with a variety of alternative sentencing approaches, including nonincarcerative, restitution-oriented work programs, fines, and confinement on an intermittent basis; however, prison should remain the primary punishment for more serious offenses. On the specific point of sentence measurement, see TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, *supra* note 8, at 31-34 app. A, 37-53 app. B, 55-61; A VON HIRSCH, *supra* note 1, at 132-40.

94. G. MUELLER, *supra* note 3, at 40-45. There is a distinction between *vindication* (defined as "the restoration or reassertion of the law-protected value which the perpetrator has destroyed. It is an abstract emphasis on both the value itself and on the rule embodying it and prohibiting its destruction," *id.* at 40) and *retribution* ("[T]he addressee [of retribution] is a different one. It is not the law itself; it is, rather, the organized group whose rules have been violated and whose sense of security has been disturbed," *id.* at 42). In my discussion, I treat vindication as one of the morally expressive aspects of retributive punishment.

95. E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 70-110 (G. Simpson trans. 1965).

96. A. VON HIRSCH, *supra* note 1, at xxxviii-xxxix.

Little wonder that the adherents of social determinism and moral relativism deny the validity of any such framework for social sanctions. The once-mavericks have become the new dogmatists; the rehabilitators defend their still-reigning, but besieged, orthodoxy with the same vehemence they themselves one justifiably directed against rigidly mechanistic notions of crime, criminality, and the "tariff" system of prescribed punishments.<sup>97</sup>

Retributivism has yet another defining characteristic that makes it the most appropriate theory upon which to construct a just system of definite sentences: It is honest about punishment-as-pain, and therefore, it seeks to limit punishment. This contrasts sharply with the rehabilitative model. Not only has the rhetoric of rehabilitation promised more than it could hope to deliver, but rehabilitative treatment has frequently delivered that which captive "patients" have a right not to receive.<sup>98</sup>

The evolution of a set of negative rights, of protective barriers against unwarranted intrusion into privacy and individual personality, forms an important adjunct to, and catalyst towards, delimiting the length of time one spends in involuntary confinement. Such "rights against" have a specific impact on rehabilitation and that theory's corollary, the indeterminate sentence: They constitute the application of familiar constitutional guarantees to the relatively unfamiliar processes of behavior analysis and modification. Due to their prospectus (reformation of the offender), trigger (criminal conviction), setting (institutional prisons), and administrators (corrections officials and their allied "experts" in the "helping professions"), these processes have, until recently, largely avoided constitutional and judicial scrutiny—retaining instead the prerogative of self-review. Fortunately for those on the receiving end, the sails of such benevolent despotism are being trimmed by incremental litigation and comprehensive proposals informed by a spirit of suitable modesty:

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97. For a brief, cogent summary of this perspective, see STRUGGLE FOR JUSTICE, *supra* note 3, at 36-37.

98. The nascent body of prisoners' rights law, partly of constitutional dimension, has articulated not only a right to treatment, but also, more importantly, a right *not* to be treated. There is a genuine, though not ineluctable, conflict of goals implicit in these lines of argument. I suggest that the answer lies in making more programs available to prisoners on a voluntary basis, so that, unlike under current practice, an inmate's failure to participate in any of them would not be grounds for continuing his or her incarceration beyond the legislatively/judicially fixed term. See generally N. MORRIS, *supra* note 3; A. VON HIRSCH, *supra* note 1.

Both in tone and in content, the recommendations of the Committee [for the Study of Incarceration] represent a departure from tradition. Permeating this report is a determination to do less rather than more—an insistence on not doing harm. . . . [W]e have here a crucial shift in perspective from a commitment to do good to a commitment to do as little as possible.<sup>99</sup>

The bedrock of such minimalism consists not only in “our own [empirically demonstrated] inability to understand the roots of crime and deviancy or to fashion programs that effect good.”<sup>100</sup> It lies also in retributivism’s insistence that we confine or otherwise deprive an offender only to punish, that we punish only justly, and that punishment is an unpleasant thing to impose on another human being and fellow citizen. It is this “truth-in-labeling” that so greatly upsets those who prefer to think of crime as, by definition, a symptom of individual pathology; conviction as a patient-referral; and the prison as a hospital. Such thinking has been characterized as an “extraordinary willingness to believe unreasonable things about criminal justice and corrections.”<sup>101</sup> If one is “helping,” limits seem wholly inappropriate; if one is punishing, they are indispensable. The Report of the Committee for the Study of Incarceration explicitly embraces this insight, and formulates its sentencing recommendations in accord with its spirit.<sup>102</sup>

#### CONCLUSION

Thus, we complete the circle, returning to an understanding of prison as pain, as a last resort, and as a place where offenders should spend as little time as possible. We learn not to accept at face value the wisdom of behavioral experts, and to tightly reign the latitude of any one individual’s power to confine people to prisons and to inflict other forms of punishment. We talk about legislatively stating penal goals, and legislatively constructing greatly reduced sentencing scales, particularized according to categories and subcategories of offenses. The sentencing judge will be required to provide reasons for a particular disposition. This summary will be available for scrutiny in the process of appellate review, which is also being advocated. The reliance on plea bargaining, ethically questionable in many ways,<sup>103</sup> might be considerably lessened, as

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99. A. VON HIRSCH, *supra* note 1, at xxxiv.

100. *Id.*

101. STRUGGLE FOR JUSTICE; *supra* note 3, at 47.

102. See generally A. VON HIRSCH, *supra* note 1.

103. Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 93 (1976).

will the awesome control of parole boards over the lives of inmates.<sup>104</sup> These and other changes are included in various determinate sentencing proposals now under consideration.<sup>105</sup>

In my view, these proposals are all for the better; though they are certainly not without critics, even apart from those ideologically committed to the rehabilitative model.<sup>106</sup> We should certainly not be afraid to acknowledge error, to scrap what is wrong in our system, and to build something better on the most appropriate principles. The *lex talionis* as measuring instrument and the eighth amendment as an important tool in the prisoner's struggle against modern barbarism are not so different from or irrelevant to one another as they might at first seem. This is precisely the kind of unexpected connection one begins to see by looking at a familiar problem from a new angle. And how humbling to realize the angle's antecedents:

If returning to these conceptions [of desert and limited discretion] seems a step into the past, it may be some consolation that the ideas underlying the Bill of Rights are no younger.<sup>107</sup>

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104. Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 396-99 (1970).

105. See note 5 *supra* and accompanying text.

106. Zimring, *A Consumer's Guide to Sentencing Reform: Making the Punishment Fit the Crime*, HASTINGS CENTER REPORT, Dec. 1976, at 13, 17.

107. A. VON HIRSCH, *supra* note 1, at 6.

