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**LINCOLN-DOUGLAS | January/February 2013**

**Resolved: Rehabilitation ought to be valued above retribution in the United States criminal justice system.**

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## Topic Analysis by Jeff Roberts

“What do you think, would not one tiny crime be wiped out by thousands of good deeds?”

— Fyodor Dostoyevsky, *Crime and Punishment*

Dostoyevsky’s novel is often said to depict the mind of a criminal, in Raskolnikov. The mind of a young man who posits: by killing the one now, many can be saved later. But, the novel also allows for an exploration of justice. And that with all crimes, there is a just punishment. For Dostoyevsky<sup>1</sup>, rather for Raskolnikov, we may feel that internal suffering alone is sufficient: “If he has a conscience he will suffer for his mistake. That will be punishment-as well as the prison.” The resolution deals with a similar thought experiment. But even if you have not pondered such topics over coffee, or thought about the subject of crime and punishments in the literary circles of your classrooms, you will recall it from prior debates because the Jan/Feb resolution for the NFL should seem nothing new to those of you who have been doing debate for a while. It is a very similar topic to the one used at the 2003 National Championship: “Resolved: rehabilitation ought to be valued above punishment in the U.S. criminal justice system.” Moreover, since 2003 we have debated sundry related resolutions e.g. Oct. 2004 “Resolved: in the U.S. judicial system, truth seeking ought to take precedence over privileged communication;” or perhaps the 2010/2011 rehash of the 2004/2005 resolution about juveniles in the courts “In the United States, juveniles charged with violent felonies ought to be treated as adults in the criminal justice system” will strike some as lending to this resolution the weight of back files and past knowledge. But, for those of you who may be newer to debate, say more recently than Jan. 2010, the topic will come as a new challenge. Just know, that some of the larger teams you may face, or those with extensive team back-files and experienced coaches should have a wealth of ready resources for such a resolution. With such cautions aside, let me say I, for one, am very pleased to see this topic come up for debate. Clearly, the reoccurrence of the topic itself suggests the degree to which the issue is extremely topical and of continued relevance.

We need only consider recent headlines to find public opinion and concern over the state of United States prisons and criminal justice system. Trial T.V. is a staple of most cable packages, forty different versions of CSI on seventy-five channels, and repeated comments in local editorials complaining of unfair trials, unfair profiling, and unjust sentencing all lead to a topic like this one being chosen. In short, you will find no shortage of criticism of the criminal justice system. A

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<sup>1</sup> Fyodor Dostoevsky, *Crime and Punishment*. 2006 ebook The Gutenberg Project. Web.  
<http://www.gutenberg.org/files/2554/2554-h/2554-h.htm>

cursory search will bring up countless opinions regarding the failings of our penal process. Consider the March 2012 article in the NY Times by a former Michigan legislator, Craig Deroche<sup>2</sup>:

What the system has become is a monumental failure that our states and nation can no longer afford. Beyond the dollars spent, our failing criminal justice system contributes to our cultural decline, the breakdown of the traditional family and dependency on public assistance programs. The statistics documenting the failure of our system are unrivaled in human history. The United States today imprisons 1 in 100 residents and has 1 in 31 citizens on parole or probation. Our minority population is a reliably easier target for getting the numbers by which society measures law enforcement today. The growth in criminalization has led to no measurable decrease in recidivism despite increasing our prison population tenfold. Government employment in criminal justice has grown by 1 million employees since 1980, as is noted by Michelle Alexander in "The New Jim Crow." Amazingly, the call to continue to grow the government and perpetuate this failure is usually led by conservatives and supported by African-American leaders, from the president to our local mayors. (Opinion Pages)

And it is not just in the opinion pages either, even in the Universities contemporary criminologists and philosophers discuss the issues related to solving the problem of crime in America. Many study the inequalities in the criminal justice system today, such as David Cole<sup>3</sup>, professor of Law at Georgetown University, who cites some remarkable statistics:

This inequality is in turn reflected in statistics on crime and the criminal justice system. The vast majority of those behind bars are poor; 40 percent of state prisoners can't even read; and **67 percent of prison inmates did not have full-time employment** when they were arrested. <sup>13</sup> The per capita incarceration rate among blacks is seven times that among whites.<sup>14</sup> **African Americans make up about 12 percent of the general population, but more than half of the prison population.**<sup>15</sup> They serve longer sentences, have higher arrest and conviction rates, face higher bail amounts, and are more often the victims of police use of deadly force than white citizens.<sup>16</sup> In 1995, **one in three young black men between the ages of twenty and twenty-nine was imprisoned or on parole or probation.**<sup>17</sup> If incarceration rates continue their current trends,

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<sup>2</sup> Deroche, Craig. "A Failing Criminal Justice System." *Room for Debate*. Opinions: NY Times.com Mar. 12, 2012. Web. 12/5/2012.

<sup>3</sup> Cole, David. "No Equal Justice." *Conn. Pub. Int. L.J.* Vol. 1, No. 1. 2001. 19-33. Web. 12/5/2012. <http://burger.law.uconn.edu/system/files/private/cole.pdf>

one in four young black males born today will serve time in prison during his lifetime (meaning that he will be convicted and sentenced to more than one year of incarceration). **Nationally, for every one black man who graduates from college, 100 are arrested.**<sup>18</sup> (21)<sup>4</sup>

As you can see, Cole's research is indicative of what many believe to be an inherently racist criminal justice system and you can bet a few debaters will launch their attacks from such a stance: more on that in a bit. First, let us begin by examining some of the language and a few of the general fields of research you will want to become familiar with as you prepare. Then, we will discuss some of the strategic options and lines of argument you may scheme for case positions on either side of the resolution.

While a complete discussion of the history of punishment and criminal justice is not possible in the space of this essay, some highlights of the conceptual basis to a theory of justice and punishment are worth noting before we explore more of the strategic potential in the topic. Punishment theory itself houses most of the literature related to rehabilitation and retribution and so becoming familiar with a few sources, especially some traditional, seminal sources like John Rawls<sup>5</sup> might offer a good starting place for many debaters. More contemporary debaters, in style or perhaps their taste of relatively more recent philosophy, may find it useful to review philosophers like T.M. Scanlon<sup>6</sup>. Regardless of which camps you choose to use for your theory of punishment, punishment as a concept is often framed by the theorists you will encounter as following tenets of consequentialism or deontology. Go figure, right? Hugo Bedau<sup>7</sup> and Erin Kelley comment in their overview in the *Stanford Encyclopedia of Philosophy* (SEP), by the way, the article might make for another good starting place for research on this resolution,

By a purely consequentialist theory, I mean a theory that imposes no constraints on what counts . . . The pure consequentialist views punishment as justified to the extent that its practice achieves (or is reasonably believed to achieve) whatever end-state the theorist specifies (such as the public interest, the general welfare, the common good). Most philosophers would reject this view in favor of introducing various constraints, whether or not they can in turn be justified by their consequences.

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<sup>4</sup> Bold face emphasis is my own.

<sup>5</sup> Rawls, John. 1971, *A Theory of Justice*, Cambridge, MA: Harvard University Press, 1971

<sup>6</sup> Scanlon, T. M., 1998, *What We Owe To Each Other*, Cambridge, MA: Harvard University Press.

<sup>7</sup> Bedau, Hugo Adam and Kelly, Erin, "Punishment", *The Stanford Encyclopedia of Philosophy* (Spring 2010 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/spr2010/entries/punishment/>>.

Thus, debaters should find themselves in familiar ground in making the basic arguments of both sides of the resolution. To explain more directly, punishment the concept, will, in general, be defined as inherently retributive. That is to say, punishment is often assigned as something undesirable inflicted on the accused as a response to the perceived violation of norms. To this end, we can defend either of the “big two” ethical theories as we construct our position on punishment.

We do not really struggle to understand punishment itself as a concept since as children we all experienced some forms of punishment from time to time e.g. speaking out of turn may have caused reprimand by our teacher, forgetting to clean our room may have lost phone privileges, running a stop sign may have led to a ticket. So, why then is it worth consideration? The conceptual basis for punishment is where the debate takes place, and in short, the question of the resolution is really one of how ought we to best view punishment? If retributive, we will often feel it is best to view it as the desert, the necessary consequence for the violation. And, perhaps obviously, various theories may justify such an opinion. While if it is rehabilitative, one is likely to argue that, more importantly than merely serving desert, the goal is to focus on improving the criminal who committed the violation. In other words, we might suspect many will feel an obligation exists to have punishments which correct rather than merely inflict desert.

That a punishment could cause crimes to be prevented from occurring before they happen or by the effect of the punishment from occurring again by fault of the punished is what is often meant in the literature as forward looking versus backward looking punishments. Bedau<sup>8</sup> elaborates:

The practice of punishment must be justified by reference either to forward-looking or to backward-looking considerations. If the former prevail, then the theory is consequentialist and probably some version of utilitarianism, according to which the point of the practice of punishment is to increase overall net social welfare by reducing (ideally, preventing) crime. If the latter prevail, the theory is deontological; on this approach, punishment is seen either as a good in itself or as a practice required by justice, thus making a direct claim on our allegiance. A deontological justification of punishment is likely to be a retributive justification. Or, as a third alternative, the justification of the practice may be found in some hybrid combination of these two independent alternatives.

So, you can choose between both of the conventional ethical approaches and also from any number of justice/punishment theorists.

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<sup>8</sup> Ibid.

The possibilities are actually rather exhausting to imagine. None should have any complaints for a lack of philosophical literature on this resolution. We could posit a contractualist basis (consider Scanlon aforementioned); an interesting option includes Richard Dworkin<sup>9</sup> who offers us the “right answer thesis” or interpretation theory for justice; the veil of ignorance approach from Rawls; any number of general consequentialists; and the listing could go on endlessly. Perhaps, the opposite complaint would be more fair: too much possibility exists and in such openness rests the potential for a lack of clash or the unfortunately common debate, nightmare, judge RFD: “ships in the night.” None the less, I think good ground is present for both sides. After-all, and yes I mentioned this above but this bears repeating, both sides of the resolution (rehabilitative and retributive) will have their general philosophical camps – to make more clear than aforementioned consider the online criminal justice textbook<sup>10</sup> explanation:

Theories that set the goal of punishment as the prevention of future crime (deterrence) are usually referred to as utilitarian because they are derived from utilitarian philosophy. Past-oriented theories (theories that focus on the past actions of the offender) are referred to as retributivist because they seek retribution from offenders for their crimes. The retributivist conception of punishment includes the notion that the purpose of punishment is to allocate moral blame to the offender for the crime and that his or her future conduct is not a proper concern for deciding punishment (Hudson 1996: 3).

And, how society deals with crime and with those in a society who violate norms for behaviors is at the very core of the question implied by the resolution. We can certainly view the terms rehabilitation and retribution as opposing theories, but they are often viewed by many within criminal justice as planks of coinciding efforts to mete punishment or just desert for crimes.

Lastly, the resolution emphasizes rehabilitation and retribution as if they must naturally contrast with one another. I think arguments could be framed by savvy debaters that the isolation of just these two terms does beg for a debate which would contrast them alone, but this interpretation need not be the only view a debater may take. After all, theories of justice and criminal justice exist beyond these two alone. Most notably, we might begin by discussing from where the terms most likely are derived. The fundamental theories of punishment and justice<sup>11</sup> include deterrence,

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<sup>9</sup> Dworkin, Richard. *A Matter of Principle*. Cambridge, MA: Harvard University Press, 1985.

<sup>10</sup> *The Purpose of the Criminal Justice System*, N.P. web. [http://www.sagepub.com/upm-data/5144\\_Banks\\_II\\_Proof\\_Chapter\\_5.pdf](http://www.sagepub.com/upm-data/5144_Banks_II_Proof_Chapter_5.pdf)

<sup>11</sup> Ibid.

retribution, just deserts, rehabilitation, incapacitation, and more recently, restorative justice.

Rehabilitation theory for punishment<sup>12</sup> follows a

complex notion involving an examination of the offense and the criminal, and a concern for the criminal's social background and punishment. Further, those in favor of rehabilitation theories acknowledge the possibility of additional problems developing during the offender's sentence or treatment that may be unconnected with the offense and which may require an offender to spend additional periods in treatment or confinement (Bean 1981: 54). Utilitarian theory argues that punishment should have reformatory or rehabilitative effects on the offender (Ten 1987: 7–8). The offender is considered reformed because the result of punishment is a change in the offender's values so that he or she will refrain from committing further offenses, now believing such conduct to be wrong.

Meanwhile, retribution is more closely related to a deterrent, or an effort to prevent the crime altogether. Retribution is defined by the SEP<sup>13</sup>:

The retributive justification of punishment is founded on two a priori norms (the guilty deserve to be punished, and no moral consideration relevant to punishment outweighs the offender's criminal desert) and an epistemological claim (we know with reasonable certainty what punishment the guilty deserve) (Primoratz 1989, M. Moore 1987).

Its deterrent implications<sup>14</sup> are discussed at length in the online text cited already. Closely related to the concept of retribution are other theories which focus on the harms done to the victims.

Theories of reconciliation and restoration often emphasize the victim's rights and reflect the same in the way they seek to give punishment. Howard Zehr<sup>15</sup>, professor of restorative justice at Eastern Mennonite University, explains what many think of as restorative justice:

'Restorative justice' is a term which quickly connects for many people and therein lies both its strength and its weakness. Many professionals, as well as lay people, are frustrated with justice as it is commonly practiced and are

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<sup>12</sup> Ibid.

<sup>13</sup> Bedau, Hugo Adam and Kelly, Erin, "Punishment", The Stanford Encyclopedia of Philosophy (Spring 2010 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/spr2010/entries/punishment/>>.

<sup>14</sup> *The Purpose of the Criminal Justice System*, N.P. web. [http://www.sagepub.com/upm-data/5144\\_Banks\\_II\\_Proof\\_Chapter\\_5.pdf](http://www.sagepub.com/upm-data/5144_Banks_II_Proof_Chapter_5.pdf)

<sup>15</sup> Zehr, Howard. "Restorative Justice: the Concept" N.P. web. <http://www.hss.state.ak.us/djj/pdf/restorative-concept.pdf> 12/5/2012

immediately attracted to the idea of restoration. Restorative justice intuitively suggests a reparative, person-centered, common-sense approach.

Zehr<sup>16</sup> continues,

Restorative justice views crime, first of all, as harm done to people and communities. Our legal system, with its focus on rules and laws, often loses sight of this reality; consequently, it makes victims, at best, a secondary concern of justice. A harm focus, however, implies a central concern for victims' needs and roles. Restorative justice begins with a concern for victims and how to meet their needs, for repairing the harm as much as possible, both concretely and symbolically.

A number of interesting case positions could be launched from a perspective which posits that the negative may defend ground like restorative justice as an acceptable alternative to rehabilitation above retribution; although, I would caution such interpretations involve a well-worded and lengthy framework of arguments for the negation theory rested upon to grant such an interpretation. But in consideration of what many believe to be, perhaps a balance of both rehabilitation and retribution, or even an over-arching theory for punishment, we would be remiss not to give some consideration to the views on restoration theory<sup>17</sup>:

Essentially, restorative justice proponents emphasize the need to support both victims and offenders, and see social relationships as a rehabilitative vehicle aimed at providing formal and informal social support and control for offenders (Bazemore and Schiff 2001: 117).

Thus, there is potential for a less controversial negative position related to defending restoration as merely equal in value to retribution and rehabilitation as opposed to the more implicit affirmative ground of "valued above."

I would spend more time reviewing other relevant theories but I do think the sources provided will get you well-into some of the theories and thus I will, with the remaining space, turn more directly to discussing some potential strategies for the resolution.

In general, we can suggest that the affirmative is pressed to defend that rehabilitation, that is the kinds of punishments which make corrections to the offender, are those which must be valued, or

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<sup>16</sup> Ibid.

<sup>17</sup> *The Purpose of the Criminal Justice System*, N.P. web. [http://www.sagepub.com/upm-data/5144\\_Banks\\_II\\_Proof\\_Chapter\\_5.pdf](http://www.sagepub.com/upm-data/5144_Banks_II_Proof_Chapter_5.pdf)

given priority, above punishments which are retributive, merely seek to prevent future crimes through deterrent value or because the offenders simply deserve said punishment. Now, my general division of ground requires some defense.

To arrive at such a ground division, a few assumptions are being made: firstly, I assume that the resolution implies by the terms 'rehabilitation', 'retribution', and 'criminal justice system' the subject of our consideration is actually punishments of crimes, and not, other potential programs. But it may easily be suggested that I may have erred here. For example, we need not look at punishments to suggest programs offered by the criminal justice system are rehabilitative. However, it becomes harder to manage that view when we consider how retribution would work if not speaking of punishment. To my knowledge, the criminal justice system does not use the concept of retribution, or I suppose I should instead suggest the literature on criminal justice I am aware of does not speak about retribution, separate from a discussion of punishments. So, I will leave the option open to the debaters to do the research and see if such a position might exist but for my purposes I did make the assumption. Secondly, I also had to assume that the natural division of ground would cause the affirmative to defend rehabilitation over retribution in value to the criminal justice system while the negative would defend retribution equal to or over rehabilitation in value to the same. Now, we could object such a division is rather traditional and conservative of me to offer. We could suppose many will offer Critical Legal Studies Kritiks and plans which offer specific rehab programs as a policy option, or kritiks of rehabilitation itself, but in short, my aim with this assumption was to offer what seem to be the directly implied burdens of the resolution. I base this on the more conventional and perhaps legalistic view that the resolution poses a statement for the affirmative to defend as true or valid, and the negative to argue conversely or in general to argue at least against the affirmative case. After-all, the negative has already lost the advantage of going first so its greatest tempo is earned by using time in its first speech to attack directly the affirmative and assuming they must defend the resolution resolves any guessing etc.

Whether you use a similar conception of the resolution is perhaps beside the point here though. If affirmative must suggest rehabilitation then they must embrace a criminal justice system which believes philosophically in punishments which have at their core some element of support and potential for re-entry into society. In other words, the viewpoint for affirmative is most likely embraced by those who agree criminals are, above all else, likely to recidivate. That is, they will repeat their mistakes again and again if correction is not made during their punishment. Theories which would posit that big sticks have no deterrent effect, that making punishment more severe or even merely raising stakes for minor offenses misses the point of the criminal justice system. And most interestingly, theories which would argue society, specifically, the United States

criminal justice system, have an obligation (maybe even a moral duty) to rehabilitate criminals. One could defend theories like this out of appeal to intrinsic human values, an appeal to the lack of effectiveness in big stick punishment methodology, or even an appeal to systemic flaws within the criminal justice system which complain that root causality for the crime is never addressed without rehabilitation etc. A conventional affirmative case might simply argue that because criminals continue to repeat crimes after release from retributive measures alone it is imperative to address corrective measures. To elevate the argument above, in value, retribution, such an affirmative likely posits that it is an obligation, or necessary, for the most utilitarian (pending the conception of justice/morality framed in the case philosophy) outcome that such rehabilitation will occur.

Affirmatives can imagine several kinds of contention level arguments for such a conventional thesis. 'Deterrence fails', 'it is net beneficial to rehabilitate', 'crime drops after retribution', 'rehabilitated criminals are productive members of society', or even 'only rehabilitation does honor to the victim.' But, even along a strictly philosophical defense one can posit several, perhaps truth-tester-esque, lines of argument for use by affirmative as well. Consider if the affirmative were to defend simply that we only value the criminal as human if we treat them as of worth. Such a position might seek to show that purely retributive, or simply retributive measures unconstrained by rehabilitative steps, do not value criminals as fully human. Perhaps, the affirmative could even argue that the victims are not fully restored, given closure, or given justice without assurance that the criminal has been corrected in both desert as well as mental disposition. In other words, it might be a defense the affirmative uses to argue: only by altering the mindset of criminals through rehabilitation can any past victims of the offender rest assured and at peace that the same offence will not happen again.

Affirmatives have a host of consequential style arguments they can pull the trigger on in order to position themselves well against the negative. Mostly, I think of positions that emphasize root causes of crime and inherent or systemic injustices within the criminal justice system. For example, one might argue that retribution fails to address root causes of crimes and thereby does not complete the utilitarian burdens of justice inherent to the terms "ought to value above" or even within the terms "criminal justice system" and its clear purposes for existence. Perhaps, they do this with a contractual theory, or perhaps a very simple utilitarian position, but in short they all build large impact contentions related to the crimes that continue to mount on one side and the overwhelming number of American offenders on the other. To some degree, the aff supposes that the present criminal justice system is currently emphasizing retribution over rehabilitation which is probably demonstrable via the money trail for public dollars spent on programs versus the ratio of prison population not afforded the opportunity to participate in those programs, but aff

does not have to assume the status quo is negative at all. In fact, affirmative could just suppose that they defend only those programs which will change the criminal justice system for a net benefit and argue against only those places where the criminal justice system still values retribution above rehabilitation. I would caution all affirmatives to give consideration to this question. The question is of great importance; imagine, where else would the clash in the debate come from if the affirmative does not immediately present such as actually existing? Will you defend a theoretical vacuum is sufficient? Will you defend programs that rehabilitate in spite of evidence which will show that the criminal justice system does presently use such programs? Is it your burden? I think affirmative will find it rather easy to paint a picture of the criminal justice system as being centrally based in retribution and as far as the prison industrial complex is concerned very little, comparatively speaking, attention and money is given to rehabilitation. But I digress, the affirmative who wishes to do so can simply approach the resolution as only giving a burden to demonstrate that the most beneficial approach is to rehabilitate instead of merely give just desert in the form of retribution. A great number of criminals go to prison and serve time without any programs offering them a means to truly rehabilitate and therein will rest the ground affirmatives will likely defend first.

In addition, affirmative has, at its disposal, a great number of common complaints about criminal justice in general. Namely, that the great number of offenders are often of minority ethnicity and most commonly of a lower socio-economic strata. These demographics stir a great number of criticisms that no system which allows for such disparity to be reflected could call itself just. How is it that only the poor or only the minorities are criminals? The question is rather obvious to these critics as they suppose the conclusion we must make is that it is not the person but their condition. A sort of birth lottery they lost which placed them in the face of overwhelming adversity, and because many barriers are imposed by structures within the economy and social dynamic, far beyond their influence and control, they are without full blameworthiness for the crimes they commit. Not all critics go so far as apologizing for the crimes mind you, but most would at least argue fault exists on both sides, and therein lies the way that affirmatives will tie back rehabilitation as an opportunity to find justice for all parties. One might argue that by way of social contract, the justice system must offer rehabilitation to fully re-balance the great failings of what are systemic causalities for many crimes. Or perhaps, the affirmative will be a bit more to the left and offer kritikal arguments related to race and economic condition. Flavors of critical legal studies follow suit with the thesis as do certain feminist criticism, Marxist, and capitalism critiques. Certainly, all indictments of the prison industrial complex with cap. Ks come to mind as one section of the literature students may wish to peruse.

Even more radical, not that I think anything I have suggested thus far would be radical, is to argue some unconventional lines of Kritik or plan/policy style cases on the affirmative.

For the most part, I would imagine these positions to be very unique and to vary so greatly that we cannot easily describe them in this sort of overview, but I do think a few ideas may stir your imaginations in case you feel like a brainstorming session with your teammates sometime.

Consider cases that will pass funding for specific rehabilitation programs. You may want to research the most successful programs out there and try those out as decent starter options for such files. Additionally, the unconventional position might argue that punishment or just desert itself is worth critique. It is not hard to see how some might suggest retribution is a mechanism for dominance and part of the highly criticized state agent. Thus, it could be hard for state agents to be argued as the problem while still defending rehab within the state, but often times such positions simply offer symbolic rejection of punishment or other such means for their alternative elements. I would suppose even to allow some affirmatives to complain that the racial injustice, or even rape occurring in prison, is so horrific a crime that we must first address the big picture problems of - - insert your favorite critique terminal impact story<sup>18</sup> - - first, before defending the resolution. As I mentioned, these positions are usually very original, creative, and highly personal in their relationship to the concerns and study of the writers so it is hard to speculate which may be the most popular, but in case anyone has forgotten, this is a TOC topic and you can expect all sorts of unusual positions to be saved for the big dance in May!

But all the fun is not for the Affirmatives is it? Negative surely has some equally high-powered positions it can muster? While most would agree that recent years have seen a great shift by negative debaters to compose strategies which are “recyclable” e.g. theory, kritiks, counter-plans, word PICs, etc., it is always near the end of a topic that we see the best negative positions are typically those which combine a conventional option with a small off-case option, or two! In some ways this is not a surprise; it would make sense in front of a panel of judges during out-rounds that you would want to show a balanced offensive approach. Consider the recent National Champions in College Football, typically the most balanced teams win. It is rare that we see the very one dimensional teams do well in the long run. Certainly, Oregon has made great strides of late to address their defensive strength for more balance with their offense. And, in many conferences often left out of the bigger bowls, we see a return to balance between passing and running in the offensive approach. Or, if football is not your forte, imagine a war wherein the army has only long range missiles. They would be very successful against many nations that they would choose to attack, but if they run into an army with anti-missile defense, an infantry, a navy, and an air-force – that is they run up against a more balanced approach – who is likely to win?

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<sup>18</sup> The astute reader will notice a bit of dissent for the use of such tactics merely to win a round. Going for these positions to win undermines the real horror of what occurs and I often feel that such tensions are under-developed by those who encounter kritikal debaters that exploit good causes as a means to a ballot.

So, we are not surprised that in debate the same conventional wisdom applies. We can love our snipers, the bishops if you will, but we need to develop a few arguments in our case box which will also allow us some balanced looks for the judges.

What might the negative say then, in terms of its conventional position and ground? The negative side is given a sizeable amount of flexibility in terms of its interpretation. To some degree, affirmatives are behooved to address all of the variations negatives can offer within the planks of their interpretation – perhaps, a giant wall of defense within the framework will become commonplace by May. Negative could simply defend that rehabilitation is itself a bad idea, so bad it does not achieve the criteria of justice or a criminal justice system much less deserve consideration for priority in value. Negative could posit that retribution must be valued above rehabilitation, perhaps as the true reason for the existence of the criminal justice system, or more potently as ‘a priori’ in its relationship with punishment or justice. Negative could avoid both of these discussions and simply argue that a balance between them is preferable to one above the other – savvy option for those who wish to capture some of the Aff ground! And, a host of combinations for conventional positions exist.

Most interestingly to me, might be Negative positions which offer the judge a set of crimes, or a particular sub-section of the criminal justice system wherein retribution must be prioritized – I am thinking of violent felonies as an example. In the case of such a negative, one would argue that a substantial amount of prisoners, at least those in prison for any length of time wherein rehabilitation could occur, are those who have committed violent felonies. This premise would be supported with additional evidence about the repeat offender status of such persons, of the life of crime, and of the repulsive nature of their offenses all to build a case that in these specific types of crime, most central to the germane ground given they are a substantial portion of those who would be rehabilitated by aff that is, retribution is exclusively, or at least paramount, in value not rehabilitation. Why? Perhaps, the argument would emphasize the moral desert of such crimes and their violence. Perhaps, the argument would emphasize the unique blameworthiness of such crimes versus those which may be more due to circumstances of systemic flaws; or perhaps, merely, out of a concern to deter future harms – thereby gaining both some deontological and utilitarian lines of development for the 2NR!

The negative, you can see, has many options. Thus, it is the strategy of one’s style which will dictate how you compose your position. A big conventional negative would argue for three to four minutes a constructive on retribution being necessary for moral desert, likely from the word ought in the resolution, and then attack the affirmative with numerous ‘rehabilitation fails’, ‘costs too much’, and ‘lacks deterrent value’ arguments on case.

But, the negatives which really get things moving will probably pick a very small form of crime like sexual predators, serial killers, or even acts of terrorism and argue from studies that rehabilitation is ineffective in those cases. The negative in such a position would play a gambit of risk/reward on the interpretation of the resolution. Does the resolution require them to defend retribution in every case the affirmative does or simply that the affirmative cannot affirm in all cases?

Conservative play often refrains from such positions since many judges will find such a move a destructive to debate. After-all, it seems likely that reciprocity of ground is a good thing. But, therein rests the play for negative. These positions are often framed as theory bait. The idea being that 1AR has to make some sacrifices in development. Could the 1AR really be fast enough to fully develop all of the theory needed to dispose of the position, give arguments at the case level for the just in case, and also rebuild the affirmative? Keep in mind, such a position is likely to come with a few other attacks in the 1NC. Perhaps, the additions will include a negative counterplan with a net-benefit of deterrence? Perhaps, just a rather lengthy rehabilitation disadvantage with economy impacts or worse court clogs issues? But the point is, to address all of the case flaws often requires the 1AR to be all-in on the theory, if they give just a cursory glance at it, say 1 minute, the judge may hold them at fault should the negative return with a full defense in the 2NR and this would substantially cost them if they left off those aforementioned comments on the negative directly! Yes, negative has many good conventional plays with the topic.

Arguments against the affirmatives will vary by case but likely the negative could imagine a few places they want to build up offense. Negatives certainly want to turn rehabilitation. Doing so could involve complaints rehab is too forward looking and thereby missing the point of punishment for a crime committed but I see little offensive potential. The game played by Affirmative is to bank on lowering recidivism and repeat offenses. So, changing the impacts would involve proving that rehabilitation makes things worse and this seems a bit illogical, but it could be out there in research I am unaware of so do not take it off the table. My suggestion is to imagine turns of the link instead. Recall debate 101, a) never run the link turn and impact turn on the same argument or you double turn yourself, and b) turning the link means you argue that rather than the impact reversing into a bad thing – like less recidivism is really bad, just don't see it happening – and instead suggest that rehabilitation itself is a bad thing. This would be the launching place for arguments related to the excessive cost of implementation. This would be where you show examples from rehabilitations attempted which often completely fail to address the real concerns of the people they aim to help. I am thinking here of the several existing programs which attempt to rehabilitate many minorities without offering services specifically designed for and aware of minority-specific issues. You may find that some programs out there

have not only failed, essentially defense for you, but have also been racially discriminatory or even further entrenched systemic dominance through their efforts, functionally offense via a turn of the link.

Having said that, I think negatives will find it hard to win a perceptual quantitative win with economy turns or even these racial or gender based objections to rehabilitation. Some qualitative complaints are made certainly in the cases of the latter and these have deontic offensive potential, if you will pardon the conflation there, but the former economic impacts, seemingly so offensive and hopeful to rebalance the impact calculus addressed by recidivism rates falling, for aff. I think all will fail in terms of their belief-factor. At some level, the link chain most will opt for with economic impacts will be far too generic and it will grossly over-state the likely link chain to its probably terminal impacts. If, however, negatives keep to what seems more within the scope of such an economic misstep, they release access to the “try *and* die<sup>19</sup>” potency of their complaint. I think such makes the offense mostly a weapon best used with large amounts of defense.

Negatives should find plenty of defense for rehabilitation. It could be easy to set up a large wall of evidence to articulate nuanced ‘implementation difficulties’, ‘funding lack’, and a general ‘lack of qualified personnel’. But in the end, what does any of that help the negative? So what, aff is tough to implement? So what, aff needs more of a plan approach? Have you established why it still *ought* not be the higher value? To some degree, affs who simply rebut that they need only establish ‘value above’, not complete overhaul of the system probably weaken the link to any real staying power of the disadvantages do they not? Perhaps the best defense you can muster on the negative is simply to show rehabilitation does not work. After-all, the shift was tried in the criminal justice past – see the 1970s studies<sup>20</sup> of the same. You could argue about due process – that the punishment is not fixed in determinacy at the time of trial. By the way, that last defensive option includes a potential impact turn – some established<sup>21</sup> that by having such a focus on the release date via rehabilitation many offenders falsely stated their progress within rehabilitation not only causing it to fail – defense – but also resulting in no recidivism impacts for aff – defense – and if you spin it correctly possibly worsening our ability to understand the causes of crime increasing recidivism in the long run - offense. So, what is negative to attack besides suggesting that rehabilitation offers an alternative to, but not a replacement for, punishment?

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<sup>19</sup> Not a pun but rather an intentional alteration to the more common phrasing try or die.

<sup>20</sup> Martinson, R. 1974 “What Works?—Questions and Answers About Prison Reform.” *The Public Interest* 35: 22–54.

<sup>21</sup> Hudson, B. 1996. *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory*. Buckingham, England: Open University Press.

I will concede that this sounds conservative and traditional of me, but perhaps negative ought to consider simply going framework heavy. Work hard on attacking the likely consequential elements of the justifications for rehabilitation. Re-focus the debate with the NC onto deontological grounds, or at least onto non-consequential grounds, such that you can have a large portion of the 1AR forced into debating framework. Use that tradeoff of 1AR time to your advantage. In doing so, your development in the 2NR should be clearer. If you create a good framework you do have an advantage. Either the affirmative had to waste substantial time in the 1AC to build several floating planks to their framework in order to operate pre-emptively in the 1AR, likely meaning they have under-covered the case level and will have vulnerability in the internal links; or, they have to spend that time in the 1AR and this affords you as negative some good lines of offense in both interpretation level gambits, theory options, and even case spreads during the 2NR. I like the chances.

My favorite sport is Formula One. In formula one racing, the tracks have 16,17, and even above 20 turns (both right and left for all of you Nascar-folk out there) and the often times a section of the track will quickly shift back and forth from left to right like a slalom in skiing. A name given to these highly technical and difficult to manage bits of track by the greatest designer of race cars of our era, Adrian Newey, is to refer to them as the 'tiddly bits.' I think the name serves well to describe the kind of troll-style arguments pervasive in today's debate world. Most of them are theory, pseudo-theoretical, or their spike counter-parts, but in the end, they are a part of the game that allows for some dramatic and creative argumentation and I would not have it any other way if a debater chooses it for themselves. So, here are a few ideas you can chew on, or simply throw in the back of your mind in case you want to consider what you will do when and if you ever hear like arguments.

What if the negative does suggest their burden is only to show that rehabilitation is not implementable? Could be a burden of aff to offer a plan, a burden of aff to specify the type of rehabilitation for ground and research purposes, or it could be simply that the neg supposes they have a theory for negation which amounts to only negating the aff without burden to uphold any converse side of the resolution. What if negative does choose to specify just a single sub-set of crime/criminal for retribution? What if negative chooses to defend restoration over retribution and in a word play for permutation theory? I would suppose 'perm do both' does not work for restorative justice since it already encompasses both is the gambit. I like a lot of interpretation gambits like playing with the meaning of the word 'value' and 'ought'. Consider if 'value' means we do not 'prioritize above' but rather we merely 'believe it is more important'. What would affirmative look like in such a case? Does this mean all solvency and plans are irrelevant to affirmation? Could a simple alternative to a critical plank like stating personally in the round that I,

as debater, value it, suffice for solvency? Of course, I love the idea of suggesting values do not exist via meta-ethical concerns and thereby relegating the discussion to one of a much more linguistic game! Doing so affords negative and affirmative some wonderful ethics arguments as well as analytical arguments within the framework debate. And also, I think developments for the word 'above' are interesting. 'Above' is such a nebulous word when it comes down to it. It does not suggest any clear policy process, it has relative norm potential for common use understandings, and in general it causes more ambiguity in how the affirmative should proceed than it does clarity. This means negative can have a lot of room for interpretation and ground on such a word so I would consider carefully if any of those options are dangerous. My thought is to suggest that 'above' means 'in the space on top of' and from there simply argue that affirmative had 'to establish that we will locate the rehabilitation wings of the prison on higher levels of the building than our retributive wings'. Ha! Just kidding, but in the jest I hope you get the idea. These arguments are trolls and rarely of much substance. Their use is often only in the element of surprise and time trade-off they gain. So, expect affirmatives to prepare with offensive pre-empts for such tactics, and if they do not then no one can blame negative for running the arguments I suppose. Finally, I would suggest referring back to the discussion of affirmative and negative options above where some other ideas were briefly postulated e.g. whose ground is the status quo, specifically in terms of whether or not retribution above rehabilitation is true of the current system?

In conclusion, I wish you all good luck on the topic. I hope you enjoy researching it and debating it. I hope we, as a subculture, uncover some really good ideas for how to repair what seems a very broken prison system in this country. And above all else, I hope you have a great deal of fun with this!

**Credentials:**

I am a lowly English teacher with relatively no background of merit in anything official. I coached some really smart and talented kids for a long-ish time and they did all the hard work and heavy lifting; taught me all I know really. They won lots of tournaments and have an impressive resume, I was lucky enough to be there watching so I picked up a few things. Additionally, I have been fortunate to make friends in the debate world who have taught me everything else, and somehow I continue to muddle it all. My thanks to all of you for your patience and to all those who have helped me in learning about debate!

## Topic Analysis by Christian Tarsney

This is going to be a bit of a non-standard topic analysis, for two reasons. First, it seems to me that the best and most interesting arguments on the topic (given an appropriate understanding of ground and burdens) are mostly philosophical in nature, in many cases fairly complex, and open to a variety of developments, such that substantive explanation of the positions is unlikely to compress well to the space available. Additionally, at least for the affirmative, there's a wide enough variety of such positions that it will be better to gesture schematically at potential forms the positions might take than to attempt a detailed summary of each potential line of argument. Secondly, though, the resolution poses what strikes me as a pretty interesting interpretive puzzle, which may not be obvious on face, but which gets more complicated the more I think about it. Once we've made some progress on sorting this puzzle out, we'll have a much easier time framing all of our fun philosophical affs and negs (i.e., making it obvious just why they affirm/negate), and perhaps also manage to avoid some un-fun theory debates in the process.

That being so, I'm going to spend most of this essay following a complicated, slightly messy chain of thought that will help us develop a precise, textually defensible interpretation of aff and neg ground. In the process, we'll have to do a lot of seat-of-the-pants conceptual analysis and problem-solving, but we'll end up with what I think is a pretty good way of debating the topic. With that in hand, we can then talk about how to put together ACs and NCs that really affirm and negate, and look at just a few illustrative ideas of what those ACs and NCs might say.

### Making the Topic Make Sense

It's been several years since we debated these "value  $x$  over  $y$ " resolutions with any regularity. But even when value comparison topics were much more common, it's not clear that we ever really understood how to debate them—i.e., knew how to develop coherent interpretations of affirmative and negative ground which both precisified the terms of the resolution and were functional in rounds. We'll see in a second why the typical, most straightforward way of approaching these topics doesn't really make sense. Along with the general challenge of interpreting value comparison claims, however, the current resolution seems to pose some special challenges. All told, if we can't come up with an interpretation that's both precise and functional, we may be in for some very messy contention-level debates (and ugly, poorly conceived theory debates) over the next few months. So before we try to talk about arguments, we need to make sure we have in hand a usable (and hopefully even correct) interpretation of the

topic that improves on some of the messiness that will likely be happening in early rounds on the topic.

Many debaters, I think, will first approach the resolution implicitly assuming something like...

*The Bad Interpretation:* The affirmative's job is to defend the more extensive use of one or more vaguely-rehabilitative-looking practices in the criminal justice system, while the negative defends either a continuation of the *status quo*, or the more extensive use of one or more vaguely-retributive-looking practices.

No one will word their interpretation quite like this, of course. But two things are certainly going to happen, both of which seem to depend on some version of the Bad Interpretation:

1. Naïve stock debate: Debater gets up, reads some typical arguments for a typical LD-sounding standard, then (if affirming) reads a bunch of contention-level arguments about how rehabilitation reduces recidivism, solves prison overcrowding, strengthens communities, lessens the oppression of some marginalized group, etc.; or (if negating) reads a bunch of contention-level arguments about how rehabilitation costs a lot of money, fails to reduce recidivism, etc., while other more punitive-looking policies achieve comparatively better results on these fronts, serve an expressive function that unites moral and political communities, etc.
2. Naïve LARP debate: Same as above, but with textual advocacies, more recent evidence, and worse standards arguments.

What's wrong with debating the resolution like this? In simplest terms, it's not at all clear how to map a set of policies (in this case, policies governing a criminal justice system and/or a penal system) into the comparative value judgments those policies imply—and in fact, there are pretty good reasons to think that there couldn't be any such mapping. In other words, the adoption of a particular policy or set of policies does not by itself determine a comparative valuation of rehabilitation or retribution, and so could never constitute a topical instance of valuing rehabilitation more, or a competitive instance of valuing retribution more.

To illustrate the point, consider a comparison of two slightly more prosaic goods—since it's nearly Christmas, make it milk and cookies. Suppose the topic is “Resolved: Santa ought to value cookies over milk.” The affirmative stands up and argues that Santa should eat two cookies for each glass of milk he drinks, and extrapolates an extinction scenario (without the sugar boost, Santa won't be able to spread holiday cheer at the necessary pace, US-Russia relations

deteriorate heading into 2013 as a result, this kills cooperation on Iranian nuclearization at a critical state in negotiations, etc.). Does this argument affirm the resolution?

Merely the fact that Santa ought to consume more cookies than glasses of milk won't do the trick: I consume (in the economic, not the gastronomic, sense of the term) far more paper towels than iPads, but I value iPads more than paper towels. Nor has the case shown that Santa should value the marginal cookie more than the marginal glass of milk (i.e., that the value added by the very last cookie he consumes, or the next one he might consume, exceeds that of the equivalent glass of milk): it could be, for instance, that in the *status quo*/the affirmative world (whichever you take to be relevant), Santa consumes more than the minimum necessary number of cookies, such that the marginal value of a cookie is close to zero. Nor, even, does the case show that the *average* value of a cookie, or the sum value of *all the cookies* Santa consumes exceeds the equivalent value for milk (suppose the negative points out that, without any milk, Santa could never eat enough cookies, so we'd be just as badly off without milk as without cookies).<sup>22</sup> And anyway, in what sense does Santa even consume more cookies than milk in the affirmative world (since this is apparently the sense in which he's adopted a cookie-focused and therefore affirmative course of action)? By some arbitrary unitization (single cookies to glasses of milk) he does, but by other measures (e.g. mass or volume) he might not.

Back to rehabilitation and retribution: Suppose the affirmative gets up and argues that the United States should adopt a policy which directs more funding to rehabilitative programs (e.g. job training in prisons) while improving prison conditions and decreasing the length of sentences. As policies go, this is nearly as affirmative-looking as you can get. But does the desirability of adopting this policy show that we ought to value rehabilitation over retribution? To start with, we might ask whether the criminal justice system that results would be "more rehabilitative than retributive" (since presumably just a move in that direction relative to the *status quo* doesn't imply that we value rehabilitation more). I'm not sure how to go about answering this question. Naïvely, as long as we're both trying to punish criminal and trying to rehabilitate them, it appears that we value both. We have not so far found any easily commensurable unitizations of rehabilitation and retribution which would let us say which we're "doing more of." But as we saw above, even doing more of one than the other wouldn't imply a comparative valuation. As with paper towels and iPads, we might value a unit of retribution over a unit of rehabilitation, but "buy" more of the latter than the former because the units are cheaper (rehabilitating criminals might be "cheaper", either

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<sup>22</sup> This is a bit of a cheat, of course. There are various, reasonably conclusive objections to sum-value or average-value interpretations of value comparison claims, but in this context the easy problem to point out is that we wouldn't be reading the valuation off the choice of policy: Santa could consume the same quantities of cookies and milk, but eat the cookies only because they're warm and delicious, and drink the milk in order to prevent a nuclear holocaust. The desirability of policy by itself (more cookies than milk, more rehabilitation than retribution) will not generally fix either the sum value or the average value per unit of the respective goods acquired under that policy.

up-front or in terms of long-term social costs, than giving them appropriate retributive punishment), or else because it takes longer to hit the point of diminishing marginal value. My second paper towel square is worth about as much to me as my first, but my second iPad much less than my first—similarly, it's reasonable to think, once a criminal has been punished appropriately, the value of each further unit of retribution is zero or (more likely) negative. If proportionately appropriate punishment for most crimes is not very harshly punitive, then we might do "very little" retribution (e.g., short jail sentences and small fines) but still value the retribution we do inflict quite highly.

We've only explored a few of many possibilities here, but we've already seen multiple ways in which the desirability of even very rehabilitative-looking policies could fail to imply a comparative value claim. The Bad Interpretation, therefore, is bad because it relies on an intuitive but ultimately incoherent understanding of what it means to value one good over another.

So what's a better understanding? The conventional economic answer, in general, is that valuation is measured by willingness to pay: I value an ounce of gold more than a barrel of oil if and only if I would be willing to spend more for the gold than for the oil, at the margin. This answer works pretty well when given discrete units or specified quantities to compare. Unfortunately, it can't answer a question like "Is gold more valuable than oil?" where no units or quantities are specified.

In the case of physical goods, as we saw, we're be tempted to interpret the question as implicitly appealing to some privileged unitization or standard of measure, like mass, and disambiguate it to mean something like "Is a given quantity of gold more valuable than an equivalent (by mass) quantity of oil?" Even here there's ambiguity—the answer might change depending on the mass in question—but more to the point, as we've noted, it's hard to find a similar unit of measure with which to commensurate abstracta like rehabilitation and retribution.

An appealing possibility is to treat individual criminals as the unit, and thus to render the question of the resolution as: "Is it more valuable, from the standpoint of the criminal justice system, that one criminal be (fully) rehabilitated than that the same criminal receive (fully) appropriate retributive punishment?" We will make some progress by adopting this scheme. But there are still significant ambiguities remaining. For one, we might intuitively want to answer this question differently for different prisoners. Many of us would prefer to see a juvenile convicted of vandalism or petty theft rehabilitated rather than punished (given the either-or), but would prefer to see a serial killer punished rather than rehabilitated. This may just represent the standard interpretational problem of lack of explicit quantification over cases in LD topics (whether to read

the resolution as containing an implicit “always,” “sometimes,” “most of the time,” etc.). But it’s reasonable to hope that if abstract claims of comparative value like this resolution make any sense at all, they shouldn’t have to be read as containing implicit quantification in the first place. We’ll return to this problem at the end of the present section, although in the end we’ll have to sweep it under the rug a bit.

A more urgent problem is that the above rendering of the resolution pretty clearly falls apart on an idiosyncrasy of the topic not shared by comparative value claims generally: namely, what it means to value *retribution*. To illustrate this point, we need to say something about standard philosophical treatments of punishment.

It’s common practice, when discussing criminal justice and punishment, to give some canonical-sounding list of “the justifications for punishment.” Standardly, that list might include:

1. Deterrence: Punish in order to deter the criminal from committing future crimes, as well as to deter others from crime, for fear of punishment.
2. Incapacitation: Punish in order to directly prevent the criminal from committing crimes, at least for a period of time (via imprisonment, monitored parole/probation, or execution).
3. Restoration: Punish in order to compensate either the particular victims of crime, or the community at large, for the damages inflicted by the criminal (via fines, community service, etc.).
4. Victim closure: Punish in order to provide victims with a sense of satisfaction that justice has been served.
5. Retribution/desert: Punish because the criminal deserves punishment, and it’s therefore good in and of itself that s/he be punished.
6. Rehabilitation: “Punish” (perhaps in an attenuated sense) in order to improve the character of the criminal, both for the criminal’s own benefit and for the benefit of society at large.

I think the above represents a pretty typical understanding of “retribution,” although I’ll leave it to you to track down definitions from the academic literature. Thus understood, “retribution” is not simply a synonym for “punishment”—i.e., it does not merely refer to the infliction of harm on wrongdoers. Rather, it refers to a particular reason for punishment, a reason which is held in

contrast to a definite set of alternatives. Inflicting “appropriate retributive punishment” on a criminal might have all sorts of value besides that of retribution itself—deterrence and incapacitation being the most general candidates.

To value retribution, therefore, is not simply to value punishment. This is another failing of the Bad Interpretation: we might design an extremely punitive criminal justice system for reasons that have nothing at all to do with valuing retribution—and in fact, if we justify the adoption of that system in terms of goals like reduced recidivism, that’s exactly what we’re doing. If we value retribution, we value punishment *for the sake of punishment*—or in other words, value it intrinsically, as well as instrumentally. Thus, the resolution should not be represented merely as a choice between punishing and rehabilitating the criminal: rather, it asks us to compare *particular reasons* for doing one or the other. In the case of rehabilitation, these reasons could (as far as I can see) be either intrinsic or instrumental—fortunately, because the boundary between the two will be fixed somewhat arbitrarily by how much is written into the definition of rehabilitation. But in the case of retribution, instrumental reasons are excluded.<sup>23</sup>

Given what we’ve said so far, though, it seems as if valuing rehabilitation should be subject to some caveats as well. With respect to retribution, we began with the observation that it is typically described as belonging to a set of contrasting justifications for punishment. This is true of rehabilitation as well. To value rehabilitation in the criminal justice system, as a justification for treating criminals in a particular way, is thus presumably to value it *in contrast to alternatives*. Thus it seems fair to say that, while we might value rehabilitation instrumentally, we value it only insofar we value it *distinctively*. To argue, for instance, that rehabilitative programs (like institutionalization in treatment facilities) are really the best form of incapacitation, or that they produce the most deterrence because rehabilitated inmates will go out into the world and help scare potential criminals straight, is not to value rehabilitation as a primary rationale for punishment, which is what’s contextually required by the resolution. Similarly, the affirmative can’t make the argument that rehabilitated criminals will come to realize the moral necessity of their being punished for their crimes, and so will inflict more appropriate retribution on themselves than the criminal justice system could otherwise (not that anyone would want to make this argument anyway). This is a minor point, perhaps, and I don’t insist on it, but it does seem to exclude a class of intuitively non-topical arguments.

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<sup>23</sup> We’re ignoring, and will continue to ignore, one potentially important complication here, namely that the retributive character of punishment is often regarded not—or not solely—as a positive reason for punishment but as a negative constraint on punishment, such that punishment can only be justified by other goals like deterrence as long as it’s within the scope of what’s retributively warranted or due. To avoid any further complication, I’ll simply assume that holding a view of this kind does not count as valuing retribution. When I speak of “valuing retribution” going forward, then, I’ll be referring for the most part—with one caveat to be introduced later—to the view sometimes called “positive retributivism”, which holds that there is intrinsic value to due punishment, or at all else being equal, it is better that wrongdoers be punished.

With all that said, we can now propose a suitable replacement for the Bad Interpretation. To recap: Judgments of comparative value are not directly implied by a choice of policy. Rather, they're determined by one-to-one comparisons of suitable units of the goods being weighed. In the case of rehabilitation and retribution, the only suitable units are individual criminals, who (in the idealized context which determines the value comparison) can be fully rehabilitated, or retributively punished, but not both. But in order to make the comparison appropriately, we need to consider not simply the desirability of these two choices, but their desirability with respect to specific values—in particular, the desirability of retributive punishment with respect to its *intrinsic* function of meting out desert, as opposed to any of its instrumental functions.

Put that all together, and we get...

*The Better Interpretation:* The affirmative defends the claim that, for a typical criminal, the instrumental value of rehabilitation (for the rehabilitated criminal and society at large, but excluding benefits mediated by other commonly identified justifications for punishment) is greater than the intrinsic value of retributively appropriate punishment (i.e., the value of punishment excluding the value of its effects), and that therefore if we could have only one, we ought to choose the former (full rehabilitation, no punishment) over the latter (no rehabilitation, ideal punishment).<sup>24</sup> The negative denies this.

This interpretation seems to resolve most of the ambiguities we've encountered in trying to make sense of the topic. The only remaining ambiguity, I think, is in the assumption of typicality—which represents the promised sweeping-under-the-rug of the implicit quantification problem discussed above. This is an imperfection, but I don't think we can do much better. And fortunately, most of the positions debaters are likely to run will be sufficiently all-or-nothing that the question of what a typical criminal looks like will be functionally irrelevant.

It's fair to ask, at this point, whether in attempting to precisify the resolution we haven't made it prohibitively difficult to debate. Is the interpretation we've arrived at functional in a debate round?

To be clear, I don't suggest that you actually read anything as wordy as the above interpretation in your rounds. But what I do suggest is that you adopt this interpretation, or something like it, for purposes of argument development, and be ready to defend particular aspects of the interpretation in order to exclude arguments that violate them (and to defend your own

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<sup>24</sup> Strictly, everything up to the "therefore" identifies only a default argumentative path to affirmation—what comes after the "therefore" is the specification of affirmative ground.

arguments). Given that approach, I think that rounds should actually be pretty easy to debate—in the balance of the topic analysis, we'll see a number of positions that unambiguously affirm or negate the topic as we're reading it.

The difficulty resolving debates arises under normative frameworks that recognize an appropriate tradeoff between the rehabilitative and retributive goals of punishment. As I suggest above, most debaters are unlikely to acknowledge that their frameworks do this. But more to the point, if they do, any remotely reasonable interpretation of the resolution will leave us with a difficult debate to resolve. Trying to draw the line between aff and neg ground in terms of policy (i.e., specifying what sorts of things a criminal justice system that valued rehabilitation over retribution *would do*) is going to make these rounds much tougher to resolve, *even if* we could reasonably square it with the text of the resolution: as long as the negative is required to defend anything like a genuinely *retributive* justification for punishment (as opposed to deterrence etc.), the task of figuring out what sorts of policies would be justified under a mixed/tradeoff-sensitive theory of punishment will be far messier than the idealized question of how to resolve a one-to-one, all-else-equal tradeoff. Moral theories that recognize a plurality of fundamentally dissimilar (though in principle commensurable) values have a very hard time doing rigorous comparison of those values, regardless of how those comparisons are construed. The interpretation we've arrived at makes those comparisons about as tractable as they could possibly be, and thus represents the most debate-functional interpretation of the topic.

### **Affirming**

Given our interpretation, affirmatives on this topic can start from a simple intuition: that good things are good, and bad things are bad. In particular, punishment (by definition, or nearly) involves inflicting harm (suffering, preference-frustration...) on someone, and this (all else being equal) is normally a bad thing; rehabilitation involves improving someone's character and behavior, and this (by definition, or almost) is good.<sup>25</sup>

As an aside, it's a remarkable fact of human moral psychology how thoroughly our retributive intuitions manage to suppress this pretty obvious thought. Perhaps it's just my dyed-in-the-wool consequentialism, but I think if you put to an average person a proposition like "All else being equal, it's better that even the worst criminals be happy than that they suffer," you might find quite a bit of agreement. In ordinary contexts, though (perhaps because all else never *is* equal), we very rarely think like this, and are much more likely to express outrage at the thought that a wrongdoer might avoid adequate punishment, without any (explicit) thought that the lack of

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<sup>25</sup> The lack of parallelism here is attributable to the asymmetry in burdens established above.

punishment will result in predictable harm to others. To put it a bit speculatively, it seems as though where our retributive intuitions kick in, empathy turns off, and it's only by deliberate effort that we can bring ourselves to feel genuine concern for the wellbeing of those we regard as bad people (this way of putting it is deliberate—I would suggest that what triggers our retributive intuitions is usually more characterological than deontic).

At any rate, this is all just to say that the affirmative is on pretty strong philosophical ground. Barring a simple appeal to intuitions, it's quite hard to construct a compelling argument for the claim that the suffering of wrongdoers has *intrinsic* value, and quite easy to imagine reasons for thinking otherwise.

The simplest and most intuitive ACs, then, will have something like the following structure:

(1) The affirmative just needs to show that the instrumental value of rehabilitation exceeds the intrinsic value of retributive punishment. {Or some similarly simplified version of the Better Interpretation...}

(2) Retributive punishment has no intrinsic value.

(3) So affirm because either...

(3a) rehabilitation has non-zero positive moral value, or

(3b) punishment has negative intrinsic value, and rehabilitation is at worst morally neutral.

There are lots of ways to go after (2). You could write an AC consisting for the most part of a laundry list of objections to the standard philosophical arguments for retributivism, with just a bit of comparative analysis at the end to tackle (3). You could also write an AC which develops just one or two sustained objections to retributivism. Though much maligned (and deservedly so, when it's run as generic moral skepticism), determinism is one interesting option for affs: plausibly, determinism leaves many of the potential foundations for moral theory undisturbed (e.g., impersonal value theories of the sort posited by utilitarians), while undermining those moral theories that depend on more deontic notions like moral responsibility/culpability, blame, or desert. Deflationary theories of personal identity (like Derek Parfit's "bundle theory") also provide interesting aff ground: these views deny that we bear the sort of deep metaphysical connection to our past selves which seems to be required for the transmission of moral qualities like desert.

Another option is to make positive arguments for a moral theory that rules out retributivism. The obvious candidate is utilitarianism (or consequentialism more generally, although there are conceivable forms of consequentialism which wouldn't affirm). So, as above, one way to write an AC is by producing a laundry list of arguments for utilitarianism, then draw the obvious implication that utilitarianism treats punishment as having intrinsic disvalue, and treats rehabilitation as (almost certainly) having positive instrumental value. Another is to pick your favorite argument for utilitarianism (unless it's Hasnas), develop it for 4-5 minutes, and then draw the same implication.

Besides util, there's the potential for virtue ethics affs that have something a bit more substantive to say about rehabilitation. I'm sure a lot of debaters will have the idea that rehabilitation = cultivating virtue, but it's important to note that on face, this position looks as though it's misreading virtue ethics as a kind of consequentialism—virtue ethics enjoins acting in accordance with virtue, not maximizing the sum of virtue in the world, and the former will not generally entail the latter. To make the argument work, what's needed is some virtue-ethical (and in particular, classical Aristotelian virtue-ethical) *political* theory which contends that the role of the *state* specifically is to cultivate (if not necessarily maximize) virtue in its citizens.<sup>26</sup> If you're interested in making a very specific philosophical argument for the value of rehabilitation, Aristotle's *Nicomachean Ethics* and *Politics* (along with the enormous secondary literature) would be a good place to start.

Barring this sort of argument, however, there will be some perceptual trickiness in deciding how to handle part (3) of the AC syllogism outlined above. In principle, regardless of the moral view you're defending or whether you're defending one at all, I think it ought to be sufficient to say something like "Rehabilitation is enormously likely to have positive moral value under any reasonable moral theory, since a rehabilitated criminal by definition is less likely to act in ways that cause harm to him/herself and others, and more likely to act in ways which positively contribute to his/her and others' wellbeing." This *prima facie* argument then leaves it to the negative, if they like, to argue that rehabilitation has zero or negative moral value.

Unfortunately, judges tend to be unimpressed by arguments that sound like this—often, I think, unjustifiedly so. As a result, you may want to do more than just lob the burden of proof on rehabilitation over to the negative. One option is to go the (3b) route and draw the implication that punishment has intrinsic disvalue, and you should certainly do this, but it still leaves you dependent on the assumption that rehabilitation has at least zero instrumental value, or less instrumental disvalue than punishment has intrinsic disvalue. These claims seem pretty blindingly

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<sup>26</sup> Notice that here, the typicality condition in the Better Interpretation might actually have some work to do: the typical criminal, in the US criminal justice system, is (plausibly) an American citizen to whom the US government bears this special obligation.

obvious, but again, judges want to think that they're voting on something more than blinding obviousness, so it's likely worth doing some work to give them that impression.

If you're defending a moral framework like utilitarianism, you can always just make ordinary-looking contention arguments and read cards about how awesome rehabilitation is (coupled with your framework-level argument against retributivism). Most of these arguments won't *actually* be doing anything for you, given the Better Interpretation of the topic. They also risk providing the negative something to hang stock (Bad Interpretation-dependent) util turns/disads off of in a way that gives them the misleading appearance of responsiveness to the AC. Perhaps the simplest option that's true to the interpretation is to read statistics quantifying the social disvalue of crime, and just draw your implications from the reduced recidivism which, plausibly, accompanies rehabilitation by definition.

If you're not defending a moral framework, you could still do the same thing, and then make the argument that the effects of criminality you describe are recognized as disvaluable by any moral theory (which some judges still may not like, but does sound a bit more substantive). You could also make a series of arguments specific to some list of stock LD moral theories ("Rehabilitation has positive value under util, deont, virtue ethics, contractualism, contractarianism...") and just frame those arguments as preempts, which at least sounds more sophisticated, even if in reality you're just articulating the basic *prima facie* argument for rehabilitation repeatedly and inefficiently.

At any rate, manage the optics how you want, but on balance I would suggest that the focus of most ACs should be on (2) rather than (3). Anything you can do to make (3) seem as trivial as it really ought to be will let you keep the round centered where you want it to be, on your philosophical objections to retributivism. If there has to be a serious debate about the value of rehabilitation, let it come to you as much as possible (and we'll see very briefly in the next section how it might).

### **Negating**

You may be worrying at this point that negative ground as we've described it looks pretty crappy. Negatives are almost forced into defending retributivism, a relatively narrow (if widely believed) philosophical position subject to lots of compelling objections, and then must also defend a difficult value comparison claim, which may not fall directly out of retributivism, and which is not at all widely discussed or argued for in the philosophical literature on punishment (retribution matters *at least as much as* rehabilitation, such that given an either-or, all-else-equal choice, it's

not the case that we ought to choose rehabilitation). Alternatively, negatives can defend the pretty odd claim that rehabilitation is actively disvaluable. But aside from some strained Kantian stuff about the joys of moral agency and the evils of manipulation, which would probably end up arguing for retributivism anyway, the only obvious positions along these lines all involve nonsense like biopower, which we can safely ignore.

But I actually think this is alright. For one thing, even if something like the interpretation we've developed were universally accepted, I doubt that the poverty of neg ground would be enough to eliminate (let alone reverse) side bias—ultimately, even if you're making the same, ultimately pretty bad arguments in every single debate, if you get seven minutes to make them and your opponent only gets four to respond, you don't have a lot to complain about. So we should be comfortable with interpretations that make neg ground qualitatively worse than aff ground, when that's what falls most naturally out of the resolution.

But for another thing, the situation content-wise isn't too terribly bleak for negatives either. We haven't noted yet that, given the Better Interpretation of the topic, negatives don't necessarily have to defend a *duty* to exact retributive punishment (or even the existence of proactive reasons to do so) but merely the existence of an unconditional, or mostly unconditional, *right to retribution*. If communities or individual victims are morally entitled to exact retribution for wrongs done to them, even at the cost of potentially rehabilitating the criminal, then they are not obligated to value rehabilitation over retribution—even if rehabilitation has objectively greater value. In developing our interpretation, we left “ought” unanalyzed, but as on most topics, the default definition will have it implying obligation or moral obligation.

With that in mind, there turn out to be plenty of ways to defend retribution (as either a right or a duty) besides the stock Kantian line that treating criminals as rational agents requires us to treat them according to a maxim they willed when committing their crimes. An argument for retribution that's been more popular among philosophers at least for much of the last century has to do with the metaphor of “righting the moral scales” or correcting the unjust imbalance which the criminal creates between his or her interests and those of society.<sup>27</sup> While I don't think this sort of argument is ultimately very good, they're been widely discussed in the literature and you can find answers to all the immediate objections. In particular, there might be an interesting version of this position along communitarian lines, that treats communities as corporate victims of crimes with a collective right to exact retribution.

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<sup>27</sup> This might be characterized as a restorative rather than retributive justification for punishment. But it's restorative in such an abstract, non-causal sense that the retributivist can assert a reasonable claim to it as well.

In addition, nearly any kind of constructivism (including contractarianism and contractualism) leaves room for leveraging our *de facto* retributive intuitions and preferences into moral content, since widely shared human preferences play a role in determining that content. Contractualism in particular provides really interesting neg ground, because there seems to be a bit of a bug in the theory with respect to punishment: in the hypothetical contracting position from which the content of contractualist moral norms is determined, all agents are assumed to share a commitment to abiding a mutually agreeable set of moral norms. But given this commitment, it's hard to see how any agent could have standing to object to harsh treatment of those who violate the moral contract. In other words, I can't reasonably reject (or, could reasonably accept) a rule to the effect that all shoplifters should have their hands chopped off, if I've already committed myself to the norm of not shoplifting, and hence contractualism may imply a nearly unlimited right to retribution. There are various ways of trying to paper over this problem, but it's at least tricky enough that you can get some interesting play from it in a debate round.

Finally, there's the potential for evolutionary naturalist positions which argue that retributive punishment of wrongdoers is a fundamental component of biologically innate human morality, deeper and stronger than any of the moral sentiments which underwrite the moral appeal of rehabilitation (the obvious candidate, empathy, lacking naturally universal scope, and in particular being restricted to those we regard as members-in-good-standing of some moral in-group). Evolutionary naturalism is a hard metaethical view to defend, and is far more often used as a foil than seriously advocated. But if you can come up with a couple of good arguments for it, and strong evidence from the evolutionary psychology literature at the contention level, then the position could be very difficult to answer.

So, those are my thoughts on the topic. I hope that, even if you're not convinced that the Better Interpretation is right in all particulars, you can appreciate the interpretive difficulties posed by comparative value resolutions in general, and this one in particular. I hope to have also made the point that appropriately abstract interpretations of the topic don't have to be expressed in terms of ambiguous generalities like "in general" or "on balance," but can be made reasonably precise. And finally, I hope to have illustrated the breadth of interesting debates available on this topic, despite the comparative specificity of the philosophical topic area.

Good luck and have fun!

## Topic Analysis by Adam Torson

It's that time again – the January/February topic, which for many of us is also debated in March, April, and May. It's an oldie but a goody (kind of). I remember debating this topic about 10 years ago at NFL Nationals. Since then, the issues implicated by the resolution have only become more pressing. In the forty year struggle between “get tough” crime control policies and rehabilitation, the former seems to have won the day thus far. The prison population in the United States is enormous and growing all the time. Whether there is a viable alternative this approach is the subject of this topic. So, dive right in, it's both interesting and important.

### Interpretation

#### A. United States Criminal Justice System

Most definitions of the criminal justice system suggest that it encompasses three components: (1) Law Enforcement, e.g. the police; (2) The Judiciary, e.g. courts; (3) Corrections, e.g. jails and prisons. A philosophical bent toward rehabilitation or retribution would no doubt influence (1) and (2), but for the most part this resolution addresses (3). Most advocacies, therefore, will deal with how offenders are treated post-conviction. I can't think of an advocacy that would change law enforcement policy or pre-conviction judicial procedures, but it might be prudent to keep in mind that the term “criminal justice system” has a broader connotation than just corrections in case somebody comes up with an unusual advocacy.

To refer to a singular criminal justice system in the United States is a bit misleading, because each individual state and the federal government have their own criminal justice systems, with a relatively small amount of overlap. It is unclear whether the resolution implicates only the Federal CJS or includes each State's criminal justice system as well. If we interpret the phrase “United States criminal justice system” to be a term of art picking out only the federal system, it is odd that “criminal justice system” is not capitalized. The proper noun “United States” is not possessive. Importantly, most criminal law happens at the State level, making a resolution purely about the federal system rather circumscribed.

On the other hand, debating exclusively about the federal system has advantages. It prevents Affs from adopting obscure single-state advocacies. Federal sentencing guidelines and other such statements of official policy are reasonable proxies for determining the motivating philosophy for federal penal policies, as opposed to the myriad of confusing and inconsistent State policies. And, the federal government has a significant role in drug prosecutions, an

especially relevant kind of criminal activity for the topic area. It would be prudent to prepare for both sides of these topicality issues.

## B. Rehabilitation

The concept of rehabilitation will be deployed in two different ways on this topic: (1) as a philosophy of punishment, and (2) in the form of particular plans for rehabilitation programs. These two aren't necessarily inconsistent, but they will signal the Aff's approach to the resolution.

### 1. Rehabilitation as a Philosophy of Punishment

Along with retribution, deterrence, and incapacitation, rehabilitation is often listed as one of the traditional justifications for punishing criminal acts. To say that rehabilitation is the underlying justification for the criminal justice system means that the primary purpose of our legal institutions is to reform criminals (especially habitual criminals) such that they are law-abiding and contribute to the life of the community.

There is literature to be found on a more broadly philosophical approach to this topic, i.e. to treat the topic as one philosophy of punishment versus another. Debaters drawing on this literature will focus less on the pragmatic instantiations of rehabilitation programs and more on the theoretical justifications for such an approach. This strategy creates some theoretical difficulty which I will discuss below.

### 2. Rehabilitation as a Correctional Program

There is much focus in the research about criminal corrections institutions on what kinds of interventions in the lives of offenders might prevent them from committing more crime. It is possible to agree on a theoretical level that rehabilitation ought to be a goal but nonetheless concede that a given rehabilitation system is inadequate or counterproductive. The affirmative might either say that on balance rehabilitation programs are net beneficial, or that a particular program is net beneficial. These advocacies are less concerned with the philosophy of punishment that motivates our penological policies and more concerned with whether particular programs or interventions should be adopted. Often they will be plans. Whether these interventions are consistent with some underlying philosophy of punishment is beside the point.

### 3. Implementation

There are a few things to keep in mind when thinking about what the Aff is implementing and how exactly they are doing it.

First, keep in mind the distinction between state and federal policies I mentioned above. There are both practical and theoretical reasons for this. As to the latter, you need to know what you're fiat-ing to avoid obvious theory objections. For example, if you're changing the penal philosophy in all 50 US states, be prepared to justify multi-actor fiat. As for practical reasons, you may be able to construct significantly more concrete link stories if you draw on evidence from a particular system rather than all systems generally. In any case, you will want to be deliberate about choosing a more philosophical or more policy-oriented position so that you can conscientiously prepare to address objections to that strategy or how to reconcile your approach with opponents taking the opposite tack.

Second, there are interesting questions about how a topical advocacy would be implemented. Typically debaters claim to fiat "normal means" to pass and implement their advocacies. The difficulty with this logic in the present topic is that correctional institutions and rehabilitation programs are notoriously underfunded and often unpopular. The Aff should think through whether it claims the power of durable fiat (that the programs will continue to be funded properly for some time) or whether it will simply claim that these programs are preferable even if they are underfunded down the road. Conversely, the negative should be prepared to either talk about the trade-offs that must happen when we fully fund rehabilitation programs (and perhaps to object to durable fiat on a theoretical level), or to make solvency indictments on the basis of under-funding and the unpopularity of rehabilitation programs with legislators and the public.

### C. Retribution

Retributivism is the view that the purpose of criminal punishment is to mete out just deserts. It is tied closely to the idea of proportionality – that punishment should be neither too harsh nor too lenient in relation to the offender's blameworthiness. It invokes a sort of economy of criminality whereby some crimes are more self-evidently heinous and therefore deserving of more severe punishment.

Theorists delineate varieties of retributivism on several theoretical grounds. A useful distinction to keep in mind is that between political retributivism and moral retributivism. The latter argues that there is an underlying moral justification for the political act of criminal punishment. It is ultimately the moral blameworthiness of the individual offender that justifies punishment. Political retributivism, on the other hand, generally relies on a kind of social contract logic to justify

punishment. Criminals have broken the rules to which they agreed as members of society. It is government's job to vindicate the social contract by exacting punishment on the offender. An alternative conception casts the criminal as a free-rider on the safety and stability created by social rules. Everyone else has forgone the ability to use violence or other unlawful force, but the criminal claims this advantage for himself. Only the threat of punishment can solve the free rider problem by ensuring that there is no payoff to cheating the system.

Retributivism is generally associated with harsher forms of punishment, but remember also that retributivism does not sanction disproportionate punishment. For that reason, the movement to "get tough" on crime is distinct from retributivism. It is possible to condemn increasing the severity of punishments on retributive grounds.

A final theory which most characterize as retributive is "expressivism." Expressivism is the idea that the purpose of punishment is to convey a message to the offender and society that condemns the criminal act. Sometimes this is described as a way to counter the message sent by the criminal that his victim is not worthy of individual respect.

#### D. Deterrence and Incapacitation

One challenge posed by the resolution is that it is apparently a false dichotomy. This is true for several reasons, but one of the more important is that deterrence and incapacitation are also widely recognized justifications for punishment.

Incapacitation is perhaps the most straightforward justification for the criminal justice system. Some people are determined to engage in criminal conduct, so we jail or execute them to protect others. It doesn't take any profound moral reflection or utilitarian calculating to figure out why Charles Manson needs to be in prison for the rest of his life.

Deterrence arguments come in two forms. *Specific deterrence* is the idea that individuals subjected to punishment will refrain from criminal conduct in the future for fear of further punishment. It is particular to the offender who suffers punishment. *General deterrence* is the idea that all individuals will refrain from criminal conduct for fear of punishment. In both cases, punishment is justified by the fact that it inspires sufficient fear that would-be offenders decide that the risk of being caught outweighs the advantages of committing crimes.

Does one side or the other get to claim these rationales? The answer is a bit unclear. Either rationale could be framed as an advantage, in particular of retribution. If a retributive approach

has harsher punishments, it may be better able to incapacitate or deter. Conversely, rehabilitation programs that, for example, imprison sex offenders until they demonstrate that they can live in society without reoffending might claim an incapacitation advantage.

A more problematic question is whether incapacitation or retribution could be an *advocacy* rather than an advantage. Does the negative have to advocate retribution, or may they merely attack the validity of rehabilitation? The more the Aff specifies what it will defend, the more it seems fair for the negative to simply advocate any competitive alternative (or the status quo). In a more broadly philosophical debate, it might be more plausible for the Aff to argue that the Neg must be more directly comparative between retribution and rehabilitation. That leads us directly to the next important phrase in the resolution.

#### E. Ought to be valued above

This is one of the more dicey phrases we get in resolution wording. There are at least three potential interpretive issues of which you should be aware.

##### 1. Topical Cases Should Trade-Off with Retributivism

The resolution seems to imply not just that the Aff advocate for a system of rehabilitation for criminal offenders, but also that that system be incompatible, at least to some extent, with a focus on retributive goals. In other words, when the Aff advocates a rehabilitative intervention, it must have retribution as an opportunity cost to be topical. On the one hand, the narrower the Aff plan, the more difficult it is to demonstrate a meaningful tradeoff with retributivism. On the other hand, it's tough to imagine a rehabilitative advocacy that doesn't trade off to some extent, however small, with the goal of giving someone his just deserts. Be cautious if you want the resolution to simply be a referendum on rehabilitation not to forget this dimension as well.

##### 2. Shifty Whole-Rez Aff Cases

A classic maneuver of shifty Affirmatives on topics like this is to try to delink all Neg offense by claiming that valuing A over B does not wholly eliminate B. In other words, just because we value rehabilitation over retribution doesn't mean we get rid of retribution entirely. The devil is in the details with this kind of argument. Without adequate specification in the AC, this claim more often than not simply represents a shift in the Affirmative advocacy. Even bolder Aff debaters (or one's who don't know better) will just flat out claim that any advantage the neg can claim would just be an instance where we would use retributive methods rather than rehabilitative ones. Negatives

obviously have to call out this abuse for what it is. Before you even get there, be especially insistent that Affirmatives clarify their advocacy in cross-examination.

### 3. Balance Negatives

This argument is so retro it makes me want to do *The Hustle*, but I have no doubt we'll see it from time to time on this topic. The basic idea of a balance neg is to say that we should value the things the resolution presents to us equally rather than valuing one above another. That's a neat trick, because it essentially gives the Negative permission to shift or tailor its advocacy so as to garner every advantage in the round. For obvious reasons it's an evasion of the central question of the resolution and abusive as all get-out.

There are actually two ways such a position could manifest itself on this topic. The first would be to say that rehabilitation and retribution should be valued equally and used depending on what is situationally appropriate. This type of advocacy might even be expanded to encompass all the different major rationales for punishment. A second way of making this argument is to claim that offenders *deserve* rehabilitation for various reasons, and so arguments that seem like Aff args (rehabilitation good) are actually Neg args because retributivism is about giving people what they deserve.

Both types of cases are likely to get the stink-eye from judges, but you still need to prepare answers to give these arguments the grand send-off they so richly deserve.

## **Affirmative Positions**

### A. Utilitarianism over Retribution

A longstanding debate in penological theory asks whether the purpose of punishment is to serve society as a whole by maximizing happiness or whether it is to give the offender what she deserves. Many affirmative cases will start with the essential premise that the purpose of government is to protect the interests of society as a whole. Absent some social benefit like reducing crime, inflicting punishments only increases the net balance of pain and suffering in the world.

Retributivism, they will argue, is problematic on a number of grounds. It is not clear how it is that we decide what constitutes a proportional punishment once we abandon the biblical "eye for an eye" approach. Moreover, it seems especially problematic in an increasingly pluralistic, modern,

liberal state that the government should take on a role as moral arbiter meting out punishments for morally blameworthy conduct. How do we square this with the fact that much morally blameworthy conduct, like committing adultery, is generally not illegal, precisely because it doesn't have a significant impact on society as a whole?

#### B. Recidivism

The most directly consequential impact in most cases will be recidivism. An enormous proportion of all crime is committed by habitual offenders: people who commit crime over and over again. This is called "recidivism." In the 1970s the idea that "nothing works" when it comes to criminal rehabilitation inspired an increasing turn to more punitive responses to crime, but there is pretty significant empirical evidence to show that at least some rehabilitation programs work pretty well.

Recidivism impacts will be used as an internal link to a variety of broader impacts, including economic impacts, over-imprisonment issues, community building, racial bias in law enforcement, etc. It will be important for Affirmatives to prepare to compare the strength of this link to the deterrence impacts that many Negatives will likely be claiming. Also remember that solvency for this advocacy will depend to some extent on what program the Affirmative claims to implement and whether it receives adequate funding.

#### C. The Failure of "Get Tough"

The movement to get tough on crime is ever popular among politicians, but there is good reason to think it has failed miserably. Harsher and longer prison sentences have increased recidivism. At the same time such approaches have disproportionately affected the socioeconomically disadvantaged and people of color, often contributing to the economic and social breakdown of inner-city communities. We now have many punishments on the books that seem wildly disproportionate to the severity of the crime, especially for certain drug crimes. The War on Drugs, perhaps the crowning achievement of the Get Tough movement, is an utter failure. The confluence of these types of arguments constitutes a fairly compelling Affirmative position.

#### D. Offender Responsibility

An alternative route is to argue that for a variety of reasons many offenders aren't wholly responsible for their crimes, and so a purely retributive response is unwarranted. For example, many crimes are partially caused by mental illness or drug and alcohol addiction. Rehabilitation might be particularly effective in such instances, and in any case it might be a more fair social

response than pretending that they were fully rational choice-makers and punishing them accordingly.

Additionally, you might argue that there are many social causes of crime that *are* society's fault. For instance, we know that there is a correlation between socio-economic status and propensity to commit certain crimes. If that is true, mightn't there be a social obligation to acknowledge that responsibility and try to redress it rather than punish the offender as if he alone were responsible for his choices?

#### E. Self-Realization

Some positions will argue that rehabilitation is a good in and itself, not for utilitarian reasons. These positions will posit that the role of society is to support individuals in ways that enable them to realize their potential and live a meaningful life with others in the community. If that is true, then rehabilitation may be preferable to retribution because these are pretty explicitly the goals of such programs.

### **Negative Positions**

#### A. Retributivism over Utilitarianism

Many Negatives will jump onto the other side of the debate I mentioned above. Utilitarianism as a philosophy for punishing crime has defects of its own. For starters, it can produce some very counter-intuitive results. For example, if a person who has not yet committed any crime would nonetheless be less likely to do so in the future by receiving rehabilitation services from the state, should we force him to do so? If deterrence is a reason for criminal conduct, wouldn't we be justified in punishing the innocent if doing so would scare others in society enough to refrain from criminal actions? Or in meting out extremely disproportionate punishment? It seems like an offender's moral blameworthiness is somewhat important to us, even if that offends liberal neutrality between moral world views.

Retributivists argue that utilitarians treat offenders as a means to the end of improving society for others, and that this might disrespect their innate worth. Similarly, many worry that rehabilitation programs fail to respect offenders as autonomous choice-makers. This is both because such programs often assume that there are social (or "heteronomous") reasons for criminal conduct and because such programs may seek to "re-educate" the offender so as to make more socially acceptable choices.

## B. Deterrence and Incapacitation

As indicated above, retributive policies have a plausible claim that they garner the advantages of deterring more crime (because their punishments tend to be more severe) and perhaps more effectively incapacitate criminals. Just how much of this is unique to negating will be the primary subject of many debates, but these are reasonable utilitarian advantages for the Neg to claim.

## C. Due Process and the Rule of Law

A further concern with rehabilitation models is that they are sometimes difficult to reconcile with due process rights. When one receives medical treatment, you spend as much time as is needed to “cure” the problem. In the context of interventions into the lives of offenders, however, such an approach would seem to run afoul of some very important political rights. For starters, indefinite detention (imprisoning someone for as long as the state thinks is best) is notoriously liable to abuse by the government. The dramatic example of this in recent years is Guantanamo Bay.

Additionally, a foundational premise of the rule of law is the principle of legality: laws and criminal punishments should be settled, standing, and readily knowable before one can be convicted of a crime. In other words, it is only fair to punish someone if they understood that what they were doing was wrong and what the consequences would be. For example, most of us would consider it unfair if we were told that a parking violation would result in 10 years imprisonment, or that we would be in prison for as long as a government therapist thought we exhibited anti-social tendencies. In these ways, rehabilitation programs might violate some important political principles.

## D. Critical Positions

In criminal justice topics it is relatively common to see some critical positions. Two major arguments come to mind.

First, there is the classic biopower position. Michel Foucault and like-minded philosophers describe biopower as a mode of social control whereby the subject is normalized by disciplinary techniques and by classification and regulation. Foucault famously invokes Jeremy Bentham’s Panopticon, a prison design wherein prisoners conform their conduct to the rules because they never know if they are being watched. Many rehabilitation programs can be accused of trying to reshape the subject in this way, not so that he feels afraid of punishment but so that he actually

wants to live a “normal” life. Many theorists find this kind of power offensive and dangerous – a license for the state to reshape the way we think of ourselves in the name of the collective health of the society. Obviously this all has very totalitarian overtones, which may or may not be justified by the actual practice of rehabilitation.

Second, we will likely see Critical Legal Studies (CLS) positions. CLS authors believe that the ideological underpinnings of legal policy are arbitrary and unjustified. They often claim that legal reasoning is just a way to legitimize social control and coercion and to serve powerful interests. They observe, for example, that there are legitimate interpretations on both sides of many legal dilemmas if only one uses the correct vocabulary and set of metaphors to defend it. CLS authors often engage in a method known as “trashing,” the object of which is not to propose alternatives but rather to unmask legal reasoning and expose its arbitrariness. For obvious reasons these types of criticisms will be applicable on any legal topic; be prepared when making legal arguments to defend against CLS arguments.

### **Conclusion**

Whether this topic is big enough to remain interesting until May is yet to be seen, but from my initial research there appears to be a fairly significant literature base. Jump in, be creative, and have fun!

## Topic Analysis by Nate Zerbib-Berda

This year's January/February topic represents a fundamental conflict in the criminal justice system. Ideally the criminal justice system could both punish criminals while rehabilitating them to become productive members of society, but retribution can often harm rehabilitative efforts and vice versa. Valuing retribution over rehabilitation can have a significant impact over our judicial system, the persons within the system and society as a whole. Furthermore this topic will discuss state power, how and when the state may exercise power within the judicial system, and what checks and protection are necessary are on the state. There is also an inherent conflict between the rights of individuals within the justice system and the protection of society and government legitimacy as a whole.

### Part 1: Key Terms of the Resolution

#### A. "Rehabilitation"

Rehabilitation is the first word in the resolution and sets the affirmative ground for the debate. Black's Law Dictionary, the leading source for legal terminology, defines rehabilitation as "The process of seeking to improve a criminal's character and outlook so that he or she can function in society without committing other crimes."<sup>28</sup> This is certainly a broad definition that is open to interpretation, but the focus of rehabilitation should be to prevent recidivism rather than to punish the criminal for their actions. Rehabilitation has a different meaning depending on the context of the crime, specifically rehabilitation for drug offenses will operate very differently than a rehabilitation program for violent crimes. There is an important psychological element to rehabilitation as well, many persons in the justice system are individuals with disabilities and chronic health conditions that can influence decision-making, functional abilities, and their ability to integrate and participate within society once they are outside the justice system. Rehabilitation can include psychological and psychiatric care, clinical consultation, as well as the development of public policy and advocacy related to persons with health and mental conditions within the system. Rehabilitation can be as broad as an overall focus to train prisoners for integration in society, and as specific as methadone clinics for heroin offenders. How you interpret and define this term of art will frame the debate in various ways.

#### B. "Valued"

While "ought" will be defined in many debates, different strategies for defining and limiting what "ought" means have been discussed repeatedly in topic analysis books. Instead, the word "valued" may have an important role is defining what action and/or actors are within the scope of

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<sup>28</sup> Black's Law Dictionary (9th ed. 2009), rehabilitation

affirmative ground. In LD we have a values debate, but this debate is often overlooked and almost always undefined. This topic should force debaters to discuss what it means to value a certain philosophy, idea or action over another. There will also be a discussion over how to determine or prioritize a value within the criminal justice system, more specifically what action is necessary or required to “value” something over another. It’s likely that no action is possible to affirm the resolution; one can value a philosophy or idea without doing anything about it. It’s possible for an ordinary citizen to value an approach to the criminal justice system without ever entering that system or influencing it. Conversely, one can make the argument that in order for rehabilitation or punishment to be valued within the criminal justice system that action and policy measures must be taken. In this sense debaters can equate “valued” with “prioritized” as it has been seen in other resolutions. One can make the argument that to value an idea without action is not placing value in that idea. If value implies worth, then it may also imply a benefit received from that valuation.

C. “Retribution”

Retribution will likely determine the negative ground for the debate when adopting a comparative worlds approach to the resolution. Black’s Law Dictionary defines retribution as “Punishment imposed as repayment or revenge for the offense committed.”<sup>29</sup> The safest interpretation of retribution is to equivocate the term with punishment, indicating the focus of the criminal justice system is to punish those who broke the law. Retribution is an important concept in criminal law, many legal experts have argued the purpose of the justice system is solely to enforce and protect the laws that currently exist by ensuring just punishment if they are broken. Often this is a simpler approach in that advocating for retribution might not need to look to the future consequences or impacts affecting society as a whole. Negatives can view retribution through a moral lens, or as a necessary deterrent. What retribution consists of will also likely be an issue in rounds, there are numerous punishments for numerous crimes, and the lined between punishment and rehabilitation is often blurred.

D. “United States criminal justice system”

The United States criminal justice system means different things to different people, and what the system encompasses has various interpretations as well. Black’s Law Dictionary defines the criminal justice system as “The collective institutions through which an accused offender passes until the accusations have been disposed of or the assessed punishment concluded. The system typically has three components: law enforcement (police, sheriffs, marshals), the judicial process (judges, prosecutors, defense lawyers), and corrections (prison officials, probation officers, and

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<sup>29</sup> Black’s Law Dictionary (9th ed. 2009), retribution

parole officers).”<sup>30</sup> This definition is encompassing and can benefit both debaters from the amount of ground it provides in discussing the resolution. Debaters can choose to focus on one area, for example the judicial process, and argue that prioritization or rehabilitation or punishment in one area of the system is enough to affirm or negate the resolution. For example arguments valuing rehabilitation within prisons will be very different than arguments rehabilitation at the law enforcement level. What strategy you choose will depend on your case and what you want to argue, but the “system” is extremely broad and encompassing, and there is extensive literature focusing on rehabilitation and punishment at every step of the judicial process.

## **Part 2: Affirmative Strategies**

### **A. Societal Welfare**

The thesis of a case promoting social welfare on the affirmative is that valuing rehabilitation in the criminal justice system will benefit society as a whole. The affirmative position in this case is that the role of the criminal justice system should be to reduce and prevent future crime, while ensuring that criminals are given a second chance to be contributing members of society. This position can conflict with the idea of just punishment, while affirmatives can certainly advocate just punishment when it applies, when punishment conflicts with rehabilitation the priority should be rehabilitation because this will best benefit society. An argument should be made as to the inequity that currently exists in our society and how that affects the criminal justice system. Persons in the justice system are often uneducated and poor; they are often a product of their environment and live in areas with high crime. Racial minorities are disproportionately represented in the criminal system, and there are institutional biases and systems in place that specifically discriminate against minorities and the poor. By prioritizing rehabilitation the affirmative side can improve society as a whole by providing convicted criminals the tools necessary to become productive members of society. There are many utilitarian impacts to a case like this, rehabilitation can provide lower crime rates in crime laden neighborhoods, and rehabilitation can be effective in treating drug addiction and mental illness leading to less drug use in communities. Rehabilitation programs also frequently involve education programs as well, giving offenders opportunities to learn new skills and ensure that the transition back to public life is easier and lasting.

Many legal scholars argue that rehabilitation is the most effective means to reducing recidivism rates as well. This is especially true for drug offenses and other non-violent crimes. If a person is committing crimes because of a chemical dependency, chronic illness or psychological disorder, rehabilitation is that persons best chance at not committing another crime. There is extensive

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<sup>30</sup> Black's Law Dictionary (9th ed. 2009), criminal-justice system

literature, research and case studies that have all determined that rehabilitation can reduce recidivism rates very effectively for certain crimes and regions. If the goal of the justice system is to prevent crime, then rehabilitation ought to be valued over punishment as it has the best chance to cure the problem or disease that is causing the offender to break the law.

#### **B. Human Dignity**

Valuing rehabilitation over retribution within the criminal justice system can prioritize and value human dignity and worth over the idea of just punishment and deterrence. All humans have worth and dignity, and valuing rehabilitation shows an emphasize prioritizing that person's wellbeing and worth as a person over society's right to punish that individual. The criminal justice system has violated many rights unjustly in the past, issues such as police brutality, cruel and unusual punishment, mistreatment and abuse in prisons, and even the capital punishment of innocent persons convicted of capital crimes. One affirmative strategy is to discuss these rights violations and why valuing rehabilitation over punishment will lead to less rights violations and fair treatment of those in the system. Prioritizing rehabilitation can lead to better treatment of prisoners, as well as reduction of sentences and less demeaning punishments. This argument is exacerbated when applied to drug and non-violent crimes, and is strengthened by the fact that many criminals are a product of their environment and might not be fully culpable for the crimes they committed.

Furthermore, valuing rehabilitation over retribution sends a clear message that the state prioritizes helping criminals solve their problems and allowing them to become productive members of society. Valuing rehabilitation recognizes the individual worth we have and acknowledges that even convicted criminals deserve a second chance at turning their life around and are capable of contributing to their communities. Providing second chances acknowledges that the convict has some inherent worth and that all persons have the capacity for moral good. Not only does rehabilitation inherently demonstrate persons have worth, but it also provides necessary hope to the offender going through rehabilitation. The prospect of a second chance and the means to overcome addiction and disease demonstrates to the offender that they have worth, and more importantly allows the offender to believe that rehabilitation is attainable.

#### **C. Overcrowding Prisons**

Prison overcrowding is at an all-time high. The United States imprisons more people than any other nation in the world. The rates of minority incarceration are disproportionate. The United States has attempted to make more arrests to reduce crime rates, and both federal and state jails are experiencing record high populations. Overcrowding in prisons has become a significant crisis. This means that prisoners that might deserve or ought to see the end of their punishment are being released early, which perpetuates the cycle of crime. Criminals that have not been

rehabilitated or have not been punished justly are being released to make room for more criminals, leading to recidivism and exacerbation of the overcrowding problem.

Not only does overcrowding ultimately lead to more crime, but also poses an enormous fiscal challenge for the state. Maintaining and running a prison is extremely expensive, and as crime rates continue to rise there is an even greater need for space in prisons. Promoting rehabilitation can reduce costs for prisons because sentences will be shorter, non-violent offenders will not necessarily need to be incarcerated, and there will be less recidivism due to the rehabilitation. If rehabilitation works then there are less criminals committing crimes and less of a need for prisons and prison space. This will reduce the amount spent on incarcerating criminals, and reduce overcrowding. There are fiscal reasons to prioritize rehabilitation, and ultimately it can solve one of the biggest problems of the modern criminal justice system. Additionally reducing overcrowding in prison can promote rights as prisoners are less likely to be mistreated by both guards and other inmates. Guards will also see more security and a safer work environment if prisons are not overcrowded. This can lead to less crime within prison, and better protection of prisoner's rights and safety. Finally, as overcrowding is one of the biggest financial burdens to the justice system, rehabilitation can help promote and further additional rehabilitative efforts. Even if the negative is true on balance, there are still some offenders that either need rehabilitation or would benefit substantially from it, and prison overcrowding takes resources away from rehabilitative efforts. On the affirmative it is possible to value rehabilitation and still punish criminals, but when you negate there may not be enough money for any rehabilitation.

**D. Punishment does not fit the crime.**

There are many criminal offenses within the justice system where rehabilitation is a much more practical and sensible option than retributive punishment. One affirmative strategy is to claim that within the criminal justice system, retributive punishment simply does not fit the crime. This effectively can turn just punishment arguments, but also argue that rehabilitation is the more appropriate response and thus ought to be valued. Non-violent crimes will almost certainly fall under the scope of this argument as there is less of a need for retributive punishment in that scenario. Drug offenses will be the strongest argument for rehabilitation as there is a chemical dependency that must be treated within the offender in order to prevent recidivism and future drug abuse. Many scholars now claim that the "War on Drugs" that began in the 1980s and still prevalent today has been a failure. Incarcerating offenders for drug possession and use has not reduced crime rates nor reduced recidivism, and rehabilitation has gained consistent support for treating drug users above retributive punishment. As drug addiction is a disease and the mind is chemically dependent on the substance, incarceration does not prove to be a deterrent and often has a negative effect on the prisoner. Furthermore drugs affect the brain in a way that drug

offenders may be less culpable than criminals that had the specific intent to commit a crime. If drug users are less culpable for their actions due to addiction, it would demonstrate retributive punishment does not fit the crime and ultimately leads to more crime and drug abuse.

### **Part 3: Negative Strategies**

#### **A. Just Punishment**

The negative can argue that retributive punishment is necessary in order to achieve justice, specifically the idea that the punishment must fit the crime. If an offender has committed a crime and harmed specific persons or property then justice requires they be punished for that crime. The negative should argue that society needs the prospect and actuality of punishment in order to uphold and maintain order in society. This also has social welfare and utilitarian impacts as just punishment provides legitimacy to the state and its ability to enforce its laws. Furthermore retributive punishment is necessary to both protect and provide justice to the victims of crimes, as it would be unfair for one member of society to be harmed without consequence. The negative should argue that victims should not be victimized even further by not seeing justice dispensed through the system, and also bear the costs of rehabilitating the person that harmed them. This can be justified under both a deontological as well as a consequentialist framework. You can also argue from a moral perspective, that persons who act immorally should receive punishment for those actions, and this increases and perpetuates moral actions within society. Another justification for retributive punishment can fall under the social contract. As criminals have violated their end of the social contract by violating the laws of society, the state has the obligation and authority to punish those criminals not only to uphold their end of the social contract with that individual, but also to uphold the social contract with the rest of society by ensuring their protection and safety.

#### **B. Deterrence**

The deterrence argument for retributive punishment is a simple but effective argument. A strong retributive punishment can have the effect of deterring future crime and reducing recidivism. The deterrent of punishment has an effect both on the offender who desires not to return to prison, but also there is an impact on the general public as they see the consequences for breaking the law. General deterrence uses the person sentenced as an example to influence the public to refrain from criminal conduct, as specific deterrence punishes the offender to dissuade that offender committing additional crimes in the future. This can have a significant impact on the rest of society and can reduce crime greatly in some areas of the law. Studies have shown the deterrent effect has succeeded, especially for capital offenses and offenses that can be punished with life sentences. The three strikes law in California, in which repeat offenders are given life sentences

after their third felony offense, has had a powerful deterrent effect and reduced recidivism among repeat felons.

**C. Accountability**

The negative also has the benefit of being able to hold offenders responsible for their crimes, increasing accountability both in the individual offender and throughout society. This argument is predicated on the idea that humans have free will and offenders consciously made a choice to violate the law, and thus the offender should be held responsible for their actions. Not only does this achieve the benefits of both just deserts and deterrence, but also can have the impact of making individual choices more meaningful because the decisions have consequences that impact the decision maker. Retributive punishment enforces the idea of free will and promotes the idea that individuals should be held responsible for their actions. This has a moral impact as well, as retribution forces offenders to be held morally accountable for their actions and to consider the moral weight of their decisions. Without retributive punishment moral responsibility and accountability is not considered in the decision making process. By holding offenders responsible and account for their actions

Additionally, retributive punishment holds the state accountable in ensuring the state fulfills its primary role of protecting its citizens and society. The basis of the social contract is protection, and thus a state's first obligation should be to protect and promote the safety of its people. Laws are created to provide order and stability to society, and when they are broken without punishment the state is not being held accountability in its role of enforcing laws and protecting citizens. Retributive punishment provides legitimacy to state because the state is fulfilling its purpose, but also because retributive punishment keeps the state accountable in enforcing its laws.

**D. Rehabilitation is ineffective.**

Another important negative strategy is to question the effectiveness of rehabilitation and its effects, especially if the affirmative argues a specific plan or rehabilitative approach. Many scholars have argued that the American penal system specifically has failed to rehabilitate prisons, and that the effectiveness of rehabilitation is less than publicly perceived. Recidivism rates for drug offenders are very high, and many rehabilitative efforts fail. Rehabilitation may not be appropriate for many offenders, and can often take years if not decades to have a lasting effect on the offender. Furthermore not all states or prisons have the resources for rehabilitation, and many only have resources for a small and specific sect of the prison population. The negative can argue that retributive punishment should be valued above rehabilitation due to the impracticality and high costs of rehabilitation, even while allowing rehabilitation in small numbers

where appropriate. The negative can also argue that retributive punishment should be valued while offenders are in the justice system, but rehabilitation can be prioritized after their sentence is complete. In this way negatives can achieve many of the benefits of rehabilitation and the affirmative case once offenders are out of the system, while also prioritizing retributive justice and upholding state legitimacy while offenders are being punished by the state.

## FRAMEWORK EVIDENCE

### MARK LIPSEY DEFINES REHABILITATION

Lipsey, Mark W. [Institute for Public Policy Studies, Vanderbilt University] and Francis T. Cullen [Division of Criminal Justice, University of Cincinnati]. "THE EFFECTIVENESS OF CORRECTIONAL REHABILITATION: A REVIEW OF SYSTEMATIC REVIEWS." Annual Review of Law and Social Science, vol. 3, 2007.

Rehabilitation treatment is distinguished from correctional sanctions by the centrality of interactions with the offenders aimed at motivating, guiding, and supporting constructive change in whatever characteristics or circumstances engender their criminal behavior or subvert their prosocial behavior. It is typically provided in conjunction with some form of sanction (e.g., incarceration or probation) but is not defined by that sanction and could, in principle, be delivered without any accompanying sanction. Cognitive behavioral therapy, for instance, involves exercises and instruction designed to alter the dysfunctional thinking patterns exhibited by many offenders (e.g., a focus on dominance in interpersonal relationships, feelings of entitlement, self-justification, displacing blame, and unrealistic expectations about the consequences of antisocial behavior; Walters 1990).

### SCHEID DEFINES RETRIBUTIVISM

Scheid, Don E. "Kant's Retributivism." *Ethics*, Vol. 93, No. 2 (Jan., 1983), pp. 262 – 283.

These two claims may be combined in what I shall refer to as the "Retributivist Principle": All and only those who commit legal offenses may justly receive punishments so long as the punishments are in proportion to the seriousness of the respective crimes.<sup>3</sup>

### SCHEID DISTINGUISHES BETWEEN TWO TYPES OF RETRIBUTIVISTS

Scheid, Don E. "Kant's Retributivism." *Ethics*, Vol. 93, No. 2 (Jan., 1983), pp. 262 – 283.

By "thoroughgoing retributivism" I shall mean any theory of punishment that embraces the Retributivist Principle and also adopts some retributivist (broad sense, i.e., non-crime-control) rationale as its general justifying aim. Some examples will help. One might claim (a) that the institution of punishment is its own justification, that the purpose of the institution is simply to implement the requirements of the Retributivist Principle. More often, however, the institution of punishment is seen as being instrumental in achieving an arrangement of things required by some principle of justice or deservedness, such as (b) that people who do bad things ought to suffer, or (c) that wicked people ought to suffer, or (d) that a proper balance of happiness and suffering must be maintained among people in proportion to their moral virtues and vices. Still another kind of general justifying aim is (e) that a certain equality of social advantages among citizens must be maintained, that a system of punishment is necessary to correct those extra advantages that criminals gain by breaking the law. Any one of these goals might serve as the general justifying aim in a theory of punishment, but none of these goals has anything to do with crime control. By contrast, "partial retributivism" is to mean a theory of punishment that also embraces the Retributivist Principle but adopts as its general justifying aim the control or reduction of crime (through deterrence, incapacitation, etc.). The ultimate aim may be to promote happiness (as in traditional utilitarian theories), or to insure personal liberty or some other good; but what will be common to all such goals is the contemplation of crime control.

## RECIDIVISM IS A HUGE PROBLEM IN THE UNITED STATES

Gabriel Hallevy [Prof. of Law, Ono Academic College], "The Recidivist Wants To Be Punished – Punishment as an Incentive to Reoffend," 5 IJPS 120 (2009)

In evaluating the volume of crimes committed by habitual offenders as a percentage of all crime committed using the same legal approach, it seems that the level of recidivism in the western world has reached alarming proportions, crossing both borders and legal systems. The prominent common statistic amongst western countries, regardless of the specific legal approach to the subject adopted, is that most criminal convictions involve habitual offenders, and as a result, the question of the impact of the recidivism factor on sentencing policy is not a trivial matter at all but one which is relevant to the majority of criminal convictions. A statistical survey carried out in 2002 by the American Justice Department throughout fifteen States of the Union and which monitored the behavior of 272,111 known criminals over a period of three years, revealed that the overall rate of recidivism in those states stood at 67.5%.<sup>16</sup> The survey in question also showed that of those taking part, 29.9% committed the subsequent offence within six months of completing the sentence imposed in respect of the first crime, 44.1% within one year of doing so, and 59.2% within two years. <sup>17</sup>

## THE IMPACTS OF RECIDIVISM

Wilson, Jane [Stanford's Strauss Scholar, developing educational programs for inmates in cities across the US.] Reducing Juvenile Recidivism in the United States, Roosevelt Review, 2007. <http://www.scribd.com/doc/19695235/Juvenile-Recidivism>

The effects of recidivism in the United States fall into four general categories. First, recidivism imposes tremendous public safety costs on American communities; high recidivism rates indicate additional victimizations (assuming that the crime for which the juvenile was arrested was in fact committed). Second, increased recidivism results in extremely destructive social costs; increases in violence, crime, homelessness, family destabilization, and public health risks are all associated with high recidivism rates. Third, recidivism imposes a considerable financial burden on the U.S. Department of Justice and, more generally, on American society; our government spends an annual sixty billion dollars on correctional programs. Fourth, high recidivism indicates a failure to provide meaningful rehabilitation for inmates reentering the community; recidivist juveniles lose out on crucial educational, social, and personal developments that can rarely be regained. Additionally, studies show that recurrent offenses during teenage years can provide a dangerous inculcation leading to adult criminality. The tragedy of this cycle of criminality cannot be understated.

## RETRIBUTIVISM AND UTILITARIANISM MAY NOT BE INCOMPATIBLE THEORIES OF CRIMINAL JUSTICE

Morris J. Fish [Justice, Supreme Court of Canada], "An Eye for an Eye: Proportionality as a Moral Principle of Punishment," *Oxford Journal of Legal Studies*, Vol. 28, No. 1 (2008), pp. 57–71

Hart refused to embrace a single theory of the justification of punishment. He argued that 'different principles . . . are relevant at different points in any morally acceptable account of punishment'.<sup>43</sup> Instead of seeking to identify one governing principle or overarching theory of punishment, Hart raised a series of distinct questions that invite different responses: 'What justifies the general practice of punishment? To whom may punishment be applied? How severely may we punish?'<sup>44</sup> The first question concerns the General Justifying Aim of punishment; the second and third, whom may we punish and how severely, are questions of distribution.<sup>45</sup> The failure to distinguish questions of General Aim from distribution, Hart suggested, lay at the root of many hollow disputes between Utilitarians and Retributivists.<sup>46</sup>

By disentangling these questions, Hart was able to marry foundational principles of punishment that until then had been thought incompatible. Utilitarianism and retributivism could live in harmony if we accept that the General Justifying Aim of punishment is Utilitarian, and that punishment should be distributed on a retributive basis.<sup>47</sup> That is to say, we can agree that the reason for having a penal system at all is the general betterment of society, rather than, as Kant would have it, because guilt cries out for punishment. And we can at the same time maintain with consistency that punishment should only be handed out to those who deserve it, and only to the extent of their guilt. On this view, the acceptance of a Utilitarian General Justifying Aim does not bind us to a crude Utilitarian theory of distribution, according to which persons might be punished out of proportion to their guilt, as a deterrent to others, or in an effort at rehabilitation. Accepting utilitarianism as the general justifying aim of punishment, we may still appeal to non-utilitarian theories to restrain its application.

**REHABILITATION CAN BE MOTIVATED BY UTILITARIANISM OR BY THE BELIEF THAT REHABILITATION IS A GOOD IN ITSELF**

Heidi M. Hurd [Prof. of Law and Philosophy, University of Illinois], "Expressing Doubts About Expressivism," 2005 U. Chi. Legal F. 405 (2005)

On a rehabilitation theory, punishment is justified if and only if it accomplishes a metamorphosis in the personality of the offender so as to make him a socially functional participant in the moral community.<sup>5</sup> The concern of the rehabilitationist is the moral transformation of the offender, and the roots of his theory concerning the justifiable goals of the criminal justice system lie deep in a perfectionist theory of legislation. On such a theory, the power of the state is properly directed toward the goal of perfecting persons morally. Perfectionists consider it legitimate for the state to enact legislation that will make us more virtuous and less vicious by nurturing in us charitable, kind, and courageous dispositions, and suppressing selfish, cruel, and bigoted dispositions. In the context of criminal law, this general political philosophy inclines theorists to the view that suffering can be justified if, but only if, it is motivated by the promise of improving the moral character of offenders.

It is crucial to be clear at the start that anyone who seeks to rehabilitate offenders because it will deter them from further wrongdoing and so make the rest of us safer, or because it will return them to the pool of productive, contributing citizens and so increase the wealth and well-being of all, is not a true rehabilitationist. Such a theorist is a utilitarian who conceives of the rehabilitation of offenders as an instrumentally effective means of maximizing social utility overall, but who is not principally interested in the moral welfare of the offender. In contrast, a true rehabilitationist is someone who takes the rehabilitation of the offender to be an intrinsic good, and who is prepared to sacrifice social utility in order to achieve that end.

### **META-ANALYSIS IS MORE RELIABLE THAN NARRATIVE STUDIES OF OFFENDER TREATMENT PROGRAMS**

Clive R. Hollin [Professor of Criminological Psychology, Centre for Applied Psychology, University of Leicester], "Treatment Programs for Offenders: Meta-Analysis, 'What Works,' and Beyond," *International Journal of Law and Psychiatry*, Vol. 22, Nos. 3-4 (1999) pp. 361-372

At an empirical level, one problem in the struggle between proponents and opponents of treatment lies in drawing a conclusive message from the research literature. In the field of offender treatment, there are hundreds of outcome studies of many different types of intervention, conducted in different settings, with different measures of "success." Applying the traditional narrative review to such a volume of outcome studies makes it very difficult, if not impossible, to draw a robust conclusion about the overall effect of rehabilitative programs (Gendreau & Andrews, 1990). If the question of effectiveness is refined further, to ask "what works, for whom, and under what conditions?" then the search for an answer becomes even more demanding. To illustrate the scale of the problem, Palmer (1996) has identified a range of interventions intended to reduce recidivism: thus, including both community and institutional programs, Palmer notes confrontation programs (i.e., deterrence), social casework, diversion from criminal justice, physical challenge, restitution, group counseling and therapy, individual counseling and therapy, family interventions, vocational training, employment, educational training, behavioral and cognitivebehavioral approaches, cognitive therapy, life skills training, multimodal programs, probation and parole enhancement, intensive probation supervision, and intensive aftercare (parole) supervision. Clearly, making sense of the research findings from such a diversity of approaches is a daunting review task when approached in the traditional manner.

The development of meta-analysis has provided an alternative to the narrative review in seeking to produce a standardized overview of a large number of empirical studies (e.g., Glass, McGaw, & Smith, 1981; Rosenthal, 1991). The application of meta-analytic methods to the offender treatment literature has precipitated a major reassessment of the "nothing works" position (Palmer, 1992).

### EMPIRICAL CIRCUMSTANCES MUST BE ACCOUNTED FOR BY MORAL THEORIES

Murphy, Jeffrie G. "Marxism and Retribution." *Philosophy and Public Affairs*, Vol. 2, No. 3 (Spring, 1973), pp. 217-243.

Now one of Marx's most important contributions to social philosophy, in my judgment, is simply his insight that philosophical theories are in peril if they are constructed in disregard of the nature of the empirical world to which they are supposed to apply.<sup>24</sup> A theory may be formally correct (i.e., coherent, or true for some possible world) but materially incorrect (i.e., inapplicable to the actual world in which we live). This insight, then, establishes the relevance of empirical research to philosophical theory and is a part, I think, of what Marx meant by "the union of theory and practice." Specifically relevant to the argument I want to develop are the following two related points: (1) The theories of moral, social, political and legal philosophy presuppose certain empirical propositions about man and society. If these propositions are false, then the theory (even if coherent or formally correct) is materially defective and practically inapplicable. (For example, if persons tempted to engage in criminal conduct do not in fact tend to calculate carefully the consequences of their actions, this renders much of deterrence theory suspect.) (2) Philosophical theories may put forth as a necessary truth that which is in fact merely an historically conditioned contingency. (For example, Hobbes argued that all men are necessarily selfish and competitive. It is possible, as many Marxists have argued, that Hobbes was really doing nothing more than elevating to the status of a necessary truth the contingent fact that the people around him in the capitalistic society in which he lived were in fact selfish and competitive.)<sup>25</sup>

## **AFFIRMATIVE EVIDENCE**

### *RECIDIVISM*

#### **RETRIBUTIVE POLICIES HAVE FAILED TO REDUCE RECIDIVISM; REHABILITATION PROGRAMS HAVE MARKEDLY REDUCED RECIDIVISM**

D. A. Andrews [Prof. of Psychology, Carleton University, Ottawa] and James Bonta [Ph.D, Director, Corrections Research, Public Safety Canada], "Rehabilitating Criminal Justice Policy and Practice," *Psychology, Public Policy, and Law*, Vol. 16 (2010), No. 1, 39–55

For over 30 years, criminal justice policy has been dominated by a "get tough" approach to offenders. Increasing punitive measures have failed to reduce criminal recidivism and instead have led to a rapidly growing correctional system that has strained government budgets. The inability of reliance on official punishment to deter crime is understandable within the context of the psychology of human conduct. However, this knowledge was largely ignored in the quest for harsher punishment. A better option for dealing with crime is to place greater effort on the rehabilitation of offenders. In particular, programs that adhere to the Risk-Need- Responsivity (RNR) model have been shown to reduce offender recidivism by up to 35%. The model describes: a) who should receive services (moderate and higher risk cases), b) the appropriate targets for rehabilitation services (criminogenic needs), and c) the powerful influence strategies for reducing criminal behavior (cognitive social learning). Although the RNR model is well known in the correctional field it is less well known, but equally relevant, for forensic, clinical, and counseling psychology. The paper summarizes the empirical base to RNR along with implications for research, policy, and practice.

### **A VARIETY OF PSYCHOLOGICAL FACTORS MAKE RETRIBUTION AN UNSUCCESSFUL APPROACH TO CRIME REDUCTION**

D. A. Andrews [Prof. of Psychology, Carleton University, Ottawa] and James Bonta [Ph.D, Director, Corrections Research, Public Safety Canada], "Rehabilitating Criminal Justice Policy and Practice," *Psychology, Public Policy, and Law*, Vol. 16 (2010), No. 1, 39–55

All of the above conditions consider only how punishment needs to be delivered to suppress behavior. They do not address characteristics of the person that may interact with the application of punishment. In situations where punishment is not delivered with immediacy and certainty, it may still be effective with certain types of people. For example, those who are futureoriented and evidence good self-monitoring and regulation skills can make the connections between the behavior and the negative consequences that may occur days, weeks, or months later. However, many offenders are impulsive (Gottfredson & Hirschi, 1990) and underestimate the chances of being punished (Piquero & Pogarsky, 2002). There is even some evidence that punishment can lead to increased offending through operation of the "gambler's fallacy." That is, "if I was punished now then it is unlikely that I will get caught and be punished again" (Pogarsky & Piquero, 2003). In addition, applying "maximum" punishment can have undesired consequences ranging from learned helplessness (Seligman, 1975) to retaliatory aggression (McCord, 1997). The long and short of all of this is how can one possibly expect that a policy centered on punishment can reduce criminal behavior?

## **THE EMPIRICAL EVIDENCE OVERWHELMINGLY SUPPORTS THE EFFECTIVENESS OF REHABILITATION PROGRAMS**

D. A. Andrews [Prof. of Psychology, Carleton University, Ottawa] and James Bonta [Ph.D, Director, Corrections Research, Public Safety Canada], "Rehabilitating Criminal Justice Policy and Practice," *Psychology, Public Policy, and Law*, Vol. 16 (2010), No. 1, 39–55

There were two significant developments that appeared in the 1980s that began to consolidate the conclusion that treatment can be effective in reducing recidivism and significantly so. First, there was the development of meta-analytic techniques to summarize in a quantitative fashion the large treatment literature that was estimated to number close to 500 studies by 1990 (Andrews & Bonta, 2006). In 1989, Lipsey () reviewed 400 treatment studies of juvenile delinquents, yielding 443 effect size estimates. He found that treatment, on average, had a 10% reduction on recidivism. However, when controls for methodological (e.g., sample size, attrition) and treatment variables (e.g., duration, evaluator involvement) were introduced, there was a 30% reduction in recidivism. Since Lipsey's (1989) landmark meta-analysis, 40 meta-analyses have confirmed the overall effectiveness of offender treatment (McGuire, 2004).

**RISK-NEED-RESPONSE REHABILITATION PROGRAMS DRAMATICALLY LOWER CRIME COMPARED TO PUNITIVE POLICIES AND OTHER REHAB PROGRAMS**

D. A. Andrews [Prof. of Psychology, Carleton University, Ottawa] and James Bonta [Ph.D, Director, Corrections Research, Public Safety Canada], "Rehabilitating Criminal Justice Policy and Practice," *Psychology, Public Policy, and Law*, Vol. 16 (2010), No. 1, 39–55

Specific support for the principles of effective treatment was found in a meta-analysis by Andrews et al. (1990). This review differed from Lipsey's earlier review (1989) in two important ways. First, the meta-analysis by Andrews, Zinger, et al. (1990) included studies of adult offenders and it was not limited to juvenile offenders. Second, and more important, the focus was on testing the RNR principles rather than uncovering the methodological characteristics of effective rehabilitation programs. It was hypothesized that program adherence to the three principles would be strongly associated with reduced recidivism. A review of 80 studies yielding 154 effect size estimates found a significant relationship between level of adherence to the RNR principles and reduced recidivism. Adherence to all three principles had a mean effect size (phi coefficient) of .30 whereas treatment programs that failed to attend to any of the principles actually showed an increase in recidivism (phi .06). As expected, criminal justice sanctions (i.e., punishment) also failed to demonstrate reduced recidivism (phi .07).

The initial findings on the importance of the RNR principles have subsequently been confirmed by a number of reviews. In 2006, Andrews and Bonta reported on the results from 374 tests of the effects of treatment and criminal justice sanctions. The mean effect size ( $r$ ) for providing any type of human service was .12 (95% CI .09, .14;  $k$  273) while for criminal justice sanctions the mean effect size was .03 (CI.05, .03;  $k$  101). If we apply Rosenthal's Binomial Effect Size Display, then delivering human service yields a 12 percentage- point difference between the treatment and the control group. In other words, if any criminal justice policy will work in reducing recidivism it is a treatment-based policy rather than a punishment-based policy.

**REHABILITATION PROGRAMS ARE CAPABLE OF REDUCING RECIDIVISM; PUNISHMENT-ORIENTED PROGRAMS FAIL**

Francis T. Cullen [Professor of Criminal Justice and Sociology, University of Cincinnati], "It's Time to Reaffirm Rehabilitation," *Criminology & Public Policy*, 5 (2006): 665–672

First, there is a growing body of evidence—now at the point of being virtually incontrovertible—that offender treatment programs that conform to the “principles of effective intervention” are capable of achieving meaningful reductions in recidivism among high-risk juveniles and adults. The corollary finding is that punishment-oriented programs are decidedly ineffective in undercutting reoffending (see, e.g., Cullen and Gendreau, 2000; Cullen et al., 2002b; Greenwood, 2006; Lipsey, 1999; MacKenzie, 2006; Maguire, 2002; see also Farrington and Coid, 2003). Of course, transferring treatment technology to agency settings and ensuring appropriate program implementation are daunting tasks (Cullen and Gendreau, 2000). Still, we now have ample reason to reject the idea that “nothing works” and to support systematic efforts to change offenders—whether they are children, juveniles, or adults.

**REHABILITATIVE MODELS FOR PUNISHMENT CAN ACCOMPLISH SOME MEASURE OF INCAPACITATION AND REDUCE RECIDIVISM BETTER THAN RETRIBUTIVE MODELS**

Francis T. Cullen [Professor of Criminal Justice and Sociology, University of Cincinnati], "Making Rehabilitation Corrections' Guiding Paradigm," *Criminology & Public Policy*, Vol. 6, No. 4 (2007): 717-728

Locking up over 2 million offenders is bound to prevent some crime (Spelman, 2000; but see Currie, 1998; Lynch, 2007). But this is not a prima facie case for the punishment paradigm. First, under rehabilitation, incapacitation effects also would occur (as well as general deterrent effects because offenders would receive a state sanction). It is just that through offender assessment, the goal would be to limit the use of incarceration to high-risk offenders and not to sweep offenders indiscriminately into the nation's prisons. Second, beyond incapacitation, the punishment paradigm has no empirical case that its "get tough" strategies specifically deter offenders. Ironically, despite its "we-are-for-the-victims-and-you-are-not" rhetoric, this approach poses a threat to public safety.

### **MANY STUDIES SHOW THAT PUNITIVE APPROACHES TO PUNISHMENT INCREASE RECIDIVISM**

Francis T. Cullen [Professor of Criminal Justice and Sociology, University of Cincinnati], "Making Rehabilitation Corrections' Guiding Paradigm," *Criminology & Public Policy*, Vol. 6, No. 4 (2007): 717-728

Indeed, the empirical literature is damning of punishment-oriented interventions. There is growing evidence that imprisonment is related to higher levels of recidivism (Chen and Shapiro, 2007; Gendreau et al., 2000; Nieuwebeerta et al., 2006; Petersilia et al., 1986; Sampson and Laub, 1993; Smith, 2006; Spohn and Holleran, 2002; see also Doob and Webster, 2003). Even clearer, a relatively voluminous, often experimental, set of studies demonstrates that control-oriented intensive supervision, scared straight, and boot camp programs have no overall impact on recidivism (Cullen et al., 2005; Cullen et al., 1996; Howell, 2003; Lipsey, 1999a; MacKenzie, 2006; MacKenzie et al., 2001; Petersilia and Turner, 1993; Petrosino et al., 2003). Of course, there is a reason why these interventions fail: They are based on a limited theory of crime (rational choice) and do not target the known proximate risk factors for reoffending (Andrews and Bonta, 2006).

**THERE IS A GROWING BODY OF EVIDENCE SUPPORTING THE IDEA THAT  
REHABILITATION CAN BE EFFECTIVE IN REDUCING RECIDIVISM**

Francis T. Cullen [Professor of Criminal Justice and Sociology, University of Cincinnati], "Making Rehabilitation Corrections' Guiding Paradigm," *Criminology & Public Policy*, Vol. 6, No. 4 (2007): 717–728

The good news is that a small but growing group of scholars has been working to document that rehabilitation programs can be effective (Cullen, 2005). Through the use of meta-analyses that survey the studies in the area, they show that rehabilitation programs achieve meaningful reductions in recidivism (Lipsey, 1999a; Lipsey and Cullen, 2007; MacKenzie, 2006; McGuire, 2002; Palmer, 1992; Petrosino, 2005; cf. Petrosino and Soydan, 2005). Most promising, an evolving theory of rehabilitation details the "principles of effective correctional treatment" (Andrews and Bonta, 2006; Gendreau, 1996). Programs based on these principles have been shown to achieve high reductions in reoffending (Andrews and Bonta, 2006; Andrews et al., 1990; Cullen and Gendreau, 2000; Gendreau et al., 2006).

This is not an occasion for heady optimism. The challenge still exists to transfer the "technology" of effective offender change to correctional agencies and to sustain such programs in organizational contexts that may lack human and economic capital (Cullen and Gendreau, 2000; Petrosino and Soydan, 2005; Latessa et al., 2002; Lin, 2000). Even so, there is increasing knowledge about how to change offenders and numerous demonstrations in real-world settings that treatment programs can be effective (Lipsey, 1999b; Lowenkamp et al., 2006). Although mentioned only in passing here, there is also increasing evidence of the effectiveness of early intervention programs (Farrington and Welsh, 2007; Greenwood, 2006; Howell, 2003). This finding suggests the possibility of building a coherent system of intervention that offers a continuum of care that extends from the prenatal period into adulthood.

In short, it simply is not accurate criminologically that "nothing works" to change offenders. Life-course research reveals that offenders have the potential to redirect their behavior along a prosocial pathway (Giordano et al., 2002; Laub and Sampson, 2003; Maruna, 2001). The extant rehabilitation scholarship shows that such change not only occurs fortuitously in natural settings but also can be achieved through carefully planned, criminologically informed interventions. We know as well that in bringing about offender reformation, rehabilitation is our "best bet"; indeed, the alternatives—doing nothing or punishing offenders—are certain failures.

## REHABILITATION IS EFFECTIVE AT REDUCING CRIME

Illescas, Santiago Redondo [Universidad de Barcelona], Julio Sanchez-Meca [Universidad de Murcia], and Vicente Garrido Genoves [Universidad de Valencia]. "Treatment of Offenders and Recidivism: Assessment of the Effectiveness of Programmes Applied in Europe." *Psychology in Spain*, 2001, Vol. 5, No. 1, 47-62. <http://www.psychologyinspain.com/content/reprints/2001/6.pdf>.

The present study explored the effectiveness of a set of treatment programmes for offenders applied in European countries in the course of a decade. In terms of correlation coefficient, mean effect size for the 32 programmes assessed was  $r+ = 0.120$  [meaning]. This result means that moderate effectiveness was obtained, on average 12% ( $r+ = 0.120$ ). The practical importance of this can be interpreted on the basis of the Binomial Effect Size Display, BESD, as shown in Table 9 (Rosenthal, 1991). Thus, assuming that there are 100 subjects in the treatment group and another 100 in the control group, the recidivism rate would be 44% in the treated group and 56% in the control group. In other words, treated subjects would relapse 12% less than subjects that had not been treated.

Bearing in mind the heterogeneity of programme effectiveness, the influence of different factors on effectiveness was analysed. On the basis of this analysis, recidivism rates appeared to be linked to the following factors:

1. The most effective programmes are those based on behavioural and cognitive-behavioural theoretical models. Similar conclusions have been reached in Gendreau and Ross (1979), Ross and Fabiano (1985), Ross et al. (1990), Andrews et al. (1990), Palmer (1992), McGuire (1992), Lösel (1995a,b, 1996) and Redondo et al. (1997).
2. In our first analysis, juvenile offenders appeared to be more responsive to rehabilitation, due to the fact that they were generally treated by means of the most effective techniques (behavioural and cognitive-behavioural). Nevertheless, in a second analysis in which the influence of treatment type was controlled, the greater effectiveness was obtained with adult offenders. This data indicates that positive results can be achieved with both juvenile and adult offenders. Looking beyond the age of the subjects, which is without doubt a conditioning factor, the most relevant factor is the application of programmes based on plausible theoretical models. Research has repeatedly shown that behavioural and cognitive-behavioural programmes produce the best results.

## **COGNITIVE-BEHAVIORAL THERAPY IS PARTICULARLY EFFECTIVE – META-ANALYSIS PROVES**

Landenberger, Nana A. and Mark W. Lipsey. "The Positive Effects of Cognitive-Behavioral Programs for Offenders: A Meta-Analysis of Factors Associated with Effective Treatment." Vanderbilt Institute for Public Policy Studies, Journal of Experimental Criminology, 2005. [http://restorativejustice.pbworks.com/f/Landenberger\\_Lipsey.pdf](http://restorativejustice.pbworks.com/f/Landenberger_Lipsey.pdf).

Several well conducted meta-analyses have identified cognitive-behavioral therapy (CBT) as a particularly effective intervention for reducing the recidivism of juvenile and adult offenders. Pearson, Lipton, Cleland, and Yee (2002), for instance, conducted a meta-analysis of 69 research studies covering both behavioral (e.g., contingency contracting, token economy) and cognitive behavioral programs. They found that the cognitive-behavioral programs were more effective in reducing recidivism than the behavioral ones, with [had] a mean recidivism reduction for treated groups of about 30%. Similarly, a meta-analysis by Wilson, Bouffard, and MacKenzie (2005) examined 20 studies of group-oriented cognitive behavioral programs for offenders and found that CBT was very effective for reducing their criminal behavior. In their analysis, representative CBT programs showed recidivism reductions of 20-30% compared to control groups.

**VARIATION IN EFFECT OF COGNITIVE BEHAVIORAL THERAPY IS EXPLAINED BY THE QUALITY OF CBT PROVIDED**

Landenberger, Nana A. and Mark W. Lipsey. "The Positive Effects of Cognitive-Behavioral Programs for Offenders: A Meta-Analysis of Factors Associated with Effective Treatment." Vanderbilt Institute for Public Policy Studies, Journal of Experimental Criminology, 2005. [http://restorativejustice.pbworks.com/f/Landenberger\\_Lipsey.pdf](http://restorativejustice.pbworks.com/f/Landenberger_Lipsey.pdf).

Lipsey and Landenberger (in press) identified a few factors that were related to variation in recidivism effects. They found that treatment of high risk offenders, greater levels of CBT training for treatment providers, and CBT programs set up for research or demonstration purposes (in contrast to "real world" routine practice programs) were associated with larger effects. What most characterized the research and demonstration programs, in turn, was smaller sample sizes, greater monitoring of offender attendance and adherence to the intervention plan (treatment fidelity checks), and providers with mental health backgrounds. These factors suggest that treatment effectiveness is mainly a function of the quality of the CBT provided.

## **SYSTEMATIC REVIEWS SHOW THAT REHABILITATION IS MORE EFFECTIVE THAN PUNISHMENT**

Lipsey, Mark W. [Institute for Public Policy Studies, Vanderbilt University] and Francis T. Cullen [Division of Criminal Justice, University of Cincinnati]. "THE EFFECTIVENESS OF CORRECTIONAL REHABILITATION: A REVIEW OF SYSTEMATIC REVIEWS." Annual Review of Law and Social Science, vol. 3, 2007.

The effects of correctional interventions on recidivism have important public safety implications when offenders are released from probation or prison. Hundreds of studies have been conducted on those effects, some investigating punitive approaches and some investigating rehabilitation treatments. Systematic reviews (meta-analyses) of those studies, while varying greatly in coverage and technique, display remarkable consistency in their overall findings. Supervision and sanctions, at best, show modest mean reductions in recidivism and, in some instances, have the opposite effect and increase reoffense rates. The mean recidivism effects found in studies of rehabilitation treatment, by comparison, are consistently positive and relatively large. There is, however, considerable variability in those effects associated with the type of treatment, how well it is implemented, and the nature of the offenders to which it is applied. The specific sources of that variability have not been well explored but some principles for effective treatment have emerged. The rehabilitation treatments generally found effective in research do not characterize current correctional practice and bridging between research and practice remains a significant challenge.

## IMPRISONMENT INCREASES RECIDIVISM

Lipsey, Mark W. [Institute for Public Policy Studies, Vanderbilt University] and Francis T. Cullen [Division of Criminal Justice, University of Cincinnati]. "THE EFFECTIVENESS OF CORRECTIONAL REHABILITATION: A REVIEW OF SYSTEMATIC REVIEWS." Annual Review of Law and Social Science, vol. 3, 2007.

A second area of research has examined the impact of prison sentences on recidivism. As Levitt (2002, p. 443) noted, "it is critical to the deterrence hypothesis that longer prison sentences be associated with reductions in crime." However, the results are not supportive of the view that incarceration dissuades offenders from reoffending after they are released. Sampson and Laub's (1993) longitudinal study using the Gluecks' Boston-area data showed that imprisonment increased recidivism by weakening social bonds (e.g., decreased job stability). Using a matched sample of felony offenders in California, Petersilia et al. (1986) found that those sent to prison had higher recidivism rates than those placed on probation. More recently, Spohn & Holleran (2002) found a similar result for a sample from Jackson County, Missouri. Studies from Canada (Smith 2006) and the Netherlands (Nieuwbeerta 2007) also show a criminogenic effect of imprisonment. As might be anticipated, none of the meta-analyses of studies of this sort (summarized in Table 1) found mean recidivism reductions for correctional confinement. The two meta-analyses that found essentially zero effects focused on boot camps, which feature relatively short term custodial care. Those summarizing studies of incarceration compared with community supervision or longer prison terms compared with shorter ones all found that the average effects were increased recidivism.

### **META-ANALYSES FIND REHABILITATION TO REDUCE RECIDIVISM BY AT LEAST 10%**

Lipsey, Mark W. [Institute for Public Policy Studies, Vanderbilt University] and Francis T. Cullen [Division of Criminal Justice, University of Cincinnati]. "THE EFFECTIVENESS OF CORRECTIONAL REHABILITATION: A REVIEW OF SYSTEMATIC REVIEWS." Annual Review of Law and Social Science, vol. 3, 2007.

The most general result available from these meta-analyses is an estimate of the overall mean effect size across diverse samples of studies of different rehabilitation treatments applied to general offender samples. The major meta-analyses of that sort which focus on recidivism outcomes for adjudicated offenders are summarized in Table 2. As shown there, every one of these meta-analyses found mean effect sizes<sup>1</sup> favorable to treatment and none found less than a 10% average reduction in recidivism. Most of their mean effect sizes represent recidivism reductions in the 20% range, varying upward to nearly 40%. It is especially notable that there is no overlap in the range of mean effect sizes found in meta-analysis of rehabilitation treatment and that found for meta-analyses of the effects of sanctions and supervision (Table 1, earlier). The smallest mean recidivism effect size found in any meta-analysis of a general collection of rehabilitation studies is bigger than the largest one found by any meta-analysis of the effects of sanctions.

*A2 GET TOUGH POLICIES*

**THE US PRISON POPULATION HAS GROWN DRAMATICALLY**

D. A. Andrews [Prof. of Psychology, Carleton University, Ottawa] and James Bonta [Ph.D, Director, Corrections Research, Public Safety Canada], "Rehabilitating Criminal Justice Policy and Practice," *Psychology, Public Policy, and Law*, Vol. 16 (2010), No. 1, 39–55

Out of step in relation to the crime rate decreases, the incarceration rate continues to increase in the United States. From 1992 to 2007, the U.S. incarceration rate grew from 505 per 100,000 to an estimated 756 per 100,000 (Walmsley, 2009). One out of 100 adults is behind bars in the United States with one in 15 African-American men and 1 in 36 Hispanic men in prison (Pew, 2008). Over five million adults are under some form of community supervision (Glaze & Bonczar, 2007). On the youth side of the criminal justice system, nearly 2.2 million juveniles were arrested in 2007 (Puzzanchera, 2009). The United States now has approximately 20% of the world's prison population (Walmsley, 2009). "Getting tough" on crime has become the major criminal justice policy in America.

### **LARGE PRISON POPULATIONS CREATE A VARIETY OF PRACTICAL PROBLEMS**

D. A. Andrews [Prof. of Psychology, Carleton University, Ottawa] and James Bonta [Ph.D, Director, Corrections Research, Public Safety Canada], "Rehabilitating Criminal Justice Policy and Practice," *Psychology, Public Policy, and Law*, Vol. 16 (2010), No. 1, 39–55

Along with the huge prison and community offender populations come a myriad of associated problems. Many prisons are overcrowded, prison conditions have deteriorated, inmates being released from prison are returning to their old neighborhoods impacting on the local economies and some state corrections budgets rival the budgets for higher education (Scott-Hayward, 2009; Wood & Dunaway, 2003). Incarceration and community sanctions are thought to serve justice and deter crime. The evidence however, suggests the contrary.

### THE “GET TOUGH” APPROACH TO CRIME HAS BEEN AN UNMITIGATED FAILURE

D. A. Andrews [Prof. of Psychology, Carleton University, Ottawa] and James Bonta [Ph.D, Director, Corrections Research, Public Safety Canada], “Rehabilitating Criminal Justice Policy and Practice,” *Psychology, Public Policy, and Law*, Vol. 16 (2010), No. 1, 39–55

The accumulating evidence is that the retribution movement has been a disastrous failure. Sentencing guidelines and the various truth-in-sentencing laws that require a minimum sentence to be served before release have resulted in longer sentences and more crowded prisons (Wood & Dunaway, 2003). The three strikes laws further compounded the problem of prison growth without any evidence that prison sentences reduce recidivism (Doob & Webster, 2003; Smith, Goggin, & Gendreau, 2002; von Hirsch, Bottoms, Burney, & Wikström, 1999). The tough new sanctions of boot camps, electronic monitoring, and Scared Straight programs that expose at-risk young offenders to prison life have had either a negligible or detrimental impact on recidivism (MacKenzie & Armstrong, 2004; Petrosino, Turpin-Petrosino, & Finckenauer, 2000; Renzema & Mayo-Wilson, 2005).

**OVER-IMPRISONMENT AS A RESULT OF “GET TOUGH” POLICIES HAS HAD A SIGNIFICANT NEGATIVE ECONOMIC IMPACT**

D. A. Andrews [Prof. of Psychology, Carleton University, Ottawa] and James Bonta [Ph.D, Director, Corrections Research, Public Safety Canada], “Rehabilitating Criminal Justice Policy and Practice,” *Psychology, Public Policy, and Law*, Vol. 16 (2010), No. 1, 39–55

All of this has caused a tremendous strain on state economies, with 22 states cutting corrections budgets for fiscal year 2010 (Scott-Hayward, 2009). Only Medicaid has out-paced corrections budgets (Stemen, 2007) and, in 2008, it was estimated that state budgets for corrections were in excess of \$52 billion (Pew, 2009). The incarceration and re-entry of large numbers of adults has a number of less visible costs. Many prisons are far removed from the neighborhoods where offenders reside. For example, in New York State, almost all of the prisons are located upstate with 60% of the prisoners coming from the poorest borough of New York City. Many of these neighborhoods have high concentrations of offenders who are sent to upstate prisons at an annual cost of over \$30,000. It has been estimated that Brooklyn alone has 35 blocks where the costs of imprisonment exceeds \$1 million per block (Gonnerman, 2004). The neighborhood of Brewer Park, Detroit has an annual cost of \$2.9 million (Pew, 2009). Not only is there a significant cost in imprisoning people from poor neighborhoods, but additional financial hardships are placed upon the families of offenders and the communities where they reside. A family may lose a breadwinner and even during incarceration, the family may still continue to support the offender. Offenders released from prisons return to their communities with poor job prospects, and their idle presence on the streets discourage the frequenting of local businesses. This in turn threatens business success, thereby eroding the tax base for many cities (Clear, 2008).

**“GET TOUGH” APPROACHES TO CRIME ACTUALLY PRODUCE DRAMATICALLY  
DISPROPORTIONATE SENTENCING**

D. A. Andrews [Prof. of Psychology, Carleton University, Ottawa] and James Bonta [Ph.D, Director, Corrections Research, Public Safety Canada], “Rehabilitating Criminal Justice Policy and Practice,” *Psychology, Public Policy, and Law*, Vol. 16 (2010), No. 1, 39–55

Finally, proponents of the just deserts model (von Hirsch, 1976) have argued that it does not matter if punishment deters crime. What matters is that punishment should fit the crime, thereby serving justice. In theory, this is an admirable goal. In practice, the goal of proportional punishment that is delivered swiftly and with certainty is difficult to achieve. Three-strikes laws and other mandatory sentencing laws have led to some bizarre applications. For example, one offender received 27 years for attempting to steal property with a value of \$90 (Austin, Clark, Hardyman & Henry 1999); another received life without parole for possession of 5.5 ounces of cocaine (Currie, 1993).

Anecdotes aside, there are fears of injustice on a much larger scale. It appears that African Americans have been particularly hit hard by the tougher sentencing laws. Blacks comprise approximately 13% of the American population, but account for 41% of the prison population (West & Sabol, 2008). Tonry and Melewski (2008) carefully analyzed a range of crime trends and criminal justice processing over a 50-year span. A number of troubling findings emerged. Between 1980, when mandatory imprisonment for certain drug offences was introduced, and 2006, the rate of incarceration for Blacks was nearly four times higher than for Whites. The number of Blacks on death row has not changed in the last twenty years despite the fact that the homicide rate among Blacks has decreased. Drug use has remained steady, but arrest rates are higher for African Americans. Blacks are twice more likely to be imprisoned for robbery than Whites. The list goes on—the war on drugs and crime verges on being a war on race. The reasons for the get-tough movement may vary, but it is now abundantly clear that it is very expensive and a failed justice policy with regard to crime prevention. Understanding why it failed can be found in the psychology of punishment.

**THE PUBLIC HAS CONSISTENLY SHOWN SUPPORT FOR REHABILITATIVE PROGRAMS,  
ESPECIALLY FOR JUVENILES**

Francis T. Cullen [Professor of Criminal Justice and Sociology, University of Cincinnati], "It's Time to Reaffirm Rehabilitation," *Criminology & Public Policy*, 5 (2006): 665–672

I was wrong. To be sure, evidence of punitive attitudes toward offenders was not in short supply. But even at this time and in this context, the public remained supportive of rehabilitation both generally (Cullen et al., 1988) and for juveniles (Cullen et al., 1983). Over the years, with some modest variation, this finding has been replicated repeatedly (for a summary, see Cullen et al., 2000; Cullen and Moon, 2002). In my own research, my colleagues and I have discovered time and again that the public favors rehabilitation as a goal of corrections, believes that treatment is particularly important for juveniles, and especially supports early intervention programs (Applegate et al., 1997; Cullen et al., 1990, 1998; Moon et al., 2000, 2003; Sundt et al., 1998). To supply just one example, in a 2001 national survey, we discovered that 80% of the sample thought that rehabilitation should be the goal of juvenile prisons and that over 9 in 10 favored a range of early intervention programs (e.g., parental management training, Head Start, after-school programs) (Cullen et al., 2002a).

I call public support for rehabilitation a "criminological fact" because over the course of a quarter century, it has been demonstrated in study after study. Just to reinforce this point again, a 2006 national poll sponsored by the National Council on Crime and Delinquency found that "by an almost 8 to 1 margin (87% to 11%), the US voting public is in favor of rehabilitative services for prisoners as opposed to a punishment-only system" (Krisberg and Marchionna, 2006:1).

**REHABILITATIVE APPROACHES PROVIDE A COMPELLING ALTERNATIVE CONCEPTION OF CRIME CONTROL POLICY THAT CAN BE SUPPORTED BY THE PUBLIC**

Francis T. Cullen [Professor of Criminal Justice and Sociology, University of Cincinnati], "It's Time to Reaffirm Rehabilitation," *Criminology & Public Policy*, 5 (2006): 665–672

The genius of rehabilitation is its fundamental duality. On the one hand, it enlists the public to support a "correctional" approach that seeks to "save" and improve offenders. It suggests that as Americans, we can do more than simply warehouse and inflict pain on lawbreakers—especially those who are still youthful. On the other hand, it promises to protect the public by ensuring that every effort is made to use our scientific knowledge to change offenders from predators into neighbors. Public safety matters. Indeed, rehabilitation offers a powerful warning to the risks of a punishment-only approach: As nearly all incarcerated offenders will reenter society, we want them to leave prison less criminally disposed—rehabilitated—than when they arrived at the penitentiary gates. It thus exposes the warehousing of offenders as a risky strategy that irresponsibly fails to stop future victimizations that are both predictable and preventable.

### **BACKLASH AGAINST THE REHABILITATION MODEL HAD MISPLACED FAITH IN THE LAW TO RESTRAIN THE HARMFUL DISCRETION OF LAW ENFORCEMENT OFFICIALS**

Francis T. Cullen [Professor of Criminal Justice and Sociology, University of Cincinnati], "Making Rehabilitation Corrections' Guiding Paradigm," *Criminology & Public Policy*, Vol. 6, No. 4 (2007): 717–728

Beginning in the late 1960s, criminologists joined with others on the political left to reject forcefully the rehabilitative ideal. Contemporary observers believe that this forsaking of treatment was a rational response to the revelation by Martinson (1974) that "nothing works" to reform offenders, but this was not the case. Rather, this attack on rehabilitation was initiated several years earlier and had far more to do with a declining trust in the state to exercise its discretionary powers, especially in the courts and in prisons, in a humane and equitable way (Cullen and Gendreau, 2000; Cullen and Gilbert, 1982; Rotman, 1990). The individualized treatment model was based on the questionable assumption that state officials—judges, wardens, and parole boards—would use discretion not to discriminate or control but to deliver finely calibrated treatment to offenders. Critics believed that this ostensibly benevolent model had the bad consequences of masking state officials' abuse and repression of mostly minority offenders. As an alternative, they favored a "justice model" that would purge corrections of discretion through due process rights and determinate sentencing (Cullen and Gilbert, 1982).

The difficulty, however, was that criminologists and fellow progressive critics ignored the unanticipated consequences of this policy choice, three of which are most salient. First, their faith in the law to restrict state power made sense in the progressive 1960s but ultimately was a "bad bet" when the courts and legislatures turned conservative. In particular, those attacking rehabilitation did not appreciate the dangers of determinate sentences. By eliminating parole release, these sentences transferred discretionary power from corrections officials and parole boards to legislators and prosecutors. Critics did not anticipate that, as America lurched to the right, these elected officials would engage in symbolic politics and use their newfound power to pass increasingly long, harsh, and mandatory determinate sentences that squeezed any hope of mercy from the system (Cullen and Gilbert, 1982; see also Beckett, 1997).

**THE “JUSTICE-MODEL” THAT REPLACED THE REHABILITATION MODEL IN THE 1970S  
UNDERMINED THE RATIONAL FOR TREATING PRISONERS DECENTLY**

Francis T. Cullen [Professor of Criminal Justice and Sociology, University of Cincinnati], “Making Rehabilitation Corrections’ Guiding Paradigm,” *Criminology & Public Policy*, Vol. 6, No. 4 (2007): 717–728

Second, the critics’ embrace of a justice model undermined the social welfare purpose of corrections, saying, in essence, that the state should not be in the business of providing services to offenders. In so doing, they robbed corrections of any persuasive rationale for why offenders, especially those imprisoned, should be treated decently. It is no coincidence that the attack on rehabilitation was accompanied by the elimination of Pell grants and college programs for inmates and by efforts to make prisons more painful (e.g., restrict access to air conditioning, television, and similar amenities). “[P]rograms for inmate education, training, and drug treatment have been made scarce,” observes De Parle (2007:34). “If policymakers were once too credulous about rehabilitation, they are now too dismissive.”

**THE JUSTICE-MODEL OF CORRECTIONS ESSENTIALLY ABANDONS ANY UTILITARIAN RATIONALE FOR THE CRIMINAL JUSTICE SYSTEM**

Francis T. Cullen [Professor of Criminal Justice and Sociology, University of Cincinnati], "Making Rehabilitation Corrections' Guiding Paradigm," *Criminology & Public Policy*, Vol. 6, No. 4 (2007): 717–728

Third, even more consequential, the justice model rejected the idea that corrections had a utilitarian purpose—that this system should be used to prevent crime. As a result, criminologists offered no blueprint for how to reduce recidivism; justice, not crime control, was their concern. They simply did not count on conservative commentators stepping into this policy void with clear prescriptions for enhancing public safety and for defending crime victims that criminologists ostensibly ignored. Their proposal was simple and compelling: Reduce crime and prevent victimization through the greater use of prisons, which can be counted on to deter some predators and to incapacitate the rest (see, e.g., Wilson, 1975). Although the punishment movement over the past three decades had diverse sources (see, e.g., Garland, 2001; Gottschalk, 2006; Lynch, 2007; Tonry, 2004; Whitman, 2003), a contributing factor was the removal, by well-meaning criminologists, of the rehabilitative ideal as the one powerful ideological bulwark capable of combating and deconstructing "get tough" policy and rhetoric.

## **AMERICANS SUPPORT PROGRAMS THAT BOTH REHABILITATE AND CARRY OUT JUST PUNISHMENTS**

Francis T. Cullen [Professor of Criminal Justice and Sociology, University of Cincinnati], "Making Rehabilitation Corrections' Guiding Paradigm," *Criminology & Public Policy*, Vol. 6, No. 4 (2007): 717–728

Despite the attack on the treatment ideal and the near-hegemony of the punishment paradigm in shaping correctional policy, research over the past three decades has shown consistently that the public supports rehabilitation (Cullen and Moon, 2002; Cullen et al., 2000). More recent polls confirm that this support remains firm (Cullen et al., 2007; Cullen, Pealer, et al., 2002; Nagin et al., 2006). In effect, Americans favor a balanced approach, one that exacts a measure of justice, protects the public against serious offenders, and makes every effort to change offenders while they are within the grasp of the state. Rehabilitation often is characterized as a "liberal idea" because it endorses "going easy" on offenders. But the public recognizes a canard when it sees one. Here is one liberal idea that citizens embrace because it is eminently rational: Why would we return any offender to the community without making a good faith effort to "save" the person and, in so doing, reduce the collateral threat to public safety? The failure to do so, Americans recognize, makes little sense and, in fact, borders on outright irresponsibility.

### **INTENSIVE SUPERVISION PROGRAMS ARE COUNTERPRODUCTIVE**

Lipsey, Mark W. [Institute for Public Policy Studies, Vanderbilt University] and Francis T. Cullen [Division of Criminal Justice, University of Cincinnati]. "THE EFFECTIVENESS OF CORRECTIONAL REHABILITATION: A REVIEW OF SYSTEMATIC REVIEWS." Annual Review of Law and Social Science, vol. 3, 2007.

First, a number of deterrence-oriented correctional interventions aimed at increasing the punishment or control experienced by offenders have been evaluated. Perhaps the most instructive is the research on intensive supervision programs (ISPs) in which parolees or probationers are placed in small caseloads, face regular and unannounced visits by supervising officers, and are threatened with revocation and incarceration if they misbehave. In a now-classic study, Petersilia and Turner (1993) examined ISPs across 14 sites using random assignment experimental designs. They found no reductions in recidivism at any of the 14 sites and, in fact, the overall one-year recidivism rate for offenders in the ISPs was higher than for those in the probation-as-usual control groups (37 vs 33 percent).

## RETRIBUTION FAILS – LEADS TO MORE RECIDIVISM AND HURTS THE ECONOMY

D.A. Andrews, Carleton University, and James Bonta, Public Safety Canada. "Rehabilitating Criminal Justice Policy and Practice," American Psychological Organization. *Psychology, Public Policy, and Law* 2010, Vol. 16, No. 1, 39–55  
[http://pretrial.org/SupervisingDefendantsDocuments/Andrews-Bonta%20\(2010\)%20Rehabilitating%20Criminal%20Justice%20Policy%20PPP%20and%20Law.pdf](http://pretrial.org/SupervisingDefendantsDocuments/Andrews-Bonta%20(2010)%20Rehabilitating%20Criminal%20Justice%20Policy%20PPP%20and%20Law.pdf)

The accumulating evidence is that the retribution movement has been a disastrous failure. Sentencing guidelines and the various truth-in-sentencing laws that require a minimum sentence to be served before release have resulted in longer sentences and more crowded prisons (Wood & Dunaway, 2003). The three strikes laws further compounded the problem of prison growth without any evidence that prison sentences reduce recidivism (Doob & Webster, 2003; Smith, Goggin, & Gendreau, 2002; von Hirsch, Bottoms, Burney, & Wikström, 1999). The tough new sanctions of boot camps, electronic monitoring, and Scared Straight programs that expose at-risk young offenders to prison life have had either a negligible or detrimental impact on recidivism (MacKenzie & Armstrong, 2004; Petrosino, Turpin-Petrosino, & Finckenauer, 2000; Renzema & MayoWilson, 2005). All of this has caused a tremendous strain on state economies, with 22 states cutting corrections budgets for fiscal year 2010 (Scott-Hayward, 2009). Only Medicaid has out-paced corrections budgets (Stemen, 2007) and, in 2008, it was estimated that state budgets for corrections were in excess of \$52 billion (Pew, 2009). The incarceration and re-entry of large numbers of adults has a number of less visible costs. Many prisons are far removed from the neighborhoods where offenders reside. For example, in New York State, almost all of the prisons are located upstate with 60% of the prisoners coming from the poorest borough of New York City. Many of these neighborhoods have high concentrations of offenders who are sent to upstate prisons at an annual cost of over \$30,000. It has been estimated that Brooklyn alone has 35 blocks where the costs of imprisonment exceeds \$1 million per block (Gonnerman, 2004). The neighborhood of Brewer Park, Detroit has an annual cost of \$2.9 million (Pew, 2009). Not only is there a significant cost in imprisoning people from poor neighborhoods, but REHABILITATING CRIMINAL JUSTICE POLICY 41 additional financial hardships are placed upon the families of offenders and the communities where they reside. A family may lose a breadwinner and even during incarceration, the family may still continue to support the offender. Offenders released from prisons return to their communities with poor job prospects, and their idle presence on the streets discourage the frequenting of local businesses. This in turn threatens business success, thereby eroding the tax base for many cities (Clear, 2008).

## REHABILITATION PROGRAMS ARE COST EFFECTIVE

Francis T. Cullen [Professor of Criminal Justice and Sociology, University of Cincinnati], "It's Time to Reaffirm Rehabilitation," *Criminology & Public Policy*, 5 (2006): 665–672

Second, as Nagin et al. observe, there is also a growing body of evidence showing that rehabilitation programs—including the treatment of adjudicated youthful offenders and early prevention strategies for those yet to enter the system—are cost effective. Computing whether spending funds on treatment is a wise investment due to the money saved from crimes prevented is difficult; much depends on the quality of the data and the assumptions that guide the calculus of what a "crime saved" is "worth" (Greenwood, 2006; Welsh, 2003; Welsh et al., 2001). Even so, the existing analyses suggest that well-designed treatment programs can be defended to policy makers as saving more than they cost (Aos et al., 2003; Greenwood, 2006; Welsh, 2003).

*A2 RETRIBUTIVISM*

**MORAL RETRIBUTIVISM IS THEORETICALLY PROBLEMATIC IN SEVERAL WAYS**

Thom Brooks [Reader in Political and Legal Philosophy, Newcastle University], "Punishment: Political; Not Moral," 14 *New Crim. L. Rev.* 427 (2011)

There is much to unpack in this important statement. Moral retributivists make the mistake of linking the justification and distribution of punishment with morality. That a moral good is best served is problematic because we may possess a reasonable diversity of views on what is the moral good. We do not punish the whole of morality, and Brudner is correct to offer the helpful distinction of criminal versus noncriminal immorality (49). If not all immorality is criminalized, then moral retributivists must offer us a theory of how we might distinguish between the two, and such a theory is often found wanting. Even if such a theory were offered, we lack any principle to determine how much suffering we should receive in terms of punishment proportionate to our wickedness: therefore, criminals would objectionably "be subject, not to a punishment they have imposed on themselves, but to the arbitrary opinions of the legislator and judge" (52)? Such a theory is unable to make best sense of the idea that the punishment should fit the crime (52). Therefore, moral retributivism is deeply flawed and an unattractive theory of punishment.

**MORAL RETRIBUTIVISM ALLOWS THE STATE TO ENFORCE DOMINANT MODES OF MORALITY**

Thom Brooks [Reader in Political and Legal Philosophy, Newcastle University], "Punishment: Political; Not Moral," 14 *New Crim. L. Rev.* 427 (2011)

Moral retributivism runs into several other problems as well. For example, moral retributivism is wrong to believe that punishment should express moral condemnation or a form of moral pedagogy through the power of the state. This is because retributivism would be reduced to an objectionable form of legal moralism whereby "it is permissible to use the criminal law to enforce the socially dominant opinion as to which evils are most deserving of public retribution" (49). Moreover, even if it were "intrinsically valuable" that the wicked are punished, it does not necessarily follow that state punishment is warranted.

**THE TRADITIONAL THEORY OF “AN EYE FOR AN EYE” IS MEANT TO BE A LIMIT ON PUNISHMENT, NOT A JUSTIFICATION FOR REVENGE**

Manuel Escamilla-Castillo [University of Granada, Faculty of Law], “The Purposes of Legal Punishment,” *Ratio Juris*. Vol. 23 No. 4 December 2010 (460–78)

In reality, the retribution theory contains two distinct ideas. The first is that of retaliation or an “eye for an eye,” wrongly understood as a theory that demands vengeance against the person of the aggressor. The theory of this law, as we find it formulated, for example, in the Old Testament, is in reality a gentler theory of the response of the criminal law to the criminal act. When it states in Exodus: “And if any mischief follow, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe” (Exodus 21, 23–5),<sup>1</sup> what should in fact be understood is: “No more than a tooth for a tooth; at most, an eye for an eye.” It is without doubt an attempt to limit the victim’s reaction in an age when the response to aggression was in the hands of the victims themselves. It is in this sense that this law should be understood as gentler. In the modern theory of punishment, in Beccaria, for example, this precept is translated as the demand for proportionality between crime and punishment (Beccaria 1872, chap. VI, 28ff.):<sup>2</sup> Bentham’s theory is important in this respect. The precept of an “eye for an eye,” then, must be understood as a theory relating to the amount of punishment according to the amount of the crime, and not as a theory about its purpose.

### **MORRIS'S THEORY OF RETRIBUTIVISM WRONGLY TREATS THE CRIMINAL AS MERELY A FREE RIDER**

Jean Hampton [Prof. of Philosophy, University of Arizona], "Correcting Harms Versus Righting Wrongs: The Goal of Retribution," 39 UCLA L. Rev. 1659 (1991-1992)

To understand retribution, we must link the point of the retributive response to the wrongfulness of the action. The failure of a well-known theory of retribution developed by Herbert Morris as an adequate account of the retributive response effectively makes this point. Morris sees wrongdoers as deserving of punishment insofar as they are free riders: when they commit a wrong, they fail to observe certain moral constraints that others in their society accept; and they are thereby able to enjoy the benefits that come from others' acceptance of these constraints .without paying the cost of accepting the constraints themselves. He therefore argues that retributive punishment is a way to even up the score: the legal system takes away the benefits enjoyed by these free riders by inflicting pain upon them equal to those benefits. 3

Morris's theory of retribution essentially makes retributive justice a species of distributive justice, and it presupposes that it is possible not only to measure benefits that come from crime, but also to compare and measure pain so that we can know how much pain equals these (measurable) benefits. Clearly, this presupposition is problematic.<sup>4</sup> However, a more basic difficulty with this theory is its assumption that the fundamental reason why we censure and punish all wrongdoers is because they are free riders. This assumption makes sense only if we believe that constraining ourselves so that we do not rape or murder or steal imposes a cost upon us. Yet that idea makes sense only if raping, murdering, and stealing are "viewed by us as desirable and attractive (either intrinsically, or in view of the ends such actions achieve), and therefore individually rational but collectively irrational actions (for example, because such behavior destabilizes the community or damages the economy). However, surely this is exactly what most of us do not think about crime. Very few of us understand our refusal to murder or assault our fellows as imposing a cost upon ourselves, and very few of us resent murderers, muggers, or rapists because they have unfairly enjoyed benefits coveted by the rest of us. To make retributive justice a species of distributive justice is to claim that the wrongfulness of criminals' behavior consists in the fact that they have behaved unfairly. Although there are a few wrongs that we might be prepared to analyze in this way (for example, when people park for free in "no parking zones", while the rest of us pay a fortune to park in the local garage), it seems absurd to say that this is what is wrong with wrongdoers who murder, assault, or abuse others. (Indeed, it seems particularly indecent to analyze child abuse or rape along these lines.)

### **RETRIBUTIVISM IS NOT INFLUENCED BY RECIDIVISM**

Gabriel Hallevy [Prof. of Law, Ono Academic College], "The Recidivist Wants To Be Punished – Punishment as an Incentive to Reoffend," 5 IJPS 120 (2009)

The retribution element is not in itself influenced by the recidivism factor, since the object is to punish the offender for the specific crime he has committed now, regardless of his criminal record.<sup>25</sup> Thus the severity of the punishment will increase according to the seriousness of the crime. Whether the defendant was a first-time offender or not is irrelevant because retribution relates to the specific act in question. Retribution was already exacted upon the habitual offender when he was tried for his earlier crime and this has no implications with regard to the retribution to be exacted with respect to his current unlawful activities. The idea behind retribution is to punish the offender retroactively for the specific criminal act he has committed, not to deter him from committing further crimes in the future.

## **RETRIBUTIVISM HAS A VERY DIFFICULT TIME DETERMINING WHAT CONSTITUTES A PROPORTIONAL PUNISHMENT**

Heidi M. Hurd [Prof. of Law and Philosophy, University of Illinois], "Expressing Doubts About Expressivism," 2005 U. Chi. Legal F. 405 (2005)

Retributivism is not without its puzzles, however, and it seems to me that the greatest one is the question of whether it can defend, in any principled way, claims about the proportionality of particular punishments to the particular harms culpably caused by particular offenders.

The principle of Lex Talionis is a powerful answer to the challenge that punishments cannot be matched to offenses: it straightforwardly demands an eye for an eye, a tooth for a tooth, and a life for a life. Surely to get back what you give is the most intuitive notion of getting your just deserts.

But no retributivist would embrace the claim that the state ought generally to be in the business of perpetrating the horrors on offenders that match in kind the horrors that they perpetrated on their innocent victims. No one in today's academy believes that the state ought to satisfy the demands of retributivism by torturing the torturer, raping the rapist, or flashing the flasher. And what would it even mean to be treasonous to the traitor?

Yet once the retributivist leaves a principle that exactly matches punishment to offense, what allows the retributivist to say that seven months, or seven years, or seventeen years, is the just reward of one who commits tax fraud? What principle works to match differential losses of liberty with crimes of differential severity?

**EXPRESSIVISM IS INCOHERENT BECAUSE IT CANNOT DISTINGUISH BETWEEN WHAT  
CRIMES OF DIFFERING SEVERITIES MEAN OR COMMUNICATE**

Heidi M. Hurd [Prof. of Law and Philosophy, University of Illinois], "Expressing Doubts About Expressivism," 2005 U. Chi. Legal F. 405 (2005)

Second, it seems close to impossible to attribute any discrete meaning to a given crime that distinguishes it in its meaning and so in its punishment-from other crimes. Just try it. Imagine that a drunk driver takes the outside corner of a blind curve, but avoids hitting anyone. You are an audience to his recklessness. What (false?) proposition do you attribute to his deed? And how does that proposition differ from those propositions that you assign to car thefts, muggings, tax evasion, speeding offenses, or acts of petty vandalism? If these crimes do not possess quite different and quite specific meanings in your mind-if you cannot attribute to them particular propositions concerning their victims- then in what sense could you craft specific punishments that would contradict, with precision, the terms of the messages sent by these crimes?

As I have tried to craft examples that will sympathetically illustrate the expressivist's thesis within this paper, I have found myself repeatedly throwing up my proverbial hands and simply describing a particular crime as conveying "disrespect for the victim." But unless a rape is properly punished the same as a petty theft (and vice versa)-because in the end both crimes convey an identical message of disrespect for their victims-the notion that crimes possess distinct meanings by virtue of Peck audiences assigning to them distinct propositions is more metaphorical than meaningful.

**EXPRESSIONISM HAS TO APPEAL TO PECULIAR METAPHYSICAL PRESUMPTIONS TO JUSTIFY THE IDEA THAT CRIMES HAVE OBJECTIVE SOCIAL MEANINGS**

Heidi M. Hurd [Prof. of Law and Philosophy, University of Illinois], "Expressing Doubts About Expressivism," 2005 U. Chi. Legal F. 405 (2005)

I agree with Smith's conclusion that those with expressivist intuitions ultimately believe that social meaning is a primitive or raw concept that is unresponsive to analysis. Certainly those who wish to free themselves from the constraining implications of the various theories concerning what social meanings can be theories framed in terms of intentions, beliefs, or conventions do seem to yearn for an account of meaning that gives it metaphysical autonomy. The most flagrant example of one who espouses this metaphysically primitive view of meaning is Edwin Baker. 1 According to Baker, there is a "missing realm" of existence that, once recognized, solves the problems that have concerned us. 2 On his understanding, there is both the "material realm" of the natural world and the "subjective realm" of the mind; but there is, in addition, a "third realm": the "social realm."<sup>53</sup> Discovery of this realm solves the conceptual worry concerning the locus of social meaning because "meaning exist[s] here, in this social realm, not as [a] 'mental event['] in the heads of either creators or perceivers."<sup>54</sup> And this construal of social meaning purportedly solves the normative worries that I have registered in response to some attempts to fix social meaning, because according to Baker, "a proper normative concern focuses on 'meanings' that exist in the social realm."<sup>55</sup> Baker concludes that "an understanding of this 'social' realm is absolutely fundamental to an understanding not only of meaning and interpretation, but of the social sciences generally."<sup>56</sup>

But as one critic of metaphysical promiscuity has argued, "special realms" are the last refuges of theories in trouble.<sup>57</sup> One who postulates metaphysical divides between the natural and the moral, between the physical and the mental, or between the individual and the social commits himself to what John Mackie called "queer entities."<sup>58</sup> And as I have suggested elsewhere,<sup>59</sup> once one commits oneself to metaphysical queerness, one is surely committed to postulating queer relations between queer and non-queer entities, and queer epistemological means of gaining knowledge about such entities and their relations. And even if we ignore all of these vintage objections to the kind of pluralist metaphysics upon which Baker's view relies, we are returned to Blackburn's fear that we have entered a "hermeneutic desert,"<sup>60</sup> a landscape "where anything goes."<sup>61</sup>

It would seem, then, that expressivism cannot deliver up a concept of social meaning that is coherent and determinate in its implications for particular cases. Absent a theory of how to attribute meanings to crimes that are propositionally unique and therefore capable of being "contradicted" by particular penalties, expressivism will be unable to make sense of when and why particular offenders ought to receive particular punishments.

### THE NEG CANNOT APPEAL TO CONSEQUENTIALIST BENEFITS

Wood, Allen W. [Professor of Philosophy, Indiana University] *Hegel's Ethical Thought*. Cambridge [England: Cambridge UP, 1990. Print.

It is an altogether different issue how the practice itself is to be justified. Here people often appeal to good consequences of various kinds: to the supposedly beneficial effects of punishment on wrongdoers themselves, or its deterrent effect on people generally, or to the part punishment might play in moral education, or to the way in which punishing wrongdoers gives satisfaction to the public's vengeful feelings toward them. Those who offer such consequentialist justifications for the practice of punishment should not be called "retributivists," even if they acknowledge that punishment itself is an inherently retributive practice in the sense described in the last two paragraphs.<sup>2</sup> True retributivists are those who hold a distinctive view about how the practice of punishment is to be justified. They think that the practice is sufficiently justified merely by the fact that justice demands that some proportionate evil should be visited on a person guilty of wrongdoing. Retributivists do not necessarily deny that punishment has good consequences, but they do deny that we need to appeal to them in justifying the practice of punishment. Rather, they say that the essential point in the justification of punishment is that it is inherently just to inflict some evil on those who have done wrong.

## **PUNISHMENT CAN NEVER BE PROPORTIONAL TO THE CRIME**

Roebuck, Greg and David Wood [Melbourne Law School]. "A Retributive Argument Against Punishment." *Criminal Law and Philosophy*, Volume 5, Issue 1, 2011.

The range of punishments a jurisdiction makes use of (that is, its punishment scale), and so more specifically, the punishment that it regards as proportionate to any particular crime, requires determining the jurisdiction's most severe punishment (that is, according to the above statement of the anchoring problem; alternative statements are considered in Part Three), the punishment to be allocated to what it regards as its most serious crime. But what should this punishment be? Suppose murder is regarded as the most serious crime. Should the punishment for murder be execution, life imprisonment, twenty years' imprisonment, ten years' imprisonment, or a fine? How is one to select from such a range, one punishment as the most severe in an actual sentencing system? Some punishments, for instance, a fine, may appear intuitively far too lenient for murder. Others, such as execution, especially where carried out in particularly painful or degrading ways, may seem intuitively far too harsh. Obviously, intuitions about the appropriate punishment for a given crime can vary greatly (and especially in the case of murder), not just within but across societies (Braithwaite and Pettit, 1990: 179). No doubt, they are influenced by existing, especially long-standing, punishment practices in the jurisdiction in question. However, it is not clear why intuitions or commonly-held beliefs should carry any weight.<sup>15</sup> A punishment scale is required precisely so that we can judge the acceptability of our ordinary intuitions, whether they are too harsh or too lenient or quite reasonable. There appears, however, to be no, non-arbitrary way of getting beyond such intuitions, to select any one punishment as the most severe in the punishment scale of a particular jurisdiction. Retributivism cannot provide this punishment (Schafer-Landau 1996: 308; 2000: 191) (and does not even claim to do so).

### **PUNISHMENT SCALES MAY BE AFFECTED BY A HOST OF FACTORS**

Roebuck, Greg and David Wood [Melbourne Law School]. "A Retributive Argument Against Punishment." *Criminal Law and Philosophy*, Volume 5, Issue 1, 2011.

There is a host of possibly relevant factors. The actual scale may well vary from prisoner to prisoner, some factors pointing to some rough principle of diminishing marginal severity, others to some rough principle of increasing marginal severity. There is obviously the further question of how these (and other) competing factors are to be weighed against each other. To what extent, if any, for instance, do they cancel each other out? There is, furthermore, the underlying question of whether the operation of such factors can be reduced to mathematical formulae, as opposed to their behaving quite erratically.

**PUNISHMENT MUST BE VIEWED IN A POLITICAL CONTEXT – RETRIBUTIVISTS FAIL BECAUSE THEY EVALUATE PUNISHMENT THROUGH AN APOLITICAL ACCOUNT**

Brettschneider, Corey. "The Rights of the Guilty: Punishment and Political Legitimacy." *Political Theory*, Vol. 35, No. 2 (Apr. 2007), pp. 175-199.

Traditional retributive accounts of punishment differ from contractualist justifications most significantly in terms of the context within which they frame the problem of punishment. Retributive accounts focus on the moral worth of either the criminal or the criminal's particular action in isolation from his relationship with the state. In this sense, they justify punishment for persons, not punishment for citizens. The apolitical nature of these accounts is demonstrated by the priority they give to the question of what is deserved by the criminal qua person rather than the question of what punishment the state can rightfully mete out. To highlight the problem with an apolitical account of state punishment, consider the following example: suppose a child molester and murderer is sentenced to death. Assume, for the sake of argument, that the punishment is justified. While on Death Row, the child molester is killed by a fellow inmate who is outraged by his crime. In some sense, the child molester received what he "deserves." We have stipulated that the appropriate punishment is death, and that is what he receives.<sup>23</sup> However, this "vigilante" approach is problematic because of who inflicts the punishment. An apolitical theory of punishment fails to recognize that legitimate governments have a distinct authority in punishing that private individuals do not. Central to the rule of law and in particular to criminal law is the notion that crimes against particular individuals are offenses against society.<sup>24</sup> This notion is reflected in the many legal systems in which crimes prosecuted by the state are considered to be controversies between "the people" and the accused individual. This practice suggests that legitimate states coerce on behalf of society as a whole in a way that private individuals cannot. The notion that state punishment has a distinct justification is reflected in the contractualist approach to punishment. This approach manifests the distinctness of the state's authority to punish in its requirement that punishments be justifiable to all reasonable citizens. In contrast, retributive accounts cannot acknowledge a moral distinction between state punishment and private punishment carried out in the same manner because they focus exclusively on what criminals qua persons deserve, not what they deserve qua citizens."

### RETRIBUTIVIST ACCOUNTS ARE OVERLY AMBITIOUS

Brettschneider, Corey. "The Rights of the Guilty: Punishment and Political Legitimacy." *Political Theory*, Vol. 35, No. 2 (Apr. 2007), pp. 175-199.

Retributivists' apolitical accounts of punishment are also problematic because their focus on criminals' moral worth as persons is too ambitious. Moral judgments of this kind are grounded in a comprehensive moral code, rather than a narrower conception of politically legitimate actions. As such, they risk privileging one particular viewpoint over other reasonable view points held by citizens of a polity. According to contractualist thinkers, this reliance on comprehensive conceptions undermines citizens' status as free and equal.

### CONTRACTARIAN RETRIBUTIVIST THEORIES FAIL

Murphy, Jeffrie G. "Marxism and Retribution." *Philosophy and Public Affairs*, Vol. 2, No. 3 (Spring, 1973), pp. 217-243.

i. Rational Choice. The model of rational choice found in Social Contract theory is egoistic-rational institutions are those that would be agreed to by calculating egoists ("devils" in Kant's more colorful terminology). The obvious question that would be raised by any Marxist is: Why give egoism this special status such that it is built, a priori, into the analysis of the concept of rationality? Is this not simply to regard as necessary that which may be only contingently found in the society around us? Starting from such an analysis, a certain result is inevitable—namely, a transcendental sanction for the status quo. Start with a bourgeois model of rationality and you will, of course, wind up defending a bourgeois theory of consent, a bourgeois theory of justice, and a bourgeois theory of punishment. Though I cannot explore the point in detail here, it seems to me that this Marxist claim may cause some serious problems for Rawls's well-known theory of justice, a theory which I have already used to unpack some of the evaluative support for the retributive theory of punishment. One cannot help suspecting that there is a certain sterility in Rawls's entire project of providing a rational proof for the preferability of a certain conception of justice over all possible alternative evaluative principles, for the description which he gives of the rational contractors in the original position is such as to guarantee that they will come up with his two principles. This would be acceptable if the analysis of rationality presupposed were intuitively obvious or argued for on independent grounds. But it is not. Why, to take just one example, is a desire for wealth a rational trait whereas envy is not? One cannot help feeling that the desired result dictates the premises.<sup>35</sup>

### **CONTRACTARIAN RETRIBUTIVIST THEORIES FAIL – PEOPLE DON'T ACTUALLY CONSENT**

Murphy, Jeffrie G. "Marxism and Retribution." *Philosophy and Public Affairs*, Vol. 2, No. 3 (Spring, 1973), pp. 217-243.

3. Voluntary Acceptance. Central to the Social Contract idea is the claim that we owe allegiance to the law because the benefits we have derived have been voluntarily accepted. This is one place where our autonomy is supposed to come in. That is, having benefited from the Rule of Law when it was possible to leave, I have in a sense consented to it and to its consequences—even my own punishment if I violate the rules. To see how silly the factual presuppositions of this account are, we can do no better than quote a famous passage from David Hume's essay "Of the Original Contract":

Can we seriously say that a poor peasant or artisan has a free choice to leave his country-when he knows no foreign language or manners, and lives from day to day by the small wages which he acquires? We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master, though he was carried on board while asleep, and must leap into the ocean and perish the moment he leaves her.

A banal empirical observation, one may say. But it is through ignoring such banalities that philosophers generate theories which allow them to spread iniquity in the ignorant belief that they are spreading righteousness.

**THERE IS NO HARD PUNISHMENT WHICH CAN FULLY RESTORE A SYSTEM OF EQUAL FREEDOM**

Merle, Jean-Christophe. "A Kantian Critique of Kant's Theory of Punishment." *Law and Philosophy*, 2000, Kluwer Academic Publishers.

To take the two meanings of Schuld – debitum and culpa, – as being equivalent is misleading and actually leads to fallacies in the case of crimes that cause damages for which there is no compensation, i.e. of all irreparable crimes. All the not irreparable infringements of the law are private crimes for which not the civil courts, but the criminal courts are competent. Kant offers the examples of "embezzlement, that is misappropriation of money or goods entrusted for commerce, and fraud in buying and selling, when committed in such a way that the other could detect it" (DR VI, 331, Gregor 105). Such crimes endanger not the existence of the legal community, but only individual people who voluntarily trusted in the criminal and engaged in contracts with him. On the contrary, public crimes don't infringe private contracts, but the civil state itself. For this, as well as for the violence against or death of the victim, there is no possible compensation. For instance, how can a prison sentence or a death sentence ever compensate for the crime as far as the victim is concerned? What could ever compensate for the insecurity to all citizens caused by a murder? The debt toward the legal community (debitum) was to be paid off only by abstaining from committing crimes. Once a crime is committed the criminal can no longer pay off the debt. Once she has lost her civil personality, the criminal has even lost the possibility of paying off her debt to the community for the future, i.e. the possibility of either obeying the law in the future.

**RETRIBUTIVISM CANNOT SAVE ITSELF FROM THE CLAIM THAT PROPORTIONALITY IS ARBITRARY BY SIMPLY FALLING BACK ON THE IDEA THAT IT IS ABOUT THE RELATIVE SEVERITY OF PUNISHMENTS FOR DIFFERENT CRIMES**

Heidi M. Hurd [Prof. of Law and Philosophy, University of Illinois], "Expressing Doubts About Expressivism," 2005 U. Chi. Legal F. 405 (2005)

But I find the retributivist's often blithe assumption that comparative proportionality will rescue him from arbitrariness to be optimistic at best, and hypocritical at worst. Imagine a society that articulates and enforces very few criminal prohibitions. It makes it criminal to murder, rape, kidnap, commit theft, engage in vandalism, or defame another's good name (considering it as serious to "steal" another's reputation as to steal his television). It condemns murderers to death, gives a life sentence for rape, and gives fifty years for kidnapping, forty-five years for theft, forty years for defamation, and thirty-five years for vandalism. Could a gossip legitimately complain when imprisoned for forty years for falsely calling her neighbor dishonest? It would seem not, at least if the test of just punishment is whether the crime is punished proportionately to other crimes. For while it would seem, in absolute terms, extraordinary to be locked away for the bulk of one's productive life for a petty slur, one cannot complain that the punishment is disproportionate to other punishments. But inasmuch as the moral force of the retributivist's theory lies in its concern for matching punishments to just deserts, it seems a fatal flaw to then declare that judgments of comparative proportionality are close enough for government work!

*DETERRENCE*

**PUNISHMENTS FOR HABITUAL OFFENDERS HAVE INCREASINGLY SMALL EFFECTS ON DETERRENCE ON THE MARGIN**

Gabriel Hallevy [Prof. of Law, Ono Academic College], "The Recidivist Wants To Be Punished – Punishment as an Incentive to Reoffend," 5 IJPS 120 (2009)

Thus for example, when a person carries out his first robbery and the court sentences him to one year in prison, this punishment would have a deterrent effect of sorts. If several days after serving out his sentence, the subject were to carry out another robbery in identical circumstances to the first offence and the court imposed on him exactly the same punishment, namely one year behind bars, then the deterrent effect on the subject generated by the second one year stretch in prison would be smaller and weaker than the deterrent effect engendered by the initial year in prison, despite the fact that in both cases the sentence handed down was identical in all respects.

The underlying rationale for the change in the deterrent effect and the quantitative value of that change may be explained by applying the rule of neo-classic economics known as diminishing marginal utility rule. In neo-classic economics a marginal utility index was developed which collates the additional benefit resulting from a growth in the use of a product or service, while the utilization of all other user units remains constant.<sup>34</sup> The rule of diminishing marginal utility states, that when the use of a product or service increases, then there will be a corresponding reduction in the additional benefit derived from that product or service. The economic development of the diminishing marginal utility rule is rooted in numerous empirical observations regarding the various functions of manufacturing. We shall set out the rule in a more precise manner and apply it to the recidivism factor. The rule of diminishing marginal utility may be expressed as follows: When product x is manufactured with the help of the variable manufacturing factor a with all other manufacturing factors remaining constant, then if we were to increase the input of a, without correspondingly increasing the remaining input factors, then the marginal utility of a would be reduced from a certain point.<sup>35</sup>

Relating this principle to the recidivism factor, product x becomes the deterrent effect, which is "manufactured" by punishment a. If in relation to each incident of robbery in the above example the court was to impose punishment a (a year in prison) with all other circumstances remaining constant, including for the purposes of the retribution objective which does not vary in different cases, then the marginal utility to be derived from imposing punishment a for the purposes of creating deterrent effect x would gradually diminish. It should be clarified that, even though in the above example the punishments imposed were identical in absolute terms (one year in prison), punishment a is nevertheless a variable "manufacturing" factor, since the "manufacturing" process of the deterrent effect is built up over time by imposing punishments on the habitual offender each time he is sentenced again.<sup>36</sup>

## **EMPIRICS CONFIRM THAT PUNISHMENT LOSES ITS DETERRENT VALUE FOR HABITUAL OFFENDERS**

Gabriel Hallevy [Prof. of Law, Ono Academic College], "The Recidivist Wants To Be Punished – Punishment as an Incentive to Reoffend," 5 IJPS 120 (2009)

An empirical study carried out on the subject supports this contention. The study, which was carried out in Britain over the course of six years into the behavior of different categories of habitual offender, found that those having the most prolific criminal records were least likely to be deterred by the imposition of extra punishment, regardless of what form that punishment took.<sup>38</sup> Thus for example, it was discovered that the percentage of recidivism amongst first-time adult offenders (those over 21 years of age) who had been given custodial sentences was 18%. The rate amongst those having one previous conviction already was 50% and in the case of those with between two and four previous convictions the rate of recidivism climbed to 72%, then to 88% in respect of those having five previous convictions. The recidivism rate amongst juvenile offenders (those up to 17 years of age) who had five previous convictions and were given a custodial sentence was 100%. The study found a similar picture emerging across all age groups.<sup>39</sup> These empirical and statistical findings correspond with the forecast made based on the rule of diminishing marginal utility and which may be expressed in graph form as follows<sup>40</sup> (Diagram 1):

### **THERE IS NO SOLID EVIDENCE THAT GENERAL DETERRENCE WORKS**

Gabriel Hallevy [Prof. of Law, Ono Academic College], "The Recidivist Wants To Be Punished – Punishment as an Incentive to Reoffend," 5 IJPS 120 (2009)

Apart from the public controversy surrounding its use,<sup>65</sup> the research studies which have been undertaken on the subject do not clearly indicate the effectiveness of the death penalty as being a substantial deterrent to the commission of various crimes. The sophisticated measuring techniques employed by various jurisdictions around the world in order to estimate the deterrent value of the death penalty have failed to show clearly and unequivocally that the use of this form of punishment is effective in creating a significant deterrent effect.<sup>66</sup> As previously referred to above, situations exist in which the death penalty is actually likely to encourage the commission of further offences, since from the time of its imposition until the sentence is carried out a negative deterrent effect subsists.<sup>67</sup> Moreover, there is no correlation between the severity of the punishment traditionally imposed by the specific legal system and the crime rate in the society it represents <sup>68</sup> and in those jurisdictions in which the maximum punishment level for various offences was increased, no corresponding fall in the level of crime was recorded.<sup>69</sup>

**DETERRENCE FAILS – DOESN'T ACCOUNT FOR OFFENDERS IMPULSIVITY AND LACK OF RATIONAL DECISION MAKING**

D.A. Andrews, Carleton University, and James Bonta, Public Safety Canada. "Rehabilitating Criminal Justice Policy and Practice," American Psychological Organization. *Psychology, Public Policy, and Law* 2010, Vol. 16, No. 1, 39–55  
[http://pretrial.org/SupervisingDefendantsDocuments/Andrews-Bonta%20\(2010\)%20Rehabilitating%20Criminal%20Justice%20Policy%20PPP%20and%20Law.pdf](http://pretrial.org/SupervisingDefendantsDocuments/Andrews-Bonta%20(2010)%20Rehabilitating%20Criminal%20Justice%20Policy%20PPP%20and%20Law.pdf)

All of the above conditions consider only how punishment needs to be delivered to suppress behavior. They do not address characteristics of the person that may interact with the application of punishment. In situations where punishment is not delivered with immediacy and certainty, it may still be effective with certain types of people. For example, those who are future oriented and evidence good self-monitoring and regulation skills can make the connections between the behavior and the negative consequences that may occur days, weeks, or months later. However, many offenders are impulsive (Gottfredson & Hirschi, 1990) and underestimate the chances of being punished (Piquero & Pogarsky, 2002). There is even some evidence that punishment can lead to increased offending through operation of the "gambler's fallacy." That is, "if I was punished now then it is unlikely that I will get caught and be punished again" (Pogarsky & Piquero, 2003). In addition, applying "maximum" punishment can have undesired consequences ranging from [lead to] learned helplessness (Seligman, 1975) to retaliatory aggression (McCord, 1997). The long and short of all of this is how can one possibly expect that a policy centered on punishment can reduce criminal behavior?

### **SPECIAL DETERRENCE DOES NOT INFRINGE THE FAIRNESS PRINCIPLE**

Merle, Jean-Christophe. "A Kantian Critique of Kant's Theory of Punishment." *Law and Philosophy*, 2000, Kluwer Academic Publishers.

One may object that the special deterrence I propose as an alternative solution for the retribution principle infringes the fairness principle according to which a punishment cannot be extended or redefined once the criminal has been sentenced.<sup>2</sup> Such an objection would rely on the incorrect assumption that not revising the degree of punishment after the sentence implies scheduling exactly when the punishment will end. But the end of the punishment I propose is clearly defined: it ends with the rehabilitation of the criminal, that is, his ability to obey the law like the other citizens, i.e. when he is no greater a threat to law enforcement than they are. A more serious objection would be the difficulty of establishing when a criminal is able to reenter the legal community as a full citizen. To assess whether a criminal is rehabilitated is certainly in most cases a complex decision that always includes a risk of error. Yet every judicial sentence includes a risk of error. Moreover, today's judicial system partly applies a kind of special deterrence: most prisoners are put on parole, which reduces the effective time of their punishment; recidivists are often punished more harshly than new offenders, and so on.

*SOCIAL AND INDIVIDUAL RESPONSIBILITY*

**PUNISHMENT MODELS WRONGLY DENY THAT SOCIETY HAS ANY RESPONSIBILITY FOR CRIMINAL BEHAVIOR**

Francis T. Cullen [Professor of Criminal Justice and Sociology, University of Cincinnati], "Making Rehabilitation Corrections' Guiding Paradigm," *Criminology & Public Policy*, Vol. 6, No. 4 (2007): 717–728

As part of a broader challenge to therapeutic thinking in modern society, rehabilitation is criticized for sending a corrosive message that offenders are not responsible for their actions. Punishment, it is claimed, reinforces moral boundaries and communicates that offenders are moral agents who deserve to be held accountable for their bad choices. This reasoning has surface appeal, but it also borders on the ridiculous—for three reasons.

First, it conveniently ignores the criminological fact that the choice of crime is not "free" but bounded—often quite tightly—by the circumstances into which offenders are born. Advocates of the punishment model feel free to acquit society—us—of any complicity in the conditions that breed crime. They feel free to ignore the disquieting reality that the correctional system disproportionately supervises minorities and the poor—groups socially neglected in our society. This blindness might prove comforting, but it hardly comprises the moral high ground.

**REHABILITATION DOES NOT ABSOLVE OFFENDERS OF MORAL RESPONSIBILITY BUT RATHER SUPPORTS THEM IN CHANGING THE THINGS THAT CAUSED THE CRIME IN THE FIRST PLACE**

Francis T. Cullen [Professor of Criminal Justice and Sociology, University of Cincinnati], "Making Rehabilitation Corrections' Guiding Paradigm," *Criminology & Public Policy*, Vol. 6, No. 4 (2007): 717–728

Second, rehabilitation does not excuse victimization but rather demands that offenders work to change those parts of themselves that lead them into crime—whether that is how they think or how they design their lives. However, in embarking on this reformation, offenders are not simply placed in a cell and told to make better decisions in the future—"or else." Rather, a recognition exists that change is challenging and that corrections should be a partner in enabling offenders to lead lives that do less harm and contribute more to the commonweal. Supporting others to live a better life hardly is morally bankrupt; indeed, it seems more akin to the Golden Rule.

**DETERMINISM IS TRUE – PEOPLE ARE NOT MORALLY RESPONSIBLE FOR THEIR ACTIONS**

Strawson, Galen. "The Impossibility of Moral Responsibility." *Philosophical Studies*, 75: 5-24, 1994. Kluwer Academic Publishers.

This may seem contrived, but essentially the same argument can be given in a more natural form. (1) It is undeniable that one is the way one is, initially, as a result of heredity and early experience, and it is undeniable that these are things for which one cannot be held to be in any responsible (morally or otherwise). (2) One cannot at any later stage of life hope to accede to true moral responsibility for the way one is by trying to change the way one already is as a result of heredity and previous experience. For (3) both the particular way in which one is moved to try to change oneself, and the degree of one's success in one's attempt at change, will be determined by how one already is as a result of heredity and previous experience. And (4) any further changes that one can bring about only after one has brought about certain initial changes will in turn be determined, via the initial changes, by heredity and previous experience. (5) This may not be the whole story, for it may be that some changes in the way one is are traceable not to heredity and experience but to the influence of indeterministic or random factors. But it is absurd to suppose that indeterministic or random factors, for which one is ex hypothesi in no way responsible, can in themselves contribute in any way to one's being truly morally responsible for how one is.

The claim, then, is not that people cannot change the way they are. They can, in certain respects (which tend to be exaggerated by North Americans and underestimated, perhaps, by Europeans). The claim is only that people cannot be supposed to change themselves in such a way as to be or become truly or ultimately morally responsible for the way they are, and hence for their actions.

**IF DETERMINISM IS TRUE, THEN PUNISHMENT CAN NEVER BE JUSTIFIED**

Strawson, Galen. "The Impossibility of Moral Responsibility." *Philosophical Studies*, 75: 5-24, 1994. Kluwer Academic Publishers.

We are what we are, and we cannot be thought to have made ourselves in such a way that we can be held to be free in our actions in such a way that we can be held to be morally responsible for our actions in such a way that any punishment or reward for our actions is ultimately just or fair. Punishments and rewards may seem deeply appropriate or intrinsically 'fitting' to us in spite of this argument, and many of the various institutions of punishment and reward in human society appear to be practically indispensable in both their legal and non-legal forms. But if one takes the notion of justice that is central to our intellectual and cultural tradition seriously, then the evident consequence of the Basic Argument is that there is a fundamental sense in which no punishment or reward is ever ultimately just. It is exactly as just to punish or reward people for their actions as it is to punish or reward them for the (natural) colour of their hair or the (natural) shape of their faces. The point seems obvious, and yet it contradicts a fundamental part of our natural self-conception, and there are elements in human thought that move very deeply against it. When it comes to questions of responsibility, we tend to feel that we are somehow responsible for the way we are. Even more importantly, perhaps, we tend to feel that our explicit self-conscious awareness of ourselves as agents who are able to deliberate about what to do, in situations of choice, suffices to constitute us as morally responsible free agents in the strongest sense, whatever the conclusion of the Basic Argument.

### **MEN DON'T FREELY WILL THEIR CRIMES – THEY ARE COMPELLED BY OTHER CONSIDERATIONS**

Murphy, Jeffrie G. "Marxism and Retribution." *Philosophy and Public Affairs*, Vol. 2, No. 3 (Spring, 1973), pp. 217-243.

To return to Bonger. Put bluntly, his theory is as follows. Criminality has two primary sources: (1) need and deprivation on the part of disadvantaged members of society, and (2) motives of greed and selfishness that are generated and reinforced in competitive capitalistic societies. Thus criminality is economically based-either directly in the case of crimes from need, or indirectly in the case of crimes growing out of motives or psychological states that are encouraged and developed in capitalistic society. In Marx's own language, such an economic system alienates men from themselves and from each other. It alienates men from themselves by creating motives and needs that are not "truly human." It alienates men from their fellows by encouraging a kind of competitiveness that forms an obstacle to the development of genuine communities to replace mere social aggregates. 28 And in Bonger's thought, the concept of community is central. He argues that moral relations and moral restraint are possible only in genuine communities characterized by bonds of sympathetic identification and mutual aid resting upon a perception of common humanity. All this he includes under the general rubric of reciprocity.29 In the absence of reciprocity in this rich sense, moral relations among men will break down and criminality will increase.30 Within bourgeois society, then, crimes are to be regarded as normal, and not psychopathological, acts. That is, they grow out of need, greed, indifference to others, and sometimes even a sense of indignation- all, alas, perfectly typical human motives.

## PEOPLE AREN'T CULPABLE IF THEY ARE COMPELLED TO COMMIT CRIMES FOR SOCIOECONOMIC REASONS

Murphy, Jeffrie G. "Marxism and Retribution." *Philosophy and Public Affairs*, Vol. 2, No. 3 (Spring, 1973), pp. 217-243.

Justice, Benefits, and Community. The retributive theory claims to be grounded on justice; but is it just to punish people who act out of those very motives that society encourages and reinforces? If Bonger is correct, much criminality is motivated by greed, selfishness, and indifference to one's fellows; but does not the whole society encourage motives of greed and selfishness ("making it," "getting ahead"), and does not the competitive nature of the society alienate men from each other and thereby encourage indifference-even, perhaps, what psychiatrists call psychopathy? The moral problem here is similar to one that arises with respect to some war crimes. When you have trained a man to believe that the enemy is not a genuine human person (but only a gook, or a chink), it does not seem quite fair to punish the man if, in a war situation, he kills indiscriminately. For the psychological trait you have conditioned him to have, like greed, is not one that invites fine moral and legal distinctions. There is something perverse in applying principles that presuppose a sense of community in a society which is structured to destroy genuine community.<sup>36</sup> Related to this is the whole allocation of benefits in contemporary society. The retributive theory really presupposes what might be called a "gentlemen's club" picture of the relation between man and society i.e., men are viewed as being part of a community of shared values and rules. The rules benefit all concerned and, as a kind of debt for the benefits derived, each man owes obedience to the rules. In the absence of such obedience, he deserves punishment in the sense that he owes payment for the benefits. For, as rational man, he can see that the rules benefit everyone (himself included) and that he would have selected them in the original position of choice. Now this may not be too far off for certain kinds of criminals-e.g., business executives guilty of tax fraud. (Though even here we might regard their motives of greed to be a function of societal reinforcement.) But to think that it applies to the typical criminal, from the poorer classes, is to live in a world of social and political fantasy. Criminals typically are not members of a shared community of values with their jailers; they suffer from what Marx calls alienation. And they certainly would be hard-pressed to name the benefits for which they are supposed to owe obedience. If justice, as both Kant and Rawls suggest, is based on reciprocity, it is hard to see what these persons are supposed to reciprocate for. Bonger addresses this point in a passage quoted earlier (p. 236): "The oppressed resort to means which they would otherwise scorn.... The basis of social feelings is reciprocity. As soon as this is trodden under foot by the ruling class, the social sentiments of the oppressed become weak towards them."

*HUMAN DIGNITY AND KANTIAN THEORY*

**REHABILITATION MODELS AFFIRM HUMAN DIGNITY WHERE PUNISH MODELS UNDERMINE IT**

Francis T. Cullen [Professor of Criminal Justice and Sociology, University of Cincinnati], "Making Rehabilitation Corrections' Guiding Paradigm," *Criminology & Public Policy*, Vol. 6, No. 4 (2007): 717-728

Third, rehabilitation does not demean human dignity but emphasizes its value. It is the punishment crowd that depicts offenders as predators (if not "scum"), embraces chain gangs and oppressive prison conditions, and wishes to turn prisons into warehouses. By contrast, advocates of treatment do not reduce offenders to a philosophical myth (rational actors fully free to make choices) or to the nature of the crime they committed (which might be minor or might be heinous). Rather, they confront offenders in the fullness of their humanity, not afraid to assess their level of pathology but also not afraid to recognize offenders' humanity and to inspire their personal growth.

## KANTIAN THEORIES OF PUNISHMENT FAIL

Murtagh, Kevin [John Jay College of Criminal Justice]. "Punishment." *Internet Encyclopedia of Philosophy*. <http://www.iep.utm.edu/punishme/#H2>.

Gertrude Ezorsky argues that we should test the Kantian position and other retributive positions that resemble it "by imagining a world in which punishing criminals has no further effects worth achieving" (xviii). In this world, punishment does not deter or rehabilitate. For whatever reason, incapacitation is impossible. In addition, victims receive no satisfaction from the punishment of those who have harmed them. In this world, a Kantian would be committed to the position that punishments still ought to be inflicted upon wrongdoers. Furthermore, the individuals that populated this world would be morally obligated to punish wrongdoers. If they failed to punish wrongdoers, they would be failing to abide by the dictates of justice. But surely it is quite odd to hold that these individuals would be morally obligated to punish when doing so would not produce any positive effects for anyone. According to Ezorsky, this terribly odd consequence suggests that the Kantian theory is problematic.

### **A KANTIAN VIEW MUST LEND ITSELF TO A REHABILITATIVE SYSTEM**

Merle, Jean-Christophe. "A Kantian Critique of Kant's Theory of Punishment." *Law and Philosophy*, 2000, Kluwer Academic Publishers.

Neither preventing a repetition of the crime nor rehabilitation, which one could call special prevention, receive much consideration in today's debate on punishment, because they are suspected of replacing the true meaning of punishment with social considerations not related to the crime. Far from this being the case, however, I think that this sort of special prevention may provide the rationale for the penal law itself. In what follows I shall describe the theory of penal law Kant should have built upon his principle of right, in order to criticize the theory he actually built upon it which, in my view, contradicts this principle. However, I shall at the same time try to refer as much as possible to particular points in Kant's Doctrine of Right, as long as these seem to me to be compatible with his principle of right.

I shall argue for the following theses: (i) Criminals should be punished, in order to hinder them from committing crimes again. This is to be achieved by means (ii) and (iii). (ii) Punishment should exclude the criminal from citizenship until (iii) is achieved. (iii) Punishment should educate the criminals, in order to rehabilitate them to full citizenship.

## A KANTIAN VIEW WOULD JUSTIFY REHABILITATION

Merle, Jean-Christophe. "A Kantian Critique of Kant's Theory of Punishment." *Law and Philosophy*, 2000, Kluwer Academic Publishers.

Kant thinks of a possible time limit to the punishment. The thief "is reduced to the status of a slave for a certain time, or permanently if the state sees fit" (DR VI, 333, Gregor 106). But there is unfortunately no other occurrence of this time limit in the Doctrine of Right. The reason for this may be that he considers the education of criminals and savages to be much more difficult than the education of children. Kant explains: "the human being has [ . . . ] a such a great inclination for freedom that he sacrifices everything for it, once he is accustomed to it for a while" (Pedagogy, IX, 442). Yet Kant nowhere excludes for any criminal the possibility of rehabilitation. In Kant's Doctrine of Right, not even the murderer must always die. The exceptions include not only the one mentioned above, i.e. the case of the murderer with too many accomplices (DR, VI, 334, Gregor 107), but also the case in which the sovereign uses his "right to grant clemency". Therefore, the murderer can eventually be rehabilitated and released, unless her release would threaten the security of the other citizens, i.e., unless is not yet disciplined. Now, the possibility of rehabilitation is strictly incompatible with the death penalty. The alternative solution to retributivism I am sketching is not at all utilitarian. It absolutely does not consider punishment "merely as a means to promote some other good for the criminal himself or for civil society" (VI, 331, Gregor 105). Rehabilitation certainly benefits the murderer more than the death penalty does. However, the rehabilitation model I have sketched relies on no goal but the goal of restoring the civil state that has been broken by the crime, and to restore it so that it can include the criminal again. To this purpose the only means available is punishment as unilateral coercion. During the time this discipline is enforced, the legal community is protected against the risk of repetition. In my sketch, punishment also has a goal that is internal to the concept of right as well as to the humanity in every person. I admit that the theory of general deterrence also has a goal that is internal to the concept of right, in so far as punishment motivates other citizens to obey the law. But the humanity in the person of the criminal is not taken seriously into consideration by the theory that makes general deterrence the rationale for punishment. Indeed, in order to maximize the deterrence effect, the theory of general deterrence may extend the punishment to the time and the degree necessary to rehabilitate the criminal as a full citizen.

## **NEGATIVE EVIDENCE**

### *RETRIBUTIVISM*

#### **RETRIBUTIVISM IS FIRMLY ROOTED IN OUR SENSIBILITIES ABOUT JUSTICE**

Manuel Escamilla-Castillo [University of Granada, Faculty of Law], "The Purposes of Legal Punishment," *Ratio Juris*. Vol. 23 No. 4 December 2010 (460–78)

The retributive theory establishes that the harm caused by the crime must be compensated by harm suffered by the person responsible for the initial harm. We can call this the ecological theory of punishment. The idea is that retribution must be directed towards restoring the previous situation of equilibrium, that has been overturned by the delinquent's action in causing injury to the victim of the crime. When a punishment is imposed on the criminal, that punishment, by "compensating" the initial illegal harm, restores the lost equilibrium, and returns the situation to balance. This idea of retribution, or payment, which must be ancestral, is firmly rooted in public opinion: We find it in expressions such as "I have paid my debt to society," said by the criminal who has served his sentence, or "The criminal must pay his due."

**RETRIBUTIVISM IS BASED ON THE IDEA THAT PUNISHMENT COMPENSATES VICTIMS FOR THE HARM THEY SUFFERED**

Manuel Escamilla-Castillo [University of Granada, Faculty of Law], "The Purposes of Legal Punishment," *Ratio Juris*. Vol. 23 No. 4 December 2010 (460–78)

The idea of retribution, as an indication of the purpose of punishment, alludes to the need for the criminal to compensate the victim of the crime for the harm suffered. This harm is two-fold: It is, on the one hand, the loss of a life, of someone's physical integrity or rights; on the other hand it is the feeling that one did not deserve that harm. These two types of harm generate resentment on the part of the victim and all those who sympathise with his suffering. This resentment must be counterbalanced by a punishment that reinstates the victim's loss as far as possible and that inflicts a balancing harm on the aggressor. It is retribution as vengeance or satisfaction of the resentment generated in the victim (Smith 1976, II, I, 1–2, 67ff.).

In the idea of retribution correctly understood, the victim's perspective is taken into account, that of the actual victim, the person who has suffered the loss occasioned by the illicit act, and the victim by sympathy, who is any spectator who experiences suffering together with the injured party. This is the point of view of the individual, of the person, who suffers an aggression, the victim, and the point of view taken by Brian Rosebury (2009, 19–21). A more dubious consideration of Rosebury is that those who argue that revenge is justified, but that only the state should address it, mix up two types of argument: One is related to justice, justifying private revenge, and the other one is a consequentialist one, justifying the state's intervention, thus giving rise to a contradiction. However, what really happens is that the state is not the end itself, but only the means. The state is justified in a consequentialist way, its sole purpose being to serve the cause of justice. Thus, state action (of any kind and in any field) can only be justified in a consequentialist way, for its service to the idea of justice for individuals.

**RETRIBUTIVISM IS MOST CONSISTENT WITH MODERN LIBERAL THEORIES THAT EMPHASIZE RESPECT FOR INDIVIDUAL AUTONOMY**

Manuel Escamilla-Castillo [University of Granada, Faculty of Law], "The Purposes of Legal Punishment," *Ratio Juris*. Vol. 23 No. 4 December 2010 (460–78)

We still have the theory of retribution, not as retaliation, corresponding to a royal capacity to deal with the proportionality between crimes and punishment, but as vengeance. As such, this theory does not affect the ruler, but rather the subject, moreover considered not collectively, as a people, but individually, as a person. The theory of punishment as vengeance, in effect, does not seek the quantum and the qualis of punishment in the king's necessities to enable him to govern, nor in the sacred needs of the priest or the academic demands of the prophet. The quantity and the quality of punishment will be fixed by reference to the individual's feeling for justice, of all individuals, whether true victims of a crime or those who express their solidarity with the victims that permits and demands their quality as human beings, of universal fratres or, as now, fellow countrymen. 5 It follows that the vengeful explanation of punishment has been declared the truly modern, liberal explanation. It is so, furthermore, in a dual sense. In the first place it is modern in that it does not take the human being as a means, but as an end in himself, thus obeying the Kantian imperative, and respecting one of the most indispensable versions of the categorical imperative, the Kantian category that most concisely brings together modern otherness (Kant 1956, 66–7). Unlike other theories, it instrumentalizes neither the victim of the crime, nor the aggressor. In the second place, it is modern also because the criterion of criminal justice relevant here is that of the citizen and not that of some heteronomous authority; criminal justice policy remains in the hands of the individual, consistent with his elevation to the category of maximum moral authority, which is the most typical content of modernity, in contrast with what happened in the medieval age, in which the religious hierarchy was the moral authority. The theory of retribution is the expression in the field of criminal law of the individual taking his destiny into his own hands, the expression of the demand for personal autonomy.

## THE SOCIAL CONTRACT REQUIRES A RETRIBUTIVE THEORY OF CRIMINAL JUSTICE

Manuel Escamilla-Castillo [University of Granada, Faculty of Law], "The Purposes of Legal Punishment," *Ratio Juris*. Vol. 23 No. 4 December 2010 (460–78)

Thirdly, Bentham's vision of punishment as something with primarily (and almost exclusively) preventive and exemplary aims, expresses a one-dimensional vision of law, separating it from the inherent complexity of the juridical, and turning it back to the more primitive phenomenon of legalism. Law is a complex phenomenon. In the origin of the complex phenomenon of law is the elemental reality of laws, above all when those laws are primary and lay down simple orders backed by threats. Before Law there existed nothing more than laws. In order to understand these laws adequately as a simple phenomenon, we only have to bear in mind the ruler from whom they came, of whose will they are the expression. When, starting from these laws, Law arose in classical Rome, it showed itself from the beginning as a complex reality. Not to overcomplicate the question, those simple laws generated expectations among the subjects about the ruler's reaction to their respective behaviour. That is what occurred with the Edict of the Praetor Peregrinus (Nemo 2006, 28ff.). Law no longer consists only of the laws (or the Edict of the Praetor), but also of the expectations that the law generates among the subjects, which has much to do with the form in which these subjects have understood the orders set out in the law or the warnings of the contents of the judicial decisions of the Praetorian Edict.

In the Modern Age one of the medieval institutions that has been redrawn and has come to be one of the pillars of the new political-legal order is the pact of sovereignty, an institution that in the Modern Age was reinterpreted under the name of the Social Contract. Subjects (who aspire to become citizens, a modern reinterpretation of the citizen of the polis or civitas) consider themselves to have a pact with the ruler. They have handed self-defence over to him; the ruler thus forms a stock of force of which his own power consists. But the subjects are ready to reclaim and recover their power if the ruler does not fulfil his commitments, fundamentally the protection of his subjects. This is what happened in the American and French Revolutions, in which the people took sovereignty back into their own hands. David Hume made a sharp critique of this vision of contractualism (Hume 1987, 465ff.), a critique that Bentham followed and deepened (Bentham 1977, 439ff.). However, this critique, based on the lack of empirical proof of the pact and on the lack of connection to a hypothetical pact for future generations, did not nullify the conceptual demand that the political order should be an alternative to individual self-protection.

In the field of criminal law, this idea of sovereignty as a reservoir of power entrusted to the ruler, of trust the restitution of which could be demanded in the event of non-fulfilment of the task, found expression in the idea of retribution as an aim of punishment. Retribution adopts the victim's point of view. It tries to put itself in his place and to understand the suffering he has undergone as a result of the offence against him and the reparation that the victim demands to restore the balance overturned by the criminal's action. If we take prevention as our standpoint, we adopt the viewpoint of the ruler. But in the modern state, the ruler is not now (and should not be) substantial, as in the Middle Ages, or in a great part of the Ancient World, but rather a servant of the people. And the people must be the measure of his exercise of power. Prevention, then, cannot be the final aim of punishment. To the extent to which he achieves retribution for the crime, the ruler will have achieved his objective of establishing peace in society (crime is a breach of the peace established by the ruler, thus crime is frequently interpreted as an attack on sovereignty). But this peace is only correctly understood when it is not the peace of the graveyard, but the living peace of subjects who now deserve to be called citizens, who can devote themselves without fear to the search for happiness, because they know that their rights are defended. And because they know that they are, the people happily renounce the right to take justice into their own hands, to entrust the defence of what is just to the hands of the ruler.

But, naturally, this retributive attitude, which caused Hart to criticise Bentham for a lack of "respect for the dignity and value of the individual person," is difficult to maintain in someone who, like Bentham, adopts, in the construction of his criminal law theory as in general in the

construction of his general theory of law, the point of view of the sovereign: for someone who, like Bentham, thinks that Law is reducible to laws.

## RETRIBUTIVISM IN THE TRADITION OF AUGUSTINE AND SMITH IS NOT OVERLY HARSH AND IMPRACTICAL

Chad Flanders [J.D. 2007, Yale; Ph.D. 2004, Chicago (philosophy). Assistant Professor of Law, Saint Louis University School of Law], "Retribution and Reform," 70 Md. L. Rev. 87 (2010-2011)

In other words, retributive theory, at least in Augustine's hands, understands part of the point of punishment as dealing with unruly emotions, and putting a constraint on them. Retribution is not meant to be harsh, but to stop us from being harsh. For, Augustine says, "who . . . is easily satisfied with merely exacting revenge equal to the injury that he received?" To the implied answer -- no one -- Augustine replies that this is the point of the commandment: to "hold in check the flames of hatred and to rein in the unbridled hearts of raging people."<sup>41</sup> Later, Augustine states explicitly that this is the job of the law, to set the penalty at equal retaliation and not to indulge the retaliation that a person may want to give, which may not stop at extracting an eye for an eye. Such a genealogy of retribution is one far removed from Whitman's irrelevance and harshness theses. Reminding ourselves of it can form part of our response to Whitman. For Augustine, at least, retribution is relevant to the problem of human psychology and its tendency toward harshness (the psychology of real human beings, not of Kantian pure wills, that is). And retribution is first and foremost a counsel of mildness, not of harshness.

Adam Smith, who like Augustine, was sensitive to the emotional roots of the retributive impulse, and its dangers, recognized how our resentment of a wrong can and will quickly outrun the bounds of legitimate feeling.<sup>42</sup> Most people, Smith says, are "incapable" of "moderation" in their resentment, and must expend "great . . . effort . . . in order to bring down the rude and undisciplined impulse of resentment" to a "suitable temper."<sup>43</sup> We don't always succeed in dampening those impulses. Those who are able to command and cabin their resentment are worthy of our esteem, but when their animosity exceeds what we as bystanders can "go along with," we "necessarily disapprove of it." In the extreme case, a person who manifests violent and excessive resentment earns our resentment rather than our sympathy. Still, although resentment can become excessive, it is nonetheless a worthy sentiment: when it is proportionate, it can be the "proper object of praise and approbation." This is why punishment, when proportionate, can be a "proper and laudable action."<sup>44</sup>

**RETRIBUTIVISM NEED NOT BE MOTIVATED BY THE ASSUMPTION THAT HUMANS ARE SIMPLY RATIONAL CHOICE-MAKERS**

Chad Flanders [J.D. 2007, Yale; Ph.D. 2004, Chicago (philosophy). Assistant Professor of Law, Saint Louis University School of Law], "Retribution and Reform," 70 Md. L. Rev. 87 (2010-2011)

In fact, Smith thought the solution to the problem of excessive emotions was to set up retributive institutions of punishment. Because retributive emotions are good to an extent, but also liable to be abused, we need to set up impartial institutions to administer punishment. If we left each person to satisfy his own grievances, civil society would soon become a "scene of bloodshed and disorder, every man revenging himself at his own hand whenever he fancied he was injured."<sup>45</sup> In order to avoid this, we give authority to the magistrates so that they might "give Satisfaction to the injured either by punishing the offender or by obliging him to compensate the wrong that has been done." The magistrate "promises to hear all complaints of injustice, to enquire diligently into the circumstances alleged upon both Sides, and to give that redress which to any impartial person shall appear to be just and equitable."<sup>46</sup> Retribution, again, is a solution to a problem of human emotion. But what we need is a way to make sure this resentment can be controlled, so that our emotions are retributive, and not vengeful, and we do this by putting punishment in the care of an impartial magistrate, "employing the power of the commonwealth to enforce the practice of this virtue [of just punishment]."

Smithian society is not a group of passionless individuals. Rather, they are all too passionate, and it is to the dangers of passion (resentment, disgust) that Smith sees retributive theory as a necessary response. Both Augustine and Smith would agree with Whitman, that punishment "always threatens to spin out of control . . . if there is no guarantee that prisoners are treated respectfully."<sup>47</sup> That is what drove Augustine and Smith to be retributivists.

## **RETRIBUTIVISM IS THE ONLY THEORY THAT CAN JUSTIFY PROPORTIONAL PUNISHMENT**

Chad Flanders [J.D. 2007, Yale; Ph.D. 2004, Chicago (philosophy). Assistant Professor of Law, Saint Louis University School of Law], "Retribution and Reform," 70 Md. L. Rev. 87 (2010-2011)

The argument that retributivism owns proportionality is simple and intuitive -- as many have thought it to be.<sup>54</sup> The only difficulty in explaining it is perhaps its overwhelming obviousness. Begin with the idea that for retributivists, punishment must be deserved punishment (which may be called the first principle of retributive punishment<sup>55</sup>). This answers the initial "why" question, but it quickly leads to the question of "how much punishment"? And the retributivist answer is that a just punishment is punishment that is proportionate to one's desert. In other words, proportionality is simply built into the retributivist commitment to deserved punishment. If a person should be punished because he deserves it, then the answer to the "how much?" question is that the person should be punished just as much and no more than he deserves.<sup>56</sup>

Retribution is often seen as a desirable theory precisely because it can explain proportionality while other theories of punishment cannot. This inability to explain how disproportionate punishments are unjust is considered a main objection against deterrence theories of punishment especially. If the goal of punishment is deterrence, then it is an open empirical question of how much punishment it will take to deter either the person or others from committing the crime in the future. It could, in principle, be endless punishment. That is to say, there is nothing built-in to the concept of deterrence that says any punishment for an offender is *prima facie* "too much." We won't know that until we know what will optimize deterrence. There is no reason in principle why we wouldn't need to punish someone fifty, sixty, or a hundred years, to deter others from committing a similar crime.

**THE FACT THAT WE CANNOT PERFECTLY DETERMINE PROPORTIONAL PUNISHMENT DOES NOT MEAN THAT THE CONCEPT IS MEANINGLESS**

Chad Flanders [J.D. 2007, Yale; Ph.D. 2004, Chicago (philosophy). Assistant Professor of Law, Saint Louis University School of Law], "Retribution and Reform," 70 Md. L. Rev. 87 (2010-2011)

So I conclude that retribution owns proportionality. But is it a value worth owning? As Alice Ristroph is only the most recent scholar to detail, proportionality runs the risk of being empty.<sup>68</sup> Once we move past exacting the punishment of an eye for the offender who has taken an eye, we seem to be in no man's land. What is the appropriate punishment for rape? Ten years? Twenty years? Life? Death?<sup>69</sup> Proportionality seems to stand mute, or says simply, over and over: make the punishment fit the crime. This gives us no guidance at all. Worse, it appears to give guidance, but in fact gives no such thing. We have a sense that we know what proportionality means: it means that we cannot give hard labor for a parking violation.<sup>70</sup> But outside of these and other fantastical examples, it cannot help us. Whitman appears to be right: proportionality at the very least is irrelevant. It can't supply answers.

I think this diagnosis is misleading in two respects. First, we should not confuse indeterminateness with emptiness. That proportionality cannot give us a certain answer in every case doesn't mean we can say that proportionality is unable to give answers. In fact, once we fix a punishment for one crime, we can go on from that: is the next crime better or worse than the crime we have a fixed punishment for? So, while proportionality cannot give absolute answers, it may still be able to give us answers relative to a scheme of punishment. If we step outside of that scheme, we may again face indeterminacy. But again, indeterminacy is not the same as emptiness. Multiple possible answers is not the same as having no answers. And, again, it is not likely that we will be creating a system of proportionate punishments from scratch. We can maneuver and talk meaningfully about proportionality vis á vis the punishments for other crimes. We can use our rough sense of what crimes deserve to fashion an overall ranking.

**IT DOES NOT MAKE SENSE FOR THE STATE TO BE MORALLY NEUTRAL WITH REGARD TO CRIMINAL PUNISHMENT**

Jean Hampton [Prof. of Philosophy, University of Arizona], "Correcting Harms Versus Righting Wrongs: The Goal of Retribution," 39 UCLA L. Rev. 1659 (1991-1992)

Finally, let me note one other political implication of this view of retribution. If I am right that morality demands that the state inflict retribution for certain serious moral wrongs, then even the most liberal state will have a moral role to play in the society it governs. It is currently fashionable for many liberals (for example, Rawls) to portray the liberal state as "morally neutral"-one that does not take moral sides as it governs a pluralist society.<sup>66</sup> However, were a state to try to be morally neutral, it would be unable to inflict retributive punishment. The demands of retribution require a legal institution not only to take moral sides, but also to strive to implement a moral world in which people are treated with the respect their value requires.

As I see it, no liberal state would be worth supporting if it did not assume this role. A state that would truly be neutral about morality could not be animated by any conception of its citizens' worth as it punished offenders, and whatever its punishment goals, could not be properly responsive to that which matters most deeply to all of us: our value. What liberal would want to live in such a state? How could an acceptable liberal state be morally neutral in the face of the white farmer's treatment of his farmhands? How could an acceptable liberal state punish burglars more than it punishes sex offenders? Just as an individual's behavior has moral meaning, so too does a state's response to the behavior of its citizens. Liberals should wish not for a morally neutral state, but for a morally reputable and conscientious one that accepts that it has a role to play in insuring that each of us is accorded the value we ought to have. The old liberals, including Locke, Rousseau and Jefferson, as well as modern liberals such as Joel Feinberg, have had no trouble with this limited moral conception of the state's role. Nor should we: for how can human autonomy be realized in a society without mutual respect for human worth?

**PUNISHMENT IS NECESSARILY RETRIBUTIVE.**

Wood, Allen W. [Professor of Philosophy, Indiana University] *Hegel's Ethical Thought*. Cambridge [England: Cambridge UP, 1990. Print.

Punishment is the social practice of inflicting evil (pain or harm) as a response to wrongdoing. To be punished is to have an evil inflicted on you by a duly constituted authority simply because it is an evil and because that authority ostensibly believes you have done something wrong. It is still punishment - unjust punishment - if the authority's belief is false, or even shammed. It is not punishment at all to inflict evil on a person who is not even alleged to have done wrong. Nor do you punish a person when your reason for inflicting the evil is that it is a means to or a by-product of some good (as in a painful medical treatment or annoying educational process). You have to choose it as an evil, and your reason for inflicting it has to be that the person has supposedly done something wrong. In that sense, the very conception of punishment is retributive. Borrowing Rawls's terminology, we could say that it is essential to punishment as an institution that particular acts of punishment should be justified by reference to the general practice of punishment; and the general practice is conceived in an essentially retributive way.<sup>1</sup>

### **PUNISHMENT ASSERTS THE ACTUALITY OF RIGHT EVEN IN THE FACE OF WRONG**

Wood, Allen W. [Professor of Philosophy, Indiana University] *Hegel's Ethical Thought*. Cambridge [England: Cambridge UP, 1990. Print.

One interpretation of Hegel's theory begins with Hegel's assertion that crime must be punished because otherwise the crime would be "valid"; hence punishment "restores the right" (PR § 99)/ This theme in Hegel's defense of punishment is clearly related to the idea (defended by Joel Feinberg) that one important function of punishment is simply to express society's strong condemnation of criminal acts.<sup>6</sup> By violating the right of another, the criminal is in effect asserting that this right has no validity. By punishing the criminal, the state effectively contradicts this assertion, demonstrating in practical terms that people do have rights, that their rights count for something. Hegel finds in this theme some affinity to his own metaphysics, in which something displays true actuality when it is capable of enduring otherness and contradiction, and returning to itself even from its own opposite. If crime, wrongdoing, or injustice (Unrecht) is the negation of right (Recht), punishment is the actuality of right; it is (as the participial form of the noun might suggest) "wrong righted," or "justice" (Gerechtigkeit). Punishment is "the negation of the negation. Actual right is the canceling of the violation [of right], which thus shows its validity and preserves itself as a necessary, mediated existence" (PR § 97A). Punishment asserts the actuality of the right even in the face of wrong or injustice; like spirit itself, right proves its actuality by vindicating itself even in its own opposite.

### CRIMINALS CONSENT TO BEING PUNISHED WHEN THEY COMMIT A CRIME

Wood, Allen W. [Professor of Philosophy, Indiana University] *Hegel's Ethical Thought*. Cambridge [England: Cambridge UP, 1990. Print.

When I commit a crime, do I thereby will that the same crime should be committed against me? Clearly murderers do not typically desire to be killed, nor thieves to be stolen from. Sometimes, however, we ascribe volition to people not on the basis of what they desire, but on the basis of their expressions of intent (in word or action). The clearest case is probably a contractual agreement. Suppose I agree to shovel your walk next winter if you mow my lawn this summer. When winter comes and I am due to perform my part of the bargain, it can be said on the basis of this agreement that I shovel your walk in accordance with my own will. This is true even if the shoveling is something I do not want to do, even if it is something I hate doing and wish that I had never agreed to do. Hegel explicitly rejects Cesare Beccaria's contractarian theory of punishment (PR § 100R). But he does accept Beccaria's claim that punishment is based on the criminal's consent to be punished: "What Beccaria demands, that a man must give his consent to be punished, is quite right; but the criminal already gives his consent through his deed. It is the nature of the crime and the criminal's own will that the violation proceeding from him should be canceled" (PR § 100A). Hegel even insists that the criminal's consent to be punished is explicit rather than tacit (VPR 4: 291).

## RETRIBUTIVISM RESPECTS THE RIGHTS OF PERSONS

Murphy, Jeffrie G. "Marxism and Retribution." *Philosophy and Public Affairs*, Vol. 2, No. 3 (Spring, 1973), pp. 217-243.

To move specifically to the topic of punishment: How exactly does retributivism (of a Kantian or Hegelian variety) respect the rights of persons? Is Marx really correct on this? I believe that he is. I believe that retributivism can be formulated in such a way that it is the only morally defensible theory of punishment. I also believe that arguments, which may be regarded as Marxist at least in spirit, can be formulated which show that social conditions as they obtain in most societies make this form of retributivism largely inapplicable within those societies. As Marx says, in those societies retributivism functions merely to provide a "transcendental sanction" for the status quo. If this is so, then the only morally defensible theory of punishment is largely inapplicable in modern societies. The consequence: modern societies largely lack the moral right to punish.<sup>6</sup> The upshot is that a Kantian moral theory (which in general seems to me correct) and a Marxist analysis of society (which, if properly qualified, also seems to me correct) produces a radical and not merely reformist attack not merely on the scope and manner of punishment in our society but on the institution of punishment itself. Institutions of punishment constitute what Bernard Harrison has called structural injustices<sup>7</sup> and are, in the absence of a major social change, to be resisted by all who take human rights to be morally serious-i.e., regard them as genuine action guides and not merely as rhetorical devices which allow people to morally sanctify institutions which in fact can only be defended on grounds of social expediency.

## PEOPLE MUST BE GIVEN WHAT THEY DESERVE

Rachels, James. "Punishment and Desert," originally appeared in *Ethics in Practice*, edited by Hugh LaFollette (Oxford: Basil Blackwell, 1997), pp. 470-479.  
<http://www.jamesrachels.org/punanddes.pdf>

First, acknowledging deserts is a way of granting people the power to determine their own fortunes. Because we live together in mutually cooperative societies, how each of us fares depends not only on what we do but on what others do as well. If we are to flourish, we need to obtain their good treatment. A system of understandings in which desert is acknowledged gives us a way of doing that. Thus, if you want to be promoted, you may earn it by working hard at your job; and if you want others to treat you decently, you can treat them decently. Absent this, what are we to do? We might imagine a system in which the only way for a person to ensure good treatment by others is somehow to coerce that treatment from them—Worker might try threatening his employer. Or we might imagine that good treatment always comes as charity—Worker might simply hope the employer will be nice to him. But the practice of acknowledging deserts is different. The practice of acknowledging deserts gives people control over whether others will treat them well or badly, by saying to them: if you behave well, you will be entitled to good treatment from others because you will have earned it. Without this control people would be in an important sense impotent, less able to affect how others will treat them and dependent on coercion or charity for any good treatment they might receive.

**RETRIBUTION MUST BE THE RATIONALE FOR PUNISHMENT – NECESSARY TO ACHIEVE ANY UTILITARIAN BENEFITS**

Robinson, Paul H. [Professor of Law, Northwestern University School of Law] and John M. Darley [Dorman T. Warren Professor of Psychology, Princeton University]. "The Utility of Desert." *Northwestern University Law Review*, Vol. 91, No. 2. 1997.

Our central point is this: The criminal law's power in nurturing and communicating societal norms and its power to have people defer to it in unanalyzed cases is directly proportional to how people defer to it in unanalyzed cases is directly proportional to criminal law's moral credibility. If criminalization or conviction (or decriminalization or refusal to convict) is to have an effect in the norm-nurturing process, it will be because the criminal law has a reputation for criminalizing and punishing only that which deserves moral condemnation, and for decriminalizing and not punishing that which does not. If, instead, the criminal law's reputation is one simply of a collection of rules, which do not necessarily reflect the community's perceptions of moral blameworthiness, then there would be little reason to expect the criminal law to be relevant to the societal debate over what is and is not condemnable and little reason to defer to it as a moral authority. What then are the requirements for a criminal law system to gain this credibility? How can this credibility be lost? Enhancing the criminal law's moral credibility requires, more than anything, that the criminal law make clear to the public that its overriding concern is doing justice. Therefore, the most important reforms for establishing the criminal law's moral credibility may be those that concern the rules by which criminal liability and punishment are distributed. The criminal law must earn a reputation for (1) punishing those who deserve it under rules perceived as just, (2) protecting from punishment those who do not deserve it, and (3) where punishment is deserved, imposing the amount of punishment deserved, no more, no less. Thus, for example, the criminal law ought to maintain a viable insanity defense that excuses those who are perceived as not responsible for their offense, ought to avoid the use of strict liability (imposing liability in the absence of a culpable state of mind), and ought to limit the use of non-exculpatory defenses. In other words, it ought to adopt rules that distribute liability and punishment according to desert, even if a non-desert distribution appears in the short-run to offer the possibility of reducing crime. The point is that every deviation from a desert distribution can incrementally undercut the criminal law's moral credibility, which in turn can undercut its ability to help in the creation and internalization of norms and its power to gain compliance by its moral authority. Thus, contrary to the apparent assumptions of past utilitarian debates, such deviations from desert are not cost free, and their cost must be included in the calculation when determining which distribution of liability will most effectively reduce crime.

*KANTIAN RETRIBUTIVE PRINCIPLES*

**TO FORGET INDIVIDUAL RESPONSIBILITY IN THE NAME OF CRIME PREVENTION IS TO TREAT OFFENDERS AS A MERE INSTRUMENT**

Manuel Escamilla-Castillo [University of Granada, Faculty of Law], "The Purposes of Legal Punishment," *Ratio Juris*. Vol. 23 No. 4 December 2010 (460–78)

In the second place, punishment must be primarily centred on the merits (or demerits) of the criminal's conduct. It must be a means of attributing responsibility for free conduct. Free behaviour, typical of the human being in modern society is necessarily responsible behaviour, the behaviour of an agent who accepts the consequence of his actions, of their repercussions on third parties, whether or not desired. Freedom and responsibility are, in this way, interdependent in human conduct. When we think of this conduct exclusively from the standpoint of prevention or setting an example, by losing sight of the worthiness of the prisoner, we equally lose sight of his essential character and we relegate him to mere instrumentality (Hayek 1960, chap. V, 71ff.). A type of society that either in itself, or through genetic inheritance or the education received, is responsible for the conduct of individuals, and not each one of them, a society in which individual conduct is presented as causally determined is a society condemned to a perpetual minority of age, a society that refuses (or is denied the right) to take its destiny in its own hands. That society is condemned to seeing someone, a dictator or helmsman, take power to decide for the others for always, someone who becomes the little father of children who never grow up, and so never become persons in their own right, always incomplete projects.

**KANTIAN CONCEPTIONS OF CRIMINAL JUSTICE REQUIRE PUNISHMENT AS THE ONLY WAY TO RECOGNIZE THE MORAL EQUALITY OF THE OFFENDER**

Chad Flanders [J.D. 2007, Yale; Ph.D. 2004, Chicago (philosophy). Assistant Professor of Law, Saint Louis University School of Law], "Retribution and Reform," 70 Md. L. Rev. 87 (2010-2011)

Morris paints the following picture. Society is made up of equals that all work under the burden of obedience to the law. When a person breaks the law he "takes advantage" of the rest of us by taking a benefit (freedom from the laws) that we do not have. To take the offender seriously -- to treat him again as an equal agent -- we must put a new burden upon him; that burden is his punishment. We must force him to accept a deprivation of his liberty for the extra liberty he has enjoyed at our expense.

When we punish the criminal by depriving him of his liberty, we are again making him equal to us. As Whitman summarizes the position, "[o]nly blame takes the offender seriously as a moral equal."<sup>34</sup> To try to "cure" the offender would be to treat him as a patient, as somehow "sick" and needing to be managed and manipulated rather than simply held responsible. Nor will it do to punish simply for the sake of deterring others, because that would be to treat the offender as a means for the sake of others' safety. This is why Hegel, following Kant and still in the grips of the Kantian picture, would speak of the prisoner's "right" to be punished.<sup>35</sup> To not punish is a denial of the offender's right to be treated as an equal, as someone who has autonomously chosen to break the law, who has at the same time chosen to be punished.

**THE STATE IS UNIQUELY POSITIONED TO VINDICATE THE MORAL WORTH OF VICTIMS BECAUSE OF ITS ROLE AS AN IMPARTIAL MORAL ADJUDICATOR.**

Jean Hampton [Prof. of Philosophy, University of Arizona], "Correcting Harms Versus Righting Wrongs: The Goal of Retribution," 39 UCLA L. Rev. 1659 (1991-1992)

Who must formulate and inflict the punishment, in order that it work as an effective vindication of the victim's value, and what kinds of denials must the state, through the criminal law, attempt to vindicate? One critic has claimed that under my theory, the state could never carry out punishment because, to establish equality, the victim must carry out the defeat herself, and not rely on someone more powerful than herself to act on her behalf.<sup>5</sup> But this criticism misunderstands both my theory of retribution and the state's role as an agent of retribution. There have always been societies in which people believe that human worth is a function of strength and power, and there are sectors of our own society in which this tenet is held. In such communities, a victim defeated by a stronger opponent would have to fight her own battles to re-establish her worth, since her worth is something that is a feature of the strength she in fact manifests. However, on the Kantian view, which undergirds my retributive theory, it is not strength, power, intelligence, or skill that creates worth; it is our bare humanity, something possessed equally by the weakest and the strongest among us. To restore this value, the wrongdoer must be defeated in a way that makes the relative value of victim and wrongdoer apparent. Yet ironically, the victim is often ill suited to deliver the defeat, not only because it will often be the case that he is unable to deliver it (for example, he may be an infant or in some way infirm), but also because he may be unable to deliver it in a way that focuses on what is morally relevant in assessing worth—namely, their common humanity. The attractiveness of the state as the agent for accomplishing retribution (for example, through a jury, judge, or legislative sanction), is that the state is—or at least purports to be—an impartial agent of morality, with greater capacity to recognize the moral facts than any involved individual citizen.

**UNDER KANTIAN MORALITY, AGENT SPECIFIC CONSIDERATIONS TREAT HUMANS AS A MEANS ONLY**

Dimitri Landa [Assistant Professor of Politics, New York University], "On the Possibility of Kantian Retributivism". ([cs.as.nyu.edu/docs/IO/2790/KantianRetributivismUtilitas.pdf](http://cs.as.nyu.edu/docs/IO/2790/KantianRetributivismUtilitas.pdf)).

In these accounts, retributivism proper may be best thought of as an implication of the arguments about the distribution of punishment (e.g., Holtman 1997a; Byrd 1989; Murphy 1987; Scheid 1983).<sup>7</sup> The essence of this view is that the Kantian categorical treatment of morality disallows the kind of case-by-case judgment about punishment that turns on considerations other than the criminal act itself to determine the appropriate social response to that act. In particular, considerations that are agent-specific, or that invoke the effects of punishment on the probability of committing other crimes or on the general welfare of members of the society, etc., would contradict 'a priori based law' and involve us in the treatment of human beings as means only, directly violating the command of the moral law (e.g., Mundle 1954; Hart 1968; Byrd 1989). The argument, then, proceeds something like the following: "

### **PUNISHMENT REASSERTS THE SUPREMACY OF THE LAW**

Ripstein, Arthur [University of Toronto]. *Force and Freedom: Kant's Legal and Political Philosophy*. Cambridge, MA: Harvard UP, 2009. Print.

In this section I will begin with the retrospective aspect of punishment. The basic idea is simple, but each part of it requires explanation: the criminal, through her crime, chooses to exempt herself from one or more of the prohibitions contained in public law. She thus asserts a form of what Kant calls “wild, lawless freedom.” The crime does not change the law normatively—violations do not change what people are entitled to do—but it is a case in which the law’s guidance of conduct is ineffective. In every case of a crime, the law has partially failed to create a system of equal freedom by constraining conduct. The punishment restores the supremacy of the law because it deprives the criminal’s deed of its effect. It does so by turning the criminal’s maxim—the principle though which he makes “such a crime his rule”<sup>17</sup>—against him: where he sought exemption, he receives exclusion, so that the law remains supreme.

**A CRIMINAL VIOLATES THE RULE OF LAW – IT IS BOTH A PUBLIC AND PRIVATE WRONG**

Ripstein, Arthur [University of Toronto]. *Force and Freedom: Kant's Legal and Political Philosophy*. Cambridge, MA: Harvard UP, 2009. Print.

The criminal's choice of means is inconsistent with the rule of law and so with a civil condition, because she unilaterally determines which means are available to her, rather than accepting the omnilateral judgment of public law. She thereby asserts a claim to what Kant elsewhere calls "wild, lawless freedom." The inconsistency parallels the inconsistency between theft and property, but does not merely replicate it. The structure of a civil condition is that omnilateral public law replaces unilateral private judgment. Through their representatives, the citizens as a collective body give themselves laws, together. No private person is entitled to make, apply, or enforce laws. Only officials acting in their official capacities are entitled do so. Much of the matter of these laws is dictated by innate right or private right: public law "contains no further or other duties of human beings among themselves than can be conceived" in a state of nature; "the laws of the condition of public right accordingly have to do only with the rightful form of their association."<sup>28</sup> In making crime her rule, the criminal violates not only the "duties of human beings among themselves" that make up the matter of most familiar crimes, but also the rightful form of public law, because the criminal's "rule" is one of unilateral exemption from omnilateral law. If unilateral choice could cancel omnilateral law, there could be no omnilateral law.<sup>29</sup>

### **THE STATE MUST RESTORE A SYSTEM OF EQUAL FREEDOM**

Ripstein, Arthur [University of Toronto]. *Force and Freedom: Kant's Legal and Political Philosophy*. Cambridge, MA: Harvard UP, 2009. Print.

A civil union enables people to give themselves coercive laws together. The only way they can do so, however, is by giving laws to themselves externally. In characterizing the executive power of the state as “irresistible,” 35 Kant is making a conceptual claim about the nature of executive power. Anything you do contrary to sovereignty is without legal effect. If you wrongfully take something from another person, it does not become yours, and damages restore it to its original possessor. The state prevents you from exempting yourself from the law by providing you with a contrary incentive; if you ignore the incentive, the state restores its own authority by hindering your hindrance of the system of equal freedom by removing the legal effect of your exemption.

### RIPSTEIN CLARIFIES WITH THE EXAMPLE OF THEFT

Ripstein, Arthur [University of Toronto]. *Force and Freedom: Kant's Legal and Political Philosophy*. Cambridge, MA: Harvard UP, 2009. Print.

The analysis of upholding the supremacy of law in the face of exemption works most straightforwardly in Kant's example of theft. The thief exempts herself from public law by exempting herself from the law's claim to regulate property. The way to make it the case that the crime did not change the law is to turn the criminal's own maxim against her. Having sought to exempt herself from the rule of law as realized in the law of property, the criminal finds herself excluded from the system of property, prohibited from having any external objects subject to her choice. If the nature of crime needs to be understood formally rather than materially, so does Kant's retributive claim that "whatever undeserved evil you inflict on another within the people, that you inflict upon yourself."<sup>36</sup> As a result, the thief must be understood not merely to have deprived some particular person of some particular piece of property, nor even simply to have acted contrary to the system of property. Instead, she has acted contrary to the people's power to give themselves laws. She made self- exemption her rule by making the violation of a particular public law her rule; her act must be made into an act of self- exclusion from that aspect of the system of public law from which she exempted herself.

### **RIPSTEIN EXPLAINS THE NATURE OF PUNISHMENT IN A KANTIAN SYSTEM**

Ripstein, Arthur [University of Toronto]. Force and Freedom: Kant's Legal and Political Philosophy. Cambridge, MA: Harvard UP, 2009. Print.

Kant gives little guidance as to how this might be done, but the formal nature of criminal wrongdoing generates the perspective from which this issue can be addressed. Because every crime is formally a self- exemption from public law, exclusion from the system of freedom must be the appropriate punishment. The seemingly self- contained nature of property is not only unrepresentative but misleading in this respect. The underlying retributive principle requires excluding the wrongdoer from participation in the civil society constituted by public law insofar as he has sought to exempt himself from some aspect of public law. Every form of punishment will thus be a form of exclusion from full participation in civil society.

### RIPSTEIN SUMMARIZES HIS ARGUMENT

Ripstein, Arthur [University of Toronto]. *Force and Freedom: Kant's Legal and Political Philosophy*. Cambridge, MA: Harvard UP, 2009. Print.

Kant's legal and political philosophy is presented as an a priori system, which is meant to apply to finite embodied rational beings, without any reference to the malevolence or defects of human nature or the difficult circumstances in which humans find themselves. His theory of punishment poses an apparent obstacle to the a priori status of his account. Crimes are typically the product of bad people or difficult circumstances. In spite of the roots of crime, I have argued that Kant's account of punishment is required because of the nature of freedom, rather than the imperfections of free beings or the world in which they find themselves.<sup>51</sup> I have argued that deterrence and retribution are not merely compatible but mutually require each other. In so doing, I have sought to provide an account that is both true to Kant's texts and, at the same time, resolutely noninstrumentalist. Retributive punishment does not serve to see to it that the wicked suffer as they deserve to; nor does punishing one person serve as a deterrent in order to prevent others from engaging in unwelcome behavior. Instead, punishment is nothing more than the supremacy of the rule of law. Prospectively, it guides conduct by threatening to make actions contrary to law pointless; retrospectively, it makes any such actions pointless, depriving them of their legal as well as their factual effects. The principle of punishment is thus the guarantee of freedom in space and time, the hindering of hindrances to freedom.

**MULTIPLE INTERPRETATIONS OF KANTIAN RETRIBUTIVISM – SCHEID SUMMARIZES S.I. BENN'S VIEW**

Scheid, Don E. "Kant's Retributivism." *Ethics*, Vol. 93, No. 2 (Jan., 1983), pp. 262 – 283.

As already noted, Kant is usually represented as espousing thoroughgoing retributivism. S. I. Benn is a good representative of this standard interpretation: "The most thoroughgoing retributivists, exemplified by Kant, maintain that the punishment of crime is right in itself, that it is fitting that the guilty should suffer, and that justice, or the moral order, requires the institution of punishment. This, however, is not to justify punishment but, rather, to deny that it needs any justification.... Its intrinsic value is appreciated immediately and intuitively."<sup>5</sup>

**MULTIPLE INTERPRETATIONS OF KANTIAN RETRIBUTIVISM – SCHEID SUMMARIZES MURPHY'S VIEW**

Scheid, Don E. "Kant's Retributivism." *Ethics*, Vol. 93, No. 2 (Jan., 1983), pp. 262 – 283.

In his book on Kant's philosophy of law, Jeffrie Murphy ascribes to Kant another version of thoroughgoing retributivism. According to Murphy, Kant's theory of punishment is based on the idea that political obligations are essentially obligations of reciprocity or fair play: "If the law is to remain just, it is important to guarantee that those who disobey it will not gain an unfair advantage over those who do obey voluntarily. Criminal punishment attempts to guarantee this, and in its retribution, it attempts to restore the proper balance between benefit and obedience."<sup>6</sup> According to Murphy's interpretation, Kant's justification for an institution of punishment is that it is required to nullify the unfair advantage law breakers gain over the law-abiding citizens.<sup>7</sup>

### SCHEID OFFERS A PARTIAL RETRIBUTIVIST INTERPRETATION OF KANT

Scheid, Don E. "Kant's Retributivism." *Ethics*, Vol. 93, No. 2 (Jan., 1983), pp. 262 – 283.

Consequently, a theory of partial retributivism may be seen to be compatible with Kant's basic moral injunction against treating persons as means merely. The general justifying aim of the institution of punishment is crime control (or, more immediately, special and general deterrence), which is also essentially the general aim of the state, that is, guaranteeing all individuals against unjust infringements of their liberties. Questions of how punishments are to be allotted are determined within the institution of punishment by the retributivist principles. Punishing criminals so as to achieve crime control does not run afoul of the injunction against using persons as mere means because the punishments are allotted according to the retributivist principles, and these guarantee that each is treated with the respect due him as a person.

**PUNISHMENT DOES NOT TREAT ONE AS A MERE MEANS TO AN END – MURPHY’S  
SOCIAL CONTRACT ARGUMENT**

Scheid, Don E. “Kant’s Retributivism.” *Ethics*, Vol. 93, No. 2 (Jan., 1983), pp. 262 – 283.

This rationale is Kant's main line of reasoning, I believe. However, there are at least two additional considerations Kant may also have had in mind. The first of these has been attributed to Kant by Jeffrie Murphy, and it runs as follows.<sup>38</sup> To treat a person with the respect due him is not to respect what he now happens, however uncritically, to desire; rather it is to respect what he desires (or would desire) as a rational person. To treat a person with moral respect is to treat him in a way that respects the desires he has or would have as a rational person. Insofar as a person is rational, he may be presumed to have agreed to that set of rules and social arrangements which a group of rational beings would agree to in a Rawlsian original position. A system of laws with coercive enforcement (the juridical state of affairs) is one thing such a group of rational beings would agree to; so each rational person may be presumed to agree to such a system. Having agreed to the system, the individual also agrees, by implication, to the punishments which attach to various crimes; and thus he agrees to his own punishment, if he happens to commit one of the designated crimes. Kant, in fact, says: "To say, 'I will to be punished if I murder someone,' can mean nothing more than, 'I submit myself along with everyone else to those laws which, if there are any criminals among the people, will naturally include penal laws.'"<sup>39</sup> On this line, then, one agrees to his punishment in that he must, as a rational person, agree to the legal system of coercive enforcement in accordance with which he is being punished.

**PUNISHMENT DOES NOT TREAT ONE AS A MERE MEANS TO AN END – CRIMINAL  
RECOGNIZES THE POSSIBLE CONSEQUENCE WHEN HE PERFORMS A PUNISHABLE  
ACTION**

Scheid, Don E. "Kant's Retributivism." *Ethics*, Vol. 93, No. 2 (Jan., 1983), pp. 262 – 283.

The second possible line is intertwined with, but distinguishable from, the one suggested by Murphy. It might be argued that by voluntarily undertaking a crime, after having been warned of the punishment attached, the criminal, in effect, volunteers himself as a candidate for punishment. Thus, if he is punished for a crime, his autonomy is not violated and so he is not, in that sense, used as a means -though his punishment functions as a deterrent. To be sure, Kant recognizes that the individual cannot directly will his own punishment, for, by definition, punishment is the imposition of something unwanted. As Kant says, "If what happens to someone is also willed by him, it cannot be a punishment."<sup>40</sup> But the individual can will his punishment indirectly. Kant says, "No one suffers punishment because he has willed the punishment, but because he has willed a punishable action.' In other words, although an individual cannot directly will or choose some outcome he does not want, he can choose something that has an unwanted consequence attached to it. In this sense, then, the criminal chooses to be punished: in committing his crime, he voluntarily puts himself in a position where he knows unwanted consequences (punishment) will or may result.

**PUNISHMENT DOES NOT USE ONE AS A MERE MEANS TO AN END – THEY CONSENT VIA THE SOCIAL CONTRACT**

Murphy, Jeffrie G. "Marxism and Retribution." *Philosophy and Public Affairs*, Vol. 2, No. 3 (Spring, 1973), pp. 217-243.

To justify government or the state is necessarily to justify at least some coercion.<sup>13</sup> This poses a problem for someone, like Kant, who maintains that human freedom is the ultimate or most sacred moral value. Kant's own attempt to justify the state, expressed in his doctrine of the moral title (*Befugnis*),<sup>14</sup> involves an argument that coercion is justified only in so far as it is used to prevent invasions against freedom. Freedom itself is the only value which can be used to limit freedom, for the appeal to any other value (e.g., utility) would undermine the ultimate status of the value of freedom. Thus Kant attempts to establish the claim that some forms of coercion (as opposed to violence) are morally permissible because, contrary to appearance, they are really consistent with rational freedom. The argument, in broad outline, goes in the following way. Coercion may keep people from doing what they desire or want to do on a particular occasion and is thus *prima facie* wrong. However, such coercion can be shown to be morally justified (and thus not absolutely wrong) if it can be established that the coercion is such that it could have been rationally willed even by the person whose desire is interfered with:

Accordingly, when it is said that a creditor has a right to demand from his debtor the payment of a debt, this does not mean that he can persuade the debtor that his own reason itself obligates him to this performance; on the contrary, to say that he has such a right means only that the use of coercion to make anyone do this is entirely compatible with everyone's freedom, including the freedom of the debtor, in accordance with universal laws.<sup>15</sup>

Like Rousseau, Kant thinks that it is only in a context governed by social practice (particularly civil government and its Rule of Law) that this can make sense. Laws may require of a person some action that he does not desire to perform. This is not a violent invasion of his freedom, however, if it can be shown that in some antecedent position of choice (what John Rawls calls "the original position"),<sup>16</sup> he would have been rational to adopt a Rule of Law (and thus run the risk of having some of his desires thwarted) rather than some other alternative arrangement like the classical State of Nature. This is, indeed, the only sense that Kant is able to make of classical Social Contract theories. Such theories are to be viewed, not as historical fantasies, but as ideal models of rational decision. For what these theories actually claim is that the only coercive institutions that are morally justified are those which a group of rational beings could agree to adopt in a position of having to pick social institutions to govern their relations:

## THE DEATH PENALTY DOES NOT VIOLATE THE CATEGORICAL IMPERATIVE

Merle, Jean-Christophe. "A Kantian Critique of Kant's Theory of Punishment." *Law and Philosophy*, 2000, Kluwer Academic Publishers.

In committing the crime, the criminal obviously decided to accept the regression into the state of nature. In the state of nature, nobody has any right and external freedom is continuously threatened, whereas the categorical imperative commands us to protect it. The criminal accepts the disappearance of the external freedom of his own will. This means that the criminal's will commits a kind of suicide, which makes him "unfit to be a citizen" (DR VI, 331, Gregor 105). The criminal ceases to be able to be treated by the state as a free person, as a rational being. The kind and degree of punishment proposed by Kant show that in a particularly clear way. The most famous example is no doubt capital punishment for murderers. Cohen (Cohen, 1922, p. 341) as well as some contemporary interpreters (cf. Schwarzbild, 1985; Pugsley, 1981, p. 1516) raise the objection against capital punishment that it contradicts the Kantian moral law, since it irremediably suppresses a rational being. For that reason they propose alternative punishments. Their argument has been so successful that today there is barely an interpreter who will take a stand in favor of this part of Kant's theory of penal law. Yet this point is worth a closer look, because there are two strikes against Cohen's position. Firstly the rational being does not cease to be only when punished, but as soon as she commits a crime. Thus punishment merely draws the consequence of the fact that by committing a crime a rational being denied her own rational essence. Second, the degree of punishment for all other crimes mentioned by Kant shows clearly that according to Kant the criminal is no longer to be dealt with as a rational being. Let me give only one example: "But what does it mean to say, "if you steal from someone, you steal from yourself?" Whoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security in any possible property. He has nothing and can also acquire nothing; but he still wants to live, and this is now possible only if others provide for him. But since the state will not provide for him free of charge, he must let it have his powers for any kind of work it pleases (in convict or prison labor) and is reduced to the status of a slave for a certain time, or permanently if the state sees fit" (VI, 333, Gregor 106). Here Kant fails to distinguish between two things: (a) that someone without property has to work for her living, and (b) that working for her living means being enslaved rather than, for instance, working as a day laborer. In reality this enslavement has something in common with the death penalty as well as with every other kind of punishment mentioned in the Doctrine of Right, for example with deportation (DR VI, 334, Gregor 107) or with "permanent expulsion from civil society" (DR, Appendix, part 5, VI, 363, Gregor 130), or even with castration. Indeed, according to Kant, castration is a partial murder, just as self castration as a partial murder: "To deprive oneself of an integral part or organ (to maim oneself) [p] are ways of partially murdering oneself" (TL, VI, 423, Gregor, Practical Philosophy, 547). Even if we put aside the question of whether suicide is or should be punishable, castration by another person remains a kind of partial death.

**A VICTIM IS HARMED WHEN AN OFFENDER TREATS HIM IN A WAY THAT DENIES HIS MORAL WORTH**

Jean Hampton [Prof. of Philosophy, University of Arizona], "Correcting Harms Versus Righting Wrongs: The Goal of Retribution," 39 UCLA L. Rev. 1659 (1991-1992)

Simply stated, harms anger us not merely because they cause suffering we have to see in others, but also because we see their inflictions as violative of the victim's entitlements given her value. Hence one way in which diminishment accomplished by an immoral action morally injures the victim is that it damages the realization of her value. That is, the false message about value carried in the action explains why the victim's entitlements are not respected. Indeed, that false message can be taken to license quite ghastly treatments, as the farmer understood when he killed his farmhands in the most humiliating way possible.

Second, even when a wrongful action does not inflict a harm, it angers us simply by virtue of what the action says about the person. We care about what people say by their actions because we care about whether our own value, and the value of others, will continue to be respected in our society. The misrepresentation of value implicit in moral injuries not only violates the entitlements generated by their value, but also threatens to reinforce belief in the wrong theory of value by the community. Our views about human value are more or less secure, and we are more or less committed to them. Fear that we are worth less than we wish (or perhaps less than others think we are worth) is a common human phenomenon, particularly in societies in which non-Kantian inegalitarian theories of worth have gained currency. A value-denying act can therefore be frightening to the victim (and others like him), insofar as it plays into those fears. Perhaps more importantly, it can encourage the infliction of similar injuries by people who find appealing the apparent diminishment of the victim and the relative elevation effected by the wrongdoing. For many, the longing to be better is a lure to behave in ways that diminish another and elevate oneself. I call this damage to the acknowledgement of the victim's value.

So I will define a *moral injury* as *damage to the realization of a victim's value, or damage to the acknowledgement of the victim's value, accomplished through behavior whose meaning is such that the victim is diminished in value.*

## **RETRIBUTION IS DESIGNED TO SEND A MESSAGE VINDICATING THE WORTH OF THE VICTIM**

Jean Hampton [Prof. of Philosophy, University of Arizona], "Correcting Harms Versus Righting Wrongs: The Goal of Retribution," 39 UCLA L. Rev. 1659 (1991-1992)

In short, retribution is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity. What do I mean by "vindicating the value of the victim?" Understanding the nature of the vindication accomplished by a successful retributive response is necessary to understanding what it means to say that a wrongdoer "deserves" punishment. To vindicate the victim, a retributive response must strive first to re-establish the acknowledgement of the victim's worth damaged by the wrongdoing, and second, to repair the damage done to the victim's ability to realize her value.

Re-establishment of the acknowledgement of the victim's worth is normally not accomplished by the mere verbal or written assertion of the equality of worth of wrongdoer and victim. For a judge or jury merely to announce, after reviewing the facts of the farmer's murder of the farmhand and his sons, that he is guilty of murder and that they were his equal in value, is to accomplish virtually nothing. The farmer, by his action, did not just "say" that these men were worthless relative to him, but also sought to make them into nothing by fashioning events that purported to establish their extreme degradation. Even if we believe that no such degradation actually took place, to be strung up, castrated and killed is to suffer severe diminishment. This representation of degradation requires more than just a few idle remarks to deny. When we face actions that not merely express the message that a person is degraded relative to the wrongdoer but also try to establish that degradation, we are morally required to respond by trying to remake the world in a way that denies what the wrongdoer's events have attempted to establish, thereby lowering the wrongdoer, elevating the victim, and annulling the act of diminishment.

**PUNISHMENT THAT IS TOO LENIENT FAILS TO EXPRESS THE MORAL GRAVITY OF THE CRIME**

Jean Hampton [Prof. of Philosophy, University of Arizona], "Correcting Harms Versus Righting Wrongs: The Goal of Retribution," 39 UCLA L. Rev. 1659 (1991-1992)

From a retributive point of view, punishments that are too lenient are as bad as (and sometimes worse than) punishments that are too severe. When a serious wrongdoer gets a mere slap on the wrist after performing an act that diminished her victim, the punisher ratifies the view that the victim is indeed the sort of being who is low relative to the wrongdoer. When the American courts, until recently, responded to spousal abusers with light punishment or no punishment at all, they were expressing the view that women were indeed the chattel of their husbands. When the present day Canadian courts use a sentencing policy that gives certain types of sexual offenders lighter sentences, on average, than those given to people who have been convicted of burglary, they are accepting a view of women that grants them standing similar to-but slightly lower than-mere objects.<sup>50</sup> Moreover, the widespread tolerance in the American South in the past for the sort of treatment meted out by the farmer to his black farmhands demonstrates societal support for the message about relative value which that farmer's act conveyed. Behavior is expressive, and the state's behavior in the face of an act of attempted degradation against a victim is itself something that will either annul or contribute further to the diminishment of the victim.

A2 UTILITARIANISM

**UTILITARIANISM INSTRUMENTALIZES LAW, JUSTIFYING UNDUE RESTRICTIONS ON AN INDIVIDUAL'S PURSUIT OF HER OWN ENDS**

Manuel Escamilla-Castillo [University of Granada, Faculty of Law], "The Purposes of Legal Punishment," *Ratio Juris*. Vol. 23 No. 4 December 2010 (460–78)

As is well known, for liberalism, the individual human being—the person being the word used by María Zambrano (1996, 130) for this concept—is the maximum authority in all fields (moral, aesthetic, religious, and political) as the only conscious reality. Utilitarianism, the moral option chosen by Bentham, poses several problems for this individual sovereignty, principally in that it does not develop its proposals of what ought to be by starting from initial, established positions (such as certain rights, a social contract, certain anthropological characteristics, and so on), but instead starts from the basis of a specific evaluation of the consequences of several possible lines of action. This assessment raises the problem, for individualism, of the heteronomy that it involves.<sup>9</sup> Utilitarianism instrumentalises punishment, as it instrumentalises law as a whole, when it subordinates it to the political objectives desired by the sovereign. When it disassociates punishment from the harm caused by the criminal (above all when this harm is not imaginary, but is connected to what the victim, sympathetic bystanders and the impartial spectator empirically feel), it implies punishment. If we have learnt anything from experience, we have to agree that that subjectivisation will not enter into the service of impersonal subjectivity (multiple) of the citizenry as a whole, but rather of the subjectivity of the ruler, moved inexorably, according to Bentham, by sinister interests. However, we must bear in mind that the context in which Bentham's theory arose was the high point of liberal ideals: This was a period when the achievements of the revolution giving rise to the United States were being consolidated, representing the high point of democratic ideals. In this context, Bentham's theory is totally coherent; it strives to be completely liberal from the beginning and, after an early, reckless flirtation with enlightened despotism, as was the case with many other thinkers of his time, he defended democratic principles, of which he offered a sound and consistent articulation. The starting point of Bentham's theory is utterly individualistic: The principles according to which the general interest is no more than the sum of private interests and each one is the best judge of his own interests offer a more than adequate basis for a liberal organization of political society. But the insistence on interests as the exclusive basis on which to make a political calculation inevitably lead to a heteronomous definition, that is left to the legislator, of the respective political relevance of the interests, and an equally heteronymous evaluation of the optimum point of conciliation between them. In political society, it is the legislator who decides what interests are relevant (and we must not forget that interests are always individual, however much they appear disguised as collective). That decision is not in free agreement with the citizens, nor with the degree of compromise that each concerned individual must make when his interests conflict with those of the other. There thus arises the heteronomy of political decision, an inevitable heteronomy, but which with a consequentialist approach as in the utilitarian, will always tend to extend to the maximum, instead of being reduced to the indispensable minimum, as demanded by the modern sovereignty of the individual. The consequentialist approach, in which all individual interests are equally valid, though lacking limits as regards the maximum level of satisfaction, inevitably seeks to reach the maximum level of heteronomy.

This does not occur with the deontic focus. Here there are no conciliations of interests to make: There are only spheres free for individual action and means for that action. The ruler, freed from the task of assessing and establishing the relative importance of individual interests, is limited to ensuring that the equal rules of the game are respected in order to make the greatest individual freedom possible compatible with the greatest freedom of all, as well as articulating the action of fraternity, that today we call solidarity, but in the Anglo-Saxon world is still called by its old name, charity.

### UTILITARIANISM ALLOWS PUNISHMENT OF THE INNOCENT

Heidi M. Hurd [Prof. of Law and Philosophy, University of Illinois], "Expressing Doubts About Expressivism," 2005 U. Chi. Legal F. 405 (2005)

Given how terribly common claims of these kinds are amongst theorists and laypersons alike, it is important for criminal law theorists to acknowledge the problems that beset the theory of punishment upon which they rely. By its very terms, a utilitarian theory is committed, in principle, to permitting the punishment of an innocent person and the acquittal of a guilty assailant. For if the visible punishment of a person known by a judge to be innocent will deter those who would be eager to offend, educate those who are morally ignorant, reinforce the social contract between those whose law-abidingness depends upon it, reduce vigilantism by those tempted by it, and achieve other social gains that collectively outweigh the costs of undeserved punishment to the person falsely accused, then the utilitarian theory will demand such punishment. Only doubt about predicted consequences slows the utilitarian. In a case in which the consequences are clear, the right thing to do is whatever will yield a net gain in social utility. Hence, where a judge can predict that social utility will be maximized by punishing an innocent person, he should punish the innocent and take cost-efficient means of preventing knowledge of his deed.

### UTILITARIANISM JUSTIFIES ALLOWING THE GUILTY TO GO FREE

Heidi M. Hurd [Prof. of Law and Philosophy, University of Illinois], "Expressing Doubts About Expressivism," 2005 U. Chi. Legal F. 405 (2005)

Similarly, of course, when social gains may be achieved by allowing a guilty person to go free, the utilitarian takes no offense at recommending that result. Thus, if greater racial harmony was achieved by the acquittal of O.J. Simpson, and that benefit outweighed the social disutility that accrued from the decision, then the utilitarian would applaud the outcome of that famous criminal case, even if she were convinced that Simpson was in fact guilty of the murders of Nicole Brown Simpson and Ron Goldman. Once again, only uncertainty concerning consequences gives a utilitarian pause: nothing inherent in the theory in principle precludes gross under- and over-punishment.

Indeed, the theory commits one to thinking that the optimal state of affairs would be achieved if the guilty were indeed apprehended, tried, and condemned very publicly, but then secretly given new identities in happy circumstances or treated to an enviable existence in a remote tropical location. Were we successfully to pretend to punish the guilty (while in fact treating them to a life that they would prefer), we would achieve all the gains that the utilitarian seeks from punishment without any of the disutility that punishment imposes on the offender. Inasmuch as the disutility of the offender is of moral relevance to the utilitarian, her theory, by its own terms, favors a reduction (and, if possible, an elimination) of punishment when its gains can be achieved through other, less costly means—most plausibly through the ruse of punishment.

**A MIXED UTILITARIAN AND RETRIBUTIVIST THEORY OF PUNISHMENT CANNOT AVOID THE PROBLEM OF ALLOWING NON-PUNISHMENT OF THE GUILTY**

Heidi M. Hurd [Prof. of Law and Philosophy, University of Illinois], "Expressing Doubts About Expressivism," 2005 U. Chi. Legal F. 405 (2005)

While the mixed theory escapes the prospect of theoretically vindicating the punishment of the innocent, it surely fails to correct for the other two interrelated problems that, in my view, defeat the theoretical defensibility of utilitarianism. Suppose that a brutal rapist finds God and is born again, so as to believably pose no threat of returning to his criminal ways. Suppose also that the mere pretense of his punishment will suffice to accomplish the other goals that might be socially useful: the deterrence of other would-be rapists, the reinforcement of the social contract, the moral education of the general public, and so on. Should he nevertheless be punished?

The answer of the mixed theorist must be "no." If no good will come of his punishment, or if the good that would come of it can be accomplished through pretending to punish him rather than actually punishing him, then the right thing to do is to let him go free (and indeed, to invest cost-efficient resources in helping him to do so, so as to maximize utility summed across all members of the community, including the rapist). So the problem is this: a mixed theory of punishment does not demand that offenders get their just deserts. It simply demands that they get no more than their just deserts.

## UTILITARIAN SYSTEMS OF PUNISHMENT LEAD TO MORALLY REPUGNANT CONCLUSIONS

Murtagh, Kevin [John Jay College of Criminal Justice]. "Punishment." *Internet Encyclopedia of Philosophy*. <http://www.iep.utm.edu/punishme/#H2>.

Perhaps the most common objection to the utilitarian justification of punishment is that its proponent is committed to punishing individuals in situations in which punishment would clearly be morally wrong. H.J. McCloskey offers the following example:

Suppose a utilitarian were visiting an area in which there was racial strife, and that, during his visit, a Negro rapes a white woman, and that race riots occur as a result of the crime, white mobs, with the connivance of the police, bashing and killing Negroes, etc. Suppose too that our utilitarian is in the area of the crime when it is committed such that his testimony would bring about the conviction of a particular Negro. If he knows that a quick arrest will stop the riots and lynchings, surely, as a utilitarian, he must conclude that he has a duty to bear false witness in order to bring about the punishment of an innocent person (127).

A utilitarian is committed to endorsing the act that would be most likely to produce the greatest balance of happiness over unhappiness, and, in this situation, it appears that the act that meets this criterion is bearing false witness against an innocent person. But, so the argument goes, it cannot be morally permissible, let alone morally mandatory, to perform an act that leads directly to the punishment of an innocent person. Therefore, since the utilitarian is committed to performing this clearly wrong act, the utilitarian justification must be incorrect.

**A UTILITARIAN FAILS TO ACCOUNT FOR RIGHTS – CANNOT GENERATE A BASIS FOR PUNISHMENT AT ALL**

Murphy, Jeffrie G. "Marxism and Retribution." *Philosophy and Public Affairs*, Vol. 2, No. 3 (Spring, 1973), pp. 217-243.

The Kantian position on the issue of punishing the innocent, and the many ways in which the utilitarian might try to accommodate that position, constitute extremely well-worn ground in contemporary moral and legal philosophy.<sup>2</sup> I do not propose to wear the ground further by adding additional comments on the issue here. What I do want to point out, however, is something which seems to me quite obvious but which philosophical commentators on punishment have almost universally failed to see—namely, that problems of the very same kind and seriousness arise for the utilitarian theory with respect to the punishment of the guilty. For a utilitarian theory of punishment (Bentham's is a paradigm) must involve justifying punishment in terms of its social results—e.g., deterrence, incapacitation, and rehabilitation. And thus even a guilty man is, on this theory, being punished because of the instrumental value the action of punishment will have in the future. He is being used as a means to some future good—e.g., the deterrence of others. Thus those of a Kantian persuasion, who see the importance of worrying about the treatment of persons as mere means, must, it would seem, object just as strenuously to the punishment of the guilty on utilitarian grounds as to the punishment of the innocent. Indeed the former worry, in some respects, seems more serious. For a utilitarian can perhaps refine his theory in such a way that it does not commit him to the punishment of the innocent. However, if he is to approve of punishment at all, he must approve of punishing the guilty in at least some cases. This makes the worry about punishing the guilty formidable indeed, and it is odd that this has gone generally unnoticed.<sup>3</sup> It has generally been assumed that if the utilitarian theory can just avoid entailing the permissibility of punishing the innocent, then all objections of a Kantian character to the theory will have been met. This seems to me simply not to be the case.

*DETERRENCE*

**FOR HABITUAL OFFENDERS, REHABILITATION IS DEEMPHASIZED AND DETERRENCE IS THE PRIMARY OBJECTIVE**

Gabriel Hallevy [Prof. of Law, Ono Academic College], "The Recidivist Wants To Be Punished – Punishment as an Incentive to Reoffend," 5 IJPS 120 (2009)

However, in the case of the habitual offender, the chances that he has a high rehabilitative potential are lower as evidenced by the fact that he has reoffended after already having been sentenced in the past. He radiates a message to society that he has no potential for rehabilitation, or at least that his potential to be rehabilitated is highly questionable, and so too that he constitutes a relatively serious danger to society. The probable result is that the impact of the recidivism factor on the goal of rehabilitation will be to limit its relevancy and ramifications, so that in the majority of cases this will be reflected in a more severe punishment for the habitual offender. In any event, the goal of rehabilitation is generally perceived to be of secondary importance compared to the objectives of retribution and deterrence, after the impact of the recidivism factor on it has been taken into account.

In contrast to the goals of retribution and rehabilitation, the object of deterrence is the most dominant consideration when it comes to sentencing the habitual criminal. The goal of deterrence is to dissuade the criminal and the community from continuing to commit crimes.<sup>28</sup> The deterrent objective looks forward and tries to give the criminal a disincentive to continuing to reoffend in the future.<sup>29</sup> The practical manifestation of the goal of deterrence is not necessarily a severe punishment. Thus, for example, where the court feels that in any given case a suspended sentence or fine would have a greater deterrent effect in so far as the future is concerned than would a custodial sentence or actual fine, it may choose to impose the former punishment rather than the latter. However, if in the court's estimation, only the bitter experience of a custodial sentence will make enough of an impression on the criminal in question to make him think twice before reoffending in the future, then it will be free to do so.<sup>30</sup> The influence of the recidivism factor on the goal of deterrence is both profound and dominant. The criminal who committed his first offence is supposed to be deterred by the court through the imposition of his initial sentence from reoffending. If he nevertheless commits a second crime, then he is effectively telling the court that his initial sentence was not sufficient to deter him from reoffending, the aim of deterrence not having been achieved. Now within the framework of the later sentence and faced with recidivism concerns which did not exist when the initial sentence was handed down, the court is obliged to give greater weight to the goal of deterrence.

## **DETERRENCE OF HABITUAL OFFENDERS REQUIRES MORE SEVERE PUNISHMENT EARLIER**

Gabriel Hallevy [Prof. of Law, Ono Academic College], "The Recidivist Wants To Be Punished – Punishment as an Incentive to Reoffend," 5 IJPS 120 (2009)

As mentioned above, an empirical study undertaken in Britain during the course of six years and which followed the paths of two hundred different habitual offenders, revealed that the percentage of recidivism amongst first-time adult offenders (those above 21 years of age) who were given a custodial sentence for their initial crime was 18%. The rate amongst those having one previous conviction already was 50% and in the case of those with between two and four previous convictions the rate of recidivism climbed to 72% and 88% in the case of five previous convictions. The recidivism rate amongst juvenile offenders (those up to 17 years of age) who had five previous convictions and were given a custodial sentence was 100%. The study found a similar picture emerging across all age groups.<sup>55</sup> The upshot of all this is, that a substantial proportion of criminal sentences do not deter criminals at all, i.e. those imposed on criminals having approximately five or more previous convictions. In these cases, the deterrent value of criminal sanctions has reached saturation point and their continued use will not act as a buffer, preventing additional crimes from being carried out in the future.

The solution to these situations lies, *prima facie*, in making punishments substantially more severe until they reach a level which will deter the criminal. Those legal systems which impose statutory limitations on judicial discretion when it comes to determining the severity of punishment have a structured approach to this subject. An example of this may be found in the Californian legislation known as the "Three Strikes Laws" within the framework of which the court is required to impose an extremely harsh sentence on third-time offenders.<sup>56</sup> The rationale at the basis of this legislation is that the deterrent value of an ordinary punishment in the case of the habitual criminal is inadequate, and therefore he has to be given an extremely severe sentence.<sup>57</sup> From the standpoint of the economic model presented above, this type of legislation has the potential to breach the walls of diminishing marginal deterrence in a substantial way and to restore, in practical terms, the deterrent capacity of the punishment imposed on the criminal in order to ensure that this time, in so far as possible, he shall indeed be deterred.

### **PUNISHMENT MUST ALSO HAVE A DETERRENT MOTIVE**

Ripstein, Arthur [University of Toronto]. *Force and Freedom: Kant's Legal and Political Philosophy*. Cambridge, MA: Harvard UP, 2009. Print.

The prospect of punishment is different, because it must provide an incentive if the law is to be effective in space and time. Moreover, it must provide the incentive systematically, and thereby provide everyone with an assurance that each of the others will act in conformity with their rights. Again, as we saw in Chapter 6, Kant argues that in private right, you are under no obligation to refrain from interfering with the property of others unless you have assurance that they will do the same with yours. Instead, rights to external objects of choice are only consistent in a civil condition, because “assurance requires omnilateral public enforcement.”<sup>44</sup> Assurance under public law mediates between each person’s entitlement to stand on his or her own rights and the rights of others: to refrain from the possession of others when they do not do the same allows them to treat you (and what belongs to you) as mere means in pursuit of their purposes. The only way to reconcile these is to provide everyone with the assurance that everyone else has an external incentive for conformity with the rights of everyone else. People may have a variety of incentives for such conformity, including morality, sympathy, and concern for reputation. Each of these may lead to acts in conformity with law, but they fail to provide assurance because their overlap with the requirements of law is contingent in any particular case. Only public law, with the threat of punishment, provides the requisite assurance, by providing an incentive that is available even when others fail in a particular case. In his lectures on natural right, Kant makes the same point, remarking that there are only two possible incentives to conform with law as such: the ethical incentive of respect for the law as such, and the juridical incentive of systematic coercion. Only these incentives can lead someone to conform to the law rather than to do the things that the law requires.<sup>45</sup> Only the availability of public enforcement can assure others that a person will conform to the law, and so only systematic enforcement can assure everyone with regard to everyone else.

### **KANT'S THEORY OF RETRIBUTIVISM STEMS FROM HIS BELIEF IN DETERRENCE**

Scheid, Don E. "Kant's Retributivism." *Ethics*, Vol. 93, No. 2 (Jan., 1983), pp. 262 – 283.

In the end, Kant's conception of a legal system is not extraordinary. The picture is that of a set of laws that define rights and duties backed up by the threat of punishment. This characterization of the legal system is enough to indicate Kant's recognition of the role of deterrence and crime control. The legal system is concerned with external duties that we can be coerced to perform through negative incentives. And Kant's talk of incentives certainly implies deterrence. 16 It is true that punishment may achieve some control of crime through incapacitation, through its educative effect, and, perhaps, through other means as well. The mechanisms Kant mainly has in mind, however, are special and general deterrence. This picture is also consistent with what Kant says in a much earlier work, *Lectures on Ethics*.<sup>7</sup> In that work, under the heading of "Reward and Punishment," Kant is quite explicit. He points out that punishment, in general, is either deterrent or retributive. Punishments are deterrent if their sole purpose is to prevent an evil from arising; and they are retributive when imposed because an evil has been done. Kant then asserts that the state is always concerned with deterrence: "Punishments are, therefore, a means of preventing an evil or of punishing it. Those imposed by governments are always deterrent. They are meant to deter the sinner himself or to deter others by making an example of him.... All punishments imposed by sovereigns and governments are pragmatic; they are designed either to correct or to make an example. Ruling authorities do not punish because a crime has been committed, but in order that crimes should not be committed."

**KANT'S ARGUMENT FOR COERCION BY THE STATE IS JUSTIFIED IN A  
CONSEQUENTIALIST MANNER**

Scheid, Don E. "Kant's Retributivism." *Ethics*, Vol. 93, No. 2 (Jan., 1983), pp. 262 – 283.

The bare existence of the legal system or state-apart from whether it is an autocracy, aristocracy, or democracy-is to be justified against the alternative of no state, the so-called "state of nature." For Kant, it is not freedom from coercion but coercion itself which is in need of justification, the burden of proof being on him who would coerce people in their activities (i.e., infringe on their freedom). As we have just seen, Kant takes the state to be a legal system having powers of coercive enforcement; thus, the state stands in need of justification. In a famous passage, Kant gives his argument for coercion by the state: "Any opposition that counteracts the hindrance of an effect promotes that effect and is consistent with it.... Consequently, if a certain use of freedom is itself a hindrance to freedom according to universal laws (that is, is unjust), then the use of coercion to counteract it, inasmuch as it is the prevention of a hindrance to freedom, is consistent with freedom according to universal laws; in other words, this use of coercion is just. It follows by the law of contradiction that justice is united with the authorization to use coercion against anyone who violates justice."<sup>22</sup> Any infringement of the individual freedom defined according to universal laws is wrong, and so coercion which prevents the infringement of such individual freedom is justified. At this point, it is important to notice that Kant's argument for a legal system with coercive enforcement is a consequentialist argument. Punishment, of course, greatly limits the freedom of the convicted offender. But such an encroachment is acceptable, in Kant's view, since individual freedom would be greatly reduced, and not at all evenly distributed, if there were no legal system; the adverse conditions of the state of nature would threaten individual freedom at every turn. The coercive system of the state is justified because it secures and guarantees the greatest possible personal freedom equitably distributed to all.

**THIS CONSEQUENTIALIST READING OF KANT'S POLITICAL THOUGHT IS COMPATIBLE WITH HIS MORAL THEORY**

Scheid, Don E. "Kant's Retributivism." *Ethics*, Vol. 93, No. 2 (Jan., 1983), pp. 262 – 283.

Kant recognizes that, while a legal system having powers of coercive enforcement is to be justified in terms of its beneficial consequences (i.e., securing individual freedom), no individual must be used as a mere means in the attainment of this goal. And Kant is quite clear about this restriction: "Juridical 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 and can never be confused with the objects of the Law of things.... He must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens."<sup>31</sup> Faced with this concern, Kant's general argument to justify a legal system and, with it, a system of punishment must be amended. If the general justifying aim of punishment is crime control, this goal must nevertheless be pursued in a morally acceptable way, that is, in a way which gives full moral respect to the persons to whom the penal system is applied. And Kant makes this amendment when he indicates two principles regarding the just imposition of punishment on an individual. The first principle, only alluded to-as in the passage immediately above- might be put as follows:

K-1: All and only persons who commit legal offenses (crimes) are justly punishable (strajbar).<sup>32</sup> The other principle, the *jus talionis* (returning like for like) is named by Kant; but he never explicitly states it. The principle is first introduced in a discussion about the amount of punishment an offender should receive.<sup>33</sup> I think it is fair to assume the principle Kant has in mind runs something like this:

K-2: To be just, the punishment must, so far as possible, equal the offense in kind and degree.

### **CERTAIN AND SWIFT PUNISHMENT DETERS CRIME**

Tonry, Michael [Sonosky Professor of Law and Public Policy and director of the Institute on Crime and Public Policy at the University of Minnesota Law School, and senior fellow in the Netherlands Institute for the Study of Crime and Law Enforcement]. Purposes and Functions of Sentencing, Crime and Justice. University of Chicago. 2006.

Current knowledge concerning deterrence is little different than eighteenth-century theorists such as Beccaria ([1764] 1995) supposed it to be: certainty and promptness of punishment are more powerful deterrents than severity. This does not mean that punishments do not deter. No one doubts that having a system of punishment has crime-preventive effects. The important question is whether changes in punishments have marginal deterrent effects, that is, whether a new policy causes crime rates to fall from whatever level they would otherwise have been at. Modern deterrent strategies, through sentencing law changes, take two forms: increases in punishments for particular offenses and mandatory minimum sentence (including "three-strikes") laws. Imaginable increases in severity of punishments do not yield significant (if any) marginal deterrent effects. Three National Academy of Sciences panels, all appointed by Republican presidents, reached that conclusion (Blumstein, Cohen, and Nagin 1978; Blumstein, Cohen, Roth, and Visher 1986; Reiss and Roth 1993), as has every major survey of the evidence (Cook 1980; Nagin 1998, 1999; von Hirsch et al. 1999; Doob and Webster 2003). This is also the belief, in my experience, of most experienced judges and prosecutors. There are a number of good practical reasons why this widely reached conclusion makes sense. First, serious sexual and violent crimes are generally committed under circumstances of extreme emotion, often exacerbated by the influence of alcohol or drugs. Detached reflection on possible penalties or recent changes in penalties seldom if ever occurs in such circumstances. Second, most minor and middling and many serious crimes do not result in arrests or prosecutions; most offenders committing them, naively but realistically, do not expect to be caught. Third, those who are caught and prosecuted almost always are offered plea bargains that break the link between the crime and the prescribed punishment. Fourth, when penalties are especially severe, they are often, albeit inconsistently, circumvented by prosecutors and judges. Fifth, for many crimes including drug trafficking, prostitution, and much gang-related activity, removing individual offenders does not alter the structural circumstances conducive to the crime. Sixth, even when one ignores all those considerations, the idea that increased penalties have sizable marginal deterrent effects requires heroic and unrealistic assumptions about "threat communication," the process by which would-be offenders learn that penalty increases have been legislated or are being implemented.)

### **HARsher PENALTIES DETER CRIME**

Shepherd, Joanna M. [Professor of Law at Emory University School of Law]. Capital Punishment Does in Fact Deter Crime. Current Controversies: Capital Punishment. Paul Connors. Detroit: Greenhaven Press, 2007. From Opposing Viewpoints Resource Center.

Panel data are data from several units like the 50 States or all U.S. counties over several years. Panel data techniques fix many of the problems associated with the data that early studies used. Now let's talk about the modern studies. 13 economic studies on capital punishment's deterrent effect have been conducted in the past decade. Most use new improved panel data and modern statistical techniques. They all use multivariate regression analysis to separate the effect on murder, of executions, demographics, economic factors, et cetera. All categories of murder are deterred by the death penalty, even so-called crimes of passion. The studies are unanimous. All 13 of them find a deterrent effect. I have conducted three of these studies. My first study used 20 years of data from all U.S. counties to measure the effect of county differences on murder. My second paper used monthly data from all U.S. States for 22 years to measure the short-term effect of capital punishment. This paper also looks at different categories of murder to determine which kinds of murder are deterred by executions. The third study looks at the effect on murders of the 1970's Supreme Court moratorium on executions. All of my papers find a deterrent effect. Moreover, I find that all categories of murder are deterred by the death penalty, even so-called crimes of passion. My results predict that each execution deters somewhere between 3 and 18 murders. The other 10 modern economics papers used different methods and different data than my own, but all find a significant deterrent effect.

*A2 REHABILITATION PROGRAMS*

**AFF HAS THE BURDEN OF PROOF**

Lipsey, Mark W. [Institute for Public Policy Studies, Vanderbilt University] and Francis T. Cullen [Division of Criminal Justice, University of Cincinnati]. "THE EFFECTIVENESS OF CORRECTIONAL REHABILITATION: A REVIEW OF SYSTEMATIC REVIEWS." Annual Review of Law and Social Science, vol. 3, 2007.

A key moment in this general critique on rehabilitation was a study published in 1975 by Lipton, Martinson, and Wilks that reviewed 231 evaluations of rehabilitation programs. In Martinson's advance summary, he reported that, "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism" (1974, p. 25). Martinson (1974, p. 48) was bold enough to ask, "Does nothing work?" The implied answer was "no." Soon thereafter, this study was widely interpreted as meaning that "nothing works" to rehabilitate offenders (Cullen & Gendreau 2000, Cullen & Gilbert 1982). Since this time, the legitimacy of correctional treatment has hinged precariously on the question of its effectiveness; after all, if rehabilitation programs "don't work," the justification for their continued use evaporates.

## REHABILITATION EMPIRICALLY FAILS FOR JUVENILE OFFENDERS

Wilson, Jane [Stanford's Strauss Scholar, developing educational programs for inmates in cities across the US.] Reducing Juvenile Recidivism in the United States, Roosevelt Review, 2007.  
<http://www.scribd.com/doc/19695235/Juvenile-Recidivism>

The American juvenile justice system desperately needs reform. Some 2.4 million juveniles are charged with offenses annually. An appalling 55 percent of juveniles released from incarceration nationwide are rearrested within one year. In urban centers, that percentage—referred to as the rate of recidivism—reaches up to 76 percent. High recidivism is associated with increases in crime, victimization, homelessness, family destabilization, and public health risks. Government-sponsored correctional programs cost sixty billion dollars annually. Most tragically, high recidivism indicates a failure to provide meaningful rehabilitation for offenders. Reducing recidivism specifically among juveniles should be of primary importance to the U.S. Department of Justice and the Office of Juvenile Justice and Delinquency Prevention. Our government's current approach to lowering recidivism emphasizes the creation and funding of rehabilitative programs. While these initiatives have made marginal gains, efforts have been insufficient. Substantial progress will only come by eliminating recidivism-fostering features of the juvenile justice system itself.

*BIOWPOWER*

**THE REHABILITATIVE APPROACH TO PUNISHMENT RELIES ON THE PROBLEMATIC ASSUMPTION THAT SOCIETY IS AN ORGANIC ENTITY WHICH THE INDIVIDUAL NEEDS TO BE REEDUCATED TO SERVE**

Manuel Escamilla-Castillo [University of Granada, Faculty of Law], "The Purposes of Legal Punishment," *Ratio Juris*. Vol. 23 No. 4 December 2010 (460–78)

There remains the theory of punishment directed towards rehabilitation, which I have called the organic theory. The reason for this name is that this theory of punishment has no sense except in the context of an idea of society as a living organism, with a life independent of and superior to that of the members making it up. According to this organisational vision of punishment, the criminal is as he is as a result of not having become useful for society, or of having ceased to be so: His incompetence has led to his separation from the community. A being separated from the community is nonsense for people who hold this conception, so great efforts must be made to return to a situation of normality, reintegrating the segregated being to the body of which he was part. The underlying approach is that there is no truth possible outside the community, so that once the possibility of dissidence is excluded, the criminal is the one in error, and thus the road to his redemption is by means of education (or re-education, as the case may be), so that by separating him from error, he will be led by truth to virtue. Rehabilitation and social reintegration in society are produced simultaneously. We are thus looking at a theory of punishment from the point of view of society as an organism, although naturally it can also be understood in connection with the notion of the "chosen people"<sup>4</sup> and brings to mind the Parable of the Prodigal Son.

## REHABILITATION UNDERMINES HUMAN CHOICE

Manuel Escamilla-Castillo [University of Granada, Faculty of Law], "The Purposes of Legal Punishment," *Ratio Juris*. Vol. 23 No. 4 December 2010 (460–78)

The idea of reform is to be born again. It may be that one has had a disappointing birth, a bad incarnation. The rebirth from which the new man arises is a remodelling, a rethinking of the true bases. It is new, starting from what has been engendered again, not from the point of view merely of the flesh, but by the work of the spirit. The legislator who seeks to reform the criminal no longer seeks to assume the ecclesiastical potestas ordinis, which to a great extent is to assume the role of God Himself, who returns to "melt down" the human wrongly engendered and pour him into a new mould that will give the proportions and the alloy of correct humanity. In part it is also the idea of conversion, of being illuminated by the light of a truth that had failed until then, and which now enables one to recognise past errors and acquire the determination to set out on a new road. It is arguably a terribly totalitarian idea, and it is the same one on which social rehabilitation is based.

We must always be well aware of what is totalitarian, contrary to all modern order, to the liberal spirit: It is the governmental imposition of human reform, not its realization by the free determination of the individual. Quite the contrary, for the traditions of the noblest thoughts, to human dignity, to a great extent, since what gives sense to human life is to be engaged in a continuous process of self-reform. In short, by entering into the definition of the nature of the human being, reform invades the province that in the Middle Ages belonged to the church: The limits between sin and crime, between morality and law, between the sacred and the profane become blurred. The sacred and the profane are then made one and span the totality of what is human, so they become totalitarian. That is exactly the idea in Edmund Burke's famous phrase (Burke 1991, 467–8).

## FORENSIC PSYCHIATRY OFTEN DEPLOYS INSTRUMENTS OF BIOPOWER

Dave Holmes [Professor and University Research Chair in Forensic Nursing, School of Nursing, Faculty of Health Sciences, University of Ottawa] and Stuart J. Murray [Associate Professor of Rhetoric, Department of English, Ryerson University], "Civilizing the Barbarian: a critical analysis of behavior modification programmes in forensic psychiatry settings," *Journal of Nursing Management* 19 (2011), 293–301

From a Foucauldian 'top-down' or systemic perspective, practitioners such as psychiatrists, psychologists, social workers and nurses might be understood as bolstering state apparatuses by implementing and providing crucial power/knowledge in order to shape and transform human material (Ransom 1997). As such, health care professionals working in forensic psychiatry settings are directly involved in what Foucault calls the discipline of individuals at the anatomo-political level (at the level of the body) (Foucault 1978). In his discussion on discipline, Foucault deploys the model of Jeremy Bentham's panopticon, a prison structure organized around a central watchtower, with prisoners' cells arranged concentrically so as to afford the guard(s) a direct line of sight into the cell, while preventing prisoners from seeing the guard(s) or seeing and communicating with each other. While the panopticon serves as a metaphor for the ways that disciplinary power operates, we found this architectural structure duplicated in the forensic psychiatry setting, where a centrally-located glassed-in nursing station (which nurses call 'the bubble') affords views down radiating corridors and into the shared Common Room. The architecture is significant for its effects on the prisoner/patient, as Foucault describes: 'He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection' (Foucault 1979, pp. 202–203). Because the inmate never knows if or when he is being watched, he becomes the object of his own surveillance, internalizing the disciplinary gaze in his 'soul': 'The soul is the effect and instrument of a political anatomy; the soul is the prison of the body' (Foucault 1979, p. 30). This process does not require consent; the question of consent is pre-empted from the start because these disciplinary systems are defined as self-justifying, as 'legitimate and unobjectionable' (Ransom 1997).

The disciplinary system's legitimacy is tied to the scientific knowledge that the apparatus enables, deploys and produces, in an almost circular fashion. Power and knowledge form a unitary structure: 'the Panopticon was also a laboratory; it could be used as a machine to carry out experiments, to alter behaviour, to train or correct individuals' (Foucault 1979, p. 203). Here we see that discipline works by individualizing. Not only are individuals separated from each other, the individual's symptoms and behaviour are observed, taxonomized and classified (according to DSM-IV diagnoses, for instance); he is medicated, he is organized (in individual 'units' or cells or seclusion rooms, for instance) through the analytical arrangement of architectural space; he is measured against a norm. Discipline, Foucault writes, 'tries to rule a multiplicity of men to the extent that their multiplicity can and must be dissolved into individual bodies that can be kept under surveillance, trained, used, and, if need be, punished, (Foucault 2003, p. 242). Knowledge and power operate to justify and legitimate one another, forming a practically unitary phenomenon Foucault calls power/knowledge'.

**“TOTAL INSTITUTIONS” STRIP INDIVIDUALS OF THEIR AUTONOMY; THIS IS ESPECIALLY TRUE WHERE INMATES ARE SUBJECT TO BEHAVIOR MODIFICATION PLANS**

Dave Holmes [Professor and University Research Chair in Forensic Nursing, School of Nursing, Faculty of Health Sciences, University of Ottawa] and Stuart J. Murray [Associate Professor of Rhetoric, Department of English, Ryerson University], “Civilizing the Barbarian: a critical analysis of behavior modification programmes in forensic psychiatry settings,” *Journal of Nursing Management* 19 (2011), 293–301

In ‘total institutions’, pervasive disciplinary and biopolitical technologies and techniques ultimately strip individuals of agency through a complex and powerful mortification process’, where they die from their old lives and are ‘re-born’ (as it were) into the life of the institution. This process is said to be successful when inmates have internalized institutional rules (Goffman 1961). The mortification process is not a matter of acculturation or assimilation of one group under the auspices of the total institution, but is something more pernicious still. In effect, the forensic psychiatry patient comes into the institution with a specific representation of himself; upon admission, he is stripped of his ‘domestic’ reference schemes and mortified through procedures and standardized plans of care. ‘In the accurate language of some of our oldest total institutions, he is led into a series of abasements, degradations, humiliations, and profanations of self... and his self is systematically, if often unintentionally, mortified’ (Goffman 1961, p. 14). The mortification process is a standard(ized) procedure in total institutions epitomized in prisons and psychiatric institutions. Inmates’ personal belongings are taken away from them while institutional substitutes are provided (Goffman 1961). In short, standardized defacement occurs.

The encompassing or ‘total’ character of total institutions is symbolized by the barrier to social intercourse with the outside world that is often built into the architectural design: locked doors, high walls, barbed wire, cliffs and water, open terrain and so forth. In forensic settings, for instance, almost every aspect of the patients’ daily life is strictly controlled and monitored. And yet, these are also social environments, which presents another problem for management to devise techniques to control and monitor sociability itself. We have suggested, then, that not only is disciplinary bio-power at play in these settings, but the logics of biopolitical power are pervasive, as the social life of the population is both an object and an objective, always with an eye to rehabilitation and reintegration into the ‘normal’ population, ‘on the outside’. Nowhere is this tension more palpable than in the implementation and management of so-called ‘scientific’ regimens and treatment plans, such as BMPs.

## **BEHAVIOR MANAGEMENT PLANS IN CORRECTIONAL INSTITUTIONS REPLICATE THE DISCIPLINARY ECONOMY IN BROADER SOCIETY**

Dave Holmes [Professor and University Research Chair in Forensic Nursing, School of Nursing, Faculty of Health Sciences, University of Ottawa] and Stuart J. Murray [Associate Professor of Rhetoric, Department of English, Ryerson University], "Civilizing the Barbarian: a critical analysis of behavior modification programmes in forensic psychiatry settings," *Journal of Nursing Management* 19 (2011), 293–301

It should be relatively easy to see how BMPs strategically deploy an 'individualizing' disciplinary bio-power, while the biopolitical aspects of this management strategy may seem somewhat more abstract. But BMPs are designed to intervene at the level of a resident's social life, reshaping his social relationships, his sociality in general and to modify it to fall within the accepted norms of the population at large. BMPs rely on a token economy, an economy of exchange that operates according to the principles of the market economy – so this is a particular kind of socialization. It is no surprise, then, that Foucault devotes a large part of his lectures on biopolitics (Foucault 2008) to neoliberal economies, as neoliberalism has become the dominant ideology governing our democratic populations. BMP strategies undoubtedly look beyond the forensic setting towards macro-social values and norms, as the stated goal of the unit is to improve reintegration into the community on release and to reduce re-offending rates and/or further admissions to mental health facilities' (Institution Name, Policies and Procedures Manual, 1997/2010, p. 1). Therefore, these do not constitute neutral institutional settings in which care takes place free from the larger influences that operate within society. And it is no surprise that management strategies have silently appropriated the biopolitical logic that governs our neoliberal democracies – where individuals are seduced into seeing themselves as 'human capital' within a system that calculates, quantifies and otherwise measures all manner of human relationships according to the terminology of the 'free' market. In Foucault's words, neoliberalism 'extends the economic model of supply and demand and of investment-costs-profit so as to make it a model of social relations and of existence itself, a form of relationship of the individual to himself, time, those around him, the group, and the family' (Foucault 2008, p. 242). The extent to which we 'freely' appropriate this model is questionable, although it is now the norm; however, it is worth repeating that the token economies of the forensic setting are imposed absolutely on residents, they are coercive rather than 'incentive' programmes, and residents have not been involved in their creation.

Thus, while BMPs might appear to 'individualize' residents in a positive way, compelling them to be responsible for themselves, to foster a deeply 'entrepreneurial' spirit in relation to their own self-management, as well as to better socialize themselves, we must bear in mind that these are not workers freely joining an employee incentive programme, nor are they consumers signing up for a retailer's rewards scheme. Indeed, workers are rewarded for their productivity or outcomes, which might bear little relation (or perhaps even an inverse relation) to their social skills or sociability in general. Similarly, retail rewards schemes are based on a customer's loyalty, and customers are free to shop elsewhere. Here, instead, the residents' social behaviours are being regulated according to a points system that is standardized, one-size-fits-all: the same number of points is lost for the same offence, and these rules apply equally to every resident in the population, while the severity or leniency of enforcement is at times arbitrary ('discretionary') for Type 1 violations (and less explicitly for Type 2) – depending on a particular nurse's reaction in a given instance. Is this arbitrariness a positive or negative reinforcer? And what are the wider (counter-) therapeutic effects when the interpersonal relationship between nursing staff and residents is shaped 'economically', through the threat of punishment and the loss of 'rewards'? Will this build trust and confidence in the resident's sociability, or will it not encourage him to 'work the system' through the cold, economic calculation of a cost-benefit analysis (something we praise in the business world)? A hegemonic theory of consumption is presumed throughout, and 'criminal' activity is redefined as any behaviour that is an 'investment', where a certain 'profit' is hoped for, but that carries a certain measurable 'risk' of penal sanctions understood in economic terms (Foucault 2008, p. 253).

## **BEHAVIOR MANAGEMENT PLANS UNDERMINE AUTONOMY BY INFANTALIZING OFFENDERS**

Dave Holmes [Professor and University Research Chair in Forensic Nursing, School of Nursing, Faculty of Health Sciences, University of Ottawa] and Stuart J. Murray [Associate Professor of Rhetoric, Department of English, Ryerson University], "Civilizing the Barbarian: a critical analysis of behavior modification programmes in forensic psychiatry settings," *Journal of Nursing Management* 19 (2011), 293–301

The management of nursing care, as far as BMPs are concerned, participates in the 'building of a world around these minor privileges', according to Goffman, which 'is perhaps the most important feature of inmate culture, and yet it is something that cannot easily be appreciated by an outsider, even one who has previously lived through the experience himself' (Goffman 1961, p. 50). BMPs therefore cannot and do not work as part of a 'care plan' if mental health care involves restoring the patient's sense of autonomy, real or symbolic; BMPs are infantilizing, they work through petty privileges. While BMPs allow the forensic psychiatry patient to exercise some control over acquiring rewards and privileges, or avoiding punishments, this infantile world is hardly analogous to the real world, and hence at cross-purposes with 'nursing care' if the ultimate objective is 'to improve reintegration into the community on release'. Any autonomy the forensic psychiatry patient does experience is a false autonomy, as it is clear that his submission to institutional order is total.

Certainly, some will argue that BMPs are therapeutic, even if they are from some perspectives 'infantilizing'. By analogy, one might argue, parents must take some rather unpopular – even punitive – decisions with regard to the care of their children. But in the wider context, in the fullness of time, children come to realize that these decisions are usually loving and protective, guiding the child as she or he develops into a fully autonomous being in her or his own right. It is questionable, however, to what extent the parent–child analogy holds in the context of a prison, where the relationship is between keeper and kept, or in the context of a therapeutic relationship, between a healthcare provider and his or her mentally ill or disordered patient/ client. These residents are not children. Where the child grows and learns to interpret a parent's decisions as she or he gains experience in her or his own decision-making processes, the resident lacks that luxury, he has neither the time nor the place to experience something similar; he is apt to experience nursing staff as inconsistent, if not cruel. He will not see beyond the prison's walls. As Foucault writes, 'It is not the family, neither is it the State apparatus, and I think it would be equally false to say, as it often is, that asylum practice, psychiatric power, does no more than reproduce the family to the advantage of, or on the demand of, a form of State control organized by a State apparatus' (Foucault 2006, p. 16).

## THE BIOPOLITICS OF FORENSIC PSYCHIATRY EMPLOY AN ILLUSORY DISCOURSE ABOUT AUTONOMY

Dave Holmes [Professor and University Research Chair in Forensic Nursing, School of Nursing, Faculty of Health Sciences, University of Ottawa] and Stuart J. Murray [Associate Professor of Rhetoric, Department of English, Ryerson University], "Civilizing the Barbarian: a critical analysis of behavior modification programmes in forensic psychiatry settings," *Journal of Nursing Management* 19 (2011), 293–301

Consequently, we must call into question the functional notion of 'autonomy' that circulates in the discourse on the effective management of residents in forensic settings and in the use of BMPs to foster ethical comportment amongst residents and in relation to those with whom they share – and will share – a social life. Mainstream biomedical ethics tend to privilege one notion of autonomy as the founding principle of ethics (Beauchamp & Childress 2008). But forensic psychiatry settings are not places where autonomy is encouraged. In effect, as Goffman clearly states, 'total institutions disrupt or defile precisely those actions that in civil society have the role of attesting to the actor and those in his presence that he has some command over his world – that he is a person with 'adult' self-determination, autonomy, and freedom of action' (Goffman 1961, p. 43). But a critical approach to ethics will delve further still, asking what we mean by 'autonomy' as we continue to use the word so freely: a critique would question the ideals of neoliberalism, calculative reason and 'rational choice theories', and it would look beyond the kinds of 'individuals' produced by disciplinary biopower to begin, instead, with the intimate and often fragile social relationships without which 'ethics' is meaningless, without which it is reduced to just one more management strategy. It is for this reason that we have emphasized the biopolitical valences of BMPs, for it is here, where one intervenes in the life of a population, a life that is first and foremost a shared life, that we must begin again if we hope to imagine an ethics that would be commensurable with the lives of these inmates, patients – 'residents' – and the lives of those who care for them. In light of the 'life' that is produced biopolitically, we must imagine an ethical life, a life that would be the domain of bioethics.

**WHILE IT IS OFTEN UNFAIR TO CHARACTERIZE CRIMINAL ACTS AS ‘FREELY CHOSEN,’  
BEHAVIOR MANAGEMENT PLANS DO NOT RESTORE OFFENDER AUTONOMY**

Dave Holmes [Professor and University Research Chair in Forensic Nursing, School of Nursing, Faculty of Health Sciences, University of Ottawa] and Stuart J. Murray [Associate Professor of Rhetoric, Department of English, Ryerson University], “Civilizing the Barbarian: a critical analysis of behavior modification programmes in forensic psychiatry settings,” *Journal of Nursing Management* 19 (2011), 293–301

The popular view of forensic psychiatry patients – and possibly of any other recidivists – is that they merely lack sufficient autonomy and willpower: they do not want to change. But this view ignores the wider forces at play in the formation of the individual; it refuses to begin to take account of the myriad socioeconomic, political and environmental factors – the conditions – that have contributed to the patient being where he is today. In most cases, these individuals lack infrastructural support, the conditions in and through which an act of sovereign will seem possible. To speak of these individuals as ‘autonomous’, to hold them to the ‘principle of autonomy’, could itself be regarded as a violent demand, one that might be incomprehensible to someone who lacks the mental and emotional – not to mention financial, institutional, familial, etc. – resources necessary for comprehension. It would be an unethical practice, then, to place this individual in a situation in which ‘autonomy’ is demanded, and, as we stated above, perhaps it is time to question the normative force of this term as desirable in and of itself (for instance, how ethical is the economic model that it presumes?). But it is perhaps worse to place him in an institutional context governed by BMPs. Even if BMPs give the illusion of fostering a sense of autonomy, they understand ‘autonomy’ only in a limited and impoverished sense, and they fail to acknowledge or to begin to redress some of the wider infrastructural conditions of mental illness, crime and their connections. BMPs represent the perfect example of a bio-psychiatric model that has gone uncontrolled, where symptoms are treated and underlying causes ignored. Not only is this treatment unethical and ineffectual in the real world, not only is its refusal to see the underlying causes tantamount to professional negligence, we assert that this form of ‘treatment’ undoubtedly exacerbates certain forms of mental illness while causing others – what Illich (1976/1995), in his classic text, has called clinical and social iatrogenesis.